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The Legal Construction of Central American Unworthiness: An Examination of Human Rights in U.S. Immigration Law

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by

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DEDICATION

For Amethyst, my inspiration and motivation.

ABSTRACT OF THE DISSERTATION

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by

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Doctor of Philosophy, Graduate Program in Ethnic Studies
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Dr. Dylan Rodriguez, Chairperson

The Legal Construction of Central American Unworthiness: An Examination of Human Rights in U.S. Immigration Law, examines how the discourse and policy of human rights is deployed in domestic immigration legislation, contributing to the process of racial formation, and reification of white supremacy. This dissertation argues that the project of human rights—both as a discourse and international and domestic legal movement—ultimately fails to provide protections for immigrants and communities of color. Instead, it obfuscates how the law maintains racial logics domestically and globally.

This dissertation centers domestic legislation outlined in the Trafficking Victims Protection Act and its corresponding reauthorizations (TVPA). Specific attention is given to two categories of immigrants that the TVPA provides protections and immigration relief for- victims of human trafficking and unaccompanied 'alien' children. These two groups were chosen because of their primacy in international human rights laws which depicts them as particularly vulnerable migrants, and the United States' incorporation of protections for them within the TVPA. Through tracing the evolution of the TVPA this

dissertation explores the various ways the law operates, and how it obscures projects of racialization as applied to Central American migrants. By analyzing specific legal protections for trafficking victims and migrant children, such as Special Immigrant Juvenile Status, this dissertation exposes how the law works to racialize and de-humanize even those groups that are veiled as worthy of rights and humanity.

This dissertation is empirically grounded in data collection in the form of case law, legislative histories, federal prosecution data, and case studies. The data obtained is analyzed through a mixed-method approach, combining legal analysis with discourse and narrative analysis, as well as grounded theory and aspects of autoethnography. As an interdisciplinary study it departs from traditional legal analysis by examining the law through critical race theory, cultural studies, and critical ethnic studies frameworks.

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INTRODUCTION

The Trafficking Victims Protection Act (TVPA) was passed in 2000. This law was intended to fight against human trafficking and to bring U.S. domestic law into compliance with the newly minted international standards to combat trafficking. The TVPA was reauthorized in 2003, 2005, 2008, and 2013.[1] With each reauthorization the law was expanded and clarified. The 2008 reauthorization addressed the vulnerabilities of foreign national children who are victims of human trafficking.[2] In the 2008 reauthorization, unaccompanied children, previously recognized as a particularly vulnerable group at the international level, became the beneficiaries of expanded protections under the TVPA. These protections included screenings to assess whether they are victims of trafficking, and to refrain from automatically deporting them if they are from non-contiguous countries.[3] On the surface it appears that the TVPA is an example of international human rights laws and norms being implemented in domestic law. Immigrant rights organizations supported the passing of the 2000 TVPA and have since worked to expand protections for immigrant trafficking victims and unaccompanied children.[4] However, since the passing of the

[1] For a summary of each reauthorization see, "Summary of the Trafficking Victims Protection Act (TVPA) and Reauthorizations FY 2017," Alliance to End Slavery & Trafficking, January 11, 2017, accessed August 14, 2018, https://endslaveryandtrafficking.org/summary-trafficking-victims-protection-act-tvpa-reauthorizations-fy-2017-2/.

[2] Trafficking Victims Protection Reauthorization Act of 2008, Public Law 110-457, 110th Cong. 2d sess. (2008).

[3] Enhancing Efforts to Combat the Trafficking of Children, 8 U.S.C §1233 (a)-(c).

TVPA, anti-immigrant discourse and policies have intensified causing advocates to counter with calls to international human rights.

Taking on an explicitly racist view, the current presidential administration's anti-immigration policies have been attacked by human rights organizations for flying in the face of international standards. Indeed, from the Muslim-Ban, to seeking to eliminate Deferred Action for Childhood Arrivals (DACA), eliminating refugee processing in Central America, and threats to rescind the 2008 TVPRA protections for unaccompanied children, advocates argue that the United States is in violation of international human rights law including the 1967 Protocol to the Refugee Convention, and the Convention Against Torture.[5] Further, the white nationalist stance of the current administration has been denounced by the international community as violating the Convention for the Elimination of Racial Discrimination.[6] These arguments position international human rights law as the antithesis of the current administration and a solution to anti-immigrant policies. For all the reliance on international human rights law for providing protections to immigrant

[4] Among organizations that supported the 2000 TVPA include, Catholic Conference, the National Organization for Women Legal Defense and Education Fund, and the National immigration Law Center. Stated in, 146 Cong. Rec. H7628-01 (daily ed. Sept. 14, 2000) (statement of Rep. Jackson-Lee), 146 cong. Rec H7628 at *H7630-31 (Westlaw).

[5] "#TrumpWatch 100 Days," Amnesty International, accessed July 10, 2018, https://www.amnestyusa.org/trump100days/; "Human rights and Immigration," American Civil Liberties Union, accessed July 10, 2018, https://www.aclu.org/issues/human-rights/human-rights-and-immigration; "United States: Events of 2017", Human Rights Watch, accessed July 10, 2018, https://www.hrw.org/world-report/2018/country-chapters/united-states.

[6] Sewell Chan and Nick Cumming-Bruce, "U.N. Panel Condemns Trump's Response to Charlottesville Violence," New York Times (August 23, 2017), accessed July 10, 2018, https://www.nytimes.com/2017/08/23/world/un-trump-racism-charlottesville.html.

groups, and communities of color in general, what are the consequences of relying on said rights domestically? This dissertation contends that the discourse of human rights works to advance anti-immigrant policies, which contributes to the racialization of immigrants and reification of racial hierarchies.

This dissertation examines the relationship between domestic immigration law and human rights to expose how these two systems work together to uphold racial hierarchies. Specifically, I look at how the discourse and policy of human rights is deployed in domestic immigration legislation which reifies logics of white supremacy and processes of racialization. In this way, I argue that the project of human rights—both as a discourse and legal (international and domestic) movement—ultimately fails to provide protections for immigrants and communities of color. Instead it obfuscates how the law maintains racial logics, domestically and globally.

I center domestic legislation outlined in the TVPA and the 2008 reauthorization (TVPRA), as it relates to victims of human trafficking and unaccompanied children. These two groups of migrants were chosen because of their relationship to international human rights protections. By analyzing the law that protects these two groups this dissertation shows how racial projects are deployed against migrants, even those that are veiled as worth of rights and humanity.

Current scholarship on the TVPA separates human trafficking from the issue of unaccompanied children.[7] Most, if not all research around the TVPA focuses on its role in combating trafficking, and the consequences it has on immigration.[8] Research on unaccompanied children, on the other hand, largely treat the TVPA as the procedural regime migrant children must navigate.[9] By studying the development and evolution of the TVPA, this dissertation understands the TVPA as a site to explore the various ways the law operates, and how it obscures projects of racialization as applied to these two groups.

Further, research on the TVPA, human trafficking, and unaccompanied children have largely ignored the role of race. Work on the TVPA and human trafficking have revealed the various ways the law works to strengthen border enforcement and criminalize immigrants.[10] While research on unaccompanied children focus on the causes of migration,

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[7] This assertion is based on my review of the literature where the majority of articles on trafficking tend to discuss labor or sex trafficking of adults and to a lesser extent child, but nearly none on the trafficking of unaccompanied children.

[8] See for example, Chacon, Tensions and Trade-offs: Protecting Trafficking Victims in the Era of Immigration Enforcement, *University of Pennsylvania Law Review* (2010); Ankita Patel, "Back to the Drawing Board: Rethinking Protections Available to Victims of Trafficking, *Seattle Journal of Social Justice* 9, (2010); Marie Segrave, "Order at the Border: the Repatriation of Victims of Trafficking", *Women Studies International Forum* 32 (2009): 251-260; Wendy Chapkis, "Trafficking, Migration and the law: protecting innocents, punishing immigrants", *Gender & Society 17*, no. 6 (2003).

[9] This is true in both articles directed towards practitioner and scholars alike. See for example, Christine M. Hernandez, "Unaccompanied Alien Children: A crisis in Our Immigration Courts," *The Colorado Lawyer* 45 (Oct. 2016); Shani M. King, "Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors," *Harvard Journal on Legislation* 50 (2013); Jacqueline Bhabha and Susan Schmidt, "Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.S.," *The Journal of the History of Childhood and Youth* 1, no. 1 (2008).

10 See for example, Chacon, "Tensions and Trade-offs."

migration experiences, and describing their unique vulnerabilities and legal processes they navigate.[11] Given the history of immigration laws as a primary mechanism for racial formation[12] in the United States, particularly for Latinos, the gap in literature is surprising.[13] One explanation for why the TVPA has been largely free from sustained racial critiques may be because it is viewed less as an immigration law and more as a human rights-influenced law. Although the TVPA, as it relates to human trafficking has been critiqued for prioritizing law enforcement over human rights,[14] I posit that its roots in the international human rights movements, and congressional intent which framed it as a human rights-based law, separates it from traditional immigration laws. Thus, a primary objective of this dissertation is to analyze the TVPA through a racial framework (developed in the subsequent sections) in order to expose the law's role in racializing immigrants through the incorporation of racial logics. To make this analytical argument I situate the TVPA in the immigration and human rights history of the United States as it relates to racial formation. By providing this overview it becomes apparent that while immigration

[11] Note that while nationality and gender, and race in regard to indigenous children, are identified, this information is used descriptively with no meaningful discussion of how the law works to racialize them once they are in the United States, or how race may play a factor in their outmigration. This is particularly true for indigenous children and afro-Latinos.

[12] Racial formation is generally understood as the structural, institutional, and cultural processes of creating racial categories. This concept is further discussed in the proceeding sections.

[13] See, Rogelio Saenz, Karen Manges Douglas, "A Call for the Racialization of Immigration Studies: On the Transition of Ethnic Migrants to Racialized Immigrants," *Sociology of Race and Ethnicity* 1, no. 1 (2015). While calls to racialize immigration studies have been heeded, the sub-area of trafficking and migrant children within immigration studies has yet to be thoroughly studied in regards to race.

[14] Chacon, "Tensions and Trade-offs."

is inextricably linked to race, human rights law in the United States is not, and has rather become a tool for tackling social injustices including in the immigration context.

LITERATURE REVIEW

Race and Immigration in the United States

Immigration law and polices have developed alongside race and are central to understanding racial formation in the United States.[15] In the nascent stages of the country, immigration and alienage laws were overtly racist as exemplified by naturalization laws which restricted citizenship to white male immigrants.[16] During this time immigration while open to European immigrants became increasingly restrictionist to ensure a racially homogenous population, save for the importation of African slaves.[17] By the early

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[15] George A. Martinez, "Arizona, Immigration, and Latinos: The Epistemology of Whiteness, the Geography of Race, Interest Convergence, and the View from the Perspective of Critical Theory," *Arizona State Law Journal* 44, no. 1 (Winter 2012): 179. For a discussion of the paradigm shift within immigration studies that takes into account the role of race see, Mary Romero, "Crossing the Immigration and Race Border- A Critical Race Theory Approach to Immigration Studies," in *Interdisciplinary and Social Justice Revisioning Academic Accountability* eds. Joe Parker, Ranu Samantrai, and Mary Romero (Albany: SUNY Press, 2010). Important work on immigration and naturalization as racial projects include, Davide G. Gutierrez, *Walls and Mirrors: Mexican Americans, Mexican Immigrants, and the Politics of Ethnicity* (Berkeley: University of California Press, 1995); Lisa Lowe, Immigrant Acts: On Asian American Cultural Politics (1996); Kevin Johnson, *The "Huddled Masses" Myth: Immigration and Civil Rights* (Philadelphia: Temple University Press, 2004); Mai Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton: Princeton University Press, 2005); and Ian Haney Lopez, *White by Law: The Legal Construction of Race* (New York: NYU Press, 2006).

[16] Naturalization Act of 1790, 1 stat. 103.

[17] Saenz and Manges Douglas state that the time period of 1783 to 1882 is traditionally seen as "unrestricted" era of immigration. The authors contend that while it was true for European immigrants, "it was not the case for immigrants of color". They note the continued forced importation of African slaves, limited citizenship to whites, and "increasing surveillance of Chinese immigrants." Rogelio Saenz and Karen Manges Douglas, "A Call for the Racialization of Immigration Studies,"168.

nineteenth century ideas on race and racial differences, advanced by eugenics science, drove a nationalism founded on racial hierarchies and the need to achieve cultural homogeneity.[18] This race-driven nationalism is reflected in the corresponding immigration laws of the time.

Most notably, race scholars point to the Chinese Exclusion Act as the first immigration law to restrict voluntary immigration based on race and class.[19] Passed in 1882, the Chinese Exclusion Act prohibited Chinese immigration for ten years while also barring them from citizenship.[20] In 1892 the Act was extended for another ten years and became a permanent bar in 1902.[21] The importance of Chinese Exclusion Act is that it "provided the legal architecture structuring and influencing twentieth-century American immigration policy.[22] For example, it laid the foundation for the 1917 Immigration Act

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[18] Mai Ngai States that the key components of the Immigration Act of 1924 "construed a vision of the American nation that embodied certain hierarchies of race and nationality." Ngai, *Impossible Subjects,* 23.

[19] Chinese Exclusion Act, 47th Cong., (May 6, 1882).

[20] "Chinese Exclusion Act (1882)" Harvard University Library Open Collections Programs, accessed March 1, 2018, http://ocp.hul.harvard.edu/immigration/exclusion.html.

[21] "Chinese Exclusion Act (1882)."

[22] Erika Lee, "The Chinese Exclusion Example: Race, Immigration, and American Gatekeeping, 1882-1924," *Journal of American Ethnic History* 21, no. 3 (Spring 2002): 37.

which implemented an "Asiatic Barred Zone" restricting immigration from "[a]ny country not owned by the U.S. adjacent to the continent of Asia."[23]

Later, in 1921, the Harding administration passed the Emergency Quota Act.[24] The purpose of the law was to limit the number of immigrants who could be admitted from any country to three percent of the total number of persons from that specific country living in the United States. These numbers were based on national origin numbers from the 1910 census. The purpose and result of the law was overtly racial. Over half of the quota was allocated to Northern and Western Europeans and the remainder for Eastern and Southern Europeans.[25] It imposed numerical limits on European immigration for the first time and established a nationality quota system- foreshadowing the 1924 Immigration Act. Further, it continued the racial bias initiated by the Chinese Exclusion Act by barring immigration from Asian countries. Although the Act was temporary, it proved to be pivotal in directing American immigration policy.

Seeking to further restrict immigration flows from undesirable countries, the Immigration Act of 1924 based quotas on the 1890 census, rather than the 1910 census that the Emergency Quota Act relied on. The clear aim of this law was to privilege immigrants

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[23] An act to regulate the immigration of aliens to, and the residence of aliens in, the United States (1917 Immigration Act), Public Law 301, 65th Cong. 1st Sess. (February. 5th, 1917).

[24] Emergency Quota Act of 1921, Public Law 67-5, 67th Cong. 1st Sess. (May 19, 1921).

[25] John Higham, *Strangers in the Land: Patterns of American Nativism,*" 2nd ed. (New York: Athenium, 1963).

from Northern Europe while restricting immigrants from Southern and Eastern Europe. At first blush the law appears to discriminate against Southern and Eastern Europeans, however, as historian Mai Ngai argues, the quota system did more than divide Europe: "It also divided Europe from the non-European world. It defined the world formally in terms of country and nationality but also in terms of race."[26] The Immigration Act limited immigration from the non-European world by excluding from immigration persons ineligible for citizenship. The list of those ineligible for citizenship included all peoples from East and South Asian countries, except for Japan.[27] Coupled with legal cases contesting who qualifies for citizenship, the 1924 Immigration Act effectively worked to define the legal boundaries of whiteness.[28]

Notably, the 1924 Immigration Act excluded countries of the Western Hemisphere from national quotas. This resulted in increased Mexican immigration and reliance on Mexican laborers to fill agricultural jobs in the Southwest. The influx of Mexican immigration was met with restrictions via border patrol policies and strict adherence to visa requirements.[29] The result was to make Mexicans into the largest illegal 'alien' group

[26] Ngai, *Impossible Subjects*, 27.

[27] Ngai, *Impossible Subjects,* 37.

[28] Ngai, *Impossible Subjects,* 37-38. Examples of cases that challenged the racial qualifications for extending naturalization include *Ozawa v. United States*, 260 U.S. 178 (1922) (holding that Japanese are not "white" and thus not eligible for citizenship); *United States v. Thind* , 261 U.S. 204 (1923) (holding Indians are note white). For an in-depth analysis into naturalization and race see, Lopez, *White By Law*.

[29] Ibid, 7.

within the United States.[30] The increased Mexican immigration into the United States grew alongside segregation laws targeting Mexicans throughout the Southwest.[31] Reliance on Mexican immigration ebbed and flowed with the economy through the 1920s, 1930s, and 1940s and was met with corresponding immigration enforcement policies. For example, during the Great Depression fears that Mexicans held jobs over whites led to the first large scale repatriation of Mexicans immigrants occurred during the Great Depression, while World War II led to increased immigration.

Amid World War II the United States and Mexico agreed to the Bracero Program which contracted Mexican labor to fill labor shortages in the United States.[32] The Bracero Program began in 1942, and continued in various iterations until 1964.[33] Over the span of its existence, about 4.6 million Mexican workers utilized the Bracero Program.[34] However, while the Bracero Program was intended to curb unauthorized immigration it engendered more of it and solidified Mexicans with illegal immigration and the stereotypes of 'illegal alien' and criminality.[35] These racial stereotypes did not differentiate between illegal

[30] Ibid.

[31] Ibid.

[32] Kitty Calavita, *Inside the State: The Bracero Program, Immigration, and the INS (*New York: Routledge, 1992).

[33] "The Bracero Program: Bracero History Archive," UCLA Labor Center, accessed on March 1, 2018, https://www.labor.ucla.edu/what-we-do/labor-studies/research-tools/the-bracero-program/

[34] "The Bracero Program: Bracero History Archive."

[35] Ngai, *Impossible Subjects*, 149.

Mexican migrants and other Mexican origins people, reducing all Mexican peoples as illegal, or 'wetbacks.' The association with illegal migration and Mexicans came to the forefront with Operation Wetback, which focused on the forced repatriation of Mexican immigrants. The operation began in California and Arizona with the coordinated efforts among Border Patrol and state and local police agencies. Between 1953 and 1955, Operation Wetback apprehended 801,069 Mexican migrants and forcibly removed them by bus, train, and boat.[36]

Following the Civil Rights Act of 1964, President Lyndon B. Johnson signed the Immigration Act of 1965.[37] The Immigration Act of 1965 ended the racially charged national origins quota system and sought to introduce an immigration policy based on equality regardless of race or nationality. By repealing the 1924 Immigration Act, the 1965 Immigration Act placed global quotas that were evenly distributed at 20,000 per country, raising the ceiling on admissions to a total of 300,000 immigrants per year. The 1965 Act also established preferences for family unification and labor-based immigration. However, Ngai points out that the inclusion of a numerical ceiling, which imposed limits on immigration, created new forms of restriction and did not address the issue of Mexican

[36] Ngai, *Impossible Subjects* ,156.

[37] The Immigration Act of 1965, Public Law 89-236, 90th Cong. 2nd sess (June 30, 1968).

immigration. Specifically, unauthorized immigration from Mexico continued to increase, and "recast Mexican migration as 'illegal'.[38]

Unauthorized immigration, primarily from Mexico, grew as a result of the numerical quotas put into place on the Western hemisphere by the 1965 Act. By the late 1970s, the Carter administration implemented legislation to strengthen border enforcement along the U.S.-Mexico border.[39] Th Reagan administration introduced the Immigration and Reform Control Act of (IRCA) in 1982 and was passed in 1986.[40] IRCA reformed the immigration system by increasing border enforcement, implementing employer penalties for hiring unauthorized immigrants, and legalizing certain unauthorized immigrants.[41] While IRCA provided a path to legalization, it failed to provide a framework to meet the demands for low-skilled workers. This demand coupled with long wait times for family-sponsored immigration petitions resulted in increased unauthorized immigration.[42]

The issue of illegal immigration came to a head in the mid-1990s with nativist and racial tropes remerging at the state and federal level. Changes to federal immigration law

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[38] Ngai, *Impossible Subjects,* 261.

[39] Muzaffar Chishi, Doris Meissner, and Claire Bergeron, "At Its 25th Anniversary, IRCA's Legacy Lives On," Migration Policy Institute, November 16, 2011, last accessed March 2, 2018, https://www.migrationpolicy.org/article/its-25th-anniversary-ircas-legacy-lives/.

[40] The Immigration Reform and Control Act, Public Law 99-603, 99th Cong. 2nd sess. (November 6, 1986).

[41] Chishi et al., "At Its 25th Anniversary, IRCA's Legacy Lives On."

[42] Chishi, et al., "At Its 25th Anniversary, IRCA's Legacy Lives On."

relied on state-level antecedents such as California's Proposition 187 which sought to deny publicly funded social services, including education and health care, to undocumented immigrants.[43] Also known as the "Save our State Initiative", Proposition 187 linked the economic recession taking place at the time with Latino undocumented immigration.[44] While this proposition passed as a ballot initiative with 59 percent of California voters it was struck down as being unconstitutional by a federal court.[45]

Relying on similar arguments, but with a national focus, the Illegal Immigration Reform, and Immigrant Responsibility Act (IIRIRA), was passed on September 30, 1996. Combined with the Antiterrorism and Effective Death Penalty Act (AEDPA) passed earlier that same year, the two laws significantly altered the immigration regime, taking a punitive approach towards both legal and illegal immigrants. Focusing on crimes committed by immigrants, AEDPA expanded the types of crimes that would qualify to deport an immigrant. By expanding the term "aggravated felony" the law encompassed crimes that were typically thought of as misdemeanors, such as simple battery.[46] Additionally, IIRIRA

[43] Marcelo M. Suarez-Orozco, "California Dreaming: Proposition 187 and the Cultural Psychology of Racial and Ethnic Exclusion," *Anthropology & Education Quarterly* 27, no. 2 (1996): 151-167.

[44] Karen Manges Douglas, Rogelio Saenz, and Aurelia Lorena Murga, "Immigration in the Era of Color-blind Racism," *American Behavioral Scientist* 59, no.11 (2015):1429-1451.

[45] Michael Alvarez, and Tara L. Butterfield, "The Resurgence of Nativism in California? The Case of Proposition 187 and Illegal Immigration," *Social Science Quarterly* 81, no. 1 (2000); *League of United Latin American Citizens v. Wilson*, No. CV 94-7569 MRP, 1997 U.S. Dist. LEXIS 18776, at 48 (C.D. Cal. Nov. 14, 1997).

[46] The American Immigration Council wrote, "As initially enacted in 1988, the term "aggravated felony" referred only to murder, federal drug trafficking, and illicit trafficking of certain firearms and

removed discretionary relief from deportation for immigrants convicted of certain crimes and replaced suspension of deportation with the tougher cancellation of removal process and implemented bars to reenter the country. IIRIRA also provided technological upgrades to the U.S.-Mexico border, further militarizing it.[47] Lastly, IIRIRA increased the immigration enforcement regime by authorizing the training of local and state police in enforcing federal immigration laws through the 287g program. Taken together, AEDPA and IIRIRA worked to make an unprecedented number of immigrants deportable for crimes committed, while making it much more difficult to fight deportation by eliminating forms of relief. Overwhelmingly racialized in implementation, scholarship around these laws reveal that they are targeted towards Latino, or Mexican men, lead to racial profiling, and at the same time link Latino immigration to criminality.[48]

International Human Rights Law and the United States

Human rights law developed concurrently, and later converged, with immigration law in the United States. However, while race played a central role in immigration law, the

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destructive devices. Congress has since expanded the definition of "aggravated felony" on numerous occasions but has never removed a crime from the list. Today, the definition of "aggravated felony" covers more than thirty types of offenses, including simple battery, theft, filing a false tax return, and failing to appear in court." Aggravated Felonies: An Overview, American Immigration Council, December 16, 2016, last accessed, March 4, 2018, https://www.americanimmigrationcouncil.org/research/aggravated-felonies-overview.

[47] Militarization of the U.S.-Mexico border began in 1994 with Operation Gatekeeper and has intensified since 9/11. For more on the militarization of the border see, Joseph Nevins, *Operation Gatekeeper: The Rise of the "Illegal Alien" and the Making of the U.S.-Mexico Boundary* (New York: Routledge, 2002).

[48] Tanya Golash-Boza and Pierrette Hondagneu-Sotelo, "Latino Immigrant Men and the Deportation Crisis: A gendered racial removal program," *Latino Studies* 11, no. 3 (2013): 271-292.

same cannot be said for domestic human rights law. Rather, human rights in the United States has increasingly been seen as a panacea to social, economic, and racial injustices.

The origins of human rights emerged during the Enlightenment period and in subsequent natural, constitutional, and political rights discourses. Contemporary discussions of human rights are understood as the burgeoning international treaties and national laws that developed since the end of World War II. As a body of law and norms, the centrality of international human rights law (IHRL) is reflected in the development of the United Nations (UN). The UN was created in 1945 as a response to the atrocities that took place during World War II. The UN Charter (the Charter) was signed on June 26, 1945 and the UN officially came into existence on October 24, 1945. The Universal Declaration of Human Rights (UDHR) was later passed on December 10, 1948. The UDHR is seen as the foundational document in human rights law, as it codifies human right norms and standards. Following the adoption of the UDHR the UN Human Rights Commission, established in 1946, began working on treaties that would legally bind member states to human rights norms, resulting in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[49] Combined with the UDHR the three treaties are commonly referred to as the

[49] Due to political divisions that gave rise to the Cold War, the UN General Assembly requested the Commission draft treaties separating civil and political rights (favored by the Western Bloc) from economic and social rights (favored by the Eastern Block). The result was the creation of the ICCPR and the ICESCR.

international bill of rights and are thought to have ushered in an era of international human rights law. [50]

The United States took the lead in establishing the international modern-day system and IHRL. Represented by First Lady Eleanor Roosevelt, the United States was instrumental in forming the United Nations and in the drafting the UDHR leaving an impressionable mark. As legal scholar Louis Henkin observes, the UDHR, ICCPR, and ICESCR, are "in their essence American constitutional rights projected around the world".[51] Indeed, these three major instruments are known as the "International Bill of Rights," a term reminiscent of the U.S. Bill of Rights.[52] Although the International Bill of Rights is based on U.S ideals reflected in the Constitution and corresponding Bill of Rights, it ignores the historical and social context of racial violence and racial hierarchies inherent in the nation-building project of the United States.

[50] There are nine core international human rights treaties with corresponding committees which monitor implementation of the treaty provisions. These nine treaties include: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1965); International Covenant on Civil and Political Rights (ICCPR) (1966); International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984); Convention on the Rights of the Child (CRC) (1989); and the International Convention on Protection of the Rights of All Migrant Workers and Members of Their Families (ICMRW) (1990); International Convention for the Protection of All Persons from Enforced Disappearance (2006); Convention on the Rights of Persons with Disabilities (2006).

[51] Louis Henkin, "Rights: American and Human," *Columbia Law Review* 79 (1979): 415.

[52] Anthony Lester, "The Overseas Trade in the American Bill of Rights," *Columbia Law Review 88* (1988): 539.

Preeminent scholar and civil rights activist W.E.B. Du Bois was acutely aware of this failing. In 1945 Du Bois was asked to sign on to an early draft of the UDHR brought by the American Jewish Committee.[53] While Du Bois had denounced the persecution of Jewish people, he refrained from supporting the proposed treaty. Rather, he provided a nuanced critique of the declaration by situating the declaration in the history of racialized peoples and questioned its applicability to racially subjugated peoples.[54] In particular Du Bois voiced the dangers of international human rights law working in the interest of imperialism and colonization.[55] To ensure this would not be the case, Du Bois proposed the "first statute of international law" should include a renunciation of colonialism.[56] While Du Bois was aware of the dangers the emerging body of international law posed, he also recognized its potential for exposing racial injustices taking place within the United States. Most notably, Du Bois served as an author for the Civil Rights Congress's 1951 petition to the UN, charging the United States with genocide.

Du Bois reaction to, and relationship with, human rights is indicative of its power and potential. Scholars have critiqued IHRL on the premise that it is a form of moral and

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[53] Randall Williams, *Human Rights and Its Violence* (Minneapolis: University of Minnesota Press, 2010), xiii.

[54] Du Bois explains his position on the draft Declaration stating in part: "…this declaration of rights has apparently no though of the rights of Negroes, Indians, and South Sea Islanders. Why then call it the Declaration of Human Rights." Williams, *Human Rights and Its Violence*, xiv.

[55] Randall Williams, *Human Rights and Its Violence*, xiv.

[56] Randall Williams, *Human Rights and Its Violence*, xiv.

cultural imperialism by the West projected onto the Global South, and a tool of capitalist expansion.[57] At the same time, on the practical level, IHRL has been taken up by social justice advocates for causes ranging from gender equality, to racial justice and increasingly for migrants and immigrants' rights.

Human Rights Law in the United States

Although the United States led the development of IHRL, domestically it was viewed with suspicion. Emerging concurrently with the Cold War, international human rights were viewed as a communist threat which sought to undermine U.S. sovereignty. For example, the former president of the American Bar Association, Frank Holman characterized international human rights as a "Communist plot to destroy the American way of Life."[58] While the threat of communism was a concern, a more eminent threat came from the Civil Rights movement. Mounting pressure from activists to end de jure racial segregation and the federal government's increasing willingness to acknowledge racial disparities—reflected in the Truman Commission on Civil rights[59] and the Justice

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[57] See, Pheng, Cheah, *Inhuman Conditions: Cosmopolitanism and Human Rights,* (Cambridge: Harvard University Press, 2006); Costas, Douzinas, *Human Rights and Empire* (London: Routledge-Cavendish, 2007); China Meiville, *Between Equal Rights: A Marxist Theory of International Law* (Chicago: Haymarket Books, 2005); Williams, *The Divided World: Human Rights and its Violence*.

[58] Ann Elizabeth Mayer, "Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution be an Obstacle to Human Rights?," *Hastings Constitutional Law Quarterly* 23 (1996): 749.

[59] Natlaie Hevener Kaufman and David Whiteman, "Opposition to Human Rights Treaties in the United States Senate: The Legacy of the Bricker Amendment," *Human Rights Quarterly* 10, no. 3 (August 1988): 310.

Department's amicus briefs criticizing segregation in education—provide the backdrop to understanding the United States' initial fear of human rights treaties. In opposition to 'federal activism' in ending segregation, states' rights were defended "as the only bulwark against an expansive federal government which would impose a host of liberal programs, including the elimination of racial restrictions on marriage, property ownership, and education."[60] It is under this social and political context that human rights treaties were viewed as another threat to the status quo. This is most evident in Ohio Senator John Bricker's attack against the United Nations and human rights treaties, viewing them as "dangerous to the American way of life."[61]

Between 1950 and 1955 Senator Bricker led the anti-human rights movement in Congress seeking to shield the Constitution from international human rights treaties. The Supremacy Clause of the Constitution declares that treaties made under the authority of the United States "shall be the supreme Law of the land."[62] Unless otherwise specified, treaties are self-executing, meaning they are given effect by "executive or judicial bodies" without the need of further legislation.[63] Self-executing clauses enable individuals to challenge, in

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[60] Kaufman and Whiteman, "Opposition to Human Rights Treaties," 310.

[61] Kaufman and Whiteman, "Opposition to Human Rights Treaties," 311.

[62] U.S. Const. art. VI.

[63] Office of the Legal Advisor, U.S. Dep't of State, Pub. No. 8809, Digest of the United States Practice in International Law 65 (1974).

state or federal courts, violations of treaty rights. Senator Bricker introduced a constitutional amendment in 1951, 1952 and again in 1953 making all treaties non-self-executing.[64] As Louis Henkin describes, the campaign to pass the Bricker Amendment "represented a move by anti-civil-rights and 'states' rights forces to seek to prevent—in particular—bringing an end to racial discrimination and segregation by international treaty."[65] The amendment was ultimately defeated, but it effectively put an end to domestic implementation of human rights treaties. Ultimately, desegregation was premised on constitutional law, and not human rights. In 1954, the Supreme Court interpreted the Constitution as forbidding segregation in *Brown v. Board of Education*, and civil rights legislation was implemented through Congress.[66] As Henkin reflects "The civil rights campaign in the United States became entirely domestic, and any thought of effecting change in the United States law by treaty was abandoned."[67]

By the 1970s the American Bar Association (ABA) reversed its position on human rights treaties.[68] Today the ABA has fully embraced human rights as a viable source of law and has established a center on human rights which promotes "greater understanding of

[64] Kaufman and Whiteman, "Opposition to Human Rights Treaties," 320.

[65] Louis Henkin, "U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker," *American Journal of International Law* 89 (April 1995): 348.

[66] *Brown v. Board of Education*, 347 U.S. 483 (1954).

[67] Louis Henkin, "U.S. Ratification of Human Rights Conventions," 349.

[68] Kaufman and Whiteman, "Opposition to Human Rights Treaties," 334.

and belief in the importance of human rights."[69] Nonetheless, the initial repulsion towards international human rights law has left its mark on how human rights treaties are taken up in the United States. Today, international human rights treaties are limited in their effect by reservations, understandings, and declarations, making them non-self-executing. In this way, "Senator Bricker lost his battle, but his ghost in now enjoying victory in war. For the package of reservations, understandings and declarations achieve virtually what the Bricker Amendment sought, and more" by declaring human rights conventions non-self-executing."[70] Accordingly, domestic inequalities and injustices continued to be viewed through the lens of civil rights. Immigration, however, became one of the primary areas where IHRL implicated domestic law.

Human Rights and Immigration

Historically immigration policies did not differentiate between regular immigration and refugees. Prior to WWII, immigrants and refugees were given the same consideration for entry, which resulted in denying Jews fleeing Nazi Germany entry into the United States. The United States' treatment towards refugees at this time was influenced by anti-Semitist attitudes towards refugee policies.[71] In this way, refugee law mirrored the restrictionist approach towards immigrants based on race discussed in the previous section.

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[69] American Bar Association Center for Human Rights, last accessed March 1, 2018, https://www.americanbar.org/groups/human_rights.html.

[70] Louis Henkin, "U.S. Ratification of Human Rights Conventions," 349.

[71] For an analysis of the U.S. policy concerning Jewish Refugees following World War II see, David S. Wyman, The Abandonment of the Jews: American and the Holocaust (New York: Pantheon Books, 1984).

Following World War II, the UN promulgated the 1951 Convention Relating to the Status of Refugees (Refugee Convention), and later expanded the definition of refugee in the 1967 Protocol Relating to the Status of Refugees (Refugee Protocol).[72] While the United States ratified the Refugee Convention in 1968 it did not implement statutory measures until 1980. Even though the United States did not implement the UN norms until 1980 it regularly accepted refugees following World War II and developed refugee policies in the context of the Cold War. Cuba became the primary country of origin for refugees entering the United States during the 1960s.[73] Due to the revolution and rise of Communism in Cuba, the United States used the influx of Cuban refugees to further its Cold War politics. The Vietnam War later brought Vietnamese, Cambodian, and Laotian refugees.

The admission of refugees following World War II up until 1980 is reflective of U.S. Cold War position and highlights the relationship between foreign policy, human rights law, and domestic immigration policy. The 1980 Refugee Act sought to move beyond anti-communist Cold War logics by incorporating the Refugees Convention into domestic law.[74] Significantly, the Refugee Act implemented the UN definition of a

[72]UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.; United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (1967).

[73] Philip A. Holman. "Refugee Resettlement in the United States" in David W. Haines (Ed.) *Refugees in America in the 1990s* (Westport: Greenwood Press, 1996).

[74] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980). For background on the adoption of the 1980 Refugee Act, *see* Deborah Anker and Michael Posner, "The Forty Year Crisis: A Legislative History of the Refugee Act of 1980," 19 *San Diego Law Review* 19 (1981): 9. For history and development

refugee.[75] Additionally, it raised the admission cap to 50,000 refugees annually with a provision that allowed flexibility to the cap given humanitarian concerns. The Refugee Act also established provision concerning asylum seekers.[76] Lastly, it replaced ad hoc nation-centric refugee programs with a federal program that would assist in resettlement to all refugees.[77] Immediately following the Refugee Act events in Cuba caused mass arrival of Cuban and Haitian refugees testing the newly implemented law. It was further tested when refugees from Central America entered in mass throughout the 1980s.

Fleeing U.S.-backed civil wars in their respective countries, Guatemalan and Salvadorans migrants sought refuge in the United States. The United States refused to extend refugee status and rather categorized them as economic migrants, thereby denying them immigration relief as provided for under the Refugee Convention and Refugee Act. In response, activists brought a human rights perspective to what was considered by the

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of U.S. refugee and asylum policy, *see* Gil Loescher and John A. Scanlan, *Calculated Kindness: Refugees and America's Half-Open Door, 1945—Present* (New York: Free Press,1986).

[75] Under the Refugee Act of 1980, refugee became defined as "any person who is outside any country of such person's nationality or, in the case of person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." Immigration and Nationality Act 101(a)(42).

[76] The Act allowed for asylum seekers to apply for refugee status once in the United States, rather than attaining refugee status prior to entering the country. But in 1996 Congress limited asylum seekers to one year to apply for asylum.

[77] Holman, "Refugee Resettlement in the United States."

government an immigration issue.[78] By framing Guatemalan and Salvadoran immigrants as asylum seekers seeking refuge, activists hoped to shed light into the civil wars while also preventing the deportation of bona fide asylum seekers.[79] With the help of activists and nonprofit organizations, Guatemalan and Salvadorans applied for political asylum, arguing they met the definition of refugee under both international human rights law and under the Refugee Act. However, the United States refused to extend refugee protections to Guatemalan and Salvadoran applicants, resulting in a lawsuit against the government. The suit alleged that the Immigration and Naturalization Service (INS) discriminated against asylum applicants in violation of U.S. and international law.[80] The lawsuit resulted in a settlement allowing de novo asylum applications and interviews for Salvadorans who had been in the United States since September 19, 1990, and Guatemalans who had been in the country since October 1, 1990.

The plight of Central Americans in obtaining human rights protections highlights the contentious relationship between the category of refugee/asylum seeker and immigrants. It further reveals the politics behind bestowing human rights which in and of itself puts into question the inalienability of said rights. In the case of Central Americans,

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[78] Susan Biler Coutin,"From Refugees to Immigrants: The Legalization Strategies of Salvadoran Immigrants and Activists," *The International Migration Review* 32, no. 4 (1998): 901-925.

[79] Biler Coutin,"From Refugees to Immigrants," 905.

[80] Biler Coutin,"From Refugees to Immigrants," 909; *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991).

claims to international human rights were successful and laid a foundation for immigrant rights activists in the United States to use IHRL as a strategy for extending rights in various areas of immigration law such as detention and border enforcement strategies.[81] However, since the 1990s, immigration law has become ever more restrictive even in areas influenced by human rights. Of notable example is the evolution of deportation policies over the past three decades.

The detention practices of the federal government came under attack during the 1980s when Central American migrants were detained en masse while awaiting asylum decisions. This trend in detaining migrants continued and intensified following the enactment of IIRIRA in 1996.[82] Under IIRIRA, detention became mandatory for certain categories of migrants such as those under expediate removal, including asylum seekers. Following 9/11, detaining migrants was framed as central to national security and the war on terror.[83] This led to changes in practices including placing more restriction on which

[81] See for example, Barbara A. Frey and X. Kevin Zhao, "The Criminalization of Immigration and the International Norm of Non-Discrimination : Deportation and Detention in U.S. Immigration Law," *Law and Inequality: A Journal of Theory & Practice* 29, (Summer, 2011):279-320.; Amnesty International, *In Hostile Terrain: Human Rights Violations in Immigration Enforcement in the US Southwest* (New York: Amnesty International, 2010).; American Civil Liberties Union, "Human Rights Violations on the United States-Mexico Border," *Submitted to the Office of the United Nations High Commissioner for Human rights Side Event on "Human Rights at International Borders"* (October 25, 2012).

[82] Michelle Brane and Christina Lundholm, "Human Rights Behind Bars: Advancing the Rights of Immigration Detainees in the United States Through Human Rights Frameworks," *Georgetown Immigration Law Journal 22* (2008): 149-150.

[83] Brane and Lundholm, Human Rights Behind Bars," 150. For an overview of the rise of detention policies and their relationship to the post 9/11 security regimes see, David Manuel Hernandez, "Pursuant to Deportation: Latinos and Immigrant Detention," *Latino Studies 6*, (2008).

migrants were eligible for release, and the mandatory detention of migrants from certain Arab and Muslim countries.[84]

At the same time, international and regional human rights standards and guidelines emerged,[85] while domestically, advocates denounced the government's policies for violating international human rights principles. The detention regime has been criticized for violating the principle prohibiting arbitrary detention found in the ICCPR, violating the Refugee Convention's prohibition against restricting the movement of asylum seekers, and for violating the protections afforded to families under the UDHR and Convention on the Rights of the Child, to name a few.[86] Even with increased challenges to the detention system, including litigation with a national focus, and petitions brought to international and

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[84] Brane and Lundholm, "Human Rights Behind Bars," 158.

[85] Specifically, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families was signed in 1990 and was entered into force in 2003. The treaty's objective is to foster respect for the human rights for migrants and to lay out protections afforded to them. However, as of now only migrant receiving nations such as Mexico, El Salvador, and Morocco have ratified the treaty, while no Western receiving nations has. Also see, Denise Gilman, "Realizing Liberty: The Use of International Human Rights Law to Realign Immigration Detention in the United States," *Fordham International Law Journal* 36 (2013): 243-333.

[86] See for example, Detention and Deportation Working Group, Briefing Materials Submitted to the United Nations Special Rapporteur on the Human Rights of Migrants, Submitted by Lutheran Immigration and Refugee Service, in partnership with the Detention Watch Network, accessed August 13, 2018, https://www.aclu.org/other/briefing-materials-submitted-united-nations-special-rapporteur-human-rights-migrants; Christian Jorgensen, Immigrant Detention in the United Stats: Violations of International Human Rights Law, January 5, 2017, accessed August 13, 2018, http://hrbrief.org/hearings/immigrant-detention-united-states-violations-international-human-rights-law/; Priyanka Bhatt, Priya Sreeivasan, Anthony Rivera, Daniel Yoon, Deven Caron, and Azadeh Shahshahani, Inside Atlanta's Immigrant Cages: A Report on the Condition of the Atlanta City Detention Center, Project South and Georgia Detention Watch, August 2018, accessed August 13, 2018, https://projectsouth.org/wp-content/uploads/2018/08/InsideATL_Imm_Cages_8_DIG.pdf.

regional bodies,[87] immigration detention has increased to the highest levels to date, including high levels of family and child detention. Coupled with the policy of deterrence through detention,[88] and the continued privatization of detention facilities, the detention regime appears to be strengthening.[89] Arguably then, challenges to the indiscriminate detention of immigrants, including calls to incorporate human rights standards within detention work to "rationalize the practice of immigration detention, providing the state with cover for its continued efforts to deprive citizens of liberty and helping ensure the vitality of detention regimes into the foreseeable future."[90]

The development of human rights law in the United States implicates some the same areas as immigration law such as constitutional law (state rights arguments seen in

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[87] For example, the UN Working Group on Arbitrary Detention has become a vehicle for brining claims against prolonged and indefinite immigration detention. For more information on Working Group see, UN Office of the High Commission, Working Group on Arbitrary Detention, accessed August 13, 2018, https://www.ohchr.org/en/issues/detention/pages/wgadindex.aspx.

[88] The Office of Detention and Removal has stated: "The National Strategy for Homeland Security promotes a balanced and integrated enforcement strategy, which ensures that the probability of apprehension and the impact of the consequences are sufficient to deter future illegal activity." Quoted in, Brane and Lundholm, "Human Rights Behind Bars," 152.

[89] The National Immigrant Justice Center found that "In November 2017, ICE reported that its total average daily population for FY 2018 was 39,322 people. This marks the second year in a row the U.S. government hit an unprecedented high in how many immigrants it incarcerates." Tara Tidwell Cullen, "ICE Released its Most Comprehensive Immigration Detention Data yet. It's Alarming, March 13, 2018, accessed August 13, 2018, https://immigrantjustice.org/staff/blog/ice-released-its-most-comprehensive-immigration-detention-data-yet.

[90] Michael Flynn, Discussion Paper on the Unintended Consequence of Human Rights Promotion on Immigration Detention. *Global Detention Project* (Mar. 12, 2012).

the Bricker era, and questions over sovereignty) and foreign policy (Cold War politics). This is particularly true in human rights law as applied to immigration, as we saw with the application of the Refugee Act to Central American asylum seekers. In regard to race, however, the development of domestic human rights law seemingly took a different trajectory from immigration. Unlike the racialized history of immigration, human rights law was viewed as having the potential for both maintaining white supremacy—as indicated by W.E.B Du Bois suspicion of human rights—and challenging it, as seen in the fears of U.S. politicians. Further, the overall lack of implementation of human rights law and its use in advocacy largely left human rights law free from implicating racial projects in the United States. In this way, human rights in the United States can be understood as a racially ambivalent area of law. This stands in contrast to the constitutive relationship between immigration law and race.

The Trafficking Victim's Protection Act

At the same time immigrant rights advocates were exploring IHRL as a way to counter increasingly restrictive immigration policies by the U.S. government, human trafficking got new-found attention. Starting in the 1990s, international organizations and governments, including the United States, took notice of human trafficking. The rise of AIDS during the 1970s and 1980s and the growth of the sex industry brought attention to the issue of prostitution and trafficking of women by non-governmental organizations

(NGOs).[91] The fall of the Soviet Union resulted in increased migration among newly independent countries, as well as the rise of transnational crime, further exacerbated concerns over trafficking. In the United States the result was a 1998 presidential directive, followed by the Trafficking and Victims of Violence Act, known as the Trafficking Victims Protection Act (TVPA), passed in 2000.[92] At the international level, the UN passed the Protocol on Trafficking in 2000.[93]

The TVPA, enacted in 2000, laid out the domestic legal framework for combating human trafficking.[94] It reflects the collaborative efforts of Congress, non-governmental organizations, and both the Clinton and Bush administrations in addressing human trafficking domestically and abroad. The purpose of the TVPA is to "combat trafficking in persons, a contemporary manifestation of slavery whose victims are primarily women and children, to ensure just and effective punishment of traffickers, and to protect their victims."[95] The TVPA addresses human trafficking through a three-prong approach that includes prevention, protection, and prosecution. First, it criminalizes and enhances

[91] Barbara Stolz, "Educating policymakers and setting the criminal justice policymaking agenda: Interest groups and the 'Victims of Trafficking and Violence Act of 2000'," *Criminal Justice* 5, no. 4 (2005): 408.

[92] Stolz, "Educating policymakers," 409.

[93] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, G.A. res. 55/25, annex II, 55 U.N. GAOR Supp. (No. 49) at 60, U.N. Doc. A/45/49 (Vol.I) (2001).

[94] The Trafficking Victims Protection Act of 2000, Public Law 106-386, 106th Congr. 2nd sess. (October 28, 2000), codified at 22 U.S.C. § 7101).

[95] 22 U.S.C. § 7101 (a).

penalties against human trafficking. Second, it provides social services and immigration benefits to victims of human trafficking. Third, it provides for the monitoring of trafficking internationally, and allocates funds to programs that will help prevent trafficking.

The TVPA provides immigration relief through the creation of the T-visa.[96] The T-visa provides nonimmigrant status in the United States to victims of human trafficking. It further provides eligibility for employment authorization. Once approved, the T-visa is valid for four years, and allows survivors to adjust to permanent residence status at the end of the visa term.[97] In order to qualify and obtain non-immigration status and later residency in the United States, a survivor must agree to assist law enforcement in investigating and prosecuting their trafficker. Under the 2005 reauthorization of the T visa, Congress relaxed this requirement so that a victim can still be eligible for T visa if it is unreasonable to expect cooperation with law enforcement due to a psychological or physical trauma.[98]

The 2008 reauthorization of the TVPA expanded protection for a sub-group of trafficking victims- unaccompanied children. Drafted as a response to concerns that

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[96] 8 C.F.R §214.11 (b) Eligibility. To be eligible for a T-visa a foreign nationals human trafficking victims must meet the following elements: "1) Is or has been a victim of a severe form of trafficking"; 2) Is physically present in the U.S. on account of their trafficking; 3) Either: "(i) Has complied with reasonable requests for assistance in the investigation or prosecution of acts of such trafficking in persons, or (ii) Is less than 18 years of age; and 4) Would suffer extreme hardship involving unusual and severe harm upon removal […]."

[97] Or before then with law enforcement approval. See, 8 C.F.R §214.11(p)(2).

[98] Immigration and Nationality Act, 8 U.S.C § 1101(a)15)(T)(iii) (stating the requirement for law enforcement cooperation is unreasonable if "a trafficking victim, due to psychological or physical trauma, is unable to cooperate with a request for assistance").

unaccompanied children were being apprehended by Customs and Border Patrol (CBP) without proper screening to assess eligibility for relief, the reauthorization outlined measures to protect this vulnerable group. [99] First, it differentiated between contiguous and non-contiguous countries.[100] Second, the TVPRA required all unaccompanied children to be screened as potential victims of human trafficking. Third, if it is determined that the child is not a victim of trafficking, then they are summarily returned to their country of origin if from a contiguous country (Mexico and/or Canada), or placed in removal proceedings if from a non-contiguous country (El Salvador, Guatemala, and Honduras for example).[101]

Given that the TVPA grew out of an international focus on human trafficking and incorporated immigration benefits during an era of restrictive immigration policy, it provides a glimpse into how the United States implements human rights laws and offers a space to interrogate the relationship between immigration, human right, and race.

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[99] William Wilberforce Trafficking Victims Protections Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008).

[100] Enhancing efforts to combat the trafficking of children, 8 USC §1232 (a)(4).

[101] Enhancing efforts to combat the trafficking of children, 8 USC §1232(a)(5)(D).

RESEARCH QUESTIONS

As the review of literature suggests, the United States' implementation of international human rights law has largely avoided analysis by race scholars. How can we understand human rights laws in the United States through a racial lens? How are human rights laws in the United States racial projects? As race has become increasingly central to understanding immigration, the same cannot be said for human rights laws, even where there is overlap between the two. What then, is the relationship between human rights and immigration? Do human rights contribute to the racializing project of immigration? If so, how? The purpose of this dissertation is an attempt to answer these questions. By centering my study on the TVPA, a law which is at the intersection of IHRL and immigration, this dissertation explores the ways in which these two systems of law contribute to the racial projects in the United States.

THEORETICAL PERSPECTIVES

The following section lays out the various theoretical perspectives this dissertation employs in analyzing the TVPA. My theoretical framework combines legal Critical Race Theory (CRT), critical race scholarship from the humanities, and anti-colonial theory to take into account the various ways that race converges with human rights and immigration.

Race and the Law

Critical Race Theory (CRT) posits that law reform and legal victories in the area of race work to mask and perpetuate systems of inequality and domination. Indeed, CRT postulates that racism is fundamentally tied to U.S. law, and that the law works in the maintenance of racial hierarchies. The goal then of CRT is to develop a jurisprudence that accounts for the role of racism in order to end the oppression of people of color.[102] LatCrit developed as an offshoot of CRT and focuses on Latinos in relation to U.S. law. LatCrit, while epistemologically and methodologically in line with CRT, can be understood as broadening the scope of analysis of CRT by taking into account the structures that facilitate the subordination of Latinos, including language, culture, phenotype, and immigration status.[103] In the tradition of CRT, LatCrit scholars take an intersectional approach to understanding the multiple structures that seek to marginalize Latinos, including immigration status. For example, CRT/LatCrit scholar Kevin Johnson highlights how immigration laws aids in the social construction of race.[104] Situating his analysis in 19th

[102] See Mari Matsuda. "Voices of America: accent, antidiscrimination law, and a jurisprudence for *the* last reconstruction. *Yale Law Journal, 100*(p.1331).

[103] Berta Esperanza Hernandez-Truyol, "Borders (en)gendered: Normativities, Latinas and a LatCrit paradigm," *New York University Law Review* 72 (1997).

[104] Kevin Johnson. *The "Huddled Masses" Myth: Immigration and Civil Rights.* (Philadelphia: Temple University Press, 2004). Also see Ian Haney-Lopez. *White by Law: The Legal Construction of Race*. (New York: New York University Press, 1996).

century immigration laws that implicate race and class, Johnson shows how current federal policies use class as a veil for racially discriminatory immigration laws. [105]

While CRT/LatCrit scholars "write scholarship that attempts to change American law, whether radically or via incremental reforms,"[106] they ultimately rely on the law, and rights-based legal arguments to address racial inequality. Of notable exception is Derrick Bell, a founder of CRT, who viewed the law as inherently violent, and argued that reliance on the law works to harm Black people and perpetuate their subjugation in society.[107]

Bell's expansive scholarship analyzed at length the failures of the law, civil rights law specifically, in providing racial equality for Blacks, and proposed theories for explaining why. Among his most influential theory is the interest-convergence principle, which developed to explain why the landmark desegregation case, *Brown v. Board of Education*, largely failed to bring about the intended goal of desegregation.[108] Bell hypothesized that racially beneficial laws are dependent on the self-interest of white policymakers. Therefore, only when there is an alignment between the interests of racially

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[105] Johnson. *The "Huddled Masses" Myth: Immigration and Civil Rights."*

[106] Laura Gomez, "A tale of two genres: on the ideal links between law and society and critical race theory", in Austin Sarat, ed., *The Blackwell Companion to Law and Society* (Oxford: Blackwell, 2004): 455.

[107] Derrick Bell, "Racial Realism," *Connecticut Law Review* 24 (1992); *Faces at the Bottom of the Well: the permanence of racism* (New York: Basic Books, 1992); Richard Delgado, "Law's Violence: Derrick Bell's Next Article," *University of Pittsburgh Law Review* 75 (2014): 436.

[108] Derrick Bell, "Brown v. Board of Education and the Interest-Convergence Dilemma," *Harvard Law Review 93* (1980).

oppressed groups and elite whites are legal protections and benefits extended to racial groups. Conversely, racially beneficial laws are eliminated or scaled back once there is a divergence of interest. Further, under the interest-convergence principle even when effective racial remedies are implemented, "that remedy will be abrogated at the point that policymakers fear the remedial policy is threatening the superior status of whites."[109] By linking racially beneficial laws to the interest of white policymakers and judicial system, Bell's interest convergence principle not only exposes the white supremacist nature of the law, but also highlights the impermanence of legal protections for racially subordinated groups. Thus, the interest convergence principle provides a useful framework for this project in its ability to explain how seemingly racially-beneficial laws are developed, and why they ultimately fail to protect communities of color.

While CRT is primarily a study of law, critical race scholars in the humanities have developed theories on race that implicate the larger epistemological foundation of the rights-regime rooted in liberalism and the modern laws that arise from it.

In *Towards a Global Idea of Race*, Denise Ferreira da Silva traces how race is constitutive to the ontological and epistemological foundations of modern juridical, economic, and moral global configurations.[110] In particular, her work highlights how

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[109] Dana N. Thompson Dorsey, and Terah T. Venzant Chambers, "Growing C-D-R (Cedar): working the intersections of interest convergence and whiteness as property in the affirmative action legal debates," *Race Ethnicity and Education 17*, no. 1 (2014):61.

Western modernity, and the rise of scientific reason, developed through locating racialized others outside of it.[111] Placed outside of modernity and reason, science was then used to justify colonization and enslavement of non-Western racialized people.[112] Related to the universalizing of scientific reason was the universalizing of the law. Once non-Western racialized others were placed outside of scientific reason, they were also placed outside of universal law. In this way, da Silva's work links juridical universality with racial subjugation, and provides a critique of CRT for its inability to see how racial difference, or what she terms the analytic of raciality, "reproduces the universality of the law."[113] For da Silva, the law is unable to provide justice for racialized groups.

Similarly, Philosopher David Theo Goldberg argues that race is central to modernity. For Goldberg, liberalism, the philosophical and political doctrine premised on rationalism and empiricism, and which promotes equality and liberty, is conceived through racism, or racial difference.[114] Focusing on the role of the modern state, Goldberg traces how racial categories are created and enforcement of racial exclusion and oppression is maintained. Specifically, in *The Racial State*, Goldberg argues that the modern nation-state

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[110] Denise Ferreira da Silva, *Towards a Global Idea of* Race (Minneapolis: University of Minnesota, 2007).

[111] da Silva, *Towards a Global Idea of* Race, 117.

[112] da Silva, *Towards a Global Idea of* Race ,117.

[113] da Silva, *Towards a Global Idea of* Race, 6.

[114] David Theo Goldberg, *Racist Culture: Philosophy and the Politics of Meaning* (Malden: Blackwell, 1993).

developed concomitantly with race and has become intertwined such that race is central to the function and mechanism of the modern state.[115] Goldberg posits that the state expresses itself in the form of racial exclusion, through the maintenance of homogeneity. Homogeneity is the exclusion of difference, or heterogeneity. To promote homogeneity, the state is implicated in racism which is necessary for the exclusion of heterogeneity. In this way, race is used to promote difference, in the interest of homogeneity. In reproducing homogeneity, steps to enclose or exclude people of color from the state manifests in law, policy, economics and culture. For example, Goldberg asserts that the racial state works in the interest of capital by regulating labor supply, which takes on a racial and gendered configuration.[116] A historical example is the United States slave-based economy which relied on racial subjugation of Blacks. In the current era, deindustrialization has corresponded to the criminalization of people of color, as a mechanism for controlling labor flow. In both examples, labor supplies are mediated through the deployment of anti-black racism.

Under the racial state a legal framework is necessary for homogeneity, while also aiding in configuring economic opportunities.[117] The rise of property law, the controlling of property crimes, citizenship, immigration laws, and laws shaping sexual interactions,

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[115] David Theo Goldberg, *The Racial State* (Malden: Blackwell Publishers Inc., 2002), 4.

[116] Goldberg, *The Racial State, 101-102.*

[117] Goldberg, *The Racial State* ,101-102.

are at once connected to the economic needs of capital as well as determining the perimeters of homogeneity. Hence, while law asserts itself as objective and impartial, it functions to maintain racialized exclusion from the state and the economy.

CRT provides an analytic for understanding the role of race in U.S. law, while the scholarship of da Silva and Goldberg problematizes CRT's reliance of the law by postulating that the law is already racialized, and that the deployment of the law works to reproduce racial logics. Given the current era of mass migration and increasing market connectedness and globalization, da Silva's and Goldberg's understanding of race and the law can be extended to the international realm, in that much like nation-states that seek to manage and maintain racial difference, the international community of Western nations—which are the primary leaders of international juridical apparatus—use international law to maintain economic, political, and cultural hegemony. This being the case, human rights doctrine, much like national immigration policies, get taken up to ensure racial hierarchies.

Human Rights, Humanitarianism, and Imperialism

Critical international legal and cultural scholars have done much work in tracing how human rights and humanitarianism becomes a vehicle for economic, military, political, and cultural intervention into non-Western nations. Marxist analysis in particular exposes how international law upholds global capitalist structures. For example, Marxist Scholar China Mieville posits that the law, both national and international, does not exist independent from social and economic realities, and rather is constitutive of unequal power

relations produced by capitalism.[118] Examining human rights theorists Pheng Cheah's scholarship reveals how international human rights doctrine upholds capitalist relations.[119] By analyzing the material condition of transnational domestic workers, his work reveals that universal claims to rights and protections are dependent on host-nation states and thus reaffirm rather than challenge national capitalist structures. In this way human rights become implicated in global capitalism, which creates the foreign domestic worker, the nation state, and international organizations.

Critical legal scholar Costas Douzinas examines how human rights is embedded in international humanitarian law, which works to legitimize Western imperialism.[120] Douzinas asserts that the rhetoric and politics of universal human rights provides a moral justification for war. As Douzinas illuminates the "UN Charter established a distinction between aggressive and defensive or unjust and justified wars" in order to maintain peace after WWII.[121] This distinction worked to restrict states from being instigators of war, however: "…states could go to war in self-defense or on the authorization of the Security Council acting on its obligation to prevent and stop violations of peace".[122] Douzinas

[118] China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (London: Pluto Press, 2006).

[119] Pheng Cheah, *Inhuman Conditions: On Cosmopolitanism and Human Rights* (Cambridge: Harvard University Press, 2006)

[120] Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (New York: Routledge-Cavendish, 2007).

[121] Douzinas, *Human Rights and Empire* ,244.

[122] Douzinas, *Human Rights and Empire* ,244.

argues that under this distinction, claims of human rights violation are considered a violation of peace, providing the moral justification to go to war. Comparing human rights to European colonization Douzinas argues current human rights norms work to advance imperialist endeavors. Much like colonization, justified as a civilizing mission, human rights justification of humanitarian intervention becomes a tactic to open markets. Similarly, just as colonization was violently enforced, current humanitarian interventions are also violently imposed. However, rather than dismissing the project of human rights, Douzinas recognizes its symbolic power for oppressed peoples, and argues for it to be reclaimed by the oppressed through collective activism and emancipatory politics.[123]

Taken together, Mieville, Cheah, and Douzinas materialist analysis of human rights provides a framework in which to understand international human rights in justifying oppressive socio-economic relations. However, human rights are not only a tool for capitalist hegemony and should also be understood in light of its relationship to racial logics and white supremacy. As these scholars do not take as central the underlying logics of race within their analysis, to complicate current understandings of human rights this project incorporates anti-colonialist scholarship.

[123] Douzinas, *Human Rights and Empire* ,33, 293.

Human Rights, (Neo)Colonialism, and Race

In *Wretched of the Earth*, Frantz Fanon describes the colonized world as being structured by a binary system.[124] Fanon argues that under colonization, race creates the boundary of humanity, where the humanity of the colonizer is juxtaposed to the inhumanity of the colonized. Thus, for Fanon race plays a fundamental role in structuring humanity. Through social differentiation, the colonized world is established and maintained through violence. Violence for Fanon includes physical violence, such as state-sanctioned police brutality, and other forms such as psychological and symbolic violence inflicted onto the colonized. This violence is embedded in all colonized societal structures and conditions including the political, juridical, economic, and cultural spheres. Moreover, these violent racialized structures are justified and legitimized through the colonial understandings of humanity, which assumes a Western (colonizer) ideal of humanity.

Fanon's analysis of race and colonialism is applied to the international human rights regime through the work of Randall Williams. Combining Marxist analysis with Fanon's racial framework, Williams argues that the current international order and primacy of human rights discourse are an extension of colonialism.[125] Given the fact that racial violence is inherent in colonialism, international human rights functions today to further

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[124] Frantz Fanon, *Wretched of the Earth*, trans. Richard Philcox (New York: Grove Press, 2004).

[125] Randall Williams, *The Divided World: Human Rights and its Violence* (Minneapolis: University of Minnesota Press, 2010).

not only capitalist hegemony but racial subjugation. Fanon's examination of race, extended by Williams, complicates Marxist analysis of international law, and the current international order by incorporating a racial lens.

Though varied in fields and subject matter, the theories discussed above guide my analysis of the TVPA. First, taking as a premise that the law is already racialized, this dissertation exposes how the TVPA upholds racial hierarchies, and its complicity in maintaining white supremacy. Second, while this dissertation focuses on how international and domestic laws support racial subjugation, my framework takes into account colonialism and current global capitalist relations. Indeed, in the case of human trafficking and unaccompanied children, among the causes of their migration is related global capitalism, and legacies of colonialism. Third, this framework guides my interrogation of international human rights law as complicit in racial projects by working in tandem with domestic laws such as the TVPA.

METHODOLOGY

Data collection comes in the form of legislative histories, legal cases, federal crime data, and case studies. I draw my methods from a broad range of disciplines including, law, sociology, cultural, ethnic, and women studies. My methodological approach to analyzing this data include, Critical Race Theory (CRT), critical discourse analysis, and grounded theory. In this section I provide an overview of the overarching methodological approaches

taken in this project, however, more detailed discussions of specific methods are found throughout my chapters.

Critical Race Theory as a Method

Critical Race Theory (CRT) takes as a premise that racism and racial privilege are foundational to U.S. society and its corresponding legal structure. Taking from this premise CRT "questions the very foundations of the liberal order, including equality theory, [and] legal reasoning."[126] Accordingly, CRT seeks "to show how contemporary law-including contemporary anti-discrimination law-paradoxically accommodates and even facilitates racism".[127] As a methodology, CRT draws from various strands of critical theory, including post-modernism, and post-structuralism, and has developed an approach towards interrogating the law which Angela Harris calls a "hermeneutics of skepticism."[128] This approach places legal doctrine and the development of jurisprudence within larger political, social, and historical contexts in order to "identify the continuity of racial oppression across time."[129] However, rather than focus on "internal inconsistencies in legal doctrine or historical and theoretical critiques that, while important, often do not offer a measurable basis from which to understand the depth of …. on-the-ground trends and social dynamics,"

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[126] Richard Delgado and Jean Stefancic, *Critical Race Theory*, 2nd ed. (New York: New York University Press, 2012): 3.

[127] Angela Harris, "Critical Race Theory," *Selected Works* (January 2012): 6, accessed April 20, 2018, http://works.bepress.com/angela_harris/17.

[128] Angela Harris, "Critical Race Theory" 6.

[129] Angela Harris, "Critical Race Theory," 10.

my dissertation takes a transdisciplinary approach to studying the constitutive relationship between race and law.[130] By combining critical discourse analysis, and grounded theory, with legal analysis, my dissertation heeds the call of CRT scholars who seek to create a more "empirically robust" race scholarship.[131]

Critical Discourse Analysis

Norman Fairclough, drawing on Michel Foucault, defines discourse as language as social practice determined by social structures.[132] For Fairclough, discourses both produce social structures as well as are determined by them. The objective of critical discourse analysis is to make visible the role of discourse in shaping social reality, paying specific attention to power, dominance, inequality and bias, and how they are maintained and reproduced within specific economic, political, and historical contexts.[133] In particular, Fairclough argues that ideology, discourse, and power are inextricably linked, where power, through ideology, obscures and naturalizes the social order and discourse works to

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[130] Osajie K. Obasogie, "Forward: Critical Race Theory and Empirical Methods," *UC Irvine Law Review 3* (May 2013):184. Also see, Laura Gómez, A Tale of Two Genres: On the Real and Ideal Links Between Law and Society and Critical Race Theory, in *The Blackwell Companion to Law and Society* (Austin Sarat ed., 2008); Laura Gómez, "Looking for Race in All the Wrong Places," *Law & Soc'y Rev 46,.*(2012); Laura Gómez, "Understanding Law and Race as Mutually Constitutive: An Innovation to Explore an Emerging Field," *Ann. Rev. Law & Soc. Sci.* 6, (2010).

[131] Osajie K. Obasogie, "Forward," 185.

[132] Norman Fairclough, Critical Language Awareness (London: Longman, 1992).

[133] Teun A. Van Dijk, T. A., *News as discourse* (Hillside: Erlbaum, 1988).

reproduce ideology. Thus, critical discourse analysis seeks to expose "ideological effects and hegemonic processes in which discourse is a feature."[134] Moreover, this methodological approach links micro-level discourses, such as verbal interactions, to macro-level discourses, such as those produced at the institutional level, to expose the underlying power structure in society.[135]

As applied to this dissertation, a critical discourse analysis seeks to understand how race emerges in discursive practices of the law, including law making, legal advocacy, and law enforcement; and to trace how universal principles, such as human rights, maintain and legitimize racial hierarchies. Further, by focusing on micro-level discourses including lawmakers framing of the TVPA, I show how the reproduction of racial logics through these actions reflect the racial logic of the law.[136]

Grounded Theory

Grounded theory can be understood as a "general methodology for developing theory that is grounded in data systematically gathered and analyzed."[137] Theory is

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[134] Jan Blommaert, and Chris Bulcaen, "Critical Discourse Analysis," *Annual Review Anthropology 29,* (2000): 449.

[135] Teun A. Van Dijk, "Critical Discourse Analysis," in *The Handbook of Discourse Analysis*, eds. Deborah Tannen, Heidi E. Hamilton, and Deborah Schiffrin (John Wiley & Sons, 2015):468.

[136] I use the term "action" to signify the social acts of individual actors (such as lawyers, and law makers) as constituent to "group actions and social processes such as legislation, news making, or the reproduction of racism." Teun A. Van Dijk, "Critical Discourse Analysis," 486.

developed throughout the research process. In this way grounded theory views "generating theory and doing social research [as] two parts of the same process."[138] In grounded theory methodology, the researcher derives her analytical categories from the data collected rather than applying preconceived hypotheses. In this way, the categories "reflect the interaction between the observer and observed."[139] Further, the observer's "disciplinary assumptions, theoretical proclivities and research interests" are reflected in the data collected and are used as a point of departure for developing their analysis.[140] Ultimately, through the reflexive process between data collection, coding, and memo writing, grounded theory generates theories that explain the sociocultural phenomenon in question. As applied in this dissertation, grounded theory methods allow for the exploration of how racialized discourses factor in the development and application of the TVPA.

A note on Autoethnography

Related to grounded theory, this dissertation is informed by my work as an immigration lawyer and as a student of ethnic studies. My legal work inspired this project

[137] Anselm Strauss and Juliet Corbin, "Grounded Theory Methodology: An Overview," in *Handbook of Qualitative Research*, eds. Norman K. Denzin and Yvonna S. Lincoln (Thousand Oaks: Sage Publications, 1994), 273.

[138] Anselm Strauss and Juliet Corbin, Grounded Theory Methodology, 273.

[139] Kathy Charmaz, "Grounded Theory" in *Rethinking Methods in Psychology,* eds. Smith, Harre, Langenhove (London: Sage Publications, 1995), 32.

[140] Charmaz, "Grounded Theory," 32. Note that Charmaz' interpretation of grounded theory can be understood as constructivist, as opposed to the original methodological approach developed by Glaser and Straus.

and provided a space for me to reflect on my experiences. Therefore, while I do not employ autoethnography in the traditional sense, my relationship to the subject matter in question invokes methodological practices used by auto-ethnographers. Autoethnocgraphy is an approach to research that analyzes personal experience "in order to understand cultural experience."[141] Similar to grounded theory, this approach "acknowledges and accommodates subjectivity, emotionality, and the researcher's influence on research, rather than hiding from these matters or assuming they don't exist." [142] As a method, autoethnographers retrospectively write about their experiences of "being part of a culture and /or by possessing a particular cultural identity."[143] These experiences are then analyzed using a variety of approaches. Focusing on a layered-account approach to autoethnography, personal experiences are analyzed alongside data and relevant literature.

While this approach is similar to grounded theory in that both analysis and data collection are conducted simultaneously, it differs in that it includes vignettes, introspection, and reflexivity in research product. As applied to this dissertation, my work representing unaccompanied children in pursuing immigration relief gave me a particular identity within the legal culture- that of an attorney. This identity afforded me a unique experience providing insight into this dissertation and guiding my data collection. At the

[141] Carolyn Ellis, Tony E. Adams, and Aruthur P. Bochner, "Autoethnography: An Overview," *Historical Social Research 36*, no. 4 (2011): 273.

[142] Carolyn Ellis et al., "Autoethnography: An Overview," 274.

[143] Carolyn Ellis et al., "Autoethnography: An Overview," 276.

same time, this position within the legal community dictates my ethical obligations as both an attorney and as a researcher. In acknowledging these ethical concerns, I have limited my personal experiences in order to protect the privacy and identity of past clients, organizations, and legal advocates that are found within this research project.

CONCEPTUALIZATION

This section provides an overview of key concepts used throughout this dissertation.

Racial Project

By racial project I rely on Omi and Winant's work on racial formation. Racial formation is the process of creating, inhabiting, transforming, and destroying, racial categories. Racial projects are those structural, institutional, and cultural sites that shape the racial formation in a specific historical context. Thus, a racial project "is simultaneously an interpretation, representation, or explanation of racial dynamics, and an effort to re-organize and redistribute resources along particular racial lines."[144] In other words, racial projects are how race becomes represented and institutionalized. Eduardo Bonilla-Silva extends the theory of racial formation and racial projects by situating it in the current era of color-blindness.[145] Contemporary racial projects refrain from overt racism and rather deploy cultural and individual choice arguments that mask underlying racisms. In the

[144] Omi and Winant, *Racial Formation in the United States: from the 1960s to the 1990s*, 2nd ed. (London: Routeledge, 1994), 56.

[145] Eduardo Bonilla-Silva, Racism without Racists: color-blind racism and the persistence of racial inequality in America, 5th ed. (London: Rowman & Littlefield, 2018).

context of this dissertation, I argue that the TVPA is a racial project. Through the creation, implementation, and reauthorization of the TVPA my project exposes the racial preferences that are embedded in the law. At a structural level these preferences determine who gets the material benefits provided for in the TVPA (immigration relief, social services, healthcare etc). At the level of ideology, the TVPA organizes current understandings of who is deserving of human right protection along particular racial lines. At each phase of the TVPA there are multiple racial projects taking place which are simultaneously competing and contrasting. For example, the law's failure to take into account domestic trafficking and domestic black victims, while preferencing immigrant trafficking victims organizes itself on anti-blackness, pitting African-American communities against immigrant communities, while at the same time working to racialize each community in specific ways.

Colorblind Racism

The United States has developed as a racial state with race determining ones political, economic, and social rights.[146] While overt racism, such as racial slavery and Jim Crow era policies are no longer legal, scholars suggest that the current era reflects a new iteration of racism. As discussed by Eduardo Bonilla-Silva, current racial inequalities found in the United States are a product of a new form of racism. Under this new racist

[146] Michael Omi, and Howard Winant, *Racial Formation in the United States*, 3rd ed. (New York: Routledge, 20015), 8.

regime, racism and discrimination takes on subtle forms, which can be understood as colorblind racism. Colorblind racism as articulated by Bonilla-Silva "composes an ideology whites use to explain, rationalize, and defend their racial interest".[147] This form of racism differs from direct racism such as Jim Crow racism in that rather than directly attributing race to inferiority, colorblind racism attributes the status of people of color to cultural deficiencies, and rationalizes it as a product of individual market choices. This dissertation uses the concept to explain how discussion regarding non-white trafficking victims and migrant children rely on "culturally deficient" arguments to explain and justify their denial of legal protections.

Racialization

Racialization refers to "the social process by which a racial group comes to exist and understand its position in the racial hierarchy as superior or inferior, and by which others in society come to understand that racial hierarchy as natural."[148] I use this term to look at how immigration and human rights law work together to create and reinforce the current racial hierarchy.

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[147] Eduardo Bonilla-Silva and David Dietrich, "The Sweet Enchantment of Color-Blind Racism in Obamerica," *ANNALS, AAPSS*, (Mar. 2011): 192.

[148] Laura Gomez, *Manifest Destinies: The Making of the Mexican American Race* (New York: New York University Press, 2007), 2.

White Supremacy

This dissertation understands white supremacy "as a *logic of social organization* that produces regimented, institutionalized, and militarized conception of "human" difference".[149] Reiland Rabaka argues that this organizing logic has created an "international global racist system" premised on white supremacy.[150] While racial project have evolved, the foundational logic of white superiority underpinning it remains intact, making the current era of post-racialism and multiculturalism an iteration of past racial systems.[151]

Additionally, this dissertation understands white supremacy through the construct of whiteness as property.[152] Formulated by Cheryl Harris, whiteness as property was developed as an analytical construct to expose how the law works in furtherance of white supremacy. Under this analytic, whiteness is understood as a property interest rooted in slavery, which has evolved from a legal status to social and self-identity that continues to underpin racially-neutral laws. Stemming from slavery, where enslaved blacks where

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[149] Dylan Rodgriguez, *Forced Passages: Imprisoned Radical Intellectuals and the U.S. Prison Regime* (Minneapolis: University of Minnesota Press, 2006), 11.

[150] Reiland Rabaka. "The Souls of White Folk: W.E.B. Du Bois's Critique of White Supremacy and Contributions to Critical White studies." *Journal of African American Studies, no. 11 (2007).*

[151] Note that Roediger's theory of whiteness as an ideology underpins both Rodriguez and Rabakas conceptualizations of white supremacy David Roediger. *Towards the Abolition of Whiteness* (New York: Verso, 1994).

[152] Cheryl I. Harris, "Whiteness as Property," *Harvard Law Review 106*, no. 8 (1993).

legally constructed as property, whiteness became constructed as a privilege which protected from slavery and promoted white supremacy over Blacks. Harris contends that the privilege of whiteness evolved into an expectation and thus can be understood as a property interest in whiteness, protected by the law. Indeed, "when the law recognizes, either implicitly or explicitly, the settled expectations of whites built on the privileges and benefits produced by white supremacy, it acknowledges and reinforces a property interest in whiteness that reproduces Black subordination."[153] Further, Harris proposes whiteness meets the functional criteria of property including the right of disposition; the right to use and enjoyment; reputation and status property; and the right to exclude.[154] Under the era of colorblindness the property interest in whiteness is maintained by asserting that race does not matter, and by denying the historical context and legacies of white domination.[155] In the context of my dissertation, whiteness as property provides an analytic to explore how human rights laws, such as the TVPA, are premised on invested interests in maintaining white supremacy.

CHAPTER SUMMARIES

The first chapter examines the legislative history of the TVPA. Through a close reading of congressional hearings and debates, I analyze the discourse around the trafficking bill

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[153] Cheryl I. Harris, "Whiteness as Property," 1731.

[154] Cheryl I. Harris, "Whiteness as Property," 1731-1737.

[155] Cheryl I. Harris, "Whiteness as Property," 1768.

to show how lawmakers framed their arguments to pass what would become the TVPA in the context of anti-immigrant sentiment. Analysis reveals that lawmakers relied on the ideal trafficking victim—European sex trafficked women—to position the law as a human rights law. At the same time, it used non-white trafficking victims to advance the punishment prong of the Act. I argue that lawmakers used racial difference to position the Act as a human rights-based bill rather than immigration bill, which in turn works to uphold the racial regime of immigration law.

The second chapter explores the legal developments of the TVPA as they relate to unaccompanied children (UC). The 2008 reauthorization of the TVPA broadened protections for UC based on the notion that they are victims of trafficking. This discursive framing of children as victims of trafficking was challenged in 2014 with the migration 'crisis' of Central American UC. Rather than being viewed as potential victims deserving of protection, these children were met with intense xenophobia and calls to deny their rights. To explore these contradictions, I juxtapose UC presence to the Central American refugee crisis of the 1980s. By doing so I trace the legal history of UC in immigration law. Like migrants fleeing the civil wars of Central America, legal protections for unaccompanied children were a result of claims to human and civil rights. While claims to human rights in advancing protections were a result of tireless advocacy on part of immigrant and human rights groups it has since been taken up by the law makers, which I argue has been used to advance anti-immigrant policies. Such is the case of unaccompanied children in the TVPRA. Thus, this chapter argues what started out as a human rights

approach towards unaccompanied children was taken up by the State to advance restrictive immigration policies which explains unaccompanied children's inability to secure protection despite of laws. It further reflects the impermanence of their human rights.

The third chapter continues its examination of the TVPA by examining one of the substantive protections afforded to migrant children under it-Special Immigrant Juvenile visa ("SIJS"). This humanitarian provision confers immigration relief to migrant children who are unable to reunify with one or both parents due to abuse, neglect, or abandonment. Through analyzing case studies on UC who have been granted SIJS, I argue that the legal requirement to obtain this relief relies on a heteronormative nuclear family model that works to criminalize migration and racialize migrants, in this case Central American migrants. These cases reveal how SIJS advances the heteropatriarchal idea of the nuclear family to justify Central American countries underdevelopment, as it abstracts the United States' complicity in the 1980s civil wars, structural adjustment policies, and the rise of gangs in Central America- all of which create the conditions for migration and necessitates non-nuclear family relations to survive. At the same time by determining Central American families as lesser-than the U.S. ideal of the family, SIJS ultimately works to criminalize and racialize immigrant families domestically. Thus, this chapter reveals the racial project of the TVPA and its influence domestically and abroad.

The final chapter departs from analyzing the implications of human right in immigration to assessing enforcement of the TVPA in criminal law. The purpose is to show

how multiple racial project are simultaneously deployed through the law. Specifically, this chapter focuses on domestic trafficking of U.S. citizen by U.S. citizens. Assessing the TVPA through a Critical Race Theory framework, I argue that in its current form the TVPA reflects colorblind racism in its domestic focus. Data on federal prosecution of human traffickers reveals disproportionate charges, and prosecutions against Black men. Additionally, when assessing the protections of domestic victims, Black women may face the most challenges being identified as victims of trafficking. These outcomes are explained by situating the TVPA in the historical context of slavery, Reconstruction, and anti-black racism in the United States.

CHAPTER ONE

Legislative History of the Trafficking Victims Protection Act

The Trafficking Victims Protection Act (TVPA or Act) was the first major anti-trafficking legislation implemented in the United States since the abolishment of slavery. The TVPA combats trafficking through a three-part strategy of prevention, protection, and prosecution. The Act prevents trafficking through awareness programs and monitoring, protects survivors through the creation of immigration relief, and facilitates the prosecution of traffickers. The TVPA was largely drafted and debated during the 106th Congress (1999-2000) and passed with broad bipartisan support on October 28, 2000.

At the same time the TVPA was being debated, so was immigration. In the House of Representatives, Congressman Lamar Smith—a longtime anti-immigrant politician from Texas and chair of the Subcommittee on Immigration and Claims—introduced a series of weekly oversight hearings that focused on the negative and destructive impact of immigration policies. These hearings included such topics as the "negative impact of immigration on native-born black and Hispanic low-wage workers", "alien smuggling", and "criminal aliens".[1] Rep. Smith used these hearings as a platform to call for restrictive

[1] See, *Hearing on the Impact of Immigration on Recent Immigrants and Black and Hispanic Citizens*, Hearing before the Subcommittee on Immigration and Claims, 106th Cong. 1st sess., March 11, 1999.; *Immigration and Naturalization Service decision impacting the agency's ability to control criminal and illegal aliens*, Hearing before the Subcommittee on Immigration and Claims, 106th Cong. 1st sess. February 25, 1999.; *Illegal Immigration Issues*, Hearing before the Subcommittee on Immigration and Claims, 106th Cong. 1st sess., June 10, 1999.

immigration policies. Yet even in this hostile immigration environment, lawmakers were able to create an entirely new immigration benefit for trafficking survivors. In this chapter, I examine the ideological work that took place for the TVPA to come to fruition in this context. I argue that both political parties ideologically converged around notions of white supremacy and racial logics, allowing for the TVPA to be enacted.

This chapter analyzes the legislative history of the TVPA through a critical race theory (CRT) lens, paying specific attention to lawmakers' framing of trafficking and their reasoning for the anti-trafficking bill. In doing so, I show how the proposed bill was framed as a human rights bill rather than an immigration bill. By making this differentiation, lawmakers from both political parties relied on racial logics, which worked to advance anti-immigrant policies. Ultimately, the TVPA's reliance on racial logics contributes to the racialization of immigrants and reflects a white supremacist interest in the TVPA and in human rights laws more generally.

I begin this chapter by situating the legislative history of the TVPA in the contemporary discourse on trafficking. I focus primarily on feminist discourse given its major influence in domestic and international anti-trafficking legislation. What becomes apparent in the discourse is the simultaneous absence of engaging with race, while invoking racialized tropes to conceptualize trafficking and position it as a human rights violation. By framing trafficking in terms of the sexual exploitation of Third World women, the feminist discourse around trafficking is premised on racial difference.

The second section examines the ways in which feminists, along with other human rights organizations and evangelical Christians, used feminist discourse to effectively

lobby lawmakers on the issue of trafficking during the 106th Congress. The third section examines how the discourse of trafficking allowed for both parties to converge ideologically. Through a close-reading of the legislative history of the bills that would result in the TVPA, it becomes apparent that lawmakers relied on the ideal trafficking victim–European sex trafficking victims–to position the law as a human rights law. At the same time, they used non-white trafficking victims to advance the punishment prong of the Act. I argue that both Republican and Democratic lawmakers used racial difference to position the Act as a human rights-based bill rather than an immigration bill, which, in turn, works to uphold the immigration racial regime. Furthermore, I apply the CRT framework of whiteness as property to demonstrate how, in addition to reifying racial hierarchies, the TVPA represents a white supremacist interest in human rights law.

CONTEMPORARY TRAFFICKING DISCOURSE

Human trafficking as a discourse is closely tied to the international movement against trafficking, led primarily by feminists. Therefore, this section focuses on how feminist organizations influenced the development of trafficking legislation at the international and domestic levels. By situating the TVPA in the discourse around trafficking, this section illuminates the ideological and political work that allowed for the TVPA to be enacted during a time of increasing anti-immigrant sentiment.

Beginning in the late 19th and early 20th centuries, human trafficking was largely framed around the panic of "white slavery.' Emerging as a racist response to increased immigration and fear of female sexuality, human trafficking became a discursive tool to legitimize laws

that limited sexuality, particularly interracial relationships, and migration.[2] This panic resulted in the International Agreement for the Suppression of the "White Slave Traffic"[3] at the international level, and the White Slave Traffic Act (also known as the Mann Act) domestically.[4] By the mid-20th century, the rise of the United Nations (U.N.), international human rights, and the United States civil rights movement ushered in an new era in trafficking discourse, in which explicitly racist discourses were replaced by human rights and women's rights rhetoric advanced by feminists.

The contemporary discourse on trafficking has largely been led by feminists who emphasize the sex trafficking of women. An outgrowth of the ideological debate around prostitution and pornography, feminists were divided into abolitionist and liberal feminists. Abolitionist feminists, a form of radical feminists, view all prostitution as coercive and, thus, a type of sexual slavery.[5] For abolitionist feminists, prostitution was equated with sex trafficking. Liberal feminists, or non-abolitionist feminists, on the other hand, differentiated between voluntary prostitution and forced prostitution, which framed their

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[2]See for example, Kerry Abrams, "Polygamy, Prostitution, and the Federalization of Immigration Law," *Columbia Law Review 105*, no. 3 (Apr. 2005); Jo Doezma, "Loose Women or Lost Women? The Re-Emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women," *Gender Issues* 23 (2000):26.

[3] 18 May 1904, 35 Stat. 1979, 1 L.N.T.S. 83, entered into force 18 July 1905.

[4] The White-Slave Traffic Act, 18 US Code (1910) §§ 2421-2424.

[5] Radical feminism is a school of thought within feminism which understands patriarchy and specifically sexual domination over women as the foundational division in society. Focusing on prostitution, abolitionist feminists believe all sex-work is coercive and oppressive over women, and thus want to bring an end to this form of domination. Rosalind Dixon calls this form of feminism dominance feminism, which regards female identity a product of sexual subordination and patriarchy. In this system of subordination, men objectify women through rape, prostitution, harassment, and pornography in order to perpetuate systems of domination. Rosalind Dixon, Feminist Disagreement (Comparatively) Recast," *Harvard Journal of Law and Gender* 31 (2008). *See*, Catherine MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989).

position on trafficking.[6] These competing ideological camps differed in their conceptualizing of trafficking and the proposed solutions for addressing it. However, their use of race in advancing these positions were similar.[7]

Though well intentioned, feminists in both ideological camps relied on racialized sexualities to advance their formulation of trafficking and, in the process, created an understanding of trafficking and human rights based on racial difference.[8] Abolitionist feminists and corresponding non-governmental organizations (NGOs) have, for example, positioned Third World women at the forefront of anti-trafficking campaigns, characterizing them as helpless and in need of rescue. This discursive use of Third World women in articulating the case for anti-trafficking legislation is a legacy of imperialism and colonialism.[9]

The discourse on trafficking has been critiqued for invoking racialized and gendered colonial tropes, masking global inequalities, and reifying global division amongst the Global South and North.[10] For example, the discourse on trafficking advanced by abolitionist feminists such as Kathleen Barry, a founder of the Coalition Against

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[6] Janie Chuang, "Rescuing Trafficking for Ideological Capture: Prostitution Reform & Anti-Trafficking Law & Policy," *University of Pennsylvania Law* Review 158 (2010): 1670.

[7] Although liberal feminists are culpable to a lesser degree. See, Jo Doezema, "Ouch! Western Feminists 'Wounded Attachment' to the 'Third World Prostitute'," *Feminist Review* 67 (2001): 18.

[8] See generally, Julietta Hua, *Trafficking Women's Human Rights* (Minneapolis: University of Minnesota Press, 2011).

[9] Doezema, "Ouch! Western Feminists," 17.

[10] Doezema, "Ouch! Western feminists;" Kamala Kempadoo, "Women of color and the global sex trade: transnational feminist perspectives," *Meridians: Feminism, Race, Transnationalism* 1, no. 2 (2001).

Trafficking in Women (CATW), has been critiqued for portraying women from the Global South as being the most vulnerable to trafficking due to their low economic and feminist development.[11] By focusing on the lack of 'development' of Third World women due to perceived cultural and/or religious deficiencies rather than examining the structural inequalities and displacement produced by neoliberalism, the discourse on trafficking works to "reposition non-Whites in particular, in subordinate positions within the nation-states in the global North and within global capitalism."[12] In the context of the United States, the discursive reliance on sex trafficking by feminists to advance human rights contributes to the racial and gendered understandings of national belonging.[13] While the discourse around sex trafficking in the U.S. and globally focuses on Third World women, it has largely refrained from invoking explicitly racist arguments and, instead, uses culture, religion, and other socio-economic markers (e.g., poverty, lack of education, etc.) as an alternative. As we will see in the following sections, this discourse effectively influenced lawmakers in positioning the TVPA as a human right rather than immigration bill.

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[11] Barry states that such a lower stage "prevails in preindustrial and feudal societies that are primarily agricultural and where women are excluded from the public sphere" and where "Third World women" are the "exclusive property of men." Nandita Sharma, "Anti-Trafficking Rhetoric and the Making of a Global Apartheid," *NWSA Journal 17*, no. 3 (2005): 101.

[12] Sharma, "Anti-Trafficking Rhetoric," 105.

[13] For instance, Julietta Hua's research reveals how trafficking discourses and images frame non-white Asian and Latino women as victims, which in turn reflects neocolonial configurations of power, and domestic racial formations. Julietta Hua, *Trafficking Women's Human Rights*, 22.

LOBBYING FOR ANTI-TRAFFICKING LEGISLATION

At the international level, feminists lobbied the U.N. ad-hoc committee charged with developing an international legal regime for tackling transnational crime.[14] The result of this ad-hoc committee was the drafting of the Convention Against Transnational Organized Crime, and supplemental protocols: Smuggling of Migrants, Trafficking in Persons, Especially Women and Children, and Trafficking in Firearms.[15] The discourse on trafficking led by feminist NGOs played a major role in developing both the Trafficking Protocol and the TVPA.[16]

Abolitionist feminist NGOs, including the Coalition Against Trafficking in Women, the European Women's Lobby (EWL), and the International Abolitionist Federation (IAF), lobbied to include prostitution within the definition of trafficking at the international level.[17] Anti-abolitionist feminist NGOs, alongside human rights groups and sex workers'

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[14] Transnational Organized Crime, G.A. Res. 53/111, U.N. GAOR, 53rd Sess., 85th plen. Mtg., U.N. Doc. A/RES/53/111 (1998).

[15] UN General Assembly, United Nations Convention against Transnational Organized Crime : resolution / adopted by the General Assembly, 8 January 2001, A/RES/55/25, available at: http://www.refworld.org/docid/3b00f55b0.html [accessed 15 June 2018]; UN General Assembly, Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, available at: http://www.refworld.org/docid/479dee062.html [accessed 15 June 2018]; UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, available at: http://www.refworld.org/docid/4720706c0.html [accessed 15 June 2018]; UN General Assembly, Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime, 31 May 2001, A/RES/55/255, available at: http://www.refworld.org/docid/3dec85104.html [accessed 15 June 2018].

[16] See, Kathy Miriam, "Stopping the Traffic in Women: Power, Agency and Abolition in Feminist Debates over Sex-Trafficking," *Journal of Social Philosophy 36*, no. 1 (2005).

[17] Moushoula Capoous Desyllas, "A Critique of the Global Trafficking Discourse and U.S. Policy," *Journal of Sociology & Social Welfare XXXIV*, no. 4 (2007): 62.

rights activists, including the Network for Sex Work Project and the Global Alliance Against Traffic in Women (GATTW), lobbied in favor of a broad definition of trafficking that would include men, women, and children, as well as various types of industries, such as domestic work and other non-sexual labor.[18]

The Trafficking Protocol reflects both feminist ideologies. The definition of trafficking in the Trafficking Protocol excludes prostitution, while including other types of labor—largely a result of anti-abolitionist and pro-sex feminists lobbying. However, the approach to combating trafficking in the Protocol emphasizes policing and criminalization, which reflects abolitionist feminist concern with policing rather than decriminalization of prostitution.[19]

At the national level, abolitionist feminists, human rights activists, religious leaders, and neoconservatives informed trafficking policy and primed the 106th Congress for quick and largely uncontested enactment of the TVPA. Like the international lobbying of the Trafficking Protocol, feminists were divided over the framing of trafficking. However, unlike the international stage, evangelical Christians were central to making human trafficking a regulatable policy concern. Led by Michael Horowitz, a neoconservative at the Hudson Institute think tank, a coalition of evangelicals lobbied and helped direct the framing of the TVPA.[20]

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[18] Capoous Desyllas, "A Critique of the Global Trafficking Discourse," 62.

[19] Catherine MacKinnon is among the feminists advocating for international policing of sexual violence. See, Catherine MacKinnon, "Women's September 11th: Rethinking the International Law of Conflict", *Harvard International Law Journal* 47 (2006).

Jennifer Block notes that evangelicals including Charles Colson and Richard Land of the Southern Baptist Convention, alongside abolitionist feminists, "won a sympathetic ear" in Republican Representative Chris Smith of New Jersey.[21] Reflecting the anti-prostitution views of these groups, Rep. Smith originally drafted a bill that focused entirely on the sexual exploitation of women and girls.[22] Further, Republican Senator Sam Brownback's previous work with human rights and religious activists to pass the International Religious Freedom Act also positioned him to work on the trafficking issue.[23] As Barbara Stolz' research indicates, Senator Brownback worked closely with feminists and religious organizations, including "Gary Haugen of the International Justice Mission and Dr. Laura Lederer of the Protection Project, Chuck Colson, former Education Secretary and Drug Czar William Bennett, Michael Horowitz of the Hudson Institute, Gloria Steinem, the National Association of Evangelicals, the Southern Baptists Convention, and Jessica Neuwirth (Equality Now)."[24] Lastly, Democratic Senator Paul Wellstone of Minnesota, the

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[20] Jennifer Block, "Sex Trafficking; Why the Faith Trade is Interested in the Sex Trade," *Conscience vol. XXV*, no. 2 (2004).

[21] Jennifer Block, "Sex Trafficking; Why the Faith Trade is Interested in the Sex Trade," 36. Gretchen Soderland, states that the TVPA , "was the product of a tenuous alliance between evangelical Christian groups and contemporary secular feminist anti-trafficking crusaders. Gretchen Soderland , "Running from the Rescuers: New U.S. Crusades Against Sex Trafficking and the Rhetoric of Abolition", NWSA 17, no. 3 (2005). For a discussion on the historical and contemporary alliance between the Christian right and feminists see, Elizabeth Bernstein, "The Sexual Politics of the "New Abolitionism"," *Journal of Feminist Cultural Studies* 18 (2007).

[22] The Name of the bill was The Freedom of Sexual Trafficking Act (HR 1356).

[23] Barbara, Stolz, "Educating policymakers and setting the criminal justice policymaking agenda: Interest groups and the 'Victims of Trafficking and Violence Act of 2000'." *Criminal Justice 5*, no. 4 (2005): 415. Note that the International Religious Freedom Act promotes religious freedom as a foreign policy goal and was the first foray into foreign policy by evangelicals.

[24] Stolz, "Educating Policymakers," 415.

other key drafter of the TVPA, had previously introduced a resolution against trafficking, and worked closely with the Global Survival Network, an organization notable for its 1997 documentary on sex trafficking of Russian women.[25]

Overall, the language of the TVPA was split among party lines reflecting the feminist ideological divide. Democrats favored a bill that covered all types of trafficking, including labor, while Republicans favored a bill that focused only on sex trafficking.[26] Republicans' anti-prostitution stance reflects the alliance between abolitionist feminists and evangelicals, and the moral impetus to end all forms of prostitution through the construction of trafficking.[27] While both political parties were divided regarding the scope of the bill, they nonetheless reproduced the feminist discourse on trafficking. In this way, the lobbying efforts by these organizations were effective in engaging both parties and inserting the feminist discourse on trafficking into the legislative process.

THE LEGISLATIVE HISTORY OF THE TVPA

Methodological Note

I analyzed the legislative history of what would become the TVPA. The TVPA was based on three bills introduced during the 106th Congress: HR 3244 and the Senate

[25] The name of the documentary is, *Bought & Sold: An Investigative Documentary About the International Trade in Women*. Global Survival Network (1997).

[26] For example, the two main drafters of the TVPA were Democratic Senator Paul Wellstone, who saw trafficking as encompassing all coercive labor, and Republican Congressman Chris Smith, who focused only on sex trafficking. See, Mary Anne McReynolds, "The Trafficking Victims Protection Act: has the Legislation Fallen Short of its Goals?," *Policy Perspectives* 15 (2008):37.

[27] Alicia W. Peters, ""Things that Involve Sex are Just Different": Us Anti-Trafficking Law and Policy on the Books, in Their Minds, and in Action," *Anthropology Quarterly* 86, (2013): 231, noting that the anti-prostitution camp believed that "including other forms of trafficking [within the statute] was tantamount to promoting prostitution.

companion bills S 2414 and S 2249. While ultimately HR 3244 was signed into law, debates over the three bills taken as a whole provide insight into the congressional intent driving the TVPA. Legislative histories are key to understanding the congressional intent behind a bill and include floor debates, hearings, conference reports, and committee reports. Floor debates, in particular, are an underutilized source of legislative history that gives insight into Congress' concerns about legislation and representatives' framing of and arguments for or against a bill. Moreover, floor debates provide a rich dataset as they are near verbatim records of representatives' remarks.

Rather than seeking to clarify statutory ambiguity, for which legislative histories are traditionally used, I analyze the legislative history within the racialized anti-immigrant context of the time. I do this in order to explore how lawmakers use racialized logics in ostensibly human rights-based legislation. Through a close reading of the legislative history, themes emerged which were categorized and used to inform further coding. Through this process the following overarching themes emerged as points of emphasis during debates on the TVPA: human rights versus immigration law; the TVPA as human rights for European women and children; and racialized others as recipients of the punishment prong of the TVPA.

TVPA: A Human Rights rather than Immigration Bill

Two Senate bills were introduced as companions to the House bill, HR 3244, which would become the TVPA. When introducing S. 2414, Democratic Senator Wellstone framed the bill as an "important human rights piece of legislation"[28] stating:

> I am here today to introduce legislation to help end the horrific trafficking in persons, particularly women and children for the purposes of sexual exploitation and forced labor. This egregious human rights violation-and we must acknowledge trafficking in persons as the gross human rights abuse that it is-is a worldwide problem that must be confronted in domestic legislation as we continue to fight it on the international front.[29]

The focus of the bill is squarely human rights and is defined through the sexual exploitation of women and children. As discussed in the previous section, Senator Wellstone sought an expanded definition of trafficking, going beyond sex trafficking to include other types of labor. Nonetheless, he emphasizes the trafficking of women and children. This framing of human rights in terms of women and children continues with remarks by Republican Senator Brownback of Kansas when he introduced his own trafficking bill. On April 13, 2000, Senator Brownback introduced his companion trafficking bill, S. 2449, framing human trafficking as "one of the most shocking and rampant human rights abuses worldwide" affecting women and children who are "forced into the sex trade against their will."[30] The emphasis on women and children ultimately made it into the purposes and findings section of the published law:

> The purposes of this chapter are to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims.[31]

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[28] 146 Cong. Rec. S2617-01 (daily ed. Apr. 12, 2000) (statement of Rep. Wellstone), WL 373396, at *S2630 (Westlaw).

[29] 146 Cong. Rec. S2617-01 (daily ed. Apr. 12, 2000) (statement of Rep. Wellstone), WL 373396, at *S2630 (Westlaw).

[30] Statements by Sam Brownback 146 Cong. Rec. S2729-01 (daily ed. Apr. 13, 2000) (statement of Rep. Brownback), WL 38108, at *S 2768 (Westlaw).

[31] 22 U.S. Code § 7101 (a). Purposes and Findings.

Interestingly, social and economic rights, or denial of rights, are explicitly mentioned in the findings section as a few of the causes of trafficking. One of the findings in the law states: "Traffickers primarily target women and girls, who are disproportionately affected by poverty, the lack of access to education, chronic unemployment, discrimination, and the lack of economic opportunities in countries of origin."[32] The discussion of the economic and social context affecting human trafficking is qualified by framing it as a women's issue. Moreover, the causes of trafficking listed are the same that lead to migration, yet explicit mention of migration is absent from the analysis. The legislative history indicates this absence is deliberate.

The TVPA takes a three-prong approach to trafficking—namely, prevention, protection, and prosecution. The primary strategy for protecting survivors of human trafficking is through the creation of the T-visa. Focusing on the immigration benefit that is created through the proposed bill, there is a conscious attempt to distance the bill from immigration law. After HR 3244 was introduced, it was referred to the Committee of the Judiciary, which altered the bill with regards to the T-visa. The Committee report proposed capping the T-visa to 5,000 annually. The debate over the cap became a site of contention for those who viewed the bill as advancing human rights over immigration. Proponents of the cap, particularly Republican Rep. Smith of Texas, who was the contemporaneous chair of the Subcommittee on Immigration and Claims, argued it was necessary to safeguard against fraud stating:

[32] 22 U.S. Code § 7101 (b)(4).

> ...[W]e need to have that cap to avoid people being tempted to take advantage of the system and abuse the privilege…whenever a new form of immigration relief is created, many aliens apply for that relief. Too often, those applications do not contain bona fide claims of relief…this cap will prevent large numbers of aliens from falsely claiming to be trafficking victims.[33]

Rep. Smith argues that immigrants generally seek ways to obtain status fraudulently. By framing immigrants as inherently fraudulent, he criminalizes them and contrasts them from genuine trafficking victims. By criminalizing immigrants, he argues victims of human trafficking must be protected from immigrants who will surely try to take their visas. In this way, Rep. Smith uses the call to protect trafficking victims to criminalize immigrants and narrow the immigration benefits of the human rights law.

The main counter to Rep. Smith's cap is that trafficking is a human rights issue and any cap would be detrimental to women and children who are the primary victims of trafficking. In arguing against the cap, Democratic Rep. Melvin Watt of North Carolina framed the bill in the context of human rights violations. He states, "Of all human rights violations currently occurring in our world, the trafficking of human beings, predominately women and children, has to be one of the most horrific practices of our time." In arguing that a visa cap is unnecessary, he compares the trafficking bill to refugee and asylum law: "We have no arbitrary limit on the number of asylees who can enter this country, and in my judgment, it is beneath our dignity as a nation to use an arbitrary cap to shut our doors

[33] 146 Cong. Rec. H7628-01 (daily ed. Sept. 14, 2000) (statement of Rep. Smith), 146 cong. Rec H7628 at *H7629 (Westlaw).

to victims of slavery and trafficking."[34] Similarly, Democratic Rep. Zoe Lofgren of California compared trafficking to the refugees and asylum seekers stating:

> …Congress has granted similar discretion to increase refugee caps and there are no caps for asylum candidates. So it is my view that we have room in this vast, wonderful, prosperous country for victims of sex trafficking and slavery… We have already in this country women who have been brought here and really held in virtual slavery, sometimes as victims of sexual oppression. When those women break free we want to make sure that they found refuge in this country of freedom.[35]

Representatives Watt and Lofgren rely on framing human trafficking protections in light of the refugee and asylum laws at the time. By doing so, they are implicating immigration, but also place the bill squarely in the framework of international human rights law given that both human trafficking and refugee and asylum law are rooted in it. They further qualify it by talking exclusively of women and children who are the victims of human rights violations. By situating the immigration benefit produced by the T-visa in light of human rights violations, these lawmakers not only distance the bill from immigration law, but also reinforce a gendered notion of human rights.

Notably, both proponents and opponents of the immigration cap rely on human rights arguments. While human rights are the reason for removing the cap to provide more victims with benefits, it is also used to argue for the protection of human rights for victims, through guarding the immigration benefit from "illegal" immigrants. Implicit in these arguments regarding human rights is the intended beneficiary of said rights. From the

[34] 146 Cong. Rec. H7628-01 (daily ed. Sept. 14, 2000) (statement of Rep. Watt), 146 cong. Rec H7628 at *H7628 (Westlaw).

[35] 146 Cong. Rec. H7628-01 (daily ed. Sept. 14, 2000) (statement of Rep. Lofgren), 146 cong. Rec H7628 at *H7629 (Westlaw).

legislative history, it is made explicit that women and children are the intended targets of the TVPA, revealing a gender dimension to the law; however, as discussed below, there is also a racial dimension implicit in the law.

TVPA as a Bill to Protect European Women and Children

The drafting of the TVPA began with the Helsinki Commission hearings on sex trafficking in 1999. In the House of Representatives, Rep. Christopher Smith, the sponsor of HR 3244, relies on the testimony at the Helsinki Commission hearings on sex trafficking when debating the need for the bill. Rep. Smith shares with the House a story provided by Dr. Lederer (known abolitionist feminist and then Director of the Protection Project of the Women and Public Policy Program at Harvard Kennedy School of Government) during the commissions hearings. The story is "an amalgamation of several true stories of women and girls who have been trafficked in Eastern Europe in recent years."[36] The story depicts how young European women fall prey to human traffickers.[37] As Rep. Smith states, the story takes place in "you can fill in the name of the country here, the Ukraine, Russia,

[36] 146 Cong. Rec. H2675-01 (daily ed. May 9, 2000) (statement of Rep. Smith), WL561118 at *H2683 (Westlaw).

[37] The story is of a 16 year old girl named Lydia, who was hanging out outside one day in "you can fill in the name of the country here, the Ukraine, Russia, Romania, Lithuania, the Czech Republic." She is approached by a woman who befriends her and tells her she can get her a modeling job. The lady takes her to dinner and invites her home for a drink and proceeds to drug her. Lydia awakes in foreign country, "you can fill in another set of countries, be it Germany, the Netherlands, Italy, some Middle Eastern countries, even as far as Japan, Canada, and of course, the United States." She is then told by a strange man that she is his property, that she owes the agency money and that she had to work off her debt in a brothel. She was "held in virtual confinement and forced to prostitute herself." When local police raided the brother, she was charged as an "illegal alien," jailed, and awaited deportation. 146 Cong. Rec. H2675-01 (daily ed. May 9, 2000) (statement of Rep. Smith), WL561118 at *H2683 (Westlaw).

Romania, Lithuania, the Czech Republic."[38] He goes on to recount a visit he took with his wife and other members of Congress to St. Petersburg, where he met with Russian women who shared their stories of sexual exploitation at the hands of human traffickers.[39] Echoing similar sentiments, Senator Wellstone recalls meeting "with women trafficked from the Ukraine to work in brothels in Western Europe and the United States" at the urging of his wife.[40] Both lawmakers make clear the TVPA is a result of the impact meeting with European sex trafficking victims made on them.

During floor debates considering a conference report,[41] Senator Brownback begins the debate with the story of Irina. As Senator Brownback explained "I think Irina's story tells in graphic detail why this [trafficking] is a problem and why the Senate needs to Act."[42] He proceeded to request that the full text of the article be included in the record of debate. Originally appearing in a New York Times article, the article follows the story of Irina, who was from a small village in Ukraine and was trafficked into Israel after

[38] 146 Cong. Rec. H2675-01 (daily ed. May 9, 2000) (statement of Rep. Smith), WL561118 at *H2683 (Westlaw).

[39] 146 Cong. Rec. H2675-01 (daily ed. May 9, 2000) (statement of Rep. Smith), WL561118 at *H2684 (Westlaw).

[40] 146 Cong. Rec. S10164-02 (daily ed. October 11, 2000) (statement of Rep. Wellstone), WL 1509753 at *S10167 (Westlaw).

[41] A conference report is the result of differences between the House and Senate versions of a bill. A bill is sent to conference in order to reconcile the differences between the chambers and arrive at compromise language. Then, both chambers must consider the conference report and pass it for the bill to continue for a bill to become law.

[42] 146 Cong. Rec. S10164-02, (daily ed. Oct. 11, 2000) (statement by Rep. Brownback) WL 1509753 at *S10164 (Westlaw).

answering a vague ad in a Ukrainian newspaper to become a topless dancer. The story acknowledges that sex trafficking is not new, and that:

> "Asians have been its basic commodity for decades. But economic hopelessness in the Slavic world has opened what experts call the most lucrative market of all to criminal gangs that have flourished since the fall of Communism: white women with little to sustain them but their dreams. Pimps, law enforcement officials and relief groups all agree that Ukrainian and Russian women are now the most valuable in the trade."[43]

The article goes on to discuss the features of trafficking in Russia and the Ukraine, while noting the Slavic physical traits of trafficking victims such as "long blond hair and deep green eyes" [44] and "enormous green eyes."[45] While the New York Times article was written by a journalist and not a lawmaker, the fact that Senator Brownback found the article so exemplary of the purpose of the bill that he formally incorporated its contents into the legislative history points to the centrality of the Eastern European trafficking victim. No other story is given as much attention or importance in the legislative process of the TVPA.

In addition to revealing lawmakers' desire to protect Eastern European women through the TVPA, the legislative history reveals how lawmakers understand the trafficking phenomenon of these women. Like the abolitionist feminist discourse that distances sex trafficking victims from any agency, lawmakers situate the trafficking of

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[43] 146 Cong. Rec. S10164-02, (daily ed. Oct. 11, 2000) (New York Time Article) WL 1509753 at *S10164 (Westlaw).

[44] The full quote is "Tamara, like all other such women interviewed for this article, asked that her full name not be published. She has classic Slavic features, with long blond hair and deep green eyes." 146 Cong. Rec. S10164-02, (daily ed. Oct. 11, 2000) (New York Times Article) WL 1509753 at *S10166 (Westlaw).

[45] The full quote is: "I don't think the man who ruined my life will even be fined," she said softly, slow tears filling her enormous green eyes" 146 Cong. Rec. S10164-02, (daily ed. Oct. 11, 2000) (New York Times Article) WL 1509753 at *S10164 (Westlaw).

European women squarely on geopolitical forces, criminal organizations, and poverty. For example, in his discussions of why trafficking of European women is occurring at the time, Senator Wellstone specifically cites the fall of the Soviet Union, which led to an outgrowth of crime. He points to "the ascendancy of the mob…that destroyed the lives of the youngest and most vulnerable in their home countries." The Senator further recounts how "Albanian women were kidnapped from Kosovo refugee camps and trafficked to work in brothels in Turkey and Europe," and how Russian and Latvian trafficking victims were told, "if they refused to work in sexually exploitive conditions, the Russian Mafia would kill their families."[46] Poverty was also referenced as another consequence of the fall of the Soviet Union and the rise of human trafficking. Democrat Rep. Sam Gejdenson states this clearly when commenting that "… the poverty that has enveloped many of those former Soviet countries, the poverty in countries around the world, that [*sic*] ought not be an excuse for allowing people's lives to be enslaved." [47]

These examples are illustrative of lawmakers' desire to protect Eastern European women through the TVPA, while at the same time creating the parameters for attaining protections under it. Not only does the law became associated with European women, but it also becomes linked to structural forces out of these women's control. The violation of European women becomes linked to geopolitics and resulting crime and poverty. This

[46] October 11, 2000 146 Cong. Rec. S10164-02 (daily ed. October 11, 2000) (statement of Rep. Wellstone), WL 1509753 , at *S10167-69.

[47] May 9, 2000 146 Cong. Rec. H2675-01 (daily ed. May 9, 2000) (statement of Rep. Gejdenson), WL 561118, at *H2684.

stands in contrast to the cultural and religious deficiencies that are used to frame the trafficking of Third World women.

The TVPA was largely propelled by the events following the fall of the Soviet Union. Trafficking has existed for centuries, and trafficking of Asian and African women was well known, but not until Eastern European women became the primary target of traffickers did human trafficking become an international phenomenon necessitating international and domestic solutions. Barbara Stolz' research on the policy behind the TVPA found the "recognition of the trafficking problem and desire to do something about it can be attributed to the restructuring of the perception of the problem…interviewees noted the correlation between the recognition of human trafficking as a problem and its association with women from the former Soviet Union-Caucasian women."[48] Stolz maintains that the "resemblance of women and girls trafficked to the wives and daughters of many policymakers may have been one factor in arousing attention to the trafficking issue." [49] Her research is supported by the legislative history of the TVPA. For one, both Rep. Smith and Senator Wellstone note that their trips to Eastern Europe and meeting European trafficking victims propelled them to action. Further, both lawmakers acknowledge the role their wives played in urging them to work on this issue. However, Stolz does not contribute race to the newfound attention towards trafficking; rather, she argues that changing perceptions of those trafficked, from criminal to victim, and distinguishing trafficking victims from smuggled undocumented immigrants was key in

[48] Stolz, "Educating policymakers," 422.

[49] Stolz, "Educating policymakers," 423.

convincing policymakers to take up the cause of trafficking. Stolz' argues that rather than race, differences between trafficking victim and "illegal immigrant" led to the creation of the TVPA. This argument ignores the centrality of race in immigration policy and the racialization of undocumented immigrants. By emphasizing the distinction between trafficking victims and undocumented immigrant, policymakers reinforce the racialization of immigrants. As we saw with the debates around the immigration benefit proposed in the bill, lawmakers attempted to shift the debate towards protecting the human rights of women and children. Because the women and children intended to be protected are European, the intent of the bill clearly relies on racial difference even when on the surface the debate is one of human rights versus immigration.

TVPA as a Bill to Punish Non-White Traffickers

Stories of Asian and Mexican trafficking victims in the United States come to the forefront when discussing the need for increased penalties for human traffickers. Senator Wellstone provides examples of Asian and Mexican nationals being trafficked into the United States in order to underscore the need to increase penalties against traffickers. In his words, "a review of the trafficking cases showed that the penalties were light and did not reflect the multitude of human rights abuses perpetrated against these women."[50] Senator Wellstone proceeded to give examples where penalties against traffickers were inadequate. Examples included a Thai sweatshop in El Monte, California;[51] sex trafficking

[50] 146 Cong. Rec. S10164-02, (daily ed. Oct. 11, 2000) (statement by Rep. Wellstone) WL 1509753 at *S10168 (Westlaw).

[51] "In a tragic case involving over 70 Thai laborers who had been held against their will, systematically abused, and made to work 20-hour shifts in a sweatshop, the seven defendants received sentences ranging from 4 to 7 years with one defendant receiving 7 months." 146 Cong. Rec. S10164-02,

of Thai women in New York; sex trafficking of Chinese women in Los Angeles;[52] deaf mute Mexican nationals trafficked in New York;[53] and *United States v. Hou,*[54] which involved the forced labor of several Mexican men.[55]

These examples show the range of trafficking situations and victims. However, the strategic use of non-white victims in the examples is problematic. Mexican and Asian trafficking victims were overwhelming used when discussing the need for stronger penalties against human traffickers. These examples ultimately fall into the trope of migrant criminality. While the traffickers' nationalities and ethnicities are not discussed it is implied they are non-citizens. This implication is supported by the prevalent understanding of trafficking. As Jennifer Chacón points out, "A significant number of

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(daily ed. Oct. 11, 2000) (statement by Rep. Wellstone) WL 1509753 at *S10168 (Westlaw).

[52] Stating "In a Los Angeles case, traffickers kidnapped a Chinese woman, raped her, forced her into prostitution, posted guards to control her movements, and burned her with cigarettes. Nevertheless, the lead defendants received 4 years and the other defendants received 2 and 3 years. That is what they received." 146 Cong. Rec. S10164-02, (daily ed. Oct. 11, 2000) (statement by Rep. Wellstone) WL 1509753 at *S10168 (Westlaw).

[53]"This is what we are dealing with right now. There was a case involving 70 deaf Mexicans that my colleagues may remember, who were held under lock and key, forced to peddle trinkets, who were beaten and in some cases tortured. The leader received 14 years and the other traffickers from 1 to 8 years." 146 Cong. Rec. S10164-02, (daily ed. Oct. 11, 2000) (statement by Rep. Wellstone) WL 1509753 at *S10181 (Westlaw).

[54] Although the Senator names this case I was unable to find the case to cross reference indicating a mistake in the case name.

[55] Focusing on *United States v. Hou*, several Mexican nationals who were illegally in the United States were forced to live and work on a chicken farm under the threats of deportation. The victims lived in a chicken shed near chickens and pesticides. Faulty wiring in the shed resulted in a fire killing one of the workers. Senator Wellstone uses this case to point to the fact that current involuntary servitude statutes failed to sufficiently punish the trafficker: "Because the labor of the workers was maintained through a scheme of nonviolent and psychological coercion the case did not fall under the involuntary servitude statues which would have resulted in life sentences given the death of one of the victims." He goes on to proclaim "That is why this legislation is so important. No longer in the United States of America are we going to turn our gaze away from this kind of exploitation, to this kind of murder of innocent people." 146 Cong. Rec. S10164-02, (daily ed. Oct. 11, 2000) (statement by Rep. Wellstone) WL 1509753 at *S10181 (Westlaw).

traffickers are noncitizens. That is inevitable given the international nature of the industry and the fact that many of the vulnerable populations subject to exploitation live in developing countries. Moreover, some traffickers operating in the United States are noncitizens, including co-ethnics who exploit individuals in their own communities who lack legal status."[56] Thus, by using examples of Asian and Mexican victims to promote the third prong of the TVPA—prosecution—lawmakers relied on established tropes of migrant and noncitizen criminality. Juxtaposed with how European women were discussed, the legislative history suggests that the purpose of the TVPA is to protect European women trafficking victims while punishing racialized groups, namely Asian and Mexican immigrants.

In perpetuating the criminality of foreigners, legislators provided examples of Mexican trafficking victims whose victimization came at the hands of smugglers. For example, both Republican Senator Tim Hutchinson and Republican Rep. Joseph Pitts tell stories of Mexican women who sought better lives in the United States just to be trafficked into sexual slavery by their smugglers.[57] Both lawmakers make clear these women were seeking "legitimate work,"[58] but through the course of their smuggling they were sexually enslaved. Senator Hutchinson notes that the smuggling debt resulted in the forced sexual

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[56] Jennifer, Chacón, "Tensions and Trade-offs: Protecting Trafficking Victims in the Era of Immigration Enforcement, " *University of Pennsylvania Law Review* (2010): 1629.

[57]146 Cong. Rec. H2675-01 (daily ed. May 9, 2000) (statement of Rep. Pitts), WL 561118, at *H2684 (Westlaw); 146 Cong. Rec. S10211-01 (daily ed. Oct. 11, 2000) (statement of Rep. Hutchinson), WL 1509760, at *S10217 (Westlaw).

[58] 146 Cong. Rec. S10211-01 (daily ed. Oct. 11, 2000) (statement of Rep. Hutchinson), WL 1509760, at *S10217 (Westlaw).

slavery of a victim, while Rep. Pitts recounts the familiar narrative of smugglers hiding migrants in "dirty trailers"[59] just to sexually exploit these migrant women. In these narratives, the sexual trafficking of Mexican women is linked to the criminal activities of human smugglers. While they do not offer information on these smugglers, they are presumed to be Mexican men.

In addition to emphasizing the criminality of Mexicans, lawmakers invoked narratives of cultural and religious backwardness to show how pervasive the trafficking of women and children is in the Global South. Senator Brownback discussed trafficking of South Asian women as a long-held practice in the eastern world. In his argument to pass the Conference Report in the Senate, he couched the bill in the tradition of British anti-slavery abolitionists stating:

> Amy Carmichael was a British missionary to India at the turn of the last century, in the early 1900's. Upon arrival, she was mortified to discover the routine practice of forced temple prostitution. This was and continues to be a practice wherein young girls, from age six onward, are dedicated to the local temple, and are then forced into prostitution against their will to generate income. Upon this morbid discovery, Amy Carmichael began to physically steal the girls away from this incredibly degrading form of slavery, hiding the girls to escape the inevitable backlash of violence. Eventually, the government outlawed this practice of forced temple prostitution, as a result of her efforts. However, it bears noting that this terrible practice continues today, in a lesser degree, in rural villages throughout South Asia, including India.[60]

By presenting the TVPA as a legacy of Britain's colonial endeavors in India, Senator

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[59] 146 Cong. Rec. H2675-01 (daily ed. May 9, 2000) (statement of Rep. Pitts), WL 561118, at *H2684 (Westlaw).

[60] 146 Cong. Rec. S10164-02, (daily ed. Oct. 11, 2000) (statement by Rep. Brownback) WL 1509753 at *S10167 (Westlaw).

Brownback invokes the orientalist discourse that legitimized British imperialism.[61] The practice of local temples enslaving young girls is noted to have existed during colonial times and claimed to continue presently. This statement points to the cultural and religious traditions of India, which were used to justify Britain's colonization of the nation. In the context of the TVPA, this narrative of cultural and religious backwardness is taken as a cause of the sex trafficking and sexual exploitation of Indian women and girls.

Statements such as these were not limited to Senator Brownback. Democratic Rep. Jan Schakowsky of Illinois, among the most progressive members of Congress, echoes this narrative when she recounts a trip she made to South Asia:

> "I saw a young girl named Nurjahan in Bangladesh. She was about 15 years old. All she knows for sure is that she thinks she is about 15 years old, but she knows for sure that at 8, she was bought by a brothel in Pakistan probably for between $200 and $1,500. She finally escaped from a life as a sex slave. I met her and eight other girls at the headquarters of an organization called Action Against Trafficking and Sexual Exploitation of Children in Dhaka, Bangladesh. They all looked like the children they were, except for the acid scars borne by a few of them. The invisible scars one can hardly bear to imagine. Many of these girls could not go home because even if their families would accept them, their communities would not."[62]

Like Senator Brownback, Rep. Schakowsky highlights the young age in which children are trafficked in South Asia and emphasizes how young the victims look. She also discusses how the families and communities of these victims are likely to reject them if they escape and return to their homes. By framing the survival of these victims in terms of the

[61] Orientalism, coined by Edward Said, is a concept to explain how stereotypes and exaggeration of difference by Western cultural and intellectual traditions was used to position the Middle East and Asia as inferior to the West justifying Western imperialist endeavors in those regions. See, Edward W. Said, *Orientalism* (New York: Random House, 1979).

[62] 146 Cong. Rec. H2675-01 (daily ed. May 9, 2000) (statement of Rep. Schakowsky), WL 561118, at *H2686 (Westlaw).

intolerances that disallow for their incorporation back into their communities, Rep. Schakowsky implicates these communities in the continued trafficking of young girls, pointing to their cultural, and arguably moral, underdevelopment.

Taken together, the use of Asian and Mexican trafficking examples in advancing stronger penalties, reveals colorblind arguments made by lawmakers in advancing the TVPA. Recall, colorblind racism relies heavily on the use of cultural deficiencies to advance and justify racial inequality.[63] While the European trafficking phenomenon is a result of international criminal organizations gaining strength after the fall of the Soviet Union and accompanying crime and poverty, trafficking in the Global South is depicted as culturally engrained, implying cultural deficiencies within these communities.

DISCUSSION

TVPA as a Human Rights Racial Project

Analyzing the legislative history, we find an emphasis on European women as victims and deserving of human rights protection. This stands in contrast to the stories of non-European trafficking victims who exemplify the need for stronger punishments under the TVPA. This framing of the TVPA by lawmakers suggests that the intended beneficiaries of the TVPA are European women. By framing the TVPA as a bill to protect European women, lawmakers were able to distance the bill from the discourse of immigration and place it within human rights. By doing so, it highlights the ambivalence of human rights in reifying and reinforcing racial logics in the United States. First, while lawmakers distance

[63] See, Eduardo Bonilla-Silva, *Racism without Racists: Color-blind Racism and the Persistence of Racial Inequality in the United States* (Lanham: Rowman and Littlefield, 2010).

the bill from immigration, the TVPA ultimately works to increase restrictive immigration measures and reinforce racial stereotypes of non-white immigrants as criminal. Second, by relying on the differences between genuine human trafficking victims (read as European women) and fraudulent non-white immigrants, lawmakers perpetuate racial hierarchies, thereby contributing to projects of racialization. This has implications for human rights legislation in the United States, as it demonstrates how human rights can be deployed in the maintenance of racial projects. In the case of the TVPA, the legislative history shows how a domestic human rights law can work to uphold the racial project of immigration.

TVPA and White Supremacy

In addition to racializing immigrants, the legislative history of the TVPA reflects the relationship between law and white supremacy. Lawmakers' intent on providing legal protections to white women is a legacy of formal protections afforded to whites against becoming enslaved. As Cheryl Harris contends in her seminal essay, *Whiteness as Property*,[64] the "presumption of freedom [arose] from color [white]" and "the black color of the race [raised] the presumption of slavery,"[65] The racial demarcation of slavery not only provided protections for whites against being enslaved, but also led the allocation of benefits related to personhood. These benefits included "all of those human rights, liberties, powers, and immunities that are important for human well-being, including: freedom of expression, freedom of conscience, freedom from bodily harm, and free and equal

[64] Cheryl Harris, "Whiteness as Property," *Harvard Law Review 106*, no. 8 (1993).

[65] Harris, "Whiteness as Property," 1720 quoting Thomas R. R. Cobb, *An Inquiry into the Law of the Negro Slavery in the United States* (1858), 66-67.

opportunities to use personal faculties."[66] The expectation of these protections and benefits became entrenched in legal doctrine evolving into a property interest in whiteness. Property interest is understood as those "expectations in tangible things that are valued and protected by the law." Thus, for Harris, the law helped to create and maintain a property interest in whiteness, which continues in the present era. While legally recognized racial subordination and white supremacy has been dismantled with the advent of civil rights, it continues through the implicit reinforcing of racial privilege. The TVPA provides a case and point for this proposition.

The purpose of the law is to combat human trafficking, specifically the sexual slavery of women. Lawmakers' emphasis on the white sex trafficking victim can be attributed to the fact that, historically, being white protected against becoming enslaved. The legal protection afforded to whites against slavery is the most basic expectation of racialized laws in the United States. This is because, as Harris' essay makes clear, racial demarcation for slavery is the starting point for legally recognized white supremacy. Thus, for lawmakers, the idea of white women becoming enslaved is an aberration of not only long-held views of slavery, but also a failure of the law in protecting the benefits of whiteness. The fact that lawmakers on both sides of the political spectrum were quick to denounce the sex trafficking of European women shows how the expectation of the law in maintaining the privileges and benefits of white supremacy goes beyond politics and is rooted in the institution of legality itself. Notwithstanding the fact that the bill comes across

[66] Harris, "Whiteness as Property," 1726 quoting Laura S. Underkuffler, "On Property: An Essay, *Yale Law Journal 100*, (1990): 128-129.

as trying to protect all victims, including those from the Global South, the bill's main objective is protecting white life. Rather than seeing the law as racially neutral, or racially inclusive, it can be seen as reinforcing the property interest in whiteness. In this way, the TVPA, framed as a human rights law, is advancing a white supremacist ideal of human rights.

Implications for Feminist Discourses

Abolitionist feminist discourse around trafficking made its way into the narrative created by lawmakers. Like feminists, lawmakers situated human trafficking within a larger understanding of human rights. However, by doing so, they relied on perpetuating racial stereotypes and based human rights on racial difference. Like feminists, by taking this approach to human trafficking they reduced human rights to racial difference. Julietta Hua's work on human trafficking provides insight into this point. Hua argues that by framing human trafficking through racialized sexualities, such as the sexual exploitation of Asian women, the feminist desire to promote human rights ultimately works to dehumanize women of color, making human rights protections unattainable for them. By framing the TVPA as a human rights bill focused on curbing sex trafficking, lawmakers relied on differentiating between white European women and Asian and Mexican women, reflecting a human right premised on racial difference. In this way, the effective lobbying by feminists—or, at minimum, the effective incorporation of the feminist discourse—contributed to lawmakers' use of racialized sexualities and helped develop the TVPA as a law premised on racial difference.

CONCLUSION

Human rights law in the United States has a contentious relationship with race. As discussed in the introductory chapter, human rights were seen as both a threat to white supremacy and a tool of racial subjection, indicating the racial ambivalence of human rights law. In the context of immigration, advocates have taken up human rights, as both a discourse and law, to advance immigrant rights. However, the outcome of this strategy has not curbed the increasingly punitive immigration regime. Given the centrality of race in immigration policy, any use of human rights will either contribute to the racialization of immigrants or challenge it. As we saw in the congressional intent of the TVPA, lawmakers used human rights to reinforce racial logics and racial hierarchies and, at the same time, protect white supremacy. A law's intent may differ in its application, but as we will see in the following chapters, the racial logics underpinning the TVPA are clear in the application and enforcement of the law.

CHAPTER TWO

Exploring the Limits of the TVPA: The Case of Unaccompanied Immigrant Children

> We now have an actual humanitarian crisis on the border that only underscores the need to drop the politics and fix our immigration system once and for all. In recent weeks, we've seen a surge of unaccompanied children arrive at the border, brought here and to other countries by smugglers and traffickers.[1]
> – President Barak Obama, June 2014

During the summer of 2014 there was an unprecedented number of unaccompanied immigrant child presenting themselves at the U.S.-Mexico border. Unaccompanied children are defined in the United States as children who have no lawful immigration status, are under the age of eighteen, and enter the country without a parent or legal guardian, or a parent or legal guardian is unavailable to provide for their care and physical custody.[2] Mainly from the Central American countries of El Salvador, Guatemala, and Honduras, these children were fleeing a host of violence and persecution in their home countries seeking refuge in the United States. However, once in the United States they encountered a different form of violence. Left to navigate a complex legal system and social order, these unaccompanied children came to experience the full force of legal violence against them.

[1] "Remarks by the President on Border Security and Immigration Reform" The White House, June 30, 2014, accessed June 2, 2018, https://obamawhitehouse.archives.gov/the-press-office/2014/06/30/remarks-president-border-security-and-immigration-reform.

[2] 6 U.S.C. § 279(g)(2) (2011).

This chapter looks at this flashpoint in immigration history to explore the limits of human rights within immigration law.

Like victims of human trafficking, unaccompanied children[3] (UC) are unique in domestic law in that legal protections for them have been influenced by international human rights law- at least discursively.[4] Further, the framing of unaccompanied children as potential human trafficking victims led to their incorporation into the Trafficking Victims Protection Act via a 2008 reauthorization bill (TVPA or TVPRA). By placing protections for UC in the TVPA, lawmakers situated the discourse of UC in the larger discursive field of human rights. However, while UC were rhetorically given claims to human rights, the 2014 'surge' or 'crisis' on the U.S.-Mexico border reveals the impossibility of such rights for these refugees from Central America.[5]

To explore why it is that despite the human rights-based legal protections provided for in the TVPA, unaccompanied children are largely responded to with restrictionist

[3] The legal term is "Unaccompanied Alien Children" or "UAC" however, rather than reinforce the dehumanizing term 'alien' this chapter uses the term unaccompanied children.

[4] Discursively, the United States legal framework adheres to human rights. As discussed in the following chapter, language regarding unaccompanied children largely mirrors standards set out in international treaties including the Convention on the Rights of the Child, the Universal Declaration of Human Rights, Convention Against Torture, and the International Convent on Civil and Political Rights. The issue regarding implementation of domestic law is another question, with advocates pointing out that the United States continues to deviate from international norms particularly in the detention and treatment of unaccompanied children. See for example, UNHCR's Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers*,* February, 1999, accessed July 7, *2018,* http://www.unhcr.org/4aa7646d9.pdf*.;* US: Halt Expansion of Immigrant Family *Detention*; Problems With Detaining *Children* Evident in New Mexico Center*, Human Rights Watch*, July 29, 2014, accessed July 7, 2018, http://www.hrw.org/news/2014/07/29/us-halt-expansion-immigrant-family-detention.

[5] David Hernandez questions the use of descriptors such as 'crisis' and 'surge' to explain the 2014 influx of unaccompanied children. He points to the political use of these terms in serving "all sides" of the debate including the anti-immigrant forces. David Hernandez, "Unaccompanied Child Migrants in "Crisis": New Surge or Case of Arrested Development? *Harvard Journal of Hispanic Policy 27* (2015).

immigration policies, I juxtapose their current presence to that of the Central American refugee crisis of the 1980s. By doing so I trace the legal history of UC in U.S. immigration law. Like adults fleeing the Civil Wars of Central America, legal protections for unaccompanied children were a result of claims to human and civil rights by activists. While claims to human rights in advancing protections were a result of tireless advocacy on the part of immigrant and human rights groups, it has since been taken up by law makers, which I argue has been used to advance anti-immigrant policies. Such is the case of unaccompanied children in the TVPRA. Thus, what started out as a human rights approach towards unaccompanied children was taken up by politicians to advance restrictive immigration policies which undermine the claims Central American children have to human rights.

UNACCOMPANIED CHILDREN AND THE CENTRAL AMERICAN REFUGEE CRISIS

The issue of Unaccompanied Children in the United States can be traced to the 1980's influx of Central American refugees fleeing civil wars. Between 1981 and 1990 nearly one million Salvadorans and Guatemalans fled to the United States, including children.[6] In this section I provide a brief overview of the political context that facilitated the exodus of Central American children, the government's response to their migration, and the legal challenges to their mistreatment.

[6] Susan Gzesh, "Central Americans and Asylum Policy in the Reagan Era," *Migration Policy Institute* (April 1, 2006): 2.

Context of 1980's Arrival of UC

The civil wars in El Salvador and Guatemala were a result of repressive military-backed governments which resulted in the rise of communist guerrilla groups.[7] The ensuing civil wars resulted in the death and disappearances of community leaders, suspected guerrillas, guerilla sympathizers, including religious leaders, by paramilitary groups. International human rights organizations including Amnesty International and America Watch "reported high levels of repression in El Salvador and Guatemala, with the majority of violations committed by military and government-supported paramilitary forces."[8] For example, in El Salvador the military and death squads were responsible for thousands of disappearances; while in Guatemala, campaigns against indigenous communities resulted in thousands of disappearances, murders and forced displacement. These civil wars became amplified as theaters in the Cold War calling the attention of the United States, which intervened on the side of the governments with the intent of stopping the spread of communism.[9]

Under the Reagan administration, the United States placed Central America at the center of its foreign policy agenda evidenced by the administration's issuance of a "White

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[7] I provide a gross oversimplification of the Civil Wars. For sustained studies on the roots and causes see, William M. LeoGrande, *Our Own Backyard: The United States in Central America, 1977-1992* (Chapel Hill, NC: The University of North Carolina Press, 1998); John A. Booth, and Thomas W. Walker, *Understanding Central America* (Boulder: Westview Press, 1999).

[8] Susan Gzesh, "Central Americans and Asylum Policy in the Reagan Era," 2.

[9] Maria Cristina Garcia, *Seeking Refuge: Central American Migration to Mexico, the United States, and Canada* (Berkeley: University of California Press, 2006), 25-32.

Paper" on El Salvador, declaring that "communist forces, directed under tutelary supervision of Cuba, had besieged the government of El Salvador" and calling for increased military aid to combat communist subversion in the country.[10] This approach towards Central America influenced immigration policies towards Central American migrants. U.S. immigration officials detained migrants where they were subjected to "intimidation, threats, and misrepresentation," and coerced into conceding deportability.[11] At the same time, those migrants who applied for asylum were summarily denied as part of the Reagan administration's policy towards Central America. The Reagan administration's complicity in the civil wars caused the administration to deny that the governments of El Salvador and Guatemala had violated human rights, thus rejecting claims that Central American migrants were asylum seekers, and rather characterizing them as economic migrants.[12]

In addition to denying human rights claims to Central Americans, political discourse around the refugee crisis was overtly xenophobic. For example, anti-immigrant

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[10] Stephen Macekura, "For Fear of Persecution: Displaced Salvadorans and U.S. Refugee Policy in the 1980s," *The Journal of Policy History 23*, no. 3 (2011): 363. Note that intervention in Central America was not new to the Reagan administration, and is rather a continuation of U.S. foreign policy which has viewed Central America as an extension of the United States sphere of influence. See, LaFeber, Walter. *Inevitable Revolutions: The United States in Central America (*New York: W.W. Norton & Company, 1983). LaFeber provides a historical overview of U.S. imperialist endeavors in Central America manifesting in the 1823 Monroe Doctrine, Theodore Roosevelt's big stick diplomacy, and FDR's Good Neighbor Policy, which facilitated U.S.-Latin American military relationships.

[11] *Orantes-Heranndez v. Meese,* 658 F. Supp. 1488 (C.D. Cal, 1988) at 1504-1505. This court case found widespread abuses of detained migrants at the hands of INS officials.

[12] Susan Gzesh, "Central Americans and Asylum Policy in the Reagan Era," 2.

politicians, such as Senator Jesse Helms of North Carolina, expressed fears of accepting non-white refugees based on cultural and socioeconomic stereotypes.[13] The Senator further linked migrants to national security issues stating "They [Salvadoran refugees] will come over our border with impunity…do you really want communism to take over your front yard?"[14] As historian Stephen Macekura notes, Senator Helm's anti-immigrant rhetoric "infused American politics with a revived sense of restriction[ism] and xenophobia."[15] This rhetoric prefigured the racist discourse that gave rise to anti-immigrant political platforms such as that of Pat Buchanan and anti-immigrant laws such as California proposition 187.[16] Under this political context, the conditions that Central American migrants encountered were anything but humane.

Developing Legal Protections for Unaccompanied Children

Like adults who fled violence and persecution to seek asylum in the United States, UC began entering the country at conspicuous levels in the 1980s.[17] Central American UC were processed like adults, held in Immigration and Naturalization Service (INS) custody

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[13] Stephen Macekura, "For Fear of Persecution,"367.

[14] Stephen Macekura, "For Fear of Persecution," 372.

[15] Stephen Macekura, "For Fear of Persecution," 371.

[16] For example, Leo Chavez argues "the threat of immigration to the "complexion" of American society comes from Pat Buchanan, a presidential candidate during the 1992 and 1996 elections." Buchanan said: "A non-white majority is envisioned if today's immigration continues," and that "America needs a "time out" from immigration." Leo Chavez, "Immigration Reform and Nativism: The Nationalist Response to Transnationalist Challenge," in *Perspectives on las America Reader*, eds. Mathew Gutmann, Felix V. Rodriguez, Lynn Stephen, and Patricia Zavella (Malden: Blackwell, 2003): 419.

[17] Olga Byrne and Elise Miler, "The Flow of Unaccompanied Children Through the Immigration System: A Resource for Practitioners, Policy Makers, and Researchers," *Vera Institute for Justice* (March 2012): 6.

to await immigration decisions, and often facing mistreatment and abuse at the hands of immigration officials.[18] The mistreatment and abuse intensified when the INS began a policy of detaining Central American migrants in detention facilities.[19] Consequently, unaccompanied children and adults were held in deplorable facilities including a "former Department of Agriculture pesticide storage facility."[20] Within these detention centers children lacked access to health care, counseling, education, and attorneys to aid in their legal cases; while at the same time they were subjected to threats, coercion, and intimidation by immigration officials.[21] INS further restricted whom undocumented children could be released to, limiting it to parents only. Detaining these children and requiring their release to parents was a strategy to "bait undocumented families into revealing themselves to authorities."[22] Lastly, INS was charged with both custodial duties and the prosecution of these children for immigration violations adding to the coercive environment.

Growing concerns about the condition these children faced, and the conflict of interest inherent in INS' position vis-à-vis these children led to a "coalition of human rights organizations, religious groups, and political leaders" to push for their improved care and

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[18] Olga Byrne and Elise Miler, "The Flow of Unaccompanied Children," 6.

[19] Michael A. Olivas, "Unaccompanied Refugee Children: Detention, Due Process, and Disgrace," *Stanford Law and Policy Review 2* (1990): 160.

[20] Michael A. Olivas, "Unaccompanied Refugee Children," 160.

[21] Michael A. Olivas, "Unaccompanied Refugee Children," 160.

[22] Michael A. Olivas, "Unaccompanied Refugee Children," 160.

"lobbied for the transfer of their care and custody to another agency."[23] This led to a series of lawsuits beginning with *Flores v. Messe*.[24] Brought in 1985 by the American Civil Liberties Union (ACLU) on behalf of Jenny Lisette Flores, Dominga Hernandez, Alma Yanira Cruz-Aldama, and Ana Martinez-Portillo (all girls between the ages of 13 and 16 and citizens of El Salvador), the lawsuit exposed the practices of mistreatment by immigration officials towards UC. The lead plaintiff, Jenny Lisette Flores' treatment at the hands of officials is exemplary of the conditions UC faced. Ms. Flores was "handcuffed, strip searched, and placed… in a juvenile detention center where she spent the next two months waiting for her deportation hearing."[25] Furthermore, the INS failed to "provide educational, or many recreational opportunities," for detained UC and "some of the minors in the facility had to share "bathrooms and sleeping quarters with unrelated adults of both sexes."[26] After nearly a decade of litigation, the case resulted in the *Flores Settlement Agreement* in 1997.[27]

The *Flores Agreement* established policies regarding the detention, treatment, and release of UC. These obligations include: releasing children from immigration detention without unnecessary delay (to non-parental family members or a shelter if needed), placing

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[23] Olga Byrne and Elise Miler, "The Flow of Unaccompanied Children," 6.

[24] *Flores v. Meese*, 942 F.2d 1352 (9th Cir. 1991), rev'd 113 S. Ct. 1439 (1993).

[25] Rebecca M. Lopez, "Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody," *Marquette Law Review* (2012): 1648.

[26] Rebecca M. Lopez, "Codifying the Flores Settlement Agreement," 1648.

[27] *Flores v. Meese-Stipulated Settlement Agreement* (U.S. Dist. Ct., Central Dist. Of California, 1997).

children in the "least restrictive setting" appropriate for their age and needs, and developing standards related to the care and treatment of children in immigration detention.[28] Disturbingly, the *Flores Agreement* also makes clear that immigration officials detaining children must provide "food and drinking water," "toilets and sinks," "medical assistance in emergencies," "adequate temperature control and ventilation," and "adequate supervision to protect minors from others," to name a few.[29] Finally, the *Flores Agreement* establishes the principle that children are to be treated with "dignity, respect and special concern for their particular vulnerability as minors."[30] Although the *Flores Agreement* recognized the special vulnerabilities unaccompanied children faced, it did not resolve the conflict of interest inherent in having INS be the custodial caretaker of these children and also oversee their removal from the country. Further, mistreatment of unaccompanied children continued.[31] Not until 2002, through the Homeland Security Act (HSA), which eliminated INS replacing it with the Department of Homeland Security (DHS), did the welfare of UC get addressed. Under the HSA, child rights advocates successfully lobbied to include an amendment transferring "responsibility for the care, placement, and release"

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[28] Stipulated Settlement Agreement, supra note 66, at P 12

[29] William A. Kandel, "Unaccompanied Alien Children: An Overview," *Congressional Research Service* (January 18, 2017): 3- 4. Also see, Stipulated Settlement Agreement, 12.

[30] Stipulated Settlement Agreement, Flores v. Reno, Case No. CV 85-4544-RJK, P11 (C.D. Cal. 1996), 9.

[31] William A. Kandel, "Unaccompanied Alien Children," 4; also see, "*The Flores Settlement: A Brief History and Next Steps*," *Human Rights First*, February 2016, accessed July, 2, 2018, http://www.humanrightsfirst.org/resource/flores-settlement-brief-history-and-next-steps.

of unaccompanied children to the Office of Refugee Resettlement.[32] Later in 2008, Congress Enacted the TVPRA which codified aspects of the *Flores Agreement*, including ORR's responsibility for the care and custody of UC.

The *Flores Agreement* is representative of the larger successes advocates had in utilizing a human rights approach to the Central American refugee crisis of the 1980s. Like other successful challenges to the treatment, detention, and denial of human rights towards Central Americans (such as the ABC settlement and the creation of Temporary Protected Status),[33] the *Flores Agreement* proved successful in bringing legal protections to Central American children. However, moving forward, policies regarding UC diverged from those concerning Central Americans in general. Following the successful incorporation of rights for Central Americans, there came increasingly restrictionist immigration policies and border enforcement. An exception to this restrictionist turn was the issue of human trafficking. By approaching unaccompanied children through human trafficking, the legal discourse around unaccompanied children proved to be an exception to the largely

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[32] Olga Byrne and Elise Miler, "The Flow of Unaccompanied Children," 7.

[33] The ABC Settlement was in response to the discriminatory practices by then INS against Guatemalan and Salvadoran asylum applicants who were fleeing the civil wars. The settlement provided de novo asylum interviews for Guatemalan and Salvadoran migrants who entered the United States before a specified date. *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991). Temporary Protected Status is a humanitarian benefit that is granted by the federal government on a temporary basis. The federal government "may designate a foreign country for TPS due to conditions in the country that temporary prevent the country's nationals from returning safely." These conditions include ongoing armed conflict, environmental disasters, or other extraordinary conditions. El Salvador and Honduras are currently designated TPS countries due to environmental disasters. In the case of Honduras TPS was granted following Hurricane Mitch in 1998. In the case of El Salvador, the designation was in response to the 2001 earthquakes. In both cases, TPS is expected to end in 2019. See, U.S. Citizenship and Immigration Services, "Temporary Protected Status," last modified July 19, 2018, accessed August 25, 2018, https://www.uscis.gov/humanitarian/temporary-protected-status.

restrictionist immigration policies of the 1990s. To examine this exception, I apply the interest convergence principle.[34] The interest convergence principle states that racially beneficial laws are extended to oppressed groups only when there is an alignment between the interest of elite whites, such as lawmakers, and the oppressed group. Conversely, these laws are eliminated or scaled back when there is a divergence of interest. As applied to the legal developments around unaccompanied children, it becomes clear that only when human trafficking, an issue of interest to Congress, became the concern, did protections for UC prevail.

EVOLUTION FROM IMMIGRATION TO TRAFFICKING OF UNACCOMPANIED CHILDREN

With allegations that mistreatment of unaccompanied children continued despite passage of the *Flores Agreement*, a number of bills were introduced seeking to address the legal framework regarding their treatment. The first bill, the Unaccompanied Alien Child Protection Act of 2000 (UACPA), was introduced by Democrat Dianne Feinstein of California during the 106th Congress, coinciding with the enacting of the TVPA.[35] Among the protections the UACPA called for included appointing of guardian ad litems (an individual appointed that represents the best interest of the child), appointed counsel,[36] and

[34] Derrick Bell, "Brown v. Board of Education and the Interest-Convergence Dilemma," *Harvard Law Review 93* (1980).

[35] Unaccompanied Alien Child Protection Act of 2000, S. 3117, 106th Cong. 2nd sess.; Unaccompanied Alien Child Protection Act of 2001, S.121 107th Cong. 1st sess.; Unaccompanied Alien Child Protection Act of 2004, S. 1129, 108th Cong. 1st sess.; Unaccompanied Alien Child Protection Act of 2005, S. 119, 109th Cong. 1st sess.; Unaccompanied Alien Child Protection Act of 2007, S. 844, 110th Cong. 1st sess.

[36] The 2000 version called for counsel to be appointed at the expense of the government, but this language was removed by the 2004 version of the bill. See, Shani M. King, "Alone and Unrepresented: A

the development of child specific guidelines for asylum based on relevant domestic and international sources.[37] Unfortunately, no version of the UACPA made it past the House of Representatives. As there is no record of any House committee hearings on these bills, the reason as to why bills regarding unaccompanied children failed to pass until the 2008 TVPRA is unclear. However, law professor Shani M. Kings states, "it is certainly feasible to imagine that any bill that seems "pro-immigration" might engender strong opposition."[38] I argue that bills regarding unaccompanied children failed to pass because they were framed as an immigration problem, and that it was not until lawmakers couched unaccompanied children in the discourse of human trafficking, which removed it from immigration into the area of human rights, did it become an issue worth addressing. This is evident from examining the evolution of the bill pre and post the passage of the TVPA.

As discussed in Chapter One of this dissertation, the TVPA was passed amidst growing anti-immigrant sentiment. This sentiment is reflected in the failure to pass the original UACPA which was introduced during the same legislative session as the TVPA. While the legislative history of this bill is scant, by looking at the language of the bill it is apparent that it is an immigration bill. The purpose of the bill is to "establish an Office of Children's Services within the Department of Justice to coordinate and implement Government actions involving unaccompanied alien children; to ensure that their best

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Call to Congress to Provide Counsel for Unaccompanied Minors," *Harvard Journal on Legislation 50* (2013): 340.

[37] The development of child specific asylum guidelines was found in the 2004 bill.

[38] Shani M. King, "Alone and Unrepresented," 340.

interests are held paramount in immigration proceedings and actions involving them; to prescribe standards for their custody, release, and detention; to improve policies for their permanent protection; and for other purposes."[39] While the language of the bill mirrors international human rights standards laid out in the Convention on the Rights of the Child, such as applying the best interest of the child standard, and calling for guardian ad litems and legal counsel, the bill does not claim any ties to international human rights law in general, nor does it address the trafficking of children.[40]

The following legislative session saw another version of the UACPA introduced again by Senator Feinstein. However, this time there is a noticeable attempt to frame unaccompanied children as a human trafficking issue. In a Senate Hearing on the UACPA before the Subcommittee on Immigration during the 107th Congress, Senator Feinstein

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[39] Unaccompanied Alien Child Protection Act of 2000, S. 3117, 106th Cong. 2nd sess. (September 27, 2000), available at https://www.govtrack.us/congress/bills/106/s3117/text/is.

[40] In 1989, the UN recognized continuing vulnerabilities of children worldwide and adopted the Convention on the Rights of the Child (CRC). The CRC not only enshrines children as having human rights, but also provides the international community with standards concerning the treatment of children providing a comprehensive list of rights and state obligations including non-discrimination, protection from abuse abandonment or neglect (art 19), and for the "best interests of the child be a primary consideration in all actions, "whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, concerning children (art 3). Unaccompanied migrant children are addressed in the CRC, and the legal framework regarding their care has been expounded upon by the Committee on the Rights of the Child (the monitoring and implementing body of the CRC). The Committee has discussed protections that are specific to unaccompanied children such as advocating for the appointment of a guardian and legal representative, access to education, the right to an adequate standard of living and health, prevention of trafficking, prevention of military recruitment, and limiting detention of UC. They additionally call for procedural safeguards for UC applying for asylum, as well as safeguards in any steps to reunify UC with family and the return of UC to their country of origin. Running throughout these safeguards is the best interest of the child standard. See, UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, accessed June 23, 2018, http://www.refworld.org/docid/3ae6b38f0.html; UN Committee on the Rights of the Child (CRC), *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, accessed July 2, 2018, http://www.refworld.org/docid/42dd174b4.html.

discusses how she became involved in the issue of unaccompanied children: "I read in the newspaper that there was a young baby from Thailand who arrived at Los Angeles Airport, and that baby had been sold by his mother to human traffickers and the traffickers used the baby to go back and forth across the ocean pretending that the baby was theirs, when, in fact, the baby wasn't theirs."[41] She goes on to discuss how the child's asylum was denied by INS but that he was able to obtain protections under the recently passed TVPA becoming "the first recipient ever of the so-called T visa."[42]

Senator Feinstein goes on to discuss the particularities of the bill, and the rest of the hearing is primarily centered on the necessity of protections for unaccompanied children and concerns as to implementing the legislation. Nevertheless, the introduction of UC as a potential human trafficking problem is not an accident. Rather it foreshadows the transformation of unaccompanied children into a human trafficking issue. While this is no doubt a politically savvy strategy to distance the bill from immigration and frame it in the same vein as the TVPA, a bill which is itself squarely rooted in human rights, by doing so it shifted the legal discourse around unaccompanied children. In this way, lawmaker's interest in human trafficking converged with migrant children to create protections for them. It further aligned the issue of unaccompanied children with a prior bill that held near unanimous support, and as we will see, with restrictionist immigration laws.

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[41] *Hearing before the Subcommittee on Immigration of the Committee on the Judiciary*, The Unaccompanied Alien Child Protection Act, 107th Cong. 2nd sess., February 28, 2002, 5.

[42] Unaccompanied Alien Child Protection Act, *Hearing*, 5.

This emphasis on the relationship between human trafficking and unaccompanied children was successful in bringing the issue of UCs into view during the 2008 reauthorization of the Trafficking Victims Protection Act. In a House Report on the bill, the Committee on Foreign Affairs discusses the congressional reason behind including unaccompanied children within the framework of the TVPA.[43] Pointing to the lack of identification of child trafficking victims despite reports that half of all individuals trafficked into the United States are children, the Committee reasoned: "It is the sense of the Congress that, to the extent consistent with the treaties and other international agreements to which the United States is a party, and to the extent practicable, the United States Government should undertake efforts to protect children from severe forms of trafficking and ensure that it does not repatriate children in Federal custody into settings that would threaten their life or safety."[44] While relying on human rights treaties, the intent of the Congress is to safely deport unaccompanied children so that they do not fall prey to human traffickers once they are back in their home country (country of nationality or last habitual residence). This congressional intent is codified in the TVPRA provision on unaccompanied children titled "Enhancing Efforts to Combat the Trafficking of Children" which lays out policies and procedures to "enhance the efforts of the United States to prevent trafficking in persons" by "developing policies and procedures to ensure that unaccompanied alien children in the United States are safely repatriated."[45] Notably, the

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[43] The Committee on Foreign Affairs, Trafficking Victims Protection Act of 2000, 110th Cong. 1st sess., HR Rep. No. 110-430(I) (November 6, 2007).

[44] The Committee on Foreign Affairs, *HR Rep*., 31.

reasoning behind focusing on the safe repatriation of children is to be in compliance with international human rights obligations.

Many of the provisions from the UACPA are reflected in the 2008 TVPRA.[46] It further added protections for unaccompanied children from non-contiguous countries. The law mandates Custom and Border Patrol screen all unaccompanied children for trafficking, and to assess whether they express a fear of return (which triggers protections under asylum law). If a child from a contiguous country (Mexico and Canada) are not deemed a victim of human trafficking and they do not express a fear of return, then they are summarily returned to their country.[47] However, children from non-contiguous countries, such as Central American countries, who are deemed a potential victim of trafficking or expresses a fear to return, or if no determination is made within 48 hours, are transferred to HHS custody and placed in removal proceedings.[48] While at first blush it appears that the added steps taken towards children from non-contiguous countries provides a human rights approach towards children by ensuring they have due process via removal proceedings, the

[45] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Public Law 110-457, *Section 235(a): Enhancing Efforts To Combat The Trafficking of Children.*

[46] Including "a mandate for the non-adversarial adjudication of unaccompanied children's asylum claims, and to the extent practicable, access to legal services through pro-bono legal representatives. Other provisions of the law mandate the safe repatriation of children to their countries of origin. The TVPRA also granted authority to HHS to appoint child advocates (guardian ad litem) to trafficking victims and other vulnerable unaccompanied children." Olga Byrne and Elise Miler, "The Flow of Unaccompanied Children," 8.

[47] Provided they withdraw their application. See, Enhancing Efforts to Combat the Trafficking of Children, 8 USC § 1232 (a)(2)(A).

[48] 8 USC § 1232 (a)(5)(D).

ultimate goal of the law is in fact to deport UC. Thus, what seems a human right influenced law is used to advance restrictionist immigration policies. This was made clear when the TVPRA was tested by the 2014 influx of unaccompanied children.

THE 2014 'CRISIS' OF UNACCOMPANIED CHILDREN

In the summer of 2014 there were reports of an alarming number of unaccompanied children being apprehended at the U.S.-Mexico border. It was reported that in the fiscal year of 2014, approximately 68,541 UC were detained at the border.[49] This was more apprehension of UC than in the previous six years combined.[50] Almost all the children detained at the border were from the Central American countries of El Salvador, Guatemala, and Honduras, also known as the Northern Triangle.

Like the prior refugee exodus out of Central America in the 1980s, the children arriving at the U.S.-Mexico border were fleeing violence and persecution. Researchers found that while children may have multiple reasons for migrating, such as family reunification and economic opportunities, children from the Northern Triangle consistently name gang violence as a primary factor for fleeing. A report conducted by the United Nations High Commissioner for Refugees surveyed 404 UC from El Salvador, Guatemala, Honduras, and Mexico. Of those surveyed, 48 percent spoke of how they were personally affected by the "violence in the region by organized armed criminal actors, including drug

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[49] "Southwest Border Unaccompanied Alien Children FY 2014", last modified November 24, 2015, accessed June 2, 2018, https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2014.

[50] William A. Kandel, "Unaccompanied Alien Children," 2.

cartels and gangs or by State actors."[51] This assertion was confirmed by political scientist Tom Wong, who conducted an analysis comparing data on UC to data from the UN Office on Drug and Crime (UNDOC) which reported homicide rates for the Northern Triangle. His study found a positive relationship between violence and children fleeing, specifically finding "higher rates of homicide in countries such as Honduras, El Salvador, and Guatemala are related to greater numbers of children fleeing to the United States."[52] Wong further examined the relationship between violence and UC fleeing based on data on security levels in Latin America. Again, he found a positive relationship between dangerous security conditions and the rise of unaccompanied children, "suggesting an even clearer link between violence and children fleeing."[53]

The exodus of people out of the Northern Triangle was felt not only in the United States but in neighboring countries including Belize, Costa Rica, Mexico, Nicaragua, and Panama, which saw a 712 percent increase in asylum applications from 2008 to 2013 from Salvadoran, Guatemalan, and Honduran asylum applicants.[54] Increases in internal displacement were also documented by the Internal Displacement Monitoring Centre

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[51] *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection*, United Nations High Commissioner for Refugees (Washington, D.C): 6, available at http://www.unhcr.org/56fc266f4.html.

[52] Tom K. Wong, "Statistical Analysis Shows that Violence, Not U.S. Immigration Policies, Is Behind the Surge of Unaccompanied Children Crossing the Border," Center for Comparative Immigration Studies, UC San Diego, last accessed June 2, 2018, https://ccis.ucsd.edu/_files/briefs/11wong-uacs2.pdf.

[53] Tom K. Wong, "Statistical Analysis."

[54] Dennis Stinchcomb and Eric Hershberg, "Unaccompanied Migrant Children from Central America, Context, Causes, and Responses," *Center for Latin American & Latino Studies, Working Paper Series no. 7* (November 2014): 13.

which reported that at the end of 2013, "242,000 Guatemalans and 17,000 Hondurans were internally displaced as a result of natural disaster or violence perpetrated by either state or non-state actors."[55] In El Salvador, during this same time period an estimated 130,000 Salvadorans had been forced to internally relocate due to street gangs.[56]

What this data reflects is the fact that individuals in the Northern Triangle were "seeking relief wherever they can, just as they did during past crises."[57] Nevertheless, anti-immigrant politicians and groups claimed that Central American migrants, specifically UC, were arriving to the United States because of the perception of relaxed immigration policies under the Obama administration, specifically pointing to Deferred Action for Childhood Arrivals (DACA) and the TVPRA. Thus, from the beginning of the 'surge' the discourse around UC was one of active denial of a humanitarian crisis necessitating a human rights approach. Indeed, there was no mention of the possibility that children may be human trafficking victims. Rather, lax immigration policies were to blame, and 'tougher' immigration policies were viewed as the solution.

Reaction to Unaccompanied Children

While UC were fleeing from violence in their home countries, anti-immigrant discourse focused mainly on perceived pull-factors created by immigration policies under

[55] Dennis Stinchcomb and Eric Hershberg, "Unaccompanied Migrant Children," 13.

[56] Dennis Stinchcomb and Eric Hershberg, "Unaccompanied Migrant Children," 13. Citing survey data gathered by the University Public Opinion Institute.

[57] Dennis Stinchcomb and Eric Hershberg, "Unaccompanied Migrant Children," 13.

the Obama Administration. Republican politicians, including former Pennsylvania Senator Rick Santorum, and Texas Senator Ted Cruz blamed the Obama administration for creating the immigration crisis.[58] In July of 2014, at the height of the crisis, Republican House Rep. Michael McCaul from Texas, who was the Chairman of the House Committee on Homeland Security, blamed the influx of UCs on the "failed immigration and border policies" of the Obama administration.[59] He dismissed prior testimony that found "the horrible economic conditions and violence in Central America were the only reason these kids are coming," and rather asserted that "these conditions [in Central America] are not new, and they have not suddenly gotten worse. What is new is a series of Executive Actions by the [Obama] Administration to grant immigration benefits to children outside the purview of the law."[60]

In addition to blaming the surge on immigration policies, politicians focused on the perceived threats posed by these children. These threats included threats to public health, national security, and increased crime. For example, former Republican Senator for Massachusetts Scott Brown, decried that unaccompanied children entering the country may be carrying Ebola.[61] Similarly, Rep. Todd Rokita of Indiana suggested that unaccompanied

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[58] Jon Greenber, "Dobbs: Obama Policy on Young Immigrants 'Created' the Crisis at the Border, *Tampa Bay Times,* July 23, 2014, accessed June 3, 2018, Proquest.

[59] Committee on Homeland Security, "Crisis on the Texas Border: Surge of Unaccompanied Minors," Statement of Chairman Michael McCaul, July 3, 2014, accessed June 5, 2018, https://homeland.house.gov/files/documents/07-03-14-McCaul-Open.pdf.

[60] Statement of Chairman Michael McCaul.

children should not be released throughout the United States for fear that they may be carrying diseases such as Ebola.[62] At the most extreme was Republican Rep. Phil Gingrey of Georgia, who wrote to the Center for Disease Control and Prevention expressing concern over UC and public health stating, "Reports of illegal migrants carrying deadly diseases such as swine flu, dengue fever, Ebola virus and tuberculosis are particularly concerning."[63] News outlets reported that Rep. Gingrey viewed UC as posing a particular risk to the public saying "they could spread the disease too quickly to be controlled, once in the United States."[64] He urged the CDC to immediately assess the situation and notify the public of risks."[65] While medical experts dismissed the idea that Ebola was being brought through the U.S.-Mexico border, it nonetheless became a narrative in the anti-immigrant agenda against unaccompanied children. Drawing from anti-immigrant rhetoric rooted in the late 19th and early 20th century descriptions of non-white immigrants as diseased, these arguments reflects the latest iteration of reinforcing racial ideologies around immigration through linking migration with health risks.[66]

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[61] Maria Santana, "Ebola fears spark backlash against Latino immigrants," *CNN*, October 12, 2014, accessed June 10, 2018, https://www.cnn.com/2014/10/10/politics/ebola-fears-spark-backlash-latinos/index.html.

[62] Lindsey Boerma, "Republican Congressman: Immigrant Children Might Carry Ebola," *CBS News*, August 5, 2014, accessed July 7, 2018, https://www.cbsnews.com/news/republican-congressman-immigrant-children-might-carry-ebola/.

[63] Maria Santana, "Ebola fears spark backlash against Latino immigrants."

[64] Maria Santana, "Ebola fears spark backlash against Latino immigrants."

[65] Maria Santana, "Ebola fears spark backlash against Latino immigrants."

Lastly, then Governor of Texas, Rick Perry, testified before the House Committee on Homeland Security that unaccompanied children posed a public health hazard, citing three cases of potential H1N1 in UC detention facilities.[67] He went on to describe a crisis of national security as a result of the 'surge,' stating that drug cartels and transnational gangs are "seeking to take advantage of the situation, attempting to circumvent security" and proclaiming potential danger "at the hands of those who might be slipping through from countries with known terrorist ties."[68] He called for securing the border by further militarization of it. This discourse was mirrored in the public sphere, where Anti-immigrant protestors took to the streets in opposition to the inflow of UC and their processing and placement in shelters. In Michigan, for example, protestors marched with AR-15 rifles and handguns, against the possibility of UC being housed in a local shelter. The group was led by Michiganders for Immigration Control and Enforcement. Its organizer, Tamyra Murray claimed some UC "belong to gangs and act as drug runners for cartels, and others coming across the border are coughing blood and have suspected tuberculosis."[69] In Arizona protests occurred following Pinal County Sheriff Paul Babeu's disclosure of the location

[66] For a sustained analysis on the use of public health in the racialization process of see, Natalie Molina, *Public Health and Race in Los Angeles*, *1879-1939* (Berkeley: University of California Press, 2006).

[67] U.S. House Committee on Homeland Security," Field Hearing: Crisis on the Texas Border: Surge of Unaccompanied Minors," Testimony of Governor Rick Perry, July 3, 2014, last accessed July 7, 2018, https://homeland.house.gov/hearing/field-hearing-crisis-texas-border-surge-unaccompanied-minors/.

[68] Testimony of Governor Rick Perry.

[69] Lindsay Knake, "Protestors carry AR rifles, flags in march against Central American teens coming to Vassar," *Saginaw News*, July 14, 2014, accessed July 7, 2018, http://www.mlive.com/news/saginaw/index.ssf/2014/07/demonstrators_in_vassar_carry.html

where UC were being placed. In explaining why he released this information, the Sheriff stated, “If you're going to send unaccompanied juveniles to another state in another jurisdiction, there's legitimate concern that other members of this community have about public safety and public health,"[70]

Figure 1. *Protestors March Against Central American Teens Coming to Vassar*. Photograph by Coty Giannelli, July 14, 2014, Mlive.com.

[70] Michael Martinez, Holly Yan and Catherine E. Shoichet, “Growing protests over where to shelter immigrant children hits Arizona,” CNN, July 16, 2014, accessed July 7, 2018, https://www.cnn.com/2014/07/15/us/arizona-immigrant-children/index.html.

The Governments Response

The Obama administration was quick to respond to the influx of unaccompanied children. Coordinating a "government-wide effort" to the crisis characterized as a "humanitarian situation," the federal government relied on the Federal Emergency Management Agency (FEMA), and the Department of Defense to assist in securing temporary shelter for the arriving migrants.[71] FEMA in particular was tasked with coordinating the federal response in ways that addressed " the needs of this vulnerable population appropriately while taking the proper measures to process and safely repatriate individuals."[72] In other words, FEMA was charged in coordinating detention efforts of UC in an appropriate manner. In addition to addressing the immediate needs (while in detention) of UC, the federal government centered on deterrence and quickly removing these children as part of its response,[73] and focusing on increasing law enforcement to interdict and prosecute "criminal organizations and smuggling rings that are exploiting

[71] "The Obama Administration's Government-Wide Response to Influx of Central American Migrants at the Southwest Border," The White House Office of Press Secretary, August 2, 2014, accessed July 8, 2018, https://obamawhitehouse.archives.gov/the-press-office/2014/08/01/obama-administration-s-government-wide-response-influx-central-american-.

[72] "The Obama Administration's Government-Wide Response."

[73] For example, in a letter to Congress, President Obama requested Congress provide the "DHS Secretary additional authority to exercise discretion in processing the return and removal of unaccompanied minor children from non-contiguous countries like Guatemala, Honduras, and El Salvador." "Letter From the President to the Speaker of the House of Representatives, Majority Leader of the Senate, Republican Leader of the Senate and the Democratic Leader of the House of Representatives," White House Office of the Press Secretary, June 30, 2014.

these individuals."[74] The focus on removal led to the Department of Justice prioritizing UC cases, accelerating removal proceedings against them.

By focusing on the deportation and deterrence of UC and prosecution of smugglers, The Obama Administration's response to the "humanitarian crisis" was to rely on restrictionist immigration policies. Coupled with the protections outlined in the TVPRA for unaccompanied children, it became clear that human rights for Central Americans were limited to maintaining their exclusion to the United States. Even so, the few rights provided to this group was viewed as too many, as indicated by conservative politicians who believed the administration was not going far enough in actions against UC. In response to the administration's plan for UC, Republican lawmakers introduced bills amending the TVPRA specifically related to taking away the non-contiguous differentiation to subject Central American children to immediate removal.[75] In this way, the human rights protections provided for in the TVPA for unaccompanied children masked the government's intent to deport, while at the same time fueling anti-immigrant rhetoric and policies.

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[74] " The Obama Administration's Government-Wide Response."

[75] Several members of Congress introduced legislation to amend the 2008 TVPRA flowing the surge and the Obama Administration's response to it. These include the Humane Act introduced by Senator John Corny (R-TX) and Rep. Henry Cuellar (D-TX); The Expedited Family Reunification Act of 2014 introduced by Rep. Matt Salmon (R-AZ); CREST Act introduced by Senator Jeff Flake (R-AZ) and John McCain (R-AZ); the Protection of Children Act introduced by Rep. John Carter (R-TX); and The Asylum Reform and Border Protection Act of 2014 introduced by Rep. Bob Goodlatte (R-VA) and Jason Chaffetz (R-UT). For details on each bill see, Lazaro Zamora, "Unaccompanied Alien Children: A Primer," *Bipartisan Policy Center*, July 21, 2014, accessed July 1, 2018, https://bipartisanpolicy.org/blog/unaccompanied-alien-children-primer/.

DISCUSSION

Interest Divergence and the Impermanence of Human Rights

The interest of lawmakers in providing human rights for unaccompanied children was never assured. The first of the protections came out of litigation challenging the government's treatment of these children. While there were lawmakers who supported the plight of Central American adult and child refugees, they were unsuccessful in their attempts at providing protections for UC. Rather, the human rights of UC were largely dependent on the *Flores Agreement*, which has been continually violated since coming into force. Not until the TVPA was reauthorized did lawmakers codify substantial protections for UC. This codification was a result of discursively aligning UC with human trafficking, while at the same time politically aligning it with restrictionist immigration policies.

Even though the rights provided for UC are in the context of their detention and repatriation, the 2014 surge revealed how quickly lawmakers' interests diverged from those of unaccompanied children. Criticizing the TVPRA for creating the conditions for the crisis, lawmakers looked to amend portions of it. Further, it was not enough that the Obama administration responded to the crisis with expediated due process through the creation of the "rocket docket."[76] Lawmakers sought to eliminate due process by summarily deporting children. Consequently, there was a complete divergence in what lawmakers envisioned for UC, reverting from a human rights approach to detention and removal, back to just

[76] This is the term immigration advocates gave to the expediated Immigration Court docket for Unaccompanied children.

removal. Thus, the case of unaccompanied children exemplifies how human trafficking as a discursive tool was used to align human rights with immigration restrictions of unaccompanied children, and how the appearance of Central American children at the border caused a divergence in interests. Moreover, while these children sought refuge, lawmakers attempted to rescind the few protections guaranteed to them, revealing the impermanence of human rights for migrants. In imagining why lawmakers diverged so quickly from the TVPRA, one only has to look at the xenophobic discourse around Central American child migrants stemming from the 1980s and increasing in 2014.

The TVPRA as a Legacy of Legal Violence

The influx of unaccompanied children from Central America has contributed to the growth of laws regarding their treatment in the United States. While the 2008 TVPRA makes no mention of the history of UCs, the fact that it developed out of the mistreatment of Salvadoran and other Central American children during the 1980s is not without significance.

The *Flores Agreement* of the 1980s was a result of the larger strategy of bringing a human rights lens to the issue of Central American refugees. The TVPRA purportedly furthers the rights of Central American UC by screening them for human trafficking and refraining from immediately deporting them. In this way, it appears the *Flores Agreement*, which forced the government to recognize the human rights of Central American children, has given way to proactivity on part of the government to recognize their rights through the codification of the TVPRA. Even with the protections laid out in the *Flores Agreement*,

mistreatment against UC continue - including denying them sanitary conditions, and failure to advise UC of possible immigration relief they may qualify for.[77] Further, because the law is primarily geared towards the deportation of unaccompanied children, and thus more focused on procedural protections over substantive claims to human rights, Central Americans are continued to be deprived of recognition as holders of human rights. This is most apparent in the fact that UC asylum claims based on gang violence are continuously denied. Similar to the asylum denials of the 1980s, the United States refuses to view the violence occurring in Central America as violating human rights. Perhaps due to the government's role in creating the conditions of violence in Central America, or the fear of opening the proverbial immigration floodgates, it nonetheless invokes the history of actively denying Central American rights to asylum protections. Coupled with the fact that little has changed in how Central American migration is framed within political discourse suggests the inability of Central Americans to be entitled to human rights protections. In these ways, the TVPRA continues the legacy of legal violence towards Central Americans.

CONCLUSION

Like the children fleeing for the United States in the 1980s, current unaccompanied children are detained, mistreated, and denied meaningful protections from repatriation. However, unlike the 1980s, the legal violence against unaccompanied children are

[77] During the summer of 2014 it was reported that UC were denied minimum standards outline in the *Flores Agreement* including maintaining clean and sanitary detention conditions, access to toilet and sinks, and provision of mattresses and blankets to UC while being held by Border Patrol. Also, UC were not advised of their right to apply of Special Immigrant Juvenile Status or possible family-based relief. Center for Human Rights and Constitutional Law, letter describing violations of Flores Settlement Agreement, October 15, 2014, accessed July 1, 2018, https://www.aila.org/infonet/flores-v-reno-settlement-agreement.

sanctioned through the TVPRA. As will be discussed in the following chapter, the legal violence embodied in immigration protections for UC ultimately works to further criminalize and racialize Central Americans migrants.

CHAPTER THREE

Legal Construction of Central American Unworthiness Through the Special Immigrant Juvenile Visa

Thus far, this dissertation has sought to show how the discourse of human rights is taken up by lawmakers and inserted into U.S. immigration law, which supports the historical continuities of legal violence against non-white populations, including reinforcing racial projects and maintaining white supremacy in the United States. In the case of Central American migrants, this legal violence extends into Central American countries themselves. This chapter asks: How are racial projects reinforced and what are the material and discursive consequences of such laws? If immigration laws are dedicated to domestic processes of racial formation, how do they influence global racial orderings?

Centering the humanitarian immigration relief of Special Immigrant Juvenile Status (SIJS), this chapter seeks to answer these questions as applied to Central America and Central American migrants in the United States. SIJS confers immigration relief to migrant children who meet specific requirements. These children must be declared a dependent of a juvenile court within the United States, with the court finding that reunification with one or both of the child's parents is not viable due to abuse, neglect, or abandonment. Further, the court must determine that it is not in the child's best interest to be returned to their country of nationality. Analyzing cases on Central American unaccompanied children who have been granted SIJS between 2015 and 2017, I argue that the use of the requirements stated above relies on an ahistoric application of the law that criminalizes migration and at

that same time racializes migrants. These cases reveal how SIJS advances the heteropatriarchal idea of the nuclear family to justify Central American countries' underdevelopment, as it abstracts from the structural conditions that facilitate migration and necessitate non-nuclear family relations to survive. At the same time, by determining Central American families are lesser than the U.S. ideal of the family, SIJS ultimately advances the project of U.S. empire-building in the region, and simultaneously works to criminalize and racialize immigrant families domestically.[1]

This chapter begins with an overview of SIJS as a legal framework that provides humanitarian relief for migrant children. It goes on to create a critical race theory (CRT) framework that considers imperial legacies of the law. By incorporating anti-imperialist scholarship, this chapter broadens the analytical framework of CRT by recognizing the reach domestic laws have in creating and reinforcing racial subjugation beyond the territorial limits of the United States. The chapter then analyzes successful SIJS claims by Central American unaccompanied children. Through narrative analysis, what becomes clear is the bidirectional nature of humanitarian immigration laws in contributing to both the racialization of migrants domestically and racial hierarchies abroad.

[1] By empire, I am referring to the economic and political objectives imposed by the United States through militarized relationships globally. See, Jacqui Alexander and Chandra Talpade Mohanty, "Introduction: Genealogies, Legacies, Movements," in *Feminist Genealogies, Colonial Legacies, Democratic Futures*, Jacquie Alexander, and Chandra Talpade Mohanty, eds. (New York: Routledge, 1997).

LEGAL FRAMEWORK OF SPECIAL IMMIGRANT JUVENILE STATUS

International Human Rights

Child-specific human rights language appeared on the international stage as early as 1924, when the League of Nations adopted the Geneva Declaration on the Rights of the Child, recognizing rights specific to children and responsibilities adults owe to children.[2] The United Nations (UN) later expanded the Geneva Declaration by adopting the Declaration of the Rights of the Child in 1959.[3] The 1959 Declaration delineated positive and negative child-specific rights, including the right to special protections, and "the right to protection against all forms of neglect, cruelty, and exploitation."[4]

In 1989, the UN recognized continuing vulnerabilities of children worldwide and adopted the Convention on the Rights of the Child (CRC).[5] The CRC not only enshrines children as having human rights, but also provides the international community with standards concerning the treatment of children, providing a comprehensive list of rights and state obligations, including non-discrimination and protection from abuse, abandonment, or neglect.[6] The CRC further states that the "best interests of the child be a

[2] Geneva Declaration of the Rights of the Child of 1924, adopted Sept. 26, 1924, League of Nations O.J. Spec. Supp. 21, at 43 (1924), available at http://www.un-documents.net/gdrc1924.htm.

[3] UN General Assembly, *Declaration of the Rights of the Child*, 20 November 1959, A/RES/1386(XIV), available at: http://www.refworld.org/docid/3ae6b38e3.html.

[4] *Declaration of the Rights of the Child*, principle 9

[5] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: http://www.refworld.org/docid/3ae6b38f0.html.

[6] *Convention on the Rights of the Child*, article 19.

primary consideration in all actions, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies..."[7]

All countries have ratified the CRC, except Somalia and the United States. The United States signed the CRC but refrained from ratifying it, meaning that it is not legally required to implement legislation to give effect to the treaty or enforce its provisions domestically. Law professor Shani King reflects that it is ironic that the United States failed to ratify the CRC given "that the 'best interest of the child' standard is taken from the U.S. and this principle has been guiding U.S. law in the area for more than 125 years."[8] Nevertheless, as a signatory to the CRC, the United States is obligated to refrain from actions that would "defeat the object and purpose of the treaty."[9] Further, even though the CRC is not binding on the United States, the rights embodied in the treaty cannot be completely ignored, as many of these as rights are found in other treaties including the UDHR, ICCPR, and Refugee Convention and Protocol, which the United States has ratified.[10] Lastly, although the United States has not ratified the CRC, it nonetheless has

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[7] *Convention on the Rights of the Child*, article 3.

[8] Shani M. King, "Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors," *Harvard Journal on Legislation* 50 (2013): 354. Note that the best interest standard has been a guiding principle in the area of child custody and dependency.

[9] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: http://www.refworld.org/docid/3ae6b3a10.html. Note that the United States has not ratified the Vienna Convention but "considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties." See, U.S. Department of State, "Vienna Convention," accessed August 16, 2018, https://www.state.gov/s/l/treaty/faqs/70139.htm.

[10] See for example, UN High Commissioner for Refugees (UNHCR), *Refugee Children: Guidelines on Protection and Care*, 1994, available at: http://www.refworld.org/docid/3ae6b3470.html.

been lauded for implementing the best interest of the child standard in immigration law through SIJS.

Domestic Law

As discussed in the previous chapter, like adults, unaccompanied children entered the United States in the 1980s fleeing the civil wars in Central America. While many children were immediately repatriated or placed in removal proceedings, others were held in detention centers. Those held in detention centers were exposed to inhumane treatment in the form of abuse, mistreatment, and denial of necessities. While some children were able to reunify with parents and other family members (following the *Flores Settlement Agreement*), a number of children were unable to leave governmental custody. For those children who remained in the long-term custody of the government and were placed into the foster care system, their fate was indeterminate. Even though the fact that these unaccompanied children had no family and were placed into foster care reflected that they were perhaps the most vulnerable of all migrants, their destiny was met with the full force of legal violence available to the state.

After experiencing abuse and mistreatment in detention centers, these children were placed into the foster care system, which is another regime known for racist state violence against children.[11] Once a child aged-out of foster care, they were placed into removal

[11] Scholarship supports this claim in the context of violence against Black people and violence against indigenous people. See for example, Dorothy Roberts, "Complicating the triangle of race, class and state: the insights of black feminists," *Ethnic and Racial Studies 37*, no. 10 (2014); *Margaret D. Jacobs, White Mother to a Dark Race: settler colonialism, materialism, and the removal of indigenous children in the American west and Australia, 1880-1940* (Lincoln: University of Nebraska Press, 2009).

proceedings and deported if no legal relief was available to them.[12] Social workers for migrant children in foster care were alarmed by the fact these children were deported back to the situation that they fled in the first place.[13] While criticisms of this practice centered around children being returned to "countries where the children had experienced harm and would face inordinately difficult futures,"[14] lawmakers framed the issue as a result of the amnesty provisions laid out in the Immigration and Refugee Control Act, as amnesty was only available for migrants who arrived prior to 1982, leaving many unaccompanied children unable to receive the benefit.[15] This legal quandary led to the creation of the Special Immigrant Juvenile Status in 1990.[16]

Under the original SIJS law, the purpose was to "alleviate hardships experienced by some dependents of the United States juvenile courts by providing qualified aliens the opportunity to apply for special immigrant classifications and lawful permanent resident status, with the possibility of becoming citizens of the United States."[17] The original statute limited SIJS to children who were eligible for long-term foster care, and where it was found

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[12] Elizabeth Keyes, "Evolving Contours of Immigration Federalism: the case of migrant children," *Harvard Latino Law Review* 19 (2016): 45.

[13] Keyes, "Evolving Contours of Immigration Federalism," 45.

[14] Keyes, "Evolving Contours of Immigration Federalism," 45.

[15] Keyes, "Evolving Contours of Immigration Federalism," 45.

[16] Immigration and Nationality Act section 101 (a)(27)(j).

[17] Katherine Porter, "In the Best Interest of the INS: An Analysis of the 1997 Amendment to the Special Immigrant Juvenile Law," *Journal of Legislation 27*, no. 2 (2001):443, quoting the Federal Register at 58 Federal Register 42844 (1993).

not in their best interest to be returned to their country of nationality.[18] The process set up by Congress to obtain SIJS required two steps: first, to petition a state court to make the findings required to apply for the immigration benefit and, second, for the federal government to adjudicate the petition.

By 1997, SIJS came under attack by lawmakers who saw the immigration relief as a loophole for undocumented children. Senator Pete Domenici, a Republican from New Mexico, voiced concerns that children were fraudulently petitioning for SIJS.[19] The Senator described three cases where foreign students entered into the dependency system to obtain SIJS. Senator Domenici requested the Attorney General to investigate immigration fraud in SIJS.[20] While the cases Senator Domenici cited as possible fraud were only three out of 430 SIJS grants that same year, his remarks "coincided with the INS's growing concern about immigration fraud."[21] As a response, Congress amended the SIJS statute limiting it to children who were not only eligible for foster care, but that the care was a result of abuse, abandonment, or neglect.[22] The amendment further limited eligibility by requiring consent from the U.S. Attorney General before beginning any

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[18] Porter, "In the Best Interest of the INS," 444.

[19] Hearing on the FY 98 Budget request before Senate Appropriation Subcommittee on Commerce, Justice, State, 105th Cong., 1st sess., March 1997 (Comments by Senator Pete Domenici), 322.

[20] Gregory Zhong Tian Chen, "Elian or Alien? The contradictions of Protecting Undocumented Children Under the Special Immigrant Juvenile Statute," *Hastings Constitutional Law Quarterly 27*(1999-2000): 640.

[21] Chen, "Elian or Alien?" 640.

[22] Porter, "In the Best Interest of the INS," 448.

dependency proceeding needed to obtain the necessary findings.[23] Notably, the 1997 SIJS amendment coincided with the push towards restrictive immigration laws, such as the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,and the Antiterrorism and Effective Death Penalty Act of 1996.

Nearly a decade passed before SIJS was revisited. During the 2008 reauthorization of the Trafficking Victims Protection Act (TVPRA), Congress expanded SIJS eligibility.[24] First, under the amendment, children no longer had to qualify for long-term foster care to be eligible for SIJS protection.[25] Second, it removed the requirement of obtaining Attorney General consent prior to obtaining SIJS findings.[26] Third, the amendment added language stating that reunification with at least one parent was not viable. The "one parent" language expanded SIJS eligibility by allowing children to apply for SIJS even when they could reunify with the non-offending parent.[27] Fourth, the amendment broadened eligibility by including findings based not only on abuse, abandonment, or neglect, but also a "similar basis" in state law.[28] Thus under the TVPRA, to qualify for SIJS, a migrant child needs to:

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[23] Porter, "In the Best Interest of the INS," 444.

[24] Trafficking Victims Protection Reauthorization Act of 2008, Pub. Law. No 110-457, 122 Stat. 5044 (2008).

[25] Keyes, "Evolving Contours of Immigration Federalism," 56.

[26] Keyes, "Evolving Contours of Immigration Federalism," 56. The 1997 amendment requiring consent from the federal government to pursue SIJS at the state level limited cases that could be heard in the state court. Removing this limitation allowed more cases to be brought.

[27] Keyes, "Evolving Contours of Immigration Federalism," 56.

[28] Ibid. Note that a "similar basis found under state law" was added to accommodate the various statutory language employed by state courts to make decision related to the care and custody of children. In establishing "a similar basis" an applicant must establish that it is similar finding to abuse, neglect, or

(1) be declared dependent on a juvenile court located in the United States or be declared dependent on an individual or entity appointed by a State or juvenile court,

(2) the court must find that the minor is unable to reunify with one or both parents due to abuse, neglect, abandonment, or a similar basis found under state law, and

(3) it is determined that return to the child's country of nationality or last habitual residence is not in the child's best interest.[29]

Overall, SIJS diverges from the general immigration framework, which largely fails to differentiate between adults and children, by introducing the best interest of the child standard. In doing so, lawmakers were lauded for incorporating international human rights standards, particularly the Convention on the Rights of the Child, within the area of immigration law. [30] Nevertheless, even with the incorporation of the best interest of the child standard, amendments to SIJS have mirrored lawmakers' uneven stance on immigration, as evidenced by the 1997 amendment restricting the law and the 2008 amendment broadening it. The fluctuation in eligibility is also reflective of migrant children's interest convergence with lawmakers, under which restrictive immigration policies influenced the decision to scale back SIJS in 1997, while locating unaccompanied

abandonment. See, Donald Neufeld and Pearl Chang, "Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions," *USCIS Memorandum*, HQOPS 70 (March 24, 2009).

[29] Special immigrant status for certain aliens declared dependent on a juvenile court- 8 CFR §204.11.

[30] Jessica R. Pulitzer, "Fear and Failing in Family Court: Special Immigrant Juvenile Status and the State Court Problem," *Cardoza Journal of Law & Gender 21* (2014):203.

children as victims of trafficking (as discussed in the previous chapter) may have influenced the broadening of SIJS in 2008.

At the same time, even though SIJS has been framed as humanitarian protections codified for migrant children, it has come under criticism by advocates and scholars. These critiques stem from the bifurcated system created by Congress.[31] SIJS is unique in immigration law for requiring the underlying evidence to be determined in a state court (e.g., dependency, family, or probate court). The reasoning behind the bifurcated system was two-fold. State courts were accustomed to making best interest of the child determinations in family and dependency proceedings and, thus, held competency to make substantive and procedural decisions regarding the welfare of children.[32] Further, state courts were already involved in dependency proceedings regarding migrant children in foster care, providing "procedural convenience."[33] Lastly, by placing the best interest determination with the state court, Congress was able to avoid the conflict of interest within the Immigration and Naturalization Service (INS), which was tasked with removing migrant children while at the same time providing for their welfare.[34]

However well-reasoned, the bifurcated system has been criticized for making states gatekeepers to immigration relief. Because state law and procedures vary, similarly

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[31] See for example, Keyes, "Evolving Contours of Immigration Federalism."

[32] Keyes, "Evolving Contours of Immigration Federalism," 37.

[33] Keyes, "Evolving Contours of Immigration Federalism," 37.

[34] Ibid.

situated migrant children are treated differently across states, producing uneven results.[35] Further, even within same states, judicial attitudes vary, with some judges uncomfortable and/or hostile to making necessary findings for migrant children.[36] These challenges ultimately undermine the best interest of the child principle as a migrant child's success in obtaining SIJS becomes dependent on a host of conditions unrelated to their claim.

Another issue with the bifurcated system is that state courts are required to make "merit-based findings comparing American conditions to that of the child's home country."[37] State-level judges are responsible for making decisions based on "evidence in the record about safety, and medical and educational opportunities in the home country…[which]…necessarily (for the child's case to be well argued) emphasize the worst parts of the home country and the best parts of the U.S."[38] Legal scholar Elizabeth Keyes has noted these findings potentially implicate foreign policy as "[i]t is at least plausible to think that the source countries for most SIJ cases (El Salvador, Honduras and Guatemala) would react negatively to consistent findings of harm or lack of opportunities within their borders."[39] Although limited to this one sentence, Keyes' remarks acknowledge the implication of the problematic narratives SIJS creates around Central America. Expanding

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[35] Michelle Anne Paznokas, "More than one Achilles' heel: exploring the weakness of SIJS's protection of abused, neglected, and abandoned immigrant youth," *Drexel Law Review 9* (2017).

[36] David Thronson, "Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. State Courts," *Texas Hispanic Journal of Law and Policy 11* (2005).

[37] Keyes, "Evolving Contours of Immigration Federalism," footnote 59.

[38] Keyes, "Evolving Contours of Immigration Federalism," 50.

[39] Keyes, "Evolving Contours of Immigration Federalism," 51.

on this idea, what does it mean for a state court to make findings based on a child's experience, many times occurring in their home country? How do we begin to analyze a domestic law that ultimately makes judgments of other countries? To explore these questions, I propose developing a CRT analytic that accounts for legal imperialism. By expanding the scope of CRT to include implications for racial subjugation beyond the territorial limits of the United States, I hope to add to the robust theoretical traditions of CRT and show how CRT is methodologically well-suited to account for global racial projects.

CRITICAL RACE THEORY AND LEGAL IMPERIALISM

Critical Race Theory developed out of the "American experience" and is, therefore, historically, culturally, and socially specific. While it emerged as a theoretical and methodological framework for explaining the history of oppression of Black people in the United States, [40] its intersectional and multidimensional approach has been applied to explain the subordination of other oppressed groups within the United States. Even though the robust analytical nature of CRT is reflected in its ability to explain different racial processes, it is still largely bound to domestic laws (e.g., anti-discrimination, education, harassment, etc.) and, consequently, is circumscribed by the geographical limits of the nation-state.

[40] See, Mari Matsuda, "Voices of America: accent, antidiscrimination law, and a jurisprudence for the last reconstruction." *Yale Law Journal 100* (1991): 1331.

Even when CRT scholarship delves into discussions that go beyond national boundaries, such as immigration, foreign policy, or colonial legacies, it is largely to trace and explain the domination of particular group experiences within the United States. For example, CRT scholars have traced the settler colonial history of the United States to explain the law's role in the justification of the colonization of indigenous peoples.[41] The colonization of Mexican territory and peoples through the concept of Manifest Destiny is also explored, detailing how it was central in racializing colonized groups and contributing to racial hierarchies.[42] Moreover, Asian American legal scholarship has utilized CRT in exploring how U.S. foreign policy influenced the process of racialization of Asian Americans in this country. For example, in the 20th century, the internment of Japanese-Americans explicitly linked U.S. foreign policy to the racist state violence occurring domestically, as exemplified in the judicial decision *Korematsu v. United States*.[43] In addition to exposing the role foreign policy has played in the racial impact of laws on Asian Americans, scholars have challenged the territorial limitations of the racialization process of Asians in the United States. Lisa Lowe explores the social construction of the Asian American race by challenging concepts of fixed borders and fixed citizenship.[44] Even

[41] Native scholars and scholarship addressing the continued colonization of indigenous peoples in the United States has given rise to TribalCrit, which is an offshoot of CRT that emphasizes colonization rather than race as the determining factor of subordination and seek sovereignty and self-determination as its goal. See, Bryan McKinley Jones Brayboy, "Toward a Tribal Critical Race Theory in Education," *The Urban Review 37*, no. 5 (2005).

[42] See, Laura Gomez, *Manifest Destinies: The Making of the Mexican American Race* (New York: New York University Press, 2007).

[43] 323 U.S. 214 (1944). See generally, Robert S. Chang, "Toward an Asian American legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space," *California Law Review 81* (1993):1304.

though her work shows the connections between the United States and Asia, it is to analyze the historical and contemporary processes that have created Asian Americans as perpetual foreigners within the United States. As these examples illustrate, CRT and its related critical legal approaches to race, take foreign policy, international relations, and international law (via treaties) as externalities that affect domestic racial projects reflected in domestic laws.

Given the United States' centrality in the international system and its role as exporter of cultural, economic, and political norms, it is important to give thought to the discursive and material effects domestic laws may have abroad and, specifically, how they may contribute to global racial hierarchies. While CRT has developed in the context of the United States, it nonetheless is well-suited to consider the varied ways laws function in maintaining racial hierarchies and white supremacy globally. Recall, CRT takes as a premise that racism and racial privilege are foundational to U.S. society and its corresponding legal structure. Taking from this premise, CRT "questions the very foundations of the liberal order, including equality theory, [and] legal reasoning".[45] Accordingly, CRT seeks "to show how contemporary law—including contemporary anti-discrimination law—paradoxically accommodates and even facilitates racism".[46] As a methodology, CRT draws from various strands of critical theory, including post-

[44] Lisa Lowe, *Immigrant Acts: On Asian American Cultural Politics* (Durham: Duke University Press, 1996).

[45] Richard Delgado and Jean Stefancic, *Critical Race Theory*, 2nd ed. (New York: New York University Press, 2012): 3.

[46] Angela Harris, "Critical Race Theory," *Selected Works* (January 2012): 6, accessed April 20, 2018, http://works.bepress.com/angela_harris/17.

modernism and post-structuralism, and has developed an approach towards interrogating the law that critical legal theorist Angela Harris calls a "hermeneutics of skepticism."[47] This approach places legal doctrine and the development of jurisprudence within larger political, social, and historical contexts in order to "identify the continuity of racial oppression across time."[48]

Through its critique, CRT, while not offering a complete rejection of liberalism, does focus on exposing the powers that produce a racially unequal and stratified society. In this way, CRT shares roots with other leftist theories that question the liberal political, economic, and jurisprudential order. Anti-colonial/anti-imperialist scholarship similarly questions the modern international system by placing it within the larger socio-historical context of colonialism and the epistemological foundations of liberalism that justified colonization.[49] Thus, it is through its critique that CRT can contribute to anti-colonial/anti-imperialist scholarship. Indeed, there have been calls for the application of CRT to international law due to its theoretical robustness that "knows no geographic, spatial, or cultural boundaries."[50] While SIJS is a domestic law, the fact that it codifies international

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[47] Harris, "Critical Race Theory,"

[48] Harris, "Critical Race Theory," 10.

[49] Foundational anti-colonial theorists include Aimé Césaire, Discourse on Colonialism (New York: Monthly Review Press, 2000); Frantz Fanon, The Wretched of the Earth (New York: Grove Press, 2004); and Albert Memmi, The Colonizer and the Colonized (Massachusetts: Beacon Press, 1991). See, Achille Mbembe, "Necropolitics," *Public Culture 15*, no. 1 (2003), and Anibal Quijano, "Coloniality of Power, Eurocentrism, and Latin America," *Nepantla: Views from South 1.3* (2000), for examples of current strains of anti-colonial scholarship.

[50] Makau Mutua, "Critical Race Theory and International law: The View of an Insider-Outsider," *Villanova Law Review 45* (2000): 848-849.

human rights standards, and is applied to other countries in making determinations at the state level, a discussion of the law at the international level may provide some insights into how to broaden CRT's approach to understand SIJS.

Racial Imperialism

CRT takes as a starting point that law works to subjugate people of color in the United States, and that the current era of colorblindness only masks this domination. This assertion parallels critical assessments of international human rights law and discourse and offers a space from which to extend CRT's theoretical and methodological framework.

For instance, legal scholar Makau Mutua offers a valuable critique of the cultural implications of human rights on non-Western countries. Specifically, he critiques the universalization of human rights for obscuring its cultural and historical foundations.[51] Contextualizing the rise of human rights in liberalism, he shows how the "culture" of human rights is that of democracy and cautions that, as implemented, human rights are an imperialist project by the West.[52] To explicate how Western cultural imperialism functions in the current global order, Mutua applies the construct of savages-victims-saviors (SVS). Through the SVS construct, he reveals the continuity between European colonialism to today's human rights corpus. Analyzing human rights law and discourse through the SVS

[51] Makau Mutua, *Human Rights: A Political and Cultural Critique* (Philadelphia: University of Pennsylvania Press, 2002), 3.

[52] Mutua, *Human Rights,* 3, stating: "The paradox of the corpus is that it seeks to foster diversity and difference but does so only under the rubric of Western political democracy." He further explains that it is through the "universalist push seeks to destroy difference" that the human rights becomes an imperialist project "by creating the rationale for various forms of intervention and penetration of other cultures with the intent of transforming them into the liberal model." Mutua, *Human Rights,* 5.

prism, it becomes apparent that colonial tropes that justified the violent subordination of non-Western people are rearticulated today to advance human rights protections (via liberalism) globally. In this construct, the "savage" is presented as states "so cruel and unimaginable as to represent their state as a negation of humanity."[53] Upon closer inspection, it is not the state but the state as the projection of a culture that is the savage. As Mutua contends, "The state only becomes a vampire when 'bad' culture overcomes or disallows the development of 'good' culture. The real savage, though, is not the state but a cultural deviation from human rights."[54] Thus, when states are admonished for violating human rights, it is a rebuke of a culture that is seen as savage. The victim in the SVS construct is depicted as the helpless innocent whose humanity has been denied by a savage state, "or the cultural foundations of the state." Lastly, the savior is "the human rights corpus itself with the United Nations, Western governments, INGOs, and Western charities as the actual rescuers, redeemers of a benighted world. In reality, however, these institutions are merely fronts. The savior is ultimately a set of culturally based norms and practices that inhere in liberal thought and philosophy."[55] Today's human rights advocates, largely Westerners, are cast as the saviors bringing the culture and practices of human rights to largely third world, Non-Western, non-white countries.

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[53] Mutua, *Human Rights,* 10.

[54] Mutua, *Human Rights,* 11.

[55] Mutua, *Human Rights,* 11.

As with past colonial projects, the human rights movement, as analyzed through the SVS construct, invokes racial connotations that work to re-entrench a global racial hierarchy. While human rights discourse is largely race-neutral, replacing discussions of racial inferiority with a preoccupation with cultural norms and practices (e.g. female genital mutilation), the fact that the "savages" and "victims" are non-white non-Westerners, while the saviors are white reveals how, "[i]t's fundamentally Eurocentric and falls within the historical continuum of the Eurocentric colonial project, in which actors are cast into superior and subordinate positions."[56]

Mutua's work exposes how colonial relations, through the rhetoric of culture, remain in the current international human rights regime. While Mutua's work emphasizes cultural imperialism, the human rights regime's roots in the colonial project are explicitly racial and violent. Randall William's analysis of the politics of human rights reminds us that while masked through rights discourse, human rights are centrally a racially violent project. Building off Frantz Fanon's work on the racial violence of colonialism, Williams argues that the ahistoricism of international human rights works to obscure the colonial legacies inherent in the current human rights regimes.[57] Focusing on the violence of colonialism, Fanon argues this violence is embedded in all colonized societal structures including the political, juridical, economic, and cultural spheres. Moreover, these violent racialized structures are justified and legitimized through the colonial understandings of

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[56] Mutua, *Human Rights,* 12.

[57] Randall Williams, *The Divided World: Human Rights and Its Violence* (Minneapolis: University of Minnesota Press, 2010).

humanity, where the colonizers humanity is realized through the negation of humanity for the colonized.[58] Williams argues that the violent racial structures of colonialism live on today despite the decolonization movements of 20th century and have been rearticulated through human rights, which becomes a justification for imperialist and neo-colonial endeavors by the West.

Legal Imperialism and White Supremacy

Combined, Mutua and Williams, via Fanon, offer an analytic from which to understand the role of international human rights law in the reproduction of global racial hierarchies. They further provide insight into how international laws, such as human rights, maintain white supremacy globally. This is revealed when applying legal scholar Cheryl Harris' theoretical construct, whiteness as property, to Mutua's and Williams' analysis of human rights.

In *Whiteness as Property*, Harris details the history of property law in the United States.[59] Premised on slavery, Harris argues that property law developed to justify legal and social structures built on race. As Harris explains, "it was the interaction between conceptions of race and property that played a critical role in establishing and maintaining

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[58] It is important to note that, for Fanon and scholars who build on his theory of colonization, colonization is understood in the African context and, more specifically, the role of anti-blackness in the project of colonization by the West. Thus, for scholars such as Lewis Gordon, the Manichean world that Fanon describes becomes used to explain the onto-epistemological condition of anti-blackness, where the opposite of human beings who are normatively white, is its negation, which is blackness. See, Lewis Gordon, *Her Majesty's Other Children: Sketches of Racism from a Neocolonial Age* (Lanham: Rowman & Littlefield, 1997).

[59] Cheryl I. Harris, "Whiteness as Property," *Harvard Law Review 106*, no. 8 (1993).

racial and economic subordination. The hyper-exploitation of Black labor was accomplished by treating Black people themselves as objects of property. Race and property were thus conflated by establishing a form of property contingent on race."[60] She further argues that laws justifying colonization were similarity rooted in race.[61] In the United States, the taking of indigenous lands was justified "through a system of property rights in land in which the 'race' of Native Americans rendered their first possession rights invisible and justified conquest."[62] Put another way, the possession of lands by indigenous people was delegitimized through legal definitions that centered white cultural practices. It is through this delegitimization that race becomes central to the taking of indigenous land. Not limited to the context of U.S. nation-building, racialized conceptions of property underpinned other forms of colonial practices rooted in other areas of law, such as international law.

Legally, the possession of non-European lands and people was justified through the international legal principle: the Doctrine of Discovery. As Native legal scholar Robert Miller cogently explains, the Doctrine of Discovery provided "that 'civilized' and 'Christian' Euro-Americans automatically acquired property rights over the lands of native peoples…. this legal principle was shaped by religious and ethnocentric ideas of European

[60] Harris, "Whiteness as Property," 1716.

[61] Similarly, in the case of settler colonialism, "only white possession and occupation of land was validated and therefore privileged as a basis for property rights." Harris, "Whiteness as Property," 1716.

[62] Harris, "Whiteness as Property," 1721.

and Christian superiority over the races and religions of the world."[63] While Miller's research on the Doctrine of Discovery is in the context of settler colonialism in the United States and other settler nations, it nonetheless points to the constitutive relationship between race and property in the colonial world, which structured the colonial system. Therefore, race and, more specifically, racialized conceptions of property in both colonization and slavery provided the basis and justification for each system, which was then ratified by law. The fact that the various systems discussed above—including slavery, colonialism, and international law—are rooted in a racialized understanding of property provides a conceptual space to place CRT in conversation with scholars of imperialism and human rights.

Harris contends that the privilege of whiteness evolved into an expectation and thus can be understood as a property interest in whiteness, protected by the law. This expectation is built on assumed white supremacy, which reproduces Black subordination.[64] While overtly recognized in the racist slave and Jim Crow era laws, it continues to exist in the current colorblind era, reemerging in the jurisprudence on de-segregation and affirmative action. Ultimately, the property interest in whiteness is maintained by asserting that race does not matter, and by denying the historical context and legacies of white domination.[65] Similarly, as both Mutua and Williams assert, the rise of international human

[63] Robert J. Miller, "The Doctrine of Discovery, Manifest Destiny, and American Indians," In *Why You Can't Teach United States History Without American Indians, eds. Susan Sleeper-Smith, Juliana Barr, Jean M. O'Brien, Nancy Shoemaker, and Scott Manning Stevens* (Durham: University of North Carolina Press, 2015): 113.

[64] Harris, "Whiteness as Property," 1731.

[65] Cheryl I. Harris, "Whiteness as Property," 1768.

rights laws and norms, and its accompanying rhetoric of universality and equality, masks unequal relations premised on race.

Further, human rights have come to justify neo-imperialist conquests by Western nations into non-Western ones.[66] In this way, the expectation of the West being able to extract resources and capital from non-Western countries, reflects a continued property interest in whiteness stemming from the Age of Discovery to today's international and human rights laws. Beyond extraction of resources, Mutua's SVS construct points to the white supremacist interest in human rights, in that the human rights corpus is largely a reflection of Western ideals and is deployed in a way that provides redemption for Westerners while reproducing the subordination of non-Western, non-white nations. In this way, human rights become an exemplification of a global interest in white supremacy, which is ultimately rooted in racialized conceptions of property. The next section analyzes the Special Immigrant Juvenile visa with this analytical framework in mind.

SIJS AS A RACIAL PROJECT

In the previous section, I developed an analytic that accounts for both domestic and international reproduction of racial hierarchies and white supremacy. In this section, I analyze litigated SIJS cases to explore how this law becomes a site for both domestic and international racial projects.

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[66] See for example, China Melville's explanation of international law and what he calls modern imperialism, as exemplified by U.S. intervention and imperialist war into Iraq. China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (London: Brill, 2004), 271-275.

Since its creation in the 1990s, SIJS visas have been insignificant compared to total immigration benefits granted. The 2014 "surge" in unaccompanied minors saw a drastic rise in SIJS visa applications. In the five years prior to the "surge," SIJS visa applications remained relatively insignificant with 1,646 applications received in 2010, compared to 11, 500 applications received in 2015.[67] In the case of Central American children, SIJS offers a viable alternative to asylum. Since claims for asylum are routinely denied due to the nonrecognition of gang-based asylum claims and, as of 2018, domestic violence claims, SIJS offers a chance of obtaining legal status in the United States. As discussed earlier, to be eligible for SIJS, a minor must be declared dependent on a juvenile court or placed in the custody of an individual or agency by a court. Furthermore, the court must find that "reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law" and that "it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality..."[68]

A review of successful Central American SIJS cases reveals common narratives that complicate Central American children's claims for humanitarian relief by undermining their humanity. After analyzing over 100 SIJS case summaries, the following themes emerged: 1) Central American fathers as the source of abandonment and abuse; 2) children

[67] U.S. Citizenship and Immigration Services, Number of I-360 Petitions for Special Immigrants with a Classification of Special Immigrant Juvenile by Fiscal Year, Quarter and Case Status January 1-March 31, 2018, last accessed August 1, 2018, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Citizenship/I360_sij_performancedata_fy2018_qtr2.pdf.

[68] Immigration and Nationality Act section 101 (a)(27)(J).

left with extended family contributing to their abuse, abandonment, or neglect; 3) economic instability or poverty seen as evidence of neglect; and 4) gang violence and law enforcement/government corruption as evidence that it is not in the best interest of children to be returned to their home country.[69] The cases that gave rise to these themes were litigated in California, but are representative of the national narrative around SIJS cases evidenced by the stories produced by legal advocates throughout the country,[70] and national media reports.[71] I provide the following narratives from which to unpack the themes noted above. These narratives are an amalgamation of the cases I reviewed and cases that I personally litigated.

Narrative 1: "Rosa" is from El Salvador. When her mother was pregnant, Rosa's father beat her mother regularly while intoxicated. Rosa's father abandoned her and her

[69] 107 case summaries were acquired with permission from a legal nonprofit and were found IRB exempt (determination on file with author). These summaries represent successfully litigated cases in California state court between 2015-2017, coinciding with the "surge" of unaccompanied children. I cross-referenced them against other legal provider examples of successful SIJS claims produced in legal trainings andadvocacy materials. Lastly, I compared case summaries to my own experience litigating SIJS cases.

[70] Typically, these narratives are also amalgamations of real-life clients and scenarios and are used in practice and training manuals. See for example, Kids In Need of Defense, "Special Immigrant Juvenile Status," accessed August 1, 2018, https://supportkind.org/wp-content/uploads/2015/04/Chapter-4-Special-Immigrant-Juvenile-Status-SIJS.pdf; Capital Area Immigrants' Rights Coalition, *Practice Manual for Pro Bono Attorneys: Representing Unaccompanied Immigrant Children* (January 2014), accessed August 1, 2018,https://www.caircoalition.org/sites/default/files/1391555303CAIRCoalitionPracticeManualforRepresentingUnaccompaniedImmigrantChildrenJan312014.pdf.

[71] A multitude of reports regarding SIJS has been produced in news outlets since the 2014 "surge". See for example, Richard Gonzales and Marisa Penaloza, "Halt on Juvenile Immigrant Visa Leaves Thousands in Limbo," *National Public Radio* (July 28, 2016), accessed August 1, 2018, https://www.npr.org/2016/07/28/483391731/halt-on-juvenile-immigrant-visa-leaves-thousands-in-limbo; John Otis, "Dangers Behind and Uncertainties Ahead, but Together at Last," *New York Times (online)* (January 16, 2017), accessed August 1, 2018, https://www.nytimes.com/2017/01/16/nyregion/neediest-cases-fund-rivera-el-salvador.html; Joseph De Avila, "Child Immigrant Find Safety-more than 5,000 youths from border influx are in region, awaiting hearings," *Wall Street Journal* (July 30, 2014), accessed August 1, 2018, https://www.wsj.com/articles/immigrants-in-n-y-region-take-breather-awaiting-hearings-1406684709.

mother when Rosa was eight months old. Struggling to support Rosa, her mother decided to migrate to the United States to work and send money for her when she was 3 years old. Rosa's mother left her in the care of her maternal grandmother. Under her care, Rosa was a victim of sexual abuse and gang harassment. One of Rosa's uncles began sexually abusing her when she was about 12 years old. Around the same time, the local gang began threatening her on her way to school. They wanted her to join the gang and be the girlfriend of the one of the members. She refused, and the gang began threatening to kill her family. Fearing for her life and that of her family, Rosa fled El Salvador to reunite with her mother.

Narrative 2: "Jonathan" fled Guatemala at the age of 15. In Guatemala, he was unable to go to school because his family could not afford it. Instead he was forced to work on the small plot of land his parents owned. He helped his parents grow corn and harvest it, beginning at the age of 8 until he left for the United States. Sometimes, Jonathan would hurt himself badly while working, but his parents refused to take him to receive medical care. Jonathan's father would drink and beat him at times, leaving bruises on his body. After being threatened and beat by gang members, Johnathan decided to go to the United States and live with his maternal aunt.

Narrative 3: "Jason" is from San Pedro Sula, Honduras. He never met his father, as his father left his mother before Jason was born. Jason became a target of gang threats when he was 12 years old. The local gang tried to recruit him. One day, on his way to school, a gang member put a gun to his head and told him he had to join the gang or, otherwise, he would die. Jason told his mother, who went to make a complaint to the

local police station. The next day, gang members left a note saying they were going to kill him for going to the police. He believes that the police told the gang about the report. Jason fled for the United States that very night.

Narrative 4[72]: "Victor" lived with his mother, brother, and maternal grandparents in El Salvador. He never established a relationship with his father because his father abandoned him and his family when he was still an infant. When Victor turned 14, the local gang members would harass him to join the gang. Victor refused. In response, the gang members threatened to forcefully "jump" him into the gang if he continued to refuse. Victor was also harassed by the police in his town. They would stop him and accuse him of being in a gang. The police beat him several times because they thought he was a gang member and did not believe Victor when he would tell them he was not in a gang. His family could not protect him from the gangs or the police forcing him to flee to the United States.

Narrative 5: "Esmeralda" is from Honduras. Her father abandoned her before she was born. She lived with her mother and older brother until she was 5 years old, when her mother decided to leave for the United States. Esmeralda and her brother were left in the care of Esmeralda's maternal grandmother. She talked to her mother regularly over the phone and skype. All was relatively well for Esmeralda. She went to school and was provided for. However, the area that she lived in was controlled by gangs. When

[72] This example is taken near verbatim from one of the case studies analyzed. Note that this narrative over laps with common asylum claims brought by Central American children. As an attorney, I represented children with these same facts in asylum rather than SIJS cases where there was no abuse, abandonment, or neglect by a parent.

Esmeralda was about 12 years old, gang members killed her brother for refusing to join them. Esmeralda's grandmother could no longer protect her, and so her mother sent for her to come to the United States.

Central American fathers as a Source of Abuse and Abandonment

To qualify for SIJS, a child must have faced abuse, abandonment, or neglect by at least one parent.[73] In the majority of SIJS cases I reviewed, Central American fathers were either absent during the entirety of a child's life, or were the source of either physical, emotional, or sexual abuse. These narratives project the idea that the nuclear family does not exist in Central America. For example, in the cases of "Jason" and "Esmeralda," their fathers are completely absent. Even where a nuclear family is found, it is regarded as an aberration to the ideal U.S. family, as is in the narrative of "Jonathan," where the father is an alcoholic who beats his son. Further, mothers' complicity in abandonment and/or abuse is also reflected in SIJS. In the case where there is abandonment by fathers, Central American female sexuality looms in the background. Rarely ever noting the marital status between parents, the SIJS narratives imply non-marital sexual relationships, which are then presented as a cause of abandonment and the non-normativity of Central American

[73] Also note that each definition of abuse, abandonment, or neglect is state-specific. For example, under California law, abandonment is found in both California Welfare and Institutions Code section 300(g) and in Family Code section 7822(a)(3). Under the family code, a child is found to be abandoned when a child has been left by one parent "in the care and custody of the other parent for a period of one year without any provision for the child's support, or without communication from the parent, with the intent on the part of the parent to abandon the child."

families. Where there is a two-parent household, the detailed abuse by fathers is met with silence on the part of the mothers, or their own victimization.

When placed into the larger history of U.S. nation-building, these narratives reveal the underlying logic of heteropatriarchy, which has been deployed in the conquest of Natives and enslavement of Africans and has since formed the basis for other imperialist endeavors. The concept of heteropatriarchy, or "the social system in which heterosexuality and patriarchy are perceived as normal and natural, and in which other configuration are perceived as abnormal, aberrant, and abhorrent,"[74] functions to naturalize social hierarchies. As Ann McClintock notes, "the family image came to figure hierarchy within unity as an organic element of historical progress, and thus became indispensable for legitimatizing exclusion and hierarchy within nonfamilial social forms, such as nationalism, liberal individualism, and imperialism."[75] Thus, the concept, or logic, of heteropatriarchy is the idea of a traditional family and "family values." As Patricia Hill Collins explains, the deployment of the ideal family naturalizes hierarchies of race, gender, age, and sexuality, by explaining them through familial hierarchies where the family is led by the patriarch with subservient positions of mother and children. This logic is then projected onto racial hierarchies, where White/European people are portrayed as civilized, intellectually mature adults who must administer over non-whites, who are portrayed as

[74] Maile Arvin, Eve Tuck, and Angie Morrill, "Decolonizing Feminism: Challenging Connections between Settler Colonialism and Heteropatriarchy," *Feminist Formations 25*, no. 1 (2013): 13.

[75] Anne Mcclintock, *Imperial Leather: Race, Gender, and Sexuality in the Colonial Contest* (New York: Routledge, 1995), 45.

intellectually underdeveloped and uncivilized children.[76] This logic further undergirds U.S. imperialist endeavors. As Andrea Smith observes, the current War on Terror links heteropatriarchy as a defense against terrorism, by implying that the nation is vulnerable to terrorism due to aberrations of the ideal family.[77]

In the examined SIJS claims, the logic of heteropatriarchy functions as a racial organizing tool domestically and abroad. Domestically, it reinforces Central Americans' position in the U.S. racial hierarchy and racializes them through the cultural deficiency arguments. Although the narratives are applying those culturally deficient arguments to offending parents who may still be in El Salvador, Guatemala, or Honduras, these arguments are projected onto the children seeking relief. Because these children are being projected as coming from culturally deficient families, they are racialized and placed in the U.S. racial hierarchy.

Children Left with Extended Family Contributing to Their Abuse, Abandonment, or Neglect

Without a traditional heteropatriarchal household to depend on, Central American mothers are unable to provide for their children, causing them to migrate north. While this narrative largely depicts mothers as having noble intentions, it ultimately places fault on

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[76] Patricia Hill Collins, "It's All in the Family: Intersections of Gender, Race, and Nation," *Hypatia 13*, no. 3 (1998): 65.

[77] Andrea Smith, "Heteropatriarchy and the Three Pillars of Settler Colonialism." In, *The Color of Violence: The INCITE! Anthology*, eds. Andrea Lee Smith, Beth E. Richie, Julia Sudbury, and Janelle White (South End Press, 2006), 68–73.

mothers for leaving their children in the care of extended family members who are abusive, neglectful, or generally unable to provide for the safety of the child. In the example of "Rosa," her sexual abuse is a direct result of her mother's absence from the home. In that case, the abandonment by Rosa's father and the economic migration of her mother destabilized the ideological construction of the ideal U.S. family, as there was no patriarch or caretaker, but rather a substituted family consisting of extended family and corresponding abuse. Similarly, in the case of "Esmeralda," her mother's decision to leave her and her brother in their grandmother's care contributed to her brother's death, as there was no one adequately able to protect them against gang violence. Recall that the logic of heteropatriarchy constructs the ideal family as a "heterosexual, two-parent household, where the male is the patriarch and breadwinner and the female parent is the caretaker and nurturer of the family."[78] The Central American families at the center of SIJS are those families that diverge from the U.S. ideal, and represent the consequences of that divergence. Notably, the construction of the ideal family has played a significant role in immigration laws, regulating who may enter the country, with primacy given to heteronuclear families.[79] With SIJS, this ideal is turned on its head in that those fleeing the non-heteronormative nuclear family are provided refuge. However, because protections rely on finding that non-nuclear families are pathological, the consequence is that an entire culture is pathologized.

[78] Rupaleem Bhuyan, "The Production of the "Battered Immigrant" in Public Policy and Domestic Violence Advocacy," *Journal of Interpersonal Violence 23* (2008): 161.

[79] See, Jennifer Chacon, "Loving Across Borders: Immigration Law and the Limits of Loving," *Wisconsin Law Review* (2007).

In the process of pathologizing Central American families, SIJS claims create a myopic view of parenting that ignores the structural forces that complicate families and require non-nuclear families as a survival strategy. Sociologist Leisy Abrego's research on Salvadoran families thoughtfully illuminates the structural conditions that have led to mothers and fathers' migration away from their children.[80] As she observes, due to historical economic conditions, the civil war, and neoliberal policies, the migration of Salvadoran parents, particularly mothers, should be understood as a survival strategy that has created transnational families. Rather than seen as abhorrent, Abrego's research unmasks the complexities of Central American families, which have been negotiated in response to economic and political factors. In the case of women, these forces have transformed motherhood to include international migration to support their children.[81] By ignoring these realities, SIJS claims reinforce culturally deficient argument against Central American parents, families, and nations.

Economic Instability or Poverty Seen as Evidence of Neglect

The issue of economic migrants is central in debates around immigration—specifically, the political will to categorize migrants as economic migrants, rather than refugees, in order to deny protections from the state.[82] In U.S. asylum and refugee laws,

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[80] Leisy J. Abrego, *Sacrificing Families: Navigating Laws, Labor, and Love Across Borders* (Stanford: Stanford University Press, 2014).

[81] Abrego, *Sacrificing Families,* 17.

[82] As was the case with Central American migrants during the 1980s. See, Susan Bibler Coutin, "From Refugees to Immigrants: The Legalization Strategies of Salvadoran Immigrants and Activists," *The International Migration Review 32*, no. 4 (1998).

economic migrants are not seen as genuine refugees worthy of state protection. In the case of SIJS, the criminalization of economic migration appears discursively through condemning non-nuclear families, which result in the migration of mainly mothers. In this narrative, the economic migration of parents creates the condition for any traumatic experiences that occur to children while under the care of extended family.

Related to the economic migration of parents contributing to the abuse, abandonment, or neglect of children, are the economic conditions in the home country. Economic instability or poverty in the home country is taken as evidence of neglect. In the case of "Johnathan" his parents are unable to send him to school, and instead make him work. Under California Penal Code Section 11165.2 general neglect includes "the failure to provide adequate food, clothing, shelter, medical care, or supervision, where no physical injury to the child has occurred." By applying California law to conditions in Guatemala, in this example, "Jonathan's" parents will be found negligent for being unable to adequately provide food or medical care. Additionally, the fact that he is a child out of school will be seen as an act of negligence or abuse by the parents. Under California Education Code, children between six and 18 are required to attend school. Violations of compulsory education can lead to parents being fined or jailed for a misdemeanor under Penal Code Section 272. While courts are unable to fine or jail "Jonathan's" parents, by applying these standards, they are projecting criminality on Central American parents and, more generally, the entire region for being poor.

Gang Violence and Law Enforcement Corruption as Evidence That it is Not in a Child's Best Interest to Return to Their Home Country

The best interest of the child standard is at the center of the final element for meeting SIJS. In making a finding that it is in the best interest of a child to not be returned to their home country, the California state court applies a comparative assessment,[83] under which "the court can focus on circumstances shown by the evidence presented to be directly connected to the child's life and relationships in the United States and in his country of origin."[84] In other words, the court compares conditions the child lived in in their home country to their conditions in the United States. The primary concern for the court in assessing these conditions is assuring the health, safety, and welfare of the child.

In nearly all Central American SIJS claims analyzed, gang violence is either the impetus for fleeing, or an exacerbating factor in making the decision to flee. For example, in all five narratives provided, gang violence is the determinative factor for fleeing. In the story of "Jason," gang violence is met with impunity by law enforcement, while in the case of "Victor," police violence is equally as harmful as the violence from gangs. By creating this narrative, which is then supported by country conditions, the state court is denouncing entire countries for their violence and lack of rule of law. These violent conditions, coupled with the underlying abuse, abandonment, or neglect, create an image of Central America,

[83] It is a relative standard that requires the court to compare one set of circumstances against another.

[84] Curtis L. Child, "Memorandum to the Presiding Judges of the Superior Courts and the Court Executive Officers of the Superior Courts on Senate Bill 873 and the Special Immigrant Juvenile Process in the Superior Courts," *Judicial Council* (Sept. 30, 2014), 16.

where violence, corruption, and cultural norms give rise to the mistreatment of children. This is then compared to the lives Central American children live here in the United States. The comparative assessment between countries appears to provide an advantage to Central American children, as their best interest will nearly always favor remaining in the United States. However, by articulating the gang violence and related impunity in home countries, these narratives work to criminalize the region. At the same time, the negative narratives around gang violence in Central America is then projected on these same children, implicating them in the very criminality they seek to escape. This "imputed gang identity"[85] is then used as evidence to justify restrictive policies against Central American youth living in the United States. For example, citing gang violence, the current administration has begun attacking SIJS as a "loophole" allowing criminal youth in the United States.[86] Framing Central American children who are eligible for SIJS and, more generally, unaccompanied children as gang members, has resulted in a drop of approvals for SIJS visas, and revocation of protections for those already granted relief.[87]

[85] As discussed by Alfonso Gonzales, "imputed gang identity" refers to "how young Latino men are policed and suspected of being in, or affiliated with, a gang regardless of having actual gang membership or affiliations." Alfonso Gonzales, *Reform Without Justice: Latino Migrant Politics and the Homeland Security State* (New York: Oxford University Press, 2014), 100.

[86] See, White House Immigration Principle & Policies, accessed August 1, 2018, https://www.politico.com/f/?id=0000015e-fe3d-dc15-a3fe-ff3d27fb0000.

[87] Eli Hager, "Young Migrants: Victims of Gangs or Members of Them?," *New York Times* (May 1, 2018), accessed August 1, 2018, https://www.nytimes.com/2018/05/01/us/immigration-minors-children.html.

DISCUSSION

SIJS is part of the larger class of humanitarian-based forms of immigration relief. It is unique in that state courts are required to make official judgments regarding parents, families, and economic and social conditions in Central America in pursuit of SIJS. While individual judgments are kept confidential,[88] they nonetheless have discursive and material consequences for Central American migrants here in the United States, and Central America as a region. As I tried to tease out through the themes above, the narratives around SIJS projects racial logics both domestically and abroad.

Domestically, as a racial project, SIJS relies on the logic of heteropatriarchy to advance arguments that place Central American parents and families as causes of abuse, abandonment, or neglect, due to their deviation from the U.S. ideal family. By doing so, the narratives frame this deviance of the Central American family as a result of culture rather than a reflection of the economic, social, and political forces that have given rise to complex families. Within the judgments against parents, there is also the criminalization of "bad" parenting. Ultimately, by criminalizing the Central American family, SIJS projects this criminalization onto migrants arriving in the United States. This is further complicated by the imputed gang identity on Central American children. Through the repeated invocation of gang violence and impunity as a reason for humanitarian relief, SIJS narratives become projected onto all Central Americans, including those fleeing gang

[88] Judgments involving children are typically held as confidential and not available for public disclosures. However, through media and nonprofit legal and social service providers, these narratives play a large role in the public discourse around migrant children.

violence. Not limited to the discursive criminalization of Central Americans, this has led to material consequences, such as justifying policy changes and denial of the relief itself. Thus, taken together, the culturally inferior rhetoric around Central American families, coupled with the linking of gang affiliation to all Central American migrant children ultimately works to racialize Central American migrants in the United States and advance anti-immigrant policies.

While the state court judgments are bounded by their jurisdiction, they have both discursive and material effects that go beyond these limits to Central America as a region, and can best be understood through the racial imperialist analytic discussed in the previous section.

SIJS as Racial Imperialism

Despite being legally bounded to the United States, SIJS narratives advance U.S. imperialist endeavors in Central America. Discursively, SIJS deploys heteropatriarchal norms into the region that are used as evidence of Central American states' inability to stop human rights violations against their populations—in this case, against children. Related to the state's inability to control perpetrators of child abuse, abandonment, and neglect, is its inability to control gang violence, and complicity in gang impunity. Understood through Mutua's SVS formulation, SIJS narratives frame Central American states as savages. Indeed, allowing non-nuclear families to exist reflects the state's inability to keep families together and is taken as proof of its inability to govern. This is because the family unit is a microcosm of the nation—a dysfunctional family reflects a dysfunctional state. Moreover,

while not explicitly stated in the narratives, the gang violence found in Central America is taken as proof of the failures of non-nuclear families and of the state, as gangs become seen as an alternative to the traditional family and in opposition to the state.

The victims are the migrant children seeking protection through SIJS. While depicted as innocent victims of state-sponsored abuse, it is important to note that, under this formulation, victims are seen as evidence of a failed state and culture, not necessarily as bearers of humanity. This is because, as Fanon contends, the colonial system is premised on the negation of humanity for the colonized. This understanding then accounts for the fact that SIJS narratives ultimately lead to the criminalization of the children it ostensibly seeks to protect.

Lastly, the savior in this example is the United States legal system, which is extending humanitarian protections to Central American children via SIJS. However, much like Mutua cautions, the use of humanitarian protections can be a tactic of imperialism by the West. In this case, by denouncing Central American countries as perpetrators of human rights violations against children due to their non-normative culture around family and 'culture' of gang violence, the United States can justify extending security measures into the region. Most recently, rooted in the Cold War politics of the 1980s, U.S. intervention in Central America has increased in the post-9/11 era and the global war on terrorism. While focusing on the Middle East following 9/11, the Bush administration recast policy towards Latin America as "complementary" to the "War on Terror."[89] Under this policy

[89] R. Guy Emerson, "Radical Neglect? The "War on Terror" and Latin America," *Latin American Politics and Society 52,* no. 1 (2010): 38.

formulation, the war on terror and terrorism became associated with transnational criminal organizations, specifically narcotraffickers and gangs. This has led to increased military initiatives, such as the Central American Regional Security Initiative, in Latin America.[90] However, as political scientist Alfonso Gonzales' research reveals, the global war on terrorism being played out in Central America directly functions to control migration and, ultimately, immigration into the United States.[91] In this way, the discourse created through SIJS provides the ideological justification for intervention in Central America, which works to advance restrictive immigration measures domestically. Thus, the material consequences of narratives produced through SIJS are not limited to the United States and are, in fact, being felt through the Central American region.

SIJS and white supremacy

The discourse produced through SIJS narratives reflect the inherent white supremacist understanding of human rights within the law. By providing humanitarian relief to Central American youth by delegitimizing Central American cultures and nations, claims to SIJS rely on the denunciation of non-Western, non-white cultures. The immediate effect of such a tactic is the immigration relief and protection from deportation for Central

[90] The Central American Regional Security Initiative (CARSI) began under the Bush administration and continued under the Obama administration. CARSI provides equipment, training, and technical assistance to support law enforcement in the interdiction of criminal organizations. See, Peter J. Meyer, and Clare Ribando Seelke, "Central America Regional Security Initiative: Background and Policy Issues for Congress," *Congressional Research Service* (May 7, 2013). This is further evidenced by increased military assistance and training provided to Latin American military officials and law enforcement through the Western Hemisphere Institute for Security Cooperation, previously known as the School of the Americas. See, Emerson, "Radical Neglect? The "War on Terror" and Latin America."

[91] Gonzales, *Reform Without Justice,* 99-120.

American children who are awarded SIJS. However, as recent policy changes indicate, these effects are short-term. The lasting effects can be seen in the racialization and criminalization of Central American youth, and the corresponding immigration enforcement activities against them. At the global level, white supremacy is maintained through human rights inspired laws, such as SIJS, by providing the ideological justification to intervene in other countries and re-entrench global racial hierarchies that privilege Western countries.

CONCLUSION

The primary objective of this chapter was to show the implications of U.S. immigration law in processes of racial formation that extend beyond the territorial limits of the United States. These implications include the discursive application of racial logics to the Central American region, which consequently justifies U.S. empire building in the region. Because of the interrelationship between racialized laws in the United States and their effects abroad, CRT would benefit from incorporating theories and methods that can account for this relationship. By centering the SIJS visa, I sought to expose how the visa implicates both domestic and international racial projects by proposing a CRT theoretical framework that engages with imperialism and colonization. A related and perhaps even more important objective is to spur discussions regarding relying on laws and legal reform in advancing justice for migrants. While SIJS provides much needed relief and protections for migrant children, the requirements for eligibility ultimately undermine the humanitarian objectives promoting it. How then can legal advocates reimagine laws that do not rely on racial logics? This question is explored in the conclusion of this dissertation.

CHAPTER FOUR

Domestic Trafficking and Anti-Black Racism

> *Slavery, real slavery, has increased dramatically across the world over in [sic] last 50 years. It has grown rapidly in part because of the belief among the public and even governments that slavery was ended in 1865…. I can assure you, slavery is not dead…Let me be clear I am talking about slavery in its most basic form: the holding of people against their will through violence, paying them nothing and exploiting them economically. It is the same basic slavery that has dogged humanity for at least 5000 years- Kevin Bales.*[1]

> *[The TVPA] is also the largest anti-slavery bill that the United States has adopted since 1865 and the demise of slavery at the end of the Civil War.*[2]

The Trafficking Victims Protection Act (TVPA) criminalizes human trafficking with respect to slavery and slavery-like practices including peonage, involuntary servitude, forced labor, and sexual servitude.[3] As the quotes above indicate, the TVPA is rooted in anti-slavery efforts and has been framed by lawmakers as legacy of emancipation. However, the role of race and racism, specifically anti-black racism, is absent from both the text and the legislative history of the TVPA. Legal scholars and scholars of human

[1] Hearing before the Committee on Foreign Relations, Slavery Throughout the World, 106th Cong., 2d sess., September 28, 2000, 20-21.

[2] 146 Cong. Rec. S10164-02, (daily ed. Oct. 11, 2000) (statement by Rep. Brownback), *S10164.

[3] 18 U.S.C. §§ 77, 1584 (involuntary servitude); § 1589 (forced labor); § 1590 (trafficking with respect to peonage, slavery, involuntary servitude, or forced labor); §1591 (sex trafficking of children or by force, fraud, or coercion); § 1592 (unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor).

trafficking have rarely addressed how anti-black racism is implicated in domestic trafficking and in the creation and enforcement of the TVPA. While scholars have noted the racial implications in the fight against trafficking at the international level there have been no sustained analysis of the role of trafficking laws in reproducing racial logics domestically.[4] For instance, Kevin Bales, an expert on human trafficking, contrasts modern slavery and old forms of slavery by emphasizing that "race means little" in today's slavery.[5] Similarly, Barbara Stolz found that race did not contribute to the creation of the TVPA.[6] Given the centrality of anti-black racism in slavery, and anti-slavery and anti-trafficking laws in the United States, this gap in research is surprising. The aim of this chapter then is to interrogate the TVPA through a racial framework to expose how it works to reify racial hierarchies, premised on anti-black racism, under the guise of eliminating human trafficking.

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[4] While legal authors have noted the racial implications in the fight against trafficking, at the international level, there has been no sustained analysis on race and current U.S. trafficking laws. For works that that include a racial perspective on human trafficking in general, see Karen E. Bravo, "Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade," *Boston University International Law Journal 25* (2007) (discussing the White Slave trade influences on the framing of modern-day trafficking); Jonathan Todres, "Law, Otherness, and Human Trafficking," *Santa Clara Law. Review 49*, (2009): 609 (providing a detailed analysis on how traffickers and victims are "othered" through racial, spatial, gendered, and class-based conceptions internationally and domestically). For non-legal scholarship see, Tyron Woods, "Surrogate selves: notes on anti-trafficking and anti-blackness," *Social Identities: Journal for the Study of Race, Nation and Culture 19,* (2013) (analyzing the trafficking of Nigerian women into Europe in order to highlight how the discourse of contemporary anti-trafficking and anti-slavery movements work to reinforce global structures of anti-blackness.).

[5] Kevin Bales, *Disposable People: New Slavery in the Global Economy* (Berkeley: University of California Press, 1999), 11.

[6] Barbara Stolz, "Educating policymakers and setting the criminal justice policymaking agenda: Interest groups and the 'Victims of Trafficking and Violence Act of 2000'," *Criminal Justice* 5, no. 4 (2005).

This chapter assesses the TVPA through a Critical Race Theory (CRT) lens and argues that the TVPA reflects colorblind racism in its domestic focus. Data on federal prosecution of human traffickers reveals disproportionate charges, and prosecutions against Black men. Additionally, when assessing the protections of domestic victims, Black women may face the most challenges being identified as victims of trafficking. These outcomes are explained by situating the TVPA in the historical context of slavery, reconstruction, and anti-black racism in the United States.

First, I provide a historical overview of human trafficking laws in the United States, concentrating on anti-slavery and anti-trafficking legislation. In this section the relationship between the anti-slavery and anti-trafficking laws to anti-black racism and anti-immigrant fears are discussed. Further, this section examines human trafficking in the current era and the response to combating it as reflected in the TVPA. In the second section I analyze the TVPA through a CRT framework, focusing on the purpose of the act, as codified, which represents a colorblind approach to combating trafficking. This is contrasted with the enforcement of the TVPA, specifically federal investigations and prosecutions, which are overwhelmingly proceeded against Black men. I go on to consider how the implementation of the TVPA may disfavor identifying African Americans as victims of trafficking.

RACIALIZED HISTORY OF U.S. ANTI-TRAFFICKING LAWS

The concept of modern-day human trafficking is framed as a new iteration of slavery. Historically, anti-slavery and anti-human trafficking legislation developed parallel to one another. Domestically, anti-slavery legislation is rooted in the 13th Amendment.

Modern human trafficking on the other hand, has its progenitor, in vice and prostitution. As a discourse, slavery and trafficking were used interchangeably since at least the Progressive Era reemerging again in the current movement against human trafficking.[7] Focusing on the legal history, both anti-slavery and anti-human trafficking laws in the United States have foundations in anti-black racism which reveals itself in the enforcement of the TVPA. This section examines early anti-trafficking laws in the United States in order to illustrate how these laws developed as part of Jim Crow and anti-miscegenation laws that targeted African Americans. Like anti-miscegenation laws that were developed as a way to maintain the racial purity of the white population, by prohibiting inter-racial sex and marriage, trafficking laws uphold white supremacy through policing sexuality and racial boundaries.[8] This section goes on to discuss how the racial impetus underlying trafficking laws is currently expressed in modern discussion and campaigns around trafficking.

13th Amendment

The foundation of the United States is firmly rooted in the institution of slavery. Ideas on race served to legitimize slavery while the law reinforced the subjugation of slaves. The United States 13th Amendment legally ended slavery, however the trafficking

[7] Brian Donovan notes that in the case of white slavery, reformers used abolitionist tactics and narratives of African slavery and the slave trade to compare the trafficking and slavery of white women to chattel slavery. Brian Donovan, *White Slave Crusades: Race, Gender, and Anti-Vice Activism, 1887-1917* (Chicago: University of Illinois Press, 2006), 32.

[8]For a historical overview of anti-miscegenation laws in the United States, and how they reflected, as well as reproduced social conceptions of race see Peggy Pascoe, "Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth-Century America," *The Journal of American History* 83, (1996), 49. Also see, *Loving v. Virginia*, 38 U.S. 1 (Jun. 12, 1967) (holding laws restricting inter-racial marriage were unconstitutional).

of slaves was officially prohibited much earlier with the passage of, "An Act to prohibit the importation of slaves into any port or place within the jurisdiction of the United States, from and after the first day of January, in the year of Lord, One Thousand Eight Hundred and Eight." [9] Signed into law on March 3, 1807, the bill came into force in 1808. This Act prohibited the importation of "negroes" into the United States from foreign countries with the intent to be sold or held as slaves and can be understood as the nation's first anti-trafficking law.[10] However, due to a lack of enforcement of the law and unwillingness to prosecute traffickers, the trafficking of Africans continued. W.E. B. Du Bois' analysis of the first domestic anti-trafficking law points to the contradictory nature of the law which resulted in a system where trafficking "flourished under the guise of its suppression."[11] Indeed, under the 1808 Act, the slave trade was so rampant that President Madison took notice and addressed Congress on December 5, 1810: "it appears that American citizens are instrumental in carrying on a traffic in enslaved Africans, equally in violation of the laws of humanity, and defiance of those of their own country. The same just and benevolent

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[9] 18 U.S. 338 (Mar. 14, 1820).

[10] Note that illicit trade from Africa into the United States continued even after the passing of the Act, while internal trade surged. See, Karen Bravo, *Exploring the Analogy*, 214. See generally, David Brion Davis, *Inhuman Bondage* (New York: Oxford University Press,2006). As to reasons why the slave trade was so difficult to curb, Saidiya Hartman summarizes Du Bois research into this history: "The history of the suppression of the Atlantic slave trade as it is narrated by Du Bois is a litany of failures, missed opportunities, and belated acts…profit rather than progress directed the actors and determined the events that culminated in the suppression of the slave trade. A laissez-faire market sensibility eclipsed the avowed commitments to liberty, equality, and freedom herald by the nascent republic. The primacy of the marketplace and the interests of planters, shipbuilders, and financiers dictated the course of the nation and caused lawmakers and politicians to equivocate about the abolition and suppression of the traffic in African lives." Saidiya Hartman, "Introduction," in W.E. B. Du Bois, *The Suppression of the African Slave-Trade to the United States of America* (New York: Oxford University Press, 2007), xxvi.

[11] Du Bois, *The Suppression of the African Slave-Trade*, xxvii.

motives which produced the interdiction in force against this criminal conduct, will doubtless be felt by Congress, in devising further means of suppressing the evil." [12] This message was echoed again by the President in 1816 when he urged Congress to act on accounts of the continued violations of the Act.[13]

In response to the ineffectiveness of the 1807 Act, supplementary laws were passed in 1818, 1819, and 1820. The 1820 Act, in particular, provided much needed teeth to the previous anti-trafficking laws by directing that "direct participation in the slave-trade should be [considered] piracy, punishable with death."[14] Nevertheless trafficking of Africans continued despite the discursive attempts by lawmakers to address the issue, due to negligent enforcement of the laws. As Du Bois noted, even with the 1820 Act in place "it is significant that not until Lincoln's administration did a slave-trader suffer death for violating the laws of the United States."[15] Further, it was not until the outbreak of the Civil War that the government was willing "to do all in its power to suppress the slave trade."[16]

Following the Civil War, the 13th Amendment, ratified in 1865, barred slavery and involuntary servitude in the United States. The 13th Amendment states in pertinent part: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place

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[12] Du Bois, *The Suppression of the African Slave-Trade,* 76.

[13] Du Bois, *The Suppression of the African Slave-Trade,* 77.

[14] Ibid, 82.

[15] Ibid*,* 83.

[16] Ibid*,* xxvii.

subject to their jurisdiction."[17] Section two of the Amendment authorizes Congress to enforce the prohibition of slavery through "appropriate legislation."[18] Stemming from the authorization granted in the 13th Amendment, Congress passed the Anti-Peonage Act.[19] Under this Act, peonage, a form of debt bondage, criminalized holding a person in this state.

While the 13th Amendment prohibits slavery, the rise of black codes, Jim Crow, and judicial interpretations effectively reestablished forms of racialized slavery in the convict-lease system and peonage via sharecropping. The 13th Amendment abolished slavery "except for punishment for a crime," however, the definition of crime worthy of the punishment of slavery was left to individual states to legislate. This resulted in a rise of racialized law targeting newly freed Blacks. As Angela Davis writes, "in the immediate aftermath of slavery, the southern states hastened to develop a criminal justice system that could legally restrict the possibilities of freedom for newly released slaves."[20] Through black codes, white southerners were able to exact economic, political, and social control over Blacks.[21] Originally, immediately following emancipation black codes were supposed to help outline and secure the legal rights of freed Blacks, such as the right to property,

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[17] U.S. Const. amend. XIII. § 1.

[18]U.S. Const. amend. XIII, §§1-2. (indicating that "Congress shall have the power to enforce this article by appropriate legislation").

[19] March 2, 1867 Act, ch. 187 §§ 1, 14, 14 Stat. 546 codified at 18 U.S.C. § 1581 (2000).

[20] Angela Davis *Are prisons obsolete?* (New York: Seven Stories Press, 2003), 29.

[21] Martha A. Mayers, *Race, labor, and Punishment in the New South* (Columbus: Ohio StateUniversity Press, 1998); Alex Lichtenstein, *Twice the work of free labor (* London: Verso, 1996).

contracts, judicial rights, and labor rights. After the radical Republicans took control over southern state governments beginning in 1867, black codes became a primary form to control the Black population. Black code type legislation included more than just vagrancy laws, but also labor contract laws, travel restrictions and employment laws.[22] Further, black codes served to define criminality in terms of race and shared many commonalities with prior slave codes. According to Du Bois, slave codes became rearticulated into black codes leading to the transformation of the criminal justice system.[23] The post-slavery criminal justice system took on many of the same functions of slavery, such as forced labor, implemented through the Convict lease system.[24] Moreover, the rise of sharecropping during the Reconstruction era resembled prior master-slave dynamics.[25] Reinforced through black codes, labor contracts between economically disenfranchised Blacks and white land owners created systems of debt-bondage even though the Peonage Act sought to prohibit the practice. Lastly, the courts legitimized these systems, with the narrowing of the 13th Amendment. During Reconstruction, the Supreme Court interpreted the 13th Amendment to prevent only the "most literal instances of slavery," [26] leaving

[22] See Eric Foner, *Nothing but Freedom: Emancipation and its Legacy* (Baton Rouge: Louisiana State University Press, 1983).

[23] W. E. B. Du Bois, " The Spawn of Slavery: The Convict-Lease System in the South," in Shaun L. Gabbidon (ed.), *W.E.B. Du Bois on Crime and Justice: laying the foundations of sociological criminology* (Burlington: Ashgate, 2007).

[24] Du Bois, " The Spawn of Slavery: The Convict-Lease System in the South."

[25] See, Erin Mauldin, "Freedom, economic autonomy, and ecological change in the cotton south, 1865-1880." *The Journal of the Civil War Era 7*, no. 3 (2017): 417.

[26]Jennifer Chacon, "Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking," *Fordham Law Review 74* (2006): 2994.

economic and contractual labor free from judicial interference.[27] In this way, laws against slavery targeted only the "most literal instances of slavery" while allowing de facto slavery in the form of the penal system and share cropping to continue.

Page Act

The Page Act of 1875 preceded the Chinese Exclusion Act as the first racially based immigration law legislated by the federal government. [28] The Page Act prohibited Chinese laborers thought to be indentured servants, or "coolies," and Chinese women thought to be prostitutes. While the law was intended to exclude Chinese immigrants without contravening the Burlingame Treaty—which protected Chinese immigrants from discrimination in the United States—it was done so under the shroud of anti-slavery and trafficking rhetoric. For example, President Ulysses S. Grant described to congress the need to protect Chinese immigrants from coolie labor and prostitution, situating both phenomena in involuntary migration:

> The great proportion of the Chinese immigrants who come to our shores do not come voluntarily, to make their homes with us and their labor productive of general prosperity but come under contracts with head-men who own them almost absolutely. In a worse form does this apply to Chinese women. Hardly a perceptible percentage of them perform any honorable labor, but they are brought for shameful purposes, to the disgrace of the communities where settled in and to the great demoralization of the youth of these localities. If this evil practice can be legislated against, it will be my pleasure as well as duty to enforce any regulation to secure so desirable an end.[29]

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[27] *In re Slaughterhouse*, 83 US (16 Wall.) 36, 93 (1872); United *States v. Harris*, 106 U.S. 629 (1882); *Robertson v. Baldwin*, 165 U.S. 275 (1897).

[28] "An Act Supplementary to the Acts in Relation to Immigration," ch. 141, section 3, 18 *Stat.* 477 (1875).

[29] 3 Cong. Rec. (1874), 3. 43rd congress, 2nd sess.

In its enforcement, the Page Act did not discern between Chinese women entering the United States for the purpose of prostitution, those entering with family, to reunite with spouses, or for other purposes. Thus, through the guise of protecting Chinese immigrants from involuntary servitude and forced prostitution the Page Act worked to restrict Chinese immigration, particularly female immigration. The consequence of excluding Chinese women from immigration has been studied in regards to its effects on the formation of Chinese families in the United States, and its role in legitimizing further Chinese exclusion laws.[30] It has also come to represent the role of the federal government regulating female sexuality via trafficking laws. As law professor Kerry Abrams found, the Page Act ushered in an era of anti-sex trafficking laws focusing on women. By 1910 "anti-prostitution fever burst beyond the boundaries of immigration law in the form of the Mann Act, which made it crime to transport women across state lines."[31]

At first blush the Page Act appears to have little to nothing to do with anti-black racism, however when placed in the context of the Reconstruction period, we see the common goal of the law was to police racial boundaries and create racial hierarchies. Federal immigration laws operated in conjunction with state anti-miscegenation laws to police racial boundaries. As law professor Jennifer Chacón argues, the Page Act signaled the beginning of Congress's efforts to police the country's racial makeup through the use

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[30] See, Erika Lee, "The Chinese Exclusion Example: Race, Immigration, and American Gatekeeping, 1882-1924," *Journal of American Ethnic History 21*, no. 3 (2002); Kerry Abrams, "Polygamy, Prostitution, and the Federalization of Immigration Law," *Columbia Law Review 105*, no. 3 (Apr. 2005).

[31] Abrams, "Polygamy, Prostitution, and the Federalization of Immigration Law," 714.

of immigration and nationality laws.[32] At the same time, black codes and later state-level anti-miscegenation laws such as Virginia's Racial Integrity Act prohibited marriage between whites and non-whites. Taken together, both immigration laws and state-level laws served the similar function of restricting racial mixing and perpetuating racial hierarchies through the regulating of sexuality. In this way, the Page Act exposes how anti-slavery rhetoric was used in furtherance of effectively restricting Chinese immigration. At the same time, the law was similar to anti-miscegenation laws, in policing sexual and racial boundaries and reifying racial hierarchies.

White Slavery

Following the end of the Civil War and the prohibition of slavery came a surge of migration from Europe to the Americas. Among those migrating were European women in search of work. This migratory phenomenon triggered a moral panic[33] around gender, racial anxiety, and immigration. As the migration of European women grew, stories of "white slavery began to circulate."[34] As feminist scholar Jo Doezma observes, "a number of high profile "exposes" of the sexual exploitation of European women functioned to create widespread attention to the issue of "white slavery." While the actual number of "white slavery" cases were few, the discourse and public imaginary went beyond factual

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[32] Jennifer Chacon, "Loving Across Borders: Immigration Law and the Limits of Loving," *Wisconsin Law Review* (2007).

[33] Stanley Cohen conceptualizes moral panic as a societal condition where a group of persons emerge as a threat to societal values, and are then stereotyped by the media, politicians, and may result in long lasting legal and social policies towards the group. See, Stanley Cohen, *Folk Devils and Moral Panic, 3rd ed*. (Milton Park: Routledge, 2002).

[34] Jo Doezma, "Loose Women or Lost Women? The Re-Emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women," *Gender Issues* 23 (2000):26.

accounts and became a vehicle to express the fears and anxieties of white American society.[35]

In the United States, the idea of white European women working and living alone presented a racially specific dilemma. In Chicago, for example, the immigration of eastern Europeans in the city coincided with a growing African American population, creating overlap with where they lived.[36] Consequently, single European women lived alone in areas either in or near Black communities. This new demographic and spatial composition of the city led to the growing narrative that connected vice in the city to race.[37] The image of European women living and socializing with Blacks was inconceivable to white society; in order to rationalize it, stories of "white slaves," and cries to end the trafficking of white women were made.[38]

The typical narrative produced by "white-slavery" abolitionists included portraying these women as innocent victims, which was established through stressing victim's youth, "virginity, whiteness and unwillingness to be a prostitute."[39] The image of this innocent victim was contrasted to the "evil trafficker," who was characterized as "non-white," encompassing both Black and non-white immigrant categories. Through this dichotomy,

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[35] Doezma, "Loose Women," 26.

[36] Christine Whyte, "Praise Be, Prostitutes as the Women We Are Not". White Slavery and Human Trafficking- an Intersectional Approach," *Intersectionality and Kritik*, 125 (2013): 131.

[37] Whyte, "Praise Be, Prostitutes," 133.

[38] Doezma, "Loose Women," 28.

[39] Doezma, "Loose Women," 28.

white society transformed white prostitutes into sexually enslaved women. As historian Donna Guy states:

> it was inconceivable that their female compatriots would willingly submit to sexual commerce with foreign, racially varied men. In one way or another these women must have been trapped and victimized. So European women in foreign bordellos were construed as "white slavers" rather than common prostitutes.[40]

On the legislative front, white slavery was depicted as a worse embodiment of slavery than the transatlantic slave trade and the enslavement of Africans. Notably, Representative James Robert Mann proposed a bill to tackle white slavery by depicting it as "a species of slavery a thousand times worse and more degrading it its consequences and effects upon humanity than any species of human slavery that ever existed in this country,"[41] and "much more horrible than any black-slave traffic ever was in the history of the world."[42] While analogizing white slavery to the chattel slavery of the recent past it ultimately revealed Congressional ambivalence towards African slavery. This ambivalence was not lost on Black women. Black women were excluded from the narrative of white slavery, and unwilling prostitution more generally. This exclusion was a result of slavery, as Black women were marked as sexually available, "over-sexed," and thus a willing participant to sexual advances, including rape.[43]

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[40] Donna J. Guy, "White Slavery, Citizenship and Nationality in Argentina," in *Nationalisms and Sexualities*, eds. Andrew Parker, Mary Russo, Doris Sommer, and Patricia Yeager (New York: Routledge, 1992): 201-217.

[41] 45 Cong. Rec. H547 (daily ed. Jan. 12, 1910) (statement of Rep. Mann).

[42] 45 Cong. Rec. H548 (daily ed. Jan. 12, 1910) (statement of Rep. Mann).

The debates around the bill, which would become known as the Mann Act, also relied on anti-immigrant rhetoric. This is reflected in a report prepared by the Commissioner General of Immigration during congressional debates on white slavery. The report estimated that over 100,000 alien prostitutes existed in the United States alongside with thousands of pimps.[44]In a testimony submitted by the Chair of Congress' Immigration Commission, Senator William P. Dillingham, referred to white slavery as "the most pitiful and revolting phase of the immigration problem."[45] By framing white slavery as an immigration problem, the restricting of immigration became a solution. As legal scholar Frederick Grittner states, "By blaming foreign villains, native-born Americans affirmed the basic purity of the nation and simplified the solution to white slavery and vice: immigration should be restricted and undesirable aliens deported."[46] The legislative history of the Mann Act reflects congressional unease with sexual morality, and immigration. At the same time, policymakers analogized white slavery to African slavery implying it was qualitatively more repulsive as the institution of U.S. slavery. Like the Page Act, the Mann Act sought to restrict racial mixing under the guise of ending human trafficking. This is substantiated in assessing the enforcement of the law.

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[43] Christine Whyte, "Praise Be, Prostitutes," 127; Saidiya V. Hartman, *Scenes of Subjection: Terror, Slavery, and Self-Making in Nineteenth-Century America* (New York: Oxford University Press, 1997).

[44] U.S. Immigration Commissioner, "Importing Women for Immoral Purposes: A partial Report from the Immigration Commission on the Importation and Harboring of Women for Immoral Purposes," Senate Doc. No. 61-196 (1909), 3.

[45] U.S. Immigration Commissioner Report.

[46] Frederick K. Grittner, *White Slavery: Myth, Ideology and American Law* (New York: Garland, 1990): 130.

In response to the panic over "white slavery," individual cities and states passed laws seeking to protect white women from becoming enslaved, which ultimately led to the passing of the White Slave Traffic Act in 1910.[47] The White Slave Traffic Act, otherwise known as the Mann Act, criminalized the transportation of "any women or girl for the purpose of prostitution or debauchery, or for any other immoral purpose" across interstate commerce.[48]

While the Act was ostensibly created to protect white women from becoming trafficked into prostitution, the law was ultimately used to limit the agency of white women, through its application to situations where white women were not being trafficked against their will, nor participating in commercialized vice.[49] The intention of regulating sexuality of women was among the primary motives of the law. This should be understood in the context of the Progressive Era, which sought a "social purity" agenda over female sexuality. As Doezma states, the Mann Act and the general myths around white slavery "were grounded in the perceived need to regulate female sexuality under the guise of protecting women."[50]

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[47] For example, in Chicago, the growing vice became a sustained topic for the City, resulting in city-wide studies on the issue, see Vice Commission of Chicago, "The Social Evil in Chicago: A Study of Existing Conditions, with Recommendations" (Chicago, 1911); Clifford G. Roe, "The White Slave Message from Chicago," in *The Great War on White Slavery or Fighting for the Protection of Our Girls*, eds. Clifford G. Roe, B. S. Steadwell, J.G. Shearer, Ernest A. Bell, Edwin W. Sims, Wm. Alexander Coote, Jeremiah Jenks, G. Stanley Hall, James Bronson Reynolds, James M. Cleary, Winfield S. Hall, Jacob Nieto, and Kate Jane Adams (Chicago,1911).

[48] White Slave Traffic Act, ch. 395, 36 Stat.825(1910) (*codified as amended at* 18 U.S.C. 2421-2424); Marlene D. Beckman, "White Slave Traffic Act: The Historical Impact of Criminal Law and Policy on Women," *Georgetown Law Journal* 72, (1983-1984):112.

[49] Jennifer M. Chacon, "Misery and Myopia," 3015.

[50] Doezma, "Loose Women*"* 24.

In addition to being applied in non-trafficking situations, the Mann Act targeted interracial relationships between white women and Black men. Among the most publicized case in the early days of the Mann Act, was its use against heavyweight boxing champion, Jack Johnson.[51] Johnson was prosecuted and convicted for transporting his then white lover, Belle Schreiber, across state lines.[52] Even though the relationship between Johnson and Schreiber was consensual, an all-white jury convicted Johnson.[53] The prosecutor of the case, is quoted saying:

> This verdict will go around the world. It is the forerunner of laws to be passed in the United States . . . forbidding miscegenation. This Negro, in the eyes of many, has been persecuted. Perhaps as an individual he was. But his misfortune is to be the foremost example of the evil in permitting the intermarriage of whites and blacks. He has violated the law. Now it is his function to teach others the law must be respected.[54]

This logic highlights one of the underlying purposes of the Mann Act-to restrain miscegenation. While Johnson was one of the most prominent Black men to be prosecuted under the Mann Act, legal scholar Rachel Moran found that it was used frequently, stating:

> When black men attempted to travel with their white fiancées to states that permitted interracial marriage, they were sometimes charged with abduction or white slavery. White women who chose to marry black men were considered sexually immoral or incompetent.[55]

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[51] Kevin R. Johnson, "The Legacy of Jim Crow: The Enduring Taboo of Black-White Romance," 84 *Texas Law Review* 84 (2006): 752.

[52] Johnson, "The Legacy of Jim Crow," 752.

[53] Johnson, "The Legacy of Jim Crow," 752.

[54] Denise C. Morgan, "Jack Johnson: Reluctant Hero of the Black Community," *Akron Law Review* 32 (1999): 552.

[55] Rachel F. Moran, *Interracial Intimacy: The Regulation of Race and Romance* (Chicago: University of Chicago, 2001): 67.

Accordingly, the deployment of the Mann Act to control interracial sexual relationships reveals the inextricable link between sex and gender in the maintenance of white supremacy and racial subjugation.

Further, the developments that led to the Mann Act were international in scope; specifically, the fear of white women being sold into sexual slavery to non-white men was not limited to the United States. Rather, events unfolding domestically mirrored European concern regarding women traveling abroad for work in the colonies. Campaigns by social purists and feminists against white slavery "coincide with the mass migration of thousands of women from Europe and Russia to the Americas, South Africa, and other prats of Europe, and Asia."[56] As Doezma explains, "this increase was facilitated by the colonialism of the "Pax Britannia," which made travel from the "centre" to the "periphery" a possibility for millions of working class people."[57] The panic over white slavery led to the 1904 International Agreement for the Suppression of the White Slave Trade.[58] Trafficking of women continued to be perceived as a threat to national, and racial, integrity, through the end of World War I and the creation of the League of Nations.

Like the panic over "white slavery" and the development of the Mann Act which arose in the context of colonialism, dejure racism and Jim Crow, the concern over "modern day slavery"[59] can be understood as emerging in the era of colorblindness. While colorblind

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[56] Doezma, "Loose Women",39.

[57] Doezma, "Loose Women",39.

[58] International Agreement for the Suppression of White Slave Traffic, May 18, 1904, 35 Stat. 1970 1 L.N.T.S. 83.

racism is not explicitly mentioned in scholarship around modern human trafficking, race has emerged as a point of discussion by scholars who have examined the discourse and campaigns around human trafficking at the international level.

Modern Day Slavery and Trafficking

Human Trafficking reemerged as an international issue beginning in the 1980s and gained momentum as it focused on the sex trafficking of Eastern European women.[60] Following the end of the Cold War and the dissolution of Russia, Eastern European women were trafficked into Western Europe and the United States, becoming a fixture in trafficking campaigns.[61] These campaigns ultimately influenced domestic lawmakers who, as discussed in Chapter One, primarily focused on the human trafficking of Eastern European, or white, women. While modern accounts of trafficking largely focused on Eastern European women, it also included women from Latin America, and Asia. Analyzing the campaigns by international human rights organizations, and feminist groups, Jo Doezma highlights the characteristics that modern trafficking discourse share with that of "white slavery," such as the archetypical innocent figure of the victim-emphasized by her youth and virginity.[62] Depictions of the victim as innocent or naïve ends up becoming "code for "non-prostitute", and thus a victim worthy of protection.[63] Further, the discourse

[59] Kevin Bales and Ron Soodalter, *The Slave Next Door: Human Trafficking and Slavery in America today* (Berkeley: University of California Press, 2009). Modern day slavery is the term used to explain current practices and intuitions of slavery.

[60] Doezma, "Loose Women," 31.

[61] Doezma, "Loose Women," 31

[62] Doezma, "Loose Women," 34.

[63] Ibid, 36.

of current trafficking campaigns invoke the racialized tropes of the Mann Act. Doezma suggests that while racial stereotypes are employed by human trafficking campaigns, they are not as blatant as previous campaigns around white slavery. For example, she suggests that current trafficking rhetoric combines previous tropes of colonial patriarchy and racism-seen in the depiction of victims as poor, "unempowered women" from "backward countries."[64] Moreover, the image of the trafficker continues to be constructed as non-white.[65]

Mirroring campaigns and human rights organizations framing of human trafficking, the TVPA emphasizes the trafficking of foreign nationals in the United States, and international and transnational trafficking. This is exemplified in the legislative history, the language of the law (which emphasizes international and transnational trafficking), and the creation of the Trafficking in Persons Report documenting nations' efforts in combating trafficking. Notably absent from the TVPA is domestic trafficking, or trafficking of U.S. citizens. This chapter argues, that this failure stems from the racialized history of slavery and trafficking in the United States. This claim is supported through the analysis of the federal criminal justice system which shows disproportionate rates of prosecutions against Black traffickers.

[64] Ibid, 37.

[65] Ibid, 38.

RACE AND THE CRIMINAL JUSTICE SYSTEM

Following the end of slavery black codes were created to maintain a racial, social, and economic order. These black codes served to define criminality in terms of race and shared many commonalities with the prior slave codes. The re-articulation of slave codes into black codes "tended to racializ[e] penalty and link[ed] it closely with previous regimes of slaver."[66] In addition to maintaining a strict racial social hierarchy, black codes were used to maintain the economic and political hegemony of whites.[67] As a consequence of this history, although laws are now 'race-neutral' disproportionate arrests, incarceration, and conviction rates persist, and have taken on a naturalized rhetoric that underlies the logic of colorblind racism.

Racial minorities, particularly African Americans, are more likely to be arrested, charged, convicted, and arrested than whites. African Americans compose only 13% of population in the United States, yet make up 28% of all arrest, and 40% of the prison population.[68] This is compared to whites, who make up 67% of the population, and 70% of all arrests, yet account for only 40% of all inmates held in state prisons and local jails.[69]

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[66] Ibid, 31.

[67]Martha A. Mayers, *Race, labor, and Punishment;* Angela Davis *Are prisons obsolete.*

[68] Marjorie Zatz discusses factors that influence court process decisions, from where police choose to survey, to which cases are pursued by prosecutors, to whether judges allow pretrial release, and the jury's decisions and sentencing. Marjorie Zatz, "The Convergence of Race, Ethnicity, Gender, and Class on Court Decision-Making: Looking Toward the 21st Century," Criminal *Justice* 3 (2000): 507. The ACLU reports that racial disparities are found at every stage of the criminal justice system, even where "race-neutral" policies exist. ACLU, Written Submission on Racial Disparities in Sentencing, Hearing on Reports of Racism in the Justice System of the United States, Submitted to the Inter-American Commission on Human Rights, 153rd Session, October 27, 2014. Accessed April 25, 2018, https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf.

Overall, more than 60% of the incarcerated population are racial minorities.[70] The federal criminal justice system reflects similar racially disparate impacts, from prosecuting to severity of sentencing.[71]

As discussed in the previous section, race is linked to human trafficking and anti-slavery laws. While the discourse around modern human trafficking can be understood as relying on racialized discourses of trafficking, there has not been an analysis on how trafficking laws themselves work to reproduce racial subjugation, or how these laws can be understood as a racial project. By examining federal criminal prosecution in the context of the enforcement of the TVPA, it becomes apparent how the legacy of slavery and history of anti-miscegenation laws—such as the Mann Act—affects decisions to investigate and prosecute African Americans under the Trafficking Act. In analyzing the TVPA, on its face and its enforcement, I employ the methods of CRT by situating trafficking laws in the historical context of racial subordination in the United States.

THE RACIAL PROJECT OF THE TVPA

The TVPA laid out the legal framework for combating human trafficking. It was reauthorized in 2003, 2005, 2008, and most recently in 2013. Notably, the 2008

[69] The number of white also include Latinos, "Failing to separate ethnicity from race hides the true disparity among races, as Hispanics-a growing proportion of the system's population-are often combined with Whites, which has the effect of inflating White rates and deflating African American rates in comparison." Christopher Hartney and Linh Vuong, National Council on Crime and Delinquency, Created Equal: Racial and Ethnic Disparities in the US Criminal Justice System (2009):2.

[70] The Sentencing Project, *Racial Disparity*. Accessed April 25, 2018, http://www.sentencingproject.org/template/page.cfm?id=122.

[71] Brenan Center for Justice & National Institute on Law & Equality, *Racial Disparities in Federal Prosecution* (2010). The ACLU reports that in the federal system, 71.3% of those sentenced to life without parole were Black. ACLU, Written Submission on Racial Disparities, 2.

reauthorization was named after English abolitionist, William Wilberforce, and the current 2017 reauthorization bill under consideration is titled the Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act of 2017. The TVPA establishes a three-prong approach to addressing trafficking: prosecution, protection, and prevention, more commonly known as the 3Ps.[72] It achieves the 3Ps through making trafficking a criminal offense, focusing on prosecuting traffickers, and providing support for victims.[73] In addition to laying out these goals, the TVPA provides a lengthy prefatory section discussing findings on trafficking that led to the creation of the Act as well as the Acts purpose.

The TVPA, makes no mention of race in its purpose of findings, yet it points to the history of slavery in the United States in finding 22 of the Act:

> One of the founding documents of the United States, the Declaration of Independence, recognizes the inherent dignity and worth of all people […] The right to be free from slavery and involuntary servitude is among those unalienable rights. Acknowledging this fact, the United States outlawed slavery and involuntary servitude in 1865, recognizing them as evil institutions that must be abolished. Current practices of sexual slavery and trafficking of women and children are similarly abhorrent to the principles upon which the United States was founded.[74]

This finding ignores the fact that the Declaration of Independence excluded slaves, and non-whites more generally. With respect to slavery, the finding glides over the racial

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[72] Prior to the TVPA prosecutors filed trafficking cases under the Mann Act and various involuntary servitude and labor statutes. See, US Department of Justice, *Attorney General's Annual Report to Congress and Assessment of U.S. Government Activities to Combat Trafficking in Persons, Fiscal Year 2012* (2012), 2.

[73] 18 U.S. Code Chapter 77- Peonage, Slavery, and Trafficking in Persons.

[74] Trafficking Victims Protection Act, 22 U.S.C. § 7101 (b)(22).

specificity of slavery in the United States, and the violent opposition to its abolishment. By abstracting the racial history of trafficking and slavery in the United States, the TVPA minimizes the racial aspects of slavery, as well as the larger discussion of how race intersects with various disparities that contributes to the vulnerability of victims.

Second, the TVPA criminalizes trafficking with respect to peonage, slavery, involuntary servitude, and forced labor, with a primary focus of combating the sex trafficking of women and children: "the purposes of this chapter are to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children."[75] By making it clear that the purpose is to protect women and children, the TVPA implies its purpose is akin to that of the Mann Act- to prohibit the sexual slavery of women. This is further supported by the legislative history of the TVPA, which as discussed in the Chapter One relied on the image of sexually enslaved Eastern European women. The findings section of the TVPA, specifically addressing the sex trafficking of women, finds that women and girls are "trafficked into the international sex trade" from countries where women face a "lack of access to education, chronic unemployment, discrimination, and the lack of economic opportunities."[76] The published findings make it clear that the objective of the TVPA is to give special attention to the international sex trafficking of women and children.

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[75] Trafficking Victims Protection Act, 22 U.S.C. § 7101 (a).

[76] Trafficking Victims Protection Act, 22 U.S.C. § 7101 (b)(4).

The approach the TVPA took in addressing trafficking reflects the focus on international and transnational trafficking. The TVPA authorizes international aid to target the causes of trafficking, such as lack of economic opportunities, promotes awareness campaigns in sending countries, and provides special protections granted to foreign national victims of trafficking through immigration relief. Further, the TVPA created the Trafficking in Persons Report (TIP Report) which investigates and partners with countries to prevent trafficking, and rates countries on their measures to combat trafficking.[77] The TIP Report originally did not include an assessment of the United States, presumably because it did not suffer from domestic trafficking. However, campaigns by activists brought attention to trafficking within the United States. Stemming primarily form the sexual exploitation of children, trafficking of U.S. citizens entered public consciousness.[78] As a result, domestic trafficking was addressed in 2005. In the 2005 reauthorization Congress acknowledged that "trafficking in persons also occurs within the borders of a county, including the United States."[79] Even after domestic trafficking was acknowledged, the United States did not evaluate its own progress in combating trafficking in the TIP Report until 2010. However, it should be noted that beginning in 2003 the Attorney General

[77] "About Us" U.S. Department of State, accessed April 21, 2018, http://www.state.gov/j/tip/about/index.htm. The Office to Monitor and Combat Trafficking in Persons, housed in the State Department, partners with foreign governments and non-governmental organization to implement strategies to prosecute traffickers, prevent trafficking, and protect victims, and to provide technical assistance in investigating crimes. In addition to working with foreign governments to strengthen anti-trafficking laws, the Department of State measures and evaluates countries and their progress in combating human trafficking. These evaluations culminate in the *Trafficking in Persons Report*, which ranks countries effectiveness in combating trafficking and offers recommendations.

[78] Carrie N. Baker, "The Influence of International Human Trafficking on United States Prostitution Laws: The Case of Expungement Laws," *Syracuse Law Review* 62 (2012): 176.

[79] Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, § 2 (4).

was directed to produce an annual report for Congress assessing the United States' government activities to combat human trafficking.[80]

Lastly, by focusing on foreign national victims, the TVPA provided fewer protections to U.S. citizen and lawful permanent residents victims. For example, while the 2000 TVPA originally authorized immigration status and public benefits to foreign nationals, the issue of domestic victims was not addressed until 2005.[81] Under the 2005 reauthorization, the Attorney General was authorized to provide discretionary grants to investigate and aid U.S. citizen and legal permanent resident victims of sex trafficking. Even so, the Office for Victims of Crime (OVC), housed within the Department of Justice, which administers funding for comprehensive services to victims of trafficking reported that in 2012, 75% of all OVC funding went to serving foreign nationals, and only 25% to citizen victims.[82] By 2015, these figures equalized, with providers reporting to serve 49% foreign nationals and 51% domestic victims.[83] The 2005 reauthorization further mandated the Department of Health and Human Services to create a residential treatment program for domestic juvenile victims.[84] With domestic trafficking finally addressed, the

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[80] US Department of Justice, *Attorney General's Annual Report to Congress and Assessment of U.S. Government Activities to Combat Trafficking in Persons, Fiscal Year 2015* (2015), 3.

[81] Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No 109-164, § 2(4), 119 Stat. 3558 (2006).

[82] US Department of Justice, *Attorney General's Annual Report to Congress and Assessment of U.S. Government Activities to Combat Trafficking in Persons, Fiscal Year 2012*, (2012), 31.

[83] 2015 Attorney General's Annual Report, 45.

[84] Note its specifically targets domestic victims of sex trafficking. , U.S. Department of Health and Human Services , *Finding a Path to Recovery: Residential Facilities for Minor Victims of Domestic Sex*

protections provided to domestic victims were matched with the prosecution of domestic traffickers.

Over-identification of Blacks as Traffickers

As discussed above, the TVPA makes no mention of race. Yet, given its focus on sex trafficking, and the history of sex trafficking-specific legislation in the United States, race becomes implicated in the enforcement of this law. This section provides a preliminary examination of the federal prosecution of domestic traffickers under the TVPA.

The TVPA authorizes several federal agencies to conduct trafficking investigations, including the Federal Bureau of Investigation (FBI), Immigration and Customs Enforcement (ICE), and the Department of Labor (DOL).[85] Of those, the FBI investigates domestic human trafficking. The FBI is divided into two sections, the Civil Rights Unit (CRU) and the Violent Crime Against Children Section (VCACS). The CRU is responsible for overseeing all human trafficking investigations involving adults, both domestic and foreign, and any sex trafficking cases involving foreign minor victims. The VCACS is responsible for investigating commercial sexual exploitation of domestic minors.[86] In fiscal year 2015, the CRU initiated 264 investigations, made 419 arrests, and obtained 90 convictions.[87] The VCACS reported 538 investigations, 2,253 arrests and 363 convictions in 2015.

Trafficking (Sept. 2007), accessed April 24, 2018, , http://aspe.hhs.gov/hsp/07/humantrafficking/ResFac/ib.htm.

[85] 2015 Attorney General's Annual Report, 58.

[86] 2015 Attorney General's Annual Report, 58.

[87] 2015 Attorney General's Annual Report, 58.

The Department of Justice (DOJ) is responsible for the criminal prosecution of human trafficking through the Criminal Section of the Civil Rights Division (CRD), and the CRD's Human Trafficking Prosecution Unit (HTPU).[88] With the U.S. Attorney's Office, the CRD and the HTPU have brought a total of 325 human trafficking cases filed between 2011 and 2015.[89] During fiscal year 2012, CRD and the U.S. Attorney's Office brought 21 forced labor and 34 sex trafficking cases, charged 108 defendants, and secured 86 convictions (31 labor, 55 sex).[90] From these figures, it appears that the TVPA's emphasis on sex trafficking continues throughout the investigation and prosecution process. In order to assess whether the TVPA disproportionately impacts African Americans, demographic data of those investigated, arrested, prosecuted, and convicted of sex trafficking is required. Unfortunately, this information is not easily found, and is typically not provided by agencies.[91] However, what little data is available is telling. A Bureau of Justice Statistics Report analyzed data from federally funded trafficking agencies.[92] This data included characteristics of trafficking suspects from cases opened between January 2008 and June 2010.

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[88] Ibid, 62.

[89] Ibid.

[90] 2012 Attorney General's Annual Report, 47.

[91] A Bureau of Justice Statistics report finds that the lack of individual level data on both victims and suspects of trafficking typically go missing, and thus unreported. Factors that contribute to missing data include length a case has been open, and whether the investigating task force updated information on a regular basis. The report finds that "characteristics of individuals involved in human trafficking was problematic overall". Duren Banks, and Tracey Kyckelhahn, "Characteristic of Suspected Human Trafficking Incidents 2008-2010," *Bureau of Justice Statistics* (Apr. 2011): 5.

The data indicated that Blacks/African Americans constituted 224 out of a total of 448 identified suspects.[93] Of those, 219 were suspected of sex trafficking, and 5 of labor trafficking.[94] Hispanics/Latinos made up 119 (89 sex trafficking, 30 labor trafficking).[95] Asians represented a total of 28 trafficking suspects (18 sex trafficking, 10 labor trafficking), and whites made up 24 suspects (22 sex trafficking, 2 labor trafficking).[96] In all, nearly two-thirds (62%) of confirmed sex trafficking cases suspects were identified as Black. Additionally, most confirmed trafficking suspects were male (81%), while 19% were female. In addition to mirroring the TVPA's concern with sex trafficking, race and gender play a major factor in who is suspected of trafficking, which later contributes to who is prosecuted and convicted. It should be noted that this data is an aggregate of local, state, and federal cases.

[92] It should be noted that the data in this report was from the Human Trafficking Reporting System, which measures performance by federally funded human trafficking tasks forces. These task forces included state and local enforcement agencies.

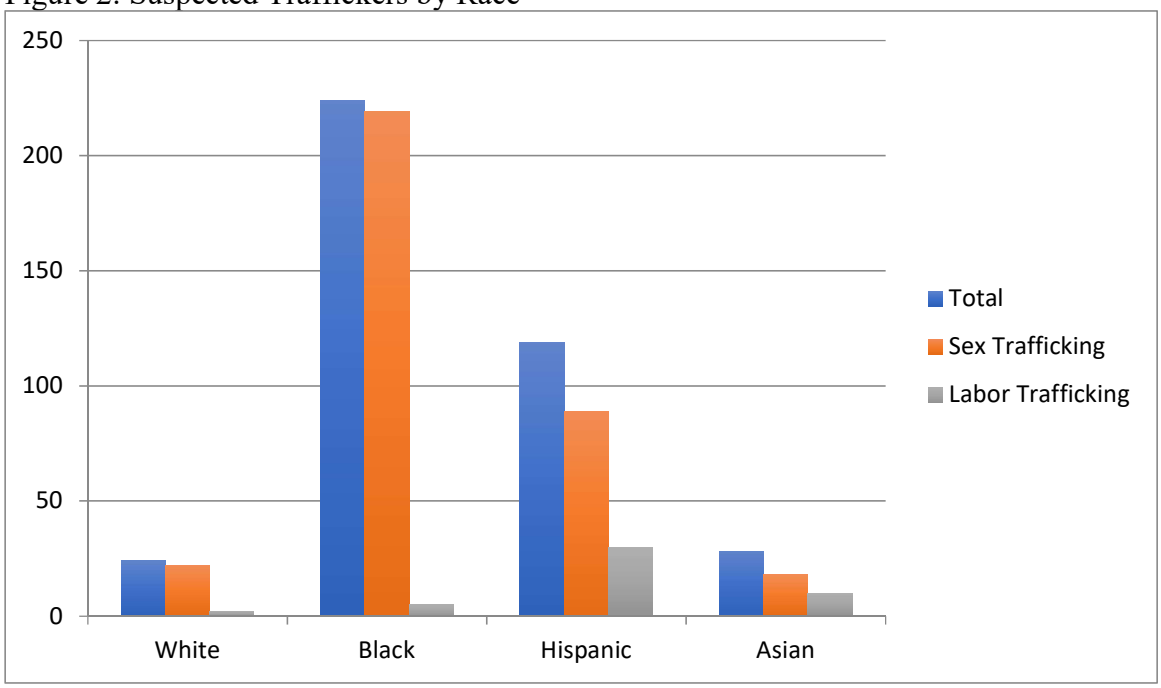
[93] Bureau of Justice Statistics, 6.

[94] Bureau of Justice Statistics, 6.

[95] Bureau of Justice Statistics, 6.

[96] Bureau of Justice Statistics, 6.

Figure 2: Suspected Traffickers by Race



Source: Data from Bureau of Justice Statistics, 2011.

Moreover, the CRD publishes select cases that represent the types of human trafficking cases prosecuted. As of 2018, a total of 18 human trafficking cases have been publicized by the CRD. Of those 18 cases, five are domestic trafficking cases, where both the trafficker and the victims appear to be U.S. citizens.[97] Of those five, three are sex trafficking cases. All three of the sex trafficking cases involve black defendants. In analyzing the domestic sex trafficking cases, a fact pattern emerges premised on the similar images of malicious trafficker targeting innocent unsuspecting victims. When situated in the context of earlier trafficking laws, these cases highlight the racial undertones in prosecuting domestic trafficking cases.

[97] The published summaries do not indicate citizenship in domestic cases. In all other cases publicized, the nationality of the traffickers and victims are noted. One can infer that those who are not explicitly characterized by their nationality are U.S. citizens.

In *U.S. v. Paris et al*., Dennis Paris an African American man was charged for operating a prostitution scheme in Hartford, Connecticut.[98] From 1999 until 2004 Paris "exploited young, uneducated girls from troubled backgrounds and forced them to perform commercial sex acts for his financial gain" through the use of "deception, fraud, coercion, brutal rapes, threat of arrests, physical violence and manipulation of addictive drugs to maintain control over his victims."[99] In June 2007 Paris was convicted of multiple counts of sex trafficking and sentenced to 30 years in prison and $46, 116 in restitution.

In *U.S. v. Norris et al*., former professional wrestler "Hardbody" Harrison Norris and his co-defendants were charged with recruiting and kidnapping homeless women and forcing them into prostitution in the Atlanta, Georgia throughout 2005.[100] He is described as "lur[ing] women "by falsely promising that he would train them to become successful wrestlers in his female wrestling company."[101] The women were described as "poor, homeless or addicted to drugs" who "suffered horrific physical, sexual, and psychological abuse" under Norris. Norris was convicted and sentenced to life in prison for sex trafficking, forced labor, federal conspiracy, and witness tampering.

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[98] *United States. Dennis Paris, et al*., No. 03:06-CR-64, 2007 U.S. Dist. Westlaw 3124724 (D. Connecticut Oct. 24, 2007).

[99] "Connecticut Man Sentenced to 360 Months in Prison for Leading Brutal Sex Trafficking Ring that Victimized U.S. Citizens," Department of Justice, October 14, 2008, accessed April 23, 2018, https://www.justice.gov/archive/opa/pr/2008/April/08_crt_259.html.

[100] *United States v. Harrison Norris Jr*., No. 1:05-CR-479-JTC/AJB, 2007 U.S. Dist. Westlaw, WL9655845 (N.D. GA. May 8, 2007).

[101] "Former Wrestler Sentenced on Sex Trafficking and Forced Labor charges," Department of Justice, April 1, 2008, accessed April 23, 2018, https://www.justice.gov/archive/opa/pr/2008/April/08_crt_259.html.

Lastly, in *U.S. v. Jones,* the defendant, Jimmie Lee Jones, who went by the alias "Mike Spade," was charged with sex trafficking and violations of the Mann Act.[102] Between 2000 and 2005, Jones coerced eight young women, including two juveniles, into prostitution in Atlanta, Georgia. He "lured and recruited the minor and adult victims into prostitution with promises of legitimate modeling or exotic dancing work and used physical violence, threats of violence, deception, and other forms of coercion to compel the victims to work as prostitutes."[103] Victims testified that Jones "caused them to engage in sex acts" with him "by striking them and threatening to beat them."[104] Jones admitted to transporting women from Georgia to Florida, Alabama and Indiana for prostitution. In August 2007, Jones pled guilty to multiple charges of sex trafficking, sex trafficking of a minor, peonage, and Mann Act violations and was sentenced to 15 years.

These cases are significant in that they exemplify what domestic human trafficking looks like in the United States from the standpoint of the federal government. In the sex trafficking cases described above, the government projects the image of Black males preying on vulnerable women who are coerced, under the threat of violence, into sexual servitude.[105] Not to take away from the severity of sex trafficking and the damage done to

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[102] *United States v. Jimmie Lee Jones,* No. 1:05-cr-617-WSD, 2007 U.S. Dist. Westlaw WL 2301420 (N.D. GA. Jul. 8, 2007).

[103] "Georgia Man Sentenced to 15 Years on Sex Trafficking and Mann Act Charges," Department of Justice January 24, 2008, accessed on April 23, 2018, https://www.justice.gov/archive/opa/pr/2008/January/08_crt_058.html.

[104] "Georgia Man Sentenced to 15 Years on Sex Trafficking and Mann Act Charges."

[105] It should be noted that sex trafficking cases against Latino men share discursive similarities with the cases discussed above. However, in the context of Latino sex traffickers, the cases implicate human smuggling and violations of immigration laws. For example, in *U.S. v. Carreto, et al*. three

victims, these cases ultimately highlight how race becomes inextricably linked to the problem of sex trafficking. By suggesting that sex trafficking is perpetrated by mainly Black males, these cases summaries perpetuate stereotypes of Black male criminality and sexual deviance into the official public discourse. Black males, have since slavery, been ascribed with sexual deviance and immorality to justify slavery, white supremacy, and later economic and political subjugation.[106] These stereotypes fueled anti-miscegenation laws, and justified lynching of Black men. Later, stereotypes of Black males as predators dominated discussions around prostitution.[107] Taken together, the statistics on traffickers and the cases discussed above reveal that enforcement of trafficking laws implicates the same anti-black racism as the Mann Act which was enacted 90 years prior to the TVPA.

Anti-Black Racism in the Prosecutorial Approach of the TVPA

The TVPA, as legislated, tackles the issue of trafficking through a three-prong approach. Of these approaches, the prosecutorial, or punishment, prong has been studied and critiqued at length. The critiques largely center on the consequences of taking a law-

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defendants, Jose Flores Carreto, Gerardo Flores Carreto, and Daniel Perez Alonso, were indicated, and later plead guilty to the sex trafficking and alien smuggling of Mexican women. They "physically and sexually assaulted their victims, used threats of physical harm and restraints to force the women to commit acts of prostitution, and would beat the women for hiding money, disobeying their orders, and failing to earn more money." The violence inflicted by the perpetrators stands in contrast to the victims who are described as "you, uneducated women from improvised backgrounds from Mexico." While out the scope of the main argument in this chapter, a sustained comparative analysis will be addressed in future research. "U.S v. Carreto, et al," Department of Justice, accessed July 10, 2018, https://www.justice.gov/crt/criminal-section-selected-case-summaries. Also see, *United States v. Carreto*, 583 F.3d 152 (2d Cir. 2009).

[106] Evelynn M. Hammond, "Toward a Genealogy of Black Female Sexuality: The Problematic of Silence" in *Feminist Theory and the Body: A Reader*, eds. Janet Price and Margrit Shildrick (New York: Routledge, 1999).

[107] Evelina Globbe, "An Analysis of Individual, Institutional, and Cultural Pimping," *Michigan Journal of Gender & Law 1*, (1993): 41.

enforcement approach to trafficking.[108] First, the TVPA originally tied victim protections to the ability of victims to aid law enforcement in the prosecution of traffickers. Specifically, in order to qualify for the T-visa, a foreign national victim had to be willing to assist law enforcement with the investigation and prosecution of their trafficker/s. The requirement was relaxed in the 2005 reauthorization, such that a victim could avoid aiding law enforcement if it was unreasonable to do so due to physical or psychological trauma. While the requirement was relaxed the expectation of aiding law enforcement remains. Predicating protections, such as immigration relief on a victim's ability to assist law enforcement has been criticized for undermining the protection prong of the TVPA as it can deter trafficking victims, many of whom are undocumented, from placing their trust in officials who can deport them. Moreover, fear of retaliation from traffickers for aiding law enforcement can contribute to a victim's unwillingness to reach out to law enforcement.

Further, as law professor Dina Francesca Haynes points out, the emphasis of trafficking through a law enforcement perspective makes it difficult to identify victims. As anti-trafficking measures comes to rely on law-enforcement, myths about what makes for legitimate victims develop.[109] Through this perspective, officials recognize a person as a legitimate victim only if they were rescued by law enforcement. This is problematic since many victims "are not found by law enforcement, chained to a bed in a brothel. They are

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[108] See for example, Diana Francesca Haynes, "(Not) Found Chained to a Bed in a Brother: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act," *Georgetown Immigration Law Journal 21* (2007); April Rieger, "Missing the Mark: Why the Trafficking Victims Protection Act Fails to Protect Sex Trafficking Victims in the United States," *Harvard Journal of Law & Gender 30* (2007).

[109] Dina Francesca Haynes, "Good Intentions Are Not Enough: Four Recommendations for Implementing the Trafficking Victims Protection Act," *University of St. Thomas Law Journal* 6 (2008).

not rescued in law enforcement raids of restaurants or sweatshops but rather seek out help on their own." [110] The consequence of this myopic view is that victims are more likely to be perceived by law enforcement as illegal immigrants making fraudulent claims to secure an immigration benefit. Lastly, it is argued that the prosecution-oriented approach works against the prevention prong of the TVPA in that in punishing countries, through economic sanctions, for not prosecuting traffickers exacerbates the conditions that give rise to trafficking by creating economic instability in already economically and politically unstable countries.[111]

Much like the legislative intent of the TVPA, these critiques largely ignore domestic trafficking and rather focus on the consequences for foreign nationals and other nations. However, when focusing on domestic trafficking, it becomes clear that the law enforcement approach implicates anti-black racism. First, when placed in the historical context of the development of the criminal justice system and anti-trafficking laws in the United States it appears that one of the functions of the TVPA is to reproduce racial logics. As the case summaries above reveal, linking black traffickers exclusively to sex trafficking stereotypes such as black sexual deviance, that once helped promote the Mann Act, become invoked again. While the race of victims is not provided, the story of saving women from Black males is generated. These cases establish Black men as violent human traffickers deserving of punishment which helps to support the continued criminalization of Black

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[110] Haynes, "(Not) Found Chained to a Bed in a Brother," 351.

[111] Dina Francesca Haynes, "Used, Abused, Arrested and Deported: Extending Immigration Benefits to Protect the Victims of Trafficking and to Secure the Prosecution of Traffickers," *Human Rights Quarterly 26*, no. 2 (May 2004): 241-242.

males. In this way, the TVPA becomes a source for criminalizing Black males. Given the centrality of race in the development of the criminal justice system, and in anti-trafficking legislation, the consequences a law enforcement approach to the TVPA takes on a racial dimension and offers an explanation to the overidentification of Black traffickers.

Second, the overemphasis on prosecution may have related consequences for Black victims of trafficking. Demographic data on victims of trafficking is scant and exact figures are not known, particularly for domestic victims in the United States. The National Human Trafficking Hotline reported that in 2017 over 8,000 human trafficking cases were identified through the hotline. Of those, the race and ethnicity were provided by 3,734 victims.[112] African American/Blacks accounted for the lowest self-identified victims with 592. While these numbers are not an accurate measure of trafficking given they represent people that call seeking help, it is notable in that Black victims were the least identifiable. Additionally, looking at statistics on prostitution may provide a good indicator of potential human trafficking victims given the vulnerabilities of prostitutes may lead to their trafficking. The FBI reported that in 2012, Blacks made up 42.8% of all prostitution arrests.[113] Although the report does not provide information as to gender, it is most likely that Black women make up the majority of these arrests. Per discussions with attorneys who work with domestic U.S. citizen victims, they have stated and support the claim that

[112] "2017 Statistics from the National Human Trafficking Hotline and BeFree Textline," Polaris Project, accessed April 25, 2018, https://polarisproject.org/2017statistics.

[113] "Arrests by Race", FBI, UCR (2012), accessed April 23, 2018, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/43tabledatadecoverviewpdf. Note that this report indicates that whites arrested for prostitution made up 53.6% of all arrests, but this figure includes Latinos, thus inflating this figure.

a majority of domestic trafficking victims are women of color, including Black women.[114] However, stereotypes around race and sexuality and the general law enforcement perspective discussed above makes it difficult for them to be viewed as victims and not criminals.

Racial Implications of the TVPA Protection Prong

In order to bring attention to the issue of human trafficking, activists and politicians alike invoked images of the transatlantic slave trade, racial slavery, and emancipation. Those visceral images were invoked to stimulate action. By analogizing modern trafficking to the transatlantic slave trade activists and legislators sought to protect European women and women from the Global South from sexual servitude. The significance of this strategy was to diminish the horrors of U.S. slavery, while at the same time abstracting it from its racist foundation. By failing to acknowledge racialized slavery and its aftermath, the TVPA ultimately excluded African Americans from being considered victims of trafficking and from accessing the protections granted in the law. By providing resources and protections to foreign nationals, imagined as European women, but also read as non-black, while not accounting for the possible domestic black victim, the TVPA reinforces a racialized hierarchy of rights premised on the structures of slavery, including sexual violence against Black women. Not only does it reinforce racialized hierarchies, the result of the TVPA exposes the condition of anti-blackness in the law. As ethnic studies scholar Jared Sexton

[114] These discussions occurred as a law student and later as attorney with other attorneys who represented trafficking victims.

articulates, racial blackness is a necessary condition of enslavement.[115] The pervasiveness of this condition is such that regardless of changes in the law, slave laws reconfigure themselves to meet the needs of the state. Laws on slavery reconfigured themselves post 13th Amendment working to subjugate Blacks through criminalization and mass imprisonment.

Additionally, the failure of the law in identifying Black victims can be attributed to the white supremist logic foundational to the law. Given that whiteness became the privilege which protected from slavery, it makes sense that lawmakers envisioned white victims to be beneficiaries of the law.[116] By not considering the trafficking of Black women, lawmakers deny the historical legacies of slavery, which contributes to the perpetuation of Black criminalization and inability of the law to recognize Black victims. In this vain, the TVPA, like the 1807 Trafficking Act, Peonage Act, and Mann Act, is thinly veiled as combating slavery while sustaining Black subjugation and promoting white supremacy.

Anti-Blackness and International Human Rights

While specific to the United States, the TVPA's contribution to reifying anti-black racism has implications for international human rights law. The TVPA grew out of the international movement against trafficking and developed alongside the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (the

[115] Jared Sexton, "People-of-Color: Notes on the Afterlife of Slavery," *Social Text 28*, no. 2 (2010): 37.

[116] See, Cheryl I. Harris, "Whiteness as Property," *Harvard Law Review 106*, no. 8 (1993).

Protocol).[117] The Protocol originated in the U.N. Convention Against Transnational Organized Crime which set the framework for addressing organized crime in general.[118] The fact that the Trafficking Protocol was included in the Convention against Organized Crime points to the reliance and normalized use of international criminal law.[119] Indeed the foundations for the trafficking Protocol can be found in attempts to prosecute sex-violence in international law. This focus on prosecution mirrors the TVPA by emphasizing prosecution of criminals rather than protecting human rights.[120] However, because the international law mandates prosecution, it in effect further supports the criminalization and racialization of Black people and puts into question the ability of international law in advancing human rights for Black people and other communities of colors.

CONCLUSION

The TVPA has been praised as a the most significant anti-slavery anti-trafficking measure taken in the United States since the 13th Amendment. However, when analyzing the enforcement of the law, it becomes apparent that the TVPA does nothing to address the racial structures of the slavery it is attempting to combat. When placing the TVPA in the historical context of slavery's afterlife, including black codes, Jim Crow, and anti-

[117] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, G.A. res. 55/25, annex II, 55 U.N. GAOR Supp. (No. 49) at 60, U.N. Doc. A/45/49 (Vol.I) (2001).

[118] Convention Against Transnational Organized Crime, G.A. res. 55/25, annex I, 55 U.N. GAOR Supp. (No. 49) at 44, U.N. Doc. A/45/49 (Vol. I) (2001).

[119] James Hathaway, "The Human Rights Quagmire of "Human Trafficking", *Virginia Journal of International Law 49* (2008).

[120] See, Britta S. Loftus, "Coordinating U.S. Law on Immigration and Human Trafficking: Lifting the Lamp to Victims," *Columbia Human Rights Law Review* 43 (2011): 159.

miscegenation laws, what we find is that the TVPA is continuing the legacy of laws that produce and justify the continued subjugation of Black people. The absence of concern for addressing domestic trafficking, and the racial dimensions that contribute to domestic trafficking, works to obscure black victims from the discourse of trafficking. At the same time, the overidentification of the Black males as traffickers produces and reinforces the criminalization of Black men. In this way, the race-neutrality of the TVPA has come to reinforce racial hierarchies premised on anti-blackness.

This chapter focused on the TVPA as applied to African Americans, in contrast to the preceding chapters analyzing the law's application to migrant populations. By shifting focus to the criminal law component of the TVPA, this chapter reveals the multiple racial projects in this law, and the simultaneous use of differing racialized histories within it. One objective of this dissertation is to trace the different ways the TVPA is deployed against various racialized groups, to reveal the process of racialization and white supremacy across populations, and the permanence of race in the law. It is my hope that this chapter will spark further research into trafficking as a discursive and ideological device that is premised on racial differentiation and hierarchies, and the consequences it has for communities of color within the United States.

CONCLUSION

On July 1, 2015 four defendants were charged (and subsequently plead guilty)[1] in federal court for the alleged trafficking of Guatemalan nationals. The victims in this case included several unaccompanied children from Guatemala who were placed with traffickers through the federal government's unaccompanied children program. The traffickers began recruiting minors in 2014, coinciding with the influx of unaccompanied minors. The indictment alleges the traffickers lured children as young as 14 or 15 to travel to the United States on promises of getting an education.[2] Several of the children were apprehended and then placed in federal custody. Each child was subsequently released to a trafficker in Marion, Ohio, who claimed to be a family friend of each victim.[3] Once in the custody of their sponsor, these children were forced to work on an egg farm, working six or seven days a week, twelve hours a day, under repeated threats of physical harm and even death.[4] The children were forced "to live in dilapidated trailers and to work at physically demanding jobs at Trillium Farms [egg farm] for up to 12 hours a day for minimal amounts of money. The work included cleaning chicken coops, loading and

[1] In total, 6 defendants were charged, and all plead guilty.

[2] Department of Justice, Civil Rights Trustees, "Remaining Defendant Pleads Guilty to Forced Labor Scheme that Exploits Guatemalan Minors at Ohio Egg Farms," February 29, 2016, accessed August 8, 2018, https://www.justice.gov/opa/pr/remaining-defendant-pleads-guilty-forced-labor-scheme-exploited-guatemalan-minors-ohio-egg.

[3] "Remaining Defendant Pleads Guilty to Forced Labor Scheme that Exploits Guatemalan Minors at Ohio Egg Farms."

[4] "Remaining Defendant Pleads Guilty to Forced Labor Scheme that Exploits Guatemalan Minors at Ohio Egg Farms."

unloading crates of chickens, de-beaking chickens and vaccinating chickens."[5] It was further reported at least one of the trailers "had no heat, no working toilet and no hot water."[6]

Public outcry followed the indictments and led to the U.S. Senate launching a six-month investigation into the trafficking of unaccompanied children (UC) once released from custody.[7] The investigation found that in addition to the Marion case, there were 13 other cases of post-release trafficking, and 15 with "serious trafficking indicators."[8] Overall the investigation revealed systemic failures on part of the government in screening sponsors which exposed unaccompanied children to abuse.[9] These failures stemmed from the department of Health and Human Services (HHS) interpretation of the TVPRA, which

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[5] "Remaining Defendant Pleads Guilty to Forced Labor Scheme that Exploits Guatemalan Minors at Ohio Egg Farms."

[6]Sarah Volpehnein, "PBS to air film investigating labor trafficking ring in Marion County," *The Marion Star*, April 23, 2018, accessed August 8, 2018, https://www.marionstar.com/story/news/local/2018/04/23/pbs-air-film-investigating-labor-trafficking-ring-marion-county/542277002/.

[7] Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, Staff Report, Protecting Unaccompanied Alien Children from Trafficking and other Abuses: The Role of the Office of Refugee Resettlement, 114 Cong., 2nd sess, January 28, 2016, accessed August 8, 2018, https://www.hsgac.senate.gov/imo/media/doc/Majority%20&%20Minority%20Staff%20Report%20-%20Protecting%20Unaccompanied%20Alien%20Children%20from%20Trafficking%20and%20Other%20Abuses%202016-01-282.pdf.

[8] Permanent Subcommittee on Investigations, 3.

[9] In the Marion case, traffickers claimed to be family friends of the unaccompanied children, but as it turned out they were hired to get the children out of federal custody and given to the traffickers. In addition to a lack of screening as to the relationship between sponsors and children, the government failed to assess living condition including background checks on adults who may be living with the sponsor. It further allowed sponsors to refuse post-release services. In the Marion case, a social worker who went to visit one of the child-victims was told that the child moved and there was no follow-up.

states: "the care and custody of all unaccompanied children…shall be the responsibility of the Secretary of Health and Human Services."[10] Under HHS' interpretation which guides its policies and procedures towards UC, its legal responsibilities over UC are discharged once children are released to sponsors.

While the report was a scathing indictment of the policies and procedures of the federal agency in charge of the care of UC, it also laid the groundwork for an attack on the protections for unaccompanied minors outlined in the TVPRA. Specifically, the Senate investigation equated abusive sponsors, such as those who traffic children, with sponsors who failed to take children to immigration court. The investigation characterized this failure as inflicting legal harm on UC due to resulting *in absentia* removal orders, which are judicial orders removing children from the country based on their failure to appear in court. This emphasis on legal harm was ultimately seen as a failure of HHS's interpretation of the TVPA and its resulting policies, just like it was to blame for the placement of children with human traffickers. The equating of abuse with legal harm became a focal point two years later when, in 2018, the Senate Permanent Subcommittee on Investigations held a follow up hearing on the progress HHS and the Department of Homeland Security (DHS) made in its policies and procedure ensuring UC were protected from abuse.

At the hearing, Senators expressed concern for HHS lack of responsibility over UC after they are released from federal custody. Senator and Chairman of the committee, Republican Rob Portman of Ohio, who had spearheaded the earlier investigation,

[10] Enhancing efforts to combat the trafficking of children, 8 U.S. C. § 1232 (b)(1).

remarked: "HHS told this subcommittee that once it places children with sponsors-even sponsors who are not related to the children-it no longer has legal responsibility for them. not if they're abused. Not if they miss their court hearings. That is completely unacceptable."[11] Similarly, Democratic Senator Tom Carper of Delaware expressed: "a 2008 law [the TVPRA] …places all children who arrive at our borders and ports of entry without a parent or guardian under the care and custody of the Department of Health and Human Services (HHS). In fulfilling its responsibilities to these children, HHS must place them in safe homes, offer them mental health care and other services they might need, and ensure that they are participating in immigration court proceedings."[12] When discussing solutions to address the abuse of unaccompanied children, a representative from DHS, James W. McCament, stated that "DHS is working closely with the Trump Administration and Members of Congress to address existing "loopholes" that allow individuals to exploit our immigration law, including amending the TVPRA to treat all UACs the same, regardless of nationality, so that if they are not victims of human trafficking they can be safely returned home or removed to a safe third country."[13] The comments by the Senators

[11] U.S. Senate Permanent Subcommittee on Investigations, Oversight of HHS & DHS Efforts to Protect Unaccompanied Alien Children from Human Trafficking & Abuse, Statement of Chairmen Rob Portman, April 26, 2018, accessed August 7, 2018, https://www.hsgac.senate.gov/imo/media/doc/Opening%20Statement%20of%20Chairman%20Rob%20Portman.pdf.

[12]U.S. Senate Permanent Subcommittee on Investigations, Oversight of HHS & DHS Efforts to Protect Unaccompanied Alien Children from Human Trafficking & Abuse, Statement of Tom Carper, April 26, 2018, accessed August 7, 2018, https://www.hsgac.senate.gov/imo/media/doc/Opening%20Statement%20of%20Ranking%20Member%20Tom%20Carper.pdf .

[13]U.S. Senate Permanent Subcommittee on Investigations, Oversight of HHS & DHS Efforts to Protect Unaccompanied Alien Children from Human Trafficking & Abuse, Statement of James W. McCament, April 26, 2018, 7. Accessed August 7, 2018, https://www.hsgac.senate.gov/imo/media/doc/McCament%20Testimony.pdf.

and DHS reveal that what started out as concern about the welfare of UC quickly transformed into a discussion on how to effectuate their removal.

The issue of trafficked Central American unaccompanied children, and the resulting attention brought to them by policy and lawmakers, exemplifies how human rights abuses towards Central Americans becomes interpreted as an immigration issue requiring restrictive measures. Indeed, echoing the solutions provided by DHS, the conservative think tank, the Heritage Foundation, proposed ending protections for unaccompanied children, specifically the protections given to children from non-contiguous countries (i.e. El Salvador, Guatemala, and Honduras). The think tank blamed the protections afforded in the TVPRA for the resulting trafficking of children, stating: "By treating these minors all as victims of trafficking, Health and Human Services is less able to devote time and resources to actual victims of human trafficking."[14] This approach to unaccompanied children has been taking up by the current administration who seeks to rescind parts of the TVPRA to ostensibly "provide special protections for any UACs who are genuinely victims of trafficking, while allowing U.S. officials to promptly and safely repatriate those UACs who are not."[15] Thus, what started as an examination into the trafficking of UC ultimately evolved into calls for restrictive immigration policies against

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[14] Paul Fredrick, and David Inserra, "Fixing This Immigration Loophole Would Help Address Children Migrants," *The Heritage Foundation*, April 4, 2018, accessed August 8, 2018, https://www.heritage.org/immigration/commentary/fixing-immigration-loophole-would-help-address-child-migrants.

[15] White House, "Loopholes in Child Trafficking Laws Put Victims-and American Citizens-At Risk," April 5, 2018, accessed August 7, 2018, https://www.whitehouse.gov/articles/loopholes-child-trafficking-laws-put-victims-american-citizens-risk/.

them, as they are not *genuine victims* deserving of human rights protections. While I do not intend to engage in a full analysis of these recent events, I do want to call attention to the ways in which the response towards the trafficking of UC is reflective of the TVPA as a racial project, and as such, a completely expected progression of this law.

The overarching claim asserted in this dissertation is that the discourse of human rights works to advance anti-immigrant policies, which contributes to the racialization of immigrants and reification of racial hierarchies. In the case of trafficked UC their inability to access claims to human rights and corresponding protections stems from the original intent of the TVPA. As discussed in Chapter One of this dissertation, the intent of the TVPA was to provide protections for European women who are the victims of human trafficking- reflecting a white supremacist vision of the law. This white supremacist interest in the law has discursive and material consequences for non-white people (both citizens and migrants) who seek protections under the TVPA. In the case of migrants, consequences include the reinforcement of racial stereotypes of non-white migrants which work to justify denying protections outlined in the TVPA. Where protections have been afforded under the TVPA, such as the expanded benefits of SIJS, they ultimately contribute to the criminalization of migrants which are later used to justify rescinding protections and benefits. Accordingly, even though the trafficking and abuse against UC discussed above are squarely in the realm of human rights violations (trafficking being violation of international human rights law), the fact that the abuse is against non-European, Central American migrant children, makes them illegible for human rights protections. In this way, the TVPA's interest in whiteness is maintained, while contributing to the racialization of

migrants. Further, the racial project of the TVPA is not limited to anti-immigrant racialization. As discussed in Chapter Four, the overidentification of Black males as traffickers, and under identification of Black female victims implicates the TVPA in the history of anti-black racism and criminalization against Black people. While this dissertation offered a look into domestic trafficking, this study would benefit from a comparative analysis on the differing racial projects incorporated in the TVPA.

THE LIMITS OF THE LAW

These recent events reflect the inability of Central American migrants to escape the purview of immigration enforcement, revealing the ineffectiveness of human rights discourse to effectuate changes within immigration law. As discussed throughout this dissertation, claims to human rights have been taken up by immigrant rights activists, legal reformers, and lawmakers, slowly emerging within domestic immigrations laws over the past three decades, beginning with the Refugee Act. However, rather than challenging the current paradigm, it has been deployed to further the draconian immigration apparatus, and as such is implicated in the racial project that is immigration. This is exemplified in the implementation of the TVPA. Since its implementation, the TVPA has worked to racialize non-white populations, such as Central American unaccompanied children, and rather than provide protections, has been a source of legal violence against them.

In voicing my concerns of the TVPA, my dissertation can be understood as an exercise in the critique of left legalism. As discussed by critical theorists Wendy Brown and Janet Halley, left legalism, are those progressive political projects that are addressed

through legal reform, including various feminist, anti-racist, anti-homophobic, human rights, and immigrant rights-based endeavors. While these projects seek emancipatory politics, they have increasingly collaborated with "liberal legalistic projects," thereby infusing "leftism with legalism and producing something that could be called left legalism."[16] Brown and Halley point to the Civil Rights movement as exemplary of seeking justice, in this case racial-justice, through legal remedies. However, tying leftist projects to legalism produces an ideological tension and contradiction. As Brown and Halley observe, "submitting the left projects to the terms of liberal legalism translates the former into the terms of the latter, a translation which will necessarily introduce tensions with, and sometimes outright cancellations of, the originating aims that animate left legalism in the first place."[17]

This tension is a result of the differing ideologies inherent in liberal legalism and leftist politics. Liberalism presumes legitimacy of the state, and the law is seen as formally neutral and equal. Leftist thought and political projects, on the other hand, view the state and the law, "as a site and potential instrument of dominance insofar as it masks unequal and unfree conditions with an ideology of freedom and liberty that entrenches or extends the powers of the already advantaged."[18] Put another way, the increasing reliance on framing political projects through legal reform and the discursive use of rights, works to

[16] Wendy Brown, and Janet Halley (eds.), *Left Legalism/ Left Critique* (Durham: Duke University Press, 2002), 8.

[17] Brown, and Halley, *Left Legalism/ Left Critique*, 16.

[18] Brown, and Halley, *Left Legalism/ Left Critique*, 7.

reinforce the very structures these projects seek to challenge. In the case of immigrant rights, this dissertation traced the various ways that calls to human rights and the incorporation of human rights language in the law reinforces restrictionist immigration measures. In this way, the project of immigrant and human rights has fallen into the paradoxical predicament that Brown and Halley describe. What, then, is the solution out of this predicament? What if any alternatives exist outside the law?

Even though this dissertation exposed the continued centrality of race in immigration law and has sought to shed light into the ways in which immigration laws invoke human rights to advance racial logics, it is by no means an argument for giving up on the law. In my work as a deportation defense attorney, I have witnessed the material benefits the law can bring to individuals. Indeed, asylum, trafficking, and SIJS laws, no matter how limited, provide much needed protections for migrants, and have saved lives that would otherwise be ended if returned to the countries they are fleeing. However, we cannot rely entirely on laws to bring about change, no matter how progressive they may appear.

Although I cannot offer concrete alternatives to the tactic of legal reform, any political project around immigration must be directed by those affected the most- migrants themselves. As discussed by political scientist Alfonso Gonzales in the context of asylum-detention, "subaltern social movements, radical attorneys, detainees, and others," challenge state practices and discourse, thereby "creating possibilities for transformation" of the

current immigration regime.[19] Further, as legal scholar and activist Dean Spade explains in the context of trans politics:

> Because laws operate as tactics in the distribution of life chances that concern us, we must approach law reform tactically. Meaningful transformation will not occur through pronouncements of equality from various government institutions. Transformative change can only arise through mass mobilization…. law reform tactics can have a role in mobilization-focused strategies, but law reform must never constitute the sole demand of trans politics. If we seek transformation that is more than symbolic and that reaches those facing the most violent manifestations of transphobia, we must move beyond the politics of recognition and inclusion.[20]

Similarly, justice for immigrants must be accompanied by social movements that challenge the status quo and reimagines what a politic of immigration looks like. While legal protections have a place in providing short-term material benefits such as immigration relief, work authorization, and other social and medical benefits, legal reform should not be the final goal. In this way, while this dissertation is a study of law, it has implications for social movements. I hope that by showing the consequences of relying on legal reform though human rights, discussions both within and outside the academy, and amongst practitioners of immigration law and immigrant rights activist will ensue, generating alternatives to the current paradigm.

Lastly, for Brown and Halley, one of the objectives of critiquing left legalism is to provide a space "to dissect our most established maxims and shibboleths, not only for

[19] Alfonso Gonzales, "Derechos en Crisis: Central American Asylum Claims in the Age of Authoritarian Neoliberalism," *Politics, Groups, and Identities* (2018): 6.

[20] Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (2015), 8.

scholastic purposes, but also for deeply political ones of renewing perspective and opening new possibility."[21] Focusing on the political, "Critique potentially reinvigorates politics by describing problems and constraints anew, by attending to what is hidden, disavowed, or implicit, and by discerning or inventing new possibilities within it."[22] Through describing the constraints of the law in providing protections and to a greater extent recognizing humanity, I hope this dissertation is a catalyst for scholars and practitioners to question their own belief in human rights, so that we can reimagine a political project that advances the lives of migrants without reinforcing the structures that seek to limit their life chances.

[21] Brown, and Halley, *Left Legalism/ Left Critique*, 27.

[22] Brown, and Halley, *Left Legalism/ Left Critique*, 33.

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