The Modern Abolitionist Movement

How Lawyers, Litigation, and Legislation Can Combat Trafficking in Persons

By Laurel G. Bellows

> *It ought to concern every person . . . every community . . . every business . . . every nation. I'm talking about the injustice, the outrage, of human trafficking, which must be called by its true name—modern slavery.*
>
> —President Barack Obama, September 25, 2012

Throughout the history of the United States, the issue of slavery has troubled the minds and hearts of legal professionals. While the last 148 years have been governed by the seemingly simple proposition of the Thirteenth Amendment, that "[n]either slavery nor involuntary servitude . . . shall exist," these concepts have been parsed and examined for years, with experts turning to a host of terms to name this crime: slavery; servitude; peonage; debt bondage; slavery-like practices; practices similar to slavery; contemporary forms of slavery; white slavery; forced labor; sex trafficking, labor trafficking, trafficking in persons; and trafficking in women and children. Whatever the term, the exploitation and abuse of victims in forced labor and the sex trade have sadly continued. But in the modern era, there are new tools for lawyers who wish to take up this cause to bring traffickers to justice and assist their victims.

A modern abolitionist legal structure has been created through the update of post–Civil War antislavery laws by the Trafficking Victims Protection Act and the simultaneous negotiation of the United Nations Trafficking in Persons Protocol in late 2000. Organized around the "3P Paradigm," these instruments *protect* victims, enable *prosecution* of traffickers, and help *prevent* modern slavery. These instruments, and over 50 state and territorial laws that have also been enacted, are not just theoretical ruminations on concepts of servitude, but are about people. They save lives and restore hope.

Like any law, the Thirteenth Amendment and its enabling legislation are only meaningful if there is vigilant and ongoing enforcement, and many courageous lawyers have risen to that challenge throughout the years: policymakers like President Abraham Lincoln, a successful corporate lawyer who used his legal skills to end the tragedy of chattel slavery; prosecutors like Assistant U.S. Attorney Pamela Chen, who fought sex and labor trafficking for over a decade in New York and recently was elevated to the federal bench; victim advocates, like University of Michigan's School of Law Professor Bridgette Carr, who represents survivors in her clinical program; public defenders like Kate Mogulescu of the Legal Aid Society in New York City, who defends victims of trafficking charged with crimes and connects them to much needed services. And the United States' leading legal organization, the American Bar Association, is marshaling the energy and resources of our nation's lawyers to change how our legal system addresses human trafficking.

As lawyers move forward to combat modern-day slavery, the work they do today must be informed by the past. Historical cases can, of course, be useful precedent in court. And the practices and techniques of earlier antislavery activists can guide the work of today's lawyers as modern abolitionists. Efforts a century apart bear such re-examination, whether the work to curb "peonage" at the dawn of the twentieth century or the fight against "trafficking in persons" at the close of the millennium.

The Development of the Concept of Coercion

In 1948, Congress consolidated the previous antislavery statutes by passing 18 U.S.C. § 1584, the Involuntary Servitude statute. Section 1584 criminalizes "knowingly and willfully hold[ing a person] to involuntary servitude or sell[ing a person] into any condition of involuntary servitude." Most of the early debates interpreting this omnibus involuntary servitude statute turned on the question of coercion: what kind of force was necessary to turn employment into slavery? Does the Thirteenth Amendment require physical force? Economic coercion? Psychological coercion?

At first, the courts interpreted the element of coercion narrowly. For instance, *United States v. Shackney*, 333 F.2d 475 (2d Cir. 1964), held that a Mexican family who worked on a chicken farm in Connecticut without pay and in fear of deportation had not been enslaved because section 1584 only prohibited "service compelled by law, by force or by the threat of continued confinement of some sort."

By the 1980s, however, courts were giving the servitude statutes broader meaning and federal prosecutors were again investigating and prosecuting cases vigorously, which resulted in case law that recognized that coercion could be established through the cumulative effect of threats and violence, *United States v. Booker*, 655 F.2d 562 (4th Cir. 1981) (coercion can be shown by proof of a "climate of fear"), and by aggregating the experiences of workers at the hands of a common trafficker, *United States v. Harris*, 701 F.2d 1095 (4th Cir. 1983) (witnessing the beating of other workers sufficient to establish climate of fear). These cases were particularly important

once it was established that victims were under no affirmative duty to attempt to escape once having been placed in fear. *United States v. Bibbs*, 564 F.2d 1165 (11th Cir. 1977). A circuit split with *Shackney* arose in the mid-1980s when the Ninth Circuit recognized that "the methods of subjugating people's wills have changed from blatant slavery to more subtle, if equally effective, forms of coercion" such as psychological manipulation and passport confiscation in *United States v. Mussry*, 726 F.2d 1448 (9th Cir. 1984). The recognition of these subtler means of coercion came at the same time as courts were confronting similar issues in related areas of the law, such as battering defenses and Stockholm Syndrome.

The resolution of the circuit split, however, reset the antislavery statutes back to 1865. In *United States v. Kozminski*, 487 U.S. 931 (1988), two intellectually disabled men had been forced to live and work on a dairy farm through threats of institutionalization, isolation, lack of pay, and horrible living conditions. Despite these facts, the Supreme Court held that psychological coercion was insufficient to support a conviction because it felt that the intent of the framers of the Thirteenth Amendment was to end a "condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process." While restricting the coverage of the antislavery statutes to physical coercion, the *Kozminski* Court left the door open for examination of how that coercion could be achieved by taking advantage of the victim's vulnerability.

> [A] child who is told he can go home late at night in the dark through a strange area may be subject to physical coercion that results in his staying, although a competent adult plainly would not be. Similarly, it is possible that threatening an incompetent with institutionalization or an immigrant with deportation could constitute the threat of legal coercion that induces involuntary servitude, even though such a threat made to an adult citizen of normal intelligence would be too implausible to produce involuntary servitude.

Moreover, the Court suggested that, if it was the wish of Congress to bring wholly psychological coercion into the federal antislavery statutes, it would need to affirmatively do so.

Laurel G. Bellows (aba-immpast-pres@staff.abanet.org), *immediate past president of the ABA, is the founder of The Bellows Law Group, P.C. She is an experienced business lawyer and mediator who counsels senior executives and corporations, in the United States and internationally, on employment matters, severance agreements, incentive compensation, and workplace disputes. She has served as chair of the ABA's policymaking House of Delegates and as chair of the ABA Commission on Women in the Profession. Bellows was the second female president of the Chicago Bar Association, where she founded the Women's Alliance.*

Following *Kozminski*, courts continued to wrestle with the concept of coercion. *United States v. Alzanki*, 54 F.3d 994 (1st Cir. 1995), bridged the holding in *Kozminski* and the forward-looking case law of *Booker*, *Bibbs*, and *Harris* (*see supra* p. 4) by upholding a domestic servitude conviction in which the maid was held in service through both physical and psychological coercion through threatened abuse of legal process by deportation and threats of injury to her family. Indeed, the court was willing to credit that the victim's fear was fueled by witnessing Mr. Alzanki commit acts of domestic abuse against his co-defendant. The landscape of coercion expanded within the narrowed parameters of the *Kozminski* holding.

United States Federal Law: The Trafficking Victims Protection Act

By the late 1990s, a consensus had emerged that the laws and treaties on the books were insufficient to capture the full range of coercion that traffickers employ. Albeit a dozen years after the fact, Congress responded to Justice O'Conner's invitation in *Kozminski* by establishing psychological coercion as a federal cause of action through the Trafficking Victims Protection Act of 2000 (TVPA). Congress redefined coercion to mean "(A) threats of serious harm to or physical restraint against any person; (B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or (C) the abuse or threatened abuse of the legal process."

In addition to focusing on international engagement, the TVPA included new criminal statutes to better capture the modern features of slavery. The TVPA created new forced labor and sex trafficking statutes, 18 U.S.C. §§ 1589 and 1591, making it unlawful to compel labor or services or commercial sex acts through the newly expanded coercion standard. These statutes specifically define "serious harm" to include "any harm, whether physical or nonphysical, 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."

Any doubt as to whether the body of case law would apply to the updated antislavery statutes of the TVPA was resolved by the First Circuit in *United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004) (Jamaican men held in forced labor as lumberjacks through threats of serious harm and document confiscation). While the type of compulsion had expanded to include psychological harm and threats of deportation, elements of prior slavery cases such as climate of fear, lack of duty to escape, and the secondary effect of coercion could still be used to explain the dynamic of enslavement in the modern era.

In the last decade, this recognition of the many ways that coercion plays out in the complex dynamic of master and

servant has been especially important in domestic servitude cases, as maids often labor behind closed doors without other victims to corroborate their accounts. *See, e.g., United States v. Calimlim*, 538 F.3d 706 (7th Cir. 2008) (domestic servant kept in total isolation by a family for 19 years, working from dawn to late at night under threat of deportation and not being able to send money to her family); *United States v. Udeozor*, 515 F.3d 260 (4th Cir. 2008) (use of rape as weapon of coercion against teenaged domestic servant in addition to beatings and noncompensated work in home and medical office); and *United States v. Djoumessi*, 538 F.3d 547 (6th Cir. 2008) (sexual assaults by man of the house properly considered part of the landscape of coercion in case involving teenaged domestic servant). Mirroring the farm worker cases of the early 1980s, post-TVPA courts are recognizing that coercive force can negate even a victim's physical absence from the traffickers. The Eighth Circuit has gone so far as to rule that the victims' short-term departure from the country did not negate coercion where they reasonably believed they had no choice but to return to the United States to pay off their debts or face serious harm. *United States v. Farrell*, 563 F.3d 364 (8th Cir. 2009).

While these opinions show that there has been forward progress in federal courts across the United States, increased enforcement efforts reveal familiar patterns of abuse: traffickers who used threats of deportation, violence, and sexual abuse to hold young, undocumented Central American women and girls in servitude as bar girls; sex traffickers who targeted U.S.–citizen single mothers from troubled backgrounds for forced prostitution; gang members who used girls as young as 12 for prostitution; those who used beatings, threats, and sexual assault to force Eastern European victims to work in massage parlors.

What has changed? People all over the world are beginning to care, shining a light into the dark places where traffickers profit, rejecting the demand that fuels sex trafficking and forced labor, and standing up for the victims. But to move this crime even further out of the shadows, it takes engagement, commitment, and political will.

Owning Up to the Responsibility

While this crime still goes widely undetected, governments around the world have been stepping up to their responsibility to combat modern slavery—at least on paper. Circling the globe, governments in more than 140 countries have criminalized sex and labor trafficking in a way that reflects a contemporary interpretation of modern slavery. In just over 13 years, more than 150 countries have acceded to the United Nation's Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children to the United Nations Convention on Transnational and Organized Crime (the "Palermo Protocol"), which contains provisions similar to those of the TVPA. In the United States, our government continues to update our own laws and encourage governments around the world to address this problem. These are no small accomplishments.

Yet a law, no matter how well devised, cannot on its own solve the problem of modern slavery. It's a tool that can help deliver outcomes: prosecuting and punishing traffickers, and providing support and services to victims.

But just as the evolution of the case law dealing with slavery has been an important process, it is by no means the limit of what governments or the legal community can or should contribute to this effort. As this article has shown, law and jurisprudence have caught up with the way modern slavery occurs in the twenty-first century. And, like the laws that provide governments the structures needed to combat modern slavery, an up-to-date legal framework provides strong guidance for lawyers dealing with this issue.

But what is the role of lawyers in this struggle, and how will this legal history help inform their work?

Within the justice system, the importance of legal professionals is clear. Judges, prosecutors, public defenders, and victim advocates are central to the process of prosecuting traffickers and providing justice for survivors of trafficking. They also are well-positioned to identify potential trafficking victims who may come in contact with the courts under a wide range of circumstances. For example, a public defender may discover that a client charged with prostitution or an immigration violation is in fact a victim of trafficking whose involvement with other crimes resulted from that exploitation. If the concepts related to exploitation—such as psychological coercion—are misunderstood by attorneys, opportunities to bring victims out of exploitation and provide them a measure of justice may be lost.

The ABA's Task Force on Human Trafficking has trained more than 500 lawyers and allied professionals to understand the barriers victims face in accessing help and resources. The task force is developing an online database of resources, materials, and legal-services programs for training and supervising volunteer lawyers. For more information regarding these activities, visit www.ambar.org/trafficking.

There is another way that attorneys can play a role. While fighting modern slavery will necessarily always have a strong criminal law component, in recent years it has become clear that the private sector also has an important stake in this effort and that corporate counsel and those representing business clients can push the cultural and social change needed to break the cycle of demand and exploitation.

It's an unfortunate reality that many of the products that American consumers rely on every day—from cotton to coffee to cellphones to fish—arrive at our markets via supply chains often tainted by forced labor. This problem touches all our lives, and making headway toward a solution requires the commitments and contributions of private-sector leaders. The good news is that many companies have made commitments to address this problem and have started taking a look at their own supply chains.

Where companies haven't taken the initiative on fighting modern slavery, regulators are willing to step in. For example, the California Supply Chain Transparency Act requires large companies that do business in California to disclose publicly what, if any, anti-trafficking policies and practices they have adopted. Additionally, the 2008 reauthorization of the TVPA changed standards related to liability, so that a business owner who turns a blind eye to modern slavery may share some responsibility. As these market-related aspects of modern slavery become integrated into the anti-trafficking movement, this issue has increasingly become the concern of general counsel and compliance officers. They are now expected to be experts in trafficking laws, related business conduct standards, auditing procedures, and regulations being enacted, plus keep their boards apprised of the changing legal landscape. In addition, companies are realizing the importance and necessity of adopting internal policies to eliminate slavery from corporate supply chains. And businesses are starting to train employees to identify victims, not only in connection with day-to-day employment, but in their communities.

The ABA's Task Force on Human Trafficking is working closely with business lawyers and corporate leaders to develop guidelines to address labor trafficking from supply chains.

Additionally, ensuring that rising lawyers start their careers with an understanding of this issue and the many areas it touches requires us to make modern slavery a part of our legal research and academic curricula. For the broader understanding of modern slavery to take hold in the justice system and private-sector legal community, it may fall first to lawyers in the academic setting to embrace this issue and lead the way through teaching and research.

Finally, because this is a crime that touches all our lives, being a lawyer who cares about modern slavery doesn't necessarily mean that fighting modern slavery needs to be a part of your job. We can all help to solve this problem by learning how our lives touch modern slavery—how the goods we consume may be touched by forced labor—and how we may be too accepting of a culture that permits exploitation in prostitution. Making a difference doesn't necessarily mean penning an opinion that changes the way we look at a certain law or grants new authorities to police and prosecutors. It can be as simple as brushing up on the trafficking law that's already on the books; or going to a training session for court officers and law enforcement to learn what the tell-tale signs of trafficking are; or asking yourself, whether in a courtroom or at a bus stop or in a place you'd least expect to find modern slavery: "Could this person be a victim?"

As lawyers, we are called to action. This crime affects us all. We all need to contribute to its demise. Lawyers can make a difference in countless ways. Use the ABA's tool kit for legal professionals, *Voices for Victims: Lawyers Against Human Trafficking*. It accompanies a film that highlights attorneys' roles in representing victims of human trafficking and legal measures that can help facilitate the enforcement of anti-trafficking laws. The electronic version of the toolkit is available on www.ambar.org/trafficking. Raise awareness of this critical issue among your colleagues. Find local resources and organizations with experience in helping trafficking victims by calling the National Human Trafficking Resource Center's hotline, 888-373-7888. Also, donate time or money to local organizations, most of which lack adequate resources to serve the needs of victims.

Lawyers are trained advocates and willing helpers of the vulnerable. We will use our problem-solving skills and our hearts to surmount any obstacles that prevent us from eliminating slavery, once again, from our nation. The ABA and lawyers will create a legal legacy of which all lawyers will be proud. ◆