

FROM SECOND CLASS TO CERTIFIED CLASS: USING CLASS-ACTION LAWSUITS TO COMBAT HUMAN TRAFFICKING

INTRODUCTION

More than fifty years ago, Martin Luther King, Jr. penned the now famous words: “[i]njustice anywhere is a threat to justice everywhere.”¹ Although the profiles of slave owners and slaves have changed, the fight against injustice in the form of slavery continues even today. Slave owners are now called traffickers, and slaves are now called trafficked persons.² Human trafficking is a modern word for an ancient woe;³ human trafficking is nothing less than modern day slavery.⁴

The U.S. Department of State estimates that each year approximately 800,000 to 900,000 people are trafficked worldwide and about 18,000 to 20,000 people are trafficked into the United States.⁵ Other estimates place the number of trafficked victims closer to 4,000,000.⁶ The United Nations predicts that human trafficking will soon become the world’s leading illegal industry,⁷ and the U.S. Department of State estimates that the annual revenues from human trafficking are between \$7 billion and \$10 billion.⁸ As a result of worldwide human trafficking, there are between 20,000,000 and 30,000,000 people living as slaves in the

¹ Letter from Martin Luther King, Jr. to Fellow Clergymen 2 (Apr. 16, 1963), http://okra.stanford.edu/transcription/document_images/undecided/630416-019.pdf.

² Karen E. Bravo, *Follow the Money? Does the International Fight Against Money Laundering Provide a Model for International Anti-Human Trafficking Efforts?*, 6 U. ST. THOMAS L.J. 138, 143 (2008).

³ Kathleen A. McKee, *Modern-Day Slavery: Framing Effective Solutions for an Age-Old Problem*, 55 CATH. U. L. REV. 141, 144–45 (2005).

⁴ Bravo, *supra* note 2, at 143; *see infra* Part I.A.

⁵ U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 7 (2003), <http://www.state.gov/documents/organization/21555>.

⁶ U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 2 (2002), <http://www.state.gov/documents/organization/10815.pdf>.

⁷ Kathleen Kim & Kusia Hreshchysyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN’S L.J. 1, 8 (2004).

⁸ U.S. DEP’T OF STATE, *supra* note 5, at 9.

twenty-first century.⁹ No other generation has ever been as enslaved as ours.¹⁰

With more human beings enslaved today than ever before, this generation has a moral duty to respond to the cries of injustice heard across the country and around the world. For the past decade, the United States has focused on prosecuting traffickers, preventing trafficking, and protecting trafficked persons.¹¹ While these efforts constitute a necessary first step, the United States' response must create a more effective deterrent if it wants to wage a successful war against human trafficking.¹²

This Note argues that using class-action lawsuits to combat human trafficking through civil litigation is a viable option and a valuable deterrent. Part I explains the context by providing background information on previous and current legal efforts to combat human trafficking. Part II describes the problem by showing why victims have limited access to justice despite stringent laws designed to prevent human trafficking. Part III outlines a solution by articulating how class-action lawsuits could be utilized as an effective deterrent to human trafficking and a viable option for providing victims with greater access to justice.

I. BACKGROUND: THE PROFILE OF PROMINENT PLAYERS

A. *The Profile of Trafficked Persons*

While the definition of “trafficked persons” has been subject to some debate,¹³ trafficked persons can be children or adults, men or women, rich or poor, educated or illiterate, and foreign or domestic persons.¹⁴ Although the media often focuses on the sexual exploitation aspect of human

⁹ *Slavery Questions and Answers*, FREE THE SLAVES, <http://www.freetheslaves.net/about-slavery/faqs-glossary> (last visited Aug. 28, 2014); *Frequently Asked Questions*, NOT FOR SALE CAMPAIGN, <https://notforsalecampaign.org/human-trafficking/frequently-asked-questions> (last visited Aug. 28, 2014); INT'L LABOUR OFF., ILO GLOBAL ESTIMATE OF FORCED LABOUR: RESULTS AND METHODOLOGY 13 (2012), http://www.ilo.org/wcmsp5/groups/public/-ed_norm/-declaration/documents/publication/wcms_182004.pdf.

¹⁰ Sarah C. Pierce, Note, *Turning a Blind Eye: U.S. Corporate Involvement in Modern Day Slavery*, 14 J. GENDER, RACE & JUST. 577, 581 (2011).

¹¹ See Jennifer A.L. Sheldon-Sherman, *The Missing “P”: Prosecution, Prevention, Protection, and Partnership in the Trafficking Victims Protection Act*, 117 PENN ST. L. REV. 443, 445, 452 (2012) (describing the “three P’s” anti-trafficking strategy).

¹² See *infra* Part II.A.

¹³ See Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 2980–83, 2981 n.9 (2006) (describing the historical difficulty in defining trafficking and challenges created by the intersection of anti-trafficking and anti-prostitution efforts).

¹⁴ *Human Trafficking*, POLARIS PROJECT, <http://www.polarisproject.org/human-trafficking/overview> (last visited Aug. 29, 2015).

trafficking,¹⁵ the United States has defined human trafficking to include both forced labor and sexual exploitation.¹⁶ People are trafficked into the United States from all over the world.¹⁷ Countries of origin include: Thailand, Mexico, Russia, Vietnam, Jamaica, Cameroon, India, and more.¹⁸

For example, in 1995, authorities discovered a sweatshop in El Monte, California, where “seventy men and women from Thailand had been enslaved.”¹⁹ These men and women had been held hostage as slaves for over seven years.²⁰ In 1997, a number of hearing-impaired men from Mexico were trafficked into the United States and forced to peddle trinkets in major cities around the country.²¹ In 2001, one of the largest landowners in California pleaded guilty to trafficking into the United States over twenty-five people, who were then used as slaves until authorities discovered and rescued them.²²

Just four years later in 2005, authorities discovered 321 Vietnamese men enslaved to work in a sweatshop in American Samoa.²³ In another case, fifty-two men from India were recruited with the prospect of high-paying jobs in the United States.²⁴ Upon arriving in the United States, the men were forced to live in squalid conditions behind locked gates and to work for substandard wages.²⁵ These men, women, boys, and girls forced

¹⁵ Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. 76, 79 (2012); see *Charlotte Man Indicted on Human Trafficking Charge*, HERALD-SUN, Nov. 22, 2014, at A3 (reporting on an indictment for sexual exploitation); Danae King, *Event Raises Awareness of Human Trafficking, Domestic Violence*, THE LIMA NEWS, Oct. 2, 2014 (describing a campus event focused on raising awareness about human trafficking solely in terms of sexual exploitation).

¹⁶ May Li, Note, *Did Indiana Deliver in its Fight Against Human Trafficking?: A Comparative Analysis Between Indiana’s Human Trafficking Laws and the International Legal Framework*, 23 IND. INT’L & COMP. L. REV. 277, 284–86 (2013). The definition of human trafficking has been subject to debate because the distinction between sex trafficking and forced labor is unclear at times, such as in cases where the victim is prostituted for profit. See *id.* (describing various definitions of trafficking that distinguish between sex trafficking and forced labor).

¹⁷ See Kim & Hreshchynshyn, *supra* note 7, at 9 (providing examples of trafficking cases where the victims were brought to the United States from a variety of countries).

¹⁸ *Id.* at 5, 9.

¹⁹ *Id.* at 9.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 22.

²³ Jennifer S. Nam, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 COLUM. L. REV. 1655, 1664, 1664 n.50 (2007).

²⁴ *Id.* at 1664.

²⁵ *Id.*

to work for substandard wages or no compensation at all are modern-day slaves.²⁶

While abuse through human trafficking is not limited to sexual exploitation,²⁷ there are still many victims who have been trafficked into the United States for sexual exploitation. For example, in 2001, seven Russians were “forced to dance nude in an Alaskan nightclub”: the women had been trafficked into the United States after being recruited to perform traditional dances for a cultural event that did not exist.²⁸ A young girl named Gabriella was lured by a family friend into the United States with the prospect of a better-paying job.²⁹ When she arrived in the United States, her “friend” forced her into commercial prostitution where she was exploited for five years before she was rescued.³⁰

Sexual exploitation is not limited to the trafficking of foreign persons into the United States—even young children who grew up as United States citizens are trafficked for sexual exploitation. Sarah, a seventeen-year-old Caucasian girl from Ohio, was trafficked into the commercial sex industry after running away from a broken home.³¹ She was lured into the industry by a thirty-year-old man pretending to be her “friend.”³² Keisha, an African-American girl who grew up in Florida, was forced to engage in commercial sex after running away from her foster family, where she also had been sexually harassed.³³

Gabriella, Sarah, and Keisha are not alone. While the nature of human trafficking makes it difficult to create highly accurate numeric estimates,³⁴ experts estimate that as many as 100,000 children are

²⁶ See Free The Slaves, Wash. D.C. & the Human Rights Ctr. of the Univ. of Cal., Berkeley, *Hidden Slaves: Forced Labor in the United States*, 23 BERKELEY J. INT’L L. 47, 47–49, 47 n.1 (2005) [hereinafter *Forced Labor in the United States*] (noting that debt bondage, forced/compulsory labor by threat, fraud, or coercion are forms of slavery or practices similar to slavery).

²⁷ See Nam, *supra* note 23, at 1664 (describing forced labor in sweatshops and factories).

²⁸ Kim & Hreshchyshyn, *supra* note 7, at 9.

²⁹ *Gabriella: Residential Brothel Sex Trafficking*, POLARIS PROJECT, <http://www.polarisproject.org/what-we-do/client-services/survivor-stories/350-gabriella-residential-brothel-sex-trafficking> (last visited Aug. 29, 2015).

³⁰ *Id.*

³¹ *Sarah: Domestic Minor Sex Trafficking*, POLARIS PROJECT, <http://www.polarisproject.org/what-we-do/client-services/survivor-stories/465-sarah-domestic-minor-sex-trafficking> (last visited Aug. 29, 2015).

³² *Id.*

³³ *Keisha: Domestic Minor Sex Trafficking*, POLARIS PROJECT, <http://www.polarisproject.org/what-we-do/client-services/survivor-stories/464-keisha-domestic-minor-sex-trafficking> (last visited Aug. 29, 2015).

³⁴ See Johnny E. McGaha & Amanda Evans, *Where Are the Victims? The Credibility Gap in Human Trafficking Research*, 4 INTERCULTURAL HUM. RTS. L. REV. 239, 243–44 (2009) (noting that variations in data may be based on changes in methodology); Valerie S. Payne, Note, *On the Road to Victory in America’s War on Human Trafficking: Landmarks,*

trafficked into the United States' commercial sex industry each year.³⁵ That estimate only includes children; many more women are trafficked for sexual exploitation as well.³⁶

Overall, human trafficking includes men, women, and children.³⁷ It includes male workers from foreign countries³⁸ and young girls born and raised in the United States.³⁹ It includes forced labor and sexual exploitation.⁴⁰ It includes individual victims like Keisha⁴¹ and classes of victims like the men from Vietnam.⁴² The crime of human trafficking or modern-day slavery includes more people today than ever before.⁴³

B. The Profile of Traffickers

The profile of traffickers is as diverse as the profile of those who are trafficked.⁴⁴ Those perpetuating the crime of human trafficking include individuals, small-scale family operations, and “complex transnational crime rings.”⁴⁵ Although traffickers are predominantly male, both men and women work as traffickers.⁴⁶ Some traffickers begin as victims themselves, but then become traffickers after being threatened to traffic others or suffer further abuses.⁴⁷ The nationality of traffickers is as varied as their victims' countries of origin.⁴⁸ While traffickers are often older than

Landmines, and the Need for Centralized Strategy, 21 REGENT U. L. REV. 435, 442 (2009) (stating that recent studies have called initial estimates into question).

³⁵ *Human Trafficking*, *supra* note 14.

³⁶ *See id.* (explaining that aggregating children and adults in sex and labor trafficking leads to higher numbers).

³⁷ *Id.*

³⁸ *See Shamir*, *supra* note 15, at 88 (describing male victims from Thailand working on a farm in Washington).

³⁹ HUMAN SMUGGLING AND TRAFFICKING CTR., DOMESTIC HUMAN TRAFFICKING: AN INTERNAL ISSUE 2 (2008), <http://www.state.gov/documents/organization/113612.pdf>.

⁴⁰ *Id.* at 3–4, 6.

⁴¹ *Keisha: Domestic Minor Sex Trafficking*, *supra* note 33.

⁴² Nam, *supra* note 23, at 1664.

⁴³ *See Pierce*, *supra* note 10, at 581 (comparing current estimates to the number of slaves during the Trans-Atlantic slave trade).

⁴⁴ Kim & Hreshchyshyn, *supra* note 7, at 6.

⁴⁵ *Id.*

⁴⁶ *Cf.* U.N. Glob. Initiative to Fight Human Trafficking, 016 Workshop: Profiling the Traffickers 5 (2008) [hereinafter *Profiling the Traffickers*], <http://www.unodc.org/documents/human-trafficking/2008/BP016ProfilingtheTraffickers.pdf> (noting that 78.1% of traffickers in a German study were male, but both men and women engage in trafficking with different roles in different cultures).

⁴⁷ *Id.*

⁴⁸ *Id.* at 7.

their victims, the age range of traffickers spans from children in their early teens to adults in their fifties and older.⁴⁹

Traffickers may be single, married, or in domestic partnerships.⁵⁰ In some cases, the families of the traffickers are aware of and collaborate with the trafficker in their illegal activities; other times, the family is unaware of the trafficker's criminal actions.⁵¹ Some traffickers force their own family members into this modern-day slavery.⁵² While some traffickers have extensive criminal records, others have no criminal record at all.⁵³ Although some traffickers are primarily engaged in their criminal trafficking activities, others are also employed in other professions.⁵⁴ Some have post-graduate degrees; others have no education at all.⁵⁵

Because human trafficking is a low-risk, high-reward activity,⁵⁶ many domestic and transnational crime rings are attracted to it.⁵⁷ For example, in 2010, twenty-nine Somalian gang members were indicted for operating a Minneapolis-based interstate sex-trafficking operation.⁵⁸ In a 2011 report, the FBI noted that there are gangs in thirty-five states and United States territories that are engaged in human trafficking.⁵⁹ Law enforcement agencies have reported that several large criminal networks are involved in trafficking humans.⁶⁰

In 2012, the U.S. Immigration and Customs Enforcement ("ICE") arrested 637 gang members identified with 168 gangs from around the United States.⁶¹ The ICE operation, Project Nefarious, was executed

⁴⁹ *Id.*

⁵⁰ *Id.* at 8.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 9.

⁵⁴ *Id.* Some human traffickers also work as doctors, lawyers, policemen, politicians, businessmen, chefs, and mechanics. *Id.*

⁵⁵ *Id.*

⁵⁶ U.S. DEP'T OF STATE, *supra* note 5, at 8–9 (noting that human trafficking is a low-risk, high-reward activity because the profits are high and victims are kept silent by threats against the victim's family, threats against the victim, and the victim's inability to access the legal system).

⁵⁷ See KAMALA D. HARRIS, CAL. DEP'T OF JUSTICE, THE STATE OF HUMAN TRAFFICKING IN CALIFORNIA 18–19 (2012), <http://oag.ca.gov/sites/all/files/agweb/pdfs/ht/human-trafficking-2012.pdf> (explaining that gangs are becoming more involved in trafficking as a funding source for other criminal activity).

⁵⁸ NAT'L GANG INTELLIGENCE CTR., 2011 NATIONAL GANG THREAT ASSESSMENT: EMERGING TRENDS 25 (2011), <http://www.fbi.gov/stats-services/publications/2011-national-gang-threat-assessment/2011-national-gang-threat-assessment-emerging-trends>.

⁵⁹ *Id.* at 24.

⁶⁰ *Id.* at 25. The study noted the following large criminal networks are involved in human trafficking: the Bloods, MS-13, Sureños, and Somali gangs. *Id.*

⁶¹ *637 Gang Members and Associates Arrested During Project Nefarious*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Apr. 25, 2012), <http://www.ice.gov/news/releases/1204/120425washingtondc.htm>.

throughout 150 cities across the United States and targeted “transnational street gangs, prison gangs, and outlaw motorcycle gangs.”⁶² More than forty percent of the gang members arrested were affiliated with a total of twenty-eight gangs involved in human trafficking.⁶³ A 2014 report from the Texas Department of Public Safety revealed that the profile of human traffickers in Texas includes “Mexican cartels and transnational gangs.”⁶⁴

Human trafficking is a multi-billion-dollar industry,⁶⁵ and individual human traffickers can make an enormous amount of money by trafficking victims.⁶⁶ Based on the victim’s route of travel, a trafficker’s profit can range from \$4,000 to \$50,000 per person.⁶⁷ Some estimate that child sex traffickers can make as much as \$600,000 per year.⁶⁸ Others estimate that traffickers can make as much as \$67,200 per year, per victim.⁶⁹ Until the cost of trafficking exceeds the profit, traffickers will have little incentive to stop enslaving fellow human beings.⁷⁰

From almost-illiterate individuals to highly educated enterprising organizations, the profile of human traffickers has many faces.⁷¹ Some faces are young; others are old.⁷² Some faces are male; others are female.⁷³ Some faces are foreign nationals; others are our neighbors.⁷⁴ While some

⁶² *Id.*

⁶³ *Id.* The others gangs and gang members were arrested for crimes unrelated to human trafficking. *Id.*

⁶⁴ TEX. DEP’T OF PUB. SAFETY, ASSESSING THE THREAT OF HUMAN TRAFFICKING IN TEXAS 8 (2014), http://www.dps.texas.gov/director_staff/media_and_communications/2014/txHumanTraffickingAssessment.pdf.

⁶⁵ Alicia Wilson, *Using Commercial Driver Licensing Authority to Combat Human Trafficking Related Crimes on America’s Highways*, 43 U. MEM. L. REV. 969, 974–75 (2013).

⁶⁶ Elizabeth M. Wheaton, Edward J. Schauer & Thomas V. Galli, *Economics of Human Trafficking*, 48 INT’L MIGRATION 114, 124 (2010), <https://www.amherst.edu/media/view/247221/original/Economics+of+Human+Trafficking.pdf>.

⁶⁷ *Human Trafficking’s Dirty Profits and Huge Costs*, INTER-AMERICAN DEV. BANK (Nov. 2, 2006), <http://www.iadb.org/en/news/webstories/2006-11-02/human-traffickings-dirty-profits-and-huge-costs,3357.html>. In Europe, criminal groups make approximately \$3 billion per year from trafficking. *Human Trafficking: People for Sale*, UNITED NATIONS OFF. ON DRUGS & CRIME, <http://www.unodc.org/toc/en/crimes/human-trafficking.html> (last visited Aug. 29, 2015).

⁶⁸ See HARRIS, *supra* note 57, at 22 (calculating one pimp’s income by multiplying the quota of one of his victims by the number of victims that pimp controlled).

⁶⁹ Priscila A. Rocha, *Our Backyard Slave Trade: The Result of Ohio’s Failure to Enact Comprehensive State-Level Human-Sex-Trafficking Legislation*, 25 J.L. & HEALTH 381, 391 (2012).

⁷⁰ *Id.*

⁷¹ See *supra* notes 46–55 and accompanying text.

⁷² Profiling the Traffickers, *supra* note 46, at 7–8.

⁷³ *Id.* at 5.

⁷⁴ See *id.* at 7, 9 (explaining the diverse national backgrounds of traffickers and the wide variety of ordinary occupations held by individuals who also engage in trafficking).

traffickers are poor,⁷⁵ traffickers collectively make billions by committing crimes against mankind.⁷⁶ Yet, while the profiles of traffickers vary, every single one should be held responsible for what they have in common: trafficking fellow human beings into forced labor or sexual exploitation.

C. *The Profile of Modern Abolitionists*

The United States has combated human trafficking by focusing on prosecution, prevention, and protection.⁷⁷ While the federal government has largely championed the fight against human trafficking, the profile of governmental actors combating human trafficking includes federal, state, and local government officials.⁷⁸ Individuals and nongovernmental organizations (NGOs) have also played an important role in preventing human trafficking and protecting victims.⁷⁹

Historically, the federal government has prosecuted few traffickers.⁸⁰ In 1999, at the peak of the federal government's efforts in prosecuting trafficking prior to passing the Trafficking Victims Protection Act (TVPA), the United States had only prosecuted six trafficking cases.⁸¹ Along with prosecutions under the Thirteenth Amendment's prohibition against slavery,⁸² the government prosecuted traffickers under a patchwork of federal laws.⁸³ Most of the laws required stringent standards, however, which made it difficult for the government to obtain convictions.⁸⁴ Accordingly, because there was no single federal law prohibiting human trafficking, the United States' efforts to combat human trafficking were ineffective.⁸⁵

⁷⁵ Profiling the Traffickers, *supra* note 46, at 9.

⁷⁶ U.S. DEP'T OF STATE, THE ECONOMICS OF FORCED LABOR (2014), <http://www.state.gov/documents/organization/228263.pdf>.

⁷⁷ See Sheldon-Sherman, *supra* note 11, at 445 (describing the three primary purposes of the United States' anti-trafficking strategy).

⁷⁸ See Mark J. Kappelhoff, *Federal Prosecutions of Human Trafficking Cases: Striking a Blow Against Modern Day Slavery*, 6 U. ST. THOMAS L.J. 9, 17 (2008) (describing how federal, state, and local officials have worked together to combat trafficking).

⁷⁹ See *id.* (describing how all coordinating agencies provide help for victims).

⁸⁰ See *id.* at 13 (explaining that early anti-trafficking statutes were not often used to prosecute trafficking crimes).

⁸¹ *Id.*

⁸² U.S. CONST. amend. XIII.

⁸³ See Sheldon-Sherman, *supra* note 11, at 451 (describing the wide variety of laws that existed prior to the TVPA).

⁸⁴ See *id.* (noting that early anti-trafficking laws were ineffective because they proscribed a limited set of conduct).

⁸⁵ 22 U.S.C. § 7101(b)(14) (2012).

In 2000, as international awareness of the magnitude of human trafficking increased, the United States responded by passing the TVPA.⁸⁶ The purpose of the TVPA was to prevent severe forms of human trafficking, including both sex trafficking and labor trafficking.⁸⁷ Under the TVPA, the federal government has tasked various agencies with anti-trafficking responsibilities: the Department of Justice (DOJ) prosecutes traffickers, the Department of Health and Human Services (DHHS) provides services to individuals who are certified as victims, the Department of State coordinates international anti-trafficking efforts, and the Department of Labor helps victims to become educated and employed.⁸⁸ Although these are the primary agencies tasked with anti-trafficking responsibilities, other federal agencies also play a role in preventing human trafficking.⁸⁹

The federal government has led in these efforts, but the states have also taken action to prevent human trafficking.⁹⁰ Although no state had an anti-trafficking law in 2003, every state but one had passed anti-trafficking laws by 2012.⁹¹ In that same time, many states also developed anti-trafficking task forces and increased the number of trafficking investigations.⁹² Today, some states have even started providing services for victims of human trafficking.⁹³ While the states have made great strides in combating human trafficking, many states are unable to effectively investigate and prosecute trafficking because of the significant associated costs.⁹⁴

Local governments have also played a role in combating human trafficking.⁹⁵ In fact, because they are much more familiar with the community, local law enforcement officers are most likely to be the first to

⁸⁶ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended in scattered sections of 18, 21, 28, and 42 U.S.C.).

⁸⁷ 22 U.S.C. § 7101(a) (2012).

⁸⁸ *Federal Government Efforts to Combat Human Trafficking*, U.S. DEPT. OF HEALTH & HUM. SERVS. (Sept. 27, 2012), <http://www.acf.hhs.gov/programs/orr/resource/federal-government-efforts-to-combat-human-trafficking>.

⁸⁹ *See id.* (noting that the Department of Homeland Security, Agency for International Development, Department of Defense, and Equal Employment Opportunity Commission help implement programs to protect and assist victims).

⁹⁰ Sheldon-Sherman, *supra* note 11, at 470.

⁹¹ *Id.*; e.g., IND. CODE § 35-42-3.5-1 (Westlaw through 2015 First Reg. Sess.); KAN. STAT. ANN. § 21-5426 (Westlaw through 2013); MISS. CODE ANN. § 97-3-54.1 (LexisNexis, LEXIS through 2015 Reg. Sess.); N.M. STAT. ANN. § 30-52-1 (Conway Greene, Westlaw through 2015 First Reg. Sess.).

⁹² Sheldon-Sherman, *supra* note 11, at 470.

⁹³ *Id.* For example, New Mexico provides victims with temporary housing, healthcare, job training, advocacy services, food assistance, mental health counseling, and more. N.M. STAT. ANN. § 30-52-2(A) (Conway Greene, Westlaw through 2015 First Reg. Sess.).

⁹⁴ Sheldon-Sherman, *supra* note 11, at 471.

⁹⁵ *Id.* at 459-60.

identify traffickers.⁹⁶ For instance, in 2007 and 2008, local law enforcement officers made sixty-eight percent of all arrests of traffickers.⁹⁷ Local law enforcement is also likely to have more contact with the victims of human trafficking.⁹⁸ Yet, because there are few training programs for local law enforcement officers, local government efforts are only marginally effective in preventing human trafficking.⁹⁹

Finally, the profile of those combating human trafficking includes NGOs.¹⁰⁰ The NGOs combating trafficking are usually nonprofit and completely independent from the government.¹⁰¹ NGOs assist in the fight against human trafficking through a variety of means.¹⁰² Some NGOs work on raising awareness and educating the public on the crime of human trafficking, while other NGOs focus on raising funds and providing services to victims of human trafficking.¹⁰³ NGOs also work closely with the government and the international community to strengthen anti-trafficking laws and prosecute traffickers.¹⁰⁴ By partnering with NGOs, the government can be more effective in preventing human trafficking.¹⁰⁵

The profile of those combating trafficking includes almost every level of domestic and international government; it also includes many levels of the private sector.¹⁰⁶ From international NGOs to ordinary citizens, the fight against human trafficking is being waged on almost every front. Yet, even with every level of government and the private sector included in the profile of those fighting trafficking, victims still have limited access to justice.¹⁰⁷

II. PROBLEMS: VICTIMS HAVE LIMITED ACCESS TO JUSTICE

Approximately 18,000 to 20,000 people are trafficked into the United States each year¹⁰⁸ and approximately 60,000 people are enslaved in the United States.¹⁰⁹ Yet, less than two percent of these victims obtain

⁹⁶ *Id.* at 460.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 460 n.132.

¹⁰⁰ Amir Abdul Kareem Al-Khayon et al., *Value of Non-Governmental Organizations in Countering Human Trafficking*, NAT'L ASS'N OF ATT'YS GEN. (Aug. 29, 2011), <http://www.naag.org/value-of-non-governmental-organizations-in-countering-human-trafficking.php>.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *See supra* notes 78–79 and accompanying text.

¹⁰⁷ *See infra* Part II.

¹⁰⁸ U.S. DEP'T OF STATE, *supra* note 5, at 7.

¹⁰⁹ Max Fisher, *This Map Shows Where the World's 30 Million Slaves Live. There are 60,000 in the U.S.*, WASH. POST (Oct. 17, 2013), <http://www.washingtonpost.com/blogs/>

services¹¹⁰ and very few of these traffickers are prosecuted for their crimes against humanity. For example, in 2011, the DOJ obtained more convictions for human trafficking than ever before.¹¹¹ Yet, even at the height of its success, the DOJ obtained justice for only a small fraction of victims compared to the number of people enslaved.¹¹² Under the TVPA, traffickers are subject to criminal prosecution and civil liability.¹¹³

A. Criminal Prosecution

Following the end of the Civil War in 1865,¹¹⁴ the United States outlawed slavery and involuntary servitude by passing the Thirteenth Amendment, which states that “[n]either 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.”¹¹⁵ Congress has passed other laws that have been used to combat human trafficking, including the Peonage Act of 1867,¹¹⁶ the Racketeer Influenced and Corrupt Organizations Act,¹¹⁷ the Mann Act,¹¹⁸ and the TVPA.¹¹⁹

worldviews/wp/2013/10/17/this-map-shows-where-the-worlds-30-million-slaves-live-there-are-60000-in-the-u-s/.

¹¹⁰ Sheldon-Sherman, *supra* note 11, at 462–63.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ 18 U.S.C. § 1584 (2012) (criminalizing involuntary servitude); 18 U.S.C. § 1589 (2012) (prohibiting forced labor); 18 U.S.C. § 1590 (2012) (prohibiting “[t]rafficking with respect to peonage, slavery, involuntary servitude, or forced labor”); 18 U.S.C. § 1591 (2012) (prohibiting sex trafficking by force, fraud, or coercion and sex trafficking of children); 18 U.S.C. § 1595 (2012) (codifying a civil right of action for victims whose rights were violated under Section 1589, 1590, or 1591).

¹¹⁴ G. Ward Hubbs, *Introduction: An Unfinished War, in THE GREAT TASK REMAINING BEFORE US: RECONSTRUCTION AS AMERICA’S CONTINUING CIVIL WAR 1*, 1 (Paul A. Cimbala & Randall M. Miller eds., 2010).

¹¹⁵ U.S. CONST. amend. XIII.

¹¹⁶ 42 U.S.C. § 1994 (2012); Mohamed Y. Mattar, *Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later*, 19 AM. U. J. GENDER, SOC. POL’Y & L. 1247, 1273 n.149 (2011).

¹¹⁷ 18 U.S.C. §§ 1961–1968 (2012).

¹¹⁸ White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2012)); Lindsay Strauss, Note, *Adult Domestic Trafficking and the William Wilberforce Trafficking Victims Protection Reauthorization Act*, 19 CORNELL J.L. & PUB. POL’Y 495, 506 (2010).

¹¹⁹ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, 114 Stat. 1464 (codified as amended in scattered sections of 8, 18, 20, 22, 27, 28, and 42 U.S.C.).

Until the passage of the TVPA, none of these laws explicitly prohibited human trafficking.¹²⁰ Accordingly, many of these laws had a limited effect in deterring or combating human trafficking.¹²¹ In response to the growing need to combat human trafficking, Congress passed the TVPA in 2000 and President Clinton signed it into law.¹²² The TVPA criminalizes involuntary servitude;¹²³ prohibits forced labor;¹²⁴ prohibits “[t]rafficking with respect to peonage, slavery, involuntary servitude, or forced labor”;¹²⁵ and prohibits sex trafficking by force, fraud, or coercion and sex trafficking of children.¹²⁶

Even with the passage of the TVPA, the United States has been largely ineffective in combating human trafficking.¹²⁷ Few traffickers are criminally prosecuted and few victims are assisted.¹²⁸ For example, from 2001 to 2008, the DOJ prosecuted 531 defendants and obtained convictions or guilty pleas in 518 cases.¹²⁹ Although these numbers represent a dramatic increase from the convictions obtained in previous years, the DOJ is still able to prosecute only a small fraction of traffickers each year.¹³⁰ Even with three straight years of record-level trafficking prosecutions,¹³¹ the DOJ has only rescued a small fraction of the victims enslaved in the United States.¹³²

¹²⁰ See Mark Sidel, *Richard B. Lillich Memorial Lecture: New Directions in the Struggle Against Human Trafficking*, 17 J. TRANSNAT'L L. & POL'Y 187, 197 (2008) (describing how earlier laws dealt with slavery, peonage, etc., but did not address trafficking directly).

¹²¹ See *id.* at 202 (explaining that state laws generally were the product of legislatures with a strong desire to make a statement, but few resources to devote to the problem, so they garnered few results).

¹²² Victims of Trafficking and Violence Protection Act of 2000, 114 Stat. 1464; Tessa L. Dysart, *The Protected Innocence Initiative: Building Protective State Law Regimes for America's Sex-Trafficked Children*, 44 COLUM. HUM. RTS. L. REV. 619, 622 (2013).

¹²³ 18 U.S.C. § 1584 (2012).

¹²⁴ *Id.* § 1589.

¹²⁵ *Id.* § 1590.

¹²⁶ *Id.* § 1591.

¹²⁷ See Chacón, *supra* note 13, at 3017 (noting that despite attention brought to the crime of trafficking by the TVPA, labor exploitation has been largely unaffected and few people have been helped).

¹²⁸ See *id.* at 3018–19 (noting a small number of individuals eligible for services and a relatively modest increase in prosecutions).

¹²⁹ Kappelhoff, *supra* note 78, at 16.

¹³⁰ Sheldon-Sherman, *supra* note 11, at 468.

¹³¹ Kappelhoff, *supra* note 78, at 16.

¹³² Dina Francesca Haynes, *Good Intentions Are Not Enough: Four Recommendations for Implementing the Trafficking Victims Protection Act*, 6 U. ST. THOMAS L.J. 77, 81 (2008). Law enforcement is unable to rescue every victim of human trafficking.

But not every legitimate victim of human trafficking is or could possibly ever be rescued by law enforcement. In fact, very few are rescued. . . . In the year 2007, as a point of reference, the DOJ's Human Trafficking Prosecution Unit,

Unless an individual qualifies for the victim services authorized under the TVPA, the victim is unable to obtain any assistance.¹³³ To qualify for these benefits, the individual must be certified by the DHHS in one of the following categories: (1) the individual must prove that she is a victim of severe trafficking and is under eighteen;¹³⁴ (2) the individual must prove that she has received “continued presence” status from the DHHS because her continued presence is necessary to prosecute traffickers; or (3) the individual must prove that she is a victim of severe trafficking, is willing to prosecute her trafficker, and has applied for a T-visa.¹³⁵

Yet, because many victims do not qualify for benefits unless the DOJ prosecutes the trafficker,¹³⁶ many victims do not receive necessary services.¹³⁷ For example, even though the TVPA authorizes 5,000 T-visas per year for certified victims of human trafficking, the Department of Homeland Security (DHS) only granted 247 T-visas in 2008 out of 394 applications.¹³⁸ These victims are likewise unable to receive the benefit of other services such as food, housing, education, and counseling.¹³⁹ Of the thousands of individuals in the United States victimized by human trafficking,¹⁴⁰ less than a few hundred are rescued from slavery and restored to society.¹⁴¹

Even in cases in which the government does attempt to prosecute the trafficker, there are several barriers reducing the effectiveness of criminal prosecution. For example, to obtain a conviction under the TVPA for involuntary servitude, the prosecutor must prove beyond a reasonable doubt¹⁴² that the trafficker “knowingly and willfully” held or sold another person into any condition of involuntary servitude.¹⁴³

working with all of its U.S. Attorneys and their investigators combined, initiated 183 investigations, charged 89 defendants in 32 cases, and obtained 103 convictions involving human trafficking.

Id. Even with an entire unit of the DOJ dedicated to combating human trafficking and with all of the resources available, the federal government was only able to obtain 103 convictions in 2007—a mere fraction necessary to deter human trafficking. *Id.*

¹³³ Sheldon-Sherman, *supra* note 11, at 461.

¹³⁴ 22 U.S.C. § 7105(b)(1)(C) (2012). Severe trafficking includes individuals forced to perform sexual or labor services through force, fraud, or coercion. *Id.* § 7102(8).

¹³⁵ *Id.* § 7105(b)(1)(E)(i).

¹³⁶ *See id.* (requiring victims to cooperate with law enforcement in order to be certified by the DHHS).

¹³⁷ Sheldon-Sherman, *supra* note 11, at 462–63.

¹³⁸ *Id.* at 466.

¹³⁹ *Id.* at 461–62.

¹⁴⁰ *Forced Labor in the United States*, *supra* note 26, at 51.

¹⁴¹ *See supra* notes 129–32 and accompanying text.

¹⁴² Kim & Hreshchyshyn, *supra* note 7, at 16–17.

¹⁴³ 18 U.S.C. § 1584(a) (2012).

Even if a preponderance of the evidence clearly indicates that the defendant enslaved a fellow human being in violation of 18 U.S.C. § 1584, the defendant walks away without any consequences if the prosecutor cannot prove the government's case beyond a reasonable doubt. In such a case, the trafficker walks away without any consequences and the trafficked victim walks away without any compensation.¹⁴⁴ Moreover, not only does the victim not receive the satisfaction of seeing the perpetrator convicted for his crimes, but the victim is also often unable to access any services provided by the DHHS.¹⁴⁵

Furthermore, in criminal prosecution, the focus of the case is on retribution for the wrong committed against society.¹⁴⁶ While punishing the wrongdoer is necessary to deter further crimes against mankind, the victim is often left without restitution or restoration.¹⁴⁷ Accordingly, criminal prosecution provides an ineffective deterrence¹⁴⁸ for the traffickers netting millions each year by enslaving fellow human beings.¹⁴⁹ While few traffickers are criminally prosecuted, even fewer are convicted of human trafficking.¹⁵⁰

B. Civil Litigation

Even though people have enslaved fellow human beings throughout history, human trafficking victims did not have an effective private right of action in the United States until 2003 when the TVPA was reauthorized.¹⁵¹ Before the 2003 reauthorization of the TVPA and the codification of a private right of action, victims of human trafficking had

¹⁴⁴ See Kim & Hreshchyshyn, *supra* note 7, at 16–17 (discussing the criminal and civil remedies available to a plaintiff that brings a successful claim under the TVPA).

¹⁴⁵ Rocha, *supra* note 69, at 412.

¹⁴⁶ See Pierce, *supra* note 10, at 585 (noting that prior to its reauthorization, “human rights advocates criticized the TVPA for its ‘limited and prosecutorially-focused approach,’ claiming that it was too focused on punishing the perpetrators rather than assisting the victims” (quoting Nam, *supra* note 23, at 1661)).

¹⁴⁷ See Kim & Hreshchyshyn, *supra* note 7, at 16–17 (discussing why restitution is often forgotten in criminal prosecutions).

¹⁴⁸ See Eileen Overbaugh, *Human Trafficking: The Need for Federal Prosecution of Accused Traffickers*, 39 SETON HALL L. REV. 635, 654 (2009) (implying that the profit from trafficking outweighs the potential punishment from trafficking).

¹⁴⁹ See *supra* note 8 and accompanying text.

¹⁵⁰ See Patricia Medige, *The Labyrinth: Pursuing a Human Trafficking Case in Middle America*, 10 J. GENDER, RACE & JUST. 269, 271 (2007) (stating that in 2005 the DOJ prosecuted 116 traffickers and convicted 45 traffickers).

¹⁵¹ See 18 U.S.C. § 1595 (2012) (codifying a civil right of action for victims). While it is beyond the scope of this article to explain why previous civil statutes did not provide an ideal remedy for human trafficking victims, several professors have provided thorough answers to this question. *E.g.*, Sidel, *supra* note 120, at 203–04; Kathleen A. McKee, *Modern-Day Slavery: Framing Effective Solutions for an Age-Old Problem*, 55 CATH. U. L. REV. 141 (2005).

no cause of action for the true harm suffered: slavery.¹⁵² Victims were left with suing to obtain civil remedies through contract law, tort law, and constitutional law.¹⁵³ Yet, while human trafficking often involves breached contracts and tort-like wrongs, the true harm suffered by the victims is slavery, and sometimes this harm was not adequately remedied through common law causes of action.¹⁵⁴ With the reauthorization of the TVPA to include a private right of action, victims can now hold their traffickers directly accountable.¹⁵⁵

While human trafficking has historically been combated almost exclusively through criminal prosecution, civil litigation enabled through the private cause of action created in the TVPA presents some unique benefits in restoring victims and punishing traffickers. Unlike in criminal prosecution, where the victim has no control over the prosecution, civil litigation gives the victim greater control over the case.¹⁵⁶ Victims are also more likely to obtain restitution by pursuing traffickers through civil litigation than through criminal prosecution.¹⁵⁷

More importantly, though, the victim is more likely to obtain a successful outcome in civil litigation than in criminal prosecution because there is a lower evidentiary standard. While the criminal prosecution must be proved beyond a reasonable doubt, the victim in a civil case can obtain victory by proving the defendant's guilt by a mere preponderance of the evidence.¹⁵⁸

Finally, while the focus of criminal prosecution is on punishing the traffickers, the focus of civil litigation is on restoring the victims by compensating them for the abuses they endured.¹⁵⁹ Under the TVPA, victims may be able to receive compensatory and punitive damages.¹⁶⁰ Unlike criminal prosecution of human trafficking, which has resulted in

¹⁵² Kim & Hreshchyshyn, *supra* note 7, at 24–25.

¹⁵³ Sidel, *supra* note 120, at 203–04.

¹⁵⁴ Kim & Hreshchyshyn, *supra* note 7, at 24–25.

¹⁵⁵ *Id.* at 16–17.

¹⁵⁶ Sidel, *supra* note 120, at 206.

¹⁵⁷ See Kim & Hreshchyshyn, *supra* note 7, at 16–17 (stating that in criminal cases, prosecutors often prioritize the defendant's incarceration, instead of the victim's restitution); Sidel, *supra* note 120, at 206 (stating that victims have some control in a civil lawsuit and a possibility of receiving monetary recovery).

¹⁵⁸ Kim & Hreshchyshyn, *supra* note 7, at 17.

¹⁵⁹ See Rocha, *supra* note 69, at 416 (stating that, because the reauthorization of the TVPA provides a private cause of action, victims may recover damages and attorneys' fees from their perpetrators).

¹⁶⁰ *Francisco v. Susano*, 525 Fed. App'x 828, 835 (10th Cir. 2013); *Ditullio v. Boehm*, 662 F.3d 1091, 1096 (9th Cir. 2011).

few convictions and minor consequences for traffickers,¹⁶¹ civil litigation could be a valuable deterrent in preventing human trafficking.¹⁶²

Yet, even though civil litigation presents a greater opportunity for success, few traffickers are sued under civil laws for enslaving fellow human beings.¹⁶³ Because they are unable to gain meaningful access to the legal system to defend their rights, many victims are unable to obtain justice through civil litigation.¹⁶⁴ Even though civil litigation has the potential to be a viable deterrent to human trafficking, few civil lawsuits are filed each year because victims of human trafficking often have little legal power.¹⁶⁵

For example, victims of human trafficking often have limited education, generally do not speak the language, and rarely have the financial resources necessary to hire qualified lawyers.¹⁶⁶ Meanwhile, lawyers have little incentive to litigate claims concerning human trafficking because of the potential for personal harm,¹⁶⁷ and very few civil lawsuits are filed compared to the number of people enslaved in the United States.¹⁶⁸ For example, while there are approximately 60,000 people enslaved in the United States,¹⁶⁹ there were only around 30 lawsuits filed under 18 U.S.C. § 1595 between 2003 and 2009.¹⁷⁰

When traffickers face less than a one percent chance of criminal prosecution or civil litigation, the status quo does not provide a viable

¹⁶¹ See *supra* Part II.A.

¹⁶² See Kim & Hreshchyshyn, *supra* note 7, at 16–17 (noting that civil litigation “empowers trafficked persons individually to pursue greater damage awards in the form of compensatory, punitive, and/or pecuniary damages,” and “can achieve substantial deterrence of trafficking activity through high punitive awards”).

¹⁶³ See Nam, *supra* note 23, at 1668 (noting that 18 U.S.C. § 1595 has been “infrequently utilized since its inception”).

¹⁶⁴ See *id.* at 1682 (noting that “trafficking victims have little access to courts, and unfortunately, the prosecutorial approach of the TVPA has heightened this lack of empowerment”).

¹⁶⁵ See *id.* at 1656–57 (“[T]rafficking victims have filed very few lawsuits under [the 2003 reauthorization of the TVPA] in the four years since its creation, while sex trafficking victims in particular have not filed a *single* lawsuit under this provision.”).

¹⁶⁶ See Kappelhoff, *supra* note 78, at 9 (stating that “human traffickers prey upon and exploit some of the most vulnerable people in our society—the poor, the unemployed, the underemployed, the uneducated, and the desperate”); Sheldon-Sherman, *supra* note 11, at 448–50 (noting that these factors, coupled with “[d]ebt bondage” and language barriers, keep victims in captivity).

¹⁶⁷ See Medige, *supra* note 150, at 281 (arguing that nonprofit legal service providers are essential to protecting victims’ rights because even if the victim can recover litigation-related attorneys’ fees, some aspects of a trafficking case do not involve litigation).

¹⁶⁸ Nam, *supra* note 23, at 1656–57.

¹⁶⁹ *Supra* note 109 and accompanying text.

¹⁷⁰ Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 2009 U. CHI. LEGAL F. 247, 292 (2009).

deterrent to human trafficking.¹⁷¹ As a consequence, less than two percent of the victims of human trafficking are able to receive services.¹⁷² If the United States wants to win the battle against human trafficking, then the nation must find a valuable deterrent—the United States must find a solution that results in consequences for more than one percent of the perpetrators.

III. SOLUTION: CLASS-ACTION LAWSUITS ARE A VIABLE OPTION AND A VALUABLE DETERRENT IN COMBATING HUMAN TRAFFICKING

A. History of Class-Action Lawsuits

Originally known as “group actions” in the twelfth century, class-action lawsuits have roots dating back to medieval times.¹⁷³ The first recorded judicially created group action, *Discart v. Otes*, occurred in 1309 when the justices in the case required all affected parties to be included within the lawsuit.¹⁷⁴ When the justices ruled against the class of plaintiffs, all of the plaintiffs were bound by the judgment.¹⁷⁵ Group actions were most frequently used when the law of a town or church was violated and multiple people were injured.¹⁷⁶ Litigating individual cases was difficult because of poor communication and transportation.¹⁷⁷

While the prevalence of group actions faded in England during the nineteenth century, the United States continued to use class actions to litigate disputes involving many similarly situated people.¹⁷⁸ Scholars credit Justice Story with preserving class-action lawsuits in the United

¹⁷¹ See Rocha, *supra* note 69, at 394 (stating that only one percent of known traffickers are prosecuted annually).

¹⁷² See Sheldon-Sherman, *supra* note 11, at 462–63 (noting that domestic victims are not required to prosecute their traffickers to obtain services).

¹⁷³ Susan T. Spence, *Looking Back . . . In A Collective Way*, BUS. L. TODAY, July–Aug. 2002, at 21.

¹⁷⁴ Raymond B. Marcin, *Searching for the Origin of the Class Action*, 23 CATH. U. L. REV. 515, 521 (1974) (citing *Discart v. Otes*, 30 Seld. Society 137, 138 (No. 158, P.C. 1309) (1914) (“[A]ll that are in like case with the present complainant are bidden to appear . . . before that same Council, either in person or by some one representing them all, to hear its opinion and to receive such judgement as shall there be delivered.”)).

¹⁷⁵ *Id.* at 522 (citing 30 Seld Society xxxvii (1914)).

¹⁷⁶ Howard M. Downs, *Federal Class Actions: Due Process by Adequacy of Representation (Identity of Claims) and the Impact of General Telephone v. Falcon*, 54 OHIO ST. L.J. 607, 612–13 (1993); *History of Class Action Lawsuits*, CLASS ACTION LAWSUITS CTR., <http://classactionlawsuitcenter.com/history-of-class-action-lawsuits> (last visited Sept. 12, 2015).

¹⁷⁷ *History of Class Action Lawsuits*, *supra* note 176.

¹⁷⁸ *Id.*

States.¹⁷⁹ In *West v. Randall*, the earliest federal class-action lawsuit in the United States,¹⁸⁰ Justice Story wrote that “[i]t is a general rule in equity, that all persons materially interested, either as plaintiffs or defendants in the subject matter of the bill ought to be made parties to the suit, however numerous they may be.”¹⁸¹

Before the United States merged law and equity, class-action lawsuits were guided by Equity Rule 48, which allowed representative suits where individual litigation was inefficient because the outcome affected many individuals.¹⁸² In the early twentieth century, Equity Rule 48 was replaced with Equity Rule 38.¹⁸³ When the United States merged law and equity in 1938,¹⁸⁴ Equity Rule 38 became Federal Rule of Civil Procedure 23—the modern rule on class-action lawsuits.¹⁸⁵

B. Requirements for Class-Action Lawsuits

To file a lawsuit as a class action, the party seeking class certification must satisfy the prerequisite requirements of Rule 23(a) and then qualify for certification under one of the three categories in Rule 23(b).¹⁸⁶ There are four requirements under Rule 23(a): commonality on questions of law or fact, adequacy of legal representation, numerosity of class members such that joinder is impracticable, and typicality of claims and defenses.¹⁸⁷ After a party seeking class certification satisfies the Rule 23(a) requirements, the party must qualify for certification under one of the Rule 23(b) categories:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would

¹⁷⁹ J. Britton Whitbeck, *Identity Crisis: Class Certification, Aggregate Proof, and How Rule 23 May Be Self-Defeating the Policy for Which It Was Established*, 32 PACE L. REV. 488, 488–89 (2012).

¹⁸⁰ Downs, *supra* note 176, at 621–22 n.55.

¹⁸¹ *West v. Randall*, 29 F. Cas. 718, 721 (C.C.D.R.I. 1820) (No. 17,424).

¹⁸² DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 10–11 (2000).

¹⁸³ Spence, *supra* note 173, at 23.

¹⁸⁴ Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 431 (2003).

¹⁸⁵ Spence, *supra* note 173, at 23.

¹⁸⁶ FED. R. CIV. P. 23(a)–(b).

¹⁸⁷ FED. R. CIV. P. 23(a).

substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.¹⁸⁸

While there are three possible categories for obtaining class certification,¹⁸⁹ Rule 23(b)(3) certification is the best option for human trafficking cases. Unlike a class action filed under 23(b)(1) or 23(b)(2), in which members are generally bound by the judgment and are not able to opt out of the class-action lawsuit, members of a 23(b)(3) class action can opt out of the lawsuit.¹⁹⁰ If a member opts out of the class action, then that member is not bound by the court's judgment and the opted-out member can proceed to file a separate lawsuit.¹⁹¹ In a 23(b)(3) class-action lawsuit, the party seeking certification must prove two elements: predominance of mutual legal or factual questions and superiority of class action over individual litigation.¹⁹² Class actions filed under 23(b)(3) are most often used to obtain money damages, as opposed to other remedies.¹⁹³ Any of these methods can be used to obtain judicial certification—an action required to move forward in a class action.¹⁹⁴

C. Benefits of Class-Action Lawsuits

There are several benefits to both courts and litigants in allowing class certification where the lawsuit involves multiple plaintiffs with identical or similar claims. The four primary advantages to pursuing a claim as a class action rather than as an individual include efficiency, effectiveness, deterrence, and compensation.¹⁹⁵ While all of these

¹⁸⁸ FED. R. CIV. P. 23(b).

¹⁸⁹ 2 WILLIAM B. RUBENSTEIN ET AL., *NEWBERG ON CLASS ACTIONS* § 4:1, at 4 (5th ed. 2012).

¹⁹⁰ *Id.* § 4:4, at 23.

¹⁹¹ Ilana T. Buschkin, *The Viability of Class Action Lawsuits in a Globalized Economy—Permitting Foreign Claimants to Be Members of Class Action Lawsuits in the U.S. Federal Courts*, 90 CORNELL L. REV. 1563, 1574–75 (2005).

¹⁹² 2 RUBENSTEIN ET AL., *supra* note 189, § 4:47, at 189.

¹⁹³ *Id.* § 4:47, at 186.

¹⁹⁴ *See* FED. R. CIV. P. 23(c)(1) (stating that, after the action is filed, the court must determine whether to certify it as a class action).

¹⁹⁵ 2 RUBENSTEIN ET AL., *supra* note 189, §§ 1:7–10, at 17, 21–22, 26, 29.

advantages may not be present in every class-action lawsuit,¹⁹⁶ these are the four major policy reasons for certifying class-action lawsuits.

First, class-action lawsuits often save time and money, increasing the efficiency of the legal process and lowering the costs of litigation.¹⁹⁷ In an age where the court system would be handicapped if all potential claims went to trial,¹⁹⁸ the ability to combine numerous individual claims into one lawsuit can help increase the efficiency of the legal system.¹⁹⁹ Class-action lawsuits reduce the number of lawsuits filed and encourage settlement.²⁰⁰

Second, class-action lawsuits increase the incentive for an individual to prosecute his or her rights and impose the costs of wrongdoing on the wrongdoer.²⁰¹ In some class-action lawsuits, the monetary award to the individual plaintiff is small but the deterrent to the defendant is high.²⁰² As such, class-action lawsuits are an effective, legal deterrent to unlawful behavior.²⁰³

Third, class-action lawsuits are an effective deterrent to illegal conduct. For example, in *Reiter v. Sonotone Corporation.*, a class of plaintiffs sued five corporations for vertical and horizontal price fixing in violation of the Clayton Act, which authorizes treble damages for violations.²⁰⁴ When the Supreme Court held that the five corporations were liable under the Clayton Act, it stated that Congress enacted the treble-damages provision for price fixing because it could deter future violations of the Clayton Act.²⁰⁵ Likewise, awarding punitive damages for wrongdoing creates an effective deterrent because it incentivizes litigation and punishes wrongdoers for illegal activity.²⁰⁶

¹⁹⁶ See Buschkin, *supra* note 191, at 1584 (stating that the advantage of efficiency is not present in some class-action suits).

¹⁹⁷ *Id.* at 1583.

¹⁹⁸ See Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 269 (1999) (“The justice system would grind to a halt if cases were prohibited from settling.”).

¹⁹⁹ See Buschkin, *supra* note 191, at 1583 (“In certain circumstances, class action lawsuits offer both courts and defendants some form of efficiency.”).

²⁰⁰ 5 JAMES D. PAGLIARO & DEANNE L. MILLER, ENVIRONMENTAL LAW PRACTICE GUIDE § 33.05(2)(b)(iii), LEXIS (Michael B. Gerrard ed., 2015).

²⁰¹ See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (noting that class-action lawsuits make recovery feasible for those plaintiffs for whom the cost of litigation would otherwise be a deterrent in the face of a small recovery).

²⁰² See Buschkin, *supra* note 191, at 1583–85 (stating that, although the injuries of individual victims may be small, the collective injuries of many victims can mitigate the high costs of litigation and hold wrongdoers accountable).

²⁰³ See *id.* at 1584 (stating that class actions allow victims to hold wrongdoers accountable).

²⁰⁴ 442 U.S. 330, 335 (1979).

²⁰⁵ *Id.* at 343–45.

²⁰⁶ 1 RUBENSTEIN ET AL., *supra* note 189, § 1:8, at 22–24.

Fourth, class-action lawsuits compensate plaintiffs for the wrongdoing they endured.²⁰⁷ Because class-action lawsuits incentivize litigation, plaintiffs are more likely to receive compensation on small claims.²⁰⁸ Furthermore, class actions enable plaintiffs with less legal power and fewer financial resources than the defendant to raise an effective legal claim.²⁰⁹ Class-action lawsuits even the playing field between defendants and plaintiffs, which is especially important in human trafficking cases.

In addition to criminal prosecution and individual litigation, class-action lawsuits in human trafficking cases present a viable option and valuable deterrent to combating the magnitude of slavery in the twenty-first century. While class-action lawsuits would not be appropriate in every human trafficking case,²¹⁰ there are some victims of human trafficking that would be well-suited to obtaining justice through filing a civil class-action lawsuit. For these potential plaintiffs, the ability to file their claim as a class would enable them to compete in the legal arena with the traffickers, who generally wield greater legal power than the victims.²¹¹ Yet, while class-action lawsuits could prove a valuable tool in combating human trafficking, courts have been reluctant to grant certification to classes of human trafficking victims.²¹²

²⁰⁷ *Id.* § 1:7, at 17; *see* *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 824, 827 (1999) (stating that claimants settled to recover compensation for personal injury and death claims).

²⁰⁸ 1 RUBENSTEIN ET AL., *supra* note 189, § 1:7, at 17, 19–21.

²⁰⁹ *Id.* § 1:7, at 19–20.

²¹⁰ *See* 1 RUBENSTEIN ET AL., *supra* note 189, §§ 1:7–10, at 17, 21–22, 26, 29 (describing four reasons that victims might want to file class actions: compensation, deterrence, efficiency, and legitimacy). For example, class-action lawsuits are not a viable deterrent where the trafficker has trafficked very few victims. *See* FED. R. CIV. P. 23(a) (stating that elements to qualify for a class action include numerosity such that joinder is impracticable and common questions of law or fact). If there are only a few victims with similar claims, the lawsuits should be filed individually or the victims should join claims. Regardless, class certification would not be appropriate because the plaintiffs are not numerous. Similarly, class-action lawsuits are not effective as a deterrent if the defendant in the suit does not have any money because the plaintiffs would endure the hassle of a trial without the benefit of any compensation and there is no consequence to the trafficker.

²¹¹ *See* 22 U.S.C. § 7101(b)(20) (2012) (stating that victims find it difficult to report or prosecute crimes); *see* 1 RUBENSTEIN ET AL., *supra* note 189, § 1:7, at 17–19 (stating that defendants generally have more resources than individual plaintiffs and that individual plaintiffs who incur small harms are generally powerless to bring an action to be compensated).

²¹² *See, e.g.*, David M. Zieja, Case Comment, *David v. Signal Int'l, L.L.C.*, 2012 U.S. Dist. LEXIS 114247 (E.D. La., Jan. 3, 2012), 36 SUFFOLK TRANSNAT'L L. REV. 277, 277–78 (2013) (analyzing a case in which a federal district court denied a motion for class certification of 500 foreign ship workers).

D. Barriers to Certification in Class-Action Trafficking Cases

Although human trafficking plaintiffs meeting the requirements of Rule 23(a) could pursue certification under any Rule 23(b) category,²¹³ it makes the most sense for potential classes to pursue certification under 23(b)(3), which requires predominance of legal or factual questions and a showing that the class action is superior to individual litigation.²¹⁴ While the superiority requirement is satisfied by showing that class-wide litigation will reduce costs and promote efficiency,²¹⁵ the predominance element requires courts to determine if the common questions in the case predominate over the individualized questions.²¹⁶ In evaluating what issues predominate in the case, courts consider the underlying elements of the claim.²¹⁷

Although few human trafficking cases have been filed as class-action lawsuits, labor trafficking cases are best suited to class-wide litigation.²¹⁸ In a labor trafficking case filed under the TVPA, the law states that:

(a) Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means—

(1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;

(2) by means of serious harm or threats of serious harm to that person or another person;

(3) by means of the abuse or threatened abuse of law or legal process; or

(4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint

shall be punished as provided under subsection (d).²¹⁹

If the plaintiffs consented to the labor conditions, then the defendant is not liable under the TVPA.²²⁰ However, if the plaintiffs were coerced to

²¹³ *Supra* notes 188–89 and accompanying text.

²¹⁴ *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 296 (3d Cir. 2011).

²¹⁵ *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996).

²¹⁶ *Sullivan*, 667 F.3d at 297.

²¹⁷ *Blades v. Monsanto Co.*, 400 F.3d 562, 569 (8th Cir. 2005).

²¹⁸ See Theodore R. Sangalis, Comment, *Elusive Empowerment: Compensating the Sex Trafficked Person Under the Trafficking Victims Protection Act*, 80 *FORDHAM L. REV.* 403, 427 (2011) (noting that many labor trafficking suits have been brought under 18 U.S.C. § 1595 and that, “[f]or the most part, the cases that reach the merits have received favorable judgments”).

²¹⁹ 18 U.S.C. § 1589 (2012).

²²⁰ See *David v. Signal Int’l, L.L.C.*, No. 08-1220, 2012 U.S. Dist. LEXIS 114247, at *71 n.35 (E.D. La. Jan. 3, 2012) (stating that the alleged victim’s consent is a relevant consideration under the TVPA for determining whether the alleged victim’s labor was involuntary).

work in the labor conditions, then the defendant is liable under the TVPA.²²¹ Therefore, the issue of consent or coercion in providing labor is the focal point in a labor trafficking case.²²² Some courts have held that the issue of consent can be tried on a representative basis,²²³ while other courts have required an individualized showing of proof concerning consent and coercion.²²⁴

Of the class-action lawsuits filed under the TVPA, courts have diverged in interpreting the proof required to show consent.²²⁵ If the issue of consent is an individualized question that predominates over other questions in the case, then class certification is not appropriate.²²⁶ In contrast, if the issue of consent does not require individualized proof, then class certification is appropriate in litigating the claims.²²⁷ Because of the divergence in interpreting the TVPA, some courts have granted class certification,²²⁸ while other courts have refused class certification.²²⁹

For example, in *Tanedo v. East Baton Rouge Parish School Board*, the United States District Court for the Central District of California granted class certification to approximately 350 Filipino teachers.²³⁰ The teachers had been lured to work in the United States by the promise of high-paying jobs.²³¹ However, once the teachers arrived in the United States, the defendants compelled the Filipinos to work without adequate pay.²³² The Filipino teachers filed a class-action lawsuit, and the court granted certification because the issue of consent in 18 U.S.C. § 1589 could be tried on a class-wide basis by using a reasonable person standard.²³³

In contrast, in *David v. Signal International, L.L.C.*, the United States District Court for the Eastern District of Louisiana refused to grant class certification to approximately 500 ship and rig workers who had

²²¹ See *id.* at *71, *76 (noting that coercion is part of the causation analysis in a civil action under 18 U.S.C. § 1589).

²²² See *id.* at *71–73 (stating that the alleged victim’s consent to labor conditions and the defendant’s coercion of the alleged victim is pivotal in determining whether labor was involuntary).

²²³ *Tanedo v. E. Baton Rouge Parish Sch. Bd.*, No. LA CV10–01172 JAK (MLGx), 2011 U.S. Dist. LEXIS 152329, at *21 (C.D. Cal. Dec. 12, 2011).

²²⁴ *David*, 2012 U.S. Dist. LEXIS 114247, at *71–73.

²²⁵ Compare *id.* at *77 (requiring an inquiry into individualized questions of consent), with *Tanedo*, 2011 U.S. Dist. LEXIS 152329, at *21 (holding that no inquiry into individualized questions of consent is required).

²²⁶ *David*, 2012 U.S. Dist. LEXIS 114247, at *58–59, *79–81.

²²⁷ *Tanedo*, 2011 U.S. Dist. LEXIS 152359, at *9, *21.

²²⁸ *Id.* at *29–30 (granting class certification in a labor trafficking case).

²²⁹ *David*, 2012 U.S. Dist. LEXIS 114247, at *8–9, *128–29 (refusing to grant class certification in a labor trafficking case).

²³⁰ *Tanedo*, 2011 U.S. Dist. LEXIS 152329, at *1, *6.

²³¹ *Id.* at *2, *4–6.

²³² *Id.* at *4–5.

²³³ *Id.* at *20–21.

been lured to the United States with promises of well-paying jobs.²³⁴ When the workers arrived in the United States, however, the traffickers forced the workers to live in “squalid conditions . . . conducive to the spread of disease and illness.”²³⁵ By confiscating the workers’ passports, the traffickers were able to coerce the workers to labor in substandard conditions.²³⁶ Because the workers were in a “precarious financial situation” and had a “vulnerable immigration status,” they were unable to leave the awful working conditions.²³⁷ While the workers lived in substandard work camps that felt like a prison, the trafficking company made millions of dollars by exploiting the migrant workers.²³⁸ When the workers brought a class-action lawsuit, the court refused to grant certification, reasoning that the TVPA required proof of individualized consent, and therefore, individual questions of fact predominated over questions of fact applicable to the class of plaintiffs.²³⁹ As such, the court held that 23(b)(3) class certification was not appropriate.²⁴⁰

E. Courts Should Adopt the Reasonable Person Standard

Courts should adopt the reasonable person standard used in *Tanedo*, which allowed a forced labor claim under the TVPA to be tried on a representative basis.²⁴¹ In *Tanedo*, the court stated that the key question was whether “a reasonable person of the same background and circumstances would feel compelled to continue working” because of the threats made by the defendant.²⁴² By adopting the reasonable person standard in forced labor claims under the TVPA, courts would effectuate the intent of the statute by providing necessary relief to classes of human trafficking victims.²⁴³

First, based on the plain language of the statute, courts should adopt a reasonable person standard in determining if the plaintiffs were coerced to labor because the language of the statute focuses on the defendant’s actions. In Section 1589(c), the definition section states that “serious

²³⁴ *David*, 2012 U.S. Dist. LEXIS 114247, at *8–10.

²³⁵ *Id.* at *43.

²³⁶ *Id.* at *33.

²³⁷ *Id.* at *44–45.

²³⁸ *Id.* at *10–11, *42–43.

²³⁹ *Id.* at *71, *77–78.

²⁴⁰ *Id.* at *129.

²⁴¹ *Tanedo v. E. Baton Rouge Parish Sch. Bd.*, No. LA CV10–01172 JAK (MLGx), 2011 U.S. Dist. LEXIS 152329, at *19–22 (C.D. Cal. Dec. 12, 2011).

²⁴² *Id.* at *21.

²⁴³ See Sangalis, *supra* note 218, at 424 (stating that the legislative intent of the TVPA is to combat human trafficking through strong measures that the legislature has kept intact even after later modifications of the TVPA).

harm” is harm that would “compel a *reasonable person* of the same background and in the same circumstances to perform or to continue performing labor or services.”²⁴⁴ Not only does the language of the statute explicitly incorporate a reasonable person standard, but the entire statute is also written with a focus on the defendant.²⁴⁵ Therefore, because the statute focuses on the defendant’s actions, courts should adopt the reasonable person standard in determining if a worker would have felt coerced by the defendant.

Second, courts should adopt a reasonable person standard because a broad interpretation of the TVPA best effectuates Congress’s intent in enacting the TVPA.²⁴⁶ By including a criminal statute prohibiting forced labor and then codifying a civil cause of action to enforce the law, the TVPA was designed to combat human trafficking by creating private attorney generals to assist in enforcing the TVPA.²⁴⁷ While the narrow interpretation of the TVPA by the *David* court denied judicial relief to 500 abused workers,²⁴⁸ the broad interpretation of the TVPA by the *Tanedo* court provided judicial relief to 350 Filipino teachers.²⁴⁹ To effectuate Congress’s intent in passing the TVPA, courts should broadly interpret the forced labor language of the TVPA, just as they have broadly interpreted other provisions of the TVPA.²⁵⁰

For example, courts have broadly interpreted other provisions of the TVPA because such an interpretation best effectuates Congress’s intent.²⁵¹ In *United States v. Marcus*, the Eastern District of New York interpreted the term “commercial sex act” to include pornography.²⁵² Similarly, in *United States v. Veerapol*, the Ninth Circuit held that the threat of deportation could constitute legal coercion even if such a threat to an adult of normal intelligence would not compel involuntary servitude.²⁵³

Even in interpreting other aspects of the forced labor statute in the TVPA, courts have broadly interpreted the language of the TVPA. In *United States v. Bradley*, the First Circuit held that the definition of

²⁴⁴ 18 U.S.C. § 1589 (2012) (emphasis added).

²⁴⁵ *Id.*

²⁴⁶ *See* 22 U.S.C. § 7101(a) (2012) (stating that the purpose of the TVPA is to prevent human trafficking).

²⁴⁷ *Ditullio v. Boehm*, 662 F.3d 1091, 1104–05 (9th Cir. 2011); Kim, *supra* note 170, at 298.

²⁴⁸ *Supra* notes 234–40 and accompanying text.

²⁴⁹ *Supra* notes 230–33 and accompanying text.

²⁵⁰ *See* Sheldon-Sherman, *supra* note 11, at 469 (stating that courts have leniently interpreted the TVPA by broadly construing terms to include different types of illegal activity).

²⁵¹ *Id.*

²⁵² 487 F. Supp. 2d 289, 306–07 (E.D.N.Y. 2007).

²⁵³ 312 F.3d 1128, 1132 (9th Cir. 2002).

“serious harm” could include threats of any consequences.²⁵⁴ By broadly interpreting the language of the TVPA, courts have effectuated Congress’s intent in passing the TVPA. Therefore, courts should broadly interpret the language of the forced labor statute to apply a reasonable person standard.

CONCLUSION

“Injustice anywhere is a threat to justice everywhere,”²⁵⁵ and this generation has a moral duty to fight against the injustice occurring every day within the borders of our own country. To be effective in preventing human trafficking, the United States must create a more effective deterrent to human trafficking. Although class-action lawsuits are not appropriate in every case, they would provide a viable and valuable deterrent in large labor trafficking schemes. Yet, classes of human trafficking victims will be denied justice unless the courts adopt a reasonable person standard in interpreting the forced labor statute of the TVPA.

Every day countless men, women, and children are treated as second-class citizens within the borders of the United States. These men, women, and children are sexually abused and financially exploited. Even though human trafficking has become one of the most profitable illegal industries worldwide, few victims are ever compensated for the abuses suffered at the hands of their traffickers. If the courts interpret the TVPA to adopt a reasonable person standard in the forced labor statute, victims of human trafficking treated as second-class citizens could pursue legal compensation as a certified class, which might enable more people to find freedom through the legal system. Our generation could be included among the most-free people ever living.

*Renee M. Knudsen**

²⁵⁴ 390 F.3d 145, 150 (1st Cir. 2004).

²⁵⁵ Letter from Martin Luther King, Jr. to Fellow Clergymen, *supra* note 1, at 2.

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