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Richard B. Lillich Memorial Lecture: New Directions in the Struggle Against Human Trafficking

Mark Sidel

University of Iowa College of Law

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Cover Page Footnote

Professor of Law, Faculty Scholar, and Lauridsen Family Fellow, University of Iowa; Research Scholar, Obermann Center for Advanced Studies, University of Iowa. I am grateful to Tahirih Lee, Associate Dean Donna Christie, Dean Don Weidner, Shaina Brenner, and Buddy Musgrove and the editors and staff of the Florida State University Journal of Transnational Law & Policy for the opportunity to deliver the 2007 Lillich Lecture and to adapt the Lecture for publication, and to Terry Coonan, Kathleen Kim, and other participants in the symposium on human trafficking at the FSU College of Law in November 2007 for their cogent comments. My thanks as well to Nellie Viner for superb research assistance at the University of Iowa College of Law and to the University of Iowa College of Law, Obermann Center for Advanced Studies, and Office of the Provost for research support.

**RICHARD B. LILlich MEMORIAL LECTURE:
NEW DIRECTIONS IN THE STRUGGLE AGAINST HUMAN
TRAFFICKING**

MARK SIDEL*

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I. INTRODUCTION

I am honored to have the opportunity to deliver this year's Richard B. Lillich Memorial Lecture, on the topic of *New Directions in the Struggle against Human Trafficking*. I am especially honored to be asked to give this lecture, and to give it here, because of the leadership role that Florida State University (FSU) and its Center for the Advancement of Human Rights (FSU's Center) have played in the struggle against human trafficking and involuntary servitude in the United States.¹

* Professor of Law, Faculty Scholar, and Lauridsen Family Fellow, University of Iowa; Research Scholar, Obermann Center for Advanced Studies, University of Iowa. I am grateful to Tahirih Lee, Associate Dean Donna Christie, Dean Don Weidner, Shaina Brenner, and Buddy Musgrove and the editors and staff of the *Florida State University Journal of Transnational Law & Policy* for the opportunity to deliver the 2007 Lillich Lecture and to adapt the Lecture for publication, and to Terry Coonan, Kathleen Kim, and other participants in the symposium on human trafficking at the FSU College of Law in November 2007 for their cogent comments. My thanks as well to Nellie Viner for superb research assistance at the University of Iowa College of Law and to the University of Iowa College of Law, Obermann Center for Advanced Studies, and Office of the Provost for research support.

1. Fla. State Univ. Ctr. for the Advancement of Human Rights, *Florida Responds to Human Trafficking* (2003) [hereinafter *Florida Responds*], available at <http://www.cahr.fsu.edu/the%20report.pdf>. Other information about the Center's fine work on human trafficking, including curriculum development, training, advocacy and other activities is available at www.cahr.fsu.edu.

I am also honored to be giving a lecture named for the late Richard B. Lillich, one of our finest scholars of international claims, investment, human rights, and other important topics in international law. Professor Lillich was the first holder of the Ball Eminent Scholar Chair at the Florida State University College of Law, and a respected member of the faculty here and at other law schools. I am also delighted to join previous Lillich Lecturers David Caron, Philip Alston, Linda Malone, and Jerome Reichman.

I never had the privilege of working with Professor Lillich. But I did have some brief contact with him. In the early and mid 1990s, I headed the Ford Foundation's programs in Vietnam and worked closely with the Vietnamese Ministry of Foreign Affairs on building the capacity of Ministry and other government personnel in such areas as human rights and international law. Senior officials at the Ministry asked me for help in identifying an American scholar who might be able to assist Vietnam in understanding the U.S. law on settlement of international claims as they undertook complex negotiations with the United States on Vietnamese and American claims arising out of the end of the Vietnam War.

I remember very well calling Professor Lillich from Hanoi and his willingness to help Vietnam understand the American law of claims settlement. He understood that a better and deeper understanding of legal processes would result in more informed negotiations and speed the process of normalizing relations between our countries. And, indeed, Vietnam and the United States resolved their mutual claims, and the resolution of that important and contentious issue helped to pave the way to the normalization of diplomatic relations between the two countries that occurred in 1995.²

My topic today is *New Directions in the Struggle Against Human Trafficking*. I must start by pointing out that FSU's Center was among the earliest American academic institutions to recognize the scourge of human trafficking and to promote and produce serious research, policy advocacy and teaching on trafficking, forced labor, and involuntary servitude. In fact, the Center has helped to pioneer several of the new directions in the struggle

2. On Vietnam-US normalization, see Mark Sidel, *The United States and Vietnam: The Road Ahead* (Asia Society 1996) (on file with the *Journal of Transnational Law & Policy*); Mark Sidel, *The United States and Vietnam: Three Years after Normalization*, in *Emerging from Conflict: Improving U.S. Relations with Current and Recent Adversaries 1* (1998), available at <http://www.stanleyfoundation.org/publications/archive/Vantage98.pdf>; Mark Sidel & Sherry Gray, *Some Thoughts on the Vietnam-US Experience*, in *Emerging from Conflict: Improving U.S. Relations with Current and Recent Adversaries 18*. For recent developments, see Mark E. Manyin, Cong. Res. Serv., *U.S.-Vietnam Relations: Background & Issues for Congress* (2008), available at http://assets.opencrs.com/rpts/RL33316_20080103.pdf.

against human trafficking that I will discuss today. Let me briefly outline several of those areas.

In the fall of 2003, the Center published a report entitled *Florida Responds to Human Trafficking*.³ The report was one of the first comprehensive reports on the problem of human trafficking, forced labor, and involuntary servitude at the state level. The report resulted from strong cooperation between the Center, other academics at the University, state officials, and nongovernmental organizations (NGOs) and social service agencies around Florida.⁴

The Center's study recommended that Florida adopt a state law to criminalize human trafficking, prevent trafficking and forced labor, and protect victims, as a counterpart to the federal law against human trafficking, the Trafficking Victims Protection Act (TVPA) enacted by Congress in 2000.⁵ And the report, and other work from the Center, supported adoption of a state law that would include a method by which victims of trafficking and related crimes could sue or otherwise seek compensation from their victimizers.⁶

In 2007, none of this is particularly surprising. A number of states – including Minnesota,⁷ California,⁸ Washington,⁹ and Ohio¹⁰ – have now issued detailed reports on human trafficking, involuntary servitude and forced labor in their states. Well over twenty states have now adopted state anti-trafficking laws.¹¹ Many

3. See Florida Responds, *supra* note 1.

4. See *id.* at *4.

5. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended at scattered sections of 8 and 22 U.S.C.).

6. See Florida Responds, *supra* note 1; Terry Coonan, *Human Rights in the Sunshine State: A Proposed Florida Law on Human Trafficking*, 31 Fla. St. U. L. Rev. 289 (2004).

7. Minn. Statistical Analysis Ctr., Minn. Office of Justice Programs, *Human Trafficking in Minnesota: A Report to the Minnesota Legislature* (2006), available at http://www.dps.state.mn.us/OJP/cj/publications/Reports/2006_Human_Trafficking.pdf.

8. Cal. Alliance to Combat Trafficking & Slavery Task Force, *Human Trafficking in California* (2007), available at http://www.safestate.org/documents/HT_Final_Report_ADA.pdf. See also Human Rights Ctr., *Freedom Denied: Forced Labor in California* (Feb. 2005), available at www.law.berkeley.edu/clinis/ihrlc/pdf/Freedom_Denied.pdf.

9. Wash. State Task Force Against Trafficking of Persons, State of Wash. Dep't of Cmty., Trade & Econ. Dev., *Human Trafficking: Present Day Slavery* (2004), available at <http://www.wcsap.org/advocacy/PDF/trafficking%20taskforce.pdf>.

10. Jeremy M. Wilson & Erin Dalton, Rand Corp., *Human Trafficking in Ohio: Markets, Responses, and Considerations* (2007), http://www.ocjs.ohio.gov/research/RAND_MG689.pdf.

11. Ctr. For Women & Policy Studies, *Report Card on State Action to Combat International Trafficking 4-5* (May 2007) [hereinafter Report Card], available at <http://www.centerwomenpolicy.org/documents/ReportCardonStateActiontoCombatInternationalTerrorism.pdf>. The Center for Women Policy Studies (CWPS) in Washington has been a

mandate that human traffickers and others convicted of similar crimes forfeit their assets, and that trafficking victims should have a private right of action to sue their traffickers is now part of federal law as well as well over thirty states' laws against trafficking.

But in 2003, though we were moving in these directions, none of this was assured, and none of these developments were preordained. The Center's report and other activities, including an early article by Professor Coonan,¹² pioneered state-based policy research on human trafficking, forced labor, and involuntary servitude, including the gathering of important data at the state level, and played a major role in spurring Florida's adoption of one of the nation's first state anti-trafficking laws, and then its revision and expansion.¹³

This brief mention of some of FSU's, and the Center's work in this area has identified several of the themes I want to discuss today. After some initial remarks about our national concern and interest in human trafficking, forced labor, and involuntary servitude, I want to turn to a discussion of several important new directions in the struggle against human trafficking in the United States and, to some degree, other countries. These are:

- The rapid growth, and the complicated role, of state laws against human trafficking
- The development of private rights of action by trafficking victims against their traffickers or, in less formal terms, an ability for victims to sue their traffickers for civil compensation, along with other issues in civil litigation against traffickers

Finally, I address the situation in research on human trafficking, forced labor, and involuntary servitude in the United States, the emergence of new, innovative and challenging research on human trafficking and forced labor in the United States, and

national institutional leader in compiling information and providing analysis on state laws against human trafficking. For the CWPS website on state laws against trafficking, see http://www.centerwomenpolicy.org/programs/trafficking/map/default_flash.asp.

12. See Florida Responds, *supra* note 1; Coonan, *supra* note 6.

13. The first Florida law provided for felonies of sex trafficking, obtaining forced labor, and trafficking for purposes of forced labor or prostitution, and for gradations of the felonies. See 2004 Fla. Laws 391 (codified as amended at Fla. Stat. § 787.06 (2007)), available at http://election.dos.state.fl.us/laws/04laws/ch_2004-391.pdf. The second Florida law expanded the reach of those felonies and added a private right of action for trafficking victims, among other provisions. See 2006 Fla. Laws 168 (codified at Fla. Stat. § 787.06 (2007)), available at <http://www.flsenate.gov/data/session/2006/Senate/bills/billtext/pdf/s0250er.pdf>. Further details on the Florida statutes are also available from the CWPS at <http://www.centerwomenpolicy.org/programs/trafficking/map/lawdetail.cfm?state=FL#31>.

the continuing need for considerably more policy and academic research on these complex phenomena and solutions to them.

II. HUMAN TRAFFICKING, FORCED LABOR, AND INVOLUNTARY SERVITUDE IN THE UNITED STATES

Let me start by trying to dispel some myths about trafficking, perhaps particularly for those who are generally aware of this problem but have not yet worked in the area, taken a course, or conducted research on it.

First, human trafficking in the United States is about both trafficking of various kinds across borders, but also sometimes entirely within the United States. Some trafficking is, of course, about cross-border issues. The case that brought me into this field is one good example, a case we now know as the largest human trafficking case in the United States since the Civil War.¹⁴ It involved the trafficking, forced labor and other crimes committed against over 200 Vietnamese and Chinese women on the American territory of American Samoa in the late 1990s and early part of this decade, a case prosecuted by the U.S. Department of Justice in cooperation with the Federal Bureau of Investigation, Department of Labor, and other agencies.

We often focus on cross-border trafficking issues, but there is of course substantial trafficking within the United States as well – forced prostitution and forced labor, for example, that involves transport of people within the United States. In my part of the country, we have seen this with forced prostitution rings and the transport of trafficked people within the Midwest,¹⁵ and domestic trafficking occurs in all other parts of the country as well. So this is both an international and a domestic phenomenon.

Second, because activists and some scholars often call human trafficking “modern-day slavery,”¹⁶ we often assume that it has all the characteristics of the slavery that we know from the history books. But, as Kevin Bales and other researchers, activists and

14. *U.S. v. Lee, et al.*, 1:01-cr-00132-SOM-BMK-1 (D. Hi. jmt. entered June 21, 2005), *aff'd*, 472 F.3d 638 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 2284 (2007).

15. *See, e.g.*, Marty Denzer, *Midwest No Safe Harbor From Human Trafficking*, Catholic News Serv., Aug. 22, 2007, <http://www.catholicbishops.org/mrs/humantrafficking.shtml>; *Truckers Haul Sex Slaves on Midwest Highways*, CitizenLink (Focus on the Family Action), July 16, 2007, <http://www.citizenlink.org/content/A000005061.cfm>. For an interesting preliminary study of policy perceptions of trafficking in the Midwest, see Vicky Luttrell, *Human Trafficking in the Midwest: Experience and Perception Among Kansas Law Enforcement Officers -- An Exploratory Study* (2005) (unpublished paper, Washburn University), www.washburn.edu/wucs/summer%2005%20reports/vicky%20human%20trafficking2005.doc.

16. *E.g.*, Florida Responds, *supra* note 1, at 14.

policy analysts have pointed out, there are many varieties of the trafficking and trafficked experience and not all of them look like traditional slavery.¹⁷ Some trafficking, forced labor, and involuntary servitude begins in chains, in involuntary, forced removal or imprisonment. That is the idea of slavery that we are often most familiar with.

But, again as Bales and others have pointed out, much of modern human trafficking, forced labor, and involuntary servitude begins not with chains but with job offers, contracts, and passports—situations in which people voluntarily take up work and move to other locations, only to find that what was voluntary quickly changes its face, turning more involuntary with time and with distance, and transitioning from the voluntary acceptance of work into forced labor, often under very different terms and involving different work.¹⁸

What is not a myth is that human trafficking, forced labor, and involuntary servitude exist in the United States. And we can clearly identify the primary types of these activities. These are sex trafficking, usually for purposes of forced prostitution or sexual abuse, and labor trafficking, in which the goal of the activity is labor against the victim's will.

Along with those two basic categories, there are a number of forms in which sex trafficking and labor trafficking, or more generally forced labor, often takes place in the United States. Studies and reports by the Center here at FSU, by the Center for Human Rights at Berkeley, Free the Slaves, a leading anti-trafficking organization, and by the U.S. Justice Department have identified the primary areas and forms in which trafficking and forced labor take place in the United States.

They include prostitution, domestic labor and domestic service, forced labor and trafficking in agriculture, sweatshops and sweatshop factories, service work, including food, nursing homes and other forms of service case, sexual exploitation of children, mail order brides, and other forms of trafficking and forced labor.¹⁹ In the United States, at least, these appear to comprise the most significant categories and forms of human trafficking and forced labor.²⁰

17. See, e.g., Kevin Bales, *Disposable People: New Slavery in the Global Economy* (2d ed., Univ. of Cal. Press 2004) [hereinafter Bales, *Disposable People*].

18. *Id.*

19. Among the studies to have shown these typologies are Florida Responds, *supra* note 1; Free the Slaves & Human Rights Ctr., Univ. of Cal. (Berkeley), *Hidden Slaves: Forced Labor in the United States* (2004), available at www.hrcberkeley.org/download/hiddenslaves_report.pdf.

20. See sources cited *supra* note 19.

How much human trafficking and forced labor is there in the United States? Here there is considerably more debate. Based on the definitions in the Victims of Trafficking and Violence Protection Act of 2000 (the 2000 Trafficking Act), the U.S. government has estimated that 14,500 to 17,500 people are trafficked into the United States each year.²¹ But—and this is an issue to which I will return later—we are not discovering and prosecuting nearly that number of cases of trafficking and forced labor and, as the Berkeley report has pointed out and many others agree, “it is unclear how these figures were calculated.”²²

That report suggests that

at any given time ten thousand or more people are working as forced laborers in the United States. It is likely that the actual number reaches into the tens of thousands. Determining the exact number of victims, however, has proven difficult given the hidden nature of forced labor and the manner in which these figures are collected and analyzed. Data on victims of forced labor is further complicated by the U.S. government’s practice of not counting the *actual* number of persons trafficked or caught in a situation of forced labor in a given year. Instead, it counts only survivors (defined by the Trafficking Act as victims of a “severe form of trafficking”) who have been *assisted* in accessing immigration benefits. By this definition, the U.S. government reports that it has assisted approximately four hundred and fifty survivors over the past three years.²³

But in more specific terms, what does trafficking look like? I could give examples from anywhere in the country, but let me give you several from Florida to provide a sense of the different types of trafficking and forced labor we face. And the fine work of the Center here and of the Department of Justice in Washington, from whose reports these examples are drawn, enables me to do this.

In March 2004, Ramiro Ramos was sentenced to fifteen years in prison, ordered to turn over assets of over \$3 million, and ordered deported for conspiring to hold workers in involuntary

21. Free the Slaves & Human Rights Ctr., *supra* note 19, at 10.

22. *Id.* (discussing calculations in U.S. Dep’t of Justice et al, Assessment of U.S. Government Activities to Combat Trafficking in Persons 8-9 (June 2004), available at http://www.usdoj.gov/crt/crim/wetf/us_assessment_2004.pdf).

23. Free the Slaves & Human Rights Ctr., *supra* note 19, at 10.

servitude and harboring undocumented workers.²⁴ His brother was also convicted and sentenced later, also to fifteen years and to share the forfeiture of \$3 million.²⁵ As the Justice Department explained:

[they] were Florida labor contractors who supplied migrant farm laborers to citrus growers. Undocumented Mexican citizens were transported to Florida to work for the Ramos brothers. Once in Florida, they were forced to work until they had paid off their transportation debt. The defendants threatened the workers with violence if they left prematurely, and brutally beat a van driver and several of his employees to prevent them from taking workers away from the area.²⁶

The two brothers were convicted in June 2002 of “conspiring to hold workers in involuntary servitude and of harboring undocumented workers.”²⁷ The \$3 million in assets was forfeited to the government “because it was used in furtherance of the conspiracy or was obtained as a result of the criminal enterprise.”²⁸

In another Florida case, in 2002, Hugo Cadena-Sosa and other defendants were charged with “conspiring with others to hold women and girls from Mexico in involuntary servitude” between 1996 and 1998.²⁹ The defendants conspired, again in the words of the Justice Department, “to lure women and girls from Mexico to Florida with promises of good jobs and better lives, and forcing them into prostitution and holding them as sexual slaves in brothel houses in Florida and the Carolinas”³⁰

They were forced to work as prostitutes until they paid a smuggling fee of \$2,000, and “[i]n some cases . . . [they] were locked in a room with no windows and given no money . . . [and]

24. U.S. v. Ramos, et al., No. 2:01-cr-14019_KMM-1(S.D. Fla. jmt. entered March 2, 2004). Press Release, U.S. Dep’t of Justice, Florida Man Sentenced on Human Trafficking-Related Charges (March 2, 2004), http://www.usdoj.gov/opa/pr/2004/March/04_crt_133.htm.

25. Press Release, U.S. Dep’t of Justice, Three Florida Men Sentenced in Conspiracy to Detain Workers in Conditions of Involuntary Servitude Charges (Nov. 20, 2002), http://www.usdoj.gov/opa/pr/2002/November/02_crt_687.htm

26. Press Release, U.S. Dep’t of Justice, *supra* note 2424.

27. *Id.*

28. *Id.*

29. Press Release, U.S. Dep’t of Justice, Florida Man Part of Mexican Trafficking Ring Pleads Guilty to Involuntary Servitude Charges (Sept. 13, 2002), http://www.usdoj.gov/opa/pr/2002/September/02_crt_525.htm; U.S. v. Cadena-Sosa et al., No. 2:98-cr-14015-JEM6 (S.D. Fla. jmt. entered Dec. 12, 2002).

30. Press Release, U.S. Dep’t of Justice, Florida Man Part of Mexican Trafficking Ring Pleads Guilty to Involuntary Servitude Charges (Sept. 13, 2002), http://www.usdoj.gov/opa/pr/2002/September/02_crt_525.htm

threatened with beatings and reprisal attacks against their families in Mexico.”³¹ When several escaped they “were hunted down and returned to the brothels, where they were punished by beatings and confinement.”³² The FSU Center’s report calls “[t]he *Cadena* case . . . one of the most high profile--and most egregious--instances of human trafficking in modern America.”³³

In yet another Florida case—also reported in detail in the Center’s fine report—a young indigenous woman from Guatemala was kidnapped by a trafficker, smuggled in South Florida, had her Guatemalan national ID card destroyed, and was forced to work in tomato fields during the day and sexually abused at night by a trafficker named Jose Tecum.³⁴ Tecum was convicted of kidnapping, immigration violations, slavery, and conspiracy to manufacture false documents and sentenced to nine years in prison.³⁵

As documented by the Center, the *Tecum* case is a useful example of the physical and psychological trauma that is often inflicted on victims. In the words of the Center’s report, she

found herself in a world completely removed from that of her indigenous culture in Guatemala. The trafficker coerced her [by] threatening her entire family in her home country. Her trafficker also employed psychological coercion unique to their native culture: at one point he stole a lock of her hair and one of her shoes and told her that the objects had been used in witchcraft ceremonies that would bind her to him willingly or unwillingly Her cultural isolation, financial dependence, and the threats of reprisals against her family sufficed to keep her compliant and subjugated. It took the victim advocate six visits in the same day to the Tecum house before she could convince the victim that she was actually free to leave the premises. When she finally did so, the victim was able to gather all her personal belongings in a single grocery bag. Even as the young girl was liberated and taken away from the house where she had been kept a prisoner, she was unable to comprehend that she was being set free: her most insistent request was that the victim advocate pay off the remainder of the debt she sup-

31. *Id.*

32. *Id.*

33. Florida Responds, *supra* note 1, at 38.

34. *Id.* at 50-52.

35. *Id.* at 51. U.S. v. Tecum et al., No. 2:00-cr-00005-JES (jmt. entered Feb. 8, 2001), *aff’d* 48 Fed. Appx. 739 (11th Cir. 2002).

posedly owed to Tecum. During the ensuing court proceedings against Tecum, he threatened the victim repeatedly in the courtroom in their native K'iche dialect.³⁶

Against this threat and challenge there have been many successes. Since the 1990s, the federal government, the NGO community, the faith-based community and others began identifying cases of human trafficking and forced labor, and the federal government began prosecuting cases. The prosecution of trafficking cases, the prevention of trafficking, and the protection of trafficking victims—what we often call the “three Ps” of trafficking law and policy in the United States—was a clear priority of the Clinton Administration and has been a clear priority of the Bush administration as well. And this sustained attack on trafficking, and on prevention and protection, has borne at least some fruit, both in prosecutions and in victims assisted.³⁷

It is also important to recognize that we in the United States are not the only country with some success in the struggle against human trafficking, forced labor, and involuntary servitude. A great number of other countries have taken up this struggle, sometimes through the efforts of NGOs, sometimes through the efforts of governments, sometimes through the media and other sectors of civil society, and sometimes—perhaps most effectively, when all those groups are involved.

III. NEW DIRECTIONS IN THE STRUGGLE AGAINST HUMAN TRAFFICKING

Let me mention several specific issues, what we might call “second generation” issues in the struggle against human trafficking and forced labor in the United States, and issues that have specifically come to the fore in the last several years.

A. State Laws against Human Trafficking

The first of those issues is the increasing propensity of states in the United States, urged on by the federal government, anti-

36. Florida Responds, *supra* note 1, at 52.

37. For recent official data, see, e.g., U.S. Dep't of Justice, Assessment of U.S. Government Efforts to Combat Trafficking in Persons in Fiscal Year 2006 (Sept. 2007), <http://www.usdoj.gov/ag/annualreports/tr2007/assessment-of-efforts-to-combat-tip0907.pdf>; U.S. Dep't of Justice, Attorney General's Annual Report to Congress on U.S. Government Activities to Combat Trafficking in Persons - Fiscal Year 2006 (May 2007), <http://www.usdoj.gov/ag/annualreports/tr2006/agreporhumantrafficking2006.pdf>.

trafficking activists, NGOs, and local legislators, to legislate at the state level about human trafficking.

Earlier in our history, we had a number of weapons in the fight against human trafficking and forced labor. Since the Civil War, those have included the Thirteenth Amendment to the Constitution, which states that “[n]either 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 subject to their jurisdiction,”³⁸ and that “Congress shall have power to enforce this article by appropriate legislation.”³⁹

Congress did enforce the Thirteenth Amendment by legislation, and the results were the federal statutes against involuntary servitude,⁴⁰ against debt servitude, or what we call peonage,⁴¹ and criminalizing conspiracy against civil rights.⁴² In the years before the TVPA of 2000, these statutes were important weapons in the struggle against human trafficking and forced labor: The first two—the statutes against involuntary servitude and debt peonage—carried jail terms of up to ten years.⁴³ The last—conspiracy against rights—carried a sentence of up to ten years and up to life in cases of death, kidnapping, or aggravated sexual abuse.⁴⁴

By the 1990s these and other criminal statutes used against traffickers and the overlords of forced labor—such as kidnapping, assault, and other crimes—were insufficient. *United States v. Kozminski*, decided by the United States Supreme Court in 1988, was important in these developments.⁴⁵ *Kozminski* interpreted the coercion requirement of the post-Civil War statutes (particularly involuntary servitude, § 1584, and conspiracy against rights, § 241) by holding that “our precedents clearly define a Thirteenth Amendment prohibition of involuntary servitude enforced by the use or threatened use of physical or legal coercion. The guarantee of freedom from involuntary servitude has never been interpreted specifically to prohibit compulsion of labor by other means, such as psychological coercion.”⁴⁶ The Court stated:

Absent change by Congress, we hold that, for purposes of criminal prosecution under § 241 or § 1584, the

38. U.S. Const. amend. XIII, § 1.

39. *Id.* § 2.

40. 18 U.S.C. § 1584 (1999 Supp.).

41. *Id.* § 1581 (1999 Supp.).

42. 18 U.S.C. § 241 (1994).

43. 18 U.S.C. §§ 1581, 1584 (1999 Supp.).

44. 18 U.S.C. § 241 (1994).

45. 487 U.S. 931, 944 (1988).

46. *Id.*

term "involuntary servitude" necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process.⁴⁷

Faced with *Kozminski* and the wider difficulties in using the post-Civil War statutes and criminal charges alone, an important and now well-documented legislative and political process culminated in the TVPA of 2000, since amended and reauthorized in 2003 and 2005.⁴⁸ The 2000 Trafficking Act focused on "severe forms of trafficking,"⁴⁹ broadened the definition of "coercion" that could lead to a criminal conviction under the Act,⁵⁰ and expanded

47. *Id.* at 952. The *Kozminski* Court also stated: This definition encompasses those cases in which the defendant holds the victim in servitude by placing the victim in fear of such physical restraint or injury or legal coercion. Our holding does not imply that evidence of other means of coercion, or of poor working conditions, or of the victim's special vulnerabilities is irrelevant in a prosecution under these statutes. As we have indicated, the vulnerabilities of the victim are relevant in determining whether the physical or legal coercion or threats thereof could plausibly have compelled the victim to serve. In addition, a trial court could properly find that evidence of other means of coercion or of extremely poor working conditions is relevant to corroborate disputed evidence regarding the use or threatened use of physical or legal coercion, the defendant's intention in using such means, or the causal effect of such conduct. We hold only that the jury must be instructed that compulsion of services by the use or threatened use of physical or legal coercion is a necessary incident of a condition of involuntary servitude.
Id. at 952-53.

48. Trafficking Victims Protection Act of 2000, *supra* note 5. For a brief review of this history, see *Developments in the Law – Jobs and Borders II. The Trafficking Victims Protection Act*, 118 Harv. L. Rev. 2180-2202 (2005) [hereinafter *Jobs and Borders*]. For the 2003 revision and reauthorization of the TVPA, see Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875. For the 2005 revision and reauthorization of the TVPA, see Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006). On the 2005 reauthorization, see Angela D. Giampolo, *The Trafficking Victims Protection Reauthorization Act of 2005: The Latest Weapon in the Fight Against Human Trafficking*, 16 Temp. Pol. & Civ. Rts. L. Rev. 195 (2006-2007).

49. 22 U.S.C. § 7102(8) (2000). Severe forms of trafficking were defined as: sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or . . . the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

Id.

50. 22 U.S.C. § 7102(2) (2000). Coercion was now defined as: (A) threats of serious harm to or physical restraint against any person; (B) any scheme, plan or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or (C) the abuse or threatened abuse of the legal process.

Id. In the words of the Justice Department, the Act deals with coercion and the restrictive requirement in *Kozminski* by "permit[ting] prosecution where nonviolent coercion is used to force victims to work in the belief they would be subject to serious harm." Civil Rts. Div., U.S. Dept. of Justice, New Legislation, Victims of Trafficking and Violence Protection Act of 2000, <http://www.usdoj.gov/crt/crim/traffickingsummary.html> (last visited July 4, 2008). For more on *Kozminski*, see Kathleen Kim, *Psychological Coercion in the Context of*

federal law to include not only the prosecution of traffickers under four new trafficking and forced labor offenses, but also committed the United States to extensive programs seeking to prevent trafficking and protect trafficking victims, including the provision of special visas for trafficking victims who are assisting in investigations and prosecutions, as well as their family members.⁵¹

Maximum penalties were increased from ten to twenty years, and, in cases of attempted or actual murder, kidnapping, or aggravated sexual abuse, up to life imprisonment.⁵² For the first time, federal law mandated that courts order restitution of the “full amount of the victim's losses” and forfeiture of property by traffickers.⁵³ And these are just the bare outlines of the 2000 Trafficking Act—it did much more as well.⁵⁴ In 2003, the Trafficking Act was amended and reauthorized to provide a private right of action for trafficking victims and to make numerous other changes.⁵⁵ And the Act was again re-authorized, amended, and somewhat expanded in 2005 as well.⁵⁶

Within several years after the adoption of the federal Trafficking Act, both the federal government and a range of NGOs, anti-trafficking activists, research centers such as the Center for the Advancement of Human Rights here at FSU, and others were asking states to enact their own anti-trafficking laws as a counterpart to the federal legislation. There were many reasons for the push at the state level, but two stood paramount: first, the federal government and NGOs were not finding as many trafficking victims as they knew, or at least assumed, were around the country, and second, state legislators around the country, Democratic and Republican, began to realize how easy, budget neutral, and politically valuable a vote for human rights and against human trafficking at the state level could be.

With the help of the Justice Department, the anti-trafficking organization known as the Freedom Network, and other organiza-

Modern-Day Involuntary Labor: Revisiting United States v. Kozminski and Understanding Human Trafficking, 38 U. Tol. L. Rev. 941 (2007) [hereinafter Kim, *Psychological Coercion*].

51. See 8 U.S.C. § 1101(15)(T) (2000).

52. See, e.g., 18 U.S.C. §§ 1581, 1583, 1589-1592 (2000).

53. 18 U.S.C. §§ 1593-1594 (2000).

54. Among the many useful discussions of the 2000 Act, see particularly Anthony M. DeStefano, *The War on Human Trafficking: U.S. Policy Assessed* (Rutgers Univ. Press 2007); Jennifer M. Chacon, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 Fordham L. Rev. 2977 (2006); Susan Tiefenbrun, *The Cultural, Political, and Legal Climate Behind the Fight to Stop Trafficking in Women: William J. Clinton's Legacy to Women's Rights*, 12 Cardozo J.L. & Gender 855, 876-78 (2006) [hereinafter Tiefenbrun, *Clinton's Legacy*]; *Jobs and Borders*, *supra* note 48.

55. See Trafficking Victims Protection Reauthorization Act of 2003, *supra* note 48, § 4(a)(4).

56. See Trafficking Victims Protection Reauthorization Act of 2005, *supra* note 48.

tions that drew up overlapping model state anti-trafficking statutes, states began to enact state anti-trafficking law in quick succession. The first state statutes began appearing in the first years of this decade and, by now, well over thirty American states have criminalized human trafficking, at least twelve have created statewide anti-trafficking task forces, at least four have new statutes regulating international marriage brokers and international matchmaking organizations, and at least five regulate sex tourism.⁵⁷

The extraordinary diversity of these state statutes typifies the spirit which with state legislators took to enacting laws on a topic that they could, almost without opposition, all rally behind. Some statutes barred human trafficking and/or forced labor; others criminalized overlapping conduct but called it by other terms. Others added broader new kinds of criminal offenses, such as “benefitting financially from trafficking” in Arkansas.⁵⁸

To cite but one example—an example close to you here in Florida, and one well-known to Professor Coonan and his colleagues—the Florida statute criminalizing human trafficking was enacted in 2004, establishing a first degree felony of sex trafficking for parents, legal guardians, or other persons having custody of a minor who sell, transfer custody, or offer to sell or transfer the minor for the purpose of sex trafficking or prostitution, and established several second degree felonies for obtaining forced labor, and for sex trafficking and human trafficking for those who knowingly participate in trafficking for purposes of forced labor or prostitution, with enhancements to a first degree felony for death or activity against a person under fourteen years old.⁵⁹

In 2006 Florida even moved to a second generation of state trafficking law, adopting an amendment that expanded the definition of forced labor or services in the first statute and included the second degree felony of knowingly benefitting from human trafficking.⁶⁰ It also established a civil cause of action that allowed for recovery of three times the profits obtained from trafficking, estab-

57. See Ctr. for Women Policy Studies, State Laws/Map of the United States, http://www.centerwomenpolicy.org/programs/trafficking/map/default_flash.asp (last visited on July 5, 2008). See also Report Card, *supra* note 11.

58. Ark. Code Ann. § 5-11-108(b)(2) (2008). Florida also has a benefitting-from-trafficking provision. See Fla. Stat. § 787.06(3)(b) (2007). For other states with this particular expansion on trafficking legislation and other innovative forms of trafficking legislation, see Ctr. for Women Policy Studies, Fact Sheet on State Anti-Trafficking Laws from National Institute on State Policy on Trafficking of Women and Girls (Sept. 2006), http://www.centerwomenpolicy.org/programs/trafficking/documents/TraffickingStateLawsFactSheetSeptember2006_000.pdf (last visited on July 5, 2008).

59. 2004 Fla. Laws 391, *supra* note 13.

60. 2006 Fla. Laws 168, *supra* note 13.

lished trafficking as a racketeering offense for purposes of the Florida RICO Act, and encouraged state-level prosecutions.⁶¹

In well less than a decade, we have seen a great majority of the states adopt statutes criminalizing various elements of human trafficking and forced labor. A significant number go even further: They may mandate restitution to victims, forfeiture of property, or even a private right of action by trafficking victims against their traffickers. They usually include enhancements for certain kinds of particularly serious actions or injuries, or based on time in servitude, or the number of victims. They may provide for mandatory training for local police and law enforcement on trafficking, as the law does in my state of Iowa.

Some states mandate a statewide report on trafficking and forced labor, as, again, my state does, along with an assessment of needs for protection of victims and prevention of trafficking, and the collection of data.⁶² They may focus more on sex trafficking and slight labor trafficking. They may—and this has proven particularly controversial in some states, and has been removed from draft bills in other states—impose corporate liability on companies engaging in or knowingly benefitting from trafficking or forced labor. They may provide for protection for trafficking victims, including eligibility for a narrow or wider range of state benefits, state certification for purposes of federal protections, including the T visa status, access to medical, professional, social, legal and other services, and so on.

These moves toward anti-trafficking legislation in the states have become a national movement. But it is not the only area in which states have moved quickly to legislate on a topic previously reserved—in practice if not necessarily in law—to the federal government. We see the same phenomenon occurring in immigration law, where state-level statutes on immigration and immigrant control are rising rapidly, and in other fields.

None of us oppose state-level laws against human trafficking and forced labor. But a few words of caution about this extraordinary phenomenon are in order. Much of this legislation at the state level is what we call, in trafficking and other contexts, “expressive” legislation.⁶³ It is intended to express the revulsion and the policy

61. *Id.* For an assessment of the Florida legislation, see Report Card, *supra* note 11, at 24-25. For another discussion of the effects of the Florida state legislation, see Anne Marie Apollo, *Human Trafficking Responsibility Falling to Local Agencies*, Naples Daily News, May 17, 2006, available at http://www.naplesnews.com/news/2006/may/17/human_trafficking_responsibility_falling_local_law/.

62. Iowa Code § 710A.2 (2007).

63. See, e.g., Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 Fordham L. Rev. 981, 1047-49 (2002-2003);

contempt of legislators of the right and left, conservatives and liberals, of both parties and other parties, to a practice that is universally condemned around the United States and far beyond. And there is nothing so wrong with expressive legislation that we should oppose it—though we certainly should be aware of what it is, and what it is not in most cases.

There are at least two issues with the rush toward expressive state legislation in the trafficking context. First, the laws that result from this bipartisan commitment toward condemning a human rights abuse, like much bipartisan expressive legislation in other areas, tends to follow a “least common denominator” pattern: Some provisions—such as those emphasizing criminalization and enforcement against labor trafficking, imposing corporate liability on companies engaging in or knowingly benefitting from trafficking or forced labor, or providing a wide range of protections for trafficking victims, including eligibility for a wider range of state benefits—tend to be dropped from such bills in favor of quick bipartisan passage without a fight. The result is expressive but sometimes relatively denuded laws, expressing voice but not necessarily with strong teeth.

The second issue leads from the first problem. Turning expressive legislation into a real weapon, into a real toolbox for working on trafficking and forced labor, rather than merely a powerful but ultimately temporary sentiment by state legislators who are eager to condemn human trafficking and often not so eager to spend money on enforcement, protection, and prevention, is a very difficult task indeed. Expressive legislation is its own reward, and in many states work on trafficking virtually ends on the day that both political parties come together to pass a state anti-trafficking law. And coming back to a state legislature to pass the tougher provisions deleted from an original bill in the interest of rapid bipartisan passage is rarely successful.

What can we do so that state-level expressive legislation against trafficking and forced labor goes beyond mere expression and actually has some real, definable, measurable effect on the ground, something more than expressing revulsion? The experiences of several states, including Florida, help to answer the question of how we convert expressive legislation that does little more than express a general policy into a weapon for real use and real effects.

Jobs and Borders, *supra* note 48, at 2200-01. More generally, see Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. Pa. L. Rev. 1503 (2000), and Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 Harv. L. Rev. 413 (1999), for more on expressivism.

We have learned from several states that it helps if the statute requires steps beyond the mere criminalization of trafficking. Those steps may include training policy, establishing a state task force that is required to report back, mandating data collection and release, and other steps. Such real work provides an opportunity to continuing pushing for action at the state level. We have learned that it helps if the state has an active, ongoing anti-trafficking organization or research center that incorporates the new state law into its work and serves as a watchdog for its enforcement. We have learned that it helps to re-focus attention on a state anti-trafficking law when, within a few years, an amended law is proposed, with bipartisan support, that fills remaining gaps and mandates continued observation.

In the end, however, despite these tactics, the initial years since the state anti-trafficking laws were enacted have been somewhat disappointing. There is often little action on prosecution, prevention and protection after the heady days in which a statute is passed. State law enforcement, judges and others often have little to do in an area in which federal prosecution has always come first. And there is, I must say with regret, relatively little evidence thus far that the enactment of state anti-trafficking laws has had a causal effect in bringing more trafficking cases to light, as clearly the Justice Department, the anti-trafficking organizations, and others hoped it would. We can and should do better.

B. Civil Litigation Against Traffickers

Civil litigation against the perpetrators of human trafficking and forced labor in the United States has a more recent history than criminal prosecution of these traffickers. A number of options have developed for civil litigation against traffickers: Victims may sue for torts committed against trafficking victims; sue for other civil wrongs (such as breach of employment contract); sue for breach of contract relating to wages, room and board, unstipulated fees, and other contractual issues.

In the United States, victims may also be able to sue for violation of the FLSA, particularly sections 206 (violation of minimum wage standards),⁶⁴ Section 207 (violations of overtime wage standards),⁶⁵ Section 215 (discrimination, such as firing, for raising wage issues),⁶⁶ and Section 216 (the damages provision, covering

64. 29 U.S.C. § 206 (2004 Supp.).

65. 29 U.S.C. § 207 (2004 Supp.).

66. 29 U.S.C. § 215(a)(3) (2004 Supp.).

unpaid back, minimum and overseas wages, attorneys' fees, costs, liquidated damages, and other damages).⁶⁷ But this does not end the panoply of civil options in the United States. Victims may sue for violation of other federal (or state) labor and/or employment laws; they may sue for withholding of passports and other identification documents; they may, in some cases, be able to sue for violation of other federal statutes, such as the pre-TVPA involuntary servitude or peonage statutes; and they can try—though often the U.S. courts will not allow—to sue under implied rights of action under the Thirteenth Amendment and Anti-Peonage Act.

There are still other options as well—the Alien Torts Claim Act, which allows civil action by an alien for a tort committed in violation of the law of nations or a treaty of the United States,⁶⁸ although the United States Supreme Court has limited its application to a relatively narrow class of torts covering a modest range of international law violations.⁶⁹

The TVPA of 2000 began the process of allowing a limited civil recovery for trafficking victims. The 2000 Act provided for mandatory restitution of the “full amount of the victim's losses”⁷⁰ and full forfeiture of property derived from trafficking.⁷¹ But that provision

67. 29 U.S.C. § 216 (2004 Supp.).

68. 28 U.S.C. § 1350 (2000).

69. The growing literature on civil actions in the trafficking context includes Kathleen Kim & Daniel Werner, *Civil Litigation on Behalf of Victims of Human Trafficking* (Legal Aid Found. of Los Angeles 2005), available at <http://www.lafla.org/clientservices/specialprojects/VictimsTrfficking0405.pdf>; Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 *Hastings Women's L.J.* 1 (2004); Jorene Soto, *Show Me the Money: The Application of the Asset Forfeiture Provisions of the Trafficking Victims Protection Act and Suggestions for the Future*, 23 *Penn St. Int'l L. Rev.* 365 (2004); Jennifer S. Nam, Note, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking*, 107 *Colum. L. Rev.* 1655 (2007); Rachel Stevens, Note, *The Trafficking of Children: A Modern Form of Slavery, Using the Alien Tort Statute to Provide Legal Recourse*, 5 *Whittier J. Child & Fam. Advoc.* 645 (2006); and Note, *Remedying the Injustices of Human Trafficking Through Tort Law*, 119 *Harv. L. Rev.* 2574 (2006).

70. 18 U.S.C. § 1594 (2000). This includes any costs incurred by the victim for— (A) medical services relating to physical, psychiatric, or psychological care; (B) physical and occupational therapy or rehabilitation; (C) necessary transportation, temporary housing, and child care expenses; (D) lost income; (E) attorneys' fees, as well as other costs incurred; and (F) any other losses suffered by the victim as a proximate result of the offense[.] 18 U.S.C. § 2259(b)(3) (2000), along with “the greater of the gross income or value to the defendant of the victim's services or labor or the value of the victim's labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act (29 U.S.C. 201 et seq.)”, 18 U.S.C.A. § 1593(b)(3) (2000).

71. 18 U.S.C. § 1594 (2000). The “full amount of the victim's losses” includes “any costs incurred by the victim for— (A) medical services relating to physical, psychiatric, or psychological care; (B) physical and occupational therapy or rehabilitation; (C) necessary transportation, temporary housing, and child care expenses; (D) lost income; (E) attorneys' fees, as well as other costs incurred; and (F) any other losses suffered by the victim as a proximate result of the offense,” 18 U.S.C.A. § 2259(b)(3), along with “the greater of the gross income or value to the defendant of the victim's services or labor or the value of the

was implemented somewhat inconsistently by prosecutors and the courts—for example, not all prosecutors requested restitution or forfeiture, not all courts gave it, and the measures of restitution and forfeiture were inconsistent.⁷²

When Congress reauthorized the TVPA in 2003 it added to the civil remedies and private rights available, providing for the first time a private right of action for trafficking victims that allowed victims to sue in federal district court for damages and reasonable attorneys' fees. The statute required that civil actions be held in pendency for criminal actions, giving criminal prosecutions priority over civil actions.⁷³ The next reauthorization of the Trafficking Act in 2005 made modest expansions to civil remedies, expanding the provision for forfeiture of assets to extraterritorial jurisdiction prosecutions as well as domestic prosecutions.⁷⁴ These provisions and the various civil remedies available under state law result in a wide variety of strategies used by lawyers for victims of trafficking, and a wide variety of calculations for losses suffered by trafficking and forced labor victims depending on the particular theory or statute sued on.

The range of issues involved in civil litigation is extraordinarily complex. They include jurisdictional issues involved class action and standing; jurisdiction over defendant foreign organizations;

victim's labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act (29 U.S.C. 201 et seq.)," 18 U.S.C.A. § 1593(b)(3). Property forfeiture under 18 U.S.C. § 1594 includes:

irrespective of any provision of State law . . . such person's interest in any property, real or personal, that was used or intended to be used to commit or to facilitate the commission of such violation; and . . . any property, real or personal, constituting or derived from, any proceeds that such person obtained, directly or indirectly, as a result of such violation

id., as well as

(c)(1) ... (A) Any property, real or personal, used or intended to be used to commit or to facilitate the commission of any violation of this chapter. (B) Any property, real or personal, which constitutes or is derived from proceeds traceable to any violation of this chapter.

Id.

72. See Soto, *supra* note 70, at 373-74; *Remedying the Injustices of Trafficking Through Tort Law*, *supra* note 70, at 2583.

73. 18 U.S.C. § 1595 (Supp. 2005). The statute provided that:

(a) [a]n individual who is a victim of a violation of section 1589, 1590, or 1591 of this chapter may bring a civil action against the perpetrator in an appropriate district court of the United States and may recover damages and reasonable attorneys fees. (b)(1) Any civil action filed under this section shall be stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim. (2) In this subsection, a "criminal action" includes investigation and prosecution and is pending until final adjudication in the trial court.

18 U.S.C. § 1595. For the full 2003 revision and reauthorization of the TVPA, see *Trafficking Victims Protection Reauthorization Act of 2003*, *supra* note 47.

74. For the 2005 revision and reauthorization of the TVPA, see *Trafficking Victims Protection Reauthorization Act of 2005*, *supra* note 48.

relationship to foreign states and sovereign immunity (such as the Jurisdictional Immunities of Foreign States Act);⁷⁵ jurisdiction over defendant foreign persons; issues of subject matter jurisdiction (such as the Fair Labor Standards Act (FLSA))⁷⁶; the preclusive effects of executive action; the question of who is an employer, and other issues. Other vexing civil litigation issues include the question of class action certification under FLSA or other statutes; issues of damages; injunctions and receivership; problems of proof; choice of law; individual vs. corporate liability; and the liability of “joint employers” (such as Vietnamese labor service companies).

But these difficulties and complications should not hide the very real importance of civil litigation against those who perpetrate human trafficking and forced labor. As a number of commentators have pointed out, the possibility of civil litigation, and particularly the private right of action now ensured by the TVPA, provides trafficking victims with some control and agency in their actions against traffickers, some possibility of a reasonable monetary recovery, some hope of putting traffickers out of business, and some possibility of full punishment against those who have victimized them. Recent work by Jennifer Nam and others has indicated clearly that civil remedies remain underused, and we must find ways of enabling victims and their advocates to fully utilize these important weapons because civil litigation is an increasingly important tool in the struggle against trafficking and forced labor.

C. New Frontier: Civil Remedies for Trafficking and Forced Labor Beyond the United States

Thus far the discussion of civil remedies and private rights of action by trafficking and forced labor against their victimizers has been very much an American topic. And there are some good reasons for that: Civil remedies and private rights of action by trafficking and forced labor victims have developed earliest, most quickly and in a more detailed way in the United States—though of course the field is still highly problematic and is still developing rapidly. But civil remedies and private rights of action against trafficking and forced labor are not limited to the United States, and they are developing abroad as well.

To take one very limited measurement—which almost certainly does not provide the full range of countries that employ civil remedies against trafficking and forced labor—the State Department

75. 28 U.S.C.A. §§ 1602-1611 (2008).

76. 28 U.S.C.A. §§ 201 *et seq.* (1938), as amended.

identifies nearly thirty countries that employ some form of civil remedies (such as civil penalties, civil damages, restitution, or forfeiture) and/or private rights of action against traffickers and forced labor bosses in the 2006 and 2007 *Trafficking in Persons Reports*.⁷⁷ Our traditional notion that civil remedies for trafficking and forced labor originate from and may be limited to the United States and several other developed countries certainly needs to be reconsidered, and our sense of the countries involved in considering, strengthening and enforcing civil remedies for trafficking and forced labor needs to be expanded. Several examples may serve to indicate the progress, or lack of progress, and discussions of civil remedies in other regions and countries.

In South Asia—one of the world’s most active areas for modern slavery and human trafficking—the push for civil remedies in trafficking and forced labor cases has its roots in civil penalties for cases of domestic violence, violence against women, and sexual harassment. At the 6th Commonwealth Ministerial Women’s Affairs Meeting in New Delhi in 2000, the well-known Sri Lankan legal scholar Radhika Coomaraswamy addressed “critical issues confronting Commonwealth women in the area of human rights”⁷⁸ and noted that:

[t]he next decade should witness the promulgation of legislation that attempts to deal with various aspects of violence against women. In this regard there is the need to draw up model legislation in different spheres. Though model legislation with regard to domestic violence exists, the other areas such as rape and sexual harassment have received less attention. *The important thing about legislation with regard to domestic violence and sexual harassment is that they attempt to combine both criminal and civil*

77. A review of the 2006 and 2007 *Trafficking in Persons Reports* indicates that Albania, Bosnia, Bulgaria, Burma, Cambodia, Colombia, Croatia, East Timor, France, Guyana, Hong Kong, Israel, Kenya, Korea, Kuwait, Macedonia, Montenegro, Morocco, Nigeria, Philippines, Portugal, Russia, Serbia (and Kosovo), Thailand, Ukraine, and Vietnam had some forms of civil remedies for trafficking and/or forced labor, though of course widely variegated. U.S. Dep’t of State, *Trafficking in Persons Report (2006)* [hereinafter TIP Report 2006], available at <http://www.state.gov/documents/organization/66086.pdf>; U.S. Dep’t of State, *Trafficking in Persons Report (2007)* [hereinafter TIP Report 2007], available at <http://www.state.gov/documents/organization/82902.pdf>.

78. Radhika Coomaraswamy, *Critical Issues Confronting Commonwealth Women in the Area of Human Rights*, 6th Commonwealth Ministerial Women’s Affairs Meeting (2000) (emphasis added), http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B64E29F5F-DF88-4393-8DB6-A0A9BBFB7CDE%7D_6WAMM%20Human%20Rights.pdf.

*remedies. This allows for the accountability of the perpetrator but also ensures that the victim does not suffer economic hardship for having reported the crime. This combination of criminal and civil remedies allows for greater protection of victims of violence.*⁷⁹

By 2007, some progress had been made on this front. As the Indian representative to the Committee on the Elimination of Discrimination Against Women (CEDAW) noted in January, 2007,

[t]he National Common Minimum Programme (NCMP) of the present government emphasizes its commitment towards women's empowerment. A number of laws have been reviewed and new ones, such as the one on sexual harassment, are on the anvil. The newly enacted Domestic Violence Act provides civil remedies to prevent domestic violence as well as protects against such violence by providing immediate and emergency relief to women caught in such situations.⁸⁰

Despite the developing recognition of the importance of civil remedies and private rights of action in cases of domestic violence, violence against women, and sexual harassment, there remains as yet, at least in India, no direct civil remedy or private right of action for trafficking and forced labor. The bridge from the first category of cases to the civil remedies in the trafficking and forced labor context can be quite long and arduous. But local practice can sometimes provide a type of civil remedy even in the absence of explicit recognition of civil remedy or private right of action. The leader of an Indian anti-trafficking organization recently explained that

[u]nder The Immoral Traffic (Prevention) Act, 1956, there is no civil remedy for recovery of money from the trafficker Therefore the possibility of recovering money from the trafficker as a civil remedy is ruled out unless a suit for recovery is filed in the Civil Courts un-

79. *Id.* ¶ 30, at 7 (emphasis added).

80. Deepa Jain Singh, Sec'y & Leader of Indian Delegation, Ministry of Women & Child Dev., Statement at the Thirty Seventh Session of the Committee on the Elimination of Discriminating Against Women (Jan. 18, 2007), <http://www.un.int/india/2007/ind1312.pdf>.

der the existing civil procedure As the offences under the above mentioned Act are criminal in nature, as a practice, the fine which is imposed upon the accused are made to pay to the victim in form of compensation. This again is subjected to the discretion of the judges who presides [sic] [over] the case.⁸¹

This situation—where civil remedies and private rights of action for trafficking and forced labor in India are not statutorily available—may have some inspiration for its reform and improvement in the new Domestic Violence Act.⁸² Certainly the discretionary practice of paying criminal fines to the victim as a “form of compensation,”⁸³ while interesting as an aspect of Indian trafficking law, is not a long-term solution to the need for civil remedies.

Its flaws are immediately apparent: such payments depend entirely on the discretion of judges, there is no statutory authority for civil remedies or private rights of action, and even this limited solution may be perverted by corrupt behavior by police and court officers, skimming off part of the criminal fines as a condition for victims to receive anything at all. So there are still major obstacles ahead for civil remedies and private rights of action in India, despite the availability of an analogous remedy in the new Domestic Violence Act.

There is also some movement toward civil compensation for trafficking victims in other countries, as the United Kingdom. In a superbly detailed report issued by the Organisation for Security and Cooperation in Europe (OSCE) in 2008, the OSCE reported on significant problems in moving toward civil litigation and compensation for trafficking victims in the United Kingdom under existing laws and victim compensation statutes. But it also pointed out that the UK's Criminal Injuries Compensation Authority (CICA) “granted the first successful claim to victims of trafficking” in July 2007, a recovery of 66,000 pounds Sterling to one victim for the sexual abuse and loss of earnings she suffered, and 36,500 pounds to another victim, also for sexual abuse and loss of earnings.⁸⁴ And the OSCE reported that “the CICA would ... enable victims of

81. Comment by Roma Debabrata, President, STOP (STOP Trafficking & Oppression of Children & Women) to research assistant to Mark Sidel (Oct. 18, 2007).

82. The Protection of Women from Domestic Violence Act, No. 43 of 2005.

83. Comment by Roma Debabrata, President, STOP (STOP Trafficking & Oppression of Children & Women) to research assistant to Mark Sidel (Oct. 18, 2007).

84. Katy Thompson & Allison Jernow, Organisation for Sec. & Cooperation in Europe Office for Democratic Instit. & Human Rights, Compensation for Trafficked & Exploited Persons in the OSCE Region 113 (2008), available at http://www.osce.org/publications/odihr/2008/05/31284_1145_en.pdf.

forced prostitution and false imprisonment to ensure compensation claims are more accessible to trafficked persons who have been sexually exploited."⁸⁵

D. The Problems of Civil Remedies in Comparative Perspective

The international context also accentuates some of the ambiguities and problems in strengthening civil remedies in trafficking and forced labor cases. It may seem strange or counter-intuitive to note negative implications of strengthening civil remedies, because the idea that victims should be able to obtain financial redress is a popular notion with strong support. Yet there are indeed problems, and they can arise in multiple contexts. I focus here on two issues: situations where the state encourages private actions as a substitute for the public action it refuses to take against trafficking or forced labor, and situations in which civil remedies and private actions are a failure and the state refuses to improve their efficacy.

Take Brazil as an example. Brazil has serious problems of trafficking and forced labor,⁸⁶ and its government has not addressed those issues consistently or comprehensively. The U.S. State Department's *Trafficking in Persons Interim Assessment*, Released by the Office to Monitor and Combat Trafficking in Persons in January, 2007, sets the scene:

[T]he Government of Brazil has made minimal improvements in addressing its trafficking in persons problem since the release of the 2006 Report. Concrete progress has yet to be realized however, in passage of anti-trafficking legislation and convicting and punishing traffickers. During the last six months, the government has taken some important steps to improve its law enforcement capacity to combat trafficking.

In October 2006, the President issued an executive order establishing a comprehensive national anti-TIP Policy. Since March 2006, high-level government officials have spoken out condemning trafficking and the use of forced labor

85. *Id.* at 114.

86. *See, e.g.*, Osha Gray Davidson, *In the Land of Slavery*, *Rolling Stone*, Sept. 8, 2005, at 74.

Brazilian law enforcement has continued to investigate and prosecute a modest number of commercial [or] sexual exploitation cases. During 2006 the government investigated 173 cases of forced labor using teams of federal labor inspectors, police, and prosecutors. This resulted in some victims being rescued from their exploiters; however, the government has yet to prosecute these cases The government took steps to remedy this by obtaining a December 1, 2006 Supreme Court ruling that all slave/forced labor cases fall under the jurisdiction of, and must be turned over to, the federal court system. This ruling is expected to lead to successful criminal prosecutions in the federal court system.⁸⁷

So, with some slow improvements, criminal measures against trafficking and forced labor are largely ineffective in Brazil. And what that led to was a less than entirely appropriate reliance by the government on civil remedies as a substitute for ineffective criminal action. As the State Department noted, “[i]n the absence of adequate criminal sanctions against forced labor, the government utilized alternative civil remedies, including the use of increasingly stiffer fines and a program backed by federal regulation to get private lenders to deny them credit.”⁸⁸

Such remedies—civil fines and denial of credit—are useful and should be endorsed, but they can never take the place of criminal processes against perpetrators of forced labor “[i]n the absence of adequate criminal sanctions.”⁸⁹ Six months after the Interim Assessment was issued in January 2007, the regular *Trafficking in Persons Report* covering 2007 noted the continuing lack of criminal process, and the concomitant rise in civil actions: “Although there were no known convictions of slave labor offenders, the number of civil actions against practitioners of slave labor rose in 2006.”⁹⁰

So one clear problem with civil remedies are situations in which the state encourages private actions as a substitute for state action through criminal enforcement. That cynical support for civil remedies is an expressive endorsement of rights that may well be a

87. U.S. Dep’t of State, *Trafficking in Persons Interim Assessment* (Jan. 19, 2007) (Brazil section), available at <http://www.state.gov/g/tip/rls/rpt/78948.htm> (last visited Sept. 30, 2008)

88. *Id.*

89. *Id.*

90. TIP Report 2007, *supra* note 78, at 68.

hollow, ineffective process and masks a lack of state support for public action.

For the State Department, the substitution of private rights for public action against trafficking or forced labor was also a particular issue in 2007 for trafficking in the household context. “Many governments,” wrote the State Department in the 2007 Trafficking in Persons report,

do not regard forced domestic servitude as a trafficking issue. *Rather than criminally punish employers for forced labor, governments generally encourage victims to return to the household or seek civil penalties from abusive employers.* Victims, traumatized from the abuse or fearing forcible deportation, often agree to allow the government to sweep the issue under the rug. They return home having lost recruitment fees they invested and wages they were owed as well as months or years of their lives. The traffickers, however, remain free and undeterred from exploiting again.⁹¹

A related but additional problem with the enthusiasm and reliance on civil remedies and private rights of action is the very real inefficacy of these remedies in many countries. The State Department has identified the failures of civil remedies in a number of countries. Two of them—Albania and Venezuela—may seek to illustrate the point and are likely applicable to many other countries as well:

The Government of Albania continued its modest efforts to protect and reintegrate victims of trafficking during 2006. Albania encourages victims to testify against traffickers, but they often refuse as a result of intimidation by traffickers. In 2006, only 20 out of 227 suspected or identified trafficking victims offered testimony against their traffickers. *Albanian law allows victims to file civil lawsuits; victims generally do not initiate these due to their distrust of the police and judiciary.*⁹²

91. *Id.* at 13 (emphasis added).

92. *Id.* at 52 (emphasis added).

Similarly, for Venezuela, “[i]n theory, victims could seek civil action against their traffickers, but laws made no provision for victim restitution.”⁹³

Thus there is a need for skepticism when faced with civil remedies and private rights of action, for their existence (as a cynical substitute for public action), and the ineffectiveness may indicate a state that refuses to take trafficking and forced labor seriously rather than a government expanding the array of weapons in this struggle. How can we not be skeptical of the goals and efficacy of civil remedies when we learn from the State Department *Trafficking in Persons Report*, that even in Burma—one of the world’s centers for trafficking and forced labor—“[v]ictims have a right to file civil suits and seek legal action against the traffickers”⁹⁴ Of course, the State Department notes, “no such civil suits have been documented,” making Burma an example of both cynical substitution of a formal right to seek civil remedies when the state itself is complicit in trafficking and forced labor, and the complete inefficacy of those formal remedies.⁹⁵

IV. PATHWAYS TO THE FUTURE: THE DIVERSIFICATION OF RESEARCH ON HUMAN TRAFFICKING

Returning to the United States, we have made some real progress on the fronts of prosecuting traffickers, preventing trafficking, and protecting victims. And we have a host of NGOs and policy advocacy groups working on the issue around the country. But for purposes of our discussion today I particularly want to point out the innovative and pathbreaking work that has been underway in the legal academy on aspects of human trafficking, forced labor, and involuntary servitude.

First, of course, there have been some significant research efforts on human trafficking and slavery more generally in recent years. The superb work of Kevin Bales stands out, for example: *Disposable People: New Slavery in the Global Economy* and Bales’s other works are important milestones in the new research on human trafficking and modern slavery, particularly in its international dimensions.⁹⁶

93. U.S. Dep’t of State, *Trafficking in Persons Report 225* (2005), available at <http://www.state.gov/documents/organization/47255.pdf>.

94. TIP Report 2007, *supra* note 77, at 72.

95. *Id.*

96. Bales, *Disposable People*, *supra* note 17; Kevin Bales, *Ending Slavery: How We Free Today’s Slaves* (Univ. of Cal. Press 2007); Kevin Bales, *Understanding Global Slavery: A Reader* (Univ. of Cal. Press 2005). I have used both editions of *Disposable People* in my courses on human trafficking, forced labor and involuntary servitude at Harvard, Iowa, and

We have other useful academic work on international and regional dimensions of trafficking and/or forced labor outside The United States,⁹⁷ including research and advocacy work on prostitution and sex trafficking,⁹⁸ some more research-focused and some focused on taking sides in the still-difficult issues of prostitution and trafficking. In particular, we have useful research on the situation in Western, Central and Eastern Europe, the product of both a significant problem—trafficking across European borders—a vibrant European research community, and scholarly publishers in Europe able to publish unabashedly research-focused volumes on an important issue that are not intended for a mass audience.

In the United States we have useful advocacy volumes,⁹⁹ and moving first person stories.¹⁰⁰ We have important policy volumes on trafficking, such as journalist Anthony DeStefano's excellent volume on the development of American policy toward trafficking called *THE WAR ON HUMAN TRAFFICKING: U.S. POLICY ASSESSED*.¹⁰¹ In the legal field, the work of Jennifer Chacon,¹⁰² Grace Chang,¹⁰³ Terry Coonan,¹⁰⁴ Kathleen Kim,¹⁰⁵ Mohamed Mattar,¹⁰⁶

Vermont, and its capacity to educate students on trafficking and forced labor is truly impressive.

97. *E.g.*, Data and Research on Human Trafficking: A Global Survey (Frank Laczko & Elzbieta M. Gozdziaik eds., Int'l Org. for Migration 2005), available at <http://www.nswp.org/pdf/IOM-GLOBALTRAFFICK.pdf>; Human Trafficking, Human Security, and the Balkans (H. Richard Friman & Simon Reich eds., Univ. of Pittsburgh Press 2007).

98. Challenging Trafficking in Persons: Theoretical Debate & Practical Approaches (Sector Project against Trafficking in Women ed., 2005); Kathryn Farr, Sex Trafficking: The Global Market in Women and Children (Worth Publishers 2005); Int'l Human Rights Inst. & Captive Daughters Media, Pornography: Driving the Demand in International Sex Trafficking (David E. Guinn ed., 2007); Zach Hunter, Be the Change: Your Guide to Freeing Slaves and Changing the World (Zondervan 2007); Craig McGill, Human Traffic: Sex, Slaves and Immigration (Vision Paperbacks 2003); Victor Malarek, The Natashas: Inside the New Global Sex Trade (1st U.S. ed., Arcade Publ'g 2004); Measuring Human Trafficking: Complexities And Pitfalls (Ernesto U. Savona & Sonia Stefanizzi eds., Springer 2007); Prostitution, Trafficking and Traumatic Stress (Melissa Farley ed., Haworth Maltreatment & Trauma Press 2003); Trafficking and the Global Sex Industry (Karen Beeks & Delila Amir eds., Lexington Books 2006).

99. *E.g.*, David Batstone, Not for Sale: The Return of the Global Slave Trade—and How We Can Fight It (HarperOne 2007).

100. *E.g.*, Louisa Waugh, Selling Olga: Stories of Human Trafficking and Resistance (Weidenfeld & Nicolson 2006).

101. DeStefano, *supra* note 54.

102. Chacon, *supra* note 54.

103. Grace Chang & Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspective from the Field(s)*, 3 Stan. J. C.R. & C.L. 317 (2007).

104. Coonan, *supra* note 6.

105. Kim & Werner, *supra* note 70; Chang & Kim, *supra* note 103; Kim, *Psychological Coercion*, *supra* note 50; Kim & Hreshchysyn, *supra* note 70.

106. Mohamed Y. Mattar, *Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention*, 14 Tul. J. Int'l & Comp. L. 357 (2006); Mohamed Y. Mattar, *Trafficking in Persons, Especially Women and Children, in Countries of the Middle East: The Scope of the Problem and the Appropriate Legislative Responses*, 26 Fordham Int'l L.J. 721 (2003).

Jennifer Nam,¹⁰⁷ Susan Tiefenbrun,¹⁰⁸ and others has led the way toward innovative analyses of the successes and failures of trafficking law and policy in the United States. In the emerging areas of state and local responses to trafficking, we have the superb early article by Stephanie Richard on the ambiguities and problems of state anti-trafficking legislation,¹⁰⁹ other very useful and more recent work on state and local responses,¹¹⁰ the excellent work by Terry Coonan on the situation here in Florida and the need for a state anti-trafficking law here,¹¹¹ and discussions of recent state anti-trafficking legislation in California¹¹² and Illinois.¹¹³

On civil litigation by victims against traffickers, we have superb early work by the Los Angeles lawyer Kathleen Kim and her collaborators on civil remedies, private rights of action, and civil litigation,¹¹⁴ as well as useful work by others on this important theme.¹¹⁵ Other superb research in the field has also been carried out, on themes as important and diverse as feminist legal approaches to human trafficking, the anti-prostitution mandate in U.S. trafficking legislation,¹¹⁶ the perspective of immigration law and policy,¹¹⁷ and other important topics.

107. See Nam, *supra* note 69.

108. Susan W. Tiefenbrun, *Copyright Infringement, Sex Trafficking, and Defamation in the Fictional Life of a Geisha*, 10 Mich. J. Gender & L. 327 (2004); Susan W. Tiefenbrun, *Sex Slavery in the United States and the Law Enacted to Stop It Here and Abroad*, 11 Wm. & Mary J. Women & L. 317 (2005); Tiefenbrun, *Clinton's Legacy*, *supra* note 54; Susan W. Tiefenbrun, *The Saga of Susannah: A U.S. Remedy for Sex Trafficking in Women: The Victims of Trafficking and Violence Protection Act of 2000*, 2002 Utah L. Rev. 107; Susan W. Tiefenbrun, *Updating the Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?*, 38 Case W. Res. J. Int'l L. 249 (2007).

109. Stephanie Richard, *State Legislation and Human Trafficking: Helpful or Harmful?*, 38 U. Mich. J.L. Reform 447 (2005).

110. *E.g.*, Marshaling Every Resource: State and Local Responses to Human Trafficking (Dessi Dimitrova ed., Princeton Univ. 2007); Ellen L. Buckwalter et al., *Modern Day Slavery in Our Own Backyard*, 12 Wm. & Mary J. Women & L. 403 (2006); Michael C. Payne, Comment, *The Half-Fought Battle: A Call for Comprehensive State Anti-Human Trafficking Legislation and a Discussion of How States Should Construct Such Legislation*, 16 Kan. J.L. & Pub. Pol'y 48 (2006); Shashi Irani Kara, Comment, *Decentralizing the Fight Against Human Trafficking in the United States: The Need for Greater Involvement in Fighting Human Trafficking by State Agencies and Local Non-Governmental Organizations*, 13 Cardozo J.L. & Gender 657 (2007).

111. Coonan, *supra* note 6.

112. *E.g.*, Matthew Garber, Recent Legislation, *Chapter 240: Human Trafficking—Combating the Underground Slave Industry in California*, 37 McGeorge L. Rev. 190 (2006).

113. Vanessa B.M. Vergara, *Looking Beneath the Surface: Illinois' Response to Human Trafficking and Modern-Day Slavery*, 38 U. Tol. L. Rev. 991 (2007); John Tanagho, Comment, *New Illinois Legislation Combats Modern-Day Slavery: A Comparative Analysis of Illinois Anti-Trafficking Law with Its Federal and State Counterparts*, 38 Loy. U. Chi. L.J. 895 (2007).

114. See sources cited, *supra* note 105.

115. See sources cited, *supra* note 70.

116. *E.g.*, Melissa Ditmore, *New U.S. Funding Policies on Trafficking Affect Sex Work and HIV-Prevention Efforts World Wide*, 33 SIECUS Rep. 26 (Spring 2005); Edi C.M. Kin-

V. CONCLUDING REMARKS

But despite this important work, human trafficking, forced labor, and involuntary servitude in the United States remains a field in which research has not yet caught up to policy. We need more in-depth studies of trafficking cases and the dynamics of exploitation, rescue, protection, and prosecution to go along with the very useful case studies already published.¹¹⁸ We need a full-fledged understanding of the new state anti-trafficking laws and whether—in the short time many of them have been in existence—they show any real promise of helping in the struggle against human trafficking and involuntary servitude. We need to understand the dynamics, process and results of ten years of episodic civil litigation against traffickers, to gain a better understanding of how we can do more to promote civil as well as criminal penalties against traffickers.

But that is not all. We need to understand the murky boundaries between human trafficking, forced labor, and other forms of serious unfair labor violations that may be partly punished under the labor laws but which are not punished as trafficking. We need to understand better how trafficking interfaces with immigration enforcement, and the special problems that immigration detainees who are also trafficked, including trafficked children, face in our immigration morass. We need to understand better the multiple and overlapping motivations of modern traffickers, if possible through interviews with them and their family members.¹¹⁹ In these and many other ways, academic research can build upon the stellar contributions of those cited here and many others to contribute to humane law and policy in this important human rights field, and to pave the way for the new directions in the struggle against human trafficking.

ney, *Appropriations for the Abolitionists: Undermining Effects of the U.S. Mandatory Anti-Prostitution Pledge in the Fight Against Human Trafficking and HIV/AIDS*, 21 Berkeley J. Gender L. & Just. 158 (2006).

117. Among other work, see, e.g., Chang & Kim, *supra* note 103.

118. E.g., Patricia Medige, *The Labyrinth: Pursuing a Human Trafficking Case in Middle America*, 10 J. Gender Race & Just. 269 (2007); Michael A. Scaperlanda, *Human Trafficking in the Heartland: Greed, Visa Fraud, and the Saga of 53 Indian Nationals "Enslaved" by a Tulsa Company*, 2 Loy. U. Chi. Int'l L. Rev. 219 (2005).

119. One interesting feature of this need for more and better research is that this is a field in which some exceptional work has already been done by students. Law students and others have participated actively in several of the studies of trafficking at the state level. Law students have produced useful case studies of trafficking, summaries of the state of the law, and other useful work. Whether in working with anti-trafficking organizations, with immigrant rights or policy organizations, with centers such as the Center for the Advancement of Human Rights here at FSU, or on their own (a strategy I would not recommend), law students can contribute in important ways to advancing, through research, our understanding of the dynamics of human trafficking and forced labor in the United States.