THE NEXT STEP IN THE FIGHT AGAINST HUMAN TRAFFICKING: OUTLAWING THE TRADE IN SLAVE-MADE GOODS

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I. Introduction

Historian Sir Lewis Namier once remarked that people tend to "imagine the past and remember the future" when conceptualizing historical periods and events.[1] Author William M. Wiecek applied this *Namierism*[2] to the fierce debate over slavery in America in the late 1800s when he wrote, "[w]hen they thought and wrote about some historical problem, such as the framers' actual intentions, abolitionists (and defenders of slavery, too) imagined the past in terms of their wishful thinking. When they tried to decry and influence the future, they 'remembered' it along synthetic lines sketched by their historical imagining."[3]

Today, the philosophical debate over the socio-political constructs of slavery is over, as the U.S. Constitution's Thirteenth

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[1] LEWIS B. NAMIER, SYMMETRY AND REPETITION IN CONFLICTS: STUDIES IN CONTEMPORARY HISTORY 72 (1942). Sir Lewis Namier developed a theory that described the thought processes of individuals as they attempted to analyze particular events in history. Through manufactured analogies and rationalizations based upon personal experiences, people applied their own perceptions of reality to the past, e.g., "imagining the past" and created personal constructs of their visions of the future based upon these same experiences, e.g., "remembering the future."

[2] The term "Namierism" was developed by John Brooke in his article *Namier and Namierism*, 3 HISTORY AND THEORY 331-347 (1963-64).

[3] WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA: 1760-1848 249 (1977).

Amendment,[4] numerous federal and state statutes, and international law all serve the purpose of providing unequivocal legal foundations for outlawing slavery in America and in the whole world in all forms. However, when viewed within the contextual confines of 21st century international commerce, the fortuitous words of Namier still ring hauntingly true as the discussion turns to the applied effectiveness of these legal instruments.

II. A Synopsis of Contemporary Slavery

Our working definition of slavery is the complete control of a person through violence or the threat of violence for economic exploitation, a situation in which the enslaved person is paid nothing beyond basic subsistence, and cannot walk away.[5] The remarkable variety of human exploitation means that there are necessarily grey areas even within this definition. However, the aim of this article is to discuss those social and economic relationships that no one would deny constitute enslavement, even if it means excluding, for example, prison labor, some forms of child labor, or terribly exploited workers who are still free to leave their employers. Using this working definition as a guide, the best estimate of the number of slaves in the world today is 27 million.[6]

Where are all of these slaves? "The biggest part of that 27 million, perhaps 15 to 20 million, is represented by *bonded labor* in

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[4] The Thirteenth Amendment to the United States Constitution, which abolished slavery in America, was ratified on December 6, 1865 and reads as follows: "Section 1. 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. Congress shall have power to enforce this article by appropriate legislation." *See* U.S. CONST. amend. XIII, §§ 1, 2.

[5] DIVISION OF BEHAVIORAL AND SOCIAL SCIENCES AND EDUCATION, NATIONAL RESEARCH COUNCIL, MONITORING INTERNATIONAL LABOR STANDARDS: QUALITY OF INFORMATION, SUMMARY OF A WORKSHOP 31 (Margaret Hilton ed., 2003) ("an economic and social relationship that takes many different forms yet retains three core characteristics: 1. loss of the slave's free will; 2. the use of violence or the threat of violence, to control the slave; and 3. economic exploitation (the slave receives no recompense for his or her labor)").

[6] KEVIN BALES, DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY (1999).

India, Pakistan, Bangladesh, and Nepal."[7] Otherwise, slavery tends to be concentrated in Southeast Asia, Northern and Western Africa, and parts of South America; but there are slaves in almost every country in the world including the United States, Japan, and most European countries.[8] To put it into perspective, today's slave population is greater than the population of Canada and six times greater than the population of Israel.[9]

These slaves, the largest portion of whom work in agriculture, tend to be used in simple, non-technological, and traditional work.[10] However, slaves are used in many other kinds of work: brick making, mining or quarrying, prostitution, gem working and jewelry making, cloth and carpet making, domestic servitude, forest clearing, charcoal production, and shop work.[11] Much of this work is aimed at local sale and consumption, but many slave-made goods reach right into our homes. Carpets, fireworks, jewelry, metal goods, and commodities such as steel, tantalum, cocoa, coffee, grains, and sugar are imported directly to North America and Europe after being produced using slave labor.[12] In countries where slavery and industry co-exist, cheap slave-made goods and food keep factory wages low and help make everything from toys to computers less expensive on the world market. In addition, the largest transnational corporations, acting through subsidiaries in the developing world, take advantage of slave labor, usually unknowingly, to increase their bottom line and the dividends to their shareholders.

There are, however, within the United States, retailers who know or should know that they are selling slave-made goods to the public in violation of federal law.[13] The importation and sale of slave-made goods as an issue with federal and state lawmakers has been eclipsed by a focus on human trafficking into the United States,

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[7] *Id.* at 9. Bonded labor, or debt-bondage, occurs when a person gives himself or herself into slavery as security against a loan or when they inherit a debt from a relative.

[8] *Id*. at 9.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* at 3-4.

[13] *Id.* at 9-10.

which has galvanized public response. While addressing human trafficking is important, in this paper we argue that as laws are made to address enslavement, such laws should also include clear provisions and penalties covering the transport and sale of slave-made goods, as well as the exploitation of trafficked persons. In order to best explore this assertion, we must first review the current law as it applies to human trafficking.

III. Human Trafficking and International Instruments

"Human trafficking" is the modern euphemism for a phenomenon--that of forcing and transporting people into slavery--which is as old as civilization. Trafficking in persons and slavery have been with us since the beginning of human history and have continued to the present day.[14] Today, however, a narrow focus on trafficking into sexual exploitation has obscured the larger problem. While sometimes used synonymously with "slave trade," the term "trafficking" has often been used *solely* to describe the transporting and forcing of women into prostitution. At the end of the 19th century there was significant official concern in the United States over the "white slave trade." This effort was primarily concerned with the enslavement of "white" women into prostitution, and much less concerned with the continuing enslavement and trafficking of other ethnic groups.[15] Both the Mann Act and the 1910 Convention for the Suppression of the White Slave Trade grew out of this concern.[16]

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[14] For a general discussion of this phenomenon, *see* Free the Slaves, http://freetheslaves.net/slavery/ (last visited Feb. 15, 2006). For a detailed review of the early history of slavery, *see generally* MILTON MELTZER, SLAVERY: A WORLD HISTORY (1993).

[15] Some of the domestic and international agreements to formalize from this concern include the International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 35 Stat. 426, 1 L.N.T.S. 83; the International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 211 Consol. T.S. 45, 103 B.F.S.P. 244 [hereinafter 1910 White Slavery Convention]; and the White Slave Traffic Act ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (2005)) [hereinafter the Mann Act].

[16] The 1910 Convention for the Suppression of the White Slave Trade made it a crime for "[w]hoever, in order to gratify the passions of another person, has, by fraud, or by means of violence, threats, abuse of authority, or any other method of compulsion, procured, enticed, or led away a woman . . . for immoral purposes . . .

After the Second World War another Convention was adopted to confront this form of trafficking in persons linked to prostitution.[17] In the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949), it was agreed to "punish any person who, to gratify the passions of another: (1) Procures, entices or leads away, for the purposes of prostitution, another person, even with the consent of that person; (2) Exploits the prostitution of another person, even with the consent of that person."[18] The Convention also set out ways for countries to cooperate in the suppression of trafficking, as well as ways to protect immigrants and migrants in transit.[19] To help prevent trafficking, the Convention called for countries "[t]o arrange for appropriate publicity warning the public of the dangers of the . . . traffic [in persons]."[20]

These were important efforts, but they failed to confront the forms of trafficking in persons not linked to prostitution. Additionally, the social and legal response to prostitution in many countries at that time was ambivalent.[21] Historically, there has been a reluctance to deal with prostitution within the legal discourse regarding forced labor, the slave trade, or enslavement. The willingness in the past to define most prostitution as consensual, the stigmatization of prostitutes, and the ambivalent attitude of male-directed law enforcement toward prostitution, meant that trafficking for purposes of prostitution was separated from *real* slavery, and tolerated in many countries. Early international instruments, such as the White Slavery Convention (1910), attempted to separate unacceptable forms of forced prostitution--especially of *white* women--and those forms of prostitution that past lawmakers considered normal, acceptable, or inevitable.[22] This separation based on the differential and discrimi-

." 1910 White Slavery Convention, *supra* note 15, art. 2.

[17] Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, 96 U.N.T.S. 271.

[18] *Id.* art. 1.

[19] *Id.* art. 17.

[20] *Id.* art. 17(2).

[21] *See*, *e.g.,* in the United States, DAVID J. LANGUM, CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT 213 (1994).

[22] *See generally* 1910 White Slavery Convention, *supra* note 15.

natory treatment of women and certain ethnic groups, created distinctions that obscured the basic crime of trafficking in persons. In the same period that organizations such as the League of Nations were concentrating on trafficking into prostitution, millions of people were being trafficked into other forms of work. In Central Africa alone, millions were forced into construction and the rubber trade. In the Americas, trafficked Chinese "coolie"[23] labor was exploited in agriculture, construction, and a large variety of other economic activities. Also, the ancient trans-Saharan slave trade across the Red Sea and Persian Gulf into Arabia remained active throughout the 19th and into the 20th century.

In the second half of the 20th century, slavery and trafficking in persons dramatically increased.[24] The population explosion following the Second World War raised the global population from 2 billion to more than 6 billion (and climbing), with most of that growth occurring in the developing world.[25] At the same time, far-reaching changes in national economies and political systems have enriched some parts of the world population while impoverishing others. When large numbers of impoverished people come under the influence of corrupt government, particularly corrupt local law enforcement, they cannot protect themselves against enslavement and trafficking. Other factors also push the poor into being trafficked. Civil wars, ethnic violence, and invasions create millions of refugees

[23] The term "coolie" applied to unskilled laborers from Asia, especially from India and China, as the use of these contract laborers in British and French colonies increased with the discontinuation of slavery. Indenture under this system usually lasted for a term of five years, in return for wages, certain benefits, and the cost of passage. These terms and conditions were enforceable by penal sanctions, yet upon expiration, coolie laborers were free to *reindenture* or seek other employment. Emigration of *Chinese coolies* began circa 1845. Conditions were extremely poor as *victims* were shipped mainly to Cuba and Peru, where they died by the thousands. *See* The Free Dictionary by Farlex at http://columbia.thefreedictionary.com/coolie (last visited May 6, 2006); *see also* P. C. CAMPBELL, CHINESE COOLIE EMIGRATION TO COUNTRIES WITHIN THE BRITISH EMPIRE (1923, repr. 1971).

[24] BALES, *supra* note 6, at 12.

[25] CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK, http://www.cia.gov./cia/publications/factbook/index.html (last visited Feb. 15, 2006).

whose precarious and weakened situations make them susceptible to being enslaved. For people in desperate poverty, a false promise of a better life often draws them into the control of criminals who then enslave and traffic them. At the same time, new technologies aid criminals who are involved in human trafficking. Better and more varied means of transport, increased methods of secure communications, the increased permeability of borders since the end of the Cold War, and the confusion and turmoil in the wake of civil unrest[26] have all helped fuel criminal involvement in trafficking. By the end of the 20th century it was clear that new and more encompassing international law was needed to address trafficking in persons.

A. The Transnational Organized Crime Convention of 2000 and Its Trafficking Protocol

To clarify the crime of trafficking in persons and to better meet the significant increase in trafficking globally, the United Nations put forward in 2000 the Convention on Transnational Organized Crime,[27] and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.[28] It was recognized that a transnational crime, such as trafficking in persons required a transnational solution, and that globalization and new technologies had created new opportunities for criminal organiza-

[26] Reports of trafficking in Indonesian orphan children following the 2004 Tsunami disaster have been widespread. "To stop child trafficking, Indonesian President Susilo Bambang Yudhoyono ordered that all minors under 16 not leave Aceh or the country. To enforce this, harbour and airport controls [were] strengthened in Medan (North Sumatra). However, many orphans ha[d] already been taken to Medan, Jakarta, and Yogyakarta." *See* Human Trafficking.org, New Information Regarding Protection of Children in Tsunami Disaster, http://www.humantrafficking.org/news/2005/protecting_tsunami_children.html (last visited May 6, 2006).

[27] United Nations Convention Against Transnational Organized Crime, U.N. GAOR, 55th Sess., Annex 1, Agenda Item 105, U.N. Doc. A/RES/55/25 (2000), *available at* http://www.uncjin.org/Documents/ Conventions/dcatoc/final_ documents_2/convention_eng.pdf [hereinafter Palermo Convention].

[28] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc. A/RES/55/383 (Dec. 12, 2000), *available at* http://www.uncjin.org/Documents/Conventions/dcatoc/ final_documents_2/convention_%20traff_eng.pdf [hereinafter Palermo Protocol].

tions, just as they had for legitimate businesses.[29] This concept of a transnational approach to an international problem is one that we will develop later with reference to the United States legal framework.

One of the key aims of the Convention and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children is to standardize terminology, laws, and practices. This agreed standardization aims to resolve many of the problems arising from the more than 300 laws and agreements that have been written concerning first the slave trade, then trafficking, and which have defined the crime of human trafficking in different ways.[30] For the first time the international community, in the Protocol, has an *agreed standard definition* of trafficking in persons.[31]

B. Defining Trafficking in Persons

The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children defines trafficking in persons in this way:

Trafficking in persons is:

- *the action of*: recruitment, transportation, transfer, harboring, or receipt of persons,
- *by means of*: the threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim,
- *for the purposes of*: exploitation, which includes exploiting the prostitution of others, sexual exploitation, forced labor, slavery or similar practices, and the removal of organs.[32]

[29] *Id.* at Preamble (discussing the need for a comprehensive international approach).

[30] *Id.*

[31] *Id.* art. 3(a).

[32] *Id.*

- *Consent of the victim is irrelevant* where illicit means are established, but criminal law defenses are preserved.[33]

The definition is broken down into three lists of elements: criminal acts, the means used to commit those acts, and the forms of exploitation.[34] This definition of trafficking is a key element of the Protocol, as it represents the first clear definition at the international level, and should greatly assist in the fight against human trafficking. Adopting the Convention will help ensure that legislative and administrative measures are consistent from country to country, and will help provide a common basis for investigation and prosecution.

While the new definition is crucial to an international response to trafficking in persons, it is important to remember that it is not an exhaustive definition, and that the Convention and Protocols are limited in scope. The Protocol is intended to "prevent and combat" trafficking in persons and facilitate international co-operation against such trafficking.[35] It applies to the "prevention, investigation and prosecution" of Protocol offenses, but only where these are "transnational in nature" and involve an "organized criminal group," as those terms are defined by the Convention.[36] The Convention, Protocol, and the definition of trafficking in persons they put forward are essential to the fight against this crime, but they are not and should not be the only tools available. All countries must attack this problem from a criminological standpoint and be willing to address trafficking in any and every form it takes. Some trafficking in persons will not cross national borders. At other times, it will be carried out by individual criminals who are not part of an organized criminal group. National laws, law enforcement strategies, and services to victims must respond to all forms of this crime, from small-scale and local trafficking to large-scale transnational trafficking. Further, we will argue that the Protocol, in its concentration on the trafficking of persons, fails to recognize the parallel trade of goods that are the

[33] *Id.* art. 3(b) (discussing consent of the victim as irrelevant); Palermo Convention, *supra* note 27, art. 11.6 (discussing criminal law defenses preserved).

[34] Palermo Protocol, *supra* note 28, art. 3(a).

[35] *Id.* art. 2.

[36] Palermo Convention, *supra* note 27, art. 2(a).

product of slave labor, and which also require interdiction and control, not least because the sale of such goods represents an important way in which traffickers and slaveholders exploit and profit from slavery.

Trafficking is normally only one of the many crimes committed against trafficked persons. Often, they are subjected to threats, confinement, physical and sexual violence, forced abortions, confiscation of passports, and unpaid forced labor. Furthermore, in a number of cases, corrupt state officials are involved in trafficking.[37] These acts constitute criminal offenses in most countries and the relevant statutes could be invoked to address certain elements of the full range of crimes. Guidelines to the Convention suggest that in order to ensure that the penalties applied reflect the gravity of the harm inflicted upon the trafficked person, countries should, in addition to prosecuting traffickers under the offense of trafficking in human beings, invoke other applicable provisions of criminal law.[38] Such offenses include, but are not limited to the following: slavery; slavery-like practices; involuntary servitude; forced or compulsory labor; debt bondage; forced marriage; forced abortion; forced pregnancy; torture; cruel, inhuman, or degrading treatment; rape; sexual assault; bodily injury; murder; kidnapping; unlawful confinement; labor exploitation; withholding of identity papers, and corruption.[39] To this list of offenses we would add importation and profiting from slave-made goods.

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[37] Human Rights Watch, Woman's Rights, *Trafficking*, http://www.hrw.org/women/trafficking.html (last visited Feb. 15, 2006).

[38] *See generally* U.N. OFFICE ON DRUGS AND CRIME, LEGISLATIVE GUIDE FOR THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME (2004), *available at* http://www.unodc.org/unodc/en/organized_crime_convention_legislative_guides.html.

[39] ANGELIKA KARTUSCH, LUDWIG BOLTZMANN INSTITUTE OF HUMAN RIGHTS VIENNA, REFERENCE GUIDE FOR ANTI-TRAFFICKING LEGISLATIVE REVIEW, WITH PARTICULAR EMPHASIS ON SOUTH EASTERN EUROPE 50 (2001), *available at* http://www.osce.org/documents/odihr/2001/09/2120_en.pdf.

IV. Trafficking Laws in the United States

In late 2000, Congress passed the Victims of Trafficking and Violence Protection Act (now commonly known as the Trafficking Victims Protection Act or TVPA).[40] This law is a bold departure from prior approaches to trafficking and forced labor in the United States. Recognizing that these crimes are global problems, the law established the Office to Monitor and Combat Trafficking in Persons within the U.S. State Department to oversee a wide range of efforts to end human trafficking abroad.[41] The TVPA:

- criminalizes procuring and subjecting another human being to peonage, involuntary sex trafficking, slavery, involuntary servitude, or forced labor;[42]
- provides social services and legal benefits to survivors of these crimes, including authorization to remain in the country;[43]
- provides funding to support protection programs for survivors in the United States as well as abroad;[44] and
- includes provisions to monitor and eliminate trafficking in countries outside the United States.[45]

Most importantly, the TVPA distinguishes smuggling--a victimless crime by which migrants cross borders without authorization --from trafficking--a practice by which individuals are induced by force, fraud, trickery, or coercion to enter the United States and then

[40] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended at scattered sections of 8, 20, 22, 27, 28, and 42 U.S.C.) [hereinafter VTVPA]. Division A of the VTVPA is further identified as the Trafficking Victims Protection Act of 2000 (codified as amended at 22 U.S.C. §§ 7101-7110 (2000), and which incorporates 18 U.S.C. §§ 1589-1594 (2000)) [hereinafter TVPA].

[41] TVPA, *supra* note 40, 22 U.S.C. § 7103. *See* U.S. Department of State, *Office to Monitor and Combat Trafficking in Persons*, www.state.gov/g/tip (last visited Mar. 15, 2006).

[42] *Id*. § 7109(a)(2) (§ 1590).

[43] *Id.* § 7105(b)(1)(A).

[44] *Id*. § 7110.

[45] *Id.* § 7103.

forced to work against their will. The law clearly specifies that those caught up in trafficking and forced labor should be recognized as *victims* of a crime rather than treated as illegal aliens who must be returned to their countries of origin.[46]

The TVPA increased penalties for involuntary servitude, peonage, and slavery by adding new crimes of human trafficking, sex trafficking, forced labor, and document servitude (withholding or destroying documents as part of the trafficking scheme).[47] In the law, trafficking is defined as providing or obtaining labor or services for peonage, slavery, involuntary servitude, or forced labor.[48] The TVPA contains a special section concerning the trafficking of adults into the sex industry through force, fraud, or coercion (in the case of victims under eighteen years old, there is no requirement to demonstrate force, fraud, or coercion).[49]

Importantly, and as was recommended by the Transnational Organized Crime Convention, the TVPA has not only strengthened laws so that traffickers can be held accountable for their crimes, but it has also provided specific measures to address the unique needs of trafficking victims.[50] To begin with, it offers temporary immigration

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[46] *See generally* TVPA, s*upra* note 40.

[47] *Id.* § 22 U.S.C. § 7109(a). The TVPA definition of forced labor is narrower than ILO Convention No. 29 as it sanctions compelled labor secured through specific types of threats, rather than labor secured through the more general "menace of penalty." ILO Convention No. 29 stipulates that the work of convicted prisoners should be carried out under the supervision of a public authority and that the prisoner is not to be hired to or placed at the service of private individuals, companies or associations. Like the ILO Convention No. 29, the Thirteenth Amendment to the United States Constitution also recognizes punishment for a crime as an exception to slavery and involuntary servitude. The United States permits prison labor in a variety of contexts and this practice has been the subject of prior ILO studies. *See* INTERNATIONAL LABOUR OFFICE GENEVA, REPORT OF THE DIRECTOR-GENERAL: STOPPING FORCED LABOUR, Report I (B), 89th Sess., at 60 (2001). *See also* U.S. CONST. amend XIII, § 1.

[48] *Id.* §§ 7101(b)(12), 7102(8)(B), 7109(a)(2) (§ 1590).

[49] *Id.* § 7109(a)(2) (§ 1591).

[50] *Id.* § 7105. The recommendation by the Palermo Convention is found in the Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocol Thereto. U.N. OFFICE ON DRUGS & CRIME, U.N. CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME & THE PROTOCOL THERETO, at 280, U.N. Sales No. E.0000000 (2004).

status to victims of a "severe form of trafficking," which includes minors who are trafficked for commercial sex and adults who are forced through deception to work against their will.[51] Under the TVPA, nonresidents who are willing to cooperate with law enforcement to prosecute their traffickers[52] may be eligible to remain in the United States[53] and to receive the same social service assistance offered to refugees,[54] even when victims have entered the U.S. illegally.[55] Family members of victims are also eligible for protection[56] and able to reunite with the survivor in the United States.[57] The Act has also enabled survivors to receive housing, psychological counseling, and other social service needs.[58]

The TVPA has also improved the ability of law enforcement to combat trafficking. It broadened the definition of "coercion" to include psychological manipulation.[59] In earlier U.S. laws against forced labor, psychological coercion was insufficient to prove force.[60] The TVPA has also criminalized the confiscation or destruction of identity or travel documents,[61] and enabled prosecutors to pursue not just the ringleaders, but all those involved in a trafficking operation.[62]

In many ways, the United States has been at the forefront of the fight against modern slavery and forced labor. Unlike international law, U.S. law recognizes that slavery is defined primarily by the power of an individual to control another for economic gain.[63]

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[51] *Id.* § 7105(b).
[52] *Id*. § 7105(b)(1)(E).
[53] *Id*. § 7105(c)(3).
[54] *Id*. § 7105(b)(1).
[55] *Id*. § 7105(e)(3).
[56] *Id*. § 7105(c)(1)(C).
[57] *Id*. § 7105(e)(1).
[58] *Id*. § 7105(b)(1).
[59] *Id.* § 7101(b)(13).
[60] United States v. Kozminski, 487 U.S. 931, 952 (1988).
[61] TVPA, *supra* note 40, 22 U.S.C. § 7109(a)(2) (§ 1592).
[62] *Id.*. § 7108(a).
[63] Nevertheless, there is a growing tendency in international law is to expand the definition of slavery. For example, the U.N. Working Group on Contemporary Forms of Slavery provided, in 1997, that "slavery" covers a range of contemporary human rights violations, including exploitation of child labor, debt bondage, and

While the definitions and philosophy of trafficking in the U.N. Trafficking Protocol and the U.S. TVPA are similar, the U.S. has adopted a more aggressive approach to human trafficking. For example, unlike the Trafficking Protocol, the TVPA contains provisions for international monitoring and sanctions.[64] Similarly, while the Protocol does not recommend allowing victims to seek relief from perpetrators, the TVPA establishes mandatory restitution from convicted traffickers.[65] A recent amendment to the TVPA allows survivors to sue their former captors for civil damages relating to violations of the statute.[66] However, while the TVPA has increased the penalties and combined existing forced labor laws, it does not alter the provisions of the Smoot-Hawley Tariff Act that prohibited the importation of slave-made goods, nor does it specifically criminalize profiting from the trade in slave-made goods.[67]

V. Jurisdictional Gaps in Anti-Slavery and Human Trafficking Laws

Both the U.N. Convention and the TVPA are significant steps forward in protecting victims of human trafficking. However, it is argued that both international and U.S. anti-trafficking laws suffer similar weaknesses when it comes to protections for victims across all geographical locations of enslavement. Although the U.N. Protocol and the U.S. TVPA are explicit in recognizing that trafficked individuals are *victims of a crime*, they concentrate on victims who are within the country of destination, and fail to address perpetrators benefiting from the exploitation of enslaved persons in other coun-

traffic in persons. *See* UNITED NATIONS OFFICE AT GENEVA [UNOG], Office of the High Commissioner for Human Rights, *Fact Sheet No. 14, Contemporary Forms of Slavery* (June 1991), *available at* http://www.unhchr.ch/html/menu6/2/fs14.htm.

[64] TVPA, *supra* note 40, 22 U.S.C. § 7107.

[65] *Id.* § 7109(a)(2) (§ 1593).

[66] Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (Dec. 19, 2003), at 18 U.S.C. § 1595, [hereinafter TVPRA].

[67] *Compare* Tariff Act of 1930, 19 U.S.C. § 1307 (2005), *with* TVPA, *supra* note 40, 22 U.S.C. 7109(a)(2) (§§ 1589-1594).

tries through the importation and sale of slave-produced goods and commodities.[68]

Accordingly, it is considered that both the U.N. Convention and the TVPA place their focus upon victims of trafficking discovered in the destination country, the country to which they have been brought by human traffickers.[69] In both the TVPA and specifically in the Model State Anti-Trafficking Criminal Statute, the definition of the crime of trafficking centers upon attempts to "recruit, entice, harbor, transport, provide, or obtain by any means, another person, intending or knowing that the person will be subjected to forced labor or services."[70] In essence, the concentration is both upon the means (recruitment, enticement, harboring, etc.) leading to enslavement, as well as upon enslavement itself.

In addition to questions pertaining to the focus of these laws, academic analyses have promoted the theory that the U.S. Constitution's Thirteenth Amendment must be reconstrued through the proverbial lens of modern international commerce.[71] With a growing number of U.S.-based multinational corporations purposefully engaging in overseas business practices deemed violative of the hallmarks of the Thirteenth Amendment, serious questions relating to the challenges brought upon by these acts must be answered.[72] As a result of this questioning, the proposition of Thirteenth Amendment reassessment has become well accepted, as the brief and intentionally broad text of the Amendment has given rise to numerous interpretations since its ratification in 1865.[73]

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[68] *See generally* TVPA, *supra* note 40; Palermo Convention, *supra* note 27.

[69] *See generally* Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973 (2002).

[70] *Compare* TVPA, *supra* note 34, 22 U.S.C. § 7102(8), *with* Model State Anti-Trafficking Criminal Statute, *available at* http://www.usdoj.gov/crt/crim/model_state_law.pdf.

[71] Wolff, *supra* note 69.

[72] *Id*.

[73] *Id.*

VI. The Thirteenth Amendment and Slavery in the Global Economy

The Thirteenth Amendment is "a grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of the United States government."[74] Through the Amendment's original direct affects of abolishing slavery, the Amendment's "contemporary relevance" extends well beyond this original purpose.[75] "Its two sections grant the federal government authority to prevent many private and state civil rights abuses. Congress can pass any laws preventing intrusions on liberty that it finds to be rationally related to slavery."[76]

Since its ratification, the interpretive application of the Amendment by the U.S. Supreme Court has been rare. However on those few occasions, the Court "has been careful to give its language a construction as liberal as its purpose is important."[77] In *Hodges v. U.S.*, the Court stated that the Amendment "[is] not a declaration in favor of a particular people. It reaches every race and every individual."[78] Preceding *Hodges*, however, the application of the Thirteenth Amendment and the accompanying Civil Rights Act of 1866 was less than admirable, as several southern states viewed these new means for equality as infringements upon state sovereignty.[79] In fact, the states of Kentucky and Louisiana respectively, passed state laws purposefully contravening the principles of the Thirteenth Amendment.[80]

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[74] Edwin Viera, Jr., *Of Syndicalism, Slavery and the Thirteenth Amendment: The Unconstitutionality of "Exclusive Representation" In Public Sector Employment*, 12 WAKE FOREST L. REV. 626 (1976).

[75] ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY 1 (2004).

[76] *Id*.

[77] Viera, *supra* note 74, at 627.

[78] Hodges v. U.S., 203 U.S. 1, 16-17 (1906).

[79] *See* TSESIS, *supra* note 75, at 62.

[80] *See generally* U.S. v. Rhodes, 1 Abb. U.S. Rep. 40 (1866). This case arose subsequent to the ratification of the Thirteenth Amendment and passage of the Civil Rights Act of 1866. "The Civil Rights Act granted the federal court jurisdiction to hear the matter because the laws of Kentucky disqualified [an African American victim of a crime] from testifying against . . . white defendants. In effect, the Kentucky law permitted whites to commit crimes against blacks with virtual impunity." *Id*. at 62-63.

After slavery was outlawed in America, various labor practices and trafficking operations[81] arose that were chillingly similar to slavery and bore the marks of indentured servitude. These practices included the Chinese "coolie" system,[82] peonage,[83] and legal variations of peonage. The Supreme Court, with regard to each of these practices, focused on the substance of enslavement rather than the legal form or context in which businesses in America were allowed to facilitate contraventions of the Amendment.[84] This narrow appli-

[81] In the *Slave Trade Cases* of 1864, the Supreme Court applied the Thirteenth Amendment to U.S. participation in the global slave trade beyond domestic borders. The *Slave Trade Cases* involved American-made ships being used to transport slaves. Despite the fact that slavery had been outlawed in the U.S., several American shipbuilders continued specializing in the construction of slave ships, known as *slavers*. Albeit U.S. citizens were not directly involved in the actual transport of slaves, slave trading, or the importation of slaves into the country, the Supreme Court ruled that they were profiting from and facilitating the slave trade through the construction of the *slavers*. According to the U.S. Supreme Court, the specialized construction of slave ships was a contributory component of the global slave trade illegally located in the U.S., and therefore the ships were subject to government seizure. These cases were handed down as companion decisions and include: The Slavers (Kate), 69 U.S. 350 (1864); The Slavers (Sarah), 69 U.S. 366 (1864); The Slavers (Weathergage), 69 U.S. 375 (1864); The Slavers (Reindeer), 69 U.S. 383 (1864) [hereinafter *Slave Trade Cases*].

[82] *See* "coolie," *supra* note 23.

[83] The term "peonage" is derived from the word "peon." Webster's Dictionary defines a "peon" as, [a] person held in servitude to a creditor until an indebtedness is satisfied." *See* Webster's On-Line Dictionary, http://www.websters-online-dictionary.org/definition/peonage (last visited May 7, 2006).

[84] Tobias Barrington Wolff, through his analysis of the evolution of the Court's interpretation, makes three propositions about the Thirteenth Amendment. The first proposition concerns the ownership of slaves. According to the Thirteenth Amendment, no United States citizen may own a slave, no matter where the slave is located." The Amendment outlaws not only slavery, but also the social relationship of master and slave, as no citizen may be a party to such a relationship. The second proposition forbids business that supports slavery. No U.S. company or entity may engage "directly in the business of supporting slavery." This also applies to U.S. entities operating outside the U.S." Slavery itself is an institution, and like all institutions, it requires support in order to function. Wolff's third proposition reads, "The Thirteenth Amendment is highly sensitive to the intentional creation of industrial markets for slave labor." The Amendment recognizes that there are some industries that are more likely to give rise to slave labor than others. Justifications for slave labor within these industries can perpetuate the practice. Wolff applies these three propositions derived from the Thirteenth Amendment to the

cation created difficulties in construing the "intent of the framers"[85] and fostered a tradition of questionable labor practices that remained long after the end of the American Civil War.[86]

A. The Slaughterhouse Cases and the Impetus of Distinction

In the well known *Slaughter-House Cases* (1873),[87] the Supreme Court rendered a decision that appeared to abridge the reach of the Thirteenth Amendment by limiting the federal "government's power to end the use of economic exploitation in order to deny people work opportunities."[88] In 1869, the Louisiana legislature granted a monopoly to a slaughterhouse operation in New Orleans for the stated purpose of protecting public health.[89] Despite these common-interest claims under the Louisiana law, the slaughterhouse at issue was accused of operating with indentured labor in direct violation of

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current global market. U.S. corporations are increasingly locating one or more components of their work in foreign jurisdictions. There, workers can be exploited and forced to work in conditions of slavery; Wolff, *supra* note 69, at 989, 992, 994, 995, 1008, 1021, 1032-35.

[85] Viera, *supra* note 74, at 627.

[86] The American Civil War (1861-1865) began when eleven Southern States (the Confederacy) seceded from the United States (the Union) following heated disagreements pertaining to federal authority to outlaw slavery and the scope of State's rights to facilitate and promote the importation of African slaves for labor on Southern plantations. The War resulted in a Union victory, as well as approximately 967,000 casualties and approximately 560,000 deaths. The end of the War was followed by a period of Reconstruction, during which the Thirteenth Amendment to the U.S. Constitution was ratified. *See* American Civil War Database, http://www.civilwardata.com (last visited May 7, 2006).

[87] Slaughter-House Cases, 83 U.S. 36 (1873). A surplus of cattle from Texas prompted the Louisiana legislature to draft legislation providing a monopoly to the Crescent City Livestock Landing and Slaughterhouse Company in New Orleans. The new "law required that the company allow any person to slaughter animals in the slaughterhouses for a fixed-fee." In response to the new legislation, local butchers filed suit challenging the granting of the monopoly. One of the primary charges launched by the butchers was the law's creation of involuntary servitude, as the "fixed-fee" provision provided an environment for improper labor practices. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 383-85 (2001).

[88] *See* TSESIS *supra* note 75, at 66.

[89] CHEMERINSKY, *supra* note 87, at 383-85 (2001).

federal law and the Constitution.[90]

Soon after the law was passed, white butchers filed suit against the State, seeking relief under both the Thirteenth and Fourteenth Amendments, claiming the monopoly prevented the petitioners from engaging in a lawful operation, while subjecting those working in the slaughterhouse to indentured servitude.[91] The U.S. Supreme Court, with Justice Samuel F. Miller writing for the majority, held, against the petitioning butchers, that the Thirteenth Amendment argument was unpersuasive, as it only applied to slave-like relations and was "inapplicable in cases where individuals sought to assert an interest in pursuing their occupations."[92] Justice Miller also rebuffed the Fourteenth Amendment argument, stating that the narrow analysis must reflect the original purpose of the framers insofar as the right to due process does not necessarily protect a right to practice a person's trade or profession.[93] In what appeared to be the Court's placement of substantive limitations on Congress's power, a clear distinction was made by the Court between U.S. and state citizenship, as it was held that the amendments did not intend to deprive the state of legal jurisdiction over the civil rights of its citizens.[94]

Within a purely historical context, the *Slaughterhouse Cases* have been used to illustrate the early development of a standard of review under the Fourteenth Amendment, rather than its brethren, the Thirteenth. However, as the *Civil Rights Cases* would later reflect, the *Slaughterhouse Cases* provided the impetus for an additional distinction between government and private actions, which would eventually play a significant role in the succeeding application of the Thirteenth Amendment and modern commercial activity.[95]

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[90] *Id.* at 383-84.

[91] *See* TSESIS, *supra* note 75, at 66.

[92] *Id*.

[93] *See* CHEMERINSKY, *supra* note 87, at 383-84.

[94] *See generally* TSESIS, *supra* note 75, at 66; CHEMERINSKY, *supra* note 87, at 382-91.

[95] *See generally* CHEMERINSKY, *supra* note 87, at 186-91.

B. The Civil Rights Cases and Congressional Authority

The Civil Rights Cases (1883)[96] represented another stage in the Supreme Court's evolutionary development of Thirteenth Amendment interpretation and application. Isolating for review Section 2 of the Thirteenth Amendment, and Section 5 of the Fourteenth, the Court held that Congress "may regulate only state and local government actions, not private conduct."[97] Following the *Slaughter-house Cases*, the Court's ruling symbolized the ongoing movement by Congress away from abolitionist ideals and reflected the lack of "resolve needed to secure citizens against arbitrary intrusions into their liberties."[98]

The case centered on the Civil Rights Act of 1875 as challenges arose pertaining to its constitutionality.[99] The Act provided that all persons were:

> entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable to citizens of every race and color, regardless of any previous condition of servitude.[100]

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[96] *The Civil Rights Cases*, 109 U.S. 3 (1883).

[97] *See* CHEMERINSKY, *supra* note 87, at 34.

[98] *See* TSESIS, *supra* note 75, at 67.

[99] *See* CHEMERINSKY, *supra* note 87, at 187.

[100] The Civil Rights Act of 1875 was an attempt to solidify Reconstruction efforts following the American Civil War, as the Republican-controlled Congress passed legislation protecting the freedom of access to public facilities and equal employment regardless of race. Two primary clauses of the Act included the following language:

> Be it enacted, That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

It was clearly the private application of the Act and its broad prohibition of private discrimination by hoteliers, restaurants, transportation providers, and other public services that gave rise to the challenges.[101]

"By an 8-1 decision, the Court held that the Act was unconstitutional and adopted a restrictive view as to the power of Congress to use these provisions to regulate private behavior," despite the public nature of the services involved and the direct application to social and commercial equality.[102] The Court openly admitted that Congress had the authority to prohibit people from being or owning slaves, and that such authority extended well into private conduct. It was discrimination, however, that the Court held was not within the powers of the legislature, and that Congress could "abolish 'all badges and incidents of slavery' but it could not use its power under the Thirteenth Amendment to 'adjust what may be called the social rights of men and races in the community.'"[103]

C. Modern Application of the Commerce Clause and Thirteenth Amendment

"By the 1960s, civil rights attorneys began resorting to the Commerce Clause in litigation" in order to circumvent the decade-

> SEC. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, . . . and shall also, for every such offense, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year . . . . *See* 18 U.S. Statutes at Large 335 et seq.

[101] *See* CHEMERINSKY, *supra* note 87, at 187.

[102] *Id.* at 187.

[103] *Id*.

old "state action restrictions" outlined in *The Civil Rights Cases*.[104] In 1964, the seemingly indestructible barrier protecting "state action" was breached in the watershed case *Heart of Atlanta Motel, Inc. v. U.S.*[105] In applying a test based upon the Commerce Clause[106] of the Constitution which grants Congress power to regulate "commerce between states," the Court upheld the Civil Rights Act of 1964.[107]

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[104] *See* TSESIS, *supra* note 75, at 131.

[105] Heart of Atlanta, Inc. v. U.S., 379 U.S. 241 (1964). An overview of the case explains:

> The motel, which discriminated in the renting of its rooms on the basis of race, sought review of a judgment by attacking the constitutionality of Title II of the Civil Rights Act of 1964. The motel contended that in enacting the statute Congress exceeded its power to regulate commerce under the Commerce Clause, U.S. Const. art I, § 8, cl. 3, and violated the Fifth and Thirteenth Amendments. Affirming the judgment, the Court held that the power of Congress over interstate commerce extended to those intrastate activities that so affected interstate commerce or the exercise of Congressional power over it to make regulation of them an appropriate means to exercise its power over interstate commerce. Further, the power of Congress to promote interstate commerce also included the power to regulate the local incidents thereof, including local activities in both the state of origin and destination, which might have a substantial and harmful effect upon that commerce. Accordingly, Congress was within its power to prohibit racial discrimination by motels serving travelers, however local their operations appeared.

See Heart of Atlanta, *supra* at Lexis Nexis Research System, *available at* http://web.lexis.com/lawschoolreg/researchlogin04.asp.

[106] Article 1, § 8 of the U.S. Constitution partially states, "The Congress shall have the power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." This provision has provided the means for a broad range of federal legislation, as well the authority for numerous judicial interpretations. Over time, the Commerce Clause has been applied to serve a variety of purposes, such as an instrument for legal support of civil rights legislation, criminal statutes, securities laws, and environmental protection. Fundamental questions related to defining the power of Congress over interstate commerce, instrumentalities of commerce, and the residual affects of legislation on commerce have all been challenged, addressed, and re-challenged at various times in American history.

[107] *See* CHEMERINSKY, *supra* note 87, at 127.

Similar to its 1875 predecessor, the 1964 Act "prohibited private employment discrimination based on race, gender, or religion, and . . . discrimination by places of public accommodations such as hotels and restaurants."[108]

When reviewing the Court's application of the Commerce Clause within the framework of racial discrimination and private business practices, one may think the next logical step is to consider the Commerce Clause as an instrument for preventing U.S.-based, international corporations from benefiting from the overseas slave trade. In *Heart of Atlanta*, however, the defenders of the discriminatory practices at issue were, in fact, the parties invoking the Thirteenth Amendment.[109]

> The appellant contends that Congress in passing this Act exceeded its power to regulate commerce under Art. I, § 8, cl. 3, of the Constitution of the United States; that the Act violates the Fifth Amendment because appellant is deprived of the right to choose its customers and operate its business as it wishes, resulting in a taking of its liberty and property without due process of law and a taking of its property without just compensation; and, finally, that by requiring appellant to rent available rooms to Negroes against its will, Congress is subjecting it to involuntary servitude in contravention of the Thirteenth Amendment.

In the *Civil Rights Cases*, the Supreme Court held that Congress possessed the authority to "abolish all badges and incidents of slavery."[110] In *Heart of Atlanta*, the Court stated that "the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both States of origin and destination, which might have a substantial and harmful effect upon that commerce."[111] Despite the fact that legal scholars contend that the Thirteenth Amendment is the instrument of choice when seeking to protect civil rights, the Commerce Clause

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[108] *Id*.
[109] *See* Heart of Atlanta, *supra* note 105, at 243-44.
[110] *See* CHEMERINSKY, *supra* note 87, at 187.
[111] *Id*. at 131.

should be considered equally relevant in providing the *jurisdictional hook* necessary to bring an end to unethical, if not deliberately illegal actions of U.S. corporations overseas.[112]

Since its ratification, the Supreme Court has applied the Thirteenth Amendment as a tool to declare newer forms of slavery unconstitutional.[113] It is argued that the practices of any entity, including corporations, violating the prohibitions of the Amendment are patently unlawful.[114] The Thirteenth Amendment prohibits slavery within the U.S., prohibits citizens from being either masters or slaves, and prohibits the support of slavery anywhere in the world.[115] Therefore, it is high time for the courts to apply the Thirteenth Amendment to corporations and other business entities operating on the periphery of the law and seal the jurisdictional gaps that exist in today's global economy.[116]

VII. Prohibiting the Profits and Products of Slavery

The rulings of the Supreme Court concerning potential involvement in or profiting from slavery are clear. In the 1864 *Slave Trade Cases*, it was held that it was illegal for an American entity to profit from slavery, no matter where that slavery occurred.[117] The physical location of the enslavement was irrelevant to the culpability engendered in taking part in, or profiting from the crime of slavery.[118] There is a strong historical logic to this. While we now live in what is widely accepted to be a global economy, this has not always been the case. If there was an exception to the localized economies of the past, it was the slave trade. An argument could be made that the slave trade represented the first truly globalized market in human history. The slave trade of the past and human trafficking today are crimes that, by their nature, transcend borders.[119] The Court recog-

[112] *See* TSESIS, *supra* note 75, at 136.

[113] *See generally Pollock*, 322 U.S. 4 (1944); Slaughter-House Cases, 83 U.S. 36 (1873).

[114] *See generally* Wolff, *supra* note 69.

[115] *Id*. at 1039.

[116] *Id*. at 1050.

[117] Slave Trade Cases, *supra* note 81.

[118] *See id.*

[119] Note, for example, the origin of the word "slave." Extensive slave-raiding

nized the fundamentally international nature of the crime and moreover, applied an aggressive evidentiary presumption in the ruling that considered circumstantial evidence. Note the following excerpt from the Court's ruling:

> It does not seem unreasonable, since it is the paramount interest of humanity that the traffic in men be, at all events, arrested, to require of the trader, who engages in a commerce, which, *although not unlawful*, is necessarily suspicious from its theatre and circumstances, that he keep his operations so clear and so distinct in their character, as to repel the imputation of prohibited purpose (emphasis added).[120]

In their finding of specific criminal activity and allowing for the forfeiture of the cargo ship *Weathergage*, the Court explained, "[u]ndoubtedly, it is the preparation of the vessel, and the purpose for which she is to be employed, that constitute the offense, and draw after it the penalty of forfeiture."[121] In other words, there was no direct evidence that the ship was used to carry slaves, only circumstantial indications that this was the case, yet the Court ordered the confiscation and forfeiture of the ship on the basis that it was likely to have been used in slave transport.

Two key points emerge from this ruling that apply to the present day. The first point rests on the remarkable fact that this ruling was handed down despite the reality of the federal government not having enforced the ban on slave trading for decades, and that carrying this ruling into enforcement would have a large and negative economic impact on a number of otherwise legitimate enterprises. In the present day, a similar situation exists. There has been little or no enforcement of any prohibition on taking part in or profiting from slavery by American corporate entities for some decades, and were

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and taking in areas of what is now Eastern Europe by groups in what is now Germany fed hundreds of thousands of victims into the slave markets of ancient Rome. So extensive was this trans-European trade that the word "slav" meaning the Slavic people captured into slavery, became synonymous with, and then acquired wholly, the meaning "slave."

[120] The Slavers (Kate), 69 U.S. at 364 (1864).

[121] The Slavers (Weathergage), 69 U.S. at 380 (1864).

the federal or state governments to do so, there would be the potential for a large and negative economic impact on a number of otherwise legitimate enterprises.

The second point rests on the nature of the enterprise carried out by, in the Court's words, "the trader, who engages in a commerce, which, although not unlawful, is necessarily suspicious from its theatre and circumstances."[122] In the present day, a number of "traders" could be identified as those who are engaged in legitimate commerce, but whose business is "necessarily suspicious."[123] The most obvious of such "traders" are those engaged in businesses that might directly use enslaved workers within the United States--agricultural labor contractors, operators of exotic dance clubs, escort services, and restaurants--all enterprises where enslaved workers have been found. Such instances are already covered and prosecuted under existing forced labor law.[124] The particular import of this ruling in the present day is the identification of a second tier of culpability, those profiting from slavery that occurs outside the national borders. On one hand, this points to transportation as it did in the original *Slave Trade Cases*--ships, aircraft, and vehicles used to carry victims of human trafficking. On the other hand, it also points to enterprises that are trading in the goods produced by slaves. What is the difference between a ship that has been the mode of transport for a trafficked person (thus providing a service to the slaveholder) and a shop that sells and derives profits from goods made by slaves (thus providing another supportive service to the slaveholder)? Without the transport service, the trafficking in persons would be likely to end. Without the ability to sell and profit from slave-made goods, the exploitation of slaves, in at least that form of production, would be unprofitable and likely to end. The Court considered these supporting institutions to be "an inextricable and culpable component of the larger practice."[125]

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[122] The Slavers (Kate), 69 U.S. at 364 (1864).

[123] *Id.*

[124] TVPA, *supra* note 40, 22 U.S.C. 7109(a)(2) (§§ 1589-1594). *See*, *e.g.,* United States v. Bibbs, 564 F.2d 1165 (5th Cir. 1977) (involuntary servitude in agriculture); United States v. Bradley, 390 F.3d 145 (1st Cir. 2004) (involuntary servitude in tree removal service).

[125] Wolff, *supra* note 69, at 1020.

In the present economy, a number of goods and products are tainted with known slave labor. Sugar, cocoa, coffee, cotton, timber, beef, tantalum (used in the production of cell phones and other electronic devices), and diamonds are all processed raw materials known to be produced with slave labor.[126] Hand-woven carpets, certain types of cigarettes, fireworks, shoes and clothing, and a number of other consumer products are also known to be made using slave labor.[127] One might argue that the Thirteenth Amendment is weak "where the burden of the claim is that a U.S. entity is knowingly making use of the fruits of a slave system that it had no role in creating,"[128] and go on to suggest that pushing the Thirteenth Amendment to cover all trade might lead to "a general embargo upon the exclusive trading arrangements with nations that exhibit serious problems with forced labor."[129]

We would argue however, that recognizing the essential role played in supporting slavery through trading in its products, and establishing law to address this recognition, need not go so far as a general embargo to achieve ends that do fit within the mandate of the Thirteenth Amendment. The separation of powers that places the regulation of foreign trade in the legislative and executive branches need not be violated to address the presence of slave-made products *within* the United States. In particular, we point to the right of a state to determine which articles or substances are to be legally defined as *prohibited articles* or *controlled substances*. Both federal and state governments enact laws to prohibit the possession or trade in such substances. It is also common, in an interesting parallel to the *Slave Trade Cases* of 1864, that ships and other means of transportation, as well as any other tools or goods, if they are used in an enterprise dealing in or conveying the controlled substance, are subject to forfeiture.[130]

If the trade in slave-made goods is supportive of a system of slavery, allowing it to function, and if U.S. entities are knowingly

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[126] BALES, *supra* note 6, at 9.
[127] *Id.*
[128] Wolff, *supra* note 69, at 1034.
[129] *Id.* at 1035.
[130] The Slavers (Reindeer), 69 U.S. 383 (1866).

profiting from this trade, then we would argue that the *Slave Trade Cases* apply. Furthermore, it was the aim of the Court that an aggressive evidentiary presumption applies in such cases, and so might also be applied to enterprises that trade in slave-made goods.[131] Such leap was substantial.[132] For the shipbuilders of the *Slave Trade Cases*, the Court found that circumstantial evidence showed that it was likely that their business was supportive of a system of slavery.[133] Compare that to the modern business of importing and selling hand-made carpets.

Today, there are few aspects of slave-based production so clearly and repeatedly documented as the use of enslaved children in the production of hand-woven carpets in India, Nepal, and Pakistan.[134] Child welfare organizations estimate that at least 500,000 children in South Asia, often working as slave laborers, produce many of the hand-knotted carpets found in American and European homes and businesses.[135] Studies estimate that children working under inhumane conditions make two-thirds of all hand-woven carpets, a large proportion of which flow to U.S. markets.[136] Helpfully, a method exists for determining that a carpet was not made with slave labor. This method, known as the RugMark system, is an inspection and labeling procedure that certifies that the rug came from a loom free of exploitative labor practices.[137] While it is normally impossible to prove that any particular rug without the RugMark label has been made by slave labor, given the large number of enslaved workers, there is strong circumstantial evidence that this is the case. By

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[131] *See id.* at 401 (holding that experience shows that positive proof in the case of a vessel equipped for slave voyage is not needed when the law allows a resort to circumstances as the means to ascertaining the truth).

[132] Wolff, *supra* note 69, at 1020.

[133] The Slavers (Reindeer), 69 U.S. at 401.

[134] For an example of an organization that documents such activities, see RUGMARK Foundation, http://www.rugmark.org/ (last visited Feb. 16, 2006).

[135] Walden Asset Management, *Child Labor: Not a Minor Issue* (2001), http://www.waldenassetmgmt.com/social/action/library/workplace.html (follow "Child Labor: Not a Minor Issue, Summer 2001" hyperlink) (last visited Feb. 19, 2006).

[136] *Id*.

[137] RUGMARK Foundation, http://www.rugmark.org/about.htm (last visited Feb. 23, 2006).

the same token, few retailers, including large department stores selling hand-woven carpets could today be ignorant of the strong possibility that they are dealing, at least partially, in slave-made goods since RugMark and other anti-slavery organizations have been extremely active in publicizing the facts of child slavery in carpet weaving.[138]

Given these facts, the chain of evidence is strong, albeit circumstantial, that: (1) hand-made carpets from South Asia are easily identified as such; (2) a significant proportion of these carpets are made by slaves; (3) U.S. wholesalers often buy directly from large family businesses in South Asia that are known to control and exploit these slaves; (4) U.S. retailers buy these rugs from the wholesalers with the knowledge that a significant proportion may be made by slaves; (5) these slave-made carpets (though they are not advertised as such) are then sold in the U.S. in shops that are regulated by state and federal laws; (6) these enterprises work to create and exploit a market outlet for slave-made carpets which, in turn, is supportive of the system of slavery and allows it to function. Not immediately relevant to this chain of evidence, but important in a commercial sense, is the fact that an alternative exists in the form of slave-free carpets through the Rugmark system. We argue that the Thirteenth Amendment would support state laws, for example, that prohibit slave-made goods from being sold in enterprises operating in that state, and that such evidence as just related would be acceptable in order to require the forfeiture of such tainted goods. It would not be unreasonable to treat such slave-made goods in the same manner as a *controlled substance* and to allow the confiscation and forfeiture of vehicles, shops, and other means of transporting and distributing the prohibited items.

Let us return for a moment to the Supreme Court's original *Slave Trade* ruling that would require a trader or business to "keep his operations so clear and so distinct in their character, as to repel the imputation of prohibited purpose."[139] If the Court ruled that this applied to enterprises supplying tools to the slave trade, it is difficult

[138] RUGMARK Foundation, http://www.rugmark.org/news_facts.htm (last visited Feb. 23, 2006).

[139] The Slavers (Kate), 69 U.S. at 364 (1864).

to imagine that it would not apply to enterprises knowingly acting as an outlet for slave-made goods into the American economy. To maintain a successful slave system requires both the tools needed to control and exploit slaves and a means of marketing and profiting from their labor. Both supplier and outlet are essential to the slave system by feeding it and enabling it to operate.[140] The aim of the Court was to isolate those practices that support slavery, and to establish remedies to ensure that slavery be ended.[141] With such a framework, founded on the Thirteenth Amendment and supported by the judgments of the U.S. Supreme Court, we believe that states could safely prohibit the sale of any slave-made goods within their borders. Furthermore, we believe that a state making such a prohibition would not be required to demonstrate strict evidence that a specific slave at a specific time and place produced a specific item offered for sale.

That said, such legislation would best serve the public if it were first a basis for education and regulation, and only secondly a basis for prosecution. For example, when cocaine was first made illegal and classified as a controlled substance, time was allowed for pharmacies and others to legally dispose of their stocks of the drug. For slave-made goods currently on the market and in the inventory of businesses, there could be a period to dispose of such stocks and to discover either a slave-free version of the same product, or an alternative. Institution of such law would also motivate businesses to investigate their product chain and consider how they might keep slave-made goods out of their shops or services. A model of businesses taking responsibility for their product chain currently exists in the U.S. and European chocolate industry, which is establishing a system for the inspection and verification of imported cocoa.[142] Additionally, a mechanism for the control of goods produced using exploitative labor exists. Known as the restraint of "hot goods," this

[140] Wolff, *supra* note 69, at 1020.

[141] *See Slave Trade Cases*, *supra* note 81.

[142] Protocol for the Growing and Processing of Cocoa Beans and their Derivative Products in a Manner that Complies with ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, Sept. 19, 2001, *available at* http://harkin.senate.gov/specials/chocolate-protocol.pdf.

mechanism could easily be extended to slave-made goods without any distortion of the underlying legal basis.

VIII. The Parallel of "Hot Goods"

There exists within federal law a clear parallel to the prohibition and control of slave-made goods previously suggested. This is the provision in the Fair Labor Standards Act ("FLSA")[143] that allows the holding and forfeiture of goods made in the United States by child or exploited adult labor.[144] As explained by James B. Leonard in a manual on the use of "Hot Goods" provisions:

> Under the Fair Labor Standards Act (29 U.S.C. §§ 201-219)("FLSA"), the U.S. Department of Labor ("USDOL") has the authority to institute litigation in federal district court to enjoin the transportation, shipment, delivery, or sale across state lines of goods that have been produced by any employee who has not been paid the minimum wage rate or overtime compensation required by the FLSA, as well as goods that have been produced in locations where any children have been employed in violation of the FLSA's child labor provisions. Such goods are considered to be tainted or "hot goods" as a result of the wage and/or child labor violations, and hence to endanger and pollute the channels of interstate commerce, much like hot cargo or contraband.[145]

It is important to note that this provision covers the goods after they have passed from the location of the labor violation on to most subsequent owners or possessors of the goods, whether they have knowledge of the labor violation related to the goods or not. The term "goods," according to Section 3(i):

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[143] Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (2005).

[144] *Id.* § 212(a).

[145] JAMES B. LEONARD, FARMWORKER JUSTICE FUND, INC., HOT GOODS TEMPORARY RESTRAINING ORDERS UNDER THE FAIR LABOR STANDARDS ACT IN THE AGRICULTURAL SECTOR OF THE ECONOMY, A MANUAL FOR LEGAL ASSISTANCE PROGRAMS (2000).

> means goods (including ships and maritime equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.[146]

This broad definition then includes not only the raw material or commodity produced with labor violating legal standards, but also the wrapping, containers, or any other packaging or shipping materials. Moreover, the inclusion of the phrase "any part or ingredient thereof" means that a pie made with apples, some of which had been harvested using illegal child labor, would be liable for seizure at any point along the chain of distribution. It does not matter that the pie would include many other ingredients, in addition to apples. However, once the pie has arrived at the home of the family that will eat it, then it has reached "the actual physical possession of the ultimate consumer" and is no longer liable to a "hot goods" seizure. Here the parallel to slave-produced commodities is important. Were the same rule applied for the gross labor violation of enslavement occurring overseas as is currently applied to goods produced within the U.S., then chocolate made with a portion of slave-made cocoa, shirts produced with a portion of slave-made cotton, or cell phones assembled with a portion of slave-mined tantalum would be subject to seizure.

It is also worth noting how the FLSA defines goods as being tainted with illegal labor practices. For a person to produce goods that are so tainted:

> 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or

[146] Fair Labor Standards Act, *supra* note 113, § 203(i).

> in any closely related process or occupation directly essential to the production thereof, in any State.[147]

This definition has two parts and together they constitute a very broad catchment area. The first part concerns the "producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods."[148] This would include any part of the work necessary to place goods into the stream of processing or of commerce. The second part concerns the "closely related process or occupation directly essential to the production."[149] This casts the net even wider to the production facilities that house the processing of the tainted goods, even if parts of that facility have no contact with the goods themselves. Again, if the same rules were applied to goods made by enslaved labor overseas, then it would be necessary to identify slave use in only one part of a production process, and it would extend to goods processed in any facility that had exploited enslaved labor, whether those goods were touched by slaves or not. We draw attention to the FLSA and the provision for the seizure of "hot goods" because it represents a clear precedent for the inclusion of similar provisions in laws written for individual states concerning trafficking, slavery, and slave-made goods.[150]

IX. The Construction of State Laws on Slavery and Trafficking

After the passage of the TVPA in 2000 and its initial implementation, it became clear that federal law enforcement alone could not stay abreast of the number of potential trafficking cases in the U.S. This was especially true after the re-deployment of large numbers of law enforcement personnel to counter-terrorism activities in the aftermath of the attacks occurring on September 11, 2001. In time, one of the responses to this need for expanded law enforcement participation was the encouragement of the enactment of anti-trafficking laws at the state level. In 2004, the Department of Justice made available a model state law on human trafficking--including provisions concerned with forced labor--that could be adapted to ex-

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[147] *Id*. § 203(j).
[148] *Id.*
[149] *Id.*
[150] *Id.*

isting state codes.[151] This model law set out the criminal provisions as follows:

> (1) INVOLUNTARY SERVITUDE. Whoever knowingly subjects, or attempts to subject, another person to forced labor or services shall be punished by imprisonment as follows, subject to Section (4), infra:
>
> (A) by causing or threatening to cause physical harm to any person, not more than 20 years;
>
> (B) by physically restraining or threatening to physically restrain another person, not more than 15 years;
>
> (C) by abusing or threatening to abuse the law or legal process, not more than 10 years;
>
> (D) by knowingly destroying, concealing, removing, confiscating or possessing any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person, not more than 5 years;
>
> (E) by using blackmail, or using or threatening to cause financial harm to [using financial control over] any person, not more than 3 years.
>
> (2) SEXUAL SERVITUDE OF A MINOR. Whoever knowingly recruits, entices, harbors, transports, provides, or obtains by any means, or attempts to recruit, entice, harbor, provide, or obtain by any means, another person under 18 years of age, knowing that the minor will engage in commercial sexual activity, sexually-explicit performance, or the production of pornography (see [relevant state statute] (defining pornography)), or causes or attempts to cause a minor to engage in commercial sexual activity, sexually-explicit performance, or the production of pornography, shall be punished by imprisonment as follows, subject to the provi-

[151] Model State Anti-Trafficking Criminal Statute, *supra* note 70.

sions of Section (4), infra:

(A) in cases involving a minor between the ages of [age of consent] and 18 years, not involving overt force or threat, for not more than 15 years;

(B) in cases in which the minor had not attained the age of [age of consent] years, not involving overt force or threat, for not more than 20 years;

(C) in cases in which the violation involved overt force or threat, for not more than 25 years.

(3) TRAFFICKING OF PERSONS FOR FORCED LABOR OR SERVICES. Whoever knowingly (a) recruits, entices, harbors, transports, provides, or obtains by any means, or attempts to recruit, entice, harbor, transport, provide, or obtain by any means, another person, intending or knowing that the person will be subjected to forced labor or services; or (b) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of Sections XXX.02(1) or (2) of this Title, shall, subject to the provisions of Section (4) infra, be imprisoned for not more than 15 years.[152]

These criminal provisions define what constitutes forced labor and trafficking, an important step since some law enforcement personnel have not been clear about how to classify certain acts or situations involving trafficked people. Note as well that this model law titles its first criminal provision as "involuntary servitude."[153] There is an interesting lack of the word "slavery," despite the fact that the Thirteenth Amendment of the Constitution that enables this law reads: "Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to

[152] *Id.* sec. XXX.02(1)-(3).
[153] *Id.* sec. XXX.02(1).

their jurisdiction."[154] Such an omission is curious since the unpaid and unfree work clearly prohibited is often and reasonably considered to be slavery.

Whatever the reason for the omission of the word "slavery" from the model legislation, it is our assertion that, based on the academic work cited, the FLSA, and the provisions against the importation of slave-made goods in the Smoot-Hawley Tariff, that the model legislation covers only a fraction of both the potential crimes linked to slavery and the corpus of constitutionally based law of slavery in the United States. Since human trafficking is just a sub-set of the larger phenomenon of slavery, it is hard to imagine why only one type of slavery should be singled out for legislation by the states. To that end we make the following recommendations:

1. That state laws on human trafficking include prohibitions on all forms and products of slavery as noted in the precedents set by the Supreme Court.
2. That these state laws include a prohibition on any corporate entities carrying out commerce that supports slavery in any country and enables it to function by providing a market for its products.
3. That state laws classify slave-made goods as controlled substances that may be interdicted and seized.
4. That the evidentiary expectations specified in such state laws follow the U.S. Supreme Court, and allow the circumstantial indication of likely slave input to products offered within a state's jurisdiction to be sufficient for their control.
5. That the procedures set out in the FLSA for the seizure of "hot goods" be extended through state laws to goods suspected of being made with slave labor.

We strongly advocate the incorporation of these provisions into state and federal law. Slavery is not a crime of the United States alone, nor a crime that need only be policed when U.S. citizens are affected.

[154] U.S. CONST. amend. XIII, § 1.

The prohibitions against slavery are universal, transcend commercial interests, and reflect the international consensus that such violations of human dignity must be rooted out. To bring this crime to an end requires strict interdiction of not only the trade in human beings, but the products of enslavement as well.