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Kathleen Kim
Kusia Hreshchyshyn

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Human Trafficking Private Right of Action:
Civil Rights for Trafficked Persons
in the United States

By Kathleen Kim* and Kusia Hreshchyshyn**

On December 19, 2003, Congress passed the Trafficking Victims Protection Reauthorization Act of 2003, which, among other modifications to the law against human trafficking, established a private right of action for persons who are trafficked to the United States.1 The addition of this new private right of action is the result of efforts by advocates who recognized inherent limitations in a prosecution-based approach to the problem of human trafficking. Using civil litigation as a strategy for compensating victims of trafficking is emerging as a powerful tool in the United States for addressing the growing problem of modern-day slavery, both at national and at global levels.

* Kathleen Kim is the director of the Human Trafficking Project at Lawyers' Committee for Civil Rights of the San Francisco Bay Area. She founded the project as a Skadden Fellow in October 2002, the first of its kind to focus on the civil needs of trafficked persons. She engages in trafficking civil litigation including one of the first cases to utilize the newly enacted trafficking private right of action and assists her clients to access protection and benefits under the TVPA and TVPRA. She is co-author of Civil Litigation on Behalf of Victims of Human Trafficking and presents locally and nationally to non-governmental and governmental organizations. She co-coordinates a coalition of San Francisco Bay Area anti-trafficking NGOs and participates in a regional Task Force facilitated by the Northern California AUSA office. As a member of the Freedom Network, Kathleen advocates for human rights-focused policy reforms that broaden protections to trafficking victims. Kathleen received her J.D. from Stanford Law School in 2002 and was an Associate Editor of Stanford Law Review. She was a 2001 Judge M. Takasugi public interest fellow. Kathleen would like to thank the tremendous support of her family, and her colleagues and clients who are role models in the advancement of human rights.


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While much has been written about the Victims of Trafficking and Violence Protection Act of 2000 ("TVPA"), there have been relatively few discussions about the effectiveness of civil remedies for trafficked persons. The TVPA represents an attempt to take a comprehensive approach toward eradicating trafficking through means that extend beyond law enforcement to include prevention programs and protection mechanisms for trafficked persons.\(^2\) While prevention efforts are mainly targeted overseas, protective immigration remedies associated with criminal prosecution under the TVPA are critical to trafficked persons in the United States in that, given certain circumstances, they can potentially provide much needed stability through permanent status and work authorization. At the same time, these immigration remedies are severely restricted by several limitations linked to the prosecutorial process. Some of the limitations include an annual quota,\(^3\) stringent requirements that trafficked persons must meet in order to fit the definition of "extreme forms of trafficking"\(^4\) and an ultimate contingency of prosecutorial discretion that is entirely outside of the trafficked person's control.\(^5\)

Civil action, in contrast to the prosecutorial

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4. TVPA § 103(8)(A)-(B), 114 Stat. at 1470; INA § 101(a)(15)(T)(I), 8 U.S.C. § 1101(a)(15)(T)(I) (2003). While the definition of "extreme forms of trafficking in persons" encompasses the exploitative labor practices, which implicitly includes the many forms of exploitation of trafficked persons in agriculture, manufacture, the hospitality industry, and domestic work, it explicitly includes any form of sex exploitation. TVPA § 103, 114 Stat. at 1470.

5. TVPA § 107, 114 Stat. at 1476; INA § 101(a)(15)(T)(III), 8 U.S.C. § 1101(a)(15)(T)(III). In order to receive benefits, a trafficked person must first go through a certification process in order to show that he or she is willing to "assist in every reasonable way in the investigation and prosecution of severe forms of trafficking in persons." TVPA § 107(b)(1)(E), 114 Stat. at 1476. However, under the principle of prosecutorial discretion, even where the trafficked person is willing to assist investigation, benefits may still be denied should the prosecutor decide not to pursue an investigation. See TVPA § 107(b)(1)(E)(ii), 114 Stat. at 1476.
approach, can provide more appropriate compensation to people who have suffered unconscionable exploitation, while allowing the trafficked person to control and direct the legal process.

This article will discuss civil litigation for trafficked persons as an alternative and in addition to the process of criminal prosecution. Part I will examine the theoretical framework for civil litigation in the trafficking context. Part II will briefly visit the problem of trafficking and the history of legal efforts to address this problem in international and U.S. domestic law. This will include a brief discussion of the hotly contested definition of trafficking. It will also include an overview of the Victims of Trafficking and Violence Protection Act, which is the U.S. law that prohibits trafficking in persons. Part III will discuss some of the advantages and complexities involved in civil litigation on behalf of trafficked persons. Part IV will provide a case example of a trafficking civil suit previous to the passage of the new private right of action. Part V will examine the shortcomings of trafficking civil suits up until now and the opportunity offered by the new trafficking cause of action to address these shortcomings. More specifically, this section will provide a legal analysis of the strategy and causes of action utilized in trafficking suits and the substantive power added by the trafficking cause of action. The article concludes with encouraging remarks on the potential for civil litigation, not only to provide more appropriate remedies to individual clients than prosecution can provide, but also its potential in public policy terms to advance Congress’ intention to eradicate modern-day slavery in the United States and abroad.

PART I: IMMIGRATION ENFORCEMENT AND CIVIL RIGHTS ACTIONS FOR TRAFFICKED PERSONS

Immigration law is the primary tool employed by the United States to determine the contours of its political community.6 There is an inherent tension between the restrictive goals of immigration laws to control the nation’s borders and the expansive civil rights laws, which the United States utilizes within its borders to remove artificial discriminatory restrictions on the labor pool.7 Both immigration and civil rights laws play a role in differentiating “full members” of the U.S. political community, those who can assert the strongest rights, from those who have weak or non-existent claims to membership because their rights are limited.8 By discriminating on the basis of citizenship status, the U.S. government can determine who has authorization to work in this country and who does not.9

7. Id. at 131-32.
8. Id. at 131-34.
9. Id. at 134.
Civil rights laws, in contrast, expand labor rights by restricting employers' ability to discriminate according to citizenship and national origin based classification. These contrasting goals of immigration and civil rights laws are paralleled by contrasting enforcement mechanisms: immigration law is enforced by public bodies and civil rights by private actors. For civil rights outside of the law enforcement realm, the state depends heavily on private actors to take on the responsibility of "private attorneys general" — private individuals who act in the place of the State in order to increase the level of compliance with antidiscrimination laws.

The chief law relating to the trafficking of persons into the United States is the Trafficking Victims Protection Act. This law has a strong prosecutorial purpose and is designed to significantly penalize traffickers. However, the TVPA also provides a previously unrecognized class of undocumented individuals with eligibility for legal status and thus represents an effort to increase civil rights protections. Prosecution of traffickers may be a necessary portion of the U.S. response to trafficking, yet this public enforcement alone is insufficient to address the complex nature of trafficking cases and the overall trafficking industry.

The conferring of legal rights on trafficked individuals is an indication in the law that other policy objectives, including prevention efforts and protection of trafficked persons, must also be met. Furthermore, the most recent addition of a private right of action to the anti-trafficking law is indicative that the state is willing to rely on private actors to enforce the civil rights of trafficked persons who are not the focus of attention in the prosecutorial process. Until recently, trafficked persons could rely on sundry federal and state labor and employment laws and tort laws related to forced labor conditions in order to seek remedies from their traffickers. Now they can also use the TVPA directly as the basis for a claim against those who trafficked them and against other liable third parties.

While the TVPA already conferred some access to the political

10. Id. at 132.
11. Id. at 134.
12. Id. at 135.
13. Id. at 135-36.
14. The U.S. response to trafficking, like the international response, has adopted a three-part approach: prevention of trafficking, prosecution of traffickers and protection of victims (either through integration or reintegration in the country of origin). Hyland, supra note 2, at 44.
15. See generally Stumpf, supra note 6, at 147-48 ("[T]he TVPA seeks to affect unlawful labor markets by shifting the focus from public enforcement of criminal and immigration law to private action founded on enhanced civil rights.").
community through limited legal status and other conferral of rights,\textsuperscript{17} civil litigation, including the new private right of action under the TVPA, has the broad potential of augmenting a trafficked person's claim to membership in the political community through enforcement of individual civil rights.

PART II: SLAVERY — TRAFFICKING IN HUMAN BEINGS

Human trafficking is also called "modern day slavery."\textsuperscript{18} While slavery was banned in the United States in 1865 with the ratification of the Thirteenth Amendment to the United States Constitution, modern-day slavery persists in the United States.\textsuperscript{19} Trafficking includes the recruitment, transport, harboring, transfer, sale or receipt of persons through coercion, abduction, force, fraud, or deception for the purposes of exploitation.\textsuperscript{20} Trafficking differs from smuggling in that smuggling involves the provision of a service, albeit illegal, while trafficking involves a continued relationship of forced labor or other exploitation that profits the trafficker.\textsuperscript{21} The continuance of an exploitative relationship underscores the fact that consent is not dispositive of the distinction between trafficking and smuggling, since any consent that trafficked persons may have given to the initial relationship is rendered meaningless by the coercive, deceptive or abusive actions of the traffickers.\textsuperscript{22}

A. WHO IS TRAFFICKED?

Men, women and children are trafficked throughout the world.\textsuperscript{23} The profiles of these people form a wide spectrum that includes deaf men from Mexico, rural uneducated girls from Nepal, highly educated urban women from Ukraine, farm boys from India, and male and female laborers from Vietnam. Age, gender, education level, and urban sophistication vary tremendously from case to case.

Globalization plays a marked role in the creation of populations of

\textsuperscript{17} Stumpf, \textit{supra} note 6, at 148.
\textsuperscript{19} Hyland, \textit{supra} note 2, at 29.
\textsuperscript{21} Margaret Murphy, \textit{Modern Day Slavery: The Trafficking of Women to the United States}, 9 BUFF. WOMEN'S L.J. 11, 11-12 (2000-2001).
displaced people who are vulnerable to trafficking. Often trafficked persons are in a precarious life situation in their country of origin. People are pressured to migrate for economic reasons or to escape gender discrimination, armed conflict, political instability, and poverty. Frequently poverty, illiteracy, economic crises, and regional conflicts have a disproportionate effect on women. Coupled with a low social status, such instability can make women especially vulnerable to trafficking in some regions. In other contexts, children or men are particularly vulnerable for recruitment to bonded and otherwise illegal labor in sweatshops and other jobs characterized as “three D-jobs — dirty, difficult, and dangerous.”

B. WHO ARE THE TRAFFICKERS AND WHAT METHODS DO THEY EMPLOY?

The types of traffickers and the methods they employ are diverse. There are complex transnational crime rings that operate on the scale of any G-8 nation to carve up markets, and there are small-scale, family-style channels as well as individuals. Trafficking nearly always involves some sort of network, some organized and others not, including recruiters, document forgers, transporters, and purchasers.

Recruitment methods most often involve luring people with false job opportunities that are promised by the trafficker, through a network of acquaintances or advertised in the media. Although kidnapping, purchasing people from family members, and ordering mail-order brides also occurs. A trafficking recruiter can be a family friend, an employment agency or even someone well-respected within the community who can build the trust of potential victims. People may accept jobs that they may know to be risky, then end up in slavery conditions when the

25. See Hyland, supra note 2, at 35-36 (citing several causative socioeconomic factors behind the vulnerability to being trafficked). See also, Joshi, supra note 24, at 36-38 (discussing the impact of industrialization in the post-colonial era and modern globalization on the displacement of people that leads to trafficking, particularly the trafficking of women who are especially vulnerable due to their subordination within the socioeconomic pressures created by privatization and liberalization of markets).
27. Hyland, supra note 2, at 35.
28. Id.
29. United Nations Office on Drugs and Crime, supra note 22.
31. Enck, supra note 18, at 375.
33. Hyland, supra note 2, at 37.
34. Murphy, supra note 21, at 12.
35. United States Department of State, supra note 23, at 7.
promised employment is replaced with sexual exploitation or uncompensated and/or exploitative labor according to terms to which they did not agree.

Compliance of an enslaved trafficked person is achieved through equally numerous ways, including threats to harm both the trafficked person and his or her family, threats to turn a trafficked person over to law enforcement or immigration authorities (who may be accurately or inaccurately portrayed as unsympathetic to the trafficked person’s situation), confiscation of documents, psychological torture including confinement and seclusion, the creation of artificial debts purportedly owed to the trafficker and sometimes physical abuse such as beatings, starvation, sexual assault, and rape.37

Furthermore, the profitable exploitation to which trafficked persons are subjected takes on a wide variety of forms. Trafficking extends far beyond sexual exploitation, such as in the commercial sex industry and prostitution.38 It includes forced labor in a “broad range of contexts, including agriculture, domestic servitude, maid service, sweatshops, begging, and marriage.”39 Trafficking has a high return-to-risk ratio that makes it more attractive to criminals than other, riskier criminal activities.40

C. GLOBAL SCOPE OF THE PROBLEM

According to the United Nations Office on Drugs and Crime, “trafficking in human beings has reached epidemic proportions” in the last decade, with no country immune from the effects of this highly profitable industry.41 “Illegal migrants and trafficking victims have become another commodity in a larger realm of criminal commerce involving other commodities, such as narcotic drugs and firearms or weapons and money laundering.”42

Published numbers on the global scope of human trafficking vary widely. The U.S. State Department’s annual Trafficking in Persons (“TIP”) Report for 2003 estimated some 800,000 to 900,000 people are traded worldwide.43 The 2004 report inexplicably reduced that range to 600,000 to 800,000.44 President George W. Bush asserted the upper limit (discussing gaming theory and rational choices that individuals make in difficult circumstances with few options). “To take the classic example, when a captive agrees to slavery rather than be killed, the choice of enslavement is the making of a bargain.” Id. at 26. In the case of coercion or fraud, not only may options be few, but misinformation negates the meaningfulness of any bargain struck.

37. Potts, supra note 32, at 229-30. See also Murphy, supra note 21, at 14.
39. Id.
40. United Nations Office on Drugs and Crime, supra note 22.
41. Id.
42. Id.
43. United States Department of State, supra note 23, at 7.
44. United States Department of State, Victims of Trafficking and Violence
of the U.S. State Department’s earlier worldwide estimate (900,000 human beings) in a recent address to the United Nations General Assembly. The U.N., by contrast, estimates as many as four million people are trafficked annually worldwide. The disparity in numbers may be due to political differences of opinion and/or methodological difficulties in obtaining accurate information about an underground industry. There are, however, widespread reports that trafficking is one of the fastest-growing illegal industries and is the third largest criminal industry, after drugs and firearms. The U.S. State Department estimates annual revenues of $7 billion to $10 billion. Moreover, due to the very high revenue-to-risk ratio, and because humans are “expendable, reusable, and re-sellable cheap commodities,” the U.N. predicts human trafficking will soon surpass the trafficking of both arms and narcotics to become the world’s leading illegal industry.

D. MANIFESTATIONS OF TRAFFICKING IN THE UNITED STATES

Like the global figures, estimates of the scope of trafficking in the United States also vary widely. The 2003 State Department Trafficking in Persons Report approximated that 18,000 to 20,000 trafficked persons enter the United States annually, while the 2004 Report reduced that estimate to 14,500 to 17,500. Previous estimates placed the number of persons trafficked to the United States on an annual basis closer to 50,000. A recent report by Free the Slaves and the Human Rights Center of the University of California, Berkeley estimates at least 10,000 forced laborers in the United States at any given time. The report further indicates that given the hidden nature of modern-day slavery, the actual number of victims likely “reaches into the tens of thousands.”

47. Stumpf, supra note 6, at 150.
48. United States Department of State, supra note 23, at 9; See also Enck, supra note 18, at 373-74.
49. Enck, supra note 18, at 374.
50. United States Department of State, supra note 23, at 7.
51. United States Department of State, supra note 44, at 23.
53. FREE THE SLAVES & HUMAN RIGHTS CENTER, HIDDEN SLAVES: FORCED LABOR IN THE UNITED STATES 14 (Sept. 2004) (listing the primary economic and demographic sectors where forced labor has been found in the United States).
Trafficked persons are exploited in many different ways in the United States. In 1995, a sweatshop was discovered in El Monte, California, where more than seventy men and women from Thailand had been enslaved for up to seven years. In 1997, eighteen traffickers were prosecuted for enslaving hearing-impaired Mexicans and forcing them to peddle trinkets in New York City, Los Angeles, and Chicago. In 2001, a couple in Maryland was convicted for enslaving two teenage girls from Cameroon in their home, forcing them to clean, cook, and care for children while confining them to the home and threatening them and their families should the girls leave. Also in 2001, seven Russian women were discovered being forced to dance nude at a nightclub in Alaska after having been recruited to perform traditional folk dances at a nonexistent cultural event. In 2003, two United States citizens in New Hampshire were convicted on eighteen counts of forced labor for enslaving Jamaican citizens to work in their tree cutting business. "The reach of traffickers is extensive in many industries in the United States, including among others, prostitution and sexual services, domestic service, agriculture, sweatshops and restaurants."

E. LEGAL RESPONSES: INTERNATIONAL AND DOMESTIC LAW

1. The United Nations Convention and the Trafficking Protocol

In December 2000, the U.N. General Assembly approved and signed in Palermo, Italy, the International Convention Against Organized Transnational Crime. This Convention entered into force on September 29, 2003, ninety days after the deposit of the fortieth instrument, according to its terms. Two Protocols to this Convention, including the U.N. Protocol Against Trafficking in Persons, Especially Women and Children ("Trafficking Protocol"), were also approved and signed in Palermo. The United States is a signatory to both the Convention and the Trafficking Protocol but has ratified neither. The stated purposes of the Trafficking

54. Potts, supra note 32, at 232-33.
55. Id. at 233.
56. Enck, supra note 18, at 372.
58. FREE THE SLAVES & HUMAN RIGHTS CENTER, supra note 53, at 14 (listing the primary economic and demographic sectors where forced labor has been found in the United States).
59. Potts, supra note 32, at 236.
61. Potts, supra note 32 at 236.
62. United Nations, supra note 60; United Nations, Signatories to the Trafficking
Protocol are threefold:

1. To prevent and combat trafficking in persons, paying particular attention to women and children;
2. To protect and assist the victims of such trafficking, with full respect for their human rights; and
3. To promote cooperation among state parties in order to meet those objectives.

The Trafficking Protocol defines “Trafficking in persons” as:
(a) The recruitment, transportation, transfer, harbouring or receipt of a person, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of the person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs .

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used .

Heated debates among scholars and activists persist about the problems inherent in this definition. The terms “autonomy” and “protectionist” describe the highly polarized approaches to the definition of trafficking. The “autonomy” advocates take the position that some trafficking is consensual and is based on self-determination of the trafficked person, who is in a situation of economic necessity. The “protectionist” position, on the other hand, centers the trafficking discussion on prostitution and views

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66. Larson, supra note 65, at 674-75; Abramson, supra note 65, at 475-76.
67. Larson, supra note 65, at 681.
all prostitution as a human rights violation akin to the bondage of slavery that must be uncompromisingly abolished.\textsuperscript{68} In this view, "consent" in the context of trafficking is meaningless.\textsuperscript{69} The focal point of contention between the autonomy and protectionist positions thus resolves into a turf battle over the placement of prostitution within the trafficking context.

The definition of trafficking in the Trafficking Protocol reflects a compromise between the "autonomy" and "protectionist" positions.\textsuperscript{70} While consent is not entirely irrelevant because of the means requirement of "the threat or use of force or other forms of coercion...." its prominence in determining a trafficking situation is diluted by Article 3 (b) wherein consent "shall be irrelevant where any of the means set forth in subparagraph (a) have been used...."\textsuperscript{71} A positive aspect of such a definition is that it is broad enough to encompass various forms of trafficking, including not only sex trafficking and labor trafficking, but also organs, babies, minors, and both genders.\textsuperscript{72} Yet, the ambiguity of the definition allows confusion to persist over the question of whether transnational migration for prostitution is \textit{per se} trafficking, and has the ultimate effect of making the distinction between migrant smuggling and trafficking a gendered one.\textsuperscript{73}

The polarized approaches to the definition of trafficking in the Trafficking Protocol and its implementation in United States domestic law reflect similarly divergent policy proposals for how to extinguish this modern form of slavery. Several authors, however, have noted that the differing approaches are not irreconcilable.\textsuperscript{74}

One possible reconciliation between these approaches is grounded in the exploitative facet of trafficking, the key element that distinguishes trafficking from smuggling.\textsuperscript{75} A labor-based definition that focuses on the illegality of labor or non-conformity with legitimate labor practices, whether or not a trafficked person consented to the trafficking, casts a wider net and is more in conformity with the Trafficking Protocol.\textsuperscript{76} Such an approach "presume[s] all persons under the control of a trafficker have

\begin{itemize}
\item \textsuperscript{68} Id. at 680.
\item \textsuperscript{69} Abramson, supra note 65, at 476.
\item \textsuperscript{70} See id. at 477.
\item \textsuperscript{71} Trafficking Protocol, supra note 64, at 32.
\item \textsuperscript{72} Mohammed Mattar, \textsc{Monitoring the Status of Severe Forms of Trafficking in Foreign Countries: Sanctions Mandated Under the U.S. Trafficking Victims Protection Act}, X \textsc{The Brown J. of World Aff.} 159, 163-64 (2003), available at http://www.watsoninstitute.org/bjwa/archive/10.1/SexTrafficking/Mattar.pdf (last visited Sept. 18, 2004).
\item \textsuperscript{73} Sullivan, supra note 65, at 83.
\item \textsuperscript{74} Larson, supra note 65, at 675. \textit{See generally} Larson, supra note 36, at 286-94.
\item \textsuperscript{75} Abramson, supra note 65, at 498 (Whereas smuggling involves the mere transportation over a national border, in trafficking the trafficker maintains a relationship of exploitation with the person trafficked.).
\item \textsuperscript{76} Abramson, supra note 65, at 499-500.
\end{itemize}
been trafficked."77 It focuses on addressing the purpose for which humans are traded, that is, exploitation. Such a view, in accordance with the spirit of the Convention, bypasses questions of trafficked persons' consent to engage in risky activities that led to being trafficked and thereby exculpates them from being accomplices in their own victimization.

Reframing the trafficking issue from the perspective of the exploited trafficked person by focusing on the exploitative bottom line of trafficking is an appropriate way to situate policy and legislative discussions within a human rights framework. By determining what legal standards define "just and favourable" free labor conditions that are "worthy of human dignity," human rights and labor rights can be brought together in a way that obviates "fruitless debates" over consent and prostitution in the context of trafficking.78 This human rights framework, based on scrutinizing labor practices, privileges the person who has been in the exploitative situation. As such, it prioritizes enforcement of civil rights and measures the successfulness of anti-trafficking legislative policy not only by its effectiveness in addressing crimes against the state through public prosecution but also by its effectiveness in enabling trafficked persons to obtain remedies for violations of their civil rights.

The Trafficking Protocol did not, however, resolve the polemic approaches to the definition of trafficking in favor of any one reconciliatory interpretation. Rather, this Protocol left the definition of trafficking vague and open to various interpretations by state parties.79 The United States domestic implementation of the international Trafficking Protocol reflects this ambiguity, along with the problematic tension between criminal prosecution and civil action as enforcement mechanisms for ending modern slavery.

2. Victims of Trafficking and Violence Protection Act of 2000

In 2000, Congress enacted the TVPA.80 This Act follows the "three P" model outlined in the Trafficking Protocol and therefore includes sections on prevention,81 protection for trafficked persons,82 and prosecution of traffickers.83 The Act defines "severe forms of trafficking" as either:

77. Id. at 500.
78. Larson, supra note 65, at 698-99.
79. Sullivan, supra note 65, at 81.
80. TVPA § 2, 114 Stat. at 1464.
81. TVPA § 106, 114 Stat. at 1474.
82. TVPA § 107, 114 Stat. at 1474-80.
(A) 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
(B) 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.

This definition acknowledges that the various purposes of trafficking in persons include exploitation specific to the commercial sex industry as well as many forms of forced labor in other industries, such as agricultural work, domestic servitude, sweatshop work, and begging.

The TVPA provides for criminal prosecution of traffickers, requires the U.S. Department of State to study the global problem of trafficking and issue its findings in an annual report on the status of other states regarding their anti-trafficking efforts, and establishes immigration relief for certain trafficking victims in the United States. The criminal prosecution is assigned to the Criminal Section of the Civil Rights Division of the Department of Justice, which "generally brings a greater human rights consciousness to its prosecutorial tasks and deterrence programs" than the regular Criminal Division.

The TVPA substantially enhances criminal penalties for traffickers. The Act doubles the sentence for holding people in involuntary servitude, expands sentencing if aggravating factors are present, and criminalizes financial gain from sex trafficking when the beneficiary knows that the person is engaged in a commercial sex act because of "force, fraud, or coercion." Document seizure is also criminalized. The Act improves enforcement by broadening the definition of coercion to go beyond physical force or threat of force to include prosecution based on psychological coercion.

The immigration relief afforded to trafficking victims primarily comes in the form of a T visa, which was authorized by the TVPA and incorporated into the Immigration and Nationality Act at section

84. TVPA § 103(9), 114 Stat. at 1470 (defining sex trafficking as "the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act").
85. TVPA § 103(3), 114 Stat. at 1469 (defining a commercial sex act as "any sex act on account of which anything of value is given to or received by any person").
86. TVPA § 103(8), 114 Stat. at 1470.
87. Hyland, supra note 2, at 33.
89. Id. at 1161.
90. See id. at 1159.
91. Hyland, supra note 2, at 65.
92. Id. at 66.
T visas are available to persons who can establish that they are victims of a "severe form of trafficking in persons," are "physically present in the United States... on account of such trafficking in persons," will comply with "any reasonable request for assistance in the investigation or prosecution of acts of such trafficking in persons," and that they will "suffer extreme hardship involving unusual and severe harm upon removal." This is a three-year temporary visa that permits adjustment to lawful permanent resident status and confers certain social benefits and work authorization. Derivative benefits may also be available to their immediate family. This combination of immigration benefits with criminal prosecution reflects Congress' attempt to create a broad approach to trafficking that identifies and criminalizes traffickers while providing access to the political community for those who have been brought here through trafficking.

Thus, the TVPA is a combination of prosecutorial measures against traffickers and support benefits for the persons who have been trafficked here. To some extent, however, the prosecutorial goals and provision of benefits are inherently at cross-purposes. While the prosecution of traffickers may be enhanced by the TVPA's improvements over previous criminal laws, from the perspective of trafficked persons, the prosecutorial focus of the law makes benefits contingent upon the prosecutorial process and therefore poses substantial barriers to full recovery.

For instance, the T visa regulations require that the trafficked person take the initiative to seek out protection, and they place the burden of proving eligibility upon the applicant. Furthermore, only 5,000 T visas may be granted per fiscal year. As indicated above, the numbers of persons trafficked to this country are not well known, yet all estimates place those numbers well above 5,000. However, four years after the enactment of the TVPA, which has cumulatively allowed a maximum of 20,000 T visas, less than 500 have been issued out of approximately 750 T visa applications submitted. Trafficking victim service providers have questioned the reasons behind such low T visa numbers and believe that the requirement that trafficked persons be willing to assist in the investigation and/or prosecution of traffickers may limit access to the T visa in several ways.

94. Fitzpatrick, supra note 88, at 1160.
95. 8 C.F.R. §§ 214.11(o).
96. Stumpf, supra note 6, at 148.
97. Fitzpatrick, supra note 88, at 1163.
98. Id. at 1162.
100. See generally Kathleen Kim, Charles Song & Melanie Orhant on behalf of the Freedom Network, Briefing to Congress: Providing Assistance to Victims of Human Trafficking, sponsored by Congressman John Conyers (May 18, 2004) (evaluating
First, trafficked persons may be afraid of retaliation from traffickers or their associates either against themselves or family members here and abroad. Fear of retaliation is compounded by a general distrust of law enforcement since traffickers’ threats that law enforcement will penalize rather than protect victims is effectuated by an absence of rule of law and government corruption in many victims’ countries of origin. Second, trafficked persons are often recovering from severe physical and psychological harm, which may compromise their ability to provide assistance with a criminal investigation. Furthermore, enforcement of the TVPA is limited by current deficiencies in training and lack of awareness of the legal remedies available under the law among traditional law enforcement personnel. Finally, assuming a victim has reported their case and is willing to cooperate with the investigation, the ultimate discretion whether to open a criminal investigation is left to the prosecutor. Where a prosecutor decides not to pursue an investigation, a worthy candidate may face complications in receiving a T visa due to the absence of law enforcement supporting evidence that the applicant is eligible for such relief.

These compromises reflect the polemic ideological opinions held by various proponents of this bipartisan legislation. The components of the TVPA that most benefit trafficked persons contrast sharply with the recent restrictive trend in immigration legislation and may be the result of international efforts to “reconceptualize trafficking as a human rights abuse.” Prosecutorial efforts reflect a response of moral outrage to high profile trafficking cases that revealed the insufficiency of anti-trafficking implementation of current laws aimed to combat human trafficking and recommending human rights focused policy reforms based on the experiences of their trafficked clients).

101. Fitzpatrick, supra note 88, at 1161.
102. Kim, Song & Orhant, supra note 100 ("The Department of Homeland Security ("DHS") considers law enforcement corroboration or the "Law Enforcement Agency" declaration ("LEA") that an individual is indeed a victim of human trafficking, to be primary evidence that a T visa applicant is eligible. While the LEA is not mandatory, DHS regulations strongly encourage it due to insufficient proof in trafficking cases for an independent assessment by immigration officers. 8 C.F.R. § 103. Thus despite an applicant’s demonstrated willingness to cooperate in the investigation or prosecution of the trafficking crime, T visas have been denied or significantly delayed due to the absence of an LEA."). While a criminal case is ongoing, federal authorities can provide the victim/witness with a form of interim immigration relief called “continued presence.” At times, however, even “continued presence” is denied or delayed. Without a T visa or continued presence, the trafficked person must subsist without federal benefits or work authorization. Often surviving off the goodwill of community groups, the need for monetary relief is urgent. Civil suit is sometimes the only avenue for relief. It should be noted that with the passage of the TVPRA, state and local law enforcement authorities are now also empowered to provide LEAs. As states begin to pass their own anti-trafficking legislation and as training for state and local law enforcement increases, LEAs may be more easily obtained, thereby facilitating the approval of T visas for trafficking victims.

103. See Joshi, supra note 24, at 39-40.
104. Fitzpatrick, supra note 88, at 1159.
laws and prosecutorial options.  

While moral outrage justifies effective prosecution of traffickers for what are often horrendous acts of exploitation, it is clear that a prosecutorial focus poses some restrictions to trafficked persons' full recovery. Civil action has the potential to fill this gap left by criminal prosecution. Recently, Congress passed the Trafficking Victims Protection Reauthorization Act of 2003, which adds a civil remedy for victims of trafficking. What this means for trafficked persons is that they can file a civil suit under the TVPRA against their traffickers, in addition to or as an alternative to any criminal prosecution in which they may choose to participate. In addition to other causes of action, the private right of action under the TVPRA provides a powerful tool for recovery for trafficked persons. More importantly, trafficked persons can advance their substantive civil rights by enforcing a remedy that targets the actual harm inflicted upon them—modern-day slavery.

PART III: THE PROS AND CONS OF CIVIL LITIGATION

Pursuing civil relief gives the trafficked person several advantages over criminal prosecution regarding compensation, accountability, and control over the case. A civil suit provides unique methods by which trafficked persons can recover damages from traffickers while globally deterring trafficking by disabling traffickers financially, thereby reducing the mercurial incentives of the industry. In a criminal prosecution, the TVPA provides for mandatory restitution and criminal forfeiture of assets. However, a restitution award depends largely on the aggressiveness of the prosecutor and the court to inform the criminal defendant that restitution may be an element of the sentence. Since prosecutors are mostly focused on incarceration, restitution is easily forgotten to the detriment of the victim. Civil litigation, in contrast, empowers trafficked persons individually to pursue greater damage awards in the form of compensatory, punitive, and/or pecuniary damages. These damage awards can compensate victims for the physical and psychological injuries they have suffered, unlike limited restitution damages. While a criminal court cannot order non-economic damages, civil litigation can achieve substantial deterrence of trafficking activity through high punitive awards. Finally, in civil litigation, third parties may sometimes be held liable and may be potential sources of payment for the damage awards, which can be

105. See Joshi, supra note 24, at 39-40.
109. Id. at 53-54.
particularly useful when the trafficker's assets are difficult to locate. "The larger entities, though frequently overlooked in criminal prosecutions...should be named in civil litigation if they are joint employers and/or joint tortfeasors. Ultimately, these larger entities may end up paying the bulk of any judgment arising from the civil litigation." Beyond damage awards, civil suits provide a way for trafficked persons to achieve justice through direct accountability. Defendant traffickers are not just held accountable for crimes against the state; they are directly accountable to their victims.

Procedural differences in civil litigation weigh in favor of successful outcomes for trafficked persons. For instance, the burden of proof is a preponderance-of-the-evidence standard rather than the higher beyond-a-reasonable-doubt standard of criminal proceedings. Plaintiffs can name larger entities as joint employer defendants that may be "unindictable due to the government's burden of proof in a criminal action." Furthermore, in cases where the absence of "hard" evidence weakens a criminal case, a lower burden of proof in civil cases still provides trafficked plaintiffs with avenues for relief. This arises in the domestic servitude context where an individual is kept in a private home and there are few, if any, corroborating witnesses. In the civil context, the testimony of a credible and sympathetic trafficked plaintiff can weigh heavily against the word of the defendant. Finally, evidentiary rules are much more permissive in civil proceedings, thus allowing plaintiffs to successfully rely on evidence of psychological conditions such as post-traumatic stress disorder, rape trauma syndrome, and battered women's syndrome, which is inadmissible in criminal forums.

The most important advantage of civil litigation for a trafficked person is that the trafficked person is the one to bring the suit and control the essential decisions shaping the case, in contrast to criminal cases, which are brought by the state and controlled by the prosecutor. In a criminal prosecution, a trafficked person's role is primarily defined as a witness for the prosecution and the prosecutor represents the interests of the state, which may not be coterminous with those of the person who has been trafficked. As a party to a civil suit, the trafficked person cannot be excluded from the courtroom, and always has final approval of settlement proposals. Furthermore, the trafficked person can sue the trafficker

112. Hyland, supra note 2, at 51.
113. Kim & Werner, supra note 2, at 18.
114. Hyland, supra note 2, at 51.
116. Id. at 42-43.
117. Hyland, supra note 2, at 51.
118. Id.
120. Id. at 3.
regardless of whether the trafficker has been found guilty in criminal proceedings, or even whether the state decides to go forward with any criminal prosecution at all. Absent an effort from the criminal prosecutors to seek restitution from the traffickers, litigation may provide the only means by which victims of trafficking may be 'made whole.'

Some of the barriers to civil litigation are similar to those found in prosecutorial efforts. Limited resources and access to information may prevent trafficked persons from seeking legal aid. Threats of retaliatory violence by the traffickers present obstacles to victims coming forward as criminal witnesses or as civil plaintiffs. Potential defendants and their assets may be difficult to locate. Finally, as in criminal cases, civil litigation can be a stressful and lengthy process, which may be particularly difficult for people who have been traumatized and may not have a stable living situation in this country.

A. IMMIGRATION STATUS: A PRO OR A CON TO CIVIL LITIGATION?

In order to file civil suit within required statute of limitations periods, a trafficked person who has reported a case to law enforcement cannot necessarily wait for the final adjudication of a T visa application. Trafficked persons seeking civil remedies may also be unwilling to cooperate with an investigation or may be otherwise ineligible for the T visa or other forms of immigration relief. Furthermore, because a work permit is conditioned on authorized status, the trafficked person’s need for monetary relief may be even more urgent under these circumstances. Consequently, with great courage, trafficked persons have proceeded with civil cases even in the absence of durable status, despite fears that defendants may use this information against them.

Not surprisingly, trafficking civil suits have taken strategic guidance from other cases involving immigrants injured by workplace abuse, where the role of immigration law in regulating employment matters presents significant obstacles in seeking relief. In this context, when faced with a

121. *Id.* at 7.
123. *Id.* at 10.
124. *Id.* at 1-22 (listing certain considerations attorneys should make with their clients to determine if pursuing civil action is appropriate).
125. See Kim, *supra* note 102 (discussing lengthy delays in the stabilization of a trafficking victim’s immigration status, work authorization, and receipt of benefits thereby increasing a need for civil relief). In consideration of the statute of limitations, where a parallel criminal investigation or prosecution is occurring, the prosecutor will allow the civil action to be filed and stayed pending the close of the criminal case. Kim & Werner, *supra* note 16, at 3.
126. Asylum, VAWA or the U visa may be other forms of immigration relief available to trafficked persons depending on the circumstances of their case.
worker complaint, employers may threaten to notify immigration authorities of a worker's undocumented status — at times, this actually occurs. 129 A 1997 INS Field Manual instructs immigration authorities to refrain from responding to employers' attempts to retaliate in this manner. 130 However, unauthorized work status is grounds for deportation, and workplace raids are a key method by which United States immigration enforcement strategy removes unlawfully present immigrants. 131 The mere threat of exposing a plaintiff's undocumented status has a "serious chilling effect" on those contemplating civil suit and those who have already filed suit. 132 Those who renounce mistreatment and file civil suit against unscrupulous employers frequently face intrusive requests of their current immigration status. Defense attorneys may seek discovery of their status as "relevant" to the merits of the case. This is particularly likely in light of the Supreme Court's decision in Hoffman Plastics v. NLRB, 133 which effectively limited back pay remedies to undocumented workers who asserted their right to organize under the National Labor Relations Act ("NLRA"). 134 Employer-defendants have attempted to use this ruling to curtail plaintiff remedies in even non-NLRA matters such as wage and hour and employment discrimination cases, and even tort cases. 135

Instruction from these types of cases has provided attorneys representing trafficking victims with strategies to safeguard against the disclosure of a victim's current immigration status. For instance, when faced with intrusive discovery requests, trafficking victims whose employment-based claims generally arise under the Fair Labor Standards Act ("FLSA") 136 can rely on established precedent that undocumented

129. See Singh v. Jutla, 214 F. Supp. 2d 1056 (N.D. Cal. 2002) (holding that the employer violated the FLSA by reporting an undocumented employee to the INS in retaliation for a wage and hour complaint); Contreras v. Corinthian Vigor Ins. Brokerage, Inc., 25 F. Supp. 2d 1053 (N.D. Cal. 1998) (holding that the employer violated the FLSA by reporting an undocumented employee to the INS in retaliation to a wage and hour complaint).


status is irrelevant to a claim of unpaid wages.\textsuperscript{137} Thus, courts will generally grant protections against defendants’ discovery of this information.\textsuperscript{138} Furthermore, where traffickers communicate with immigration authorities in retaliation to a complaint, they subject themselves to penalties as well as high punitive judgments in some jurisdictions for violation of the FLSA’s anti-retaliation provisions.\textsuperscript{139}

In contrast to employment cases, a trafficked person’s immigration status at the time of victimization is fundamental to the merits of the case and therefore information that is not advantageous to conceal. The trafficker generally arranges a trafficked person’s migration. This may mean that the trafficked person is smuggled without a visa or that the trafficked person enters this country on a tourist visa, sponsored by the trafficker, which soon expires. A trafficker may apply for a legitimate employment-based temporary visa for the trafficked person. Employment-based visas, however, effectively bind the trafficked person to the trafficker, by denying job portability and limiting labor protections.\textsuperscript{140} In all cases, the trafficker often uses the victim’s “illegal status” or dominion over their employment-based status to compel the forced labor.\textsuperscript{141} Ironically then, there is little reason to keep the trafficked person’s past immigration status confidential and many reasons to keep current status


\textsuperscript{138} Id.

\textsuperscript{139} See Singh v. Jutla, 214 F. Supp. 2d 1056 (N.D. Cal. 2002) (awarding a $200,000 punitive damages award to the plaintiff, an undocumented worker who was held in INS detention after his employer reported him to INS in retaliation for making a wage and hour complaint). See also 29 U.S.C. § 216(b) (2000) (providing that an employer who violates the FLSA’s anti-retaliation clause is liable for compensatory and punitive damages).

\textsuperscript{140} Similar to post-WWII “bracero” programs, U.S. employers can recruit unskilled temporary immigrant workers through the H2A and H2B visa programs. The H2A and H2B programs provide status based on employment with the recruiting employer and allow for lower wages, working and housing conditions. A3 and G5 visas are provided to “attendants, servants, or personal employees” of foreign government officials and representatives of international organizations. B1 visas are often issued to domestic workers employed by other foreign nationals. Cases of severe exploitation have been documented in all visa categories.

\textsuperscript{141} Kim & Werner, supra note 16, at 7.
protected.

Trafficking civil cases illustrate the way in which immigration controls, and an absence of labor protections in informal industries, intersect to cultivate an environment ripe for egregious human rights abuses. Trafficking cases also show how immigration status may continue to restrict the rights of trafficked persons even after liberation from the traffickers. Despite these logistical complications, trafficked persons who have courageously freed themselves are equally determined to hold their traffickers directly accountable for the abuse. In the end, trafficked persons who assert their civil rights have received successful judgments and have been brought closer to a holistic and fuller recovery.142

PART IV: CASE EXAMPLE

Since the TVPA went into effect in 2000, the Department of Justice has prosecuted a variety of trafficking violations under the Act. The following example, the “Reddy Case,” is a landmark case of trafficking prosecution in the United States and involves a complex scheme of trafficking many individuals into the California Bay Area by a wealthy family for exploitation of cheap labor and sexual servitude.143 This case example shows how the TVPA “gives federal law enforcement the authority to prosecute the sophisticated forms of nonphysical coercion that traffickers use today to exploit their victims.”144 This case is also an example of how the TVPA may be applied to order a trafficker to pay restitution to his victims.145

Yet, while this case poses as a landmark victory for the prosecution of an egregious violation of human rights and concretely places behind bars a man who committed these human rights violations, it accomplishes only one important part of anti-trafficking enforcement in the United States. From the perspective of the many people who were exploited in this trafficking scheme, the ordered restitution is an inadequate remedy. Equally important, the deterrence accomplished through imprisonment of individual traffickers falls far short of the level of deterrence needed to stop trafficking entirely.

Nine individuals who were trafficked to the United States through the Reddy network subsequently filed a class action lawsuit in civil court.146

142. See Blair Jackson, Enslaved Maid Wins $800,000, DAILY JOURNAL, Aug. 31, 2004 (awarding a substantial judgment to a trafficked domestic worker).
145. Id.
While the civil litigation action against Lakireddy Bali Reddy and his family does not present a perfect model for addressing trafficking, it does show how prior to passage of the Trafficking Victims Private Right of Action ("TVPRA"), civil litigation complemented prosecutorial action by pursuing compensation for the victims and deterring trafficking through judgments which have substantial financial impact on traffickers.

On March 7, 2001, Lakireddy Bali Reddy, one of the largest landowners in Berkeley, California pleaded guilty to trafficking women and girls into the United States to place them into slave labor in his property holdings and for sexual servitude.\textsuperscript{147} For over two decades, Reddy built his business in the real estate and restaurant industries through the exploitation of girls and women.\textsuperscript{148} He brought them to the United States through a widespread conspiracy to violate immigration laws.\textsuperscript{149} Reddy, certain family members, and others arranged to bring laborers to work in his Berkeley businesses.\textsuperscript{150} For example, the prosecution at his trial brought forth evidence that he had imported, under false pretenses, over twenty-five people since 1986 to use as slave labor.\textsuperscript{151}

The young individuals Reddy and family trafficked into the United States were also utilized for the purposes of engaging in sexual acts with him and others.\textsuperscript{152} For example, his brother and sister posed as husband and wife to bring in two young girls, who they held out to be their daughters, for the purpose of engaging in sexual relations with him.\textsuperscript{153}

Reddy was able to recruit slave laborers and sex slaves because of his extensive influence in his home village of Velvadam, in Andhra Pradesh, India.\textsuperscript{154} After finishing his education in Berkeley, Reddy went into real estate and accumulated holdings to include over 1,000 rental units in the East Bay, plus commercial properties and a restaurant in downtown Berkeley.\textsuperscript{155} His holdings are estimated to be worth $70 million.\textsuperscript{156} He used the wealth that he amassed in the United States to “build schools, colleges, bus stands and temples” in India, and he would offer these women a chance to come work in the United States.\textsuperscript{157}

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\textsuperscript{148} American Civil Liberties Union, \textit{supra} note 143.
\textsuperscript{149} Department of Justice, \textit{supra} note 147.
\textsuperscript{150} \textit{Id.}
\textsuperscript{152} Department of Justice, \textit{supra} note 147.
\textsuperscript{153} \textit{Id.}
\textsuperscript{154} Din, \textit{supra} note 151.
\textsuperscript{155} \textit{Id.}
\textsuperscript{156} Chang, \textit{supra} note 146.
\textsuperscript{157} Din, \textit{supra} note 151.
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In the accounts of Reddy’s exploitation of the people he trafficked to the United States, the line is blurred between labor exploitation and sexual exploitation. In part, this may be because traffickers “will use whatever means necessary to ensure the confinement and cooperation of their victims” including sexual assault.  

While official accounts of Reddy’s purposes of using trafficked persons draw a distinction between sex and cheap labor, sexual assault and rape functioned as effective measures for disciplining the workers in his trafficking scheme.

It was not until the tragic death of one of the girls that he trafficked to Berkeley that his criminal activities were exposed. In January 2000, one of the girls Reddy had exploited died of carbon monoxide poisoning in a Berkeley apartment he owned; he was arrested shortly thereafter. Her sister had also suffered carbon monoxide poisoning but had survived. This tragedy led to a federal investigation and Reddy’s eventual guilty plea. Reddy was sentenced to over eight years in prison and ordered to pay $2 million in restitution to these two victims. According to the attorney who represented the two victims, “[t]he sentence allows our clients to continue the process of recovery from their terrible ordeal.”

While the conviction of Reddy represents a milestone in community response to an egregious violation of human rights and women’s rights, it also represents some limitations in the prosecutorial process. The most poignant of these is that, while only two of Reddy’s victims got substantial restitution, his family business, which owes its success in part to the slavery and cheap labor of his many trafficked victims, continues to thrive in Berkeley, and many other members of his trafficking network escaped punishment.

In 2002, nine young Indian women, plus the parents of another woman, filed a class action lawsuit in Alameda County Superior Court seeking $100 million in damages from the Reddy family. Until now, the Reddy civil complaint has provided a model for other attorneys representing trafficked persons in civil litigation. Relying on a patchwork of traditional employment and tort claims, the lawsuit puts forth many causes of action by which a trafficked person may obtain material recovery. Because a

158. Potts, supra note 32, at 229.
159. American Civil Liberties Union, supra note 143.
160. Id.
161. Department of Justice, supra note 147.
162. Id.
163. American Civil Liberties Union, supra note 143.
164. Id.
165. Id. (citing Nalini Shekar, a Bay Area activist for women’s rights and for the protection of victims of domestic violence).
166. Chang, supra note 146.
167. Id.
private right of action for slavery or slave-like practices did not exist, the Reddy complaint adds "implied rights of action" under the Thirteenth Amendment and Anti-Peonage Act, as well as forced labor and slavery claims under the Alien Tort Claims Act ("ATCA"). While the employment and common law tort claims proceeded without controversy, the assertion of "novel" claims directly challenging slavery encountered strategic difficulties due to a long history of disfavor by the courts.

In an unpublished order in the Northern District of California, the court dismissed claims asserting "implied rights of action" for slavery under the Thirteenth Amendment and Anti-Peonage Act. The ATCA claim survived a motion to dismiss, leaving it the only viable claim for trafficking victims hoping to challenge modern-day slavery. This case settled before going to trial. While the plaintiffs may have recovered materially, the legal maneuvering required to target slavery and the ultimate dismissal of claims addressing the actual harm to the plaintiffs hampered full vindication of their rights. The next section provides a closer analysis of the limitations of trafficking civil litigation up until now and the potential for recovery and empowerment that a trafficking specific cause of action provides to trafficked persons.

PART V: TRAFFICKING CIVIL LITIGATION BEFORE AND AFTER THE TRAFFICKING PRIVATE RIGHT OF ACTION ("TVPRA")

Prior to the passage of the TVPRA, trafficking civil suits were brought primarily under the Fair Labor Standards Act, analogous state employment laws and various state common law torts. Trafficking complaints resembled employment disputes or personal injury claims. Limited by the confines of these laws, trafficking victims were presented with incomplete avenues for relief. For example, victims of forced prostitution are exempt from wage and hour protections under the FLSA since the FLSA covers only legal types of employment. Trafficked persons who may be domestic workers or agricultural workers are exempt from higher overtime pay under the FLSA and the Migrant and Seasonal Worker Protection

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173. Id. (order granting in part and denying in part defendants' motion to dismiss claims).
174. FREE THE SLAVES & HUMAN RIGHTS CENTER, supra note 53, at 7 (referencing the Reddy civil case that settled for $8.9 million).
175. Kim & Werner, supra note 16, at 41 (noting that some commercial sex activity is legal and thus may be compensable).
Relying on employment claims not only deprives trafficked plaintiffs of full monetary relief, but also bases their claim in a law enacted through Congress' commerce power, intended to regulate market relationships, not gross human rights abuses. Defining the relationship of trafficker and trafficking victim as one between an employer and employee presumes a lesser harm that can be corrected by simple calculations of wage and hour discrepancies and does little to vindicate the trafficked person's human right to be free from slavery.

Although various tort claims such as "intentional infliction of emotional distress" or "false imprisonment" can provide trafficked persons with additional material recovery through punitive damages, these discreet claims address only the "incidental effects" of modern-day slavery. Trafficking lawsuits must plead several torts and prove each independently to even begin to address the full range of injuries suffered by trafficked persons. Finally, state common law torts clearly lack the descriptive power to convey to a court of law that a defendant should be held accountable for committing slavery.

A handful of ambitious trafficking lawsuits have asserted additional claims in an effort to increase potential for recovery and to expose the substantive nature of the actual harm inflicted — modern-day slavery. As in Doe I v. Reddy, these additional claims include "implied rights of action" under the Thirteenth Amendment and its enabling statutes criminalizing involuntary servitude and peonage, as well as the Alien Tort Claims Act to enforce international human rights standards. The success of these claims often depends on creative legal maneuvering to defeat motions to dismiss and scrutiny from courts. Ultimately, the frequent dismissal of these claims relegates lawsuits on behalf of trafficking victims to "simple" employment matters or personal injury claims, depriving the trafficked

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176. Migrant and Seasonal Worker Protection Act, 29 U.S.C. §§ 1801-1872 (1983); Kim & Werner, supra note 16, at 38 (noting that there is no explicit protection for trafficked workers under the FLSA, and the FLSA has exemptions for several categories of workers where trafficking is found). Interestingly, when the FLSA was first enacted, it excluded from coverage the two primary sources of African American labor at the time, domestic service and agriculture. See William E. Forbath, Caste, Class and Equal Citizenship, 98 MICH. L. REV. 1, 26 (1999). See also Melanie Ryan, Swept Under the Carpet: Lack of Legal Protections for Household Workers - A Call for Justice, 20 WOMEN'S RTS. L. REP. 159, 160-63 (1999).

177. See Baher Azmy, Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda, 71 FORDHAM L. REV. 981, 1039 (2002) (explaining that the use of the FLSA in slavery cases "continues an undesirable fiction of grounding human rights protections in the language and theory of the commerce power.").

178. Id. at 983.

179. Id. at 986.

180. Id. at 1047 ("The expressive value of the FLSA and other state common-law remedies are simply a mismatch for the individual harm suffered by the victims of slavery and involuntary servitude or for the collective, social harm inflicted by its perpetrators.").

181. See supra text accompanying notes 168-73.
person of their fundamental right to full relief from slavery.

A. THIRTEENTH AMENDMENT OF THE U.S. CONSTITUTION

Sec. 1. [Slavery prohibited.] "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 subject to their jurisdiction." \(^{183}\)

Sec. 2. [Power to enforce amendment.] "Congress shall have power to enforce this article by appropriate legislation." \(^{184}\)

The Thirteenth Amendment prohibits slavery and criminalizes slave-like practices. Pursuant to Section 2, Congress' enforcement power, criminal statutes have been enacted to implement the mandate of the Thirteenth Amendment. Courts refer to these criminal statutes to adjudicate the prohibition of slave-like practices. Supreme Court jurisprudence has developed around cases brought against offenders of the amendment's enabling criminal statutes. These cases demonstrate the Court's interest in abolishing slavery in all its forms and evolving manifestations. \(^{185}\) The Court emphasized the broad reach of the amendment in the Civil Rights Cases, proclaiming that the Thirteenth Amendment is "self-executing," establishes "universal civil and political freedom," and applies to any state of circumstances. \(^{186}\) In U.S. v. Kozminski, the Court reiterated that the Thirteenth Amendment could be broadly interpreted, given less restrictive criminal enabling statutes: "We draw no conclusions from this historical survey about the potential scope of the Thirteenth Amendment." \(^{187}\) However, despite the Court's recognition of the government's strong interest in abolishing all forms of slavery as crimes against the state, a statutory right to a civil remedy enforceable by a private plaintiff has never existed under the Thirteenth Amendment and the Supreme Court has never acknowledged one.

B. INVOLUNTARY SERVITUDE

Whoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held, shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated

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182. U.S. Const. amend. XIII.
183. Id. § 1
184. Id. § 2.
sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.\textsuperscript{189}

Section 1584 criminalizes the practice of involuntary servitude and was enacted pursuant to Section 2 of the Thirteenth Amendment.\textsuperscript{190} Lawsuits alleging slavery argue that since there is no exclusive statutory remedy for involuntary servitude, a private right of action should be "implied." The Eastern District of New York in \textit{Manliguez v. Martin}\textsuperscript{191} is the only court that found an implied civil cause of action under 18 U.S.C. § 1584. The plaintiff in this case, a trafficked domestic worker, argued that section 1584 applies to both private and state actors who commit involuntary servitude, and it is possible to "imply" a private right of action where it was within Congress' intent to create one and when "the statute in question... prohibited certain conduct or created federal rights in favor of private parties."\textsuperscript{192} The plaintiff defeated a motion to dismiss this claim based on statute of limitations. Without much explanation, the district court held that section 1584 is grounded in the Thirteenth Amendment, which confers the federal right to be protected from involuntary servitude and a private cause of action would be consistent with section 1584's legislative intent.\textsuperscript{193}

Most courts, however, have refused to recognize an implied right of action under section 1584 and the Thirteenth Amendment.\textsuperscript{194} Courts have generally followed the decision in \textit{Turner v. Unification Church},\textsuperscript{195} which provides more explanation for rejecting that an implied Thirteenth Amendment private right of action exists.\textsuperscript{196} Essentially, \textit{Turner} held that use of the Thirteenth Amendment to obtain relief was not appropriate or necessary since the injuries at issue could be addressed by state tort laws: "When private wrongdoing can be adequately redressed by state law, there is much less compulsion for the judiciary to erect an additional constitutional cause of action."\textsuperscript{197} Further, the court expressed concern that implying a civil cause under the Thirteenth Amendment would "'constitutionalize' a large portion of state tort law."\textsuperscript{198} Other courts have summarily declared that no such private right of action exists: "Plaintiff has

\begin{thebibliography}{99}
\bibitem{189} Id.
\bibitem{190} Id.
\bibitem{191} 226 F. Supp. 2d 377 (E.D.N.Y. 2002).
\bibitem{192} Id. at 384.
\bibitem{193} Id.
\bibitem{196} Id.
\bibitem{197} Id. at 374.
\bibitem{198} Id.
\end{thebibliography}
pointed to no authority, and the court knows of none, allowing a plaintiff to proceed directly under the Thirteenth Amendment against private parties such as the defendants here.”199

C. ANTI-PEONAGE ACT200

The holding of any person to service or labor under the system known as peonage is hereby declared to be unlawful, and the same is hereby abolished and forever prohibited in the Territory of New Mexico, or in any other Territory or State of the United States; and all acts, laws, resolutions, orders, regulations or usages of any Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void.201

The Anti-Peonage Act was passed in 1867 pursuant to Congress’ enforcement power under Section 2 of the Thirteenth Amendment. The measure criminalized debt bondage and peonage in an effort to combat the second progeny of slavery after the Thirteenth Amendment’s abolishment of chattel slavery. The Anti-Peonage Act provides historic evidence that application of the Thirteenth Amendment is not limited to chattel slavery, which was based on the ownership of a human being as property of the slaveholder. Supreme Court recognition that manifestations of slavery were evolving is also demonstrated through the Slaughter-House Cases involving Mexican peonage and the Chinese coolie labor system.202 Here the Court prohibited “all forms of involuntary slavery of whatever class or name.”203 Similarly, in Clyatt v. United States,204 the Supreme Court upheld the constitutionality of the Anti-Peonage Act by emphasizing that the Thirteenth Amendment established “universal freedom” and that peonage, the “status or condition of compulsory service, based upon the indebtedness of the peon to his master,” also constitutes slavery.205 Despite precedent emphasizing the broad reach of the Thirteenth Amendment to criminalize slavery and its emerging manifestations, a civil remedy has never been interpreted.

201. Id.
202. 83 U.S. 36 (1873).
203. Id. at 72.
204. 197 U.S. 207 (1905).
205. Id. at 217-18.
Similar to the Thirteenth Amendment and Section 1584, there is no explicit private right of action under the Anti-Peonage Act. Plaintiffs challenging peonage and debt bondage under this act must argue that a cause of action can be implied. Courts again rely on the holding in Turner, finding that no such implied rights exist in the Thirteenth Amendment or in the criminal statutes rooted in the Thirteenth Amendment. Bringing a cause of action under the Anti-Ppeonage Act faces the additional hurdle of state action. Although the Supreme Court has not definitively required state action in Anti-Ppeonage cases, all Supreme Court decisions under this act have involved state actors. Furthermore, the Fifth Circuit in Craine v. Alexander declared that state action is required for violations under the act as it “renders invalid only the ‘acts, laws, resolutions, orders, regulations or usages’ of the states.”

In sum, Thirteenth Amendment jurisprudence has historically resisted private enforcement of its prohibition against slavery. Trafficked plaintiffs have thus faced motions to dismiss “implied” rights under the amendment, which courts generally grant. While trafficked persons have still been able to pursue damages based on employment laws and state common law torts, they have been deprived of any federal right to directly challenge the actual harm of slavery.

D. THE ALIEN TORT CLAIMS ACT (“ATCA”)

The ATCA grants federal jurisdiction for “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” The ATCA has emerged as the primary civil litigation tool for addressing human rights abuses. To date, it has provided the only viable claim for trafficked persons to privately enforce a remedy for modern-day slavery. The statute was enacted in 1789 by the first Congress to primarily deal with piracy, but was rarely invoked for almost two centuries. Its reemergence in cases involving international human rights abuses has created much controversy in the courts with conflicting views over the judiciary's role in adjudicating and enforcing international legal norms.

A valid claim under the ATCA requires that: (1) an alien sues; (2) for a tort; (3) in violation of international law. The third prong is where much of the legal uncertainty arises. Establishing subject matter jurisdiction under the ATCA requires addressing the threshold question of whether or not the tort in question violates “the law of nations.” Precedents established by a
line of federal circuit cases, as well as a recent Supreme Court decision, upheld ATCA jurisdiction and conferred a cause of action for a narrow set of human rights abuses.  

*Filartiga v. Pena-Irala* marks the first case to lift the ATCA from obscurity. Here, the Second Circuit held that torture constitutes a violation of international law, extending ATCA jurisdiction to cases of human rights abuses. To determine the contours of the law of nations, the Second Circuit cited the Supreme Court opinion in *United States v. Smith*, which stated that the law of nations "may be ascertained by consulting the works of jurists, writing professedly on the public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." The Second Circuit affirmed that international law should be interpreted according to contemporary standards and not restricted to the state of affairs at the time the ATCA was enacted in 1789. The court cautioned, however, against the extraterritorial application of particularized domestic regulations, urging strict adherence to the requirement that international law have the "general assent of civilized nations."

Analyzing the case history up to and including *Filartiga*, scholars have identified four criteria to determine whether or not a tort violates the law of nations and, therefore, is actionable under the ATCA. Torts in violation of international law are: (1) definable, (2) universal, (3) obligatory norms that are (4) the object of concerted international attention. The Second Circuit cited consistent language condemning torture in numerous international agreements concluding that "official torture is now prohibited by the law of nations."

Under this analysis, slavery and slave trade qualify as a violation of the law of nations. Prohibitions against slavery rise to the level of a *jus cogens* norm, "which are derived from values taken to be fundamental by the international community, enjoy the highest status within customary

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213. 630 F.2d 876 (2d Cir. 1980).
215. *Filartiga*, 630 F.2d at 880 (citing United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820)).
216. *Id.* at 881.
international law and are binding on all nations.” Jus cogens norms are a subset of customary international legal norms “accepted and recognized by the international community of states as a whole from which no derogation is permitted.” Customary law is not necessarily binding on all states, but jus cogens norms actually “create ‘international crimes,’” examples of which include genocide, apartheid and slavery.

Several lawsuits on behalf of trafficked persons have utilized the ATCA to pursue damages for slavery. A common affirmative defense to these cases is that the law of nations monitors the conduct of states, not private individuals. In Kadic v. Karadavic, however, the Second Circuit applied the ATCA to private individuals, hence extending ATCA jurisdiction to non-state sanctioned torts. The court listed a limited category of ATCA violations, actionable against non-state actors, including piracy; slavery or slave trade; war crimes; and genocide: “We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.” This was reaffirmed by the Ninth Circuit in John Doe v. Unocal, which held that individual liability under the ATCA may be established for a “‘handful of crimes,’ including slave trading.” Yet, private actors have been found liable only for violations of jus cogens norms.

The most significant challenge for trafficking lawsuits bringing ATCA claims has been establishing that slavery’s contemporary manifestations, such as trafficking for forced labor, amount to actual “slavery,” and therefore a jus cogens norm that is actionable under the ATCA against private actors. The Supreme Court has not adjudicated this issue. The Ninth Circuit in Unocal, a case brought against Unocal Corporation by Burmese forced laborers, recognized that “[f]orced labor is a modern variant of slavery to which the law of nations attributes individual liability such that state action is not required.” This decision affirmed the lower court’s broadened definition of slavery which adapted to modern-day circumstances: “Although certain instruments . . . adopted at the beginning of the nineteenth century, define slavery in a restrictive manner, the

221. Id. at 715.
222. 70 F.3d 232 (2d Cir. 1995).
223. Id. at 239.
225. Id. at 30.
226. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2), at cmt. n. 2 (1987).
prohibition of slavery must now be understood as covering all contemporary manifestations of this practice.\textsuperscript{228} Originally the Ninth Circuit dismissed this case; however, the plaintiffs — building on the \textit{Kadic} decision — have recently persuaded the court to reinstate a suit against Unocal for forced labor, rape and extrajudicial killing that took place in Myanmar.\textsuperscript{229} The court in this case has the capability of handing down a monumental decision, if they rule in favor of the plaintiffs. \textit{Unocal} could become the first case in which an American-based corporation will stand trial in federal court because of jurisdiction predicated on the ATCA for suspected violations of international law. The case was reargued in July of 2003 before an \textit{en banc} panel of the Ninth Circuit. No decision has yet been handed down.

The ATCA has provided trafficking victims with a viable claim for individually challenging slavery and slave-like practices. However, despite circuit court precedent conferring a right of action for victims of forced labor or slavery, much legal uncertainty persists. The ATCA is a progressive, but abstract law, based on sources of international law, which for the most part are not self-executing and have not been ratified by the United States. Courts have recognized ATCA causes of action based on the diligence of plaintiff's attorneys who have researched and compiled laundry lists of treaties and conventions establishing certain egregious human rights abuses as customary international law violations that rise to the level of \textit{jus cogens} norms. However, judges in more conservative circuits have argued that the ATCA provides jurisdiction alone and leaves to Congress the task of defining specific causes of action.\textsuperscript{230}

The Supreme Court in \textit{Sosa v. Alvarez-Machain},\textsuperscript{231} has recently recognized ATCA jurisdiction and a cause of action, but only for a narrow class of torts. The \textit{Sosa} decision refused to enumerate those causes of action and cautions against the creation of "new" torts.\textsuperscript{232} In \textit{Sosa}, the Court rejected an ATCA cause of action on behalf of a Mexican national who was arbitrarily arrested and kidnapped by another Mexican national collaborating with U.S. federal agents. Despite the plaintiff's showing that arbitrary arrest is condemned in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which the United States has ratified, the Court held that these international instruments did not create legal obligations enforceable by federal courts: "[T]he Declaration does not of its own force impose obligations as a matter

\begin{itemize}
\item \textsuperscript{228} \textit{Unocal}, 110 F. Supp. 2d at 1308.
\item \textsuperscript{229} \textit{Unocal}, 2002 U.S. App. LEXIS 19263.
\item \textsuperscript{230} Al Odah v. United States, 321 F.3d 1134, 1146 (D.C. Cir. 2003) (Randolph, J. concurring); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (Bork, J., concurring).
\item \textsuperscript{231} 124 S. Ct. 2739 (2004).
\item \textsuperscript{232} \textit{Id.}
\end{itemize}
of international law . . . although the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing . . . ."\(^{233}\) The Court reiterated vague language that an ATCA cause of action could only be brought for a "modest number of international law violations."\(^{234}\) In determining which violations could be challenged under the ATCA, the Court reaffirmed its ruling in \textit{Correctional Services Corp. v. Malesko},\(^{235}\) which held that private rights of action are created by the legislature, not by courts.\(^{236}\) In examining the original legislative intent of the ATCA, which was to provide a cause of action for only specific and definable violations, the Court determined that contemporary causes of action should be no less defined. The Court further held that in determining whether an international norm is sufficiently definite to support a cause of action, courts must consider the "practical consequences" on foreign policy of allowing plaintiffs to bring the action in U.S. courts.\(^{237}\) Finally, the Court again emphasized Congress’ sole role in creating private rights and that Congress has never "affirmatively encouraged greater judicial creativity" regarding ATCA jurisprudence and has done "nothing to promote such suit" — which was reinforced by the Senate’s declaration in the ratification of the International Covenant on Civil and Political Rights.\(^{238}\)

The Court’s majority disagreed with Justice Scalia’s concurrence, which argued for an absolute closing of the door to ATCA litigation based on international norms. However, the Court’s majority strongly resisted broad interpretations of binding international legal norms and encouraged "vigilant doorkeeping . . . open to a narrow class of international norms today."\(^{239}\) Consequently, the debate over the ATCA’s reach persists, between those promoting an evolutionary interpretation of international law versus those who are reluctant to grant "greater rights [to aliens] in the nation’s courts than American citizens enjoy."\(^{240}\)

Use of the TVPRA clearly circumvents the obstacles that ATCA litigation for trafficking victims has faced until now. The TVPRA is fully enforceable against private actors and provides trafficked persons in the United States, though they may be "aliens," with a direct civil remedy for contemporary manifestations of slavery. Interestingly, despite the Supreme Court’s cautionary ruling and dismissal of \textit{Sosa}'s ATCA claim based on

\(^{233}\) Id. at 2767.
\(^{234}\) Id. at 2761.
\(^{236}\) \textit{Sosa}, 124 S. Ct. at 2762-63 (citing \textit{Correctional Services Corp.}, 534 U.S. at 68).
\(^{237}\) Id. at 2766.
\(^{238}\) Id. at 2763 (citing International Covenant on Civil and Political Rights, 138 Cong. Rec. 8071 (1992)).
\(^{239}\) Id. at 2764.
forced transborder abduction, the Court opinion has the unique effect of bolstering an ATCA claim based on trafficking now that the TVPRA has been passed. With the TVPRA, Congress has expressed clear intent to provide a private right of action for modern-day slavery. Thus, an ATCA claim for trafficked persons does not run the risk of creating "new rights," which the *Sosa* Court proscribed. Furthermore, the ATCA permits jurisdiction over violations that occur on foreign soil. While use of the TVPRA is limited to those trafficked to the U.S., its explicit conferral of a civil remedy may still provide victims of trafficking and forced labor in other countries with a stronger ATCA claim for enforcing remedies in U.S. courts. Continued use of the ATCA will contribute to the development of case law recognizing modern-day slavery, forced labor and other slave-like practices as bound by international legal norms, and will encourage enforcement of these international norms in domestic courts.

E. TRAFFICKING VICTIMS PRIVATE RIGHT OF ACTION ("TVPA"): CIVIL REMEDY IS AMENDED TO THE TVPA.

By amending the TVPA to include a private right of action, Congress has provided a mechanism by which trafficked persons can individually enforce a remedy for modern-day slavery. The need for a judicially created remedy has been eliminated, thereby diminishing some of the strategic complexities involved in litigating trafficking cases up until now. The Fair Labor Standards Act no longer poses the risk of mischaracterizing trafficking as primarily an employment matter. Additionally, trafficked persons can seek a complete remedy, rather than the piecemeal approach required by common law torts. By targeting the actual harm suffered by trafficked persons, the TVPRA increases the potential for greater material recovery and makes possible the full expression of the trafficked person's experience. The significance of the latter cannot be undervalued. Understanding trafficking as a human rights issue rather than a market anomaly or simple tort claim will provide much needed substance to modern-day slavery jurisprudence.

The fuller narrative provided by trafficked persons will expand the very meaning of slavery to include its contemporary manifestations. By asserting the TVPRA in civil courts, the trafficked person can significantly influence interpretation of the original TVPA, its definition of trafficking and modern-day slavery, and the application of its enacted criminal

242. See *Azmy*, supra note 177.
243. Id.
244. Id. See also Michael J. Wishnie, *Immigrant Workers and the Domestic Enforcement of International Labor Rights*, 4 U. PA. J. LAB. & EMP. L. 529, 541 (noting that plaintiffs bringing a civil claim of forced labor can provide a narrative of their experience which can lead to "fuller compensation" and can "spur organizing and public education campaigns.")
statutes. For example, the TVPA explicitly prohibits all forms of involuntary servitude, including labor compelled by psychological coercion. The government’s implementation of the criminal statutes enacted by the TVPA, however, demonstrates a lack of understanding of these legislative developments. Despite the TVPA’s broadened definition of involuntary servitude, trafficking criminal cases continue to rely on the Supreme Court’s analysis of involuntary servitude in \textit{U.S. v. Kozminski},\textsuperscript{245} which applies an older, more restrictive, conception of involuntary servitude requiring coercion through the actual or threatened use of physical force or the legal process against the victim. The \textit{Kozminski} Court explained, however, that broader interpretations of slavery were possible if dealing with less restrictive criminal statutes since “the scope of conduct prohibited . . . is of statutory construction.”\textsuperscript{246}

The TVPA has enacted such statutes recognizing that “psychological abuse” and “nonviolent coercion”\textsuperscript{247} can also create an environment of fear and intimidation, preventing a victim from leaving. The TVPA’s definition of “involuntary servitude” includes “any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint.”\textsuperscript{248} This language, mirrored in the TVPA’s definition of “coercion,”\textsuperscript{249} indicates that in the absence of direct threats, a “scheme, plan or pattern,” though more subtle, may be an equally effective form of coercion. Furthermore, this definition contemplates that coercion can be established even if the threatened harm is directed against “another person.” By pleading his or her own case under the new laws, the trafficked plaintiff is more likely to encourage courts to consider these additional factors. Through individual assertion of the right to be free from slavery, trafficked persons can provide greater substance to the laws that were intended to protect them.\textsuperscript{250}

Most importantly, beyond civil litigation, by conferring a private right to renounce slavery, the TVPRA provides trafficked persons with membership in the greater political community. “Rights also realize the interests of others, including the construction of a political culture with a

\textsuperscript{245} 487 U.S. at 940-942.
\textsuperscript{246} \textit{Id.} at 940-942.
\textsuperscript{248} 22 U.S.C. § 7102(5).
\textsuperscript{249} 22 U.S.C. § 7102(2).
\textsuperscript{250} John Ryan, \textit{Woman Sues L.A. Couple for Enslaving Her: Sri Lanka Native Was Lured to U.S., Abused, Suit Says}, \textit{DAILY JOURNAL}, Sept. 8, 2004 (describing a lawsuit utilizing the TVPRA as “the first of its kind” on behalf of a trafficked domestic worker by attorneys at the Lawyers’ Committee for Civil Rights and Wilson, Sonsini, Goodrich & Rosati).
specific kind of character." Congressional action reflects the values of our political culture. Through laws criminalizing slavery, our society has historically shown broad consensus that slavery is morally reprehensible. The trafficking civil action illustrates that expression of our moral condemnation would be incomplete without the trafficked person’s assertion of an expressive remedy.

PART VI: CONCLUSION

Until recently, the focus of efforts to eradicate slavery in the United States and abroad has been one of prosecution, protection and prevention, as modeled by the U.N. Convention and Trafficking Protocol, and the TVPA in the United States. While most preventative efforts are deployed abroad through the U.S. Department of State, protection measures for trafficked persons in the United States are contingent upon federal law enforcement choosing to investigate and/or prosecute trafficking violations. The inherent selectivity in the prosecutorial process and its focus on the utilization of trafficked persons as witnesses to state pursuit of a public goal leaves many trafficked persons excluded from protection benefits, and ultimately from full access to justice.

From the strategic point of view of the state, civil litigation can complement the deterrent purpose of prosecution. By substantially increasing the financial risk to traffickers, it can tip the scales in favor of prevention and provide private enforcement of anti-trafficking policy. If the United States can effectively shut down trafficking industries domestically by making it unprofitable and risky, it can have an influential and positive impact on the global industry of human trafficking.

Beyond the public policy objectives of private enforcement, civil litigation is a means by which trafficked persons can vindicate their human rights. Employing a human rights framework to prosecute human trafficking focuses on the persons who are trafficked. Traffickers take advantage of people in an outrageous denial of self-determination through commodification. It is appropriate, therefore, that trafficked persons not just be passive witnesses in the public vindication of crimes against the state. They should have control over the legal process by which they can vindicate their own rights. A private right of action provides a direct avenue to remedy the substantive violation of enslavement.