

November 21, 2019

Little Hoover Commission
925 L Street, Suite 805
Sacramento, CA 95814

Re: Testimony of Professor Kathleen Kim on Labor Trafficking in California

Dear Commissioners,

Thank you for the opportunity to speak today on labor trafficking in the United States and specifically, in California. I am a Professor of Law at Loyola Law School in Los Angeles, where my teaching and scholarly expertise focus on human trafficking and immigration. Before joining Loyola, I launched the first legal services project in the nation dedicated to representing trafficked plaintiffs in their civil lawsuits against their traffickers. I launched the project in 2002 at the Lawyers' Committee for Civil Rights in San Francisco, as a Skadden Fellow. I utilized the federal Trafficking Victims Protection Act (TVPA) of 2000, its private right of action amended in 2003, state and federal employment and labor code provisions, and workplace torts, to obtain monetary compensation for my clients from their traffickers for the abuse of forced labor. Along the way, I represented those who served as key victim-witnesses in parallel criminal proceedings and succeeded in obtaining other victim benefits such as the T visa. In 2004, I co-wrote the California Trafficking Victims Protection Act, passed by an overwhelming bipartisan majority and enacted into law in 2005. In addition to criminalizing human trafficking, the California law served as a robust tool to vindicate the rights of trafficked persons through access to civil justice and victim protections.

All my clients experienced trafficking in California—compelled to work through force, fraud or coercion, in a wide range of industries such as domestic work, hospitality including restaurants and hotels, garment, construction, agriculture, day labor and the commercial sex industry, among others. Delivering know your rights presentations at community-based workers' rights organizations like Las

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Mujeres Unidos y Activas in Oakland and the Day Laborer Center of San Francisco introduced me to my first clients who had been forced to work as domestic servants, fast food workers and janitors. To conduct outreach to sex workers, I worked alongside St. James Infirmary, a free health care provider for sex workers. St. James Infirmary's nonjudgmental approach to servicing all sex workers strengthened trust between its outreach workers and client population. My alliance with St. James Infirmary gave me access to massage parlors so I could educate the workers about the TVPA's protections for those trafficked and empower voluntary sex workers to act as watch dogs to prevent coerced sexual exploitation. I note my outreach to sex workers, because labor trafficking afflicts sex workers, just as sexual exploitation afflicts forced laborers. Not only are cases involving trafficking for both traditional low-wage industries and for commercial sex a regular occurrence, but the legal definition of forced labor covers forced, defrauded or coerced work in a wide range of industries including sex-related work that is not prostitution.

My legal services soon became known throughout the region. I received direct referrals from organizations like California Rural Legal Assistance, Next Door Solutions, a domestic violence shelter in San Jose, and the Assistant United States Attorney's Office. All sought my assistance to provide civil legal services to trafficked individuals who had recently liberated from forced labor situations. The early years of this work brought together a nascent network of anti-trafficking stakeholders. NGO service providers and federal government authorities formed regional task forces to identify strategies to advance the objectives of the TVPA, to protect trafficked workers and to prosecute their traffickers. The addition of state and local law enforcement urged further interagency cooperation. Yet, effective collaboration among these stakeholders was challenged at times, by competing interests and misconceptions of the legal definition of human trafficking promulgated by the TVPA. In writing the CTVPA, I worked with my counterparts at the Coalition to Abolish Slavery and Trafficking and Asian Pacific Islander Legal Outreach, in consultation with the federal Department of Justice's Human Trafficking Unit, to craft a human trafficking law that overcame some of the definitional ambiguities of the TVPA, while ensuring consistency with California's Constitution and statutory regime.

To explain, the federal TVPA defines “severe forms of trafficking” as either:

- (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
- (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.¹

The definition acknowledges that the various purposes of trafficking persons include exploitation in both the commercial-sex industry and other industries, such as agriculture, domestic service, garment manufacturing, construction, and restaurants. The definition recognizes traditional violations of the Thirteenth Amendment and its enforcement statutes, such as slavery and peonage, as well as new forms of exploitation, such as sex trafficking and debt bondage.

In addition to “force” and “fraud,” the definition explicitly includes “coercion” as one of the means by which an individual may be trafficked into sex or labor exploitation. Moreover, any initial consent to the work situation that a trafficked individual may have given is rendered immaterial due to the trafficker’s forceful, deceptive, or coercive conduct and subsequent exploitation. Finally, while migration across international borders is often a characteristic of human trafficking, the TVPA’s definition makes clear that any “recruitment, harboring, transportation, provision, or obtaining” of an individual for the purpose of involuntary labor qualifies as human trafficking.² Thus, cross-border movement is not a requirement to meet the legal definition of human trafficking.

The TVPA supports a broad vision of coercion. Most significantly, it recognizes that even in the absence of physical force, psychological abuse and nonviolent coercion create an environment of fear and intimidation that may prevent a worker from leaving an exploitive work situation. In fact, the vast majority of trafficking cases have no evidence of overt physical force or violence. As indicated in the Act’s purpose and findings, Congress explicitly proclaimed that crimes of involuntary servitude should

¹ Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. § 7102 (2006) (amended 2008).

² 22 U.S.C. § 7102(8)(B).

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include those perpetrated through psychological abuse and nonviolent coercion, “Involuntary servitude statutes are intended to reach cases in which persons are held in a condition of servitude through nonviolent coercion.”³

Two aspects of the 2000 version of the TVPA created challenges in applying the law, especially with respect to labor trafficking. First, the bifurcated definition separating sex trafficking from labor trafficking, also reflected in the criminal provisions setting forth the crime of forced labor as distinct from sex trafficking, had disparate effects. Law enforcement tended to prioritize the investigation and prosecution of sex trafficking rather than labor trafficking, often explicitly mandated by departmental policy. The bifurcated legal definition was also inconsistent with sociological understandings of human trafficking which considers the forced, defrauded or coerced end point, whether labor exploitation or sex services, as a single, albeit complex phenomenon.⁴

Second, the TVPA of 2000 made clear that congressional action required a comprehensive human trafficking law to combat the forces of global labor migration that preyed upon desperate workers vulnerable to forced labor through nonviolent psychologically coercive tactics. Yet, the lack of clarity as to the legal operationalization of nonviolent nonphysical coercion, presented persistent difficulties with law enforcement and judges. Their framework for enforcing Thirteenth Amendment crimes was informed by previous laws banning slavery and involuntary servitude, which required evidence of direct or threatened physical force or criminal penalty. Thirteenth Amendment doctrine backs up this understanding. Since the Thirteenth Amendment’s abolition of antebellum chattel slavery in 1865, Section Two of the Thirteenth Amendment, which empowers Congress to enact enforcement legislation, has had limited use. Section Two promulgated the Anti-Peonage Act of 1867 and the Involuntary Servitude Statute of 1949. Both responded to new forms of unfree labor. However, courts ultimately limited their reach to exclude cases where psychological coercion was used to force the servitude of another. The TVPA’s most significant contribution to Thirteenth Amendment doctrine is its inclusion of the legal significance of nonphysical coercion as a tactic that can compel the compliance of

³ *Id.*

⁴ See Kathleen Kim & Grace Chang, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)*, 3 STAN. J.C.R. & C.L. 317 (2007).

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a worker and prevent them from leaving.⁵

The CTVPA was written to overcome the initial stumbling blocks raised by early implementation of the TVPA. The CTVPA sets forth a unitary definition of human trafficking and it clearly describes the range of conduct that is defined as coercive:

CA Penal Code § 236.1. (a) Any person who deprives or violates the personal liberty of another with the intent to effect or maintain a felony violation...to obtain forced labor or services [including sex], is guilty of human trafficking...

(d) (1) For purposes of this section, unlawful deprivation or violation of the personal liberty of another includes substantial and sustained restriction of another's liberty accomplished through fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person, under circumstances where the person receiving or apprehending the threat reasonably believes that it is likely that the person making the threat would carry it out.

(2) Duress includes knowingly destroying, concealing, removing, confiscating, or possessing any actual or purported passport or immigration document of the victim.

(e) For purposes of this section, "forced labor or services" means labor or services that are performed or provided by a person and are obtained or maintained through force, fraud, or coercion, or equivalent conduct that would reasonably overbear the will of the person.

Significantly, Congress amended the TVPA in 2008, slightly reorganizing the coercion standard and codifying parts of the TVPA's original conference report.

The 2008 TVPA amendments require the following for the crime of forced labor:

[W]hoever 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;

⁵ See Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409, 461 (2011).

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- (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 restraint⁶

The 2008 amendments further define “abuse or threatened abuse of the law or legal process” as:

the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.⁷

Additionally, the concept of nonphysical coercion is encapsulated under the term “serious harm”:

any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.⁸

The 2008 TVPA amendments indicate that the range of nonphysical harms that are legally sufficient to establish forced labor include “psychological, financial, or reputational harm.”⁹ To determine the seriousness of the harm, the statute instructs consideration of “all the surrounding circumstances” and applies the standard of a “reasonable person” with the “same background and in the same circumstances”¹⁰ as the alleged trafficked person, thereby contemplating the trafficked person’s individual characteristics. Furthermore, with respect to legal coercion, the 2008 TVPA amendments clarify that compelling labor through threats of any legal proceeding, whether “administrative, civil, or

⁶ 18 U.S.C. § 1589(a) (Supp. II 2008).

⁷ *Id.* § 1589(c)(1).

⁸ *Id.* § 1589(c)(2).

⁹ *Id.*

¹⁰ *Id.*

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criminal,”¹¹ also constitutes a violation of forced labor. Thus, threats of deportation, an administrative and civil immigration consequence, is sufficient to coerce forced labor. It should be noted that, in addition to threats of deportation, a scheme, pattern or plan, designed to cause a worker to believe that she could be deported is also sufficient to coerce forced labor under the TVPA.

In determining the degree of coercion that is legally actionable, the 2008 TVPA incorporates the conference report’s instruction that courts take into account the victim’s individual circumstances, such as age and background.¹² These circumstances contemplate an individual’s socio-economic status, including level of education, literacy and familiarity with U.S. laws and culture. Furthermore, the 2008 TVPA’s reference to “psychological, financial, or reputational harm” as forms of serious harm reflects the conference report’s three case examples involving subtle, nonphysical coercion.¹³ In one case example, the conference report states that a trafficked domestic worker suffers a threat of serious harm when a trafficker leads her “to believe that children in her care will be harmed if she leaves the home.”¹⁴ In another scenario, a trafficker subjects a worker to a “scheme, plan, or pattern” when the worker is caused “to believe that her family will face harms such as banishment, starvation, or bankruptcy in their home country.”¹⁵ In a third example, individuals traffic children into forced labor by means of “nonviolent and psychological coercion,” including “isolation, denial of sleep, and other punishments.”¹⁶ These examples describe broader conduct, rather than specific threats, where individuals are coerced into submission by fear of negative consequences other than bodily harm. Additionally, these examples encompass not only a trafficker’s directly coercive conduct, but also contemplate the worker’s individualized economic and social pressures. For instance, in the scenario of the domestic worker who faces her family’s banishment, starvation, or bankruptcy, one can imagine such a consequence for many workers who must migrate for work to sustain their families in their countries of origin. Economically dependent on his or her job, the worker may feel indirectly forced to endure exploitive labor conditions to send money to his or her family to prevent their destitution.

¹¹ *Id.* § 1589(c)(1)

¹² H.R. REP. NO. 106-939, at 101 (2000) (Conf. Rep.).

¹³ 18 U.S.C. § 1589(c)(2).

¹⁴ H.R. REP. NO. 106-939, at 101.

¹⁵ *Id.*

¹⁶ *Id.*

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The TVPA does not limit the range of conceivable possibilities within the realm of nonphysical coercion. Instead, the TVPA's coercion standard depends on the particular circumstances of the trafficking victim. Threatened harm, whether explicit or implicit, is determined according to a reasonable assessment of the alleged victim's background and surrounding circumstances.

The level of detail added by the 2008 amendments to the TVPA heightens the legal significance of psychological coercion. The simultaneous application of both the TVPA and the CTVPA should be sufficient to identify and enforce human trafficking crimes, especially labor trafficking. In my remaining remarks, I explain how the most legally significant contributions of the TVPA and CTVPA are still underutilized. Coercion claims remain under investigated and despite the CTVPA's initial holistic unitary definition of human trafficking, sex trafficking investigations remain the priority to the neglect of the prevailing phenomenon of forced labor.¹⁷

Based on my research, the means by which workers are trafficked do not rely on physical violence, although forced workers often suffer debilitating physical injuries resulting from their exploitation. Primarily, workers are coerced to remain on the job through threats that exploit the difference in power and sophistication between the employer and the employee. For example, the employer may tell the workers that they will be jailed or deported if they attempt to leave. Workers in these circumstances may consider remaining with the employer to be the lesser of two evils, especially if they do not understand the U.S. justice system and/or they face abject poverty or threats to their safety if they are returned to their home country.¹⁸ Additionally, employers of trafficked workers exploit their victims' inability to freely work for another employer, their need to provide for family back home, and their feelings of shame and powerlessness to prevent them from leaving or from telling others of their plight.

The legal analysis of the coercion standard requires a situational lens. The coercion sufficient for finding a forced labor violation considers the following factors: the trafficking victim's individual circumstances that make them especially vulnerable to exploitation such as race, national origin, ethnicity, gender and class; degrading workplace conditions that disempower and render helpless the

¹⁷ See Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409 (2011).

¹⁸ See Kathleen Kim, *Beyond Coercion*, 62 UCLA L. REV. 1558 (2015).

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trafficking victim; and threats by the traffickers, including psychological, financial and legal threats, that place victims in a climate of fear that force their compliance with the forced labor conditions.

In 2007, the California Governor appointed me to the first statewide anti-trafficking task force coordinated by the California Attorney General's Office. In our final report, we observed the prevalence of forced labor in CA, yet the under discovery and under enforcement of such cases.¹⁹ I engaged in research to identify the problem and found that throughout our justice system, there was a lack of understanding and incentive to pursue coercion cases. I found a distinct correlation between labor trafficking and the psychologically coercive means that traffickers utilize to lure and force the compliance of their victims. Although physical injuries and abuse takes place in many of these cases, the trafficking was achieved through nonviolent coercive tactics. These are difficult cases to investigate and even more difficult to prove.

As a Los Angeles Police Commissioner until 2016, I worked with vice officers detailed to human trafficking investigations. Experts in enforcing sex crimes, vice officers are adept at identifying sex trafficking victims, especially child victims of sex trafficking, whose minor status forfeits their legal consent to engage in commercial sex activity and therefore, makes them de facto victims in the absence of force, fraud or coercion. Uncovering labor trafficking operations, however, which require difficult-to-obtain evidence of force, fraud or coercion, whether the victims are adults or children, depended on the investigative techniques of detectives within the Robbery/Homicide Division. In spite of the tenacious probing of Robbery/Homicide detectives to identify labor trafficking cases, they would face pushback from district attorneys, skeptical that prosecutions based on nonviolent coercion, would succeed in court.

The gap in the criminal enforcement of these cases has been filled by a growing number of civil lawsuits. There is a significant correlation between civil litigation and labor trafficking. My scholarship focuses primarily on the relationship between labor trafficking and coercion and agency responses

¹⁹ Human Trafficking in California, Final Report of the California Alliance to Combat Trafficking and Slavery Task Force (October 2007).

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including under enforcement.²⁰ My scholarship also engages with the role that anti-trafficking civil litigation plays in the justice system, particularly for labor trafficking victims.²¹

Below, I provide recommendations to rectify the persistent inattention to labor trafficking. I base my recommendations on my background and scholarship detailed above, as well as the following facts: Between 2009 and 2017, 95% of federal indictments for human trafficking involved sex trafficking.²² Conversely, between 2003 and 2018 approximately 95% of civil human trafficking cases involved labor trafficking.²³ The vast majority of labor trafficking victims are foreign nationals.²⁴ These fundamental facts inform the core of my work. First, labor trafficking is difficult to detect and prosecute due to, among other things, the nonphysical coercive means that traffickers utilize to force workers into submission. While the criminal justice system has focused on sex trafficking to the neglect of labor trafficking, the civil justice system, to some extent, has filled that gap by pursuing relief on behalf of labor trafficking victims. Finally, it comes as no surprise that the vast majority of labor trafficking victims in the United States are foreign born. Immigration policy is inextricably connected to labor trafficking. Options for safe migration and stable immigration status empower workers, while restrictions that tie guest workers to their employers or leave noncitizen workers vulnerable to deportation constrains their freedom in the workplace.

The recommendations I provide below, fall under three categories: research, capacity-building and prevention.

Research:

- Various governmental agencies and non-governmental organizations regularly collect data on human trafficking including numbers of victims identified and reported; and numbers and

²⁰ Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409 (2011); Kathleen Kim, *Beyond Coercion*, 62 UCLA L. REV. 1558 (2015).

²¹ See generally, Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Rights of Undocumented Workers*, 2009 U.CHI. LEGAL.F. 247 (2009).

²² 2018 Federal Human Trafficking Report, Human Trafficking Institute (2019).

²³ Federal Human Trafficking Civil Litigation: Fifteen Years of the Private Right of Action, Human Trafficking Legal Center (2018).

²⁴ *Id.*; see also Human Trafficking and Immigrant Rights, Freedom Network USA (2015).

- types of cases reported, investigated, and prosecuted.²⁵ This data, however, is skewed by the historical focus of anti-trafficking efforts on sex trafficking rather than labor trafficking. As described above, for example, local law enforcement typically engage in anti-trafficking efforts through their vice units which have greater familiarity with the commercial sex industry and is not accustomed to investigating employers in other labor industries. Meanwhile, federal policy has often directed the U.S. Department of Justice and Department of Homeland Security to concentrate on the enforcement of sex trafficking crimes to the neglect of labor trafficking. Governmental and philanthropic resources that fund many anti-trafficking services, outreach and education, reflect this emphasis on sex trafficking. As a result most data on human trafficking disproportionately centers on sex trafficking, especially child sex trafficking, and therefore, underrepresents the frequency of labor trafficking.
- Other entities are better situated to engage in and report on labor trafficking research. Non-governmental anti-trafficking organizations like the Human Trafficking Legal Center, the Coalition to Abolish Slavery and Trafficking and the Freedom Network, have played critical roles in increasing access to justice for all victims of human trafficking, whether for labor or sex. In doing so, these organizations publish data on the labor trafficked population that they reach. Yet, gaps in research remain. Expanded partnerships with academia and immigration and workplace rights organizations could fill some of these gaps. For example, at LMU's Loyola Law School in Los Angeles, I work with our research library to maintain a database of civil lawsuits brought by labor trafficked plaintiffs, filed in California, which is not captured in the federal data. Further, California agencies such as the Department of Industrial Relations and the Department of Fair Employment and Housing which focus on investigating and remedying violations in the workplace and have the legal authority to enforce human trafficking crimes, may be valuable sources of data related to labor trafficking.

Capacity-Building:

²⁵ See e.g., U.S. Department of Justice Attorney General's Trafficking in Persons Report; State Department Annual Trafficking in Persons Report; Polaris Project; and Human Trafficking Institute.

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- During my time as a Los Angeles Police Commissioner, I observed that federal funding specifically allocated to increase the LAPD’s capacity to coordinate human trafficking investigations, incentivized the department to develop thoughtful strategies to investigate both trafficking for labor and sex. The expiration of that funding correlated with a drop in labor trafficking investigations. The California DIR and DFEH currently have the leadership and internal expertise to identify and prosecute labor trafficking crimes. Although California laws empower them to do so, scarce resources limit their ability to expand units devoted to this work. State funding specifically dedicated to address labor trafficking in California, would undoubtedly urge the attention and skill of California’s local law enforcement and state workplace rights agencies. With increased investigation of labor trafficking by local and state law enforcement, non-governmental service providers upon which anti-trafficking efforts rely, will also require additional funding to shelter, counsel and advocate for victims and give technical assistance to first responders.

Prevention:

- The vast majority of labor trafficked individuals are foreign born. While some are undocumented when trafficked into forced labor, many initially migrate to the U.S. with legal visas that tie them to their trafficker. Those visas later expire if the trafficked worker escapes from the forced labor situation, which renders that worker highly vulnerable to re-trafficking. Workers who are undocumented or have precarious immigration status are susceptible to forced labor because, when they object to unconscionable working conditions, their employer explicitly or implicitly threatens to have them deported. The link between restrictive immigration laws and human trafficking is well documented.²⁶ California’s “sanctuary” laws limit information sharing between state actors and the federal government, to protect California’s noncitizen residents from overbroad immigration enforcement. For example, the Immigrant Worker Protection Act prevents California employers from colluding with immigration authorities to facilitate immigration enforcement actions against their employees. These types of sanctuary protections should be extended to all public and private

²⁶ Kathleen Kim, *Beyond Coercion*, 62 UCLA L. REV. 1558 (2015).

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facilities in California that are likely to encounter trafficking victims, including hospitals, schools, jails, and courthouses. After all, fear of encountering immigration authorities remains a primary factor in the acquiescence of workers to forced labor conditions.²⁷

Thank you again for the opportunity to address the topic of labor trafficking in California. I commend the Commission for its attention to this oft-neglected issue. I look forward to your questions and comments, and the possibility of collaboration in the future.

Best regards,

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²⁷ Sheldon Zhang, *Looking for a Hidden Population: Trafficking of Migrant Laborers in San Diego County*, San Diego State University (20120).