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Successes and Failures in International Human Trafficking Law

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KEYNOTE ADDRESS

**SUCCESSSES AND FAILURES IN
INTERNATIONAL HUMAN TRAFFICKING LAW**

*Ambassador Luis CdeBaca**

Ann Arbor, Michigan
February 5, 2011

Professor Carr yesterday remarked that human trafficking is too often discussed only in theoretical or academic ways. I've spent most of my career in the field, where interactions with victims, traffickers, and defense attorneys are anything but theoretical. But as keynote speaker for an academic symposium this morning, I'm going to try to lay out a bit of the conceptual state of play from my current vantage point.

The title of this symposium, "Successes and Failures in International Human Trafficking Law," is a bit binary. Perhaps, in the best diplomatic tradition, we can temper that to "Limitations and Opportunities in International Human Trafficking Law" for my purposes today. And I think I'm suited to offer some personal reflections here at the Law School today, having worked on this issue, whether as one of Professor MacKinnon's students, helping with the groundbreaking symposium that brought cutting-edge work to the fore;¹ as a young trial lawyer in the Civil Rights Division; as a staff member on the House Judiciary Committee; and now as Ambassador-at-Large to Monitor and Combat Trafficking in Persons.

This past Tuesday, Secretary of State Hillary Clinton and I hosted the annual Cabinet meeting to address the issue of human trafficking. We gathered in a room in the State Department named after Thomas Jefferson: A man who declared it self-evident that all were created equal. A man who, in drafting the legislation that incorporated Michigan into the United States, wrote the words that would later become the 13th Amendment.² A man who owned slaves. This giant of liberty could restrict slavery for others, but not for himself. Not just a cognitive dissonance, or in our modern lens a hypocrisy, but a central feature of the America we treasure.

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1. See generally Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & LAW 13 (1993).

2. Northwest Ordinance of 1787, ch. 8, art. 6, 1 Stat. 50, 53 (1789).

Late in life, concerned that the drive to abolish slavery (rather than let it die out gradually) would tear apart the Union, Jefferson wrote of the practice:

[A]s it is, we have the wolf by the ears, and we can neither hold him, nor safely let him go. Justice is in one scale, and self-preservation in the other.³

That ability to avoid—to hold on to an inconsistent or comfortable self-image while involuntary servitude and slavery persists—is not just something a genius like Jefferson could do in the early 1800s. While the arc of history may move toward justice, such contradictory impulses are present not only in American legal responses to slavery and the slave trade, but in the international arena as well. For many of us—as consumers, as business owners—or for governments—it is easier to relegate slavery to the mists of history than to confront the wolf that we are holding in the modern era.

Sadly, over the last century in the fight against human trafficking, despite the extensive development of norms in human rights, labor rights, and rule of law scholarship, the exploitation and suffering of trafficking victims has continued unabated in the outside world. This history has been the failure of international human trafficking law. Its successes are being written by the people you are hearing from today.

So what is the state of play? In the last decade, the field of international law has seen an astonishing level of activity against modern slavery. Under the umbrella term “human trafficking,” international institutions and governments have focused on the fight against all the activities involved when one person obtains or holds another in compelled service, whether the underlying service is for sex or labor.

We are currently confronting many different concepts used in legal and non-legal regimes to describe this state of compelled service, concepts that are at times confusing and seemingly contradictory. A regime in which “white slavery” required neither enslavement or a Caucasian victim, but was a legal term for transporting a woman or girl across a border for prostitution.⁴ An international law regime that developed various conventions, instruments, and institutions addressing the intertwining concepts of slavery,⁵ enslavement, servitude, practices similar to slavery, forced labor,

3. Letter from Thomas Jefferson to John Holmes (Apr. 22, 1820), in 4 MEMOIRS, CORRESPONDENCE, AND MISCELLANIES FROM THE PAPERS OF THOMAS JEFFERSON 323, 324 (Thomas Jefferson Randolph ed., 1829).

4. See White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2006)) (currently requiring not even a female victim); Jo Doezema, *Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women*, 18 GENDER ISSUES 23, 30–31 (2000) (placing the Mann Act in the context of the white slavery campaigns, and noting the re-emergence of the concept as “trafficking in women” starting in the 1980s).

5. The international regime against slavery has historically known “arguments about which practices should be categorized as slavery,” and many terms, including serfdom, forced

bonded labor, and trafficking, without a clear vision of how the regimes were to interrelate. The Talmudicly rigid insistence on separating the concepts of moving someone into exploitation, and the exploitation itself.

Secure in their camps, often each with an institutional home in competing ministries or agencies, actors seemed to define themselves by their silos, their instruments, or their periodic gatherings rather than by measurable impact on victims' lives. And so for decades, we seemed to be content with broad, international instruments rather than vigorous law enforcement.

Under these approaches, international instruments and domestic legislation addressing issues of compelled service under such rubrics as slavery, forced labor, or child labor were steadily promulgated, but few were freed, and fewer were arrested. Criminal sentences, if obtained at all, seemed to reflect an assumption of a victimless crime involving unsavory women, or a conception that illegal migrants or marginalized ethnic groups deserved their situation and were lucky even to have work, even if it was enforced through the unholy trinity of debt, threat, and violence. Abuse was not seen as something done to them, it is "just how they are." This isn't something I read—these are the reactions I heard as a young prosecutor working on these cases and dealing with my counterparts from across the globe.

In the year 2000, that changed. In the United States, the Trafficking Victims Protection Act of 2000⁶ updated our post-Civil War antislavery statutes. And in the United Nations, the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children ("Palermo Protocol"),⁷ supplementing the U.N. Convention Against Transnational Organized Crime, for the first time defined the term "trafficking in persons" that had been bandied about willy-nilly for over a century. Human trafficking was cast not as movement; it addressed all the activities involved in compelling an individual to work—from the recruiter in the village, to the boss who holds the worker or prostitute in servitude.⁸

These statutes and instruments set off a cascade of legal work around the globe, and the results of the last decade have been nothing short of astounding. But to understand these changes, we have to start here, in Ann Arbor.

labor and "conditions analogous to slavery" have been used in international slavery conventions. See Kevin Bales & Peter T. Robbins, "*No One Shall Be Held in Slavery or Servitude*": A Critical Analysis of International Slavery Agreements and Concepts of Slavery, *HUM. RTS. REV.*, Jan.–Mar. 2001, at 18, 20–21.

6. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, secs. 101–113, 114 Stat. 1464, 1466–91 (codified as amended at 22 U.S.C. §§ 7101–7109 (2000)).

7. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime art. 3(a), *opened for signature* Dec. 12, 2000, T.I.A.S. No. 13,127,2237 U.N.T.S. 319 (entered into force Dec. 25, 2003) [hereinafter Palermo Protocol]. It was originally adopted by a United Nations General Assembly Resolution. G.A. Res. 55/25, ¶ 2, U.N. Doc. A/RES/55/25 (Nov. 15, 2000).

8. See ANNE T. GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* 30 (2010).

Louis Molitoris had been in mental institutions, but was living on the streets here when he was scooped up by Ike Kozminski, a dairy farmer in Chelsea.⁹ They took another man off the side of a country road, Robert Fulmer.¹⁰ In their sixties, they “viewed the world and responded to authority as would someone of 8 to 10 years.”¹¹

Trapped in a web of coercion and deceit—but not physical force—they accepted their lot, and lived among the animals in squalid conditions, afraid to leave and isolated from the outside world.

Eventually, they were liberated and placed in adult foster care. Ike Kozminski was convicted of involuntary servitude. But the Supreme Court, in 1988, ruled that our antislavery statutes didn’t apply to victims held in bondage through psychological and structural coercion, but only through threats, force, or threats of incarceration.

While noting that the vulnerability of the victims should be taken into account, the Court suggested that if our antislavery statutes were to be updated in order to capture modern concepts of dependency and abuse, it would have to happen through legislation, not through litigation.¹²

Cases like we heard about yesterday from Dee Dee and Nicole—where so much of the coercion was through isolation and manipulation of the vulnerability of immigrant children—were suddenly outside the protection of federal antislavery law.

The need for a “*Kozminski fix*” was a major impetus for me and others in the Clinton Administration, and the solutions are embedded in the TVPA and the Palermo Protocol. The lessons? Laws that recognize the abuse of positions of vulnerability. The notion that consent-negating facts such as threats or coercion overrode the seeming consent of the victim to travel or serve needed to be established. The need for victim care and prevention, as well as for prosecution, needed to be realized. Antitrafficking laws rooted not in the Commerce Clause or notions of violent crime, but based on civil rights and human rights guarantees, needed to be written.

So, you see, just as the language of the 13th Amendment was born of the Northwest Ordinance, in the modern antislavery fight, the road seems to lead back here to Michigan.

So what have we learned since then? In the last decade, we’ve come to understand that modern slavery comes in many forms—all equally deserving of a response—and that force, fraud, and coercion is no less criminal for being often subtle. We’ve learned that victim care is a necessary predicate to successful prosecution, that empowered victims with brave lawyers can make change through civil action, that all survivors should be able to have their voices heard and see their traffickers brought to justice, and that survi-

9. United States v. Kozminski, 487 U.S. 931, 935 (1988).

10. *Id.*

11. *Id.*

12. *Id.* at 951.

vors should be welcomed into society with programs like the T-visa, not repatriated after being displayed in court.

And we know that we must assess traffickers—not by who their victims are—but by the heinous crimes they commit and the practices to which they subject their victims. We must follow a civil rights approach that focuses on the denial of liberty—not on transportation or the morality of the underlying service. To recognize that no woman is “fallen,” no man is “illegal,” but that they are people, with inalienable rights. And we have to see past not just our assumptions of those who are victimized, but the assumptions and labels we attach to the context in which people are enslaved.

A case in point is the situation often euphemized as “gender-based violence in conflict zones.”¹³ We know it is wrong, but once we look for the human right that describes the harm, what we find is not just a violation of the nondiscrimination principle, but of the right to be free from enslavement. Most notable is the opinion of the International Criminal Tribunal for Yugoslavia (ICTY) in *Prosecutor v. Kunarac and Kovac*.¹⁴

There, the tribunal considered whether the defendants violated their victims’ human rights in the course of the Bosnian Serb Army’s attack on the Bosnian Muslim population in the village of Foča.

They locked Bosnian women in high school buildings, houses, and sports halls for months, subjecting them to regular rapes and compelling them to perform domestic chores. The prosecutor at the ICTY brought the case, in part, on the theory that the defendants had committed crimes against humanity in enslaving these women. The tribunal thus had to analyze whether the defendants had engaged in “enslavement” as a crime against humanity under the tribunal’s statute. Not content to merely recite, once again, the bare-bones definition under the 1926 Slavery Convention that slavery is “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised,”¹⁵ the tribunal instead set forth an evolved understanding that included various “contemporary forms of slavery” under customary international law.¹⁶

To flesh this out, the Trial Chamber noted that

13. See MEGAN BASTICK ET AL., GENEVA CENTRE FOR THE DEMOCRATIC CONTROL OF ARMED FORCES, SEXUAL VIOLENCE IN ARMED CONFLICT: GLOBAL OVERVIEW AND IMPLICATIONS FOR THE SECURITY SECTOR 118 (2007).

14. *Prosecutor v. Kunarac, Kovac & Vukonic (Foča)*, Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Chamber Judgment (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001) [hereinafter *Foča* Trial Judgment].

15. Convention to Suppress the Slave Trade and Slavery, art. 1(1), Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253 (entered into force Mar. 9, 1927), amended by Protocol Amending the Slavery Convention Signed at Geneva on 25 September 1926, Dec. 7, 1953, 7 U.S.T. 479, 182 U.N.T.S. 51.

16. *Foča* Trial Judgment, *supra* note 14, ¶ 541; see also *Prosecutor v. Kunarac, Kovac & Vukovic*, Case Nos. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, ¶ 117 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002).

indications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labor or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking.¹⁷

Compare this with a more recent case in the European Court of Human Rights. In *Rantsev v. Cyprus and Russia*,¹⁸ that court held that failure to take certain measures to protect a trafficking victim was a violation of Article 4 of the European Convention on Human Rights, which proscribes slavery, servitude, and forced or compulsory labor—even though Article 4 does not use the term “trafficking.”¹⁹

It appears that courts and legislative bodies, faced with scholars who would parse all of these concepts, are responding by what I'd call “synonym by paragraph”—the rattling off of all of these terms, under the umbrella of whichever concept is brought the controversy before them. And it also becomes a circle of synonyms. So *Rantsev* says that a prohibition against slavery, servitude, and forced or compulsory labor requires certain measures to protect victims of trafficking,²⁰ the International Labour Organization says that trafficking is part of forced labor,²¹ the ICTY says trafficking is an

17. *Foča* Trial Judgment, *supra* note 14, ¶ 542.

18. *Rantsev v. Cyprus & Russia*, App. No. 25965/04, 51 Eur. H.R. Rep. 1 (2010), available at <http://www.echr.coe.int> (by searching under Case-Law, HUDOC database).

19. European Convention on the Protection of Human Rights and Fundamental Freedoms art. 4, *opened for signature* Nov. 4, 1950, C.E.T.S. No. 005 (entered into force Sept. 3, 1953; amended June 1, 2010).

20. *Id.* ¶ 281.

21. See generally INT'L LABOUR ORG., COMBATING THE FORCED LABOUR OUTCOMES OF HUMAN TRAFFICKING 2 (2004), available at <http://www.ilo.org/public/portugue/region/europro/lisbon/pdf/agis.pdf>. The report states:

ILO research on the forced labour outcomes of human trafficking . . . revealed that whereas most female victims are trafficked for commercial sexual exploitation, approximately one quarter of the trafficking victims experience coercion in other sectors such as domestic services, agriculture or construction. Trafficking for forced labour exploitation has so far been insufficiently addressed.

Id.

indicator of enslavement,²² the Bush Administration renames the Involuntary Servitude and Slavery program under the umbrella of human trafficking,²³ and the TVPA and Palermo Protocol dutifully include as the purpose of trafficking the now-familiar list of concepts.²⁴ What I can tell you from my work in the field and the research that we do each year for the annual *Trafficking in Persons Report*, is that first, victims neither know, nor care, whether what happened to them is slavery, servitude, practices similar to, forced labor, bonded labor, trafficking, or any other concept in international or domestic parlance, no matter how in vogue it may be. They know they can't leave, and think that no one is there to help them. Secondly, while terms that have cropped up and stuck throughout the last 150 years may be interesting from a juridical or academic perspective, such aggressive parsing complicates a basic mechanism of international human rights law—multilateral enforcement and reporting mechanisms.

This was a challenge as UNODC's first attempt at multilateral reporting on trafficking in persons, which was dependent on submissions from states themselves. Key countries with major trafficking problems submitted no data at all; other countries painted a rosy picture; and some tried to minimize the problem by applying their own definition to argue that what was happening in their country wasn't trafficking.²⁵

As Anne Gallagher points out in her excellent new textbook, such self-reporting, or weak reporting at the United Nations, has in some ways been eclipsed²⁶ by the more rigorous—and perhaps less forgiving—annual exercise that the United States carries out. Rather than letting countries off the hook because their problem is one of bonded labor instead of trafficking, the annual *Trafficking in Persons Report* includes an evaluation of bonded labor, forced labor, child prostitution, domestic servitude, and the many other forms of modern slavery. To do otherwise would be to give an escape valve to countries whose technical “lawyering” can define the problem down, or shunt it off to the side.

It is not just a reporting problem that I worry about, but a problem of definitional self-exemption from the Trafficking Protocol's duties on internal trafficking prosecutions and from its ethos of victim protection.

An example. I spent an enjoyable, though very jet-lagged dinner in a South Asian country last week. An economist and legal scholar—formerly Ambassador to the Geneva organizations, including the Human Rights Council—was adamant that the enslavement of child maids in his country

22. See Rantsev, 51 Eur. H.R. Rep. 1, ¶¶ 142–143 (citing *Foča Trial Judgment*, *supra* note 14).

23. KEVIN BALES & RON SOODALTER, *THE SLAVE NEXT DOOR: HUMAN TRAFFICKING AND SLAVERY IN AMERICA TODAY* 244 (2009).

24. See Trafficking Victims Protection Act of 2000 § 102(b), 22 U.S.C. § 7101 (2010); Palermo Protocol, *supra* note 7, art. 3(a).

25. Cf. GALLAGHER, *supra* note 8, at 469 (discussing the problems inherent in self-reporting).

26. *Id.* at 480–86.

was deplorable, but should not be dealt with under the Trafficking Protocol or a new trafficking law, because it was not trafficking—they had not been moved, they were not prostitutes.

Before I could respond, a Supreme Court Justice and a police trainer jumped in. “How can you conceptually separate the process from the enslavement without being disingenuous?” asked the Justice.

Perhaps even more to the point, “Do you want me to have to teach illiterate policemen and poorly trained prosecutors seven synonyms?” asked the policeman. “I only have one chance with them, and if you give them a reason to say it isn’t a case, they’ll take the path of least resistance.”

(I’d be interested if any legal historian could tell us whether such similar parsing ever took place for such accepted unitary concepts as “cease and desist” or “null and void”!)

Rather than getting sidelined on which label will be put on which aspect of modern slavery (or which term is “kept” by which international organization or domestic agency), I’d like to look at where the law is heading, whether we call this area of the law human trafficking or, as we did here until 2001 in the United States, involuntary servitude.

The *Foča* caselaw is fully consonant with victim-centered views on trafficking that are developing as we better understand the crime as an international community.²⁷ It’s not enough to disprove slavery, to say that the victim didn’t put up a fight, that she consented or could have run away. Instead, it’s the defendant’s act in claiming the victim and denying her freedom that makes it a crime. And the defendant, the tribunal tells us, doesn’t have to decide to hold that victim forever.

As I mentioned above, in *Rantsev*, the European Court of Human Rights also applied a forward-leaning approach in the context of the European Convention. Not only did the court view certain measures to combat trafficking as resulting from the European Convention’s Article 4 prohibition of slavery, servitude, and forced and compulsory labor, it held two countries liable for failing to identify Ms. Rantseva as a victim of trafficking and to protect her.²⁸

And in the United States? In the aftermath of *Kozminski*, much forward momentum was lost. As I mentioned, the *Kozminski* court restricted the legally cognizable coercion to physical force, threat, or legal coercion tantamount to incarceration.²⁹ It gutted the federal litigation strategy of the 1970s and 1980s that had incorporated into the antislavery fight the understanding of psychological coercion and dependency that were revolutionizing the battle against domestic and sexual violence.

However, the *Kozminski* court at least provided one way forward—a recognition that the particular vulnerabilities of the victim (say the immi-

27. *Foča* Trial Judgment, *supra* note 14, ¶ 542.

28. *See, e.g.,* *Rantsev v. Cyprus & Russia*, App. No. 25965/04, 51 Eur. H.R. Rep. 1, ¶¶ 298, 309 (2010).

29. *United States v. Kozminski*, 487 U.S. 931, 952 (1988).

grant's fear of deportation or a mentally ill person's fear of institutionalization) was relevant in determining whether the coercion used had been sufficient to overbear the victim's will.³⁰

A few years following *Kozminski*, the First Circuit relied on this aspect of the decision to make it clear that, despite the narrowing of the types of force necessary for a conviction, the victim's situation was particularly important. Noting such victim-centered concepts as the Sixth Circuit's ruling in a case out of Grand Rapids, *United States v. King*, that victims did not have to be physically restrained,³¹ the court in *United States v. Alzanki* reintroduced the concept of psychological coercion.³²

The court recognized that veiled threats, combined with witnessing the women of the house being beaten by her husband, abuse, and fearing harm for her family—all these psychological elements factored into the mix of human trafficking. The landscape of coercion expanded, but it was to take Congressional action to firmly establish these concepts.

And so, finding that “[e]xisting legislation and law enforcement in the United States and other countries are inadequate to deter trafficking and bring traffickers to justice, failing to reflect the gravity of the offenses involved,”³³ the Trafficking Victims Protection Act of 2000 updated the federal antislavery statutes to include victims who are enslaved through psychological manipulation, even if there was no physical coercion.

Congress introduced new criminal statutes to better capture the features of this newly defined slavery: one focuses on sex trafficking, another on forced labor. The sex trafficking statute does not require a showing of coercion when the victim is a child. But their definition of coercion is a shared one.

The new trafficking statutes made it unlawful to provide or obtain the labor or services of a person by placing them in fear of serious harm.

The term ‘serious harm’ means any harm, whether physical or non-physical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.³⁴

Thus, Congress mandated that psychological coercion, in the form of threats of serious harm, taking into consideration the victim's background, was sufficient to support a criminal conviction for these updated servitude statutes. They heard the *Kozminski* court's challenge of Congressional action, and rose to it.

30. *Id.*

31. *United States v. King*, 840 F.2d 1276, 1280 (6th Cir. 1985).

32. *United States v. Alzanki*, 54 F.3d 994, 1001 (1st Cir. 1995).

33. Trafficking Victims Protection Act of 2000 § 102(b)(14), 22 U.S.C. § 7101 (2010).

34. 18 U.S.C. § 1589(c)(2) (2008).

Now there was some question following the TVPA of whether the same involuntary servitude case law would apply to the new laws. After all, they were now styled “trafficking.” That doubt was quickly laid to rest.

In *United States v. Bradley*,³⁵ a New Hampshire couple were convicted of forcing four Jamaican men to work on their tree farm. They made the men live in a tool shed about the size of this podium, charging the men each \$50 per week for rent. They threatened them with serious harm and physical violence; they took the victims’ passports and tickets so they could not return home to Jamaica, and told them horror stories of previous victims. They even sicced dogs on them when they thought they were trying to leave. But at the same time, the men had bicycles, and could go into town, and even went out to nightclubs a few times. Clearly, the chains were not physical, but mental and emotional.

The First Circuit upheld the Section 1589 conviction, and used the traditional involuntary servitude cases—*Kozminski* and *Alzanki* among them—to color in the outlines of compelled labor.³⁶ Trafficking law evolved: the threshold for compulsion was lower than what the old laws required, but we still can use the good elements of past slavery cases to explain how grown men can reasonably feel trapped in a condition of servitude.

What we view as coercion continues to change. Some of the most cutting-edge cases in the last decade have involved the most difficult fact patterns—domestic servitude. That is, the forced labor of those—usually of individual women or even young girls—facing some of the most hidden forms of coercion in one of the most intimate of surroundings. Daily threats, endless work, all within the confines of one family’s home. Usually not enslaved with other women, or even seeing clients who could corroborate their story, the domestic servant case is a classic “he said/she said” case. And the power differential between master and servant is often so great as to render the relationships so subtle that the *Kozminski* court would run away.

In *United States v. Calimlim*,³⁷ a Milwaukee jury convicted two doctors of holding their Filipina servant in involuntary servitude for nineteen years. Although the victim was never beaten, her compliance with the family’s ceaseless work schedule and her years of confinement were enforced by the threatened abuse of legal process. The Seventh Circuit found

[she] was told repeatedly by the adult Calimlins and their children that if anyone discovered her she could be arrested, imprisoned, and deported, and she would not be able to send any more money back to her family. Fear of that consequence kept her from breaking any of the rules or appearing outside the house.³⁸

35. *United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004), *vacated on other grounds*, 545 U.S. 1101 (2005).

36. *See id.* at 150, 153, 156–57.

37. *United States v. Calimlim*, 538 F.3d 706 (7th Cir. 2008).

38. *Id.* at 709.

For nineteen years. They told her that she was infertile and since her life was over, they said, she had nowhere else to go. They locked her in a basement room when company came. They made her wash the cars in the garage so neighbors never even knew there was a maid.

Psychological coercion.

Physical coercion.

And in so many cases, sexual coercion.

At what point is sex the object that the trafficker seeks, and at what point is it the tool that they use to terrorize and enslave? As with so many issues in this modern abolitionist fight, those concepts seem much less distinct the closer one gets to the victims.

Again, all roads seem to lead back here, to southeast Michigan. A few years ago, a Sixth Circuit case involved the use of sexual abuse as a method of enforcing domestic servitude in a Farmington Hills home.

In *United States v. Djoumessi*,³⁹ a fourteen-year-old girl from Cameroon got off the airplane at Detroit Wayne thinking that she was going to get an education in America. Instead, she was taken to the home of a pharmacist and a lawyer. Instead of school, she received a constant work schedule, and regular beatings.

She worked 6:00 a.m. to nearly midnight caring for the defendants' three children, cleaning their house, and cooking their food. Several times in the nearly four years the victim lived in the house, Mr. Djoumessi summoned the victim to him and forced her to have sex. The jury convicted, and the circuit court incorporated the fear and trauma of the rapes as part of the landscape of coercion.

I've talked a lot about cases that resulted in prosecutions, but prosecution alone cannot provide victims with the compassion and patience that meets their immediate needs and long-term potential alike. That takes victim care, and that means not just statutes, but programs and policies.

The victim-centered approach contemplated by the TVPA and the Palermo Protocol does not mean patching up a potential witness long enough to get his or her testimony; it means efforts that extend well beyond the confines of a criminal case. It means partnerships between law enforcement and service providers, not just to win the case, but as colleagues sharing the responsibility of letting the survivors' voices be heard.

It means policies that allow these things to happen, with the best interests of the victims in mind. Like counseling and certain forms of immigration relief. An umbrella of services that surrounds survivors, but also extends to their children and family members who are in danger or feel peril.

It means access to educational and economic opportunities and a conception of justice not as a winning percentage of court cases but instead as a process that recognizes and reinstates the power of the survivor.

39. *United States v. Djoumessi*, 538 F.3d 547 (6th Cir. 2008).

And as we see from *Rantsev*, and a case pending in the Human Rights Court from Britain that we'll hopefully hear about from Saadiya Chaudary later today, it likely doesn't just mean recognizing and implementing these actions as good policies—it likely means affirmative efforts to revise laws, reform immigration institutions, train police to recognize victims, and investigate cases thoroughly.

And yet, with all of the progress we've made on establishing a legal framework, antitrafficking laws here and abroad are a hodgepodge of old and new, sometimes comprehensive, other times a patchwork. At their best, concrete and victim-centered. At their worst, harmfully clumsy. But in the main, somewhat confused.

Let me give you some examples:

The Council of the European Union has started to take a stronger leadership role in trafficking, adopting the first coordinated criminal directive that each participating member state strengthen its criminal laws, protect victims more thoroughly, and proactively prevent trafficking.⁴⁰ It also appointed an E.U.-wide trafficking coordinator to ensure that each member state is living up to international legal standards on trafficking.⁴¹

Contrast those actions with the South Asian Association for Regional Cooperation (SAARC). It has hobbled regional efforts to deal with trafficking in persons as modern slavery by adopting a regional convention in January 2002 (which did not come into force until November 2005) that is grounded in an archaic definition of trafficking and does not take into account the progress made through negotiating and adopting the Palermo Protocol. Instead, it limits itself to “the evil of trafficking in women and children for the purpose of prostitution.”⁴²

This narrow and anachronistic perspective has allowed governments in the region to ignore calls for comprehensive antitrafficking legislation and policies that address labor trafficking and the trafficking of males. Legal and policy structures in SAARC countries continue to be drawn on the lines of the 2002 Convention.

40. Press Release, Eur. Comm'n, The Commission Appoints an EU Anti-Trafficking Coordinator (Dec. 14, 2010), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1715>; see Council Directive 2011/36, arts. 9, 22, 2011 O.J. (L 101) 7, 11 (EU) (requiring member states to improve investigation and prosecution measures as well as pass implementing laws); *id.* arts. 11–17, at 8–10 (concerning support and protection of victims); *id.* arts. 18–19, at 10 (focusing on prevention and the creation of national rapporteurs to assess “trends in trafficking in human beings”).

41. See Press Release, Eur. Comm'n, *supra* note 40.

42. SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution pmb., *opened for signature* Jan. 5, 2002, *available at* <http://www.saarc-sec.org/userfiles/conv-traffiking.pdf>; see also ASIAN DEV. BANK [ADB] & INT'L ORG. FOR MIGRATION [IOM], REVIEW OF THE SAARC CONVENTION AND THE CURRENT STATUS OF IMPLEMENTATION IN BANGLADESH: FINAL DRAFT xiii (2009), *available at* <http://www.iom.org.bd/publications/Review%20of%20SAARC%20Trafficking%20Convention%20Bangladesh.pdf>.

Only recently, one of the SAARC members—Bangladesh—has decided to go far beyond the limited scope of the pact in drafting a comprehensive antitrafficking law that will set a new standard for the region when enacted.⁴³

Other countries as varied as Brunei, the Dominican Republic, Senegal, Malaysia, Spain, and Morocco continue to conflate trafficking in persons and smuggling, making it impossible to distinguish what actions they are actually taking to combat trafficking in persons.

Even with all of this variation, there is a growing international consensus that states have a responsibility to prevent trafficking, prosecute traffickers, and protect their victims. One hundred forty-six countries have become parties to the Palermo Protocol and 116 countries—in keeping with their promises reflected in the Palermo Protocol—have passed laws criminalizing *all* forms of trafficking in persons.⁴⁴

And yet legal questions endure about how to best eradicate trafficking and who is responsible.

The best answers are—at the same time—*expansive* in their understanding of the victim experience, *firm* in their adherence to the definitional boundaries of force, fraud, or coercion reducing someone to compelled service, and *creative* in their ability to touch each of the elements of a crime that touches us all—even those of you who pay your domestic workers and don't buy sex.

Because we have to recognize our own slavery footprint, and the effect that demand plays in the traffickers' brutal actions. Pimps do not create the market, they respond to it, and maximize their profits with cruelty and control. With millions of slaves estimated in the agriculture and mining sectors, odds are each of us is eating, drinking, driving, or even texting on something tainted by modern slavery.

We all have a choice. We can look beneath the surface and act on what we see, or we can be like the customer who felt something was wrong but didn't want to get involved—or worse, didn't care so long as their hair got braided.

Over ten years ago when the Trafficking Victims Protection Act and the Palermo Protocol were signed, we had a skeleton for what a victim-centered response might look like. In the years since, we have fleshed out a dynamic body of laws, rulings, policies, and practices that will move us from our historic contradictions.

43. See Porimol Palma, *Tough Anti-Trafficking Law in the Offing: Draft Suggests Speedy Trial Tribunal, Considering the Offences Non-Bailable*, DAILY STAR, Dec. 20, 2010, <http://www.thedailystar.net/newDesign/news-details.php?nid=166665>.

44. U.N. OFFICE OF LEGAL AFFAIRS, 2 MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL ch. XVIII, no. 12(a), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en (last updated Oct. 21, 2011); OFFICE TO MONITOR & COMBAT TRAFFICKING IN PERS., U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 2 (10th ed. 2010), available at <http://www.state.gov/documents/organization/142979.pdf>.

Laws exist to prosecute this crime. Victim protections are being developed and implemented. Even laws to cleanse the supply chain and bring a new era of accountability for the private sector. A nexus is emerging where responsibility is established, risks are identified, and transparent policy is required.

Both Palermo and the TVPA acknowledged that people who are on the farthest margins of any society have as much right as anyone else to the protection of the criminal law. Indeed, they need the protection more than those whom legal establishments would like to favor. They should see their abusers brought to justice. They need their voices heard in the legal process.

In fifteen years, we've moved from Ukrainian mothers telling a very sympathetic First Lady about the young women who had disappeared from their villages, to that same woman—now Secretary of State—chairing a meeting of a President's Cabinet who sees the 3P approach as normal, in a world where there are international and domestic legal and administrative structures. We see results. Some self-driven and some prodded by U.S. leadership and diplomacy, but results nonetheless.

CONCLUSION

In this week's Cabinet meeting in the Thomas Jefferson room, we saw the launch of new enforcement initiatives and the planning of a comprehensive victim services assessment. We saw an understanding of the impact of sex trafficking on girls, the need for actionable intelligence, and the possibilities in government procurement.

I came away from that meeting thinking a lot about implementation—here, in other countries, and within the international system. And it has perhaps crystallized something for me.

The existence of law does not—in and of itself—combat modern slavery. If making slavery illegal was enough, we would be 146 years away from the last slave in America. The raft of international conventions over the last century would have freed the whole world several times over. Thomas Jefferson's draft of the Northwest Ordinance, James Madison's outlawing of the transatlantic trade, and Abraham Lincoln's promise of freedom would have magically prevented Ike Kozminski, Evelyn Djoumessi, Murial King and the Prophet William Lewis from holding people in servitude here in Michigan.

The existence of structures do not—in and of themselves—combat modern slavery. If having reporting mechanisms, interministerial meetings, and occasional testimony before a U.N. body were enough, the last sixty years would have seen a burst of freedom, rather than trafficking becoming termed one of the fastest growing transnational crimes.

And so our challenge, as government actors, as international lawyers, as multilateralists, is to look at our norms and laws and structures to see if they are making an impact in the real world. If they are implementable. If they are being implemented.

Because law without commensurate implementation gives a false sense of accomplishment. It punishes no one, and frees no one.

It just defers the inevitable and papers over the inequity. Economies and power structures grow comfortable with abused household help underfoot, with women and children bought and sold in sex markets, with men and women abused in foreign lands as long as they keep sending back the remittances, with slavery tolerated in fields, factories, and the fishing fleet as long as exports continue.

In short, a wolf by the ears.

A genius, Thomas Jefferson framed the problem for us. A flawed human being like all of us, he could not reconcile it for himself, or for the new nation. He set up the scale upon which this issue must be balanced, but I think that this man, who got so many things right, got this one wrong.

The question of slavery—whether for states, multilateral institutions, companies, or individuals—whether in 1820 or in 2011—is not a choice between justice and self-preservation. If we choose justice, we, and all that we stand for, will be preserved. How we choose, and what we do, will decide the success or failure of modern international human trafficking law.

