OREGON

CIVIL RIGHTS

NEWSLETTER

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Human Trafficking: An Overview

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The images are potent: workers baking in the Sonoran desert crammed into the trailer of a semi, waiting to make an illegal border crossing; children abducted and sold into sexual slavery; emaciated slaves, chained together, digging for precious gems in sweltering, cramped mines.... These are images that may come to mind when we hear the term "human trafficking." Most human trafficking, however, is much less cinematic and quite a bit more mundane; its victims typically work in the hospitality, landscaping, construction, home health care, food service, domestic service, and agricultural industries.

"Human trafficking" is a broad term that has come into currency only in the last 15 years or so to refer to the process of holding people in compelled service. The many different manifestations of human trafficking all have in common that element of compulsion—the person's service is involuntary.

Most often, trafficking victims are workers who initially enter into service voluntarily. Unscrupulous employers then compel those workers to stay in service by exploiting such vulnerabilities as high rates of unemployment, poverty, crime, discrimination, corruption, political conflict, ignorance of the law, immigration status, cultural acceptance of the practice, and fear. Additionally, although men comprise a significant number of trafficking victims, traffickers often use sexual violence as a weapon against women to keep them in compelled service.

Trafficking occurs, for example, when a worker in Indonesia is offered a wonderful, well-paying job in the United States and the visa to live here. The working conditions, however, prove to be intolerable, the hours long, the wages substandard, and if the worker says a word, he will be summarily fired, reported to immigration authorities, and sent home.

Trafficking may also occur when a Colombian worker, for example, is hired to take care of the children. As it turns out, she is also required to "take care of" the employer, who is holding onto her passport, just for safekeeping. Traditional colonial-style peonage is also still rampant, although not so much in this country. The U.S. Department of Justice estimates that in South Asia, millions of trafficking victims are working to pay off their ancestors' debts.

Modern forms of debt-bondage have also emerged. Many labor recruiters charge exorbitant fees to workers, who frequently obtain high-interest loans to pay them off, and others require the workers to leave collateral, such as the deeds to their homes. Workers then start off deeply in debt, often with high interest rates, that they have no hope of repaying.

It is difficult to ascertain the scope of human trafficking, since accurate numbers are hard to come by. In 2000, when Congress passed the Victims of Trafficking and Violence Protection Act of 2000 (TVPA), 114 Stat. 1464 (largely codified at 18 USC §§1581–1595), the statute's Findings reported: "At least 700,000 persons annually, primarily women and children, are trafficked within or across international borders. Approximately 50,000 women and children are trafficked into the United States each year."

The most recent Department of Justice report (2011) estimated that some 12.3 million adults and children work in forced labor, bonded labor, and forced prostitution around the world. The U.N. International Labour Organization (ILO) estimates that 10% of those people are subjected to forced prostitution. On the other hand, according to UNICEF, as many as two million children alone are subjected to prostitution in the global commercial sex trade. Although difficult to quantify, the human trafficking problem is significant.

Federal and State Laws

United States laws prohibiting the various kinds of human trafficking ultimately stem from the Thirteenth Amendment to the U.S. Constitution,

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Supreme Court Update

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Decided

***Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, No. 10-553 (January 11, 2012)**

The United States Supreme Court unanimously reversed the Sixth Circuit in this case, holding that the establishment and free exercise clauses of the First Amendment bar employment discrimination suits brought by ministers claiming violations of employment discrimination laws. Please see page 3 for details.

***U.S. v. Jones*, No. 10-1259 (January 23, 2012)**

The Supreme Court unanimously affirmed the D.C. Circuit in this case, holding that the admission of evidence obtained by the warrantless use of a GPS device attached to a vehicle violated the Fourth Amendment.

The respondent in this case was sentenced to life in prison after government authorities discovered vast amounts of contraband, including drugs, guns, and money, after tracking him using a GPS device they had attached to his vehicle. The Sixth Circuit vacated the respondent's conviction on grounds that the evidence gathered as a result of the GPS installation was inadmissible. The Supreme Court affirmed, reasoning that the government's attachment of the GPS to the vehicle, and its use of that device to monitor the vehicle's movements, was a search under the Fourth Amendment that required a valid warrant.

Certiorari Granted

***Fisher v. Texas*, No. 11-345 (February 21, 2012)**

In this case out of the Fifth Circuit, the Court will revisit the issue of affirmative action in higher education. This issue was previously addressed by the Court in *Grutter v. Bollinger*, 539 US 306 (2003), a 5–4 ruling in which the Court held that while public institutions of higher education may not use a point system to enhance minority enrollment, they may consider race to some extent in an effort to ensure academic diversity. The instant case was brought by Abigail Fisher, a white student, who alleges she was denied admission to the University of Texas because of her race.

***Jackson v. Hobbs*, No. 10-9647 (November 7, 2011)**
***Miller v. Alabama*, No. 10-9646 (November 7, 2011)**

In these companion cases out of Arkansas and Alabama, respectively, the Supreme Court will address whether sentencing a juvenile to life imprisonment without the possibility of parole for a homicide offense violates the Eighth Amendment's prohibition against cruel and unusual punishment. Both defendants in this case were 14 years old when they committed their crimes, and both were later convicted of aggravated murder. In *Graham v. Florida*, 560 US ___, 130 S Ct 2011 (2010), the Supreme Court held that sentencing juveniles to life without parole for non-homicidal offenses violates the Eighth Amendment's prohibition against cruel and unusual punishment. In these cases, the Court will decide whether the same rule applies when the offender has committed murder. ✦

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Supreme Court Says Ministerial Exception Can Include Teachers

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2012 marks the year that the U.S. Supreme Court, in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, No. 10-553, 565 US ___ (2012), recognized that a "ministerial exception" exists and bars suits alleging employment discrimination by ministers against their religious employers. The Court's ruling clearly grants religious institutions the freedom to employ (and terminate) employees who act as ministers of their faith—not just the head of a religious congregation. In so doing, the Court joins the U.S. courts of appeals, one of which has recognized the exception since 1989. (The Ninth Circuit did so in 2004.) The Court's ruling is less clear, however, about who is and who is not a "minister" and how a religious organization (or its employees) makes that determination.

The "ministerial exception" allows religious organizations—under the establishment and free exercise clauses of the First Amendment—the religious freedom from government interference (in this case, employment discrimination laws passed by Congress) to determine whom to employ to perform their religious work. Traditionally, the exception has been applied to allow religious organizations the discretion to discriminate in hiring ministers, rabbis, priests, and other religious leaders. The *Hosanna-Tabor* decision is significant because it holds that the exception may also encompass positions in religious schools that require formal religious training or instruct students about religious matters.

In the *Hosanna-Tabor* case, the EEOC brought suit on behalf of Cheryl Perich, who was a "called" teacher (as opposed to a "lay" teacher) at a school in Redford, Michigan. Ms. Perich spent the vast majority of her time teaching secular subjects: math, language arts, social studies, science, gym, art, and music. She also taught a religion class four days a week, led the students in prayer and devotional exercises every day, attended a weekly school-wide chapel service, and led the chapel service about twice a year.

Significantly, even though her religious duties consumed only 45 minutes of each workday, Ms. Perich had completed religious training, and the school considered her a "commissioned minister." The school said that she was terminated because she had violated religious doctrine in threatening to bring a lawsuit against the school (under the Americans with Disabilities Act) rather than trying to resolve the dispute within the church. The EEOC took up the case on her behalf.

The EEOC and Ms. Perich argued that religious organizations could defend against employment discrimination claims by invoking their constitutional right to freedom of association under the First Amendment without the need for a special rule for ministers grounded in the religion clauses.

The Court rejected this position, relying on the text of the First Amendment itself, finding that it gives "special solicitude" to the rights of religious organizations, as compared to social clubs, labor unions, or other organizations. The Court reasoned that "requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs."

Although the question of precisely what positions are or will be included in the ministerial exception remains unanswered, in the Opinion of the Court, Justice Roberts relied on the fact that the church and school held Ms. Perich out as a minister, issued her a diploma of vocation, and required her to undergo a significant degree of religious training, followed by a formal process of commissioning. Ms. Perich also held herself out as a minister, for example, by claiming a special housing allowance on her tax returns.

Although the Court did not adopt a rigid formula for deciding when an employee qualifies as a minister, the Court did rely on the following considerations in concluding that Ms. Perich qualified: (1) the formal title given to her by the church; (2) the substance reflected in that title; (3) Ms. Perich's own use of that title; and (4) the important religious functions she performed for the church.

In reversing the appellate court's decision, Justice Roberts found three errors by the lower court: (1) it failed to give proper consideration to Ms. Perich's title of commissioned minister; (2) it gave too much weight to the fact that other lay teachers performed the same religious duties; and (3) it placed too much emphasis on her performance of secular duties.

In a concurring opinion, Justice Thomas went further: he wrote that the very question of whom the exception includes is itself religious in nature. In another concurring opinion, Justice Alito wrote that the exception should apply to "any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith."

The Court concluded with a recognition of the importance of enforcing employment discrimination statutes, but yielded to the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. ✦

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Recent Decisions

Ninth Circuit Court of Appeals

***Dawson v. Entek International*, 630 F3d 928 (9th Cir 2011)**

A former employee alleged that he had been subjected to unlawful harassment on the basis of his sexual orientation and to retaliation for complaining about the harassment. Specifically, the employee alleged that several co-workers directed derogatory terms for homosexuals toward him (in the presence of his supervisor, who did not nothing to stop the comments) and that he was terminated within days of complaining to the company's human resources department about his co-workers' conduct.

The district court accepted the company's explanation that the plaintiff was terminated for violating its neutral attendance policy and granted summary judgment for the employer. Reversing, the Ninth Circuit held that the employee presented sufficient evidence that the company's explanation for his discharge was pretextual, and that there was sufficient evidence that the employee's supervisors were on notice of the harassment to potentially impute liability to the company.

***Harris v. Maricopa County Superior Court*, 631 F3d 963 (9th Cir 2011)**

A former state employee brought claims for discrimination, breach of contract, and various tort theories under both Arizona and federal law. The district court granted summary judgment for the state on all the plaintiff's claims and, after determining that several of them were frivolous, awarded the state more than $100,000 in attorney fees and costs.

Reversing, the Ninth Circuit concluded that the district court improperly prorated the state's overall fees between the employee's frivolous and nonfrivolous claims, and held that an employment discrimination defendant bears the burden of establishing that the fees it requests have been incurred solely because of the need to defend against frivolous claims. In dissent,

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Judge Bybee argued that the majority's decision was inconsistent with the outcome in *Tutor–Saliba Corp. v. City of Hailey*, 452 F3d 1055 (9th Cir 2006), and that it was out of step with the majority of circuits that have examined the issue.

***Lopez v. Pacific Maritime Association*, 657 F3d 762 (9th Cir 2011)**

An applicant for longshore employment sued under the Americans with Disabilities Act (ADA) and California law, challenging the employer's "one-strike rule," by which an applicant is eliminated from consideration if he tests positive for drugs or alcohol during a pre-employment screening test. The plaintiff alleged that the policy facially discriminated against him on the basis of his former substance abuse addiction, for which he was in recovery and which is indisputably a protected disability under the ADA.

The Ninth Circuit affirmed summary judgment for the employer, finding that because the one-strike policy applied to all applicants who tested positive for drug use (regardless of whether they suffered from a substance abuse addiction), it did not discriminate on the basis of a disability.

***Shelley v. Geren*, — F3d —, 2012 WL 89215 (9th Cir 2012)**

The Ninth Circuit held that the employer was not entitled to summary judgment in an Age Discrimination in Employment Act (ADEA) suit, because the plaintiff presented a prima facie case for discrimination under the *McDonnell Douglas* framework. Specifically, the panel rejected the district court's conclusion that the Supreme Court's decision in *Gross v. FBL Services*, — U.S. —, 129 S Ct 2343 (2009), which held that the mixed-motive doctrine did not apply in ADEA actions, also precluded use of the pretext analysis first articulated in *McDonnell Douglas*.

Oregon Court of Appeals

***Russell v. U.S. National Bank Assoc.*, 246 Or App 74 (2011)**

Oregon's final paycheck statutes, ORS 652.140 and 652.150, allow an employee to recover up to 30 days' wages as a penalty if her employer does not provide her with her full and final pay at termination. In this case, the circuit court dismissed a former employee's final paycheck claim as untimely under the applicable three-year statute of limitations (ORS 12.100(2)) after concluding that her claim accrued on the first day of the penalty period, i.e., the first day her final paycheck was deemed "late" under the timelines set forth in ORS 652.140. Reversing, the Oregon Court of Appeals held that the claim did not accrue until the time when all the penalty wages became due, i.e., 30 days after the employer should have provided her final paycheck.

***Young v. State of Oregon*, 246 Or App 115, (2011)**

A group of state employees prevailed on a claim for unpaid overtime and, in addition to their unpaid wages, were awarded post-judgment interest following appeal. The employees sued again, seeking interest on their post-judgment interest and, for those who left their employment with the state before the post-judgment interest was paid, statutory penalties under Oregon's final paycheck law.

The trial court rejected both theories, and the Court of Appeals affirmed. The court reasoned that awarding "interest on interest" would violate the post-judgment interest statute's (ORS 82.010) dictate that interest be simple rather than compound. Further, the court held that post-judgment interest did not fit the definition of "wages" under the final paycheck statute.

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"Unemployed Need Not Apply": Is That Legal?

Alyssa Engelberg

Finding a job in the current economy is an uphill battle for almost everyone. Unemployed job seekers may have an even more difficult time due to job advertisements explicitly stating that unemployed individuals will not be considered for the position. Such ads feature language like "unemployed applicants not considered" or "all applicants must be currently employed." This practice has been referred to as "employment status discrimination" and may have significant legal ramifications for employers.

Employers who use "unemployed need not apply" language in job advertisements will likely soon violate a new Oregon statute. Senate Bill 1548, designed to stop employers from posting such ads, was passed by the Senate on February 15 and by the House on Feb. 27. The bill will take effect as soon as Governor Kitzhaber signs it, assuming he does.

SB 1548 prohibits the publication of job advertisements that include language indicating that unemployed individuals should not apply for the job or that they will not be considered for the job. The bill, however, will likely have a limited effect, given that it does not provide for a private cause of action, that it caps civil penalties the BOLI commissioner may assess at $1,000 per violation, and that such penalties do not go to the complainant.

Several other states have considered similar legislation, and New Jersey was the first to pass such a statute, which took effect on June 1, 2011. NJSA 34:8B-1. On the federal level, the American Jobs Act, a package of policies designed to lower the national unemployment rate, included a provision similar to SB 1548. Congress, however, failed to pass the bill in 2011 and now appears unlikely to do so in a contentious election year.

SB 1548 does not make the unemployed a protected class under Oregon statutes prohibiting discrimination in hiring. Unemployed people are also not a protected class under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, or the Age Discrimination in Employment Act. Therefore, an applicant who alleges that he was not hired for a position because he was unemployed does not have a cause of action for disparate treatment under those anti-discrimination laws. A policy that discriminates against unemployed applicants, however, could result in a disparate impact claim under those same statutes.

"Disparate impact" refers to "employment practices that are facially neutral in their treatment of different groups but in fact fall more harshly on one group than another and cannot be justified by a business necessity." *Teamsters v. United States*, 431 US 324 (1977). Employers may adopt blanket policies without intending to harm a particular group. Lack of discriminatory intent, however, does not protect an employer from liability. Under the disparate impact theory, courts are to look at the effect of a policy rather than the intent behind it.

A disparate impact claim follows the burden-shifting framework laid out by the United States Supreme Court. The plaintiff must show that a particular employment practice has a disproportionate impact on a protected class. The burden then shifts to the employer to show that the practice is required by a business necessity. Even if the employer meets its burden, the plaintiff may still prevail if he or she shows that there is a less discriminatory alternative that would still achieve the employer's business necessity. *See Griggs v. Duke Power Company*, 401 US 424 (1971); *Dothard v. Rawlinson*, 433 US 321 (1977).

Plaintiffs commonly use statistics to demonstrate a policy's disproportionate effect on a protected class. The national unemployment statistics from January 2012 reveal that the jobless rate among African Americans was running at 13.6%, compared to a 7.4% unemployment rate among the white population. Bureau of Labor Statistics, U.S. Department of Labor, *The Employment Situation: January 2012* (2012), http://www.bls.gov/news.release/pdf/empsit.pdf.

Similarly, the unemployment rate for Latinos was listed at 10.5%. *Id*. And while the unemployment rate for both men and women over the age of 20 was 7.7%, there were times in the past year when the jobless rate among men was 2% higher than the rate for women. *Id*. Therefore, African Americans, Latinos, and, at one point, men could use these unemployment statistics to argue that a neutral policy against considering unemployed applicants results in an adverse impact on a protected class.

The U.S. Equal Employment Opportunity Commission has questioned using "current employment as a sign of quality performance" and as a hiring selection device. An EEOC press release suggests that "such a correlation is decidedly weak" and that the practice of screening out the unemployed may have a disproportionate effect on women, certain racial and ethnic minority community members, and people with disabilities. EEOC, *Out of Work? Out of Luck* (Feb. 16, 2011), http://www.eeoc.gov/eeoc/newsroom/release/2-16-11.cfm.

SB 1548 will probably take effect in Oregon very soon, prohibiting job advertisements that limit applicants to people who are currently employed. Given the new statute's limited scope, however, a disparate impact lawsuit based on a refusal to consider unemployed applicants may be of a greater concern for employers due to the potential for significantly higher damages. ✦

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which provides as follows:

> **Section 1. Slavery and involuntary servitude abolished.** 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.
>
> **Section 2. Enforcement.** Congress shall have power to enforce this article by appropriate legislation.

In response, over the next decades, Congress enacted laws imposing severe criminal penalties for crimes such as holding people in peonage (18 USC §1581), slavery (18 USC §§1582–1583, 1585–1588), and involuntary servitude (18 USC §1584), as well as the aiding, assisting, facilitating, participating in, or in any way benefiting from any of them. A few legal definitions at this point might be helpful.

Peonage, or debt bondage, is "a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness." *Clyatt v. United States*, 197 US 207, 215 (1905); *United States v. Gaskin* 320 US 527 (1944). "A slave is a person who is wholly subject to the will of another, one who has no freedom of action and whose person and services are wholly under the control of another, and who is in a state of enforced compulsory service to another." *United States v. Ingalls*, 73 F Supp 76 (DC Cal 1947).

"[T]he term 'involuntary servitude' necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process." *United States v. Kozminski*, 487 US 931, 952 (1988).

Recognizing the seriousness of trafficking problems, Congress passed the TVPA in 2000 to consolidate the various criminal statutes with new legislation designed to comprehensively combat human trafficking. The idea was to strengthen the criminal laws against the traffickers, defining and making "human trafficking" itself a federal crime with severe penalties, and providing conditional protection and benefits to trafficking victims.

In the context of its prohibitions, the TVPA added to the existing array of penal statutes the felony of sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age. 18 USC §1591. The TVPA created the separate crime of trafficking for anyone who recruits, harbors, transports, provides, or obtains by any means any person for labor or services in violation of the chapter. 18 USC §1590.

In addition, the TVPA added human trafficking crimes as predicate offenses for RICO charges; "trafficking in persons" is now included in the definition of a racketeering activity. 18 USC §1961(1).

Perhaps most significantly, the TVPA added 18 USC §1589, defining and penalizing "forced labor," expressly to address the holding in *Kozminski, supra*. *See* H.R. Conf. Rep. No. 106-939, at 100-101 (2000). In *Kozminski*, the U.S. Supreme Court held that the preexisting ban on "involuntary servitude" in §1584 only prohibited conduct involving the use or threatened use of "physical or legal coercion." 487 US at 949–952.

In response, and accepting the Court's invitation to broaden the sweep of existing protections, Congress adopted §1589. For the purposes of that statute, "serious harm" encompasses not only physical violence, but also more subtle psychological methods of coercion—"'such as where traffickers threaten harm to third persons, restrain their victims without physical violence or injury, or threaten dire consequences by means other than overt violence.' The term 'serious harm' as used in this Act refers to a broad array of harms, including both physical and nonphysical . . . ." *United States v. Bradley*, 390 F3d 145, 150 (2004) (citations omitted), *vacated and remanded (for resentencing) on other grounds, Bradley v. United States*, 545 US 1101 (2005).

Recognizing the seriousness of trafficking problems, Congress passed the TVPA in 2000 to consolidate the various criminal statutes with new legislation designed to comprehensively combat human trafficking.

Oregon's statutory scheme complements, and to some extent overlaps, the federal protections. Indeed, it was meant to fill in some small gaps in the coverage of the TVPA.

Central to the Oregon law is the prohibition of "involuntary servitude," (cf. "forced labor" under 18 USC §1589), which is defined in ORS 163.263(4). Like the federal statute, the state statute makes it felonious to obtain the labor or services of another person by enumerated coercive means, including "abusing or threatening to abuse the law or legal process;" "threatening to report a person to a government agency for the purpose of arrest or deportation;" "threatening to collect an unlawful debt;" document theft; instilling the fear that the actor will withhold the necessities of life, including but not limited to lodging, food, and clothing (ORS 163.263(1)); or causing or threatening to cause death, physical injury, or physical restraint (ORS 163.264(1)). Note that, at least arguably, the latter two may also constitute "threats of serious harm" as defined in 18 USC §1589(c).

Also prohibited under Oregon law is "trafficking in persons," which is defined as the recruitment or other facilitation of obtaining another person knowing that the other person will be

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subjected to involuntary servitude, the attempts thereof, or benefiting from the participation in such a venture. ORS 163.266.

Both state and federal human trafficking laws provide remedial tools in addition to criminal prosecution. In many ways, 18 USC §1595, added by the Trafficking Victims' Protection Reauthorization Act of 2003, is the most interesting, in that it establishes a private right of civil action by victims against their traffickers, empowering victims to bring federal civil suits against traffickers for actual and punitive damages, as well as costs and attorney fees. To avoid the myriad problems inherent in parallel criminal and civil proceedings—and particularly those relating to self-incrimination—the TVPA provides that any civil action is stayed pending investigation and resolution of the criminal matter. The statute of limitations is ten years.

The TVPA also created a private right of action in 18 USC §1964(c) for individuals whose business or property interests were injured as a result of a pattern of racketeering activity. The successful claimant can be awarded costs and attorney fees in addition to damages.

Similarly, ORS 30.867 creates a private right of action for violation of state criminal laws relating to involuntary servitude or trafficking in persons irrespective of any criminal prosecution or the result of a criminal prosecution. Again, damages, costs, and attorney fees are allowed; the statute of limitations is six years.

Litigating Claims

Litigation of these issues can be difficult. One problem lies in the laws themselves. While the various statutes may seem clear enough, as can be seen from the cases cited above, they tend to become surprisingly complex in application.

The practicalities can be even more daunting. For one thing, the costs can be high and the logistics ungainly, and the litigation of trafficking cases involving immigrant victims, witnesses, or traffickers even more so. Potential witnesses may be hard to locate, or easy to locate but costly to access. Depositions in foreign countries may be needed, and they are also expensive. Foreign contracts and other documents may need to be located, obtained, and construed according to foreign law. Interpreters and expert witnesses may be essential and are costly.

Balanced against those expenses are the problems of dealing with elusive traffickers, or impecunious traffickers who may not have insurance to cover any potential damage awards, and the difficulties involving in finding and accessing the assets of foreign corporations or individuals who have assets to be located.

Beyond that, the very nature of human trafficking involves the exploitation of victims' vulnerabilities, many of which can be problematic in the litigation context. A dependency relationship often develops between the victim and the trafficker, with the victim relying on the trafficker for food, housing, employment, even presence in this country. In spite of the exploitative nature of the relationship, victims often have a certain sense of security in the arrangement and are reluctant to jeopardize what little bit of security they have. They also may come to sympathize with their exploiters, in a Stockholm syndrome–like phenomenon, displaying a certain loyalty to their traffickers.

The other side of that security is fear, not only of losing the little security they have, but of actual violence. Emerson noted: "If you strike at a king, you must kill him." With that thought in mind, victims tend to have an inherent mistrust of the ability of anyone—lawyers, courts, or law enforcement—to assure success if they come forward, or to provide them with adequate protection from the angry trafficker when they do.

Consequently, victims—who, after a typically grueling day of work, have little time or energy to spare—are often, understandably, reluctant to come forward at all. Then, after they have mustered the courage to do so, it is often difficult to find witnesses—many of whom have been similarly victimized and are subject to the same vulnerabilities—who are willing to cooperate or testify, making the entire litigation process that much more challenging.

Consequently, victims—who, after a typically grueling day of work, have little time or energy to spare—are often, understandably, reluctant to come forward at all.

This is particularly true with immigrant victims. While it is difficult to accurately generalize, immigrant victims tend to be both socially and culturally isolated, with a less-than-comfortable relationship with U.S. institutions and, often, with the language. Obviously, undocumented workers, who are subject to immediate deportation if they come to the attention of the authorities, have a strong disincentive to complain about working conditions, workplace treatment, or much of anything else.

Even legally documented temporary workers are vulnerable. They typically receive visas or immigration entry permits linked to the sponsor employer in the destination country. They work at the pleasure of their sponsors; the cost of incurring displeasure is deportation. There often are few real options for migrants to seek legal remedies for abuses or conditions of forced labor. Perhaps most crucially, these workers do not enjoy one of the fundamental protections of a competitive labor market: the ability to change jobs if they are mistreated.

Some of these problems are ameliorated—somewhat, in some cases—by

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the TVPA, which provides conditional protection and benefits to victims. Most significantly, the TVPA established the "T visa," which allows victims of trafficking who are cooperating in investigations to become temporary residents of the United States. The statute also provides for witness protection for trafficking victims who have come forward. Of great help have been social service agencies, such as Catholic Charities, that have devoted a vast amount of effort in helping trafficking victims.

In spite of its origins in the Thirteenth Amendment (1865), the concerted effort to combat human trafficking is still in its infancy. In the context of civil litigation, which is to say, in the context of the victims themselves being empowered and taking the initiative to sue their exploiters, that is literally true.

Human trafficking is a serious and pervasive problem that will persist as long as it is economically productive for those who hold workers in the various forms of involuntary servitude. Current laws are a solid step in the direction of diminishing that productivity. ✦

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Newsletter Articles Needed

Have you recently done some research or written a memo that you could easily transform into an article for this newsletter?

Do you need an incentive to brush up on a recent development in the law?

We need articles for this newsletter.

If you or someone in your office would like to contribute an article this spring, please contact our editor at elise.gautier@comcast.net.

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