

UNDERSTANDING HUMAN
TRAFFICKING CASES
A JUDGE'S PERSPECTIVE

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THE SCOPE OF THE INTERNATIONAL PROBLEM

- 12.3 million victims of human trafficking world wide according to 2010 reports
 - \$32 billion in profits to the traffickers
 - Frequently linked to organized crime – complex organizations with specific roles along the route
 - Challenge of working internationally across borders to share information and evidence
 - Big money: money laundering; false identification, bribery
 - Public corruption inherent in its success
-

TYPES OF TRAFFICKING

- Forced prostitution of foreign born women and children
 - Forced agricultural labor (farm worker)
 - Domestic servitude
 - Domestic sex trafficking
 - No need to cross international borders for trafficking
 - Crime of control and coercion
-

DIFFERENCE BETWEEN TRAFFICKING AND SMUGGLING

- SMUGGLING
 - Offense against the integrity of borders
 - Business relationship consummated once alien has reached border
 - Requires illegal border crossing
- TRAFFICKING
 - Offense against a person
 - Coerced or compelled labor or service
 - Smuggling debt
 - Traffickers maintain control over their victims after the border is crossed
-

THE INTERNATIONAL COMMUNITY'S RESPONSE

- 1989 UN Convention on the Rights of the child
 - 1996 Hague Convention on the Protection of Children
 - 1998 Rome Statute of the International Criminal Court
 - 1999 International Labor Organization Concerning the Prohibition of Child Labor
 - 2000 United Nations Convention on Organized Crime
 - 2000 TVPA – UN Protocol (revised and updated three times)
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THE NUMBER OF PROSECUTIONS

- Only 3,000 prosecutions worldwide
 - Cyprus TIP report for 2010 reported only 24 victims of sex trafficking and 17 victims of forced labor
 - Low numbers of prosecutions due to:
 - Lack of training, understanding, ability to locate the crime and identify victims
 - Lack of focus on protecting a class of individuals who have little voice or recognition
-

GLOBAL LAW ENFORCEMENT DATA

The Trafficking Victims Protection Reauthorization Act (TVPRA) of 2003 added to the original law a new requirement that foreign governments provide the Department of State with data on trafficking investigations, prosecutions, convictions, and sentences in order to be considered in full compliance with the TVPA's minimum standards for the elimination of trafficking (Tier 1). The 2004 TIP Report collected this data for the first time. The 2007 TIP Report showed for the first time a breakout of the number of total prosecutions and convictions that related to labor trafficking, placed in parentheses.

YEAR	PROSECUTIONS	CONVICTIONS	VICTIMS IDENTIFIED	NEW OR AMENDED LEGISLATION
2005	6,178	4,379		40
2006	5,808	3,160		21
2007	5,682 (490)	3,427 (326)		28
2008	5,212 (312)	2,983 (104)	30,961	26
2009	5,606 (432)	4,166 (335)	49,105	33
2010	6,017 (607)	3,619 (237)	33,113	17
2011	7,206 (508)	4,239 (320)	41,210	15
2012	7,705 (1,153)	4,746 (518)	46,570	21

The numbers in parentheses are those of labor trafficking prosecutions, convictions and victims identified.

Source: Department of State Trafficking in Persons Report, 2013

WHY?

- Victims do not self identify
 - Victims fear law enforcement
 - Corruption within the states
 - Prosecution of the Victims for crimes
 - Prosecution of the Victims for immigration offenses
 - Fear of Deportation
 - Fear of the reality of their situation: loss of ability to control their lives
 - SHAME
-

THE VICTIM INTERVIEW –CLUES TO TRAFFICKING

- not free to leave
 - owes a debt to the person who is in control of her work and residence and care
 - came from another country and is concerned about siblings abroad
 - has no income and no ability to purchase anything for herself
 - does not know exactly where she is – unable to identify places within the community
 - is isolated from others within the community; resides in one location without access to outsiders and outside activity
 - is fearful
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TRAFFICKING = COERCION

- Victims kept in isolation with no ability to learn their surroundings or moved from location to location
 - Victims owe a debt for the transportation to the country
 - Victims do not hold their own money; all basic “needs” are provided by the trafficker
 - Victims often have their passports held by the traffickers or worse by the police who act in conjunction with traffickers
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COERCION

- Victims believe that the trafficker will harm them, or their families, or bring other siblings to the country to be trafficked
 - Victims lose self confidence and shame of who they have become is overwhelming
 - Victims feel that there is no way to escape – traffickers have convinced them that they will be harmed or deported
-

COERCION

- Sexual abuse, battery, rape
 - Isolation, neglect of basic needs
 - Physical abuse
 - Observing other victims being raped or abused
 - Psychological abuse: threats of harm to victims or family
 - Controlling all aspects of daily life: food, shelter, health care
 - Threats of reporting their criminality to the authorities
 - Debt bondage
-

NEED TO UNDERSTAND THE VICTIMIZATION

- Malleable victims often seeking “better life”
 - Some leaving war torn area, poverty, natural disaster
 - Some duped into coming and do not understand they will be prostituted
 - Others understand they will be prostituted but soon learn that they are no longer free to leave
 - All become controlled and manipulated through a variety of psychological and physical means
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COMMON MISUNDERSTANDINGS

- Victim chose this way of life
 - Victim could seek help if she really wanted it
 - Victim can return to her home country if she wants
 - Victim is being paid and is working normal hours under normal conditions
 - Victim cares for, admires, her pimp
 - Victim is residing in healthy conditions
-

REALITY OF THE SITUATION

- Victim is housed in neglectful, often unsanitary, and unhealthy conditions
 - Victim is not free to leave
 - Trafficker enforces rules that result in sanctions if broken
 - Sanctions include violence, sex, rape, and degradation
 - Traffickers instill fear of law enforcement and deportation
 - Traffickers hold on to passports and issue false identification documents
-

TRAFFICKER'S CONTROL LEADS TO PSYCHOLOGICAL TRAUMA

- Victim believes there is no way out of the situation
 - Even if victim were to leave, despair over what she has become prevents her from seeking help from family
 - Victim often has no identification documents to prove who she is
 - Victim is completely reliant on trafficker for food, shelter, knowledge of the outside world and medical care
 - Victim is broken psychologically and incapable of asserting independence
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SIGNIFICANCE OF TRAUMA: INCONSISTENT STATEMENTS

- Psychological trauma:
 - efforts to avoid thoughts on the traumatic experience;
 - to avoid anything that reminds the victim of the traumatic experience;
 - inability to recall specific details or strange focus on one detail;
 - inability to remain focused on the discussion; exhaustion
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SIGNIFICANCE OF COERCION: INCONSISTENT STATEMENTS

- Likelihood of
 - inconsistent statements
 - inconsistencies amongst victims due to different levels of psychological ability to address the victimization
 - first statement being less detailed than later statements
 - victim going through phases of refusing to cooperate
 - having to work long hours with victim more than other types of cases
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UNDERSTAND THE PROGRESSION OF INTERVIEWING

- Law enforcement interview differs from social worker interview
 - Law enforcement seeks the who, what, when and how
 - Law enforcement seeks immediate response from fearful interviewee
 - Once victim is provided safe harbor, food, clothing, the interview will expand
 - Once given the time and patience with the victim, the details will expand and victim may recant her earlier denial of harm
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WHAT DOES A JUDGE WANT TO SEE?

- Credible testimony
 - Testimony supported by other evidence
 - Testimony that does not sound forced, created, or cut from a mold
 - Testimony that describes the elements of the crime
 - Testimony that makes sense to her in light of her knowledge of the crime
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HOW DO YOU KNOW THE TRUTH? CORROBORATION OF WITNESS

- Surveillance: photos and videos of the comings and goings
 - Bank records: show the cash deposits on the days she said she paid him
 - Phone records: show the links to his control through the phone calls before and after the “work”
 - Site photos: show the barren rooms, locks on the doors, one dress in the closet, fence around the perimeter
 - Immigration records: show the entry into the country together
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ADVANCED CORROBORATION

- Cooperator testimony of someone on the inside
 - Recorded phone calls between the victim and the trafficker
 - Chats, text messages, emails
 - Undercover operation – entry into the world of the trafficker
 - Undercover operation – money laundering opportunity
 - GPS tracker on vehicle or phone
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ADVANCED CORROBORATION

- Lack of payroll records, tax records, business records
 - Tracing funds – (wire transfers, purchases of large ticket items like cars)
 - Rental records, and other real estate documents – who is on the lease?
 - Who contacts the utilities to set up/change service
 - ISP connection to location?
 - Basic neighbor interviews
-

OTHER CRIMES MAY BE INVOLVED

- Identification document fraud
 - Tax evasion
 - Kidnapping
 - Wire fraud
 - Computer luring
 - Violent crimes: rape, battery
-

RECOGNIZE THE UNIQUE VICTIMIZATION OF THE CRIME

- Fear, physical illness, lack of basic needs (food, shelter, clothing), potential criminal exposure – all work against the ability to present your case
 - A victim needs to know and have access to services
 - Physical health (medicine, IV testing, STD testing)
 - Mental health (counseling, support, time)
 - Shelter and Basics (food, safe haven, clothing)
 - Communication about the next step
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WORKING WITH NGO'S

- NGOs provide access to the services needed to stabilize the victim
 - NGO's can provide insights into the trafficker based on their experiences with the locale and/or the cultural group of victims
 - NGO's can provide leads to law enforcement based on their interaction with the victims
 - NGO's can provide the emotional and health support needed for the victim while law enforcement investigates
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USE OF TASK FORCE APPROACH

- Building partnerships with local and federal law enforcement, medical personnel, grass roots organizations, immigration organizations
 - Tap into community networks -- foreign language papers and ethnic community groups
 - Identifying victims through non-traditional means: church groups, shelters, hospitals, food pantries, building inspectors, utility companies
-

EDUCATE THE JUDGE

- Understand that trafficking is not easily understood
- Understand that victims do not even identify themselves as victims of trafficking
- How can a judge rule that a crime has been committed if she does not understand the crime?

USE AN EXPERT

BENEFITS OF EXPERT TESTIMONY

- Describes a crime that is not easily identifiable and occurs under our noses each day
 - Explains the climate of fear that would cause a victim to have inconsistencies in her telling of her victimization
 - Explains the level of trauma that coercion causes which often keeps a victim from escaping or reporting to the authorities
 - Explains psychological coercion and fear
 - Explains cultural and gender differences that can impact a victim's credibility
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QUALIFICATIONS OF AN EXPERT

- Can be someone with psychological or psychiatric expertise who has dealt with victims of trauma
 - Can be someone with hands-on experience interviewing and dealing with victims of human trafficking
 - Can be someone who has studied a particular culture and has interviewed victims from that particular culture
 - Can be someone in law enforcement, medical field, mental health field, non-profit field, education
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EXPERTS NOT ONLY EDUCATE; THEY CORROBORATE

- Experts can opine on evidence and why it is significant to coercion
 - Experts can opine on behavior of the victims and why that behavior is consistent with coercion
 - Experts can opine on the symptoms and injuries suffered by your victims and explain why they are common to human trafficking victims
 - Experts offer a badge of credibility to your victims
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Co-author, *Child Exploitation and Trafficking
Examining the Global Issues and U.S. Response*



THE SCOPE OF THE PROBLEM

- 20 million victims of human trafficking world wide according to 2014 reports (44,000 identified victims)
- 100,000 United States Children sexually trafficked
- \$32 billion in profits to the traffickers
- Frequently linked to organized crime – complex organizations with specific roles along the route
- Challenge of working internationally across borders to share information and evidence
- Big money: money laundering; false identification, bribery
- Public corruption inherent in its success



TYPES OF TRAFFICKING

- Forced prostitution of both nationals and foreign born women and children
- Forced agricultural labor (farm worker)
- Domestic servitude
- Domestic sex trafficking
 - No need to cross international borders for trafficking
 - Crime of control and coercion



DIFFERENCE BETWEEN TRAFFICKING AND SMUGGLING

SMUGGLING

- Offense against the integrity of borders
- Business relationship consummated once alien has reached border
- Requires illegal border crossing

TRAFFICKING

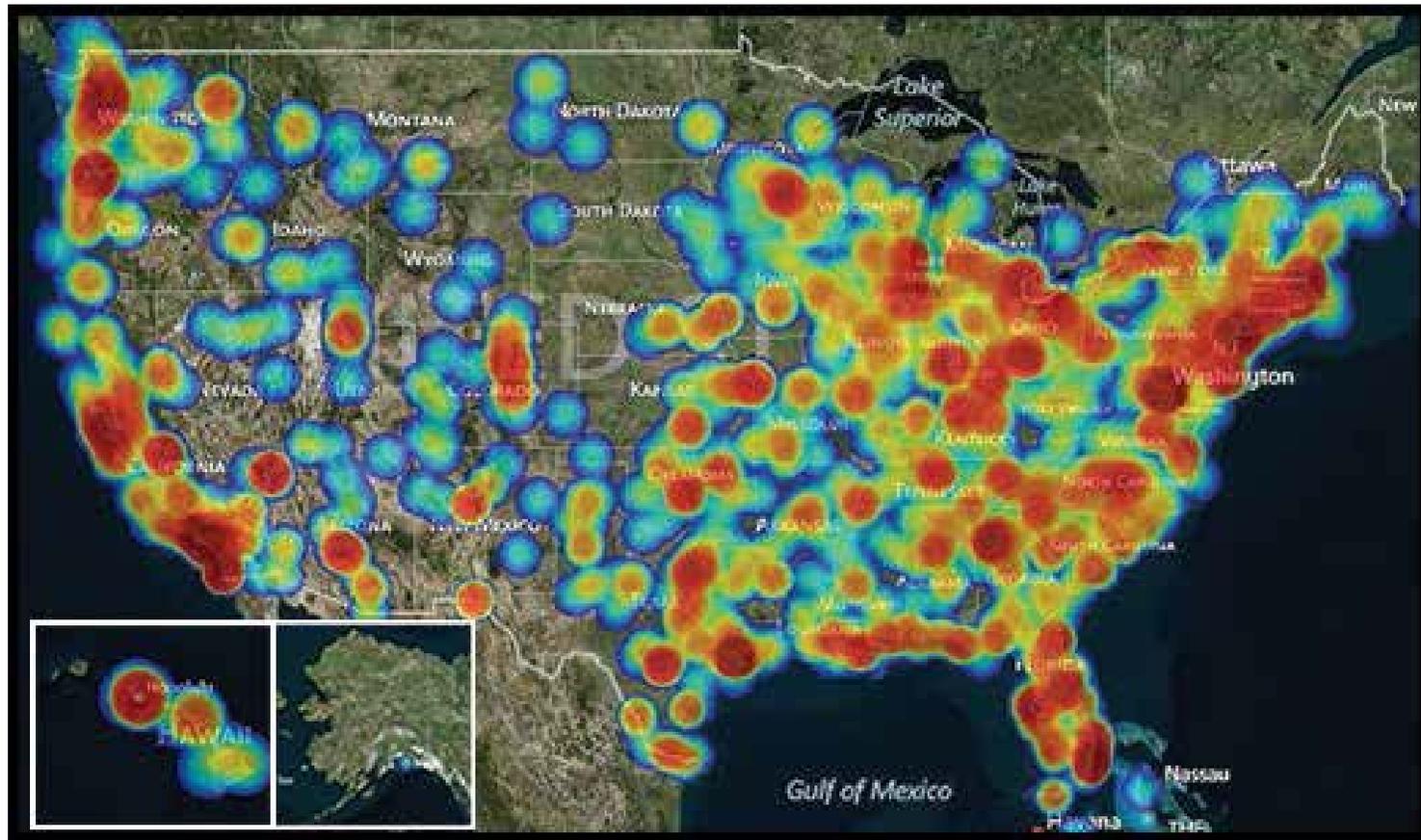
- Offense against a person
- Coerced or compelled labor or service
- Smuggling debt
- Traffickers maintain control over their victims after the border is crossed



THE NUMBER OF PROSECUTIONS

- Only 5,776 convictions worldwide
- Low numbers of prosecutions due to:
 - Lack of training, understanding, ability to locate the crime and identify victims
 - Lack of focus on protecting a class of individuals who have little voice or recognition
 - Lack of prosecutors charging HT statutes – charging older and often simpler charges
 - Lack of coordinated local, state, federal task forces
 - Difficulty in working with challenging victim class
 - Difficulty in working with immigration and social services

IS THERE HUMAN TRAFFICKING IN THE UNITED STATES?





FROM OVER 9,000 CALLS IN THE PAST 5 YEARS TO THE NHTRC

- Sex trafficking 5932 (63.80%)
- Labor trafficking 2027 (21.80%)
- Sex and labor trafficking 234 (2.52%)
- Other / not specified 1105 (11.88%)



VICTIM DEMOGRAPHICS

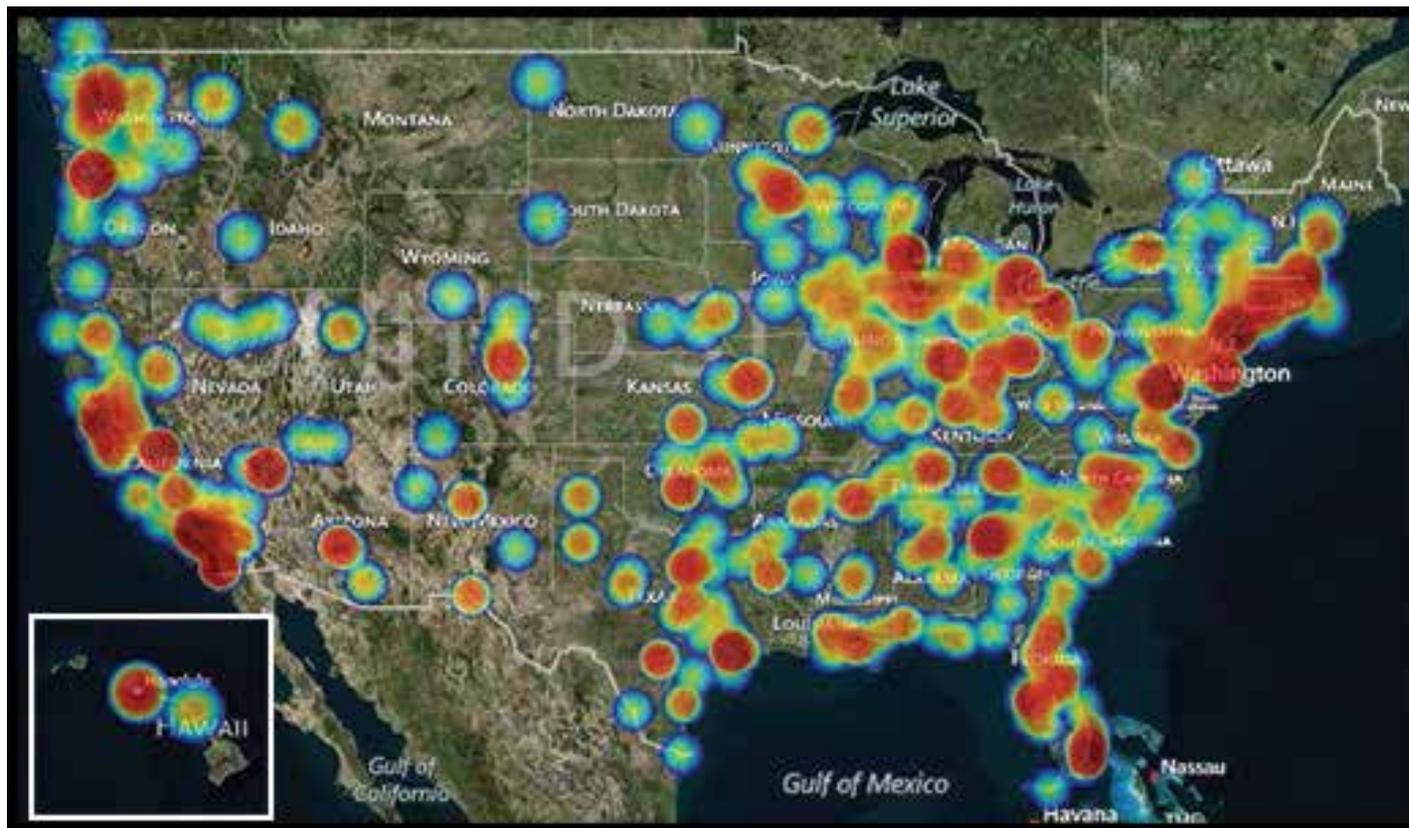
- sex trafficking 52% (adults) 33% (minors)
- labor trafficking 70% (adults) 20% (minors)
- sex trafficking 5% (male) 85% (female)
- labor trafficking 40% (male) 27% (female)
- labor trafficking 20% (US citizens) 66%
(foreign nationals)



States with the highest reports of human trafficking

1. California
2. Texas
3. Florida
4. New York
5. Illinois
6. District of Columbia
7. Virginia
8. Ohio
9. North Carolina
10. Georgia

Most significant form of trafficking
in US = sex trafficking of females thru pimp





Over 40% of
cases
referenced
children
under 18.

WHO IS RECRUITING FOR ST AND HOW?

- Pimps --
over 80%
- Use of romantic interest/grooming
- Socially through friends
- In public places
- 18% from on line
- Posing as a benefactor for lodging food, or job



Where is the labor trafficking?

Domestic Work 27.13%
Labor, Other/Not Specified 16.82%
Restaurant/Food Service 10.85%
Peddling Ring 10.56%
Traveling Sales Crew 9.57%
Other Small Business 8.04%
Agriculture 4.54%
Construction 2.37%
Begging Ring 1.78%
Factory 1.33%
Health & Beauty Services 1.13%
Housekeeping/Cleaning Service 0.94%
Carnival 0.84%

Immense gap between numbers of victims and numbers of prosecutions/rescues

YEAR	PROSECUTIONS	CONVICTIONS	VICTIMS IDENTIFIED	NEW OR AMENDED LEGISLATION
2006	5,808	3,160		21
2007	5,682 (490)	3,427 (326)		28
2008	5,212 (312)	2,983 (104)	30,961	26
2009	5,606 (432)	4,166 (335)	49,105	33
2010	6,017 (607)	3,619 (237)	33,113	17
2011	7,909 (456)	3,969 (278)	42,291 (15,205)	15
2012	7,705 (1,153)	4,746 (518)	46,570 (17,368)	21
2013	9,460 (1,199)	5,776 (470)	44,758 (10,603)	58



WHY?

- Victims do not self identify
- Victims fear law enforcement
- Corruption within the states
- Prosecution of the Victims for crimes
- Prosecution of the Victims for immigration offenses
- Fear of Deportation
- Fear of the reality of their situation: loss of ability to control their lives
- Shame
- SOCIETY'S INABILITY TO SEE THE CRIME



TRAFFICKING = COERCION

- Victims kept in isolation with no ability to learn their surroundings or moved from location to location
- Victims owe a debt for the transportation to the country
- Victims do not hold their own money; all basic “needs” are provided by the trafficker
- Victims often have their passports held by the traffickers or worse by the police who act in conjunction with traffickers
- Victims often do not speak the language



COERCION

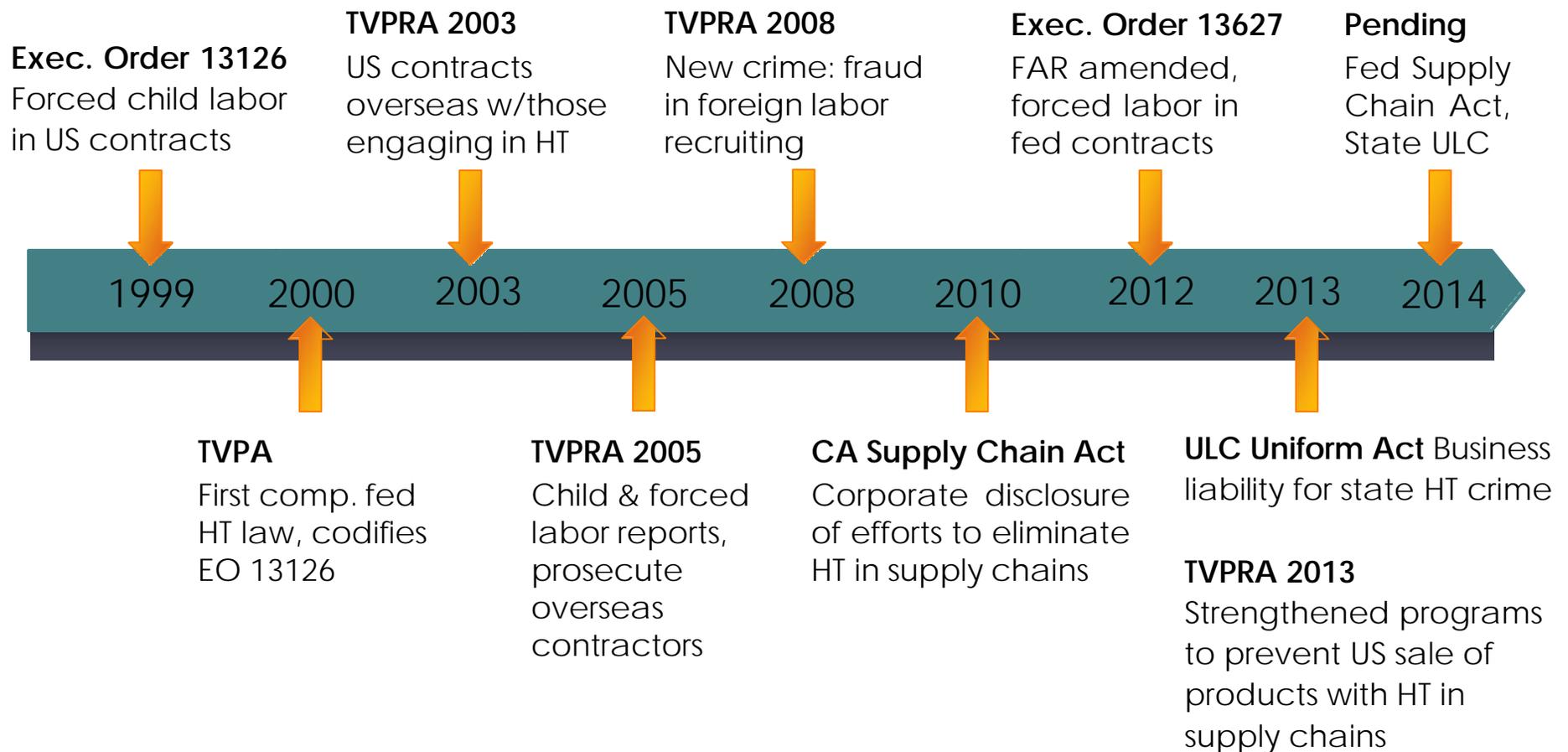
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COERCION

- Sexual abuse, battery, rape
- Isolation, neglect of basic needs
- Physical abuse
- Observing other victims being raped or abused
- Psychological abuse: threats of harm to victims or family
- Controlling all aspects of daily life: food, shelter, health care
- Threats of reporting their criminality to the authorities
 - Debt bondage

Legislating Supply Chain Compliance: A Timeline





How did we get here?

Increasing Awareness: The Upward Trend of Statistics

National HT Hotline Calls: 2007-2012

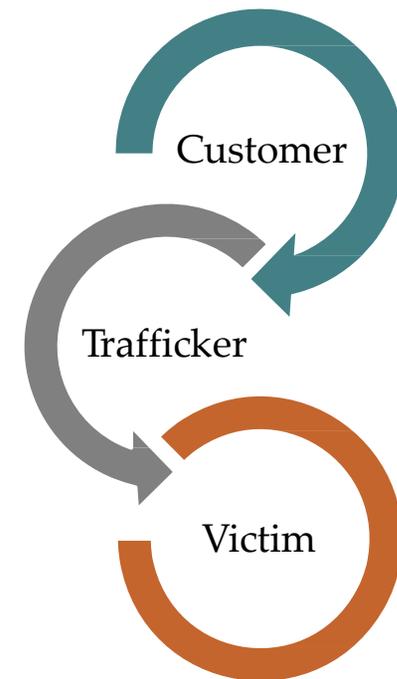
National Glimpse	
Number of Unique HT Cases Nationwide	9,298
Number of Calls of Labor Exploitation	4,167
% of Cases Involving Children	29%
% Sex Trafficking	64%
% Labor Trafficking	22%
% Other	15%

Source: NHTRC

2013 Calls:
5,214 Potential Trafficking Cases (929 Labor Trafficking)
2,175 Potential Labor Exploitation Cases

Economics 101: Demand

- *Where there is a demand, there will be a supply*
- Customers enable commercial sex & sex trafficking
- Businesses/individuals that turn a blind eye to minimize expense can enable labor trafficking





Promulgating Scrutiny

Government Attempts to Motivate Corporate Action



Foreign Corrupt Practices Act

IMPACT ON BUSINESSES

- **Develop compliance program**
- **Conduct internal investigations**
- **Train officers and employees**
- **Adopt procedures to ensure compliance**
- **Maintain accurate books and records**
- **Publicly display awareness**

FCPA PENALTIES

IMPACT ON BUSINESSES

- **SEC: 51 enforcement actions 2010-2014**
- **DOJ: 72 criminal actions 2010-2014**
- **In 2013, DOJ and SEC collected in excess of \$6.35 million in civil and criminal penalties**
- **Of 10 DOJ enforcement actions in 2011, all but one equal criminal fines in excess of \$3 million**
- **In 2012-2013, only 3 paid less than \$7 million in fines**

US Dept. of Labor Reports

- 1999 Exec. Order 13126, *Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor*
 - DOL to maintain list of products/countries of origin produced by **forced child labor**
 - Federal contractors supplying products on list must prove “good faith effort” to determine if products produced w/forced child labor
- 2000 Trafficking Victims Protection Act: Codified E.O. 13126
- 2003 & 2005 TVPRAs: Expanded DOL reporting to include forced labor and child labor
- **2001 Forced Child Labor: 11 products from 2 countries**
- **2013 Forced Child Labor: 35 products from 26 countries**
- **2013 Forced OR Child Labor: 134 products from 74 countries**
- **2014 Forced OR Child Labor: 136 products from 74 countries**

LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR

By Country

KEY
FOACED LABOA O&DLABOR 90111

Atgh111JlIn n: D - C • C O A L - E S
Mgoll
Argontllilll
su.EEIERR>ES • 6RICKS • OOTIION • GARUC •
GRAR.S • SIRAWBERRES •
10BAO.O • TOKAIOES • Y BAHATE
<DrnIN
BiDiS • BAIC • CS • I1111 • FOOTV • EAR •
STEELRJRNaJRE • GLASS • LEATHER • J.JJE
TEXTLES • HAICIES • Pa . I11Y • SALT • SHAI •
SOAP • TEXIIS
BAHINAS • CITA.15 FALGS • SL.6AR CANE
C O T - • CRUSHED GRANITE
IIM & IUn . cal . IU1a • BRICTS • CATTLE •
O O . • GOID • PEAHUTI •
. ZINC
SES • 8RIGKS • CASHEWS • C1a n & • CERAJoCS •
CNUICOAL • COFI0N • M GAAMENTI •
MAHJC/CASSAVA • RIEA1A.IES • RICE • SISAL •
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By Type

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• cocoa • axxmuts • rotree • cam • cotton • cuwmbers • ClITin
• eggplants • sh • nowers • garlic • goats • grapes • g" "" beans •
hazelnuts • hogs • hybrid cottonseed • lobsters • manloc • assava •
melons • mlraa • nlle perch • o llyes • onions • pam 0 ft • palm thatch •
peanutsphysic nutsit:astDr beans • pineapple< • pappiespoultry •
pulse5 • nee • rubber • sesame • shefmsh • shrimp • sisal • strawberrie •
• sugar beets • sugarcane • sunf1owers • tea • teak • tllapla • tllTber •
tobacco • tomatoes • vanlla • wheat •)Orbamate

63

Agriculture/Forestly/Fishing

artncal n s • baked goods • beef • blds • brassware • bricks
• carpets • cement • oeram lcs • charcoal • christmas decorations •
clay bricks • dr1ed fish • electronics • erri:elllshd textiles • rashlon
accessories • n, ks • rootwear • 1Umltue • garments • glass •
glass bangles • hand-woYen textiles hcnse • Jute ta11115 • leather
• Imther goods/1ccessor1e< • locks • matche5 • nails • PJ'OLE<hnts •
sand& • slkratnc • slk th" "" d • soap • soccer balls • steel 1Umltue •
surgical Instruments • texWes • thread/yarn • toys

4

Manufacturing

casslterite • coal • ootran • copper • crushed granite • diamonds
• emeralds • uorspar • gems • gold • granite • 1JIM11 • gypsum
• heterogenlte • Iron • Jade • Imestone • pumice stone • rubie •
salt • sand • sapphires • slYer • stones • ranzanlte • tin • trona •
woltram lte • zinc

29

Mining/Quarrying

1

pomograp1j

Other E J



TVPA & TVPRAs: Expanding Criminal Liability

- 2000, 2003, 2005, 2008
- **2000:** Establish federal crime
- **2003:** Terminate US contracts with overseas contractors engaging in HT or forced labor
- **2005:** Expand federal criminal prosecutions to US contractors & government personnel overseas
- **2008:** Create new crime for fraud in foreign worker recruiting

2010 California

Transparency in Supply Chains Act

- Require corporate disclosure of efforts to eliminate human trafficking from supply chains
 - Inform consumer choices
 - Create pressure for Company to eradicate
- Basics: Large businesses in CA must disclose policies, if any, in place to address HT in supply chains
- Exclusive Remedy for Violations: State Attorney General Action
 - Injunctive relief to post the required disclosures
 - *But see . . .* potential class action suits under CA statutes

CA Supply Chains Act: Who?

- CA's Franchise Tax Board provides list:
 - Retail seller or manufacturer
 - Over \$100 million in “annual worldwide gross receipts”
 - Doing business in CA, as defined by CA tax code
- CAAG resisted disclosure of list (noncompliant companies a chance to redeem), **but . . .**

Notify Me

KNmW CHAIN

Committed to Ethical and Transparent Supply Chains

THE ISSUE

ABOUT US

BROWSE COMPANIES

RESOURCES

BLOG

BROWSE COMPANIES

Sector

Any Sector

Company Name

Statement Status

Any Statement Status

E

COMPANY NAME

SECTOR

STATEMENT POSTED

99¢ Only Stores

Discretionary

Consumer



Abaxis, hc.

Healthcare



CA Supply Chains Act: What?

- Disclosure: Whether and to what extent Company –
 - Verifies supply chains to evaluate/address risks of HT
 - Uses third party verification?
 - Audits suppliers for compliance with Company standards
 - Unannounced visits? Independent auditors?
 - Requires supplier certification that materials comply with HT laws of countries where they do business
 - Maintains internal “accountability” procedures for employees or contractors who fail to meet Company standards on HT
 - Provides Company supply chain managers/employees with training on HT, emphasizing mitigation of supply chain risks



2012 E.O. 13627:

US Contract Debarment

- *Strengthening Protections Against Trafficking In Persons In Federal Contracts*
- Amendment of Federal Acquisition Regulation to prohibit federal contractors, subcontractors & their employees from:
 - Using misleading/fraudulent recruitment practices
 - Charging employees recruitment fees
 - Destroying, concealing, or withholding employee IDs
 - Failing to pay return travel to US for employees sent on foreign projects
 - FAR Council Discretion: Anything directly supporting or promoting HT, forced labor, or procuring commercial sex
- Violations: Debarment from US contracts
- Agencies on tight timeline to revise

2013 Uniform Act on the Prevention of & Remedies for Human Trafficking

- 2010 ABA Proposal to Uniform Law Commission:
 - Convene committee to draft uniform state law to prosecute trafficking
 - Goal: Improve coordination & collaboration (prevent criminal forum shopping)
 - Highly unusual to undertake uniform criminal act dealing with substantive law
- November 2013: Final Draft, with specific section on Business Entity Liability (2 Years of Drafting)
 - Approved by ULC & ABA House of Delegates

UAPRHT Proscribes for Corporations:

- Knowingly engaging in forced labor or sexual servitude:
 - Owner/manager employs forced labor directly in manufacturing/distribution facility
 - Hotel runs prostitution operation for the benefit of its guests
- Employee/agent uses forced labor or sexual servitude for benefit of Company, Company finds out, and does not *effectively* act to stop it
 - Subcontracts for discounted cleaning services at Company using a labor trafficking ring
 - Forced/child labor used at factory operated by employee/agent
- Potential Penalties:
 - Fines
 - Disgorgement of Profits from Activity
 - Debarment from state/local government contracts



Pay Attention to the Previews

Why Corporations Should Care About the Uniform Act, State Legislation, and Mounting Public Scrutiny

UAPRHT Section 8: Coming Soon to a State Near You



States With Existing Criminal Business Entity Provisions

- Arkansas
- District of Columbia
- Georgia
- Hawaii
- Massachusetts
- Minnesota
- Mississippi
- Missouri
- Rhode Island
- South Carolina
- Tennessee
- Vermont
- Wisconsin

**Total: 26 States With or Considering
Criminal HT Business Entity Liability**



HR4842:

On the Federal Radar

- *Business Supply Chain Transparency on Trafficking and Slavery Act of 2014*
- Introduced in House 06/11/2014 (In Committee)
- SEC to require mandatory annual reports for certain covered companies to include disclosures on:
 - Whether the Company has taken measures to identify and address
 - Forced labor, slavery, human trafficking, and the worst forms of child labor
 - Within supply chains
- “Top 100”: Sec. of Labor to publish annually a list of top companies adhering to federal/international supply chain labor standards
- Tried in prior years, and failed, *but . . .*

Momentum: Mounting Public Scrutiny

REVISED 102B

ADOPTED
RESOLUTION

1 RESOLVED, That the American Bar Association adopts the black letter Model Principles of the
2 ABA Model Business and Supplier Policies on Labor Trafficking and Child Labor, dated February
3 2014, as follows:

4

5 [THE MODEL PRINCIPLES](#)

6

7 [A. MODEL BUSINESS PRINCIPLES](#)

8 [Principle 1—The Business will Prohibit Labor Trafficking and Child Labor in](#)

9

10 [Principle 2—The Business will Conduct a Risk Assessment of the Risk of La](#)
11 [Child Labor and Continually Monitor Implementation of this Policy.](#)

12

13 [Principle 3—The Business should: \(i\) Train Relevant Employees, \(ii\) Eng](#)
14 [Improvement, and \(iii\) Maintain Effective Communications Mechanisms with](#)

15

16 [Principle 4—The Business will Devise a Remediation Policy and Pla](#)
17 [Remediation for Labor Trafficking or Child Labor in its Operations.](#)

18

ATEST Coalition

March 2014

Demand CAAG **enforce Supply Chains Act**,
noted **102** corporations **failed to comply**

ABA Resolution 102B

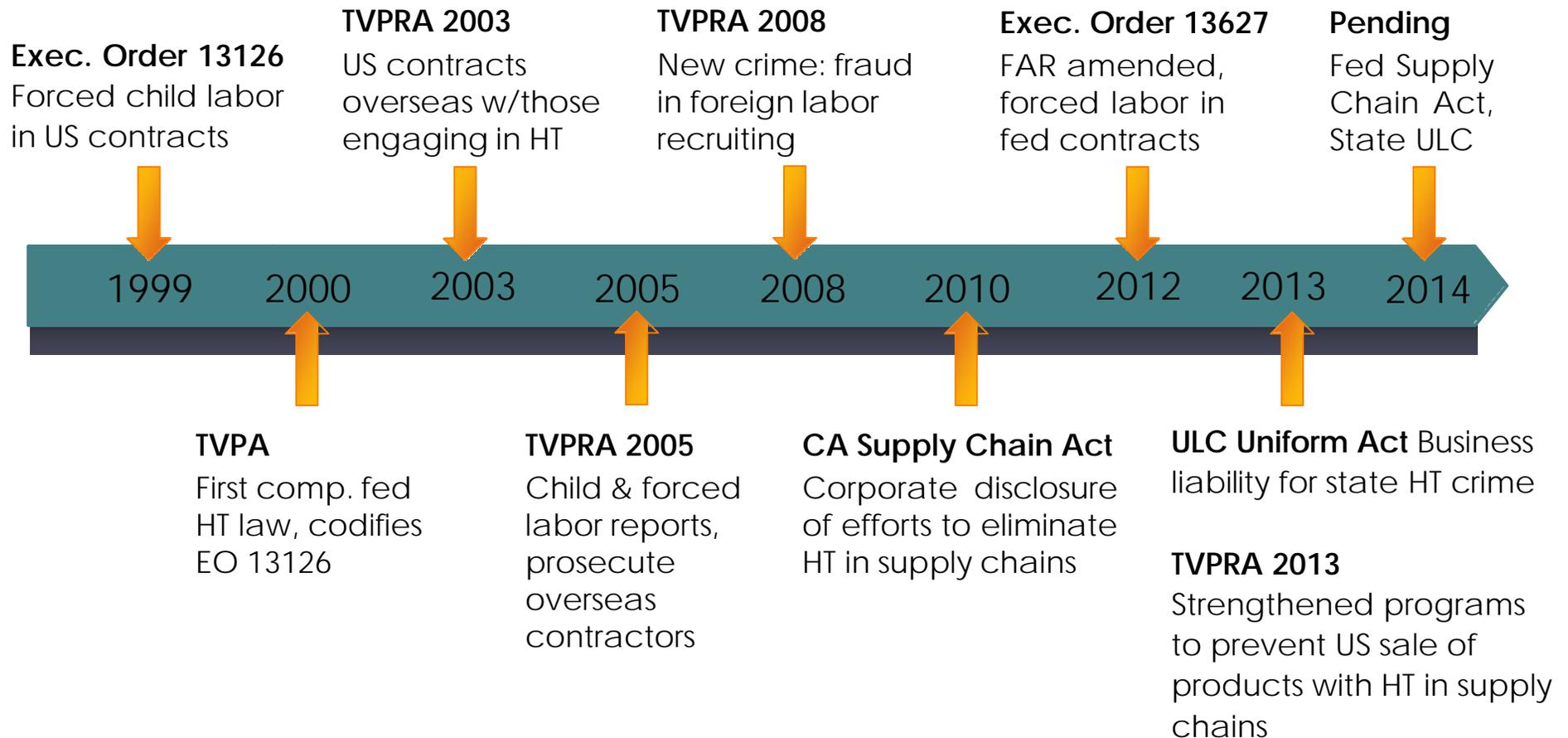
February 2014

Model policies for business enterprises to identify general areas where the risk of labor trafficking or child labor is more significant so they can prioritize those for appropriate action.

The screenshot shows the ATEST website with the following content:

- ATEST Alliance To End Slavery & Trafficking**
- Navigation: ABOUT ATEST, POLICY & RESOURCES, MEDIA CENTER, GET INVOLVED, BLOG
- Header: NATIONAL HUMAN TRAFFICKING HOTLINE 888-373-7888
- Section: HOME » RESOURCES
- Article Title: LETTER TO REQUEST ENFORCEMENT OF CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT
- Date: MARCH 18, 2014
- Text: Today, eleven organizations joined the Alliance to End Slavery & Trafficking (ATEST) in calling for the California Attorney General to enforce the California Transparency in Supply Chains Act. Tens of millions of adults and children are living in conditions of modern slavery around the world, exploited through force, fraud or coercion. And a reality in today's global economy is that many of the goods we use and buy everyday are produced far from where they are bought, successively changing hands along complex and opaque supply chains. Because we believe global businesses have a responsibility to eradicate modern slavery within their supply chains, the following letter calls upon the California Attorney General to fulfill her responsibility and enforce this law.
- RELATED MATERIALS: ATEST REPORT AIMS TO BOLSTER CORPORATE COMPLIANCE WITH CALIFORNIA'S TRANSPARENCY IN SUPPLY CHAINS ACT, SB 657; ATEST WELCOMES KNOWTHECHAIN AS TOOL FOR PROMOTING TRANSPARENCY AROUND SLAVERY IN SUPPLY CHAINS; NEW REPORT HELPS COMPANIES MEET AND EXCEED REQUIREMENTS TO ELIMINATE HUMAN TRAFFICKING FROM SUPPLY CHAINS
- MEMBER ORGANIZATIONS: ATEST, VITAL VOICES GLOBAL PARTNERSHIP, etc.

Review the Timeline: A Case for Building Momentum



Questions?

Honorable Virginia M. Kendall
United States District Court -Northern District of IL
Virginia_kendall@ilnd.uscourts.gov
Co-author, *Child Exploitation and Trafficking
Examining the Global Issues and U.S. Response*

*Federal Judicial Center
International Litigation Guide*

Mutual Legal Assistance Treaties and
Letters Rogatory: A Guide for Judges

2014

*Federal Judicial Center
International Litigation Guide*

Mutual Legal Assistance Treaties and
Letters Rogatory: A Guide for Judges

T. Markus Funk
Partner, Perkins Coie

Federal Judicial Center
2014

This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to develop and conduct education programs for the judicial branch. While the Center regards the content as responsible and valuable, it does not reflect policy or recommendations of the Board of the Federal Judicial Center.

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I. Introduction

The investigation of transnational criminal conduct, like the discovery process for transnational civil proceedings, often involves gathering evidence located in foreign countries. However, national sovereignty, international treaties, and international law preclude U.S. law enforcement officials from simply flying to a foreign country to conduct searches, question suspects, obtain documents, and proceed with arresting individuals for trial in the United States. In the absence of a foreign country's agreement to cooperate in a criminal investigation or civil litigation, U.S. prosecutors or civil litigation counsel have limited options. For this reason, transnational cooperation and collaboration is an integral component of contemporary justice systems.¹

For criminal proceedings, there are two primary means of obtaining evidence: a Mutual Legal Assistance Treaty (MLAT) and a letter rogatory. For civil proceedings, there is only a letter rogatory. Evidence obtained from abroad through these tools may be presented as part of court proceedings, requiring U.S. judges to be familiar with the legal issues implicated by transnational requests for assistance.² In addition, judges should be aware that diplomacy, executive agreements, and information exchange through informal communications also play an important role in transnational criminal investigations and civil litigation.³

Requests for transnational assistance requiring judicial oversight most commonly involve activities necessary for proceeding with a criminal investigation or prosecution or a transnational civil proceeding, such as serving subpoenas, locating evidence and individuals, and taking testimony. The court's role in reviewing these requests will vary depending upon the applicable treaties and foreign law.⁴

1. See generally Lita M. Grace, *The United States and Canadian Border: An Attempt to Increase Bi-Lateral Cooperation for the Prevention of Transnational Crime*, Colum. J. Int'l Aff. (2012), available at <http://jia.sipa.columbia.edu/united-states-and-canadian-border> (last visited Jan. 13, 2014) (“[M]ultiple federal law enforcement agencies have begun to observe a statistical increase in the committing of transnational crime. The United States understands that it will take cooperation with more than one country in order to deter transnational crime . . .”).

2. This guide focuses on obtaining evidence and assistance in criminal matters. The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters [hereinafter the Hague Evidence Convention]—codified at 28 U.S.C. § 1781 under the auspices of the Hague Conference on Private International Law, and enforced since 1972—sets forth the procedures for obtaining evidence and assistance in civil cases by its over fifty signatory countries (including the United States).

3. See generally Virginia M. Kendall & T. Markus Funk, *Child Exploitation and Trafficking: Examining the Global Challenges and U.S. Responses* 231–34 (2012) (“Although formal MLATs, letters rogatory, and conventions may be the ‘public face’ of the world’s cooperative law enforcement community, a comparable amount of exchange of information occurs through tried-and-tested informal [channels.]”); Dan Webb et al., *Corporate Internal Investigations* § 13.08 (2010) (noting the various informal channels of foreign-based evidence gathering in light of the “past two decades [of exploding] international trade and commerce”).

4. For example, 28 U.S.C. § 1782 expressly states that “a person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any applicable privilege,” which may include foreign privilege (see *In re Commissioner’s Subpoenas*, 325 F.3d 1287, 1292 (11th Cir. 2003)).

The MLAT is a treaty-based mechanism for seeking foreign law enforcement cooperation and assistance in support of an ongoing criminal investigation or proceeding.⁵ The MLAT process, and its benefits, are available only to government officials, typically prosecutors.⁶ MLATs do not apply to civil litigants or proceedings. Supervising the execution of *incoming* MLATs—requests for assistance from foreign jurisdictions—requires direct federal district court oversight and involvement.⁷ In contrast, the courts play no part in initiating or processing *outgoing* MLAT requests. That is the province of the executive branch.

Letters rogatory, in contrast, have a considerably broader reach than MLATs: they can be issued by U.S. federal and state courts as part of criminal, civil, and administrative proceedings, and they can be sent to U.S. federal and state courts by any foreign or international tribunal or “interested person.”⁸

Letters rogatory (also known as “letters of request” when presented by a non-party “interested person”⁹) were first used to facilitate cooperation among the courts of the several states of the Union. Today, the letter rogatory process is used internationally and is codified at 28 U.S.C. §§ 1781¹⁰ and 1782 (the “Judicial Assistance Statute”).¹¹

Letters rogatory are available to prosecutors, defendants, and civil litigants once formal proceedings have commenced; they typically cannot issue during the

5. *See generally* U.S. Department of State, 7 Foreign Affairs Manual [hereinafter FAM] § 962.1, www.state.gov/m/a/dir/regs/fam/ (“MLATs have become increasingly important. They seek to improve the effectiveness of judicial assistance and to regularize and facilitate its procedures.”).

6. *See id.* § 962.5.

7. However, state courts do not help in the processing of incoming MLAT requests. If evidence located abroad is needed as part of a prosecution in state courts, local prosecutors may enlist the MLAT process and work with the foreign judicial system. *See Morgenthau v. Avion Res. Ltd.*, 49 A.D.3d 50, 59, 849 N.Y.S.2d 223, 230 (2007).

8. *See* 28 U.S.C. § 1782(a) (“The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.”).

9. *See generally In re Letter of Request from Crown Prosecution Serv. of United Kingdom*, 870 F.2d 686, 687 (D.C. Cir. 1989) (involving a request by foreign government for information for use in underlying criminal investigation).

10. Title 28 U.S.C. § 1781(a) provides that the U.S. State Department is “empowered” to (1) use formal channels to transmit letters rogatory from foreign or international tribunals to the appropriate U.S. court, and receive and return them after execution; and (2) transmit letters rogatory from U.S. courts to the applicable foreign or international tribunal, officer, or agency, and receive and return them after execution. Notably, section 1781(b) also expressly states that U.S. courts or foreign or international tribunals may skip the middleman (to wit, the U.S. State Department) and send their requests directly to the foreign tribunal, officer, or agency.

11. Title 28 U.S.C. § 1782(a) allows any litigant involved in a “proceeding in a foreign or international tribunal” to apply to a U.S. court to obtain evidence for use in the non-U.S. civil or criminal proceeding. This avenue for obtaining evidence from inside the United States is, thus, unrestricted in terms of (1) the type of proceeding, and (2) the foreign countries from which such requests can issue, and, therefore, overlaps—and, indeed, exceeds—the subject matter of the Hague Evidence Convention. What is more, unlike the Hague Evidence Convention, section 1782 does not require the foreign litigant to first request the discovery from the non-U.S. tribunal.

investigative stage of criminal proceedings.¹² The process for letters rogatory is more time-consuming and unpredictable than that for MLATs. This is in large part because the enforcement of letters rogatory is a matter of comity between courts, rather than treaty-based.

For these reasons, prosecutors typically consider letters rogatory an option of last resort for accessing evidence abroad, to be exercised only when MLATs are not available. In contrast, because MLATs are never available to private parties, defense counsel and civil litigants must rely on letters rogatory to gather evidence located abroad. This disparity in access to evidence may result in delayed proceedings and cause the defense to raise access to justice issues.

Requests from abroad (“incoming requests”) for legal assistance are directed to a country’s designated “central authority,” usually the Department (or Ministry) of Justice. The central authority, in turn, transmits the MLAT or letter-rogatory-related communication to the appropriate court or government entity.

When a federal prosecutor appears before a U.S. district court requesting assistance on behalf of a foreign state or provides notice that the U.S. government will seek assistance from a foreign state, the prosecutor acts at the direction of the U.S. Department of Justice’s Office of International Affairs (OIA). OIA is the United States’ central authority and de facto functional hub for all outgoing and incoming requests for transnational investigation and litigation assistance. Its attorneys process the paperwork for incoming and outgoing requests for assistance, issue guidance, and draft the form motions used by federal prosecutors. If the court has questions or concerns about the request, the judge may address them directly to OIA, typically through the local United States Attorney’s Office.

This guide provides an overview of the statutory schemes and procedural matters that distinguish MLATs and letters rogatory, and it discusses legal issues that arise when the prosecution, the defense, or a civil litigant seeks to obtain evidence from abroad as part of a criminal or civil proceeding. Figure 1 is a chart that compares the two processes. The guide also discusses informal channels for information exchange in Part IV.

12. See *In re* Letter of Request from Crown Prosecution Serv. of United Kingdom, 870 F.2d at 692 (suggesting that letters rogatory are available unless there is a reliable indication that there is a likelihood that proceedings will be instituted within a reasonable time); see also 28 U.S.C. § 1782(a) (providing that, with the exception of criminal investigations, the section only covers “testimony or statement or . . . documents or other things for use in a *proceeding* in a foreign or international tribunal . . .”) (emphasis added).

Figure 1. Comparison of an MLAT and a Letter Rogatory

Issue	MLAT	Letter Rogatory
Nature of instrument?	Bilateral cooperation treaty	Issued by state and federal courts as a matter of comity (and with the expectation of reciprocity)
Scope of use?	The primary method of obtaining foreign evidence and other assistance	Available to all parties in criminal and civil matters
Nature of judicial involvement?	U.S. district courts supervise issuance and execution only of incoming requests	Federal and state judiciaries supervise issuance and execution of outgoing and incoming requests
Available to criminal defendants?	No (except pursuant to the first three MLATS the United States signed)	Yes; in fact, is the primary formal means for defendants to obtain foreign evidence
Available to civil litigants?	No	Yes
Available to prosecutors?	Yes	Yes
Must a case have been filed for assistance to be available?	No	Yes
Available pre-indictment (during investigative phase)?	Yes	No
Efficient method of obtaining evidence?	Relatively speaking, yes	No, generally slow and cumbersome
Processed through diplomatic channels?	Always	Almost always

II. Mutual Legal Assistance Treaties

A. Overview

MLATs are the principal vehicle through which law enforcement officials make transnational requests for assistance relating to evidence gathering and other law enforcement activities. They are available for use by law enforcement officials involved in criminal investigations and proceedings (or in some civil matters where the case is related to a criminal matter).¹³ MLATs are legally binding negotiated commitments. Nonetheless, courts review specific requests for assistance and may deny them if they fail to comply with applicable domestic law or procedure.¹⁴

1. Scope

MLATs provide for mutual cooperation between nations in the investigation and prosecution of transnational crime, and they do so through explicitly enumerated categories of law enforcement assistance unique to each treaty.¹⁵ The types of assistance MLATs usually provide for include the following:

- serving judicial or other documents;
- locating or identifying persons or things;
- taking testimony;
- examining objects and sites;
- requesting searches and seizures;
- obtaining documents or electronic evidence;
- identifying, tracing, and freezing or confiscating proceeds or instrumentalities of crime and/or other assets;
- transferring persons in custody for testimonial purposes or to face charges, as in extradition cases;
- freezing assets; and

13. See generally 7 FAM § 962.5, *supra* note 5.

14. See generally *United States v. Rommy*, 506 F.3d 108 (2d Cir. 2007) (holding that “when securing evidence without MLAT authorization, foreign government officials lacking diplomatic immunity must conduct themselves in accordance with applicable ‘domestic laws.’”); see also Kimberly Prost, *Breaking Down the Barriers: International Cooperation in Combating Transnational Crime*, http://www.oas.org/juridico/mla/en/can/en_can_prost.en.html (last visited Jan. 13, 2014) (“For mutual assistance to succeed, the operative principle must be that requests will be executed in accordance with the law of the requested state and to the extent not prohibited by that law, will be provided in the manner sought by the requesting state. In other words, while authorities in a requested state must always meet the standards prescribed by domestic law, unless the rendering of assistance in the form sought would constitute a violation of that law, it should be provided.”).

15. See *In re Commissioner’s Subpoenas*, 325 F.3d 1287, 1291 (11th Cir. 2003) (“Despite the apparent versatility of 28 U.S.C. § 1782, law enforcement authorities found the statute to be an unattractive option in practice because it provided wide discretion in the district court to refuse the request and did not obligate other nations to return the favor that it grants. MLATs, on the other hand, have the desired quality of compulsion, as they contractually obligate the two countries to provide to each other evidence and other forms of assistance needed in criminal cases while streamlining and enhancing the effectiveness of the process for obtaining needed evidence.”).

- any other assistance permitted by the foreign law and specified in the applicable treaty.¹⁶

Most MLATs also include a catchall provision authorizing the transfer of any evidence not prohibited by the requested nation’s law.¹⁷

The United States has bilateral MLATs in force with every European Union member state, many of the Organization of American States member states, and many other countries around the world. An MLAT is negotiated by the U.S. Department of Justice in cooperation with the U.S. Department of State. The Secretary of State formally submits the proposed MLAT, typically together with a report detailing the function and purposes of the MLAT’s key provisions,¹⁸ to the President of the United States for transmittal to the U.S. Senate. Following the advice and consent of the Senate, the President signs the treaty and directs the Secretary of State to take the actions necessary for the treaty to enter into force. Once signatory countries have complied with entry-into-force provisions, the MLAT becomes binding under international law.¹⁹

In February 2010, the United States and the European Union (through its fifty-six member countries) entered into a historic MLAT. This multiparty MLAT seeks to enhance and modernize cross-border law enforcement and judicial cooperation. The terms of the E.U.–U.S. agreement include standard areas of assistance, such as identifying financial account information, finding and seizing evidence, and taking testimony. This MLAT also includes provisions addressing bank secrecy, joint criminal investigations, use of videoconferencing for taking testimony, and assistance to administrative agencies, such as the Securities and Exchange Commission and the Federal Trade Commission.²⁰

2. Procedure

When a foreign country requests assistance pursuant to an MLAT, the U.S. court must determine whether (1) the terms of the MLAT prescribe practices or procedures for the taking of testimony and production of evidence, (2) the Federal Rules of Procedure and Evidence apply, or (3) the MLAT requires some sort of a hybrid approach. It is also acceptable to follow specified practices and procedures of the requesting country—*provided* they are consistent with U.S. law, including the rules relating to privilege. MLATs executed in the United States must follow U.S. constitutional requirements, including the protection of Fourth Amendment²¹

16. See generally Hon. Virginia M. Kendall & T. Markus Funk, *The Role of Mutual Legal Assistance Treaties in Obtaining Foreign Evidence*, 40 A.B.A. Litig. J. 1, 1–3 (2014) (listing standard types of assistance).

17. David Luban et al., *International and Transnational Criminal Law* 376 (2009).

18. See, e.g., S. Exec. Doc. No. 109-14 (2006); S. Treaty Doc. No. 111-6 (2010).

19. See, e.g., S. Exec. Doc. No. 110-14 (2008); see also U.S. Gov’t Accountability Office, GAO-11-730, *Tax Administration: IRS’s Information Exchanges with Other Countries Could Be Improved Through Better Performance Information* (2011).

20. Luban et al., *supra* note 17, at 386.

21. U.S. Const. amend. IV (providing freedom from “unreasonable searches and seizures”).

and Fifth Amendment²² rights. That said, U.S. legal standards do not apply to the seizure of evidence overseas when the foreign country is conducting the investigation independently and seizes evidence later introduced in a U.S. court,²³ nor does the Sixth Amendment right to counsel attach to civil depositions.²⁴

3. Contents

To assist the U.S. court in reviewing an incoming MLAT request, the following information is usually included (or should be made available by the assistant U.S. attorney handling the matter):

Basic information

- the name of the authority conducting the investigation, prosecution, or other proceeding to which the request relates;
- a description of the subject matter and the nature of the investigation, prosecution, or proceeding, including the specific criminal offenses that relate to the matter;
- a description of the evidence, information, or other assistance sought; and
- a statement of the purpose for which the evidence, information, or other assistance is sought.

22. *Id.* amend. V. Witnesses deposed in the United States or in a foreign country retain the Fifth Amendment privilege against self-incrimination, regardless of whether they are U.S. citizens or foreign nationals. *See generally In re Terrorist Bombings of South Africa*, 552 F.3d 177, 199 (2d Cir. 2008) (“[R]egardless of the origin—i.e., domestic or foreign—of a statement, it cannot be admitted at trial in the United States if the statement was ‘compelled.’ Similarly, it does not matter whether the defendant is a U.S. citizen or a foreign national: ‘no person’ tried in the civilian courts of the United States can be compelled ‘to be a witness against himself.’”) (citation omitted). *See also United States v. Jefferson*, 594 F. Supp. 2d 655, 670 n.25 (E.D. Va. 2009); David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?*, 25 *Jefferson L. Rev.* 367, 388 (2003) (analyzing the issue and finding that U.S. and foreign citizens enjoy the same general privileges and protections under the U.S. Constitution).

23. *United States v. Behety*, 32 F.3d 503 (11th Cir. 1994) (holding that U.S. authorities’ presence during Guatemalan officials’ search of a U.S. vessel and action of tipping Guatemalan authorities that the vessel may contain cocaine insufficient to constitute “substantial participation,” which would have triggered the Fourth Amendment reasonableness standard for evaluating the search); *In re Request for Assistance from Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d 1151, 1156 n.12 (11th Cir. 1988) (abrogated on other grounds) (refusing to quash a subpoena the court issued pursuant to a request for legal assistance from a foreign government; the court “must decide whether the evidence would be discoverable in the foreign country before granting assistance”); *United States v. Callaway*, 446 F.2d 753 (3d Cir. 1971) (ruling that U.S. courts may exclude evidence gathered by foreign governments only (1) where there is joint action by both the U.S. and foreign governments, and (2) where solo actions by the foreign government “shock the conscience” of the U.S. court).

24. Civil depositions do not trigger the Sixth Amendment. *See generally United States v. Hayes*, 231 F.3d 663, 674 (9th Cir. 2000) (holding that the right to counsel had not attached, even after the government had sought to obtain material witness depositions for use at the defendant’s trial).

Assistance-specific details

- information concerning the identity and location of any person from whom evidence is sought;
- information concerning the identity and location of a person to be served, that person’s relationship to the proceeding, and the manner in which service is to be made;
- information on the identity and whereabouts of a person to be located;
- a precise description of the place or person to be searched and items to be seized;
- a description of the manner in which any testimony or statement is to be taken and recorded;
- a list of questions to be asked of a witness; and
- a description of any particular procedure to be followed in executing the request.

An MLAT request containing this information provides the district court with a general basis for evaluating the request for assistance. If necessary, the court may ask the assigned prosecutor to provide additional information (typically through OIA).

B. Statutory Scheme

1. 28 U.S.C. § 1782

Originally enacted in the mid-nineteenth century to encourage reciprocal assistance with transnational litigation, the statute now codified at 28 U.S.C. § 1782 permits federal courts to provide cross-border assistance via MLATs.²⁵ It sets forth specific procedures courts and prosecutors must follow:

- a) The district court of the district in which a person resides or is found *may* order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. . . . The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.²⁶

Section 1782 allows any “interested person” from any country who is involved in a “proceeding in a foreign or international tribunal” to apply—whether through an MLAT or letter rogatory—to a U.S. court to obtain evidence for use in that non-U.S. civil or criminal proceeding. Section 1782 is broader than the Hague Evidence Convention and does not require the foreign litigant to first re-

25. *See, e.g., Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247–49 (2004) (detailing the history of section 1782).

26. 28 U.S.C. § 1782(a).

quest the discovery from the non-U.S. tribunal.²⁷ Section 1782 gives courts discretion as to “whether, and to what extent, to honor a request for assistance.”²⁸

2. 18 U.S.C. § 3512

The Foreign Evidence Efficiency Act, codified at 18 U.S.C. § 3512, was enacted to help streamline the MLAT process, making it “easier for the United States to respond to requests by allowing them to be centralized and by putting the process for handling them within a clear statutory system.”²⁹

The assistance contemplated by section 3512 includes, but is not limited to

- (A) a search warrant, as provided under Rule 41 of the Federal Rules of Criminal Procedure;³⁰
- (B) a warrant or order for contents of stored wire or electronic communications or for records related thereto, as provided under section 2703 of this title;
- (C) an order for a pen register or trap and trace device, as provided under section 3123 of this title; or
- (D) an order requiring the appearance of a person for the purpose of providing testimony or a statement, or requiring the production of documents or other things, or both.³¹

To process the foreign request for assistance, the assistant U.S. attorney will review and approve the request, and then, pursuant to 18 U.S.C. § 3512, will file it with the U.S. district court

- (1) in the district where the person who may be required to appear resides or is located or in which the documents or things to be produced are located;
- (2) in cases in which the request seeks the appearance of persons or production of documents or things that may be located in multiple districts, in any one of the districts in which such a person, documents, or things may be located; or
- (3) in any case, the district in which a related Federal criminal investigation or prosecution is being conducted, or in the District of Columbia.³²

As it does under 28 U.S.C. § 1782, under 18 U.S.C. § 3512, the court has discretion over whether to issue the requested order.³³

27. See *In re Premises Located at 840 140th Ave., NE, Bellevue, Wash.*, 634 F.3d 557, 571 (9th Cir. 2011) (“We hold that requests for assistance via the U.S.–Russia MLAT utilize the procedural mechanisms of § 1782 without importing the substantive limitations of § 1782. In particular, the parties to the treaty intended that the district courts would not possess the normal ‘broad discretion,’ conferred by § 1782, to deny requests for assistance.”).

28. See *id.* at 563.

29. 155 Cong. Rec. S6810 (daily ed. June 18, 2009) (statement of Sen. Whitehouse).

30. Note, however, that a district court’s authorization to issue search warrants under this section is subject to certain restrictions, namely, that the foreign offense for which the evidence is sought involves conduct that, if committed in the United States, would be considered an offense punishable by imprisonment for more than one year under federal or state law. 18 U.S.C. § 3512(e) (2009).

31. 18 U.S.C. § 3512(a)(2) (2009).

32. *Id.* § 3512(a) & (c).

33. *Id.* § 3512(a)(1) (providing that “a Federal judge *may* issue such orders as may be necessary to execute a request from a foreign authority”) (emphasis added); § 3512(a)(2) (“Any order issued by a Federal judge pursuant to paragraph (1) *may* include the issuance of [non-exhaustive list of orders].”) (emphasis added).

The application to provide the requested assistance, like all such filings, may be submitted *ex parte* and under seal.³⁴ Section 3512 also permits the appointment of an outside individual—sometimes referred to as a “commissioner”³⁵—“to direct the taking of testimony or statements or of the production of documents or other things, or both.”³⁶ A commissioner may pursue requests in multiple judicial districts, eliminating the need for judges in different districts to appoint separate commissioners and otherwise duplicate their efforts.³⁷ Section 3512 also permits judges to oversee and approve subpoenas and other orders (but not search warrants) outside of their district.

Under section 3512, federal judges continue to serve as gatekeepers for search warrants, wiretaps, and other methods of obtaining evidence, ensuring that the collection of requested foreign evidence meets the same standards as those required in U.S. cases (such as, for example, the probable cause standard, specificity in warrants, and protection of attorney–client, physician–patient, and other recognized privileges).³⁸

C. Judicial Review of Requests for Mutual Legal Assistance

Although there is a presumption in favor of honoring MLAT requests,³⁹ the district court must still review the terms of each request, checking that they comply with the terms of the underlying treaty and comport with U.S. law.⁴⁰ For example, in *United Kingdom v. United States*,⁴¹ appellants awaiting trial in England requested disclosure of law enforcement documents they claimed were requested by

34. *See generally* Robert Timothy Reagan, Federal Judicial Center, Sealing Court Records and Proceedings: A Pocket Guide (2010) (noting the court’s wide discretion in whether to grant an *ex parte* motion to seal).

35. While the statute does not require the commissioner to be a lawyer or prosecutor, courts routinely appoint an assistant United States attorney to be the commissioner. *See* 18 U.S.C. § 3512(b)(1) (“In response to an application for execution of a request from a foreign authority as described under subsection (a), a Federal judge may also issue an order appointing *a person* to direct the taking of testimony or statements or of the production of documents or other things, or both”) (emphasis added). *See, e.g.*, *United States v. Trustees of Boston College*, 831 F. Supp. 2d 435 (D. Mass. 2011) (appointing an assistant United States attorney as the commissioner); *In re Request from United Kingdom Pursuant to Treaty*, No. 11-2511, 685 F.3d 1 (1st Cir. 2012) (same).

36. 18 U.S.C. § 3512(b)(1), (2).

37. *See id.* § 3512(b)(2), (f).

38. *See, e.g.*, 28 U.S.C. § 1782(a) (“A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.”). *In re Request from United Kingdom Pursuant to Treaty Between Gov’t of U.S. & Gov’t of United Kingdom on Mut. Assistance in Criminal Matters in the Matter of Dolours Price*, 718 F.3d 13 (1st Cir. 2013) (conducting a relevancy analysis of subpoenaed materials).

39. *In re Premises Located at 840 140th Ave. NE, Bellevue, Wash.*, 634 F.3d 557, 571 (9th Cir. 2011) (“When a request for assistance under the MLAT arrives before a district court . . . almost all the factors already would point to the conclusion that the district court should grant the request.”).

40. *See Kendall & Funk, supra* note 16, at 2 (discussing the role of district courts as gatekeepers).

41. 238 F.3d 1312, 1315 (11th Cir. 2001), *cert. denied sub nom. Raji v. United States*, 122 S. Ct. 206 (2001).

British law enforcement officials pursuant to the U.S.–U.K. MLAT. The Eleventh Circuit denied the motion, finding that the underlying U.K. request for evidence did not conform to the specific protocol set forth in the treaty and, accordingly, no valid MLAT request had been made.⁴²

U.S. courts will also consider constitutional challenges to a request for legal assistance. Although such cases are rare, “a district court may not enforce a subpoena that would offend a constitutional guarantee,” such as a subpoena that would result in an “egregious violation of human rights.”⁴³

D. Legal Issues

While the majority of requests for assistance pursuant to an MLAT proceed uneventfully, courts sometimes are called upon to resolve related legal issues, such as dual criminality, defense access to evidence located abroad, delay, and statute of limitations.

1. Dual Criminality

Unlike extradition treaties enforced in U.S. courts, MLATs do not require dual criminality—that the offense for which the foreign state seeks assistance also constitutes a crime in the requested state. The utilitarian reason for this deviation from the norm is to facilitate responsiveness.

MLATs, after all, are intended to improve law enforcement cooperation between countries, and the United States’ law enforcement objectives often depend upon timely assistance from treaty signatories. The United States has committed to responding to requests under MLATs even if the doctrine of dual criminality exists as part of the requesting country’s domestic law.⁴⁴ This approach establishes a high standard of responsiveness, enabling the United States to “urge that foreign authorities respond to our requests for evidence with comparable speed.”⁴⁵ Most MLATs expressly state that the dual criminality principle does not apply.⁴⁶

Some MLATs, however, are drafted to include limitations that are triggered if the requested assistance requires a court warrant or other compulsion and the underlying offense is not a crime in the requested country. In jurisdictions where domestic law requires dual criminality for international treaties, the MLAT is often drafted to include a nonexclusive list of covered offenses that allow for mutual legal assistance.

42. *Id.* at 1317.

43. *In re Premises*, 634 F.3d at 572.

44. *United States v. Trustees of Boston College*, 831 F. Supp. 2d 435, 450 (D. Mass. 2011) (*aff’d in part sub nom.*); *In re Request from United Kingdom Pursuant to Treaty*, No. 11-2511, 685 F.3d 1 (1st Cir. 2012).

45. *In re Request from United Kingdom Pursuant to Treaty*, No. 11-2511, 685 F.3d 1 (1st Cir. 2012).

46. *In re Commissioner’s Subpoenas*, 325 F.3d 1287, 1299 (11th Cir. 2003). *See also* sources cited at *supra* note 3.

2. Defense Access to Evidence Located Abroad

The MLAT process was created to facilitate international cooperation in the investigation and prosecution of criminal cases. Each treaty's terms apply only to the contracting nations' parties, and the benefits conferred are available only to the governmental officials of those nations.

The first three MLATs signed by the United States—those with Switzerland,⁴⁷ Turkey, and the Netherlands—include provisions granting defense counsel permission to access evidence pursuant to an MLAT. Subsequent MLATs do not include comparable provisions.⁴⁸

Thus, access to evidence through an MLAT is restricted to prosecutors, government agencies that investigate criminal conduct, and government agencies that are responsible for matters ancillary to criminal conduct, including civil forfeiture. In fact, the vast majority of MLATs signed by the United States explicitly *exclude* non-government access to U.S. processes.⁴⁹ Criminal defendants, like civil litigants, must use letters rogatory to secure evidence located abroad, a process that is less efficient and less reliable.⁵⁰

Federal prosecutors increasingly rely on extraterritoriality provisions in federal law, such as those incorporated into the Foreign Corrupt Practices Act,⁵¹ to bring cases in which much of the physical evidence and most potential witnesses are located overseas. Because the MLAT process is only available to the prosecution, the defendant's ability to collect and present evidence is limited.

47. In a case involving the MLAT between the United States and Switzerland, defense counsel requested the government's assistance with securing witness testimony via the MLAT process. Agreeing with the defense argument that the proffered evidence was important to its case, the court ordered the Department of Justice to provide the requested assistance. *United States v. Sindona*, 636 F.2d 792 (2d Cir. 1980). The reasoning of this case is limited to MLATs that provide for defense access to evidence abroad, such as those with Switzerland, Turkey, and the Netherlands. All other MLATs include language explicitly restricting defense access. *See also* L. Song Richardson, *Convicting the Innocent*, 26 *Berkeley J. Int'l L.* 62, 84 (2008); *United States v. Chitron Electronics Co.*, 668 F. Supp. 2d 298, 306 (D. Mass. 2009) (discussing U.S.–China MLAT).

48. *United Kingdom v. United States*, 238 F.3d 1312, 1317 (11th Cir. 2001), *cert. denied sub nom. Raji v. United States*, 122 S. Ct. 206 (2001).

49. *See United States v. Duboc*, 694 F.3d 1223, 1229 (11th Cir. 2012) (“[T]here is a presumption that international agreements do not create private rights or private causes of action in domestic courts, even when the agreement directly benefits private persons. This presumption and the plain terms of the MLAT show that Duboc, as a private party, may not use the MLAT as a defense to the forfeiture of the Thailand condos.”) (citing *United States v. Valencia-Trujillo*, 573 F.3d 1171, 1180–81 (11th Cir. 2009)).

50. *See generally United Kingdom*, 238 F.3d at 1314 (explaining that there is no provision for private parties, such as individual criminal defendants in the English (or American) courts, to request the production of information).

51. 15 U.S.C. §§ 78dd-1, *et seq.* *See generally* T. Markus Funk & Bo Dul, *Regrouping and Refocusing: 2013 FCPA Year-In-Review and Enforcement Trends for 2014*, *Bloomberg BNA Sec. Reg. & L. Rep.*, 46 SRLR 121 (Jan. 20, 2014).

Commentators have noted that the lack of compulsion parity between prosecutors and the defense in obtaining foreign evidence has due process implications.⁵² Counsel for the defense may argue that a vital piece of exculpatory evidence is located overseas and the MLAT process is the only realistic way of obtaining it. Counsel may request that the government provide assistance with accessing this evidence through the MLAT process, and if the prosecution refuses, counsel may petition the court for relief.⁵³ However, few, if any, courts have been receptive to such petitions in the absence of language in the MLAT that provides for defense access to evidence abroad.

In *United States v. Mejia*, the defendants were involved in a cross-border drug trafficking organization run out of Costa Rica. A grand jury in the District of Columbia indicted the Colombian nationals, charging them with conspiracy to distribute cocaine.⁵⁴ Panamanian authorities arrested two of the defendants, turning the men over to the custody of the United States. During pretrial proceedings, the two defendants petitioned the trial court to require that the government produce tape recordings made during the Costa Rican trial of one of their alleged (non-testifying) coconspirators. The defendants conceded that the tapes were not within the U.S. government's "possession, custody, or control" within the meaning of Rule 16, but argued that the prosecution had "the power" to secure the trial tapes or transcripts from the Costa Rican government via the U.S.–Costa Rican MLAT.⁵⁵ The trial court rejected the defendants' request, ruling that the government had no obligation to use its "best efforts" through the MLAT to obtain the tapes.⁵⁶

52. See Daniel Huff, *Witness for the Defense: The Compulsory Process Clause As a Limit on Extraterritorial Criminal Jurisdiction*, 15 Tex. Rev. L. & Pol. 129, 160–61 (2010); Robert Neale Lyman, *Compulsory Process in a Globalized Era: Defendant Access to Mutual Legal Assistance Treaties*, 47 Va. J. Int'l L. 261, 273 (2006); Richardson, *supra* note 47, at 84–85; Ian R. Conner, *Peoples Divided: The Application of United States Constitutional Protections in International Criminal Law Enforcement*, 11 Wm. & Mary Bill Rts. J. 495, 503–04 (2002); Frank Tuerkheimer, *Globalization of U.S. Law Enforcement: Does the Constitution Come Along?*, 39 Hous. L. Rev. 307, 357–73 (2002). See also *United States v. Theresius Filippi*, 918 F.2d 244, 247 (1st Cir. 1990) (implicating the Due Process Clause by not requesting Special Interest Parole from the INS).

53. If the Department of Justice refuses to use an MLAT to execute a Federal Rule of Criminal Procedure 15 court order authorizing a criminal defendant to take a deposition abroad (instead telling the defendant to seek enforcement of the order through a letter rogatory), the defendant may contend that the refusal violates the defendant's rights under the Compulsory Process Clause of the Sixth Amendment. Defendants may also cite the International Covenant on Civil and Political Rights, to which the United States became a party in 1992. The Covenant provides, in part: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees in full equality To examine or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him." International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 (referring to art.14, sec. 3).

54. *United States v. Mejia*, 448 F.3d 436 (D.C. Cir. 2006).

55. *Id.* at 444.

56. *Id.*

On appeal, the D.C. Circuit found that the government satisfied its sole obligation, compliance with Rule 16. The court did note that, pursuant to 28 U.S.C. § 1781(b)(2), the defendants “could have asked the district court to issue letters rogatory to the Costa Rican court to obtain any tapes or transcripts that may have existed, [but did] not do so.”⁵⁷ This language may leave open the argument that had the defendants first sought the requested evidence using the letter rogatory process, the outcome (or at least the analysis) might have been different.⁵⁸

Courts have consistently held that MLATs create no private rights permitting an individual defendant to force the government to request evidence pursuant to an MLAT, even when the defendant invokes constitutional concerns.⁵⁹ In *United States v. Jefferson*, Jefferson argued that the Sixth Amendment required the government to utilize the MLAT process to obtain depositions for the defense.⁶⁰ The district court disagreed, stating that “it is clear that defendant is not entitled to make use of the MLAT and that this result does not violate defendant’s constitutional right to compulsory process.”⁶¹

Likewise, the Eleventh Circuit rejected a challenge to a forfeiture order by a defendant who asserted that the government did not follow the provisions of the MLAT between Thailand and the United States.⁶² The court noted the “presumption that international agreements do not create private rights” and held that the defendant, as a private party, could not use the MLAT as a defense to the forfeiture.⁶³ The First Circuit similarly rejected an argument that an MLAT allowed for a private right of action, citing both the language of the U.S.–U.K. MLAT itself and the fact that other courts have “uniformly” ruled that no such private right exists under the language of similar MLATs.⁶⁴

3. Delay

Obtaining evidence through the use of formal MLATs between nations can be time-consuming and may result in government requests for additional time. The main difficulties are the required level of legal formality and the availability of resources, such as staff and funding. In more complex cases, as well as those involving technology, another potential cause of delay is the limited capacity of

57. *Id.* at 445.

58. *See id.* (citing *United States v. Sensi*, 879 F.2d 888, 899 (D.C. Cir. 1989)). *But see* *Euromepa v. R. Esmerian, Inc.*, 51 F.3d 1095, 1098 (2d Cir. 1995) (declining to engraft a “quasi-exhaustion requirement” into section 1782 that would force litigants to seek “information through the foreign or international tribunal” before requesting discovery from the district court); *In re Veiga*, 746 F. Supp. 2d 8, 24 (D.D.C. 2010) (same).

59. *See, e.g.*, *United States v. Jefferson*, 594 F. Supp. 2d 655, 674 (E.D. Va. 2009).

60. *Id.* at 673.

61. *Id.*

62. *United States v. Duboc*, 694 F.3d 1223, 1229 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 1278, 185 L. Ed. 2d 214 (U.S. 2013), *reh’g denied*, 133 S. Ct. 2051, 185 L. Ed. 2d 908 (U.S. 2013).

63. *Id.* at 1229–30.

64. *In re Request from United Kingdom Pursuant to Treaty*, No. 11-2511, 685 F.3d 1 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 1796, 185 L. Ed. 2d 856 (U.S. 2013).

some foreign law enforcement agencies to conduct the sophisticated forensic analysis needed to comply with an MLAT request.⁶⁵

In other cases, the foreign country may simply have more limited experience with the evidence-gathering process. *United States v. \$93,110.00 in U.S. Currency*,⁶⁶ for example, involved an action for civil forfeiture with evidence located in Mexico. Although the case had been pending for almost three years, the U.S. government requested additional time to gather evidence, citing the “significant challenges” in obtaining formal discovery from Mexico despite numerous inquiries. Noting the government’s due diligence, the court granted the request, but also stated that it would rely on its inherent authority to control the scheduling of pre-trial proceedings and deny any future MLAT-based extension requests.⁶⁷

Although district courts are involved in overseeing incoming MLAT requests, they have no direct oversight over requests sent *from* the United States to a foreign country. A court may sometimes become indirectly involved in an outgoing MLAT process, however, such as when delays in processing have an impact on the management of a domestic case or present speedy trial issues. If an MLAT request issued by the Department of Justice threatens to result in unacceptable delays in or burdens on a court proceeding, the court may suggest that the government either (1) forgo obtaining certain evidence, or (2) limit its request to essential evidence, thereby ensuring that requests are processed expeditiously.

4. Statute of Limitations

When the government seeks evidence from abroad prior to the return of an indictment, it files an *ex parte* application with the court to toll the statute of limitations pursuant to 18 U.S.C. § 3292. The court must find by a preponderance of the evidence that “it reasonably appears” the evidence is located in the foreign country,⁶⁸ and the tolling of the statute may not exceed three years.⁶⁹ The suspension of the statute of limitations begins on the date that the MLAT request is made; it ends when the foreign government takes its final action on the request.⁷⁰ Section 3292

65. *See generally* Kendall & Funk, *supra* note 3, at 215 (suggesting that, because of these challenges, it is often preferable to request that the foreign authorities “simply ship the entire seized hard drive to the United States”).

66. No. CV-08-1499-PHX-LOA, 2010 WL 2745065 (D. Ariz. July 12, 2010).

67. *Id.*

68. *See* *United States v. Trainor*, 376 F.3d 1325, 1336 (11th Cir. 2004) (“[T]he Government must present some evidence—something of evidentiary value—that it reasonably appears the requested evidence is in a foreign country.”).

69. *See, e.g.,* *United States v. Lyttle*, 667 F.3d 220, 224 (2d Cir. 2012) (holding that section 3292 “requires a district court to suspend the running of a statute of limitations upon an appropriate application showing: (1) that evidence of an offense being investigated by a grand jury is in a foreign country; and (2) that such evidence has been officially requested. According to the statute, the preponderance-of-the-evidence standard applies when determining whether the United States has made an official request. When deciding whether the evidence is in a foreign country, however, a lower standard applies: a court must find by a preponderance of the evidence . . . that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in a foreign country.”).

70. 18 U.S.C. § 3292(b).

does not provide the defendant with a right to notice that the statute of limitations is being suspended or a hearing on the issue.⁷¹

In *United States v. Lyttle*, the court rejected the defendant's claim that tolling the statute of limitations was improper, because the documents in question could have been obtained through the U.S. branch of a Hungarian bank via domestic subpoena duces tecum, rather than the more time-consuming MLAT process.⁷² Looking at the "plain text" of section 3292, the court found no requirement that the foreign evidence be obtainable *only* through diplomatic channels in order for the statute of limitations to be tolled.⁷³

Although section 3292 incorporates a low evidentiary threshold, the court must nevertheless scrutinize government requests to have the statute of limitations tolled. In *United States v. Wilson*,⁷⁴ the defendant was indicted in 1998 for an international money laundering conspiracy involving the Bahamas. The defendant filed a motion to dismiss, arguing that the prosecution was time-barred. Contesting this motion, the government pointed to a 1994 court order suspending the limitations period beginning in 1993, when OIA made an official request for Wilson's financial records from a Nassau bank, pursuant to the U.S.–Bahamas MLAT. Wilson challenged the government's assertion, arguing that the proffered copy of the letter of request and the government's "representation" that the letter was sent were inadequate.⁷⁵ The Fifth Circuit ruled that the evidence raised a factual issue concerning whether the government actually sent the discovery request to the Bahamas, and it remanded the case for an evidentiary hearing.⁷⁶

On remand, the government failed to produce any documentary evidence that the letter of request was sent; nor did it offer testimony of individuals who issued or received the letter.⁷⁷ The district court, nevertheless, again denied Wilson's motion to dismiss. The court of appeals, in turn, for a second time reversed the district court's decision, pointing to the absence of "consistent procedures or practices at OIA during the time in question," and concluding that the district court improperly tolled the statute of limitations.⁷⁸

71. See *DeGeorge v. U.S. Dist. Court for Cent. Dist. Cal.*, 219 F.3d 930, 937 (9th Cir. 2000). See also *United States v. Hoffecker*, 530 F.3d 137, 168 (3d Cir. 2008) ("We find that there was nothing improper about the ex parte nature of the proceeding before the grand jury judge."); *United States v. Wilson*, 249 F.3d 366, 371 (5th Cir. 2001) ("An application to toll the statute of limitations under § 3292 is a preindictment, ex parte proceeding."), *abrogated by* *Whitfield v. United States*, 543 U.S. 209 (2005).

72. 667 F.3d at 224–25.

73. *Id.* at 225.

74. 249 F.3d 366 (5th Cir. 2001). See also *United States v. Torres*, 318 F.3d 1058, 1061 (11th Cir. 2003) ("Under § 3292, the government may apply, ex parte, for suspension of the statute of limitations when it seeks evidence located in a foreign country.").

75. *Wilson*, 249 F.3d at 372.

76. *Id.* at 373.

77. The government introduced the testimony of a paralegal who did not work on the Wilson case but "claimed familiarity with the office policies and procedures in place in 1993 when OIA allegedly sent the MLAT request." *United States v. Wilson*, 322 F.3d 353 (5th Cir. 2003).

78. *Id.* at 362.

III. Letters Rogatory

Letters rogatory are formal requests for judicial assistance made by a court in one country to a court in another country.⁷⁹ Once issued, they may be conveyed through diplomatic channels, or they may be sent directly from court to court.⁸⁰ Letters rogatory are often used to obtain evidence, such as compelled testimony, that may not be accessible to a foreign criminal or civil litigant without judicial authorization. They are used primarily by non-government litigants who do not have access to the MLAT process. “While it has been held that federal courts have inherent power to issue and respond to letters rogatory, such jurisdiction has largely been regulated by congressional legislation.”⁸¹

A. *Outgoing*

The letter rogatory process is less formal than pursuing evidence through an MLAT, but its execution can be more time-consuming. Outgoing letters rogatory—requests for assistance with obtaining evidence abroad, made by counsel through the U.S. court—are issued by the U.S. State Department pursuant to 28 U.S.C. § 1781, and provided for under Federal Rules of Civil Procedure 28(b) and 4(f)(2)(B). Section 1781(b), however, also allows for a district court (and, for that matter, a foreign court) to bypass the State Department and transmit the outgoing letter rogatory directly to the “foreign tribunal, officer, or agency.”⁸²

In most cases, foreign courts honor requests issued pursuant to letters rogatory. However, international judicial assistance is discretionary, based upon principles of comity rather than treaty, and is also subject to legal procedures in the requested country. Compliance with a letter rogatory request is left to the discretion of the court or tribunal in the “requested” jurisdiction (that is, the court or tribunal to which the letter rogatory is addressed). For example, if a request for compelled

79. The rules for enforcement of letters rogatory were promulgated as part of the Hague Convention Relating to Civil Procedure, which was ratified by more than sixty countries, including the United States. *See* Hague Convention Relating to Civil Procedure, <http://www.jus.uio.no/english/services/library/treaties/11/11-02/civil-procedure.xml> (last visited April 9, 2014). *See also* Eileen P. McCarthy, *A Proposed Uniform Standard for U.S. Courts in Granting Requests for International Judicial Assistance*, 15 *Fordham Int’l L.J.* 772, 778 (1991) (“Letters rogatory can be more effective than commissions because the executing courts have recourse to their own procedures to compel recalcitrant or reluctant witnesses to comply with their judicial decrees.”).

80. 28 U.S.C. § 1781. Letters rogatory and accompanying documents may be submitted to the Office of American Services, U.S. Department of State, SA-29 4th Floor, 2201 C Street N.W., Washington, DC 20520-0001. Phone: 1-888-407-4747. *See generally* U.S. Department of State, Preparation of Letters Rogatory, <http://travel.state.gov/content/travel/english/legal-considerations/judicial/obtaining-evidence/preparation-letters-rogatory.html> (last visited April 10, 2014).

81. *In re* Letters Rogatory from the Justice Court, District of Montreal, Canada, 523 F.2d 562 (6th Cir. 1975).

82. Title 28 U.S.C. § 1781(a) provides that the U.S. State Department is “empowered” to (1) use formal channels to transmit letters rogatory from foreign or international tribunals to the appropriate U.S. court and receive and return them after execution, and (2) transmit letters rogatory from U.S. courts to the applicable foreign or international tribunal, officer, or agency and receive and return them after execution.

testimony is granted by a foreign court, the taking of that testimony may not necessarily follow procedures similar to those of the United States, such as through depositions.

Because the letter rogatory process is time-consuming and may involve unique issues of foreign procedural law, parties seeking evidence can arrange for local counsel in the foreign country to file the letter rogatory on their behalf, a strategy that may facilitate the process. The U.S. trial proceedings may be impacted by delays flowing from the foregoing procedural and practical hurdles.⁸³

B. Incoming

Incoming letters rogatory—requests for judicial assistance originating in a foreign or international tribunal—are also covered by 28 U.S.C. §§ 1781 and 1782. OIA receives incoming letters rogatory from foreign or international tribunals and transmits each request to the federal court in the district where the evidence is located or witness resides.⁸⁴ After reviewing the request, the district court may order the taking of testimony or production of evidence for use in the foreign proceeding.⁸⁵ The evidence is then provided to the requesting foreign party by OIA.

The U.S. court may “prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing.”⁸⁶ Or, if nothing in the request prescribes otherwise, the court may follow the Federal Rules of Civil Procedure. Legal privileges are respected, and privileged testimony cannot be compelled. The process typically takes place *ex parte*, though a court has the authority to require notification of other parties in the foreign litigation prior to the issuance of an order.⁸⁷

U.S. courts have considerable discretion when reviewing incoming letters rogatory from foreign courts.⁸⁸ The U.S. Supreme Court’s decision in *Intel Corp. v. Advanced Micro Devices, Inc.*⁸⁹ involved a request to a U.S. district court for the production of documents to be used in a proceeding before a European administrative tribunal. The Supreme Court clarified the parameters of U.S. court assis-

83. The following statutory provisions also govern the issuance and processing of letters rogatory: the All Writs Act, 28 U.S.C. § 1651; 28 U.S.C. §§ 1781 and 1782 (describing the transmittal of letters rogatory through the Department of State and through the district courts); 28 U.S.C. § 1696 (providing for the use of letters rogatory for service of process pursuant to a request by a foreign tribunal); and 22 C.F.R. 92.66 (detailing the consular procedures for transmittal of letters rogatory).

84. 28 U.S.C. § 1782.

85. *Id.*

86. *Id.*

87. *See, e.g., In re Merck & Co.*, 197 F.R.D. 267, 271 (M.D.N.C. 2000).

88. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264 (2004) (“As earlier emphasized, a district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so.”); *Four Pillars Enters. Co. v. Avery Dennison Corp.*, 308 F.3d 1075, 1078 (9th Cir. 2002) (“Congress gave the federal district courts broad discretion to determine whether, and to what extent, to honor a request for assistance under 28 U.S.C. § 1782.”).

89. 542 U.S. at 241.

tance to foreign tribunals pursuant to section 1782 and reiterated that district courts have broad discretion in allowing discovery that aids foreign proceedings.

When reviewing an application made under section 1782, a court should examine the nature of the foreign tribunal, the character of the proceedings, and the foreign government's receptivity to U.S. judicial assistance. It should also consider the following:

- Is the person from whom discovery is sought a participant in the foreign proceeding? “[T]he need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant.”⁹⁰
- Does the request conceal “an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States?”⁹¹
- Is the request unduly intrusive or burdensome or made for the purpose of harassment?⁹²

The *Intel* decision also noted that in some cases a court may modify a discovery request to make it less burdensome.⁹³

C. Case Management

In contrast to MLATs, letters rogatory are not treaty-based; there is no guarantee that the requested country or tribunal will act on a request for assistance, or if it acts, how it will act. When evaluating a defendant's request for letters rogatory to secure evidence located abroad, courts consider the following factors:

- Is the proffered evidence exculpatory?
- Is it cumulative of evidence more readily available in the United States?
- Was the request for evidence made in a timely manner?⁹⁴

If the evidence in question is necessary to ensure a fair trial, obtaining it will most likely warrant the delay inherent in the letter rogatory process.⁹⁵

In *United States v. Jefferson*,⁹⁶ for example, Jefferson made a pretrial motion to depose witnesses located in Nigeria, arguing that their testimony would be exculpatory.⁹⁷ The witnesses would not consent to be deposed, and Jefferson sought an order requiring the government to invoke the MLAT between the United States and Nigeria, or, in the alternative, requested that the court issue a letter rogatory.⁹⁸ The court found the proffered witness testimony to be material,

90. *In re Clerici*, 481 F.3d 1324, 1334 (11th Cir. 2007) (quoting *Intel*, 542 U.S. at 264–65).

91. *Intel*, 542 U.S. at 241.

92. See generally *id.* at 264–65; *In re Request for Assistance from Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988).

93. *Intel*, 542 U.S. at 245 (“[I]ntrusive or burdensome requests may be rejected or trimmed.”).

94. *United States v. Dearden*, 546 F.2d 622, 625 (5th Cir. 1977); *United States v. Rosen*, 240 F.R.D. 204, 213 (E.D. Va. 2007); *United States v. Jefferson*, 594 F. Supp. 2d 655, 673 (E.D. Va. 2009).

95. See *Progressive Minerals, LLC v. Rashid*, No. 5:07-CV-108, 2009 WL 1789083, at *2 (N.D. W. Va. June 23, 2009); *Rosen*, 240 F.R.D. at 213.

96. 594 F. Supp. 2d at 661.

97. *Id.*

98. *Id.*

noncumulative, and potentially exculpatory.⁹⁹ The government argued that Jefferson's motion should be denied because he waited nearly a year after indictment before seeking the evidence and the trial would be delayed.

Noting that the MLAT process was not available to the defense, the court agreed to issue a letter rogatory. The court found that the material nature of the evidence requested excused the delay required to obtain it. The court issued a letter rogatory to the appropriate Nigerian judicial authority, requesting that it ascertain the witnesses' willingness to waive their Fifth Amendment rights and answer questions fully in a later deposition—a compromise ruling tailored to the case.¹⁰⁰

The letter rogatory process may take as long as a year, presenting courts with case management challenges. Although delays may be mitigated by transmitting a copy of the request through INTERPOL or some other more direct route, even in urgent cases, such requests often take at least a month to execute. To minimize unnecessary delay, the court may choose to review outgoing letters rogatory or inquire of counsel whether steps were taken to ensure as expeditious a response as possible.

1. Preliminary Information

Courts may consider the following issues when reviewing an outgoing letter rogatory:

- Did the party requesting the assistance review the country-specific judicial assistance information on the Department of State website and U.S. state and federal law relating to the subject to determine whether the requested assistance can, in fact, be rendered?
- Does the letter include unnecessary information that may confuse a court in the receiving foreign country?
- Is the request for assistance sufficiently specific so as not to resemble a fishing expedition?
- If the party making the request believes it is preferable for foreign courts to follow particular procedures, does the letter include specific instructions in this regard (for example, a verbatim transcript, witness testimony under oath, or permission for U.S. or foreign counsel to attend or participate in proceedings)?
- Has the party requesting the letter consulted the country-specific information for guidance about authentication procedures for the particular country (that is, are a judicial signature and seal sufficient)?

99. *Id.* at 667–73.

100. *Id.* at 675–76.

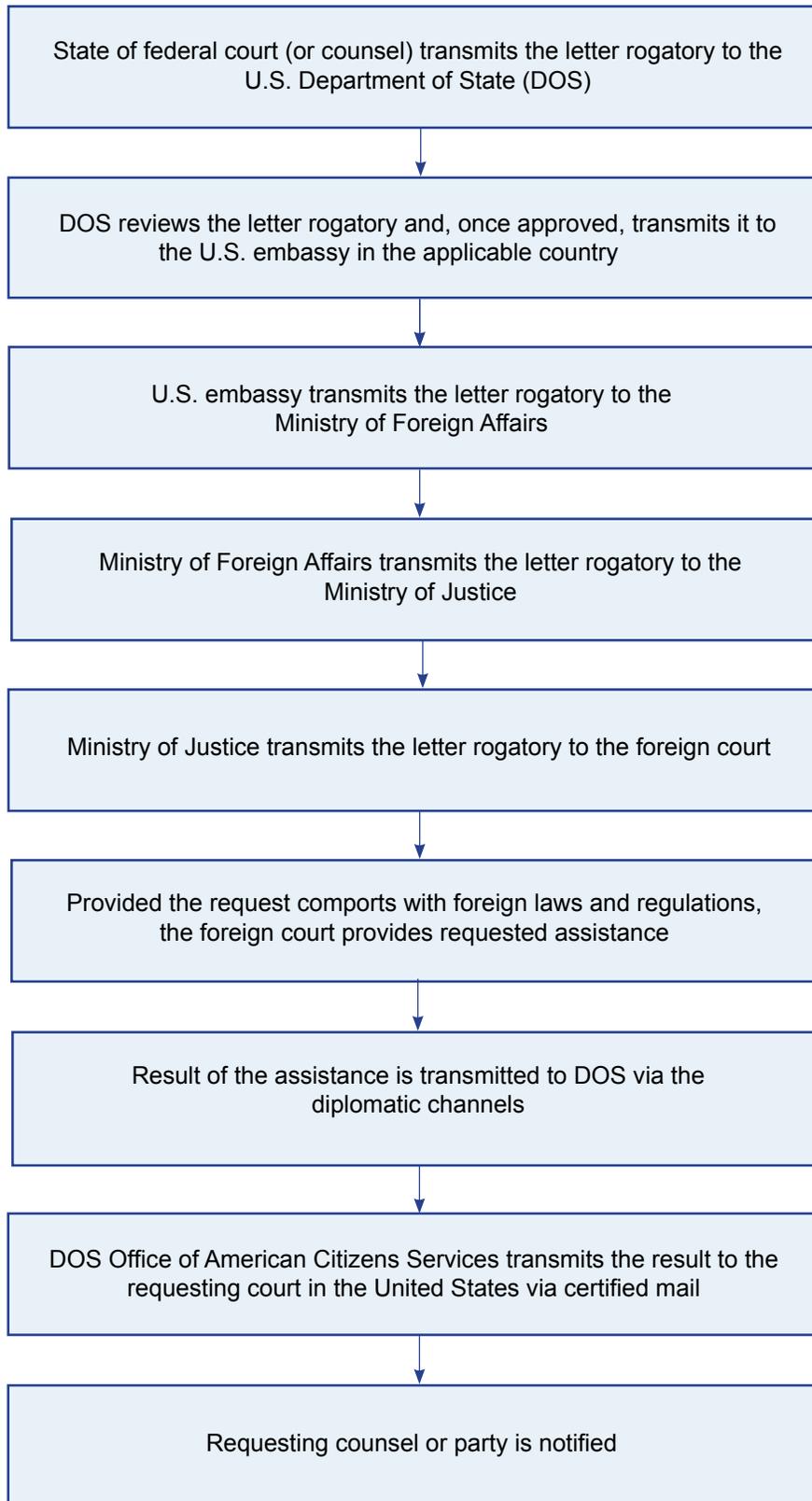
2. Essential Elements of a Letter Rogatory

In addition, to facilitate the process, courts should ensure that the letter includes the following:

- a statement that the request for international judicial assistance is being made in the interests of justice;
- a brief synopsis of the case, including identification of the parties and the nature of the claim and relief sought, to enable the foreign court to understand the issues involved;
- the type of case (e.g., civil, criminal, or administrative);
- the nature of the assistance required (e.g., compel testimony or production of evidence, serve process);
- the name, address, and other identifiers, such as corporate title, of the person abroad to be served or from whom evidence is to be compelled, and a description of any documents to be served;
- a list of questions to be asked, where applicable (generally in the form of written interrogatories);
- a statement from the requesting court expressing a willingness to provide similar reciprocal assistance to judicial authorities of the receiving state; and
- a statement that the requesting court or counsel is willing to reimburse the judicial authorities of the receiving state for any costs incurred in executing the requesting court's letter rogatory.

Figure 2 outlines the typical outgoing letter rogatory process, and the Appendix presents a sample letter rogatory from the U.S. Department of Justice.

Figure 2. Submitting a Letter Rogatory for Execution by a Foreign Court



IV. Information Exchange Through Informal Channels

Although formal MLATs, letters rogatory, and other international conventions are the “public face” of transnational legal assistance, a significant amount of criminal investigation-related information is exchanged through informal channels: investigator to investigator, prosecutor to prosecutor, defense counsel to local counterpart. Indeed, personal, cooperative law enforcement relationships can be so informal and “off the grid” that law enforcement agencies, courts, and defendants may only learn of them by accident.

Responding to the challenges of transnational law enforcement, the FBI and other U.S. law enforcement agencies have aggressively sought to develop institutional relationships with their foreign counterparts. Teams of U.S. law enforcement officers regularly coordinate with each other and with their foreign counterparts in a task force approach, often working out of offices in U.S. embassies and missions around the world. This “bricks and mortar” outreach enables U.S. law enforcement officials to cultivate professional relationships and more readily access other sources of information in the host countries.

The U.S. Departments of State, Treasury, and Justice institutionalize cross-border cooperation through memoranda of understanding (MOU) structured to improve the handling and sharing of law enforcement information in foreign jurisdictions. Although the benefits of this cooperation are significant, the process has limitations. Courts should be aware that information gathered in the informal manner described in this section may be incomplete and is not always tendered to prosecutors or, through the discovery process, provided to the defense.

V. Conclusion

Whether through MLATs, letters rogatory, or informal means, the process of obtaining evidence from abroad in criminal and civil cases can be time-consuming and frustrating to all parties involved, including the courts. Prepared with a basic understanding of how these transnational evidence-gathering tools operate, courts can plan for potential delays; evaluate the arguments made by the government, the defense, and civil litigants; and facilitate the evidence-gathering process in a manner that promotes fairness and conserves resources.

Appendix
U.S. DEPARTMENT OF JUSTICE
SAMPLE LETTER ROGATORY

NAME OF COURT IN SENDING STATE REQUESTING JUDICIAL ASSISTANCE

NAME OF PLAINTIFF

V. DOCKET NUMBER

NAME OF DEFENDANT

REQUEST FOR INTERNATIONAL JUDICIAL ASSISTANCE
(LETTER ROGATORY)

(Name of the requesting court) presents its compliments to the appropriate judicial authority of (name of receiving state), and requests international judicial assistance to (obtain evidence/effect service of process) to be used in a (civil, criminal, administrative) proceeding before this court in the above captioned matter. A (trial/hearing) on this matter is scheduled at present for (date) in (city, state, country).

This court requests the assistance described herein as necessary in the interests of justice. The assistance requested is that the appropriate judicial authority of (name of receiving state) (compel the appearance of the below named individuals to give evidence/produce documents) (effect service of process upon the below named individuals).

(Names of witnesses/persons to be served)

(Nationality of witnesses/persons to be served)

(Addresses of witnesses/persons to be served)

(Description of documents or other evidence to be produced)

Facts

(The facts of the case pending before the requesting court should be stated briefly here, including a list of those laws of the sending state which govern the matter pending before the court in the receiving state.)

(Questions)

(If the request is for evidence, the questions for the witnesses should be listed here.)

(List any special rights of witnesses pursuant to the laws of the requesting state here.)

(List any special methods or procedures to be followed.)

(Include a request for notification of time and place for examination of witnesses/documents before the court in the receiving state here.)

Reciprocity

(The requesting court should include a statement expressing a willingness to provide similar assistance to judicial authorities of the receiving state.)

Reimbursement for costs

(The requesting court should include a statement expressing a willingness to reimburse the judicial authorities of the receiving state for costs incurred in executing the requesting court's letters rogatory.)

Signature of requesting judge

Typed name of requesting judge

Name of requesting court

City, State, Country

Date

(Seal of court)

Recommended Resources

Internet sites

INTERPOL: www.interpol.int/.

U.S. Attorney's Manual Section on Letters Rogatory: www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00275.htm.

U.S. Department of Justice, Criminal Division contact information: www.justice.gov/criminal/about/contact.html.

U.S. Department of Justice, Office of International Affairs homepage: www.justice.gov/criminal/about/oia.html.

U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, International Center homepage: www.nij.gov/international/.

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T. Markus Funk is a partner at Perkins Coie. Prior to entering private practice, he for ten years served as a federal prosecutor in Chicago, and for two years led the efforts of the U.S. Department of Justice (DOJ) and U.S. State Department to establish the rule of law in post-conflict Kosovo. Both the State Department and DOJ awarded Mr. Funk their highest service distinctions.

Mr. Funk was formerly a law clerk to Chief U.S. District Judge Catherine D. Perry (St. Louis) and the Hon. Morris S. Arnold (U.S. Court of Appeals for the Eighth Circuit). He taught criminal and international law at, among other places, the University of Oxford, University of Chicago Law School, Northwestern University School of Law, and the U.S. Department of Justice's National Advocacy Center.

Mr. Funk has authored numerous books, book chapters, and articles on international law and litigation, including *The Kosovo Trial Skills Manual* (U.S. Department of Justice 2007), *Victims' Rights and Advocacy at the International Criminal Court* (Oxford University Press 2010), *The Haiti Trial Skills Manual* (American Bar Association 2011), and *Child Exploitation and Trafficking: Examining the Global Challenges and U.S. Responses* (co-authored with the Hon. Virginia M. Kendall; Rowman & Littlefield 2012). He can be reached at MFunk@perkinscoie.com.

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Human Trafficking: The Reality, the Scope and the Consequences

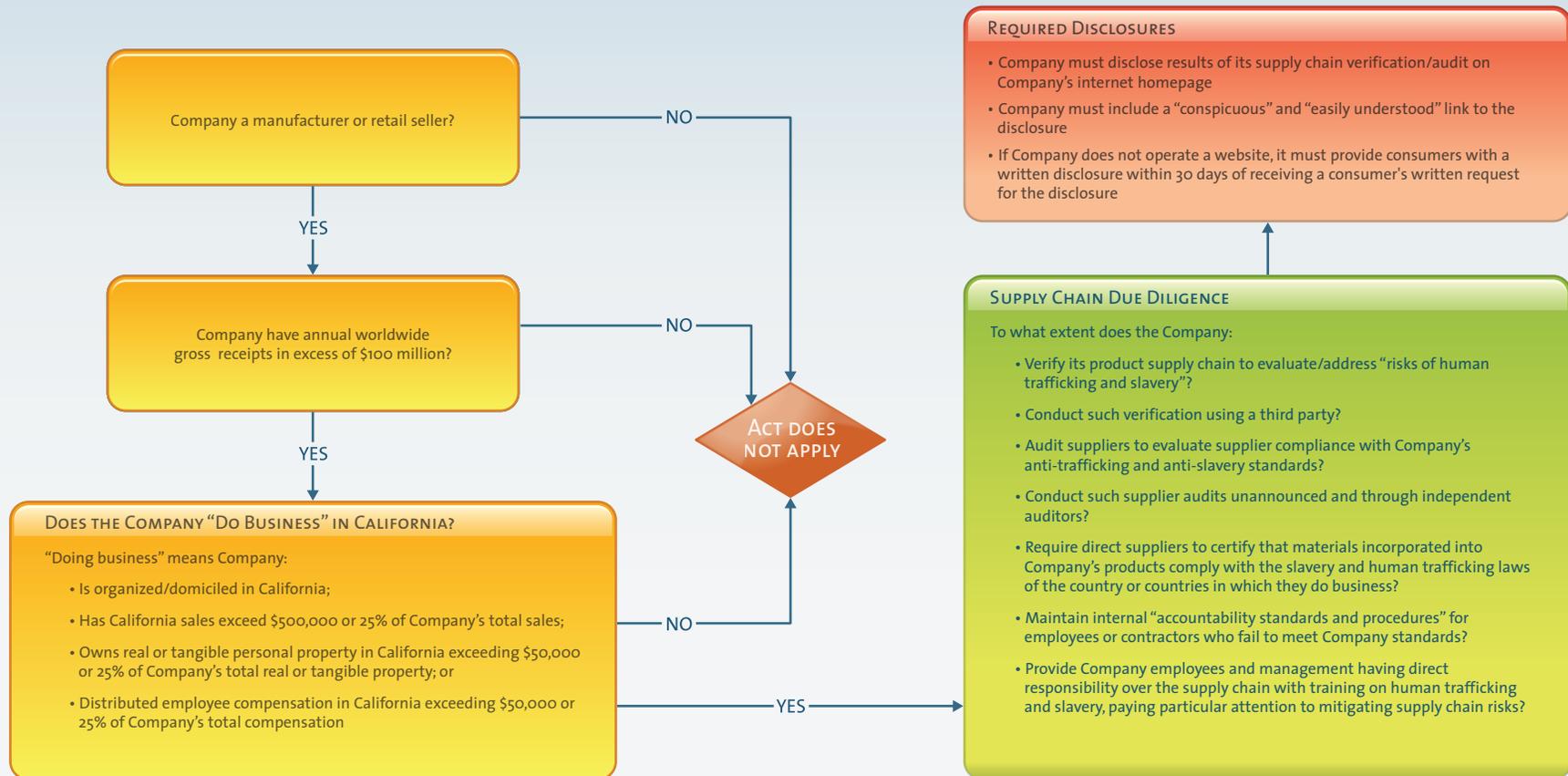
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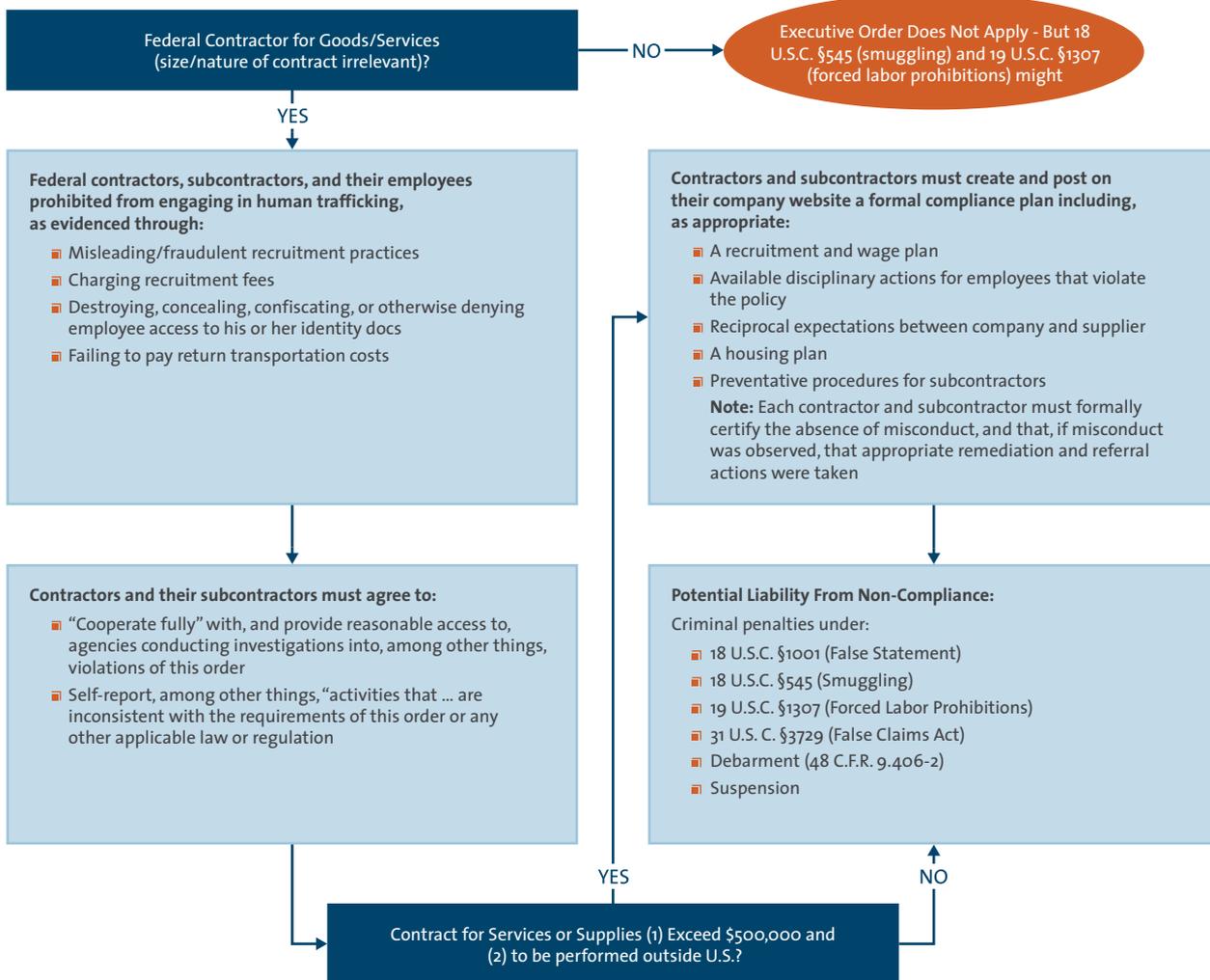
BREAKING DOWN THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT



BACKGROUND

- Purpose of Act is to help consumers to "distinguish companies or the merits of their efforts to supply products free from threat of slavery and trafficking"
- Exclusive remedy for violations of Act = Attorney General Action (but potential class actions under California statutes also likely)
- California's Franchise Tax Board provides annual list of retail sellers and manufacturers required to comply with the Act

DECONSTRUCTING THE EXECUTIVE ORDER AGAINST TRAFFICKING IN PERSONS IN FEDERAL CONTRACTING



Corporate Social
Responsibility Practice

“Trafficking” is defined broadly to include (1) 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, and (2) 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

Note: The Federal Acquisitions Register will be amended in the Spring of 2013 to reflect the above objectives

The information contained herein is not, and should not be relied upon as, legal advice, and is not a substitute for qualified legal counsel.



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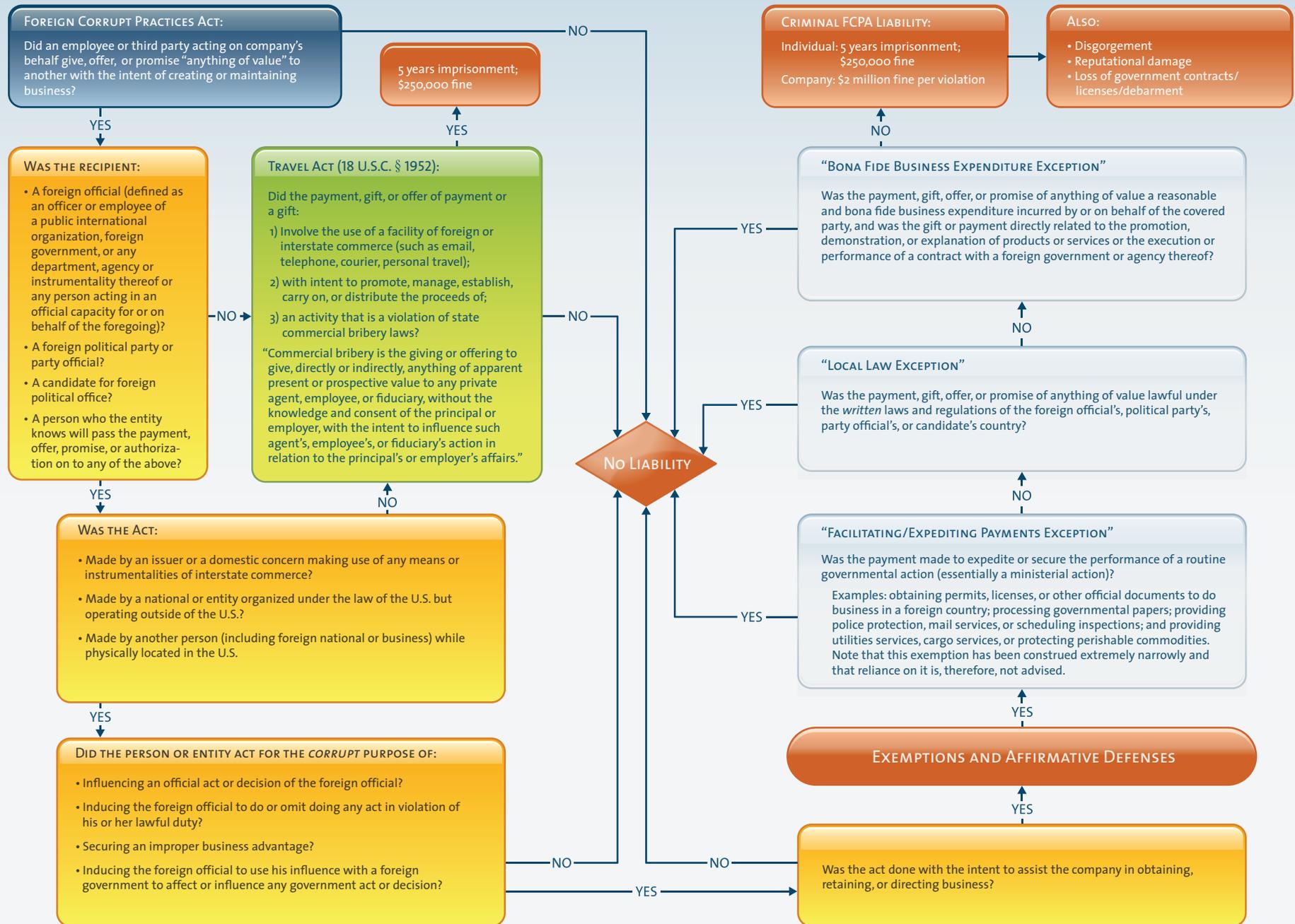
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WALKING THROUGH THE FCPA AND TRAVEL ACT'S ANTI-BRIBERY PROVISIONS





TRAFFICKING IN PERSONS REPORT

JUNE 2014



Dear Reader:

This is a vital and challenging time for all of us. The United States is engaged on countless active fronts on every continent across the globe—big, simultaneous confrontations and efforts.

Among those challenges, and one absolutely inextricably linked to the broader effort to spread the rule of law and face the crisis of failed and failing states, we find perhaps no greater assault on basic freedom than the evil of human trafficking. Whether it comes in the form of a young girl trapped in a brothel, a woman enslaved as a domestic worker, a boy forced to sell himself on the street, or a man abused on a fishing boat, the victims of this crime have been robbed of the right to lead the lives they choose for themselves, and trafficking and its consequences have a spill-over effect that touches every element of a society.

The fight against modern slavery is deeply personal to me. When I was a prosecutor outside of Boston in the 1970s, I worked to put criminals behind bars for rape and sexual assault. We were actually one of the very first jurisdictions in America to set up a witness protection program for victims.

My time as a prosecutor seared in me a simple lesson: Only when we start focusing on victims as survivors—not just as potential witnesses—can we provide them with a greater measure of justice, and help them find the courage to step forward.

Survivors know better than anyone the steps we need to take to identify those enslaved and bring to justice those responsible. When a Cambodian man is lured under false pretenses and subjected to forced labor far from home, he knows better than anyone how we mitigate that risk. When a young Nepalese woman is coerced into a sex industry, she knows better than anyone how to help law enforcement spot future victims of this crime. And when this woman cooperates in the conviction of her trafficker, she knows better than anyone what makes that process less traumatic and our efforts more effective.

We each have a responsibility to make this horrific and all-too-common crime a lot less common. And our work with victims is the key that will open the door to real change—not just on behalf of the more than 44,000 survivors who have been identified in the past year, but also for the more than 20 million victims of trafficking who have not.

As Secretary of State, I've seen with my own two eyes countless individual acts of courage and commitment. I've seen how victims of this crime can become survivors and how survivors can become voices of conscience and conviction in the cause.

This year's *Trafficking in Persons Report* offers a roadmap for the road ahead as we confront the scourge of trafficking. Whether a concerned citizen, a board member, a government official, or a survivor of trafficking, we each have a responsibility to spot human trafficking, engage our communities, and commit to take action. I invite you to help us turn the page.

Onwards,

A handwritten signature in black ink that reads "John F. Kerry".

John F. Kerry
Secretary of State



Dear Reader:

This year's theme—*The Journey from Victim to Survivor*—is very personal to me. It brings to mind many of the people I came to know and admire during the years I spent as a civil rights prosecutor.

I remember how frightened "Phuong" looked entering the empty courtroom a few days before the trial. To ease the trauma of testifying, she and her fellow survivors took turns sitting in the witness stand, the jury box, and even—with the permission of the court—the judge's chair. She sat at counsel's table, questioning one of the agents as if she were the prosecutor. As the hour went by and she became comfortable in the courtroom, her nervousness turned to laughter and then to determination. A week later, leaving the stand after a long cross-examination, she remarked about the defendant: "He looks so small." The

balance of power had finally shifted. A decade later, he remains in federal prison and his victims are living their lives in America. I was honored to attend the 10th anniversary celebrating their liberation from the garment factory; we danced and sang and told stories and laughed with the children. Phuong and her friends were no longer victims, they were survivors.

Then there was "Katia." Trying hard to be tough and strong, the former track star who had been held in servitude in a strip club finally began to open up after she saw a female agent handcuff her trafficker at the end of a court hearing. While he went to prison, she went to work, building a new life in the United States and choosing to engage occasionally in anti-trafficking advocacy on her own terms. She bravely testified before Congress, sharing her story so that others could be helped. When I keynoted a seminar in her new hometown, Katia and one of her fellow survivors insisted on introducing me. I looked up at the podium and saw that they were still strong, but no longer scared. Toughness, defensiveness, and wariness had been replaced by determination, resilience, and grace. We were still linked, not as a prosecutor and victim-witnesses, but as colleagues.

What trafficking victims endure is incomparable to what most of us confront in a lifetime and should put into context the small injustices and frustrations of our daily work and lives. The same can be said of their courage and strength, both during their exploitation and recovery. Of the tens of thousands of victims identified this year worldwide, some will become advocates, some will go on to achieve personal goals, and some will continue to need care.

This *Report* stands for the belief that all survivors should be able to feel their power and live their truth. Whether becoming a witness or an activist, an employer or employee, the journey from victim to survivor is one that no one should walk alone. Last year, we challenged governments to ensure trafficking victims have "the freedom to choose their own futures." That future is now.

Sincerely,

A handwritten signature in blue ink that reads "Luis CdeBaca".

Luis CdeBaca

Ambassador-at-Large to Monitor and
Combat Trafficking in Persons



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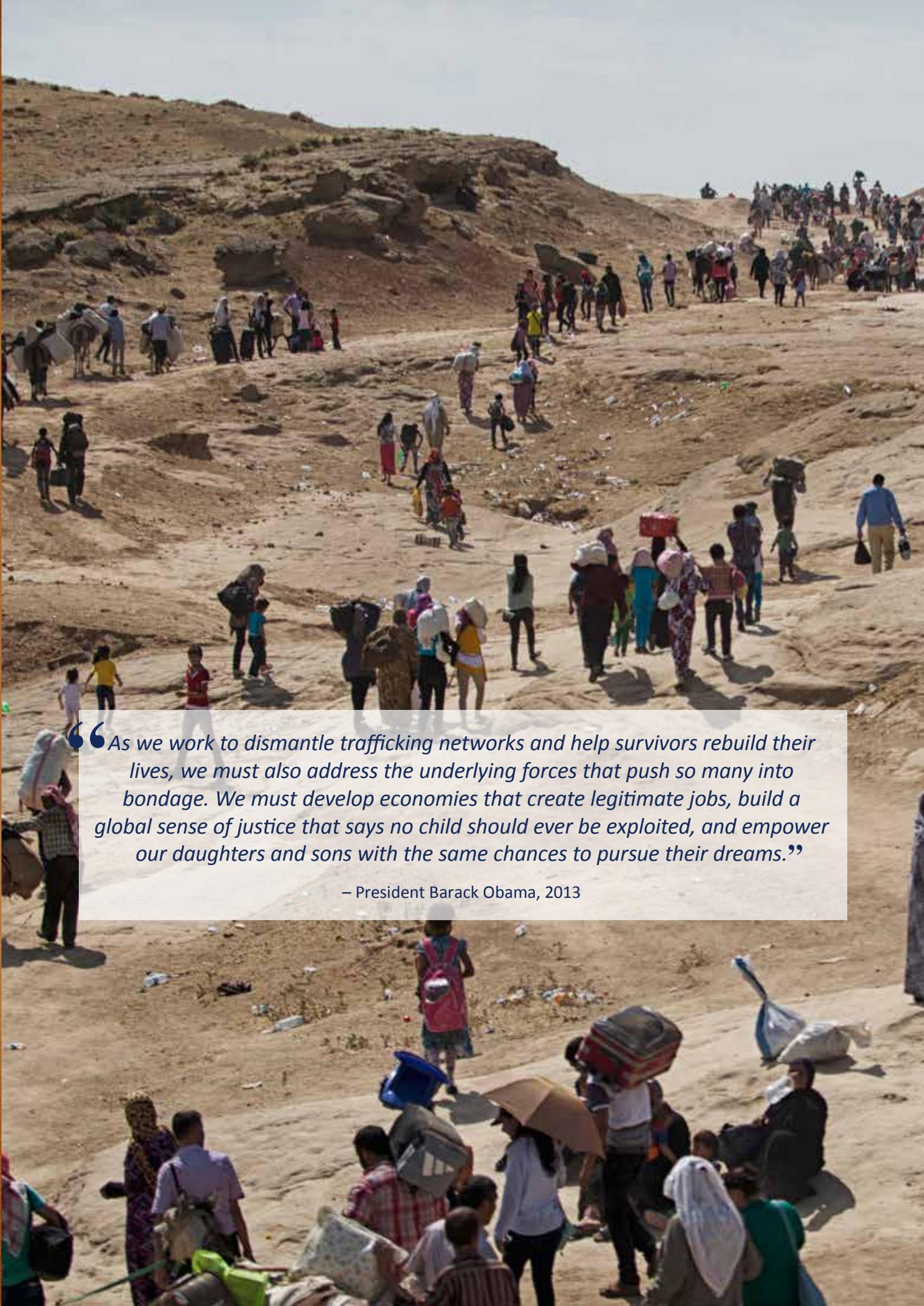
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This Report and subsequent updates are available at www.state.gov/j/tip



“As we work to dismantle trafficking networks and help survivors rebuild their lives, we must also address the underlying forces that push so many into bondage. We must develop economies that create legitimate jobs, build a global sense of justice that says no child should ever be exploited, and empower our daughters and sons with the same chances to pursue their dreams.”

– President Barack Obama, 2013

THE JOURNEY FROM VICTIM TO SURVIVOR

In the 14 years the United States has produced the *Trafficking in Persons Report*, the world has made tremendous progress in the fight against human trafficking. There is no government, however, that has done a perfect job responding to this crime. In the years ahead, it seems unlikely that any government will reach perfection. But should that day arrive when human trafficking disappears, one fact will remain certain: what has happened to the victims of modern slavery can never be undone. For those who have endured the exploitation of modern slavery, even the most effective justice system and the most innovative efforts to prevent future trafficking will not reverse the abuse and trauma that millions of trafficking victims have endured.

With the right support and services, however, victims can move beyond their suffering and forward with their lives. With the right legal structures and policies, they can see justice done. With the right opportunities, they can make choices about the lives they want and even use their experiences to help guide and strengthen efforts to fight this crime. This process is unique for each victim, and each must take steps based on his or her own strength, agency, and determination.

Governments play a vital role in facilitating this process. While a government institution will never be able to reverse what has happened to someone abused in a situation of modern slavery, governments can aid an individual's recovery by providing support to each victim on his or her journey toward becoming a survivor.

In addition to assessments of what almost every government in the world is doing to combat modern slavery, this year's *Trafficking in Persons Report* takes a hard look at the journey from victim to survivor, making recommendations and highlighting effective practices that, if implemented, could ease the path forward for countless survivors around the world.

BUILDING ON A STRONG FOUNDATION

For governments to properly assist victims, they must broadly and effectively implement a strong, modern, comprehensive anti-trafficking law. Such a law includes criminal provisions treating human trafficking as a serious offense with commensurately serious punishment for offenders and, just as important, victim protection measures that address needs such as immigration status, restitution, and immunity for offenses they were forced to commit during the course of the victimization.

Another early step, while seemingly obvious, is nevertheless one of the greatest challenges to anti-trafficking efforts in general: finding the victims and getting them out of harm's way. The strongest victim protection scheme is useless if victims remain trapped in exploitation. Governments cannot sit back and wait for victims to self-identify; rather, they must proactively seek victims out by investigating high-risk sectors, screening vulnerable populations, and training relevant government officials to recognize trafficking when they see it. It is vital that victims not be treated like criminals or be subjected to arrest or deportation for other offenses.

The best approaches to victim identification are those that involve government partnerships with communities, non-governmental organizations (NGOs), and international organizations that can provide expertise on identifying trafficking victims and attending to their needs. For example, when police conduct raids of brothels, collaboration with NGOs can help police identify potential trafficking victims and refer them for

VICTIMS' STORIES

The victims' testimonies included in this *Report* are meant to be illustrative only and do not reflect all forms of trafficking that occur. These stories could take place anywhere in the world. They illustrate the many forms of trafficking and the wide variety of places in which they occur. Many of the victims' names have been changed in this *Report*. Most uncaptioned photographs are not images of confirmed trafficking victims. Still, they illustrate the myriad forms of exploitation that comprise human trafficking and the variety of situations in which trafficking victims are found.

protective services. Police can notify service providers that a raid is imminent, and the shelter can provide victims with immediate assistance.

Once victims are identified, government and civil society must ensure services are available to meet victims' immediate needs: health care, a bed for the night, immediate protection for themselves and their family members, and counseling. These earliest stages of care are essential in easing victims out of crisis and setting the stage for sustained, long-term support.

Earlier publications of the *Trafficking in Persons Report* deal with these issues in greater detail (specifically the 2012 and 2013 installments with respect to victim identification and protection), and provide a more comprehensive overview of what governments can do to take the first steps of a victim-centered approach. Everything that follows relates to establishing this framework successfully.

DIGNITY, SECURITY, AND RESPECT

Meeting the immediate needs of victims of human trafficking after their identification is critical. These individuals have often endured horrific physical, psychological, and/or sexual abuse at the hands of their traffickers and others. But victim services that focus on providing support only until individuals are physically well enough to be sent on their way—or put in line for deportation—are insufficient. Those who have been enslaved have endured more than physical harm. They have been robbed of their freedom, including the freedom to make choices about their own lives. Medical care and a few nights in a shelter do not make a victim whole again. Even as the physical wounds are salved and begin healing, a major element of the recovery process is helping victims regain their agency, their dignity, and the confidence to make choices about how to move forward with their lives.

President Barack Obama and His Holiness Pope Francis at the Vatican during their first meeting. The Pontiff's position on modern slavery is clear: when any man, woman, or child is enslaved anywhere, it is a threat to peace, justice, and human dignity everywhere.



“I exhort the international community to adopt an even more unanimous and effective strategy against human trafficking, so that in every part of the world, men and women may no longer be used as a means to an end.”

— Pope Francis, 2013

CAMBODIA

Kieu's family relied on their local pond for their livelihood. When her father became ill, the nets they used fell into disrepair. Mending them would cost the equivalent of approximately \$200 they did not have. Her parents turned to a loan shark whose exorbitant interest rates quickly ballooned their debt to the equivalent of approximately \$9,000. "Virgin selling" was a common practice in their community, and Kieu's mother, after acquiring a "certificate of virginity" from the hospital, sold her to a man at a hotel. Kieu was 12 years old. Upon hearing that she was to be sold again, Kieu fled, making her way to a safe house where she could recover. Kieu is now self-sufficient and hopes to start her own business.

HUMAN TRAFFICKING DEFINED

The TVPA defines “severe forms of trafficking in persons” as:

- ❖ sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age; or
- ❖ 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.

A victim need **not** be physically transported from one location to another in order for the crime to fall within these definitions.

A girl sells tomatoes streetside in Benin. *Vidomegon* is a tradition ostensibly to offer children educational and vocational opportunities by sending them to wealthy homes, but instead is often used to exploit children in forced labor.



THE VULNERABILITY OF LGBT INDIVIDUALS TO HUMAN TRAFFICKING

Lesbian, gay, bisexual, and transgender (LGBT) persons around the world often experience discrimination and elevated threats of violence because of their sexual orientation or gender identity. In 2013, the International Lesbian, Gay, Bisexual, Transgender, and Intersex Association (ILGA) reported that nearly 80 countries had laws that criminalize people on the basis of sexual orientation or gender identity. LGBT persons face elevated threats of violence and discrimination in employment, healthcare, and educational opportunities. Some family members have ostracized LGBT relatives from their homes. The cumulative effects of homophobia and discrimination make LGBT persons particularly vulnerable to traffickers who prey on the desperation of those who wish to escape social alienation and maltreatment.

Governments and NGOs have made progress in identifying LGBT trafficking victims and highlighting the vulnerability of LGBT persons to crimes such as human trafficking. For example, in 2013, NGOs working on LGBT issues in Argentina identified traffickers who promised transgender women job opportunities in Europe, but instead confiscated their passports and forced them into prostitution. Police in the Philippines have identified LGBT trafficking victims during anti-trafficking operations. Civil society in South Africa has identified instances of traffickers coercing LGBT children to remain in prostitution under threat of disclosing their sexual orientation or gender identity to their families. As part of the *2013-2017 Federal Strategic Action Plan on Services for Victims of Trafficking in the United States*, U.S. agencies have committed to gathering information on the needs of LGBT victims of human trafficking. NGOs in the United States estimate LGBT homeless youth comprise 20 to 40 percent of the homeless youth population; these youth are at particularly high risk of being forced into prostitution.

Biases and discrimination severely complicate proper identification of, and provision of care to, LGBT victims of human trafficking. Law enforcement officials and service providers should partner with LGBT organizations to enhance victim identification efforts and adapt assistance services to meet the unique needs of LGBT victims. LGBT victims of human trafficking should also be included in the dialogue on these issues as well as on helping victims become survivors.

Countries in the *TIP Report* that are **NOT** States Parties to the Protocol to Prevent, Suppress and Punish Trafficking In Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime

AFGHANISTAN

ANGOLA

BANGLADESH

BARBADOS

BHUTAN

BRUNEI

COMOROS

CONGO, REPUBLIC OF

CZECH REPUBLIC

ERITREA

FIJI

IRAN

JAPAN

KOREA (DPRK)

KOREA, REPUBLIC OF

MALDIVES

MARSHALL ISLANDS

NEPAL

PAKISTAN

PALAU

PAPUA NEW GUINEA

SIERRA LEONE

SINGAPORE

SOLOMON ISLANDS

SOMALIA

SOUTH SUDAN

SRI LANKA

SUDAN

TONGA

UGANDA

YEMEN



Two Chinese laborers, ages 23 and 22, are working in the Ibaraki prefecture, north of Tokyo, through the Japanese government's Technical Intern Training Program. Although the program was intended to develop technical expertise for the participants, many work as low-skilled laborers, exposed to harsh conditions and vulnerable to forced labor.

Those working with victims must respect their choices and freedom, including the right to refuse services. This respect must guide all efforts to provide support. If victims want to walk away as soon as they have escaped modern slavery, that decision should be in their control. What governments can control, however, is the range of services and support available to victims so that they have a menu of options from which to choose.

One of the most important needs of recently-liberated trafficking victims is a place to stay that is safe, yet that also respects their freedom and autonomy.

As the work of the anti-trafficking movement has shown, not all “shelters” are worthy of the title. In recent years, victims of trafficking around the world have broken free from their exploitation only to find themselves locked in so-called shelters that more closely resemble detention centers than havens of support and safety. In some places, governments succeed in identifying trafficking victims and then place them into large populations of refugees and asylum seekers, where services are not tailored to their specific needs. Trafficked persons housed in mixed-use shelters may also face stigma from other residents for their participation in prostitution or crimes they were forced to commit during their servitude.

Such environments fail to support a victim's sense of independence and agency. Worse still, confinement and isolation—which were likely part of their exploitation—have the potential to re-traumatize.

Ideally, a shelter is a place where a trafficked person is free to stay, leave, and return again if he or she feels the need. To be sure, such facilities need to be safe and secure. Certain procedures and policies can be put in place to guarantee security, such as restrictions on who is allowed to enter a facility or even know the address. Of course, additional structures and restrictions are necessary for child victims. An effective shelter promotes, rather than hinders, a victim's freedom of movement. And where independent living is in the best interest of the trafficked person, the use of the shelter as more of a drop-in center may be most appropriate.

UNITED STATES

When teenager Melissa ran away from home, she was quickly found by a man who promised her help, but was actually a pimp who intended to sexually exploit her. He used psychological manipulation and coercion to hold her in prostitution, and advertised her using online sites. Refusal to do what he said was met by beatings and threats. Despite her fear of being found and killed if she ran, Melissa one day managed to escape from a hotel room where he was keeping her. A patron at another hotel nearby helped her reach the police, who arrested her trafficker.

Ideally, shelters work closely with other service providers to support the trafficked person well beyond the physical and psychological care that may be required initially. Individuals who do not speak the local language may need interpretation services or access to language classes. Migrant victims may need assistance obtaining immigration status from authorities. Victims who are playing a role in the prosecution of their abuser or who are seeking restitution require legal services (see next page for additional details on access to justice for victims).

As trafficked persons become more independent, they often need support in finding housing, job training, education, and employment. Best practices are to not place conditions on access to such support by requiring victims to participate in a criminal investigation, or to

live in a particular shelter, or to follow a prescribed course for recovery. Assistance options are most effective if they are flexible and adaptive, reflecting the difficulty in predicting what a victim may need as he or she takes steps toward becoming a survivor. In any case, well-designed, long-term assistance does not involve telling a victim what he or she must do with his or her life, but rather entails providing the help requested to help each individual reach personal goals.

Even though governments are responsible for making sure assistance for victims is available, government agencies themselves are often not the best direct providers of care. Here is where the importance of strong partnerships becomes clear. In many countries around the world, NGOs, international organizations, and civil society groups are already providing quality assistance to victims. Many of these efforts are underfunded, and many do not have nearly the capacity to deal with the full magnitude of the problem in their regions. But when government works with civil society to amplify resources and expertise, survivors stand to benefit from enhanced services and protections.



“We need people to know this is going on, and we need trained people in our congregations, Federations, and agencies at all levels, to identify signs of trafficking. . . . Most of us were not aware that this was impacting our own communities, but the issue is serious and widespread. Human trafficking is not only happening to foreign nationals. It’s happening to kids in our own communities.”

– Susan K. Stern, chair of the Jewish Federations of North America National Campaign, 2013

Additionally, government collaboration with private-sector partners can help open up job opportunities to survivors. Some companies have already adopted anti-trafficking policies and practices to crack down on trafficking in supply chains and to train employees to identify trafficking when they see it. Another approach companies can take is to offer survivors employment programs and a more promising path forward.

ACCESS TO JUSTICE

A government’s obligation to confront modern slavery is tied to the fact that trafficking in persons is first and foremost a crime, and only governments can prosecute suspects and incarcerate criminals. Similarly, only governments can confer immigration benefits or mandate restitution to victims of a crime. In the same way a government guarantees the rights of its citizens, a government has a responsibility to uphold the rule of law by punishing those who run afoul of it.

In cases of human trafficking, the government’s pursuit of justice has effects that reach beyond maintaining the sanctity of law. For those who have endured the brutality of modern slavery, seeing their abusers brought to justice can have an enormous positive impact on their recovery process. In addition to broader benefits of removing a criminal from the streets, victims’ knowledge that those who enslaved them can no longer do them or others harm can play a major role in helping overcome their trauma.

Survivors and staff of the Coalition to Abolish Slavery & Trafficking (CAST) receive the Presidential Award for Extraordinary Efforts to Combat Trafficking in Persons from U.S. Secretary of State John F. Kerry and Ambassador-at-Large to Monitor and Combat Trafficking in Persons Luis CdeBaca at the annual meeting of the President’s Interagency Task Force to Combat Trafficking in Persons at the White House on April 8, 2014.



THE USE OF FORCED CRIMINALITY: VICTIMS HIDDEN BEHIND A CRIME

Methods used by human traffickers continue to evolve, as does the understanding of this crime among law enforcement and anti-trafficking activists. One distinct, yet often under-identified, characteristic of human trafficking is forced criminality. Traffickers may force adults and children to commit crimes in the course of their victimization, including theft, illicit drug production and transport, prostitution, terrorism, and murder. For example, in Mexico, organized criminal groups have coerced children and migrants to work as assassins and in the production, transportation, and sale of drugs. In November 2013, police arrested six adult Roma accused of forcing their children to commit burglaries in Paris and its suburbs. The victims were reportedly physically beaten for failure to deliver a daily quota of stolen goods. In Afghanistan, insurgent groups force older Afghan children to serve as suicide bombers. Non-state militant groups in Pakistan force children—some as young as 9 years old—to serve as suicide bombers in both Pakistan and Afghanistan. Children and men, primarily from Vietnam and China, have been forced to work on cannabis farms in the United Kingdom and Denmark through the use of verbal and physical threats and intimidation.

Victims of trafficking should not be held liable for their involvement in unlawful activities that are a direct consequence of their victimization. Trafficked individuals who are forced to commit a crime are commonly mistaken for criminals—rather than being identified as victims—and therefore treated as such by law enforcement and judicial officials. Many victims of trafficking remain undetected among those who have committed crimes because of a lack of proper victim identification and screening. One example in the United States involves victims of human trafficking who are forced to commit commercial sex acts, and are then prosecuted by state or local officials for prostitution or prostitution-related activity. Many states, including New York State, have passed laws to allow trafficking victims to overturn or vacate these convictions where criminal activity was committed as part of the trafficking situation. In 2009, three Vietnamese children were arrested for working on cannabis farms in the United Kingdom, convicted for drug offenses, and sentenced to imprisonment. An appellate court, however, overturned the convictions in 2013, holding that the children were victims of trafficking. This case reflects a growing awareness that victims of human trafficking involved in forced criminality should be shielded from prosecution. It also demonstrates the difficulties that law enforcement and judicial officials face when combating crimes and enforcing the law.

It is important that governments develop and implement policies to identify trafficking victims who are forced to participate in criminal activity in the course of their victimization, and provide them with appropriate protective services. In addition to general awareness training on human trafficking, training law enforcement and judicial officials about the principles of non-punishment and non-prosecution of victims is key to increasing the likelihood that individuals will be properly identified by the authorities, and thereby secure access to justice and protection.



At a Department of State “TechCamp” workshop in Mexico, over 80 participants discussed best practices for integrating technology in the fight against human trafficking.



When she was only 11 years old, “Guddi” was recruited by a woman from her village to work as a domestic servant. When she arrived in the city, however, she was taken to a brothel in the red light district and forced into prostitution. She has been trapped in debt bondage by her trafficker ever since.





Eastern European women wait for customers in a Tel Aviv brothel. Women from Ukraine, Russia, Moldova, Uzbekistan, China, Ghana, and to a lesser extent South America, are vulnerable to sex trafficking in Israel.

Thus, the “prosecution” component of the “3P” paradigm of prosecution, protection, and prevention cannot be fully separated from the “protection” element, as the prosecution of traffickers can be very significant in the long-term protection of victims.

Around the world, many promising practices have emerged in recent years that are improving the way governments prosecute trafficking in persons cases. Specialized courts, extensive training for judges, prosecutors, and law enforcement, and procedures to expedite trafficking cases through judicial systems are making a difference in securing more trafficking convictions, putting more abusers behind bars, and providing a sense of justice to more victims.

Of course, victims themselves often play an integral role in the successful prosecution of trafficking cases as witnesses or assisting with investigations in other ways. Victims are often hesitant to cooperate with authorities. Some may not even acknowledge or realize that they are victims of a crime, or because of dependency or “trauma bonding” may still harbor affection for their abusers or have conflicted feelings about criminal charges. It is not unusual for a victim to choose not to cooperate with authorities, testify in open court, or confront his or her trafficker. A victim-centered approach to prosecutions, however, has proven effective in bringing more victims along as participants in the investigation and prosecution of their traffickers.

The most successful legal and judicial systems employ “victim-witness coordinators” to work directly with individuals and their advocates to help them navigate the criminal justice system. Ideally, these coordinators bring expertise in dealing directly with victims and experience in ascertaining their needs and willingness to collaborate with law enforcement. When victims choose to participate in prosecution efforts, properly

ROMANIA – ENGLAND

Ioana and her boyfriend had been dating for a year when they decided to move to England together. He arranged everything for the move, including housing, and Ioana left her job and family in Romania with excitement for a better life. When she arrived in Manchester, everything changed. Her “boyfriend” and a friend created a profile for Ioana on an adult website and began advertising her for sex, arranging clients, and taking all of her earnings. She was afraid to try to escape, because he had become violent. Now safe, Ioana speaks out about her experience: “I don’t want this to happen to any other girls again.”



A young child brings tea to customers in Nepal, as two school children wait for the bus behind him. Poverty and lack of schooling increase the vulnerability of millions of children worldwide to forced labor and debt bondage.

“ Having survived trafficking at the age of 12, I knew, from my own experience, that each time victims were stopped by police or treated like criminals, they were pushed closer to their trafficker. ”

– Carissa Phelps, founder and CEO of Runaway Girl, FPC, 2013

trained victim-witness coordinators can counsel them on what role they will play and help them prepare for depositions or court appearances. Throughout the recovery process, it is ideal for victims to have access to their own legal counsel as well.

Victims need assistance and so do law enforcement officials. Experts from civil society can provide training and assistance to law enforcement agencies working with trafficking victims. These partnerships help to create cooperative relationships between law enforcement and service providers. A trusting relationship benefits prosecution efforts and trafficking victims alike. Law enforcement officials who work regularly with victim service providers and advocates gain a better understanding of the needs and situations of trafficking victims. Advocates and attorneys who know and trust their law enforcement counterparts are better equipped to provide guidance and support to victims as they decide to come forward and assist with prosecutions without fear that the victims under their care will be mistreated.

Justice is not just limited to seeing a trafficker put behind bars. Ideally, in addition to jail time, an anti-trafficking law includes provisions that impose on traffickers an obligation to provide restitution for the loss that resulted from their victim’s enslavement and damages for any injuries. In the United States, restitution to trafficking victims is mandatory in criminal cases. Effective and early seizure of a trafficker’s assets can sometimes help ensure that restitution is not just ordered, but in fact paid. Of course, there will be times when a trafficker will not be able to pay what is owed to the victim. In such cases, a government can take steps to ensure that the burden of the loss and injury does not fall solely on the victim. Crime victim compensation programs can be established to help remedy at least some of the loss.



“Any support offered to victims of trafficking needs to be given in a way that restores a sense of control for the victims over their own lives. . . . When support is provided in a way that does not respect the will of the victims, or is even provided against their will, this may result in further trauma and a continuation of their victimization.”

– Annette Lyth, Regional project manager of the Greater Mekong Sub-region of Southeast Asia for the UN Interagency Project on Human Trafficking (UNIAP), 2013

MARGINALIZED COMMUNITIES: ROMANI VICTIMS OF TRAFFICKING

Romani—also known as Roma, Roms, or Romane—are one of the largest minority groups in Europe and are highly vulnerable to human trafficking. Ethnic Romani men, women, and particularly children are subjected to sex trafficking and forced labor—including forced begging, forced criminality, involuntary domestic servitude, and servile marriages—throughout Europe, including in Western Europe, Central Europe, and the Balkans. This exploitation occurs both internally, especially in countries with large native Romani populations, and transnationally. The Organization for Security and Cooperation in Europe (OSCE) Ministerial Council issued a decision in December 2013 that called on participating States to take measures to address Romani victims of human trafficking.

Like other marginalized groups across the world, Romani are particularly vulnerable to trafficking due to poverty, multi-generational social exclusion, and discrimination—including lack of access to a variety of social services, education, and employment. For instance, because of poor access to credit and employment opportunities, Romani often resort to using informal moneylenders that charge exorbitant interest rates, contributing to high levels of debt, which heighten trafficking vulnerability. Furthermore, recorded cases also exist of exploiters fraudulently claiming social benefits from Romani trafficking victims, depriving victims of this assistance.

In general, European governments do not adequately address the issue of identifying and protecting Romani trafficking victims. Victim protection services and prevention campaigns are often not accessible to the Romani community, as they are at times denied services based on their ethnicity or are located in isolated areas where services are not available. Law enforcement and other officials are typically not trained in or sensitized to trafficking issues in the Romani community. At times, combating trafficking has been used as a pretext to promote discriminatory policies against Romani, such as forced evictions and arbitrary arrests and detention.

Many Romani victims are hesitant to seek assistance from the police because they distrust authorities due to historic discrimination and a fear of unjust prosecution. In some instances, police have penalized Romani victims for committing illegal acts as a result of being trafficked, such as being forced to engage in petty theft. Furthermore, in those countries in which governments rely on victims to self-identify, this mistrust can result in disproportionately small numbers of Romani victims identified, which can contribute to continued exploitation of victims. The lack of formal victim identification may also lead to an absence of protection services, which in turn can result in increased vulnerability to re-trafficking.

Some policy recommendations to address the needs of Romani victims of human trafficking include:

- Governments should include full and effective participation of Romani communities and organizations in anti-trafficking bodies, including anti-trafficking law enforcement and victim identification groups.
- Trafficking prevention campaigns and efforts should be targeted to Romani communities, particularly those that are segregated and socially excluded.
- Governments should improve access to prevention and protection services, such as public awareness campaigns for communities and law enforcement, and adequate shelters, legal and social services, and vocational assistance.
- Law enforcement should not impose criminal liability on trafficking victims, including Romani, for crimes they were forced to commit.
- Anti-trafficking policies should explicitly recognize the Romani as a vulnerable group.

HUMAN TRAFFICKING AND MAJOR SPORTING EVENTS

Major sporting events—such as the Olympics, World Cup, and Super Bowl—provide both an opportunity to raise awareness about human trafficking as well as a challenge to identify trafficking victims and prosecute traffickers who take advantage of these events. Successful anti-trafficking efforts must be comprehensive and sustainable, addressing both labor and sex trafficking conditions before, during, and after such events.

Prior to the Event: Major sporting events often entail massive capital improvement and infrastructure projects, creating a huge demand for cost-effective labor and materials. Governments and civil society can take steps to prevent this significant increase in construction from being accompanied by an increase in forced labor. Governments should ensure labor laws meet international standards, regulate labor recruitment agencies, and frequently inspect construction sites for violations of labor laws. To prepare for the 2012 Olympics in London, the London Councils, a government association in the United Kingdom, commissioned a report on the potential impact of the Olympics on human trafficking. Governments in countries hosting major sporting events may wish to consider similar analyses to identify potential gaps in human trafficking responses. These strategies will be particularly important in countries planning to host future Olympics (Brazil in 2016, South Korea in 2018, and Japan in 2020) and World Cup tournaments (Russia in 2018 and Qatar in 2022).

Game Day: Increased commerce, tourism, and media attention accompany major sporting events. Unfortunately, there is a lack of hard data on the prevalence of human trafficking—including sex trafficking—associated with these events. Governments and civil society—including the airline and hospitality sectors—can collaborate to combat trafficking by launching media campaigns, training law enforcement officials and event volunteers, and establishing partnerships to recognize indicators of human trafficking and to identify victims. Additional data collection of human trafficking surrounding major sporting events will inform future anti-trafficking efforts.

After the Event Concludes: Modern slavery is a 365-day-a-year crime that requires a 365-day-a-year response. Traffickers do not cease operations once a sporting event concludes, and stadiums and surrounding areas can remain popular destinations for travel and tourism. The lasting effect of anti-trafficking efforts associated with major sporting events can be even more important than the impact of those efforts during the event itself. This ripple effect can take the form of enhanced partnerships between law enforcement officials, service providers, and the tourism industry, or simply sports fans sustaining the anti-trafficking efforts that they learned about during the event.

The End It Movement launched a campaign at the 2013 NCAA Final Four basketball tournament in Atlanta, Georgia to bring awareness to the reality of sex trafficking in the United States. Young actresses portrayed victims of sex trafficking.



“On the day I was rescued, I knew three words in English: “hi,” “dolphin,” and “stepsister.” I now believe my captors intentionally kept anything from me that might teach me the language, because knowledge of English could have given me more power. Something captors do well is keep their slaves powerless.”

– Shyima Hall

The 2009 *Trafficking in Persons Report* highlighted the story of Shyima Hall, an Egyptian girl who was sold by her parents at the age of eight to a wealthy Egyptian couple. When the family subsequently moved to California, they smuggled her into the United States on a temporary visa and put her to work up to 20 hours a day in their large suburban home. They confiscated her passport and regularly verbally and physically assaulted her; Shyima suffered for four years before a neighbor filed an anonymous complaint with the state child welfare agency, leading to her rescue. Since that time, she has taken remarkable steps to rebuild her life and to bring awareness to the reality of trafficking around the world. She has gone to college and in 2011 became a United States citizen. Shyima recently released a memoir that tells the story of her childhood, harrowing slavery, and undeniable resilience. She now calls her life “heaven,” and dreams of becoming a police officer or immigration agent to help other victims of trafficking.



PROMISING PRACTICES IN THE ERADICATION OF TRAFFICKING IN PERSONS

Innovation and technology are essential in the fight against human trafficking. The private sector, anti-trafficking advocates, law enforcement officials, academics, and governments are working together to develop innovative solutions to address the complexities involved in both fighting this crime and supporting victims as they strive to restore their lives. Examples of these promising practices include:

MOBILE TECHNOLOGIES IN UGANDA:

In partnership with the Government of Norway, International Organization for Migration (IOM) caseworkers in the field are using mobile technologies in Uganda to collect information about the protection needs of trafficked children. The data, which caseworkers capture using smart phones and then send to a central database for storage, aggregation, and analysis, identifies trends in the trafficking of children from rural to urban areas. IOM uses these trends and patterns to guide the project's anti-trafficking strategy. The web application of the database displays live charts that show anonymous and disaggregated data in a visual format for public viewing.

"TECHCAMPS" IN PHNOM PENH AND TLAXCALA:

Department of State "TechCamps" bring local and regional civil society organizations together with technologists to develop solutions to challenges faced in particular communities. In September 2013, the U.S. Embassy in Cambodia hosted the first-ever "TechCamp" focused on using technology to address challenges in combating modern slavery in Southeast Asia. Challenges ranged from providing hotline information to labor migrants to reducing social stigma for sex trafficking survivors. The McCain Institute for International Leadership provided seed funding for two local projects after the Phnom Penh event. The U.S. Embassy in Mexico also hosted a "TechCamp" in Tlaxcala, a state facing significant challenges in combating sex trafficking. "TechCamp" Mexico focused on developing low-cost, easily-implemented solutions, including interactive soap operas to increase public awareness about trafficking and data scraping to map high-risk areas.

TECHNOLOGY TO IDENTIFY AND SERVE VICTIMS:

The White House Forum to Combat Human Trafficking in 2013 brought stakeholders together with survivors to highlight technology that is being used to help identify victims, connect them to services, and bring traffickers to justice. The forum featured new technology being used by the National Human Trafficking Resource Center (NHTRC) hotline, including the development of a system for individuals to connect discreetly with NHTRC through text messages in addition to a toll-free hotline. Additionally, Polaris Project, working with Google, software companies, and other NGOs, launched a Global Human Trafficking Hotline Network project to help create a more coordinated global response for victims of trafficking.

IDENTIFYING IRREGULAR FINANCIAL TRANSACTIONS:

Collaboration between the Manhattan District Attorney's Office, the Thomson Reuters Foundation, and financial institutions and foundations is helping corporations to identify potential cases of human trafficking by looking for irregularities and red flags in financial transactions. American Express, Bank of America, Barclays, Citigroup, the Human Trafficking Pro Bono Legal Center, JPMorgan Chase & Co., TD Bank, Theodore S. Greenberg, Polaris Project, Wells Fargo, and Western Union participated in the effort. The U.S. Financial Crimes Enforcement Network (FinCEN), in dialogue with other U.S. agencies, private industry, NGOs, academia, and law enforcement, launched a similar initiative to identify financial red flags and provide guidance to financial institutions on how to detect and properly report suspected human trafficking. FinCEN's goal is to supplement and aid law enforcement investigations by supporting the effective detection and reporting of human trafficking financing through Suspicious Activity Reports. Through these efforts, financial institutions are developing the ability to identify suspicious financial activity that may help identify human traffickers.

CLEARING THE WAY

Working together with a wide range of partners, governments can set up a system of protection and support services that help victims along every step of their journey, from the moment they are identified as trafficking victims, to the delivery of care for their immediate injuries, to the transition support and long-term services. Partnerships help these efforts succeed.

Governments alone have authority over certain regulatory, structural, and environmental factors. For example, a shelter may be equipped to provide continuing, long-term support for victims. But if a country's trafficking law mandates that individuals can obtain services only for a limited period of time or that services are wholly contingent upon cooperation with authorities, victims may not receive essential long-term care. Even when training, education, and job placement programs may be available, immigration laws can prohibit a migrant victim from working legally and taking those next steps forward. Conversely, citizen victims risk exclusion if victim-care structures are designed only for foreign victims.

INDIA

Still a teenager, Aanya dropped out of school with the hope of finding work to help her family. Leaving her home in a region rife with poverty, Aanya arrived in the capital and felt lucky to find work in an upscale neighborhood through a domestic worker placement agency. Rather than a good job, Aanya ended up enslaved in a home, locked in, and abused by her employer. For months she endured violent beatings and isolation. Terrified, she worked without pay, forbidden from interacting with—or even calling—anyone she knew. With the help of police and anti-trafficking activists, Aanya escaped, and her case has gone to court. Back home with her family and re-enrolled in school, Aanya is receiving follow-up care.

A New York based non-profit serving women in South and Southeast Asia, the Nomi Network, aims to create economic opportunities for survivors and women and girls at risk of human trafficking. The women and girls pictured here are from the first class of graduates from a new training program.



All over the world, however, laws and regulations hinder NGOs and well-intentioned government officials from providing the services that victims need. These obstacles may be unintentional, such as existing laws designed to deal with other issues that inadvertently affect a government's attempt to confront trafficking. They may reflect attitudes toward particular groups—such as immigrants, people in prostitution, persons with disabilities, or LGBT individuals—that fail to recognize that modern slavery occurs among all groups, including the stigmatized or marginalized. Governments should do whatever is necessary to make sure no law, policy, or regulation prevents a trafficker from being prosecuted, or a victim from being identified and becoming a survivor.

THE SURVIVOR'S VOICE: GUIDING THE WAY FORWARD

The approaches and practices that this *Report* recommends are not a panacea for the challenge of modern slavery, nor do they offer a perfect solution for what trafficked persons need. The search for those answers is what continues to drive the fight against modern slavery forward.

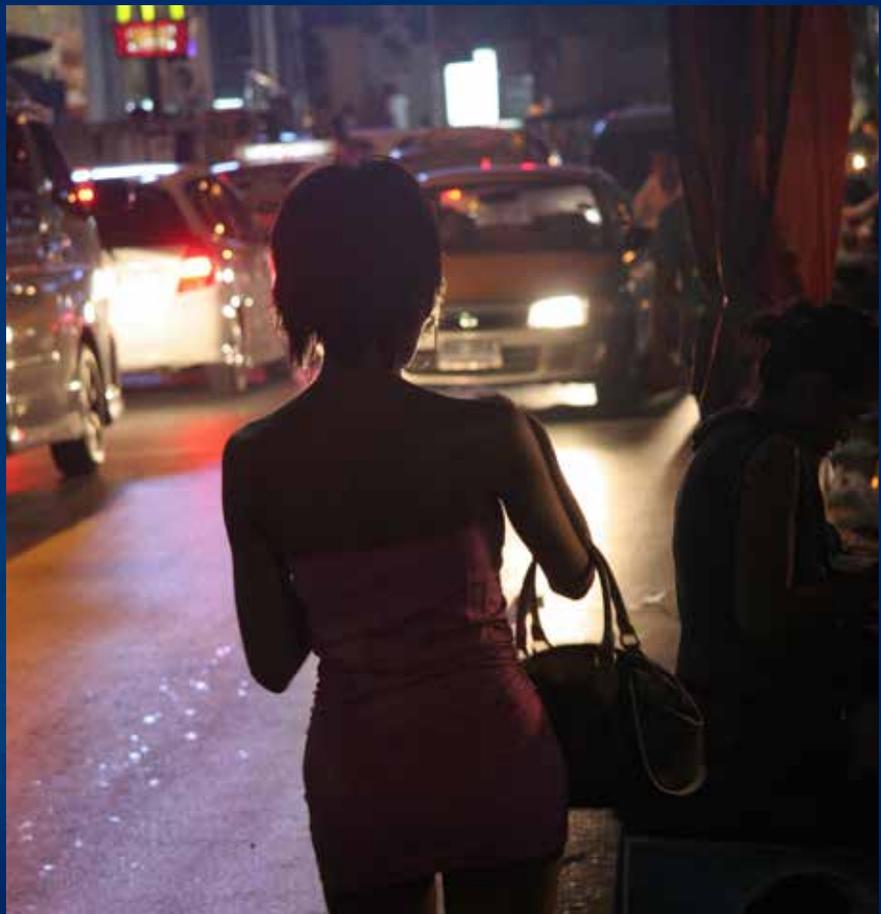
In this fight, survivors play a vital role in finding better solutions. Those who have made the journey from victim to survivor have done so in ways as unique as each individual and his or her own experience.

More than a few survivors have chosen to refocus their talents, their passions, and their experiences back into the struggle against modern slavery.

Survivors run shelters, advocate before legislatures, train law enforcement officials, and meet with presidents and prime ministers to push for a more robust response to this crime. No one can explain the barbarity of modern slavery as well as someone who has endured it, and no one can better evaluate what works and what does not as governments and partners come to the aid of those still in bondage. It has been inspiring to see survivors seemingly set apart by the differences of their cases find the commonality of their experiences and forge a new understanding of a crime that they best comprehend.

In addition to helping victims on their journeys to become survivors, governments can also benefit from opening the door to them as experts, colleagues, policymakers, and advocates.

A young girl waits for clients on the side of the road in Bangkok, Thailand. Many women and girls from within Thailand and from neighboring countries are victims of sex trafficking, often to meet the demand of sex tourists from countries in the region and elsewhere.



MAKING THE PROBLEM WORSE: OFF-DUTY LAW ENFORCEMENT OFFICERS PROVIDING SECURITY IN HIGH-RISK ESTABLISHMENTS

At times, trafficking offenders employ off-duty law enforcement officers to provide nighttime security in clubs, bars, or other establishments that are at high risk of being a venue for trafficking. This practice likely inhibits the willingness of law enforcement authorities to investigate allegations of human trafficking. Off-duty officers on the payroll of an establishment engaging in human trafficking may be less likely to report or investigate a potential trafficking situation at that locale. In addition, their law enforcement colleagues who do not work in the establishment may feel pressure to look the other way, rather than risk compromising their fellow officers. The practice of off-duty law enforcement officers working other security jobs may also have a negative impact on the community's perception of the role of law enforcement. Most significantly, potential trafficking victims are not likely to turn to these law enforcement officers for help or trust a police officer who works in, and potentially enables, an environment where exploitation is occurring.

Governments can help by discouraging law enforcement officials from providing security in their off-duty hours to such establishments. Governments can also conduct sensitization training for law enforcement that includes a human trafficking component and by prosecuting officials found to be complicit in human trafficking. Further, governments can develop codes of conduct for officials that outline clear conflicts of interest in regard to off-duty employment and encourage trafficking victim identification and referral.

This is one of the oldest brothels in the red light district of Mumbai, India. On each floor, enforcers guard the rooms. Women from Bangladesh, Nepal, and India are subjected to sex trafficking in Mumbai's commercial sex trade.



The stories of those survivors—the stories of all survivors—are living, breathing reminders of why governments must live up to their responsibility to combat this serious crime in all its forms. If a survivor-turned-advocate had been misidentified and treated as a criminal, perhaps today she would not be working for the freedom of more who are enslaved. If a survivor who was reunited with his family was instead deported back to the country where he was originally exploited, perhaps today he would not be working to give his children a bright future. If survivors who were treated with respect and understanding were instead viewed as pariahs and forced out on the streets, perhaps today they would once again be victims.

This *Report* has in the past noted the legacy of Frederick Douglass. A hero of the abolitionist movement, Douglass effected change not only through his compelling accounts of life as an enslaved child servant and farmworker, but also through his activism and advocacy. Fittingly, it was this survivor of slavery who became one of the United States' first African-American ambassadors and advocated for women's rights. He also accurately predicted that slavery could reappear if governments left vulnerable migrants unprotected.

PERU

Oscar's cousin worked in a bar in the gold mining region of Peru and told him stories of being paid in chunks of gold. Oscar, 16 at the time, left home in hopes of finding similar work. Upon arrival, the mine owner told him that he had to work 90 days to repay the fee his cousin received for recruiting him, and because the owner controlled the river traffic, there were no options for escape. Oscar then realized he had been sold into slavery. Oscar contracted malaria but was refused medical attention and left to die in a hut; the other workers cared for him and fed him out of their own meager rations. Too weak to work in the mines, he was forced to work in the kitchens. After the 90 days were completed, Oscar packed his bags to leave, but the boss told him he was not free because he was only credited for working 30 days. Oscar was not credited with 90 days' work until he worked for eight months. Upon his return from the Amazon, Oscar was hospitalized for yellow fever. To repay the doctors, he had to borrow money from his family; Oscar believed the only way to repay that debt was to return to work in the jungle.

Two women wait for customers in a street-side brothel. Millions of Indian women, men, and children are subjected to sex trafficking.



REACTIVATING TRAUMA IN SEX TRAFFICKING TESTIMONY

Sex trafficking victims face a long road to recovery, and testifying against their exploiters can often hinder that process. While witness testimony can be an effective and necessary form of evidence for a criminal trial, the primary trauma experienced by a victim during the trafficking situation may be reactivated when recounting the exploitation or confronting the exploiter face-to-face. In many cases, the victim-witness has been threatened by the trafficker directly warning against reporting to law enforcement, or the witness's family members have been threatened or intimidated as a way to prevent cooperation in an investigation or prosecution. In addition, a victim may fear possible prosecution for unlawful activities committed as part of the victimization such as prostitution, drug use, and illegal immigration. This fear is compounded in some cases in which victims experienced previous instances of being treated as criminals, whether arrested, detained, charged, or even prosecuted. The defense may also cite the victim's engagement in criminal activity or criminal record as evidence of his or her lack of credibility. In fact, sometimes victims are not ideal witnesses. If the victim had a close relationship with the trafficker (also known as trauma bonding), has a deep-rooted distrust of law enforcement, or fears retaliation, a victim may be a reluctant or ineffective witness.

The need for resources for victims throughout, and even after, the investigation and prosecution is critical, especially because some human trafficking trials last several years. During this time, victims often face financial difficulties—including lack of housing and employment—and continued emotional and psychological stress, including Post-Traumatic Stress Disorder in many cases, resulting from the trafficking situation, that require long-term medical and mental health care.

To prevent or reduce the chance of reactivating primary trauma, experts encourage government officials to incorporate a victim-centered approach and provide support to victim-witnesses when investigating and prosecuting trafficking offenses. Specialized courts to hear human trafficking cases and the designation of specific prosecutors who have significant experience in handling these cases have led to a greater number of prosecutions while minimizing victim re-traumatization. Collaboration between law enforcement officials and NGOs that provide comprehensive victim assistance, including legal and case management services, has also proven to be a necessary component in successful prosecutions. The Government of Canada, for example, has fostered partnerships with NGOs through the Victims Fund, resulting in additional support for victims, such as projects that raise awareness and provide services and assistance. Law enforcement officials in many countries would benefit from sharing best practices to ensure that victims are not re-traumatized and traffickers are prosecuted in accordance with due process. Best practices include:

- Interviewing victims in a comfortable, non-group setting with a legal advocate present where possible.
- Providing the option, where legally possible, to pre-record statements for use as evidence to avoid the need for repeated accounts of abuse.
- Adopting evidentiary rules to preclude introduction of prior sexual history.
- Providing support—such as victim advocates, free legal counsel, and change in immigration status—that is not conditional on live trial testimony.



PHILIPPINES – SAUDI ARABIA

Marie left her home for a job as a domestic worker in Saudi Arabia—the opportunity for a fair wage and a safe workplace made the sacrifice of leaving her family and her life in the Philippines seem worth it. In reality, Marie spent her time in Saudi Arabia being sold from employer to employer—11 in all. In the last home where she worked, she was beaten severely. After her stay in the hospital, she was sent home to the Philippines. She has never been paid for her months of work.

Sadly, for every inspiring story of a survivor who has moved past his or her exploitation, there will be too many untold stories of victims unidentified, re-traumatized, jailed, or worse. For the global struggle against modern slavery to succeed, there must be more stories of men and women finishing their journey.

The journey to becoming a survivor will become a reality for more victims only if many others walk on that path alongside them, whether law enforcement officials, advocates, ministers, or lawmakers. When the burden is shared and when the course points toward a common goal, more lives will be restored, and slowly, exploitation and enslavement will give way to justice, opportunity, and freedom.

“Human trafficking is, quite simply, the exploitation of human beings for profit. It is a scourge that is not defeated by barriers of wealth and influence—trafficking is an immense problem for developed and developing nations alike.”

– Anne T. Gallagher, *Officer of the Order of Australia*,
former Advisor on Trafficking to the United Nations High Commissioner for Human Rights, 2013



DEFINITIONS AND METHODOLOGY

“When I had sex with him, I felt empty inside. I hurt and I felt very weak. It was very difficult. I thought about why I was doing this and why my mom did this to me.”

– “Jorani,” human trafficking survivor
whose mother sold her into prostitution, Cambodia, 2013

WHAT IS TRAFFICKING IN PERSONS?

“Trafficking in persons” and “human trafficking” have been used as umbrella terms for the act of recruiting, harboring, transporting, providing, or obtaining a person for compelled labor or commercial sex acts through the use of force, fraud, or coercion. The Trafficking Victims Protection Act (TVPA) of 2000 (Pub. L. 106-386), as amended, and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the Palermo Protocol), describe this compelled service using a number of different terms, including involuntary servitude, slavery or practices similar to slavery, debt bondage, and forced labor.

Human trafficking can include, but does not require, movement. People may be considered trafficking victims regardless of whether they were born into a state of servitude, were transported to the exploitative situation, previously consented to work for a trafficker, or participated in a crime as a direct result of being trafficked. At the heart of this phenomenon is the traffickers’ goal of exploiting and enslaving their victims and the myriad coercive and deceptive practices they use to do so.

THE FACE OF MODERN SLAVERY

Sex Trafficking

When an adult engages in a commercial sex act, such as prostitution, as the result of force, threats of force, fraud, coercion or any combination of such means, that person is a victim of trafficking. Under such circumstances, perpetrators involved in recruiting, harboring, enticing, transporting, providing, obtaining, or maintaining a person for that purpose are guilty of sex trafficking of an adult. Sex trafficking also may occur within debt bondage, as individuals are forced to continue in prostitution through the use of unlawful “debt,” purportedly incurred through their transportation, recruitment, or even their crude “sale”—which exploiters insist they must pay off before they can be free. An adult’s consent to participate in prostitution is not legally determinative: if one is thereafter held in service through psychological manipulation or physical force, he or she is a trafficking victim and should receive benefits outlined in the Palermo Protocol and applicable domestic laws.

Child Sex Trafficking

When a child (under 18 years of age) is recruited, enticed, harbored, transported, provided, obtained, or maintained to perform a commercial sex act, proving force, fraud, or coercion is not necessary for the offense to be characterized as human trafficking. There are no exceptions to this rule: no cultural or socioeconomic rationalizations alter the fact that children who are prostituted are trafficking victims.

PAKISTAN – UNITED ARAB EMIRATES

Mariam and her 16-year-old daughter Fatima were promised jobs at a beauty salon in the United Arab Emirates. On their flight from Pakistan, a friendly man gave Mariam his number just in case she needed any help while there. Mariam and Fatima were picked up at the airport by an acquaintance of the person who paid for their flights and promised them jobs. She took their passports. Then, instead of going to a salon, the mother and daughter were made to engage in prostitution to pay for their plane tickets. Mariam had to see her daughter cry every time a client left her room. When she could, Mariam called the man from her flight and confided in him; he encouraged her to contact the police. They convinced their captor that they needed to go to the market, but instead found a taxi and went to the police. During the investigation, the police uncovered other victims, also lured with promises of jobs in a beauty salon.

MEDIA BEST PRACTICES

Ask most people where their information about human trafficking comes from, and the answer is often “I heard about it on the news.” Unsurprisingly, the media play an enormous role shaping perceptions and guiding the public conversation about this crime. *How* the media reports on human trafficking is just as important as *what* is being reported, and the overall impact of these stories is reflected in the way the public, politicians, law enforcement, and even other media outlets understand the issue.

In recent years, a number of reports about trafficking have relied on misinformation and outdated statistics, blamed or exploited victims, and conflated terminology. Instead of shining a brighter light on this problem, such reports add confusion to a crime that is already underreported and often misunderstood by the public. As the issue of human trafficking begins to enter the public consciousness, members of the media have a responsibility to report thoroughly and responsibly, and to protect those who have already been victimized.

A few promising practices can keep journalists on the right track:

- **Language matters.** Is there a difference between survivor and victim? Prostitution and sex trafficking? Human smuggling and human trafficking? The conflation of terms, as well as the failure to use the correct definition to describe human trafficking, can confuse and mislead audiences. Human trafficking is a complex crime that many communities are still trying to understand, and using outdated terms or incorrect definitions only weakens understanding of the issue. *Become familiar with the trafficking definitions of international law, found in the Palermo Protocol to the United Nations Transnational Organized Crime Convention, as well as other related terms that are commonly used.*
- **Dangers of re-victimization.** Photos or names of human trafficking victims should not be published without their consent, and journalists should not speak with a minor without a victim specialist, parent, or guardian present. Human trafficking cases often involve complex safety concerns that could be exacerbated by a published story, or if a victim or survivor has not fully healed, a published story may reactivate trauma or shame years later. *Ensure that, before a victim of human trafficking agrees to share his or her story, he or she understands that once the story is published, it will be available to the public at large.*
- **Survivor stories.** Although interviewing survivors may be the key to understanding human trafficking, there are optimal ways to approach survivors and learn about their experiences. Reporters should invest time engaging service providers and NGOs that work with survivors to learn and understand the best possible approaches. *Be flexible, do not make demands, and do not expect the survivor to tell you his or her story in one sitting. Spend time with survivors, get to know them as people, and follow up even after the story is complete.*
- **Half the story.** When media report on only one type of human trafficking, the public is left with only part of the story. Human trafficking includes sex trafficking, child sex trafficking, forced labor, bonded labor, involuntary domestic servitude, and debt bondage. *Strengthen the public’s understanding of human trafficking and the full scope of the crime.*
- **Numbers game.** Reporters often lead with numbers, but reliable statistics related to human trafficking are difficult to find. Human trafficking is a clandestine crime and few victims and survivors come forward for fear of retaliation, shame, or lack of understanding of what is happening to them. Numbers are not always the story. *Pursue individual stories of survival, new government initiatives, or innovative research efforts until better data are available.*
- **Human trafficking happens.** Simply reporting that human trafficking occurs is not a story. Human trafficking happens in every country in the world. *Go deeper and find out who are the most vulnerable to victimization, what kind of help is offered for survivors, and what your community is doing to eradicate this problem.*
- **Advocacy journalism.** Human trafficking is a popular topic for journalists hoping to make a social impact. Journalists may befriend survivors, earn their trust, and in some cases help remove them from a harmful situation. This is typically not appropriate. Everyone should do their part to help eradicate this crime, but victim assistance should be handled by accredited organizations. “Rescuing” a victim is not a means to a story. *Instead, connect a victim to a reputable service provider to ensure they are safe and their needs are met.*



Above: Police work to reunite families with 39 children who were rescued in a raid on an embroidery factory. Such raids can be traumatic for human trafficking victims, as their abusers have often filled them with fear of authorities through psychological manipulation.

Below: A group of boys wait to be processed after a police raid on garment factories in New Delhi, India. Anti-Trafficking Police and NGOs helped remove 26 children from the factories, but it is feared that many more were not rescued.



HUMAN TRAFFICKING AND THE DEMAND FOR ORGANS

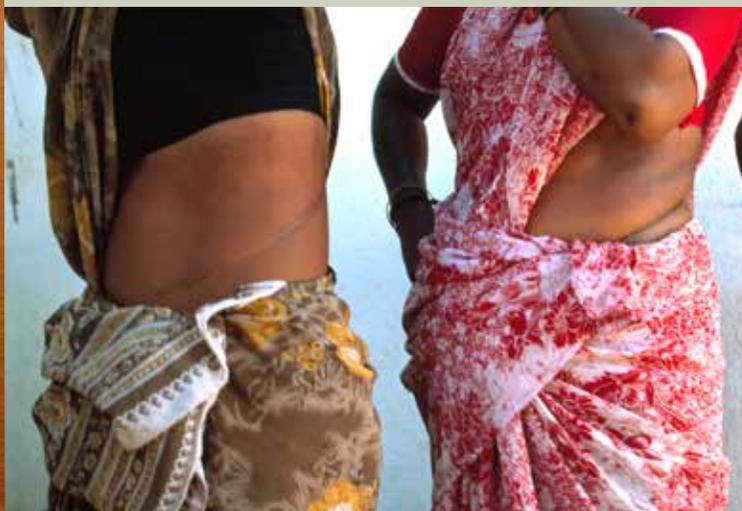
More than 114,000 organ transplants are reportedly performed every year around the world. These operations satisfy less than an estimated 10 percent of the global need for organs such as kidneys, livers, hearts, lungs, and pancreases. One third of these operations include kidneys and livers from living donors. The shortage of human organs, coupled with the desperation experienced by patients in need of transplants, has created an illicit market for organs.

Governments, the medical community, and international organizations, such as the World Health Organization, are addressing the illicit sale and purchase of organs through the adoption of regulations, laws, codes of conduct, awareness campaigns, and mechanisms to improve traceability of organs, as well as to protect the health and safety of all participants. Many countries have also criminalized the buying and selling of human organs. Unscrupulous individuals seeking to profit from this shortage, however, prey on disadvantaged persons, frequently adult male laborers from less-developed countries. These living donors are often paid a fraction of what they were promised, are not able to return to work due to poor health outcomes resulting from their surgeries, and have little hope of being compensated for their damages. This practice is exploitative and unethical, and often illegal under local law. Sometimes it also involves trafficking in persons for the purpose of organ removal.

BUT WHAT MAKES AN ILLEGAL ORGAN TRADE ALSO A HUMAN TRAFFICKING CRIME?

The sale and purchase of organs themselves, while a crime in many countries, does not *per se* constitute human trafficking. The crime of trafficking in persons requires the recruitment, transport, or harboring of a person for organ removal through coercive means, including the “abuse of a position of vulnerability.” Cases in which organs are donated from deceased donors who have died of natural causes do not involve human trafficking.

Some advocates have taken the position that when economically disadvantaged donors enter into agreements for organ removal in exchange for money, they invariably become trafficking victims because there is “an abuse of a position of vulnerability.” Abuse of a position of vulnerability is one of the “means” under the Palermo Protocol definition of trafficking in persons. Thus, if a person who is in a position of vulnerability is recruited by another who abuses that position by falsely promising payment and health care benefits in exchange for a kidney, the recruiter may well have engaged in trafficking in persons for the purpose of organ removal. The UN’s Office on Drugs and Crime (UNODC) states in its Guidance Note on “abuse of a position of vulnerability” as a means of trafficking in persons that the abuse of vulnerability occurs when “an individual’s personal, situational, or circumstantial vulnerability is intentionally used or otherwise taken advantage of such that the person believes that submitting to the will of the abuser is the only real and acceptable option available to him or her, and that belief is reasonable in light of the victim’s situation.” Thus, poverty alone—without abuse of that vulnerability in a manner to make a victim’s submission to exploitation the “only real and acceptable option”—is not enough to support a trafficking case, whether the exploitation is sexual exploitation, forced labor, or the removal of organs.



The use of children in the commercial sex trade is prohibited both under U.S. law and by statute in most countries around the world. Sex trafficking has devastating consequences for minors, including long-lasting physical and psychological trauma, disease (including HIV/AIDS), drug addiction, unwanted pregnancy, malnutrition, social ostracism, and even death.

Forced Labor

Forced labor, sometimes also referred to as labor trafficking, encompasses the range of activities—recruiting, harboring, transporting, providing, or obtaining—involved when a person uses force or physical threats, psychological coercion, abuse of the legal process, deception, or other coercive means to compel someone to work. Once a person's labor is exploited by such means, the person's prior consent to work for an employer is legally irrelevant: the employer is a trafficker and the employee is a trafficking victim. Migrants are particularly vulnerable to this form of human trafficking, but individuals also may be forced into labor in their own countries. Female victims of forced or bonded labor, especially women and girls in domestic servitude, are often sexually exploited as well.

Bonded Labor or Debt Bondage

One form of coercion is the use of a bond or debt. U.S. law prohibits the use of a debt or other threats of financial harm as a form of coercion and the Palermo Protocol requires states to criminalize threats and other forms of coercion for the purpose of forced labor or services or practices similar to slavery or servitude. Some workers inherit debt; for example, in South Asia it is estimated that there are millions of trafficking victims working to pay off their ancestors' debts. Others fall victim to traffickers or recruiters who unlawfully exploit an initial debt assumed as a term of employment.

Debts taken on by migrant laborers in their countries of origin, often with the support of labor agencies and employers in the destination country, can also contribute to a situation of debt bondage. Such circumstances may occur in the context of employment-based temporary work programs in which a worker's legal status in the destination country is tied to the employer and workers fear seeking redress.

Young Chinese children work side by side with their parents in hazardous conditions in a leather factory. In recent years, reports have indicated a connection between luxury goods, counterfeiting, and forced labor.



BURMA – THAILAND

Trusting his recruiters, Myo believed he was leaving his home in Burma to work in a pineapple factory in Thailand. Yet, when he arrived, he was sold to a boat captain for the equivalent of approximately \$430. He was held on the boat for 10 months, forced to work, and beaten regularly. On the rare occasion that the boat docked at port, the officers bribed local police to allow them to keep the fishermen on the boat rather than risking them escaping if they were allowed to set foot on shore. Myo was finally able to escape and sought refuge in a temple. He continues to struggle with deafness, having had his head and ear smashed into a block of ice on the fishing boat.

Involuntary Domestic Servitude

Involuntary domestic servitude is a form of human trafficking found in unique circumstances—work in a private residence—that create unique vulnerabilities for victims. It is a crime where domestic workers are not free to leave their employment and are often abused and underpaid. Many domestic workers do not receive the basic benefits and protections commonly extended to other groups of workers—things as simple as a day off. Moreover, their ability to move freely is often limited, and employment in private homes increases their vulnerability and isolation. Authorities cannot inspect homes as easily as formal workplaces, and in many cases do not have the mandate or capacity to do so. Domestic workers, especially women, confront various forms of abuse, harassment, and exploitation, including sexual and gender-based violence. These issues, taken together, may be symptoms of a situation of domestic servitude.

Forced Child Labor

Although children may legally engage in certain forms of work, children can also be found in situations of forced labor. A child can be a victim of human trafficking regardless of the location of that exploitation. Some indicators of possible forced labor of a child include situations in which the child appears to be in the custody of a non-family member who requires the child to perform work that financially benefits someone outside the child's family and does not offer the child the option of leaving. When the victim of forced labor is a child, the crime is still one of trafficking. Anti-trafficking responses should supplement, not replace, traditional actions against child labor, such as remediation and education. When children are compelled to work, their abusers should not be able to escape criminal punishment by taking weaker administrative responses to child labor practices.

Unlawful Recruitment and Use of Child Soldiers

Child soldiering is a manifestation of human trafficking when it involves the unlawful recruitment or use of children—through force, fraud, or coercion—by armed forces as combatants or other forms of labor. Some child soldiers are also sexually exploited by members of armed groups. Perpetrators may be government armed forces, paramilitary organizations, or rebel groups. Many children are forcibly abducted to be used as combatants. Others are unlawfully made to work as porters, cooks, guards, servants, messengers, or spies. Young girls can be forced to marry or have sex with male combatants. Both male and female child soldiers are often sexually abused and are at high risk of contracting sexually transmitted diseases.

“ *I worked for him for a few months, cleaning and cooking, but he never paid me. . . . When I demanded my overdue money, he said I would have to have sex with him, then he would give me the money, but I refused so he beat me. After this I was too scared to ask for my money, so I did whatever he asked.”*

“Christine,” human trafficking survivor who migrated from Zimbabwe to South Africa looking for work, 2014

VICTIMS' CONSENT

A common perception of a trafficking victim is of a woman kidnapped, made to cross a border, forced into sexual slavery, and physically beaten. The reality of human trafficking is frequently much more subtle. Vulnerable individuals may be aware of, and initially agree to, poor working conditions or the basic duties of the job that underlies their exploitation. Victims may sign contracts and thereby initially agree to work for a certain employer, but later find that they were deceived and cannot leave the job because of threats against their families or overwhelming debts owed to the recruitment agency that arranged the employment.

On the issue of victims' consent to exploitation, the Palermo Protocol is clear: if any coercive means have been used, a victim's consent "shall be irrelevant." This means that a man who has signed a contract to work in a factory, but who is later forced to work through threats or physical abuse, is a trafficking victim regardless of his agreement to work in that factory. Similarly, a woman who has voluntarily traveled to a country knowing that she would engage in prostitution is also a trafficking victim if, subsequently, her exploiters use any form of coercion to require her to engage in prostitution for their benefit. If a state's laws conform to the Palermo Protocol requirements, a trafficker would not be able to successfully defend a trafficking charge by presenting evidence that a victim previously engaged in prostitution, knew the purpose of travel, or in any other way consented or agreed to work for someone who subsequently used coercion to exploit the victim.

With regard to children, the Palermo Protocol provides that proof of coercive means is not relevant. Thus, a child is considered to be a victim of human trafficking simply if she or he is subjected to forced labor or prostitution by a third party, regardless of whether any form of coercion was used at any stage in the process.

Even if the legal concept of consent is clear, its application is more complex in practice, especially when the victim is an adult. Many countries struggle with uniform application of this provision. In some countries, courts have thrown out trafficking cases when prosecutors have been unable to prove that the victims were coerced at the outset of recruitment. For example, in one European country, a judge rejected trafficking charges in a case where a mentally disabled man was forced to pick berries. Despite clear use of force to compel labor—the victim was dragged back to the labor camp with a noose around his neck—the court held that lack of proof of coercion from the very beginning of recruitment nullified the trafficking. In other countries, defense attorneys have made arguments that victims' prior prostitution proves that they had not been forced to engage in prostitution. More subtly, consent may influence whether prosecutors bring trafficking cases at all. Cases without the "paradigmatic victim" may prove more difficult to win because there is a risk that the judge or jury will view the victim as a criminal rather than a victim. To be successful, these cases require both strong legal presentations and compelling evidence in addition to victim testimony. Efforts to further address the challenging issue of consent would not only help ensure that victims' rights are protected, but would also align prosecutions with the Palermo Protocol requirements. Such efforts might include the explicit incorporation of the Palermo Protocol provision on consent into domestic criminal law and the training of investigators and prosecutors. It is helpful to clarify for fact finders—whether they are judges or juries—that consent cannot be a valid defense to the charge of trafficking and to educate them on the various forms that apparent consent may take (e.g., contracts, failure to leave a situation of exploitation, or victims who do not self-identify as victims). Similarly, investigators can learn that investigations do not need to stop just because a victim had expressed a form of consent.



Construction in preparation for the 2022 FIFA World Cup has already begun, and reports of abuse have received global attention. Initial consent of a construction worker to accept a tough job in a harsh environment does not waive his or her right to work free from abuse. When an employer or labor recruiter deceives workers about the terms of employment, withholds their passports, holds them in brutal conditions, and exploits their labor, the workers are victims of trafficking.

VULNERABILITY OF INDIGENOUS PERSONS TO HUMAN TRAFFICKING

The United Nations estimates there are more than 370 million indigenous people worldwide. At times, they are described as aboriginal: members of a tribe, or members of a specific group. While there is no internationally accepted definition of “indigenous,” the United Nations Permanent Forum on Indigenous Issues identifies several key factors to facilitate international understanding of the term:

- Self-identification of indigenous peoples at an individual and community level;
- Historical continuity with pre-colonial and/or pre-settler societies;
- Strong link to territories and surrounding natural resources;
- Distinct social, economic, or political systems;
- Distinct language, culture, and beliefs;
- Membership in non-dominant groups of society; and/or
- Resolve to maintain and reproduce their ancestral environments and system as distinctive peoples and communities.

Worldwide, indigenous persons are often economically and politically marginalized and are disproportionately affected by environmental degradation and armed conflict. They may lack citizenship and access to basic services, sometimes including education. These factors make indigenous peoples particularly vulnerable to both sex trafficking and forced labor. For example, children from hill tribes in northern Thailand seeking employment opportunities have been found in commercial sexual exploitation, including sex trafficking, in bars in major cities within the country. In North America, government officials and NGOs alike have identified aboriginal Canadian and American Indian women and girls as particularly vulnerable to sex trafficking. In Latin America, members of indigenous communities are often more vulnerable to both sex and labor trafficking than other segments of local society; in both Peru and Colombia, they have been forcibly recruited by illegal armed groups. In remote areas of the Democratic Republic of the Congo, members of Batwa, or pygmy groups, are subjected to conditions of forced labor in agriculture, mining, mechanics, and domestic service. San women and boys in Namibia are exploited in domestic servitude and forced cattle herding, while San girls are vulnerable to sex trafficking.

Combating the trafficking of indigenous persons requires prosecution, protection, and prevention efforts that are culturally-sensitive and collaborative—efforts that also empower indigenous groups to identify and respond to forced labor and sex trafficking within their communities. For example, the government of the Canadian province of British Columbia and NGOs have partnered with aboriginal communities to strengthen their collective capacity to effectively work with trafficking victims by incorporating community traditions and rituals into victim protection efforts, such as use of the medicine wheel—a diverse indigenous tradition with spiritual and healing purposes.

Below: Ashaninka Indian girls go about daily life in the world’s top coca-growing valley. The Ashaninka are the largest indigenous group in the Amazon region of Peru, and some have been kidnapped or forcibly recruited to serve as combatants in the illicit narcotics trade by the terrorist group Sendero Luminoso.



“Many children, like myself, come from various traumas previously to entering into foster care, and many times, are further exposed to trauma throughout their experience in the foster care system. Although there are many people who uplift the system for its successes, there are many elements within the experience of foster care that make youth more susceptible to being victimized. Youth within the system are more vulnerable to becoming sexually exploited because youth accept and normalize the experience of being used as an object of financial gain by people who are supposed to care for us, we experience various people who control our lives, and we lack the opportunity to gain meaningful relationships and attachments.”

– Withelma “T” Ortiz Walker Pettigrew



Featured in the 2013 *TIP Report*, survivor and advocate Withelma “T” Ortiz Walker Pettigrew has become an outspoken advocate raising awareness about sex trafficking in the United States. This year, she was named one of TIME Magazine’s “100 Most Influential People.”

METHODOLOGY

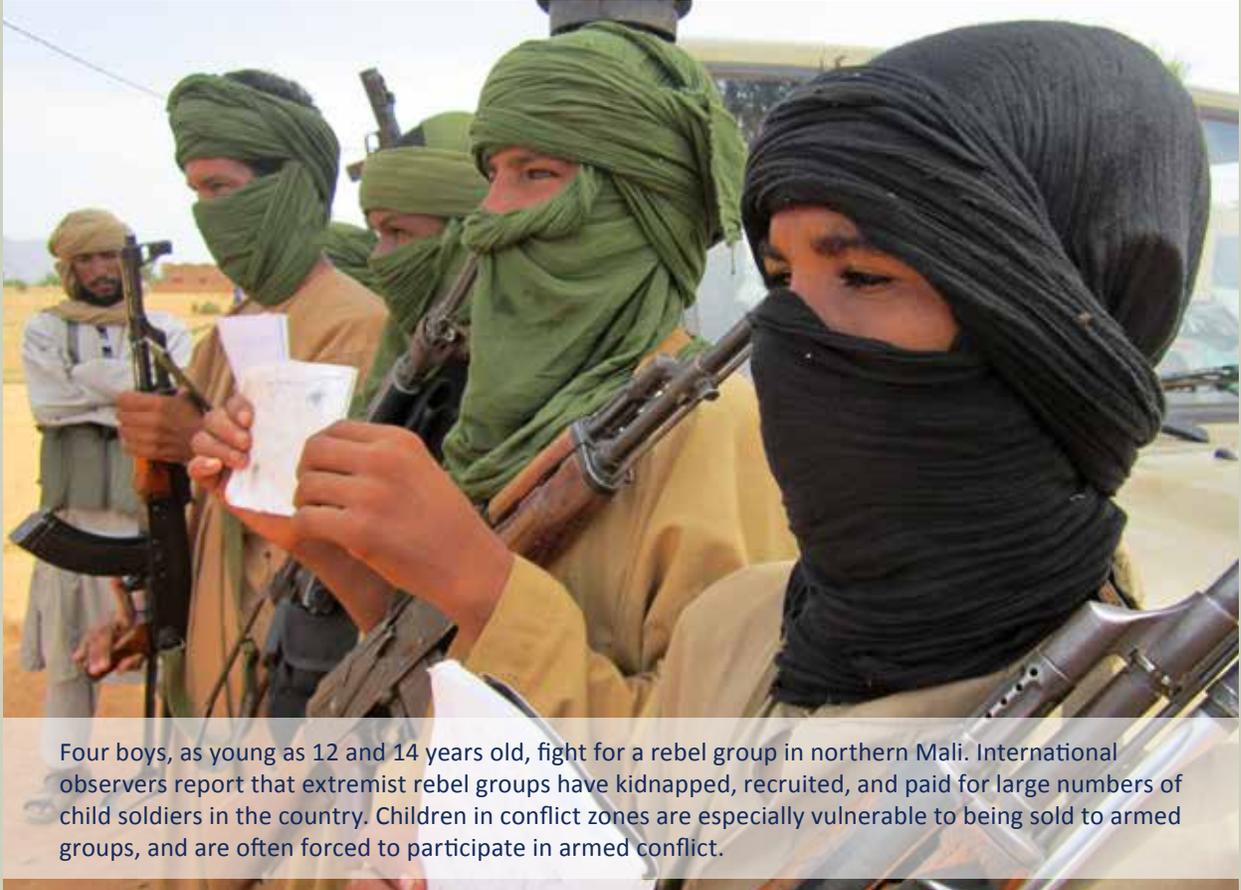
The U.S. Department of State prepared this *Report* using information from U.S. embassies, government officials, non-governmental and international organizations, published reports, news articles, academic studies, research trips to every region of the world, and information submitted to tipreport@state.gov. This email address provides a means by which organizations and individuals can share information with the Department of State on government progress in addressing trafficking.

U.S. diplomatic posts and domestic agencies reported on the trafficking situation and governmental action to fight trafficking based on thorough research that included meetings with a wide variety of government officials, local and international NGO representatives, officials of international organizations, journalists, academics, and survivors. U.S. missions overseas are dedicated to covering human trafficking issues. The 2014 *TIP Report* covers government efforts undertaken from April 1, 2013 through March 31, 2014.

PHILIPPINES – AUSTRALIA

With dreams of successful boxing careers, Czar and three of his friends fell prey to three Australians who helped them procure temporary sports visas and paid for their travel from the Philippines to Sydney. Upon arriving in Australia, the men were already in debt to their captors, who confiscated their passports and forced them into unpaid domestic labor as “houseboys.” Rather than making their way in the boxing industry, they were forced to live in an uninsulated garage with mere table scraps for meals. After three months, Czar finally entered a boxing match, and won the equivalent of approximately \$3,500, but the money was taken by his captor. Shortly thereafter, Czar ran away and escaped. One of his friends also escaped, and went to the police. An investigation was opened into their captors on counts of exploitation and human trafficking.

CHILD SOLDIERS



Four boys, as young as 12 and 14 years old, fight for a rebel group in northern Mali. International observers report that extremist rebel groups have kidnapped, recruited, and paid for large numbers of child soldiers in the country. Children in conflict zones are especially vulnerable to being sold to armed groups, and are often forced to participate in armed conflict.

The Child Soldiers Prevention Act of 2008 (CSPA) was signed into law on December 23, 2008 (Title IV of Pub. L. 110-457), and took effect on June 21, 2009. The CSPA requires publication in the annual *TIP Report* of a list of foreign governments identified during the previous year as having governmental armed forces or government-supported armed groups that recruit and use child soldiers, as defined in the Act. These determinations cover the reporting period beginning April 1, 2013 and ending March 31, 2014.

For the purpose of the CSPA, and generally consistent with the provisions of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, the term “child soldier” means:

- (i) any person under 18 years of age who takes a direct part in hostilities as a member of governmental armed forces;
- (ii) any person under 18 years of age who has been compulsorily recruited into governmental armed forces;
- (iii) any person under 15 years of age who has been voluntarily recruited into governmental armed forces; or
- (iv) any person under 18 years of age who has been recruited or used in hostilities by armed forces distinct from the armed forces of a state.

The term “child soldier” includes any person described in clauses (ii), (iii), or (iv) who is serving in any capacity, including in a support role such as a “cook, porter, messenger, medic, guard, or sex slave.”

Governments identified on the list are subject to restrictions, in the following fiscal year, on certain security assistance and commercial licensing of military equipment. The CSPA, as amended, prohibits assistance to

governments that are identified in the list under the following authorities: International Military Education and Training, Foreign Military Financing, Excess Defense Articles, and Peacekeeping Operations, with exceptions for some programs undertaken pursuant to the Peacekeeping Operations authority. The CSPA also prohibits the issuance of licenses for direct commercial sales of military equipment to such governments. Beginning October 1, 2014 and effective throughout Fiscal Year 2015, these restrictions will apply to the listed countries, absent a presidential national interest waiver, applicable exception, or reinstatement of assistance pursuant to the terms of the CSPA. The determination to include a government in the CSPA list is informed by a range of sources, including first-hand observation by U.S. government personnel and research and credible reporting from various United Nations entities, international organizations, local and international NGOs, and international media outlets.

The 2014 CSPA List includes governments in the following countries:

1. **Burma**
2. **Central African Republic**
3. **Democratic Republic of the Congo**
4. **Rwanda**
5. **Somalia**
6. **South Sudan**
7. **Sudan**
8. **Syria**
9. **Yemen**

SPECIAL COURT OF SIERRA LEONE: ACCOUNTABILITY AT THE HIGHEST LEVEL FOR CHILD SOLDIERING OFFENSES

The Special Court for Sierra Leone (SCSL) was established in 2002 by agreement between the Government of the Republic of Sierra Leone and the United Nations to try those most responsible for crimes against humanity, war crimes, and other serious violations of international humanitarian law, including conscripting or recruiting children under the age of 15 years, committed in the civil war. Since its inception, the Special Court has handed down several important decisions in cases involving allegations related to the conscripting or enlisting of children under the age of 15 years into armed forces or armed groups. During Sierra Leone's civil war, all parties to the conflict recruited and used child soldiers. Children were forced to fight, commit atrocities, and were often sexually abused. Former Liberian President Charles Taylor was convicted by the SCSL on 11 counts of crimes against humanity and war crimes for his role in supporting armed groups, including the Revolutionary United Front, in the planning and commission of crimes committed during the conflict. In a landmark 2004 decision, the Court held that individual criminal responsibility for the crime of recruiting children under the age of 15 years had crystallized as customary international law prior to November 1996. In June 2007, the Court delivered the first judgment of an international or mixed tribunal convicting persons of conscripting or enlisting children under the age of 15 years into armed forces or using them to participate actively in hostilities.

In 2013, the Special Court reached another milestone by upholding the conviction of former Liberian President Charles Taylor. The judgment marked the first time a former head of state had been convicted in an international or hybrid court of violations of international law. Taylor was convicted, among other charges, of aiding and abetting sexual slavery and conscription of child soldiers. After more than a decade of working toward accountability for crimes against humanity and war crimes committed in Sierra Leone, the SCSL transitioned on December 31, 2013, to a successor mechanism, the Residual Special Court for Sierra Leone, which will continue to provide a variety of ongoing functions, including witness protection services and management of convicted detainees. Its work stands for the proposition that the international community can achieve justice and accountability for crimes committed, even by proxy, against the most vulnerable—children in armed conflict.

TIER PLACEMENT

The Department places each country in the 2014 *TIP Report* onto one of four tiers, as mandated by the TVPA. This placement is based more on the extent of government action to combat trafficking than on the size of the country's problem. The analyses are based on the extent of governments' efforts to reach compliance with the TVPA's minimum standards for the elimination of human trafficking (see page 425), which are generally consistent with the Palermo Protocol.

While Tier 1 is the highest ranking, it does not mean that a country has no human trafficking problem or that it is doing enough to address the problem. Rather, a Tier 1 ranking indicates that a government has acknowledged the existence of human trafficking, has made efforts to address the problem, and meets the TVPA's minimum standards. Each year, governments need to demonstrate appreciable progress in combating trafficking to maintain a Tier 1 ranking. Indeed, Tier 1 represents a responsibility rather than a reprieve. A country is never finished with the job of fighting trafficking.

Tier rankings and narratives in the 2014 *TIP Report* reflect an assessment of the following:

- » enactment of laws prohibiting severe forms of trafficking in persons, as defined by the TVPA, and provision of criminal punishments for trafficking offenses;
- » criminal penalties prescribed for human trafficking offenses with a maximum of at least four years' deprivation of liberty, or a more severe penalty;
- » implementation of human trafficking laws through vigorous prosecution of the prevalent forms of trafficking in the country and sentencing of offenders;
- » proactive victim identification measures with systematic procedures to guide law enforcement and other government-supported front-line responders in the process of victim identification;
- » government funding and partnerships with NGOs to provide victims with access to primary health care, counseling, and shelter, allowing them to recount their trafficking experiences to trained social counselors and law enforcement in an environment of minimal pressure;
- » victim protection efforts that include access to services and shelter without detention and with legal alternatives to removal to countries in which victims would face retribution or hardship;
- » the extent to which a government ensures victims are provided with legal and other assistance and that, consistent with domestic law, proceedings are not prejudicial to victims' rights, dignity, or psychological well-being;
- » the extent to which a government ensures the safe, humane, and to the extent possible, voluntary repatriation and reintegration of victims; and
- » governmental measures to prevent human trafficking, including efforts to curb practices identified as contributing factors to human trafficking, such as employers' confiscation of foreign workers' passports and allowing labor recruiters to charge prospective migrants excessive fees.

Tier rankings and narratives are NOT affected by the following:

- » efforts, however laudable, undertaken exclusively by non-governmental actors in the country;
- » general public awareness events—government-sponsored or otherwise—lacking concrete ties to the prosecution of traffickers, protection of victims, or prevention of trafficking; and
- » broad-based law enforcement or developmental initiatives.

MEXICO – UNITED STATES

Flor Molina was a hard worker and a good seamstress, working two jobs in Mexico to support her three young children. When her sewing teacher told her about a sewing job in the United States, she thought it was a good opportunity. Once they arrived at the border, the woman who arranged their travel took Flor's identification documents and clothes, "for safekeeping." She and her teacher were taken to a sewing factory and immediately began working. Beaten and prohibited from leaving the factory, Flor began her days at 4:00 in the morning; she not only worked as a seamstress, but had to clean the factory after the other workers went home. After 40 days, she was allowed to leave to attend church, where she was able to get help. With the help of a local NGO, Flor was able to break free. Now, she is a leader in a U.S. national survivors' caucus, and advocates for victims' rights and supply chain transparency.

“This entire village is in debt to the land owner. I took a loan of Rs 10,000 (\$181) for medical treatment. Our wage is so small, we can never repay the loans.”

– “Amit,” male, age 33, 2014



The 35-year-old woman above is in debt to her employer for the equivalent of approximately \$2,500 and must work in his brick factory to pay the debt. The 27-year-old woman below owes her employer the equivalent of approximately \$3,000. Both of these Pakistani women are trapped in debt bondage. Unscrupulous recruiters exploit a vulnerability—sometimes caused by natural disaster or sickness—trapping their victims in debt bondage for years to repay the initial loan.





A GUIDE TO THE TIERS

Tier 1

Countries whose governments fully comply with the TVPA's minimum standards for the elimination of trafficking.

Tier 2

Countries whose governments do not fully comply with the TVPA's minimum standards but are making significant efforts to bring themselves into compliance with those standards.

Tier 2 Watch List

Countries whose governments do not fully comply with the TVPA's minimum standards, but are making significant efforts to bring themselves into compliance with those standards, and for which:

- a) the **absolute number** of victims of severe forms of trafficking is very significant or is significantly increasing;
- b) there is a failure to provide evidence of **increasing efforts** to combat severe forms of trafficking in persons from the previous year, including increased investigations, prosecution, and convictions of trafficking crimes, increased assistance to victims, and decreasing evidence of complicity in severe forms of trafficking by government officials; or
- c) the determination that a country is making significant efforts to bring itself into compliance with minimum standards was based on **commitments by the country to take additional steps over the next year**.

Tier 3

Countries whose governments do not fully comply with the TVPA's minimum standards and are not making significant efforts to do so.

The TVPA lists additional factors to determine whether a country should be on Tier 2 (or Tier 2 Watch List) versus Tier 3. First is the extent to which the country is a country of origin, transit, or destination for severe forms of trafficking. Second is the extent to which the country's government does not comply with the TVPA's minimum standards and, in particular, the extent to which officials or government employees have been complicit in severe forms of trafficking. And the third factor is the reasonable measures that the government would need to undertake to be in compliance with the minimum standards in light of the government's resources and capabilities to address and eliminate severe forms of trafficking in persons.

A 2008 amendment to the TVPA provides that any country that has been ranked Tier 2 Watch List for two consecutive years and that would otherwise be ranked Tier 2 Watch List for the next year will instead be ranked Tier 3 in that third year. This automatic downgrade provision came into effect for the first time in the 2013 *Report*. The Secretary of State is authorized to waive the automatic downgrade based on credible evidence that a waiver is justified because the government has a written plan that, if implemented, would constitute making significant efforts to comply with the TVPA's minimum standards for the elimination of trafficking and is devoting sufficient resources to implement the plan. The Secretary can only issue this waiver for two consecutive years. After the third year, a country must either go up to Tier 2 or down to Tier 3. Governments subject to the automatic downgrade provision are noted as such in the country narratives.

INDIA

Ajay was only 15 when he was abducted from a city playground one evening and sold to a rich sugarcane farmer, far from home. Upon waking the next morning—and until he was able to escape about a year later—Ajay endured back-breaking work cleaning livestock pens and processing sugarcane. He was forced to work with little food and less sleep, even after he lost a finger while cutting cane. Escape seemed inconceivable to him and the other children on the farm, until one day his owner sent Ajay to run an errand. Ajay seized the chance to escape and began the long journey home to his family. His family celebrated his return—a year after he was abducted—and while they asked the police to investigate what happened to Ajay, many children continue to be held in forced labor on sugarcane farms and elsewhere.

VIETNAM

Needing to support their families, teenagers Dung and Chien dropped out of school and went to work as gold miners. The boys were forced to work underground around the clock, under constant surveillance, and controlled by threats. They were told they would not get paid until they had worked for six months. Racked with untreated malaria and malnourished, Dung and Chien organized an escape attempt with some of the other boys being held in the mines, only to be caught and beaten by the foreman. They were able to finally escape with the help of local villagers, who fed them as they hid from the bosses in the jungle. With the help of a local child support center, the boys are looking forward to being reunited with their families.

PENALTIES FOR TIER 3 COUNTRIES

Pursuant to the TVPA, governments of countries on Tier 3 may be subject to certain restrictions on bilateral assistance, whereby the U.S. government may withhold or withdraw non-humanitarian, non-trade-related foreign assistance. In addition, certain countries on Tier 3 may not receive funding for government employees' participation in educational and cultural exchange programs. Consistent with the TVPA, governments subject to restrictions would also face U.S. opposition to assistance (except for humanitarian, trade-related, and certain development-related assistance) from international financial institutions, such as the International Monetary Fund and the World Bank.

Imposed restrictions will take effect upon the beginning of the U.S. government's next Fiscal Year—

October 1, 2014—however, all or part of the TVPA's restrictions can be waived if the President determines that the provision of such assistance to the government would promote the purposes of the statute or is otherwise in the United States' national interest. The TVPA also provides for a waiver of restrictions if necessary to avoid significant adverse effects on vulnerable populations, including women and children.

No tier ranking is permanent. Every country, including the United States, can do more. All countries must maintain and increase efforts to combat trafficking.

“Whether it comes in the form of a young girl trapped in a brothel, a woman enslaved as a domestic worker, a boy forced to sell himself on the street, or a man abused on a fishing boat, the victims of this crime have been robbed of the right to lead the lives they choose for themselves.”

– Secretary of State John F. Kerry, 2014

State troopers in New Jersey receive assignments for the security posts for the 2014 Super Bowl. New Jersey officials trained law enforcement, airport employees, and hospitality personnel about how to identify victims of sex trafficking before the event.



GLOBAL LAW ENFORCEMENT DATA

The Trafficking Victims Protection Reauthorization Act (TVPRA) of 2003 added to the original law a new requirement that foreign governments provide the Department of State with data on trafficking investigations, prosecutions, convictions, and sentences in order to be considered in full compliance with the TVPA's minimum standards for the elimination of trafficking (Tier 1). The 2004 *TIP Report* collected this data for the first time. The 2007 *TIP Report* showed for the first time a breakout of the number of total prosecutions and convictions that related to labor trafficking, placed in parentheses.

YEAR	PROSECUTIONS	CONVICTIONS	VICTIMS IDENTIFIED	NEW OR AMENDED LEGISLATION
2006	5,808	3,160		21
2007	5,682 (490)	3,427 (326)		28
2008	5,212 (312)	2,983 (104)	30,961	26
2009	5,606 (432)	4,166 (335)	49,105	33
2010	6,017 (607)	3,619 (237)	33,113	17
2011	7,909 (456)	3,969 (278)	42,291 (15,205)	15
2012	7,705 (1,153)	4,746 (518)	46,570 (17,368)	21
2013	9,460 (1,199)	5,776 (470)	44,758 (10,603)	58

The above statistics are estimates only, given the lack of uniformity in national reporting structures. The numbers in parentheses are those of labor trafficking prosecutions, convictions, and victims identified.

An education session for farmworkers on their rights under the Fair Food Program takes place during the workday on a Florida farm. The Coalition of Immokalee Workers' Fair Food Program has brought together tens of thousands of workers, 26 agribusinesses, and 12 retail food corporations to prevent forced labor and worker abuses—including sexual violence—in Florida's tomato industry.

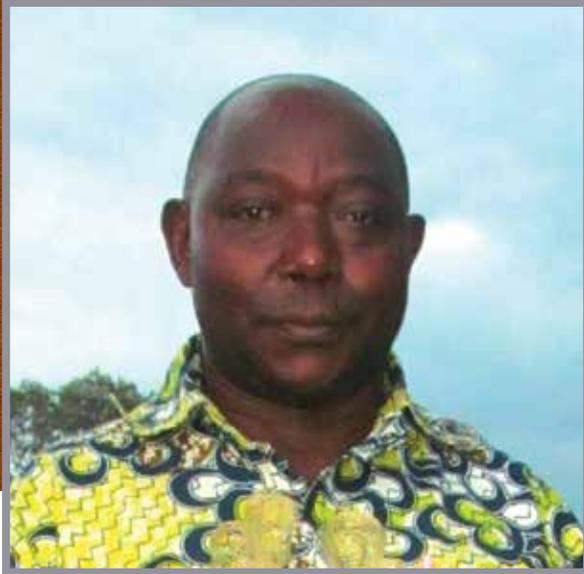


2014 TIP REPORT HEROES

Each year, the Department of State honors individuals around the world who have devoted their lives to the fight against human trafficking. These individuals are NGO workers, lawmakers, police officers, and concerned citizens who are committed to ending modern slavery. They are recognized for their tireless efforts—despite resistance, opposition, and threats to their lives—to protect victims, punish offenders, and raise awareness of ongoing criminal practices in their countries and abroad.

GILBERT MUNDA

Democratic Republic of the Congo (DRC)



Gilbert Munda is the coordinator of the Action Center for Youth and Vulnerable Children (CAJED), and as a former orphan himself and father of 12 children, Mr. Munda's tremendous compassion drives his effective leadership. CAJED is an NGO created in 1992 in the Democratic Republic of Congo to provide temporary care and full support for vulnerable children, specifically those formerly associated with armed groups, before reunifying them with their families. Under Mr. Munda's leadership, CAJED has been a UNICEF partner since 2004, and operates a shelter, which provides children with psychosocial support, recreation activities, non-formal education, and family reunification assistance.

In 2011, CAJED formed a consortium with other disarmament, demobilization, and reintegration-focused NGOs in North Kivu, and, through this extensive network, CAJED has assisted over 9,000 children who have been demobilized from armed groups. Mr. Munda engages directly with MONUSCO and UN teams of first responders in the release of children. Together with his team, Mr. Munda has risked his life to help free these children, but, in a country torn by conflict, the efforts of Mr. Munda put these children on the path to healing and help bring peace to the DRC.

BHANUJA SHARAN LAL

India



As director of the Manav Sansadhan Evam Mahila Vikas Sansthan (MSEMVS), Bhanuja Sharan Lal leads more than 75 frontline anti-trafficking workers in northern India. MSEMVS has enabled communities to progressively dismantle entrenched systems of modern slavery at brick kilns, farms, and quarries. They have transformed hundreds of communities into no-go zones for traffickers, making modern slavery virtually nonexistent in more than 130 villages.

Led by Mr. Lal, MSEMVS helps trafficking victims establish Community Vigilance Committees, a process through which groups of survivors achieve freedom by exercising collective power through district-level networks and pressuring police to enforce anti-trafficking laws. MSEMVS assists in freeing approximately 65 men, women, and children every month, and provides survivors with follow-up reintegration support. MSEMVS has also launched and manages a shelter that provides rights-based assistance and recovery to sex trafficking survivors.

Additionally, Mr. Lal has focused intensely on eradicating child labor. Currently, 14 village-based schools enable more than 500 child trafficking survivors to catch up on their education, so they can successfully enter public schools within three years. These schools, which open and close as necessary, enable large numbers of children to come out of slavery and receive an education.

MYEONGJIN KO*Republic of Korea (ROK)*

Myeongjin Ko is a tireless activist who directs the Dasihamkke Center for sex trafficking victims in South Korea. The Center conducts outreach and counseling for victims of sex trafficking, and assists them with legal and medical services. In response to the increasing number of runaway teenagers falling into prostitution and sex trafficking, Ms. Ko established a special division at the Center that offers services for juvenile victims 24 hours a day, 365 days a year. Since its establishment in 2013, the juvenile care division has provided counseling for approximately 10,000 individual cases in person, over the phone, and online.

In addition to her work on the ground, Ms. Ko has published several manuals in multiple languages on helping and providing services to sex trafficking victims, and has distributed them to Korean embassies and consulates in the United States, Japan, and Australia, three primary destinations for Korean sex trafficking victims.

Ms. Ko also directs Eco-Gender, an advocacy network of Korean anti-trafficking organizations, and has led several civic groups with that network to raise public awareness. The Ministry of Justice named Ms. Ko a Guardian of Female and Children Victim's Rights in 2013.

ELISABETH SIOUFI*Lebanon*

Elisabeth Sioufi, director of the Beirut Bar Association's Institute for Human Rights, relentlessly advocates for and raises awareness about victims of human trafficking. She was a key leader in advocating the passage of Lebanon's first anti-trafficking law in 2012, and she continues to make trafficking a top priority for the Lebanese government. Ms. Sioufi is an active member of various national steering committees working to protect local and foreign domestic workers, combat human trafficking, prevent torture, and promote child protection, and is the Secretary of the Human Rights Commission of the International Union of Lawyers.

Ms. Sioufi played an instrumental role in drafting the National Strategy to Combat Trafficking in Persons in Lebanon and the National Action Plan for Combating Trafficking in Persons, both of which were finalized in 2013 and await cabinet approval. She regularly holds training sessions on human trafficking for law enforcement, army, and community police personnel, as well as reporters to improve coverage of human trafficking stories in Lebanon.

Ms. Sioufi also led the effort to create a government manual that defined human trafficking and outlined ways to combat it, and held a roundtable with government representatives and NGOs to agree upon a set of indicators for identifying victims of trafficking.

TEK NARAYAN KUNWAR*Nepal*

Tek Narayan Kunwar, Lalitpur District Judge, has been at the forefront of efforts in Nepal to counter human trafficking by fully implementing the Human Trafficking and Transportation Control Act, while championing the rights of victims. Judge Kunwar's victim-centered approach has provided a much needed ray of hope in the ongoing legal struggle against trafficking. During his previous tenure in District Court Makwanpur, he pioneered a "Fast Track Court System" to decrease the length of time survivors must wait to appear. Judge Kunwar also allows survivors to choose a court date (previously, they would receive little notice), and ensures that hearings proceed continually until a case is decided.

Judge Kunwar also takes a victim-centered approach to sentencing. In May 2013, recognizing the need for immediate compensation, he took the unprecedented step of ordering the government of Nepal to pay the equivalent of approximately \$3,000 to a trafficking survivor. He also established new jurisprudence to impose appropriately severe penalties for this egregious crime.

The Judicial Council of Nepal, a national government agency, named Judge Kunwar the Best Performing Judge of 2013 for his aggressive approach to combating human trafficking. He has published extensively on human rights and international law, judicial independence, and gender equality and law.

BEATRICE JEDY-AGBA*Nigeria*

Beatrice Jedy-Agba was appointed Executive Secretary of Nigeria's National Agency for the Prohibition of Trafficking in Persons and other Related Matters (NAPTIP) in 2011. NAPTIP is responsible for enhancing the effectiveness of law enforcement, preventing root causes, and providing victim protection. The Agency has nine shelters across the country, and has assisted in providing assistance and rehabilitation to thousands of survivors.

Mrs. Jedy-Agba is transforming the Nigerian national landscape with respect to combating trafficking. Under her leadership, NAPTIP has become a model throughout Africa for coordination of government anti-trafficking efforts. Her work has resulted in the incorporation of human trafficking issues into national development discourse and planning. She has improved NAPTIP's relationships with critical partners in Nigeria's anti-trafficking response, such as local and international NGOs and foreign governments. Not focused solely on the South/North trafficking routes, she has made significant efforts to return and reintegrate Nigerian survivors of human trafficking from several West African countries, and has led collaboration to address the trade in the region. Mrs. Jedy-Agba also has initiated human trafficking public awareness campaigns to increase understanding and mobilize the general public.

JHINNA PINCHI*Peru*

Survivor Jhinna Pinchi was the first trafficking victim in Peru to face her traffickers in court. Since her escape in 2009, she has taken extraordinary risks. She has faced threats of death and violence, surmounted repeated social and legal obstacles, and challenged the status quo.

In 2007, Ms. Pinchi was trafficked from her home in the Peruvian Amazon and exploited in the commercial sex trade at a strip club in northern Peru. For over two years, she was denied her basic rights. She was drugged, attacked, and exploited. Finally, she escaped and began her long struggle for justice.

Ms. Pinchi encountered countless hurdles in bringing her traffickers to court, including the suspicious deaths of two key witnesses. It took four years, but she never gave up. In December 2013, a Peruvian court convicted three of her abusers for trafficking in persons, and sentenced two of them to 15 and 12 years' imprisonment, respectively. The lead defendant remains at large.

Ms. Pinchi has become a sought-after speaker and advocate, and her remarkable story has been developed into a documentary to raise awareness about human trafficking.

MONICA BOSEFF*Romania*

Monica Boseff is the executive director of the Open Door Foundation (Usa Deschisa) and driving force behind an emergency aftercare shelter specifically designed for female victims of human trafficking in Bucharest, Romania. In a country where government funding for survivor aftercare is limited, opening a shelter is a monumental undertaking. Yet, after surveying other organizations and speaking to government officials to properly understand the need, Ms. Boseff launched the emergency shelter, Open Door, in April 2013. The shelter provides residents with medical, psychological, and social support, helping them heal physically, mentally, and emotionally. As part of the recovery process, Ms. Boseff also designed and implemented a job skills training component to the program in coordination with the Starbucks Corporation, who agreed to hire Open Door graduates.

Whether in her capacity as the shelter supervisor, or working relentlessly to identify and secure new financial and in-kind assistance to keep the shelter open and running, Ms. Boseff is a tireless advocate for increasing resources to combat trafficking and assist survivors. What Ms. Boseff has been able to accomplish in a very short time is testament to her strong will, faith, and passion for helping survivors.

CHARMAINE GANDHI-ANDREWS*Trinidad and Tobago*

As the first-ever Director of the Government of Trinidad and Tobago's Counter-Trafficking Unit at the Ministry of National Security, Charmaine Gandhi-Andrews fundamentally changed the way the government responds to the problem of human trafficking. Ms. Gandhi-Andrews was for several years a leading and outspoken advocate for trafficking in persons legislation, which the government ultimately implemented in January 2013. Largely due to her tireless efforts, Trinidad and Tobago has an infrastructure in place to recognize, identify, and support victims. In her first year she led over 20 investigations into suspected trafficking cases, resulting in charges filed against 12 alleged traffickers—including government officials—and uncovered a dangerous network of criminal gangs facilitating human trafficking in the Caribbean region.

In 2013, the Counter-Trafficking Unit hosted over 20 presentations and workshops designed to educate law enforcement, non-governmental organizations, the legal community, and students about human trafficking. This outreach broke down barriers by connecting and sensitizing resource providers, who have since opened their doors and wallets to support trafficking victims. In a short few years, Ms. Gandhi-Andrews, now the Deputy Chief Immigration Officer, has become the public face of anti-trafficking efforts in Trinidad and Tobago, shaping a national dialogue that embraces proactive efforts to combat trafficking in persons.

VAN NGOC TA*Vietnam*

Van Ngoc Ta is the Chief Lawyer at Blue Dragon, an Australian charity based in Vietnam that has been involved in helping children and young adults secure their freedom from human trafficking since 2005. To date, Mr. Van has personally assisted over 300 trafficking victims of forced labor in Vietnam and sex trafficking in China. His approach involves undercover operations to locate victims, and his team works with Vietnamese authorities to arrange and conduct a plan to facilitate victims' release.

With years of experience under his belt, Mr. Van has developed a comprehensive approach to assisting trafficking victims, including locating victims, providing services, assisting them in making formal statements to police, supporting their reintegration into their communities, and representing them in court against their traffickers. Mr. Van's tireless efforts have earned him the trust of police and government officials, who often invite him to assist them in their anti-trafficking efforts.

In addition to direct services, Mr. Van has had a great impact on communities in Vietnam where he conducts awareness campaigns and meets with leaders and families to educate them on prevention. Truly making a difference both at the individual level and on a national scale, Mr. Van is influencing the way Vietnam thinks and acts about trafficking.

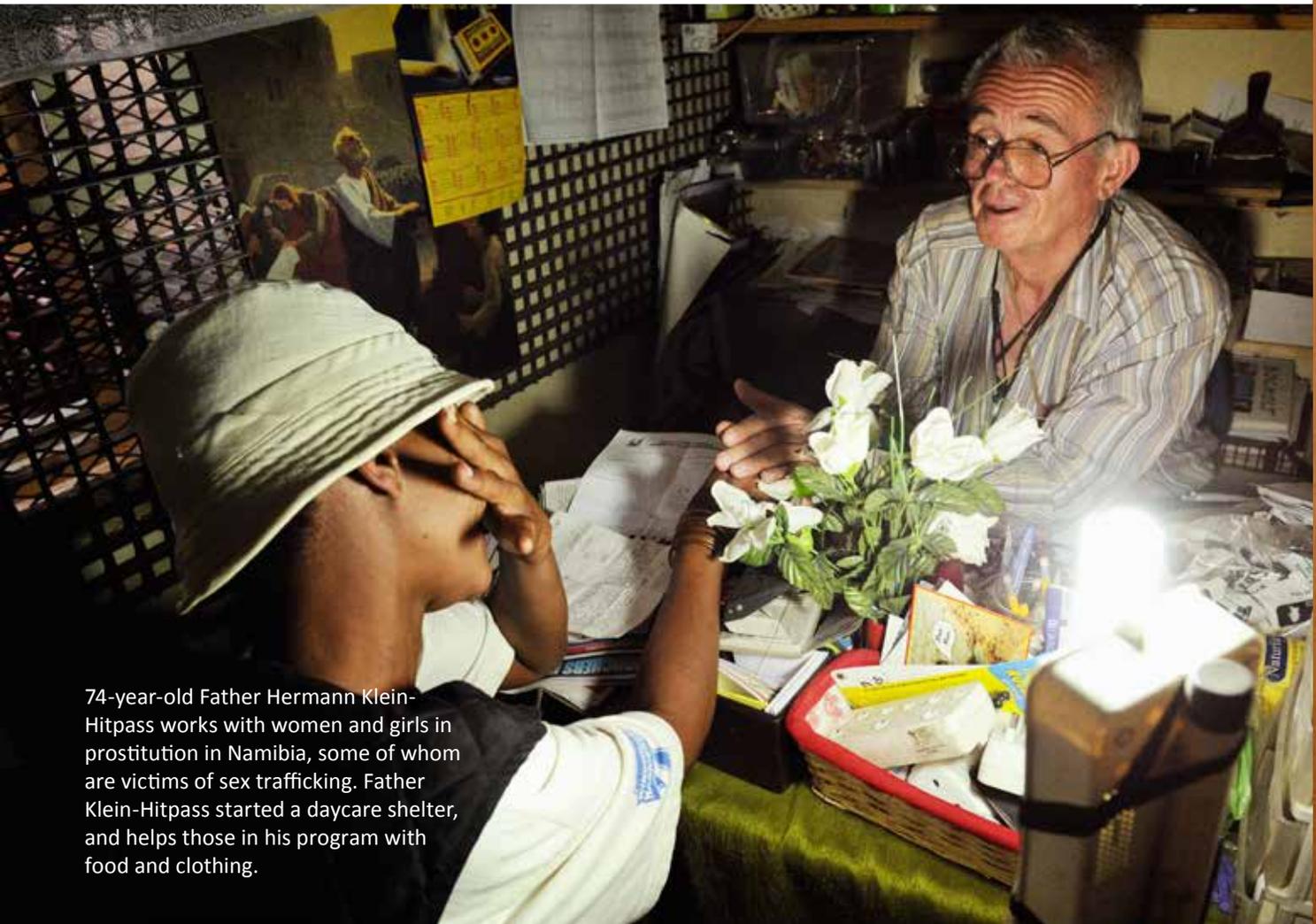
❧ IN MEMORIAM ❧

Irene Fernandez, Malaysia



Photo courtesy of Malaysiakini

In early 2014, the anti-trafficking community suffered the enormous loss of Irene Fernandez, the co-founder and director of Tenaganita, a legal and advocacy organization committed to defending the rights of migrant workers, refugees, and trafficking victims in Malaysia. Fernandez fought tirelessly to expose and correct injustices faced by vulnerable groups in the country, persevering in the face of threats and pressure. Her trailblazing efforts provided migrant worker trafficking victims with much needed legal assistance and advocacy. For this valuable work, Fernandez was recognized as a *TIP Report Hero* in the 2006 *Trafficking in Persons Report*.



74-year-old Father Hermann Klein-Hitpass works with women and girls in prostitution in Namibia, some of whom are victims of sex trafficking. Father Klein-Hitpass started a daycare shelter, and helps those in his program with food and clothing.

THE INTERSECTION BETWEEN ENVIRONMENTAL DEGRADATION AND HUMAN TRAFFICKING

Certain industries face particularly high environmental risks, including agriculture, fishing and aquaculture, logging, and mining. Workers in these sectors also face risks; the use of forced labor has been documented along the supply chains of many commercial sectors. Exploitation of both people and natural resources appears even more likely when the yield is obtained or produced in illegal, unregulated, or environmentally harmful ways and in areas where monitoring and legal enforcement are weak.



AGRICULTURE (CROPS AND LIVESTOCK)

Unsustainable agricultural practices around the world are a major cause of environmental degradation. The manner in which land is used can either protect or destroy biodiversity, water resources, and soil. Some governments and corporations are working to ensure that the agricultural sector becomes increasingly more productive, and also that this productivity is achieved in an environmentally sustainable way. Alongside the movement to protect the environment from harm, governments must also protect agricultural workers from exploitation.



Agriculture is considered by the ILO to be one of the most hazardous employment sectors. Particular risks to workers include exposure to harsh chemicals and diseases, work in extreme weather conditions, and operation of dangerous machinery without proper training. Moreover, many agricultural workers are vulnerable to human trafficking due to their exclusion from coverage by local labor laws, pressure on growers to reduce costs, insufficient internal monitoring and audits of labor policies, and lack of government oversight.

As documented in this *Report* over the years, adults and children are compelled to work in various agricultural sectors around the globe.

For example:

- ▶ Throughout Africa, children and adults are forced to work on farms and plantations harvesting cotton, tea, coffee, cocoa, fruits, vegetables, rubber, rice, tobacco, and sugar. There are documented examples of children forced to herd cattle in Lesotho, Mozambique, and Namibia, and camels in Chad.



- In Europe, men from Brazil, Bulgaria, China, and India are subjected to forced labor on horticulture sites and fruit farms in Belgium. Men and women are exploited in the agricultural sectors in Croatia, Georgia, the Netherlands, Spain, and the United Kingdom.
- In Latin America, adults and children are forced to harvest tomatoes in Mexico, gather fruits and grains in Argentina, and herd livestock in Brazil.
- In the Middle East, traffickers exploit foreign migrant men in the agricultural sectors of Israel and Jordan. Traffickers reportedly force Syrian refugees, including children, to harvest fruits and vegetables on farms in Lebanon.
- In the United States, victims of labor trafficking have been found among the nation's migrant and seasonal farmworkers, including adults and children who harvest crops and raise animals.



FISHING AND AQUACULTURE

The 2012 *Trafficking in Persons Report* highlighted forced labor on fishing vessels occurring concurrently with illegal, unreported, and unregulated fishing, which threatens food security and the preservation of marine resources. Vessels involved in other environmental crimes, such as poaching, may also trap their crews in forced labor. Testimonies from survivors of forced labor on fishing vessels have revealed that many of the vessels on which they suffered exploitation used banned fishing gear, fished in prohibited areas, failed to report or misreported catches, operated with fake licenses, and docked in unauthorized ports—all illegal fishing practices that contribute to resource depletion and species endangerment. Without proper regulation, monitoring, and enforcement of laws governing both fishing practices and working conditions, criminals will continue to threaten the environmental sustainability of oceans and exploit workers with impunity.

In recent years, a growing body of evidence has documented forced labor on inland, coastal, and deep sea fishing vessels, as well as in shrimp farming and seafood processing. This evidence has prompted the international advocacy community to increase pressure on governments and private sector stakeholders to address the exploitation of men, women, and children who work in the commercial fishing and aquaculture sector.

Reports of maritime forced labor include:

- In Europe, Belize-flagged fishing vessels operating in the Barents Sea north of Norway have used forced labor, as have vessels employing Ukrainian men in the Sea of Okhotsk.
- In the Caribbean, foreign-flagged fishing vessels have used forced labor in the waters of Jamaica and Trinidad and Tobago.
- Along the coastline of sub-Saharan Africa, forced labor has become more apparent on European and Asian fishing vessels seeking to catch fish in poorly regulated waters. Traffickers have exploited victims in the territorial waters of Mauritius, South Africa, and Senegal, as well as aboard small lake-based boats in Ghana and Kenya.

- In Asia, men from Cambodia, Burma, the Philippines, Indonesia, Vietnam, China, India, and Bangladesh are subjected to forced labor on foreign-flagged (largely Taiwanese, Korean, and Hong Kong) vessels operating in territorial waters of countries in Southeast Asia, the Pacific region, and New Zealand.

LOGGING

One out of five people in the world relies directly upon forests for food, income, building materials, and medicine. Yet laws to protect forests are often weak and poorly monitored. Illegal logging has led to forest degradation, deforestation, corruption at the highest levels in governments, and human rights abuses against entire communities, including indigenous populations. Human trafficking is included in this list of abuses. While some governments and civil society organizations have voiced strong opposition to illegal logging and made pledges to protect this valuable resource, the international community has given comparably little attention to the workers cutting down the trees, transporting the logs, or working in the intermediate processing centers. At the same time, the serious problem of workers in logging camps sexually exploiting trafficking victims has garnered insufficient attention.



There is a dearth of documented information on working conditions of loggers and the way the logging industry increases the risk of human trafficking in nearby communities.

Recent reports of trafficking in this sector include:

- In Asia, victims have been subjected to labor trafficking in the logging industry. For example, Solomon Islands authorities reported a Malaysian logging company subjected Malaysians to trafficking-related abuse in 2012. Burmese military-linked logging operations have used villagers for forced labor. North Koreans are forced to work in the Russian logging industry under bilateral agreements. Migrant workers in logging camps in Pacific Island nations have forced children into marriage and the sex trade.
- In Brazil, privately owned logging companies have subjected Brazilian men to forced labor.
- The Government of Belarus has imposed forced labor on Belarusian nationals in its logging industry.



MINING

Mining—particularly artisanal and small-scale mining—often has a negative impact on the environment, including through deforestation and pollution due to widespread use of mercury. The United Nations Environment Programme estimates that the mining sector is responsible for 37 percent of global mercury emissions, which harm ecosystems and have serious health impacts on humans and animals. In addition to degrading the environment, mining often occurs in remote or rural areas with limited government presence, leaving individuals in mining communities in Latin America, Africa, and Asia more vulnerable to forced labor and sex trafficking.

Examples of human trafficking related to the mining industry include:

- In the eastern Democratic Republic of the Congo, a significant number of Congolese men and boys working as artisanal miners are exploited in debt bondage by businesspeople and supply dealers from whom they acquire cash advances, tools, food, and other provisions at inflated prices and to whom they must sell mined minerals at prices below the market value. The miners are forced to continue working to pay off constantly accumulating debts that are virtually impossible to repay.
- In Angola, some Congolese migrants seeking employment in diamond-mining districts are exploited in forced labor in the mines or forced prostitution in mining communities.
- A gold rush in southeastern Senegal has created serious health and environmental challenges for affected communities due to the use of mercury and cyanide in mining operations. The rapid influx of workers has also contributed to the forced labor and sex trafficking of children and women in mining areas.
- In Guyana, traffickers are attracted to the country's interior gold mining communities where there is limited government presence. Here, they exploit Guyanese girls in the sex trade in mining camps.
- In Peru, forced labor in the gold mining industry remains a particular problem. In 2013, a report titled, *Risk Analysis of Indicators of Forced Labor and Human Trafficking in Illegal Gold Mining in Peru*, catalogued the result of interviews with nearly 100 mine workers and individuals involved in related industries (such as cooks, mechanics, and people in prostitution). It traces how gold tainted by human trafficking ends up in products available in the global marketplace, from watches to smart phones.



NEXT STEPS

Governments, private industry, and civil society have an opportunity to push for greater environmental protections in tandem with greater protections for workers, including those victimized by human trafficking. Additional research is needed to further study the relationship between environmental degradation and human trafficking in these and other industries. It is also essential to strengthen partnerships to better understand this intersection and tackle both forms of exploitation, individually and together.



THE TIERS

TIER 1

Countries whose governments fully comply with the Trafficking Victims Protection Act's (TVPA) minimum standards.

TIER 2

Countries whose governments do not fully comply with the TVPA's minimum standards, but are making significant efforts to bring themselves into compliance with those standards.

TIER 2 WATCH LIST

Countries whose governments do not fully comply with the TVPA's minimum standards, but are making significant efforts to bring themselves into compliance with those standards AND:

- a) The **absolute number of victims** of severe forms of trafficking is very significant or is significantly increasing;
- b) There is a **failure to provide evidence of increasing efforts** to combat severe forms of trafficking in persons from the previous year; or
- c) The determination that a country is making significant efforts to bring itself into compliance with minimum standards was based on **commitments by the country to take additional future steps over the next year.**

TIER 3

Countries whose governments do not fully comply with the minimum standards and are not making significant efforts to do so.



TIER PLACEMENTS

TIER 1

ARMENIA	FINLAND	LUXEMBOURG	SLOVENIA
AUSTRALIA	FRANCE	MACEDONIA	SPAIN
AUSTRIA	GERMANY	NETHERLANDS	SWEDEN
BELGIUM	ICELAND	NEW ZEALAND	SWITZERLAND
CANADA	IRELAND	NICARAGUA	TAIWAN
CHILE	ISRAEL	NORWAY	UNITED KINGDOM
CZECH REPUBLIC	ITALY	POLAND	UNITED STATES OF AMERICA
DENMARK	KOREA, SOUTH	SLOVAK REPUBLIC	

TIER 2

AFGHANISTAN	DOMINICAN REPUBLIC	KYRGYZ REPUBLIC	PORTUGAL
ALBANIA	ECUADOR	LATVIA	ROMANIA
ARGENTINA	EGYPT	LIBERIA	ST. LUCIA
ARUBA	EL SALVADOR	LITHUANIA	ST. MAARTEN
AZERBAIJAN	ESTONIA	MACAU	SENEGAL
THE BAHAMAS	ETHIOPIA	MALDIVES	SERBIA
BANGLADESH	FIJI	MALAWI	SEYCHELLES
BARBADOS	GABON	MALTA	SIERRA LEONE
BENIN	GEORGIA	MAURITIUS	SINGAPORE
BHUTAN	GHANA	MEXICO	SOUTH AFRICA
BRAZIL	GREECE	MICRONESIA	SWAZILAND
BRUNEI	GUATEMALA	MOLDOVA	TAJIKISTAN
BULGARIA	HONDURAS	MONGOLIA	TRINIDAD & TOBAGO
BURKINA FASO	HONG KONG	MONTENEGRO	TOGO
CABO VERDE	HUNGARY	MOZAMBIQUE	TONGA
CAMEROON	INDIA	NEPAL	TURKEY
CHAD	INDONESIA	NIGER	UGANDA
COLOMBIA	IRAQ	NIGERIA	UNITED ARAB EMIRATES
CONGO, REPUBLIC OF	JAPAN	OMAN	VIETNAM
COSTA RICA	JORDAN	PALAU	ZAMBIA
COTE D'IVOIRE	KAZAKHSTAN	PARAGUAY	
CROATIA	KIRIBATI	PERU	
CURACAO	KOSOVO	PHILIPPINES	

TIER 2 WATCH LIST

ANGOLA	CHINA (PRC)	LESOTHO	SOLOMON ISLANDS
ANTIGUA & BARBUDA	COMOROS	MADAGASCAR	SOUTH SUDAN
BAHRAIN	CYPRUS	MALI	SRI LANKA
BELARUS	DJIBOUTI	MARSHALL ISLANDS	SUDAN
BELIZE	GUINEA	MOROCCO	SURINAME
BOLIVIA	GUYANA	NAMIBIA	TANZANIA
BOSNIA & HERZEGOVINA	HAITI	PAKISTAN	TIMOR-LESTE
BOTSWANA	JAMAICA	PANAMA	TUNISIA
BURMA	KENYA	QATAR	TURKMENISTAN
BURUNDI	LAOS	RWANDA	UKRAINE
CAMBODIA	LEBANON	ST. VINCENT & THE GRENADINES	URUGUAY

TIER 3

ALGERIA	GUINEA-BISSAU	PAPUA NEW GUINEA	VENEZUELA*
CENTRAL AFRICAN REPUBLIC	IRAN	RUSSIA	ZIMBABWE
CONGO, DEMOCRATIC REP. OF	KOREA, NORTH	SAUDI ARABIA	
CUBA	KUWAIT	SYRIA	
EQUATORIAL GUINEA	LIBYA	THAILAND*	
ERITREA	MALAYSIA*	UZBEKISTAN	
THE GAMBIA	MAURITANIA	YEMEN	

SPECIAL CASE

SOMALIA

* Auto downgrade from Tier 2 Watch List

AFRICA



Boundary representation is not authoritative.

YEAR	PROSECUTIONS	CONVICTIONS	VICTIMS IDENTIFIED	NEW OR AMENDED LEGISLATION
2007	123 (28)	63 (26)		5
2008	109 (18)	90 (20)	7,799	10
2009	325 (47)	117 (30)	10,861	8
2010	272 (168)	163 (113)	9,626	5
2011	340 (45)	217 (113)	8,900 (5,098)	2
2012	493 (273)	252 (177)	10,043 (6,544)	4
2013	572 (245)	341 (192)	10,096 (2,250)	7

The above statistics are estimates only, given the lack of uniformity in national reporting structures. The numbers in parentheses are those of labor trafficking prosecutions, convictions, and victims identified.

TIER PLACEMENTS

- Tier 1
- Tier 2
- Tier 2 Watch List
- Tier 3
- Special Case



EAST ASIA & PACIFIC

Boundary representation is not authoritative.

YEAR	PROSECUTIONS	CONVICTIONS	VICTIMS IDENTIFIED	NEW OR AMENDED LEGISLATION
2007	1,047 (7)	651 (7)		4
2008	1,083 (106)	643 (35)	3,374	2
2009	357 (113)	256 (72)	5,238	3
2010	427 (53)	177 (9)	2,597	0
2011	2,127 (55)	978 (55)	8,454 (3,140)	4
2012	1,682 (115)	1,251 (103)	8,521 (1,804)	4
2013	2,460 (188)	1,271 (39)	7,886 (1,077)	3

The above statistics are estimates only, given the lack of uniformity in national reporting structures. The numbers in parentheses are those of labor trafficking prosecutions, convictions, and victims identified.

TIER PLACEMENTS

- Tier 1
- Tier 2
- Tier 2 Watch List
- Tier 3
- Tier 3 (Auto downgrade)



EUROPE

Boundary representation is not authoritative.

YEAR	PROSECUTIONS	CONVICTIONS	VICTIMS IDENTIFIED	NEW OR AMENDED LEGISLATION
2007	2,820 (111)	1,941 (80)		7
2008	2,808 (83)	1,721 (16)	8,981	1
2009	2,208 (160)	1,733 (149)	14,650	14
2010	2,803 (47)	1,850 (38)	8,548	4
2011	3,188 (298)	1,601 (81)	10,185 (1,796)	2
2012	3,161 (361)	1,818 (112)	11,905 (2,306)	3
2013	3,223 (275)	2,684 (127)	10,374 (1,863)	35

The above statistics are estimates only, given the lack of uniformity in national reporting structures. The numbers in parentheses are those of labor trafficking prosecutions, convictions, and victims identified.

* As part of the Kingdom of the Netherlands, Aruba, Curacao and St. Maarten are covered by the State Department's Bureau of European Affairs.

TIER PLACEMENTS

- Tier 1
- Tier 2
- Tier 2 Watch List
- Tier 3

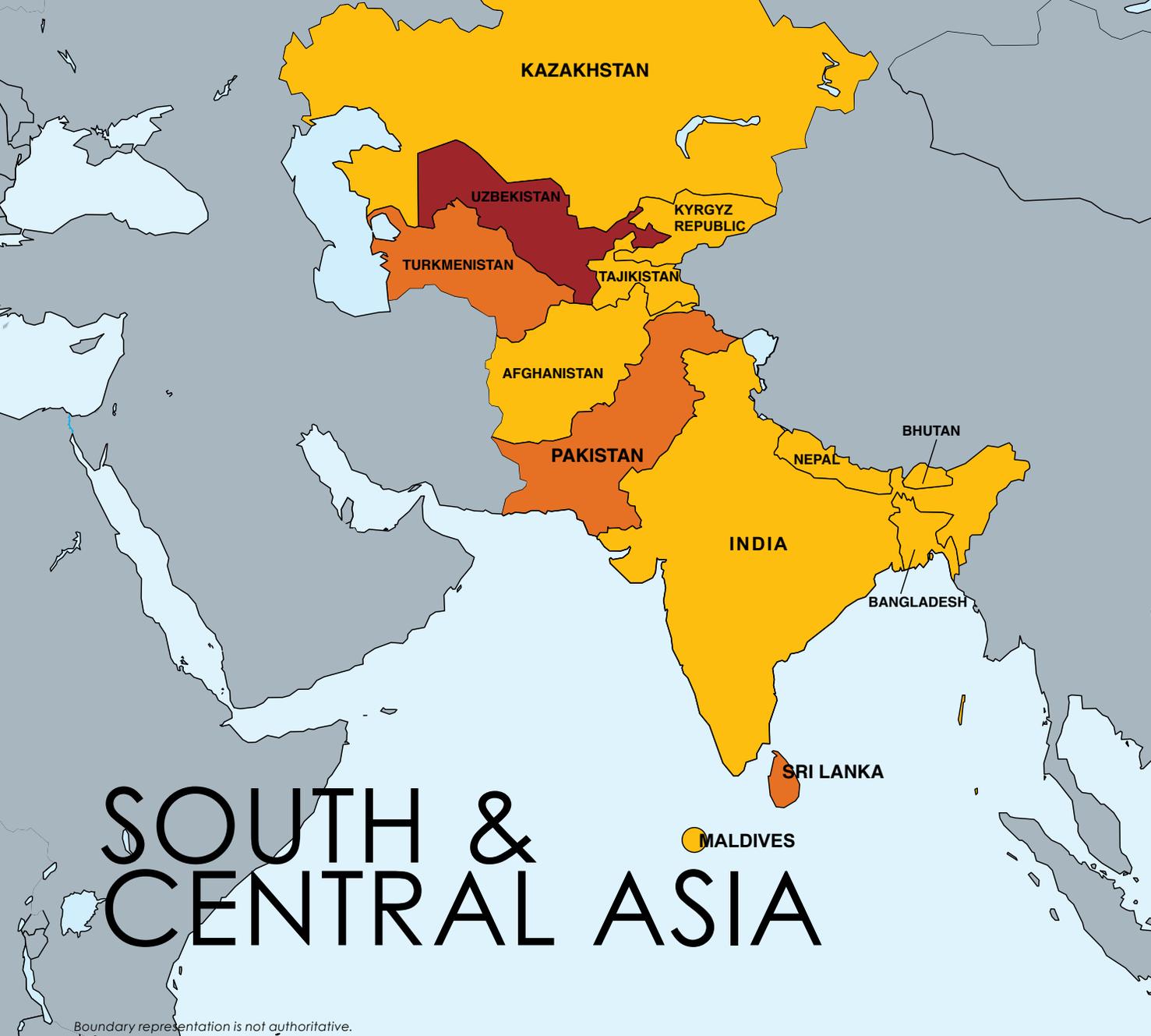


YEAR	PROSECUTIONS	CONVICTIONS	VICTIMS IDENTIFIED	NEW OR AMENDED LEGISLATION
2007	415 (181)	361 (179)		1
2008	120 (56)	26 (2)	688	6
2009	80 (9)	57 (8)	1,011	6
2010	323 (63)	68 (10)	1,304	1
2011	209 (17)	60 (5)	1,831 (1,132)	2
2012	249 (29)	149 (15)	4,047 (1,063)	1
2013	119 (25)	60 (4)	1,460 (172)	4

The above statistics are estimates only, given the lack of uniformity in national reporting structures. The numbers in parentheses are those of labor trafficking prosecutions, convictions, and victims identified.

TIER PLACEMENTS

- Tier 1
- Tier 2
- Tier 2 Watch List
- Tier 3



YEAR	PROSECUTIONS	CONVICTIONS	VICTIMS IDENTIFIED	NEW OR AMENDED LEGISLATION
2007	824 (162)	298 (33)		4
2008	644 (7)	342 (7)	3,510	2
2009	1,989 (56)	1,450 (10)	8,325	1
2010	1,460 (196)	1,068 (11)	4,357	1
2011	974 (24)	829 (11)	3,907 (1,089)	2
2012	1,043 (6)	874 (4)	4,415 (2,150)	1
2013	1,904 (259)	974 (58)	7,124 (1,290)	5

The above statistics are estimates only, given the lack of uniformity in national reporting structures. The numbers in parentheses are those of labor trafficking prosecutions, convictions, and victims identified.

TIER PLACEMENTS

- Tier 1
- Tier 2
- Tier 2 Watch List
- Tier 3

WESTERN HEMISPHERE

Boundary representation is not authoritative.



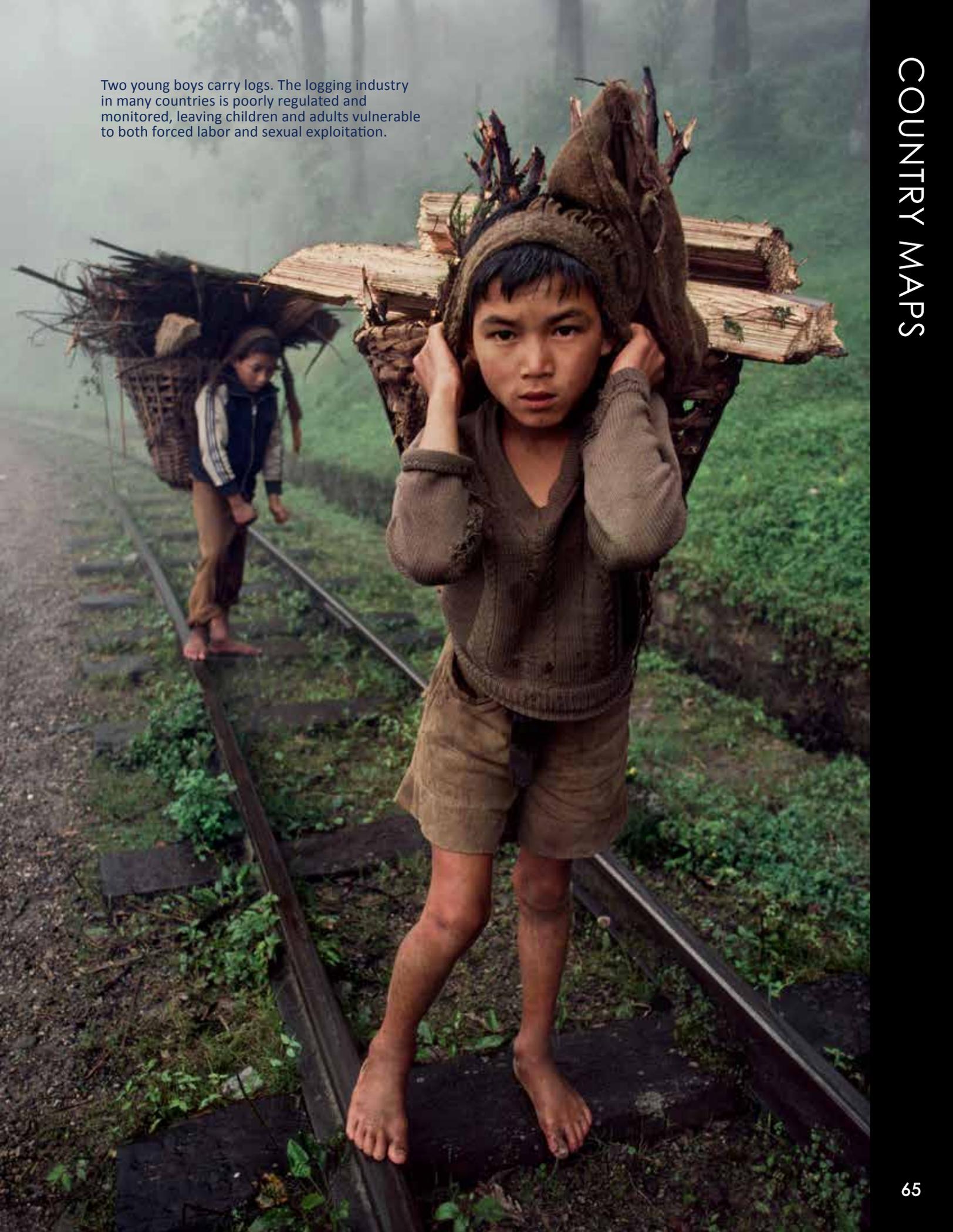
YEAR	PROSECUTIONS	CONVICTIONS	VICTIMS IDENTIFIED	NEW OR AMENDED LEGISLATION
2007	426 (1)	113 (1)		7
2008	448 (42)	161 (24)	6,609	5
2009	647 (47)	553 (66)	9,020	1
2010	732 (80)	293 (65)	6,681	6
2011	624 (17)	279 (14)	9,014 (2,490)	3
2012	1,077 (369)	402 (107)	7,639 (3,501)	8
2013	1,182 (207)	446 (50)	7,818 (3,951)	4

The above statistics are estimates only, given the lack of uniformity in national reporting structures. The numbers in parentheses are those of labor trafficking prosecutions, convictions, and victims identified.

TIER PLACEMENTS

- Tier 1
- Tier 2
- Tier 2 Watch List
- Tier 3
- Tier 3 (Auto downgrade)

Two young boys carry logs. The logging industry in many countries is poorly regulated and monitored, leaving children and adults vulnerable to both forced labor and sexual exploitation.



HOW TO READ A COUNTRY NARRATIVE

This page shows a sample country narrative. The Prosecution, Protection, and Prevention sections of each country narrative describe how a government has or has not addressed the relevant TVPA minimum standards (see page 425), during the reporting period. This truncated narrative gives a few examples.

The country's tier ranking is based on the government's efforts against trafficking as measured by the TVPA minimum standards.

COUNTRY X (Tier 2 Watch List)

Profile of human trafficking in recent years.

Country X is a transit and destination country for men and women subjected to forced labor and, to a much lesser extent, forced prostitution. Men and women from South and Southeast Asia, East Africa, and the Middle East voluntarily travel to Country X as laborers and domestic servants, but some subsequently face conditions indicative of involuntary servitude. These conditions include threats of serious harm, including threats of legal action and deportation; withholding of pay; restrictions on freedom of movement, including the confiscation of passports and travel documents and physical, mental, and sexual abuse. In some cases, arriving migrant workers have found that the terms of employment in Country X are wholly different from those they agreed to in their home countries. Individuals employed as domestic servants are particularly vulnerable to trafficking since they are not covered under the provisions of the labor law. Country X is also a destination for women who migrate and become involved in prostitution, but the extent to which these women are subjected to forced prostitution is unknown.

Synopsis of government efforts.

The Government of Country X shows evidence of overall increasing efforts. The government has not yet enacted necessary trafficking legislation, during the reporting period it reaffirmed its commitment to this goal over the next year. Despite these efforts, the government did not show evidence of overall progress in prosecuting and punishing trafficking offenders and identifying victims of trafficking; therefore, Country X is placed on Tier 2 Watch List.

Guidance on how the government can improve its performance and obtain a better tier ranking.

RECOMMENDATIONS FOR COUNTRY X:

Enact the draft comprehensive anti-trafficking legislation; significantly increase efforts to investigate and prosecute trafficking offenses, and convict trafficking offenders; institute and consistently enforce measures to identify victims of trafficking as those arrested for immigration offenses; and collect, disaggregate, analyze, and disseminate trafficking law enforcement data.

Summary of the government's legal structure and law enforcement efforts against human trafficking.

PROSECUTION

The Government of Country X made minimal efforts to investigate and prosecute trafficking offenses during the reporting period. Country X does not prohibit all acts of trafficking, but it criminalizes slavery under Section 321 and forced labor under Section 322 of its criminal law. The prescribed penalty for forced labor – up to six months' imprisonment – is not sufficiently stringent. Article 297 prohibits forced or coerced prostitution, and the prostitution of a child below age 15 even if there was no compulsion or redress; the prescribed penalty is up to 15 years' imprisonment, which is commensurate with penalties prescribed for other serious crimes, such as rape. Draft revisions to the penal code have not yet been enacted. An unconfirmed report indicates that four traffickers were charged with fraudulently issuing visas to workers who they then exploited. Two were reportedly deported, and two were reportedly convicted. The government did not confirm nor deny the existence of this case. The government did not report any investigations, prosecutions, convictions, or sentences for trafficking complicity of public officials.

PROTECTION

Country X made minimal progress in protecting victims of trafficking during the reporting period. Although health care facilities reportedly refer suspected abuse cases to the government anti-trafficking shelter for investigation, the government continues to lack a systematic procedure for law enforcement to identify victims of trafficking among vulnerable populations, such as foreign workers awaiting deportation and women arrested for prostitution; as a result, victims may be punished and automatically deported without being identified as victims or offered protection. The government reported that the MOI has a process by which it refers victims to the trafficking shelter; however, this process is underutilized in practice. The trafficking shelter assisted 24 individuals during the reporting period and provided them with a wide range of services, including full medical treatment and legal and job assistance. Country X commonly fines and detains potential trafficking victims for unlawful acts committed as a direct result of being trafficked, such as immigration violations and running away from their sponsors, without determining whether the individuals are victims of trafficking.

Country X sometimes offers temporary relief from deportation so that victims can testify as witnesses against their employers. However, victims were generally not permitted to leave the country if there is a pending case. The government did not routinely encourage victims to assist in trafficking investigations or consistently offer victims alternatives to removal to countries where they may face retribution or hardship.

PREVENTION

Country X made modest progress in preventing trafficking in persons during the reporting period. In March, Country X hosted a two-day regional workshop meant to establish dialogue between scholars, government officials, and stakeholders to discuss regional and international efforts to combat TH; and how to help victims. While the government made no apparent effort to amend provisions of Country X's sponsorship law – enacted in March 2009 – to help prevent the forced labor of migrant workers, the government did start to enforce other parts of the law to the benefit of migrant workers. One provision in the sponsorship law continues to require foreign workers to request exit permits from their sponsors in order to leave Country X. Although this may increase migrant workers' vulnerability to forced labor, the law created a new process through which a laborer who was not granted an exit permit due to a sponsor's refusal or other circumstances can seek one by other means. The government has a national plan of action to address trafficking in persons, but did not publicly disseminate the plan or take steps to implement it during the reporting period. The government did not take any public awareness campaigns aimed at reducing the demand for commercial sex acts in Country X, but the government undertook public awareness campaigns, but the government convicted two of its nationals for soliciting children for sex in other countries and sentenced them to 10 years' imprisonment.

TVPA Minimum Standard 4(2) – whether the government adequately protects victims of trafficking by identifying them and ensuring they have access to necessary services.

Summary of the government's efforts to ensure that trafficking victims are identified and provided adequate protection.

TVPA Minimum Standards 1-3 – whether the government prohibits all forms of trafficking and prescribes adequate criminal punishments.

TVPA Minimum Standard 4(3) – whether the government is making adequate efforts to prevent human trafficking.

Summary of the government's efforts to prevent human trafficking.

TVPA Minimum Standard 4(1) – whether the government vigorously investigates and prosecutes trafficking offenses and convicts and punishes trafficking offenders and provides data on these actions.

TVPA Minimum Standard 4(7) – whether the government has made adequate efforts to address the involvement in or facilitation of human trafficking by government employees.

TVPA Minimum Standard 4(12) – whether the government has made efforts to reduce the demand for commercial sex acts, and, if applicable, participation in international sex tourism by its nationals.

Identifying Victims of Human Trafficking Potential Indicators & Red Flags

The following is a list of red flags to look for in a potential situation of or a victim of human trafficking. Taken individually, each indicator may not be deterministic of trafficking and nor is this list meant to be exhaustive. This list is intended to encompass all forms of human trafficking; some indicators may be more strongly associated with one type of trafficking. Indicators reference conditions a potential victim might exhibit.

Common Work and Living Conditions

- Is not free to leave or come and go as he/she wishes
- Is under 18 years of age and is providing commercial sex acts
- Is in the commercial sex industry and has a pimp/manager
- Is unpaid, paid very little, or paid only through tips
- Works excessively long and/or unusual hours
- Is not allowed breaks or suffers under unusual restrictions at work
- Owes a large and/or increasing debt and is unable to pay it off
- Was recruited through false promises concerning the nature and conditions of his/her work
- Is living or working in a location with high security measures (e.g. opaque or boarded-up windows, bars on windows, barbed wire, security cameras, etc.).

Poor Mental Health or Abnormal Behavior

- Exhibits unusually fearful, anxious, depressed, submissive, tense, or nervous/paranoid behavior
- Reacts with unusually fearful or anxious behavior at any reference to “law enforcement”
- Avoids eye contact
- Exhibits a flat affect

Poor Physical Health

- Exhibits unexplained injuries or signs of prolonged/untreated illness or disease
- Appears malnourished
- Shows signs of physical and/or sexual abuse, physical restraint, confinement, or torture

Lack of Control

- Has few or no personal possessions
- Is not in control of his/her own money, and/or has no financial records, or bank account
- Is not in control of his/her own identification documents (e.g. ID, passport, or visa)
- Is not allowed or able to speak for him/herself (e.g., a third party may insist on being present and/or interpreting)
- Has an attorney that he/she does not seem to know or has not agreed to provide representation services



Other

- Has been “branded” by a trafficker (e.g. a tattoo of the trafficker’s name)
- Claims to be “just visiting” and is unable to clarify where he/she is staying or to provide an address
- Exhibits a lack of knowledge of whereabouts and/or does not know what city he/she is in
- Exhibits a loss of a sense of time
- Has numerous inconsistencies in his/her story

Myths & Misconceptions

To effectively combat human trafficking, each of us needs to have a clear "lens" that helps us understand what human trafficking is. When this lens is clouded or biased by misconceptions about the definition of trafficking, our ability to respond to the crime is reduced. It is important to learn how to identify and break down commonly-held myths and misconceptions regarding human trafficking and the type of trafficking networks that exist in the United States.

Myth 1: *Trafficked persons can only be foreign nationals or are only immigrants from other countries.*

Reality: The federal definition of human trafficking includes both U.S. citizens and foreign nationals. Both are protected under the federal trafficking statutes and have been since the TVPA of 2000. Human trafficking within the United States affects victims who are U.S. citizens, lawful permanent residents, visa holders, and undocumented workers.

Myth 2: *Human trafficking is essentially a crime that must involve some form of travel, transportation, or movement across state or national borders.*

Reality: Trafficking does not require transportation. Although transportation may be involved as a control mechanism to keep victims in unfamiliar places, it is not a required element of the trafficking definition. Human trafficking is not synonymous with forced migration or smuggling, which involve border crossing.

Myth 3: *Human trafficking is another term for human smuggling.*

Reality: Smuggling is a crime against a country's borders; human trafficking is a crime against a person. Each are distinct federal crimes in the United States. While smuggling requires illegal border crossing, human trafficking involves commercial sex acts or labor or services that are induced through force, fraud, or coercion, regardless of whether or not transportation occurs.

Myth 4: *There must be elements of physical restraint, physical force, or physical bondage when identifying a human trafficking situation.*

Reality: Trafficking does not require physical restraint, bodily harm, or physical force. Psychological means of control, such as threats, fraud, or abuse of the legal process, are sufficient elements of the crime. Unlike the previous federal involuntary servitude statutes (U.S.C. 1584), the new federal crimes created by the Trafficking Victims Protection Act (TVPA) of 2000 were intended to address "subtler" forms of coercion and to broaden previous standards that only considered bodily harm.

Myth 5: *Victims of human trafficking will immediately ask for help or assistance and will self-identify as a victim of a crime.*

Reality: Victims of human trafficking often do not immediately seek help or self-identify as victims of a crime due to a variety of factors, including lack of trust, self-blame, or specific instructions by the traffickers regarding how to behave when talking to law enforcement or social services. It is important to avoid making a snap judgment about who is or who is not a trafficking victim based on first encounters. Trust often takes time to develop. Continued trust-building and patient interviewing is often required to get to the whole story and uncover the full experience of what a victim has gone through.

Myth 6: *Human trafficking victims always come from situations of poverty or from small rural villages.*

Reality: Although poverty can be a factor in human trafficking because it is often an indicator of vulnerability, **poverty alone is not a single causal factor or universal indicator of a human trafficking victim.** Trafficking victims can come from a range of income levels, and many may come from families with higher socioeconomic status.

Myth 7: *Sex trafficking is the only form of human trafficking.*

Reality: The federal definition of human trafficking encompasses **both sex trafficking and labor trafficking**, and the crime can affect men and women, children and adults.

Myth 8: *Human trafficking only occurs in illegal underground industries.*

Reality: Trafficking can occur in legal and legitimate business settings as well as underground markets. Human trafficking has been reported in business markets such as restaurants, hotels, and manufacturing plants, as well as underground markets such as commercial sex in residential brothels and street based commercial sex.

Myth 9: *If the trafficked person consented to be in their initial situation or was informed about what type of labor they would be doing or that commercial sex would be involved, then it cannot be human trafficking or against their will because they “knew better.”*

Reality: Initial consent to commercial sex or a labor setting prior to acts of force, fraud, or coercion (or if the victim is a minor in a sex trafficking situation) is **not relevant to the crime, nor is payment.**

Myth 10: *Foreign national trafficking victims are always undocumented immigrants or here in this country illegally.*

Reality: Not all foreign national victims are undocumented. Foreign national trafficked persons can be in the United States through either legal or illegal means. Although some foreign national victims are undocumented, a significant percentage may have legitimate visas for various purposes.

Operated by 

 This website was made possible through Grant Number 90ZV0102 from the Anti-Trafficking in Persons Division, Office of Refugee Resettlement, U.S. Department of Health and Human Services. Its contents are solely the responsibility of the authors and do not necessarily represent the official views of the Anti-Trafficking in Persons Division, the Office of Refugee Resettlement, or HHS.

List of Goods Produced by Child Labor or Forced Labor

Required by the Trafficking Victims
Protection Reauthorization Act of 2005



BUREAU OF INTERNATIONAL LABOR AFFAIRS
UNITED STATES DEPARTMENT OF LABOR

December 1, 2014





In Memoriam

All photographs in this report are credited to U. Roberto (“Robin”) Romano, who passed away on November 1, 2013. Robin traveled the world to document the human face of child labor through photographs, films, and interviews.

From coffee and cocoa plantations in Africa to factories in Asia, he made it his life’s work to raise awareness about the exploitation of children and call for action to address this abuse.

SECRETARY OF LABOR
WASHINGTON, D.C.

DEC 01 2014

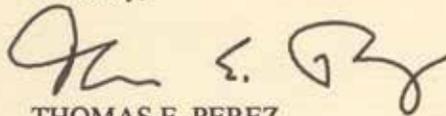
The Honorable Joseph R. Biden
The Vice President of the United States
Washington, DC 20500

Dear Mr. Vice President:

The enclosed report, titled The Department of Labor's (DOL) *List of Goods Produced by Child Labor or Forced Labor* (List), is produced in accordance with the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2005. This is the sixth edition of the TVPRA report. With this update, the List now includes 136 goods from 74 countries that DOL's Bureau of International Labor Affairs has reason to believe are produced by child labor or forced labor in violation of international standards.

DOL will continue to update the List periodically. We hope this report is useful to you.

Sincerely,



THOMAS E. PEREZ

Enclosure

cc: The Honorable Harry Reid, Senate Majority Leader
The Honorable Mitch McConnell, Senate Minority Leader



SECRETARY OF LABOR

WASHINGTON, D.C.

DEC 01 2014

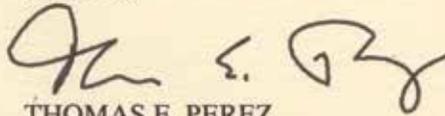
The Honorable John Boehner
Speaker of the House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

The enclosed report, titled The Department of Labor's (DOL) *List of Goods Produced by Child Labor or Forced Labor* (List), is produced in accordance with the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2005. This is the sixth edition of the TVPRA report. With this update, the List now includes 136 goods from 74 countries that DOL's Bureau of International Labor Affairs has reason to believe are produced by child labor or forced labor in violation of international standards.

DOL will continue to update the List periodically. We hope this report is useful to you.

Sincerely,



THOMAS E. PEREZ

Enclosure

cc: The Honorable Nancy Pelosi, House Minority Leader



SECRETARY OF LABOR
WASHINGTON, D.C. 20210

DEC 01 2014

FOREWORD

This year, we celebrate the 50th anniversary of the Civil Rights Act, signed into law by President Lyndon Johnson on July 2, 1964. The Civil Rights Act enshrined into law the basic principle upon which our country was founded – that all people are created equal. For the Freedom Riders who set out for the Deep South to challenge the status quo of Jim Crow laws, the Filipino and Mexican farmworkers who organized the Delano Grape Strike, and so many other civil rights activists, the struggle was about more than simply ending discrimination. It was about economic justice and fighting for equal access to good jobs and decent wages. It was about unlocking doors to the American Dream. It was about advancing the cause of labor rights. It marked a recognition that at the core of the struggle for equal opportunity was the promise of economic opportunity.

While there has been remarkable progress over the past half century, that struggle still continues— not only here in the United States but abroad. As Secretary of Labor, I am committed to ensuring that the United States is at the forefront of efforts to ensure that workers around the world are treated fairly and able to share in the benefits of the global economy. For many people, including those in minority communities of color, living within caste systems, subject to ethnic strife, and part of indigenous populations, the road to meaningful opportunity remains blocked.

In President Obama's 2014 State of the Union address, he noted that "the best measure of opportunity is access to a good job." Sadly, all too often, that opportunity is threatened or denied for adults and children around the globe. A new law in Bolivia now permits children as young as 10 to work. In Nigeria, Boko Haram's opposition to female education led to the kidnapping of over 200 schoolgirls. And for 168 million child laborers around the world and 6 million children who suffer as forced laborers, "opportunity" has meant carrying heavy loads and wielding machetes on farms; scavenging in garbage dumps and being exposed to electronic waste; climbing into mine shafts in search of diamonds and gold; enduring physical, emotional, and verbal abuse as domestic servants; fighting as child combatants in armed conflict; and being coerced, deceived, and trapped in jobs by unscrupulous labor recruiters and sex traffickers.

But we are making important progress. In June, delegates to the 103rd International Labor Conference in Geneva, Switzerland acknowledged their shared commitment to protect workers and promote opportunity by voting overwhelmingly to adopt a new Protocol and Recommendation on Forced Labor. The Protocol supplements existing ILO Convention 29 on Forced Labor and reaffirms the need for measures of prevention, protection, and remedies, including compensation, for victims of forced labor. These standards will help further galvanize those working to eradicate forced labor around the world.

And in October, the Nobel Peace Prize was awarded to two courageous human rights champions, Kailash Satyarthi and Malala Yousafzai. Kailash Satyarthi's tireless campaign to end forced child labor, and Malala Yousafzai's fearless global advocacy for the rights of boys and girls to an

education, have brought hope to countless children suffering exploitation and facing an uncertain future. The attention they will continue to receive as recipients of the Peace Prize provides an unprecedented opportunity to highlight more broadly the global efforts to eradicate child labor and other forms of exploitation.

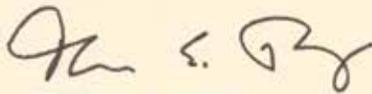
Through the U.S. Department of Labor's Bureau of International Labor Affairs, I am releasing the sixth edition of the Department's *List of Goods Produced by Child Labor or Forced Labor*, mandated by the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2005. This year's edition includes two new goods, one new country, and 11 new items.

We dedicate this report to Senator Tom Harkin of Iowa, who is retiring at the end of this term. Throughout his 40 years in the U.S. House of Representatives and the U.S. Senate, Tom Harkin has been a fierce and tireless champion for equal opportunity for all Americans, fighting for access to a quality education, advancing the rights of individuals with disabilities, and so much more.

Senator Harkin also deserves our gratitude for leading efforts to protect workers' rights and eliminate the worst forms of child labor globally, from the carpet industries of South Asia to the cocoa farms of West Africa and the manufacturing sector in Latin America. In the words of Senator Harkin, the intent of these reports is "to bring countries to account, to shine a spotlight on their need to reform their national laws and to put in place social safety nets for those trapped in the worst forms of child labor. The aim is not punitive but rather to jumpstart individual and collective action."

Senator Harkin was inspired by young people like Iqbal Masih (1983-1995) and by those who brought attention to the cause like Robin Romano (1956-2013). Iqbal was a Pakistani child sold into slavery who became an outspoken advocate against child exploitation after his escape at age 10, only to be murdered two years later. His heroism gave rise to the Iqbal Masih Award, an annual honor presented by the Secretary of Labor to recognize exceptional efforts to reduce the worst forms of child labor. Last month, Senator Harkin received the 2014 Iqbal Masih Award. Robin, whose legacy includes all the photos in this year's report, made it his life's work to raise awareness about the exploitation of children through images of child laborers around the world. Robin long played a leadership role in the advocacy organization Media Voices for Children, the 2012 Iqbal Masih Award recipient.

In signing the Civil Rights Act into law half a century ago, President Johnson called it "a challenge to all of us to go to work in our communities and our States, in our homes and in our hearts, to eliminate the last vestiges of injustice in our beloved country." As we continue our nation's journey toward true equal justice for all, let us also recommit ourselves to realizing Tom Harkin's vision—to end abusive labor practices and ensure basic dignity and real opportunity for every man, woman, and child around the globe.



THOMAS E. PEREZ

Introduction

Who picked the cotton for the shirt on your back? Who cut the cane for the sugar in your coffee? Who fired the kiln to make the bricks in your fireplace?

The List contained in these pages originates from a simple conviction: none of the products we consume on a daily basis should be made by an adult who is forced to produce them or a child under conditions that violate international law.

This sixth edition of the U.S. Department of Labor's (DOL) *List of Goods Produced by Child Labor or Forced Labor*, mandated by the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2005 (TVPRA List), shows we still have a long way to go toward reaching that goal. It tallies 136 goods produced by forced labor or child labor in violation of international standards, or both, in 74 countries across the world. However, it also illustrates that the combination of strong international labor standards and improved data collection and reporting put us all in a position to combat forced labor and child labor more effectively.

This edition of the TVPRA List comes at an historic moment in the global fight against forced labor. In June 2014, the International Labor Organization's (ILO) International Labor Conference adopted a Protocol and Recommendation to address gaps in the implementation of the ILO's Forced Labor Convention, 1930 (C. 29). These new instruments aim to advance prevention, protection and compensation measures to effectively achieve the elimination of forced labor.¹ They will be critical tools to guide and bolster the efforts of governments, businesses, and civil society as they seek to provide protection and remedies to the estimated 21 million people in forced labor around the world; to prevent more people from falling victim to this crime; and to target the criminals who earn an estimated \$150 billion per year in illegal profits through the use of forced labor.²

The ILO's fundamental conventions on child labor, the Minimum Age Convention, 1973 (C. 138) and the Worst Forms of Child Labor Convention, 1999 (C. 182), have played a key role in building an international, multi-sectoral movement against child labor, with common goals and complementary efforts. The cumulative effect of these efforts is clear in the ILO's most recent global estimates on working children which demonstrate a significant decline in child labor from 215 million in 2008 to 168 million in 2012. Among the 168 million child laborers in 2012, 85 million were engaged in hazardous work.³

The TVPRA of 2005 requires DOL's Bureau of International Labor Affairs (ILAB) to "develop and make available to the public a list of goods from countries that [ILAB] has reason to believe are produced by forced labor or child labor in violation of international standards." ILAB published its initial TVPRA List on September 10, 2009. The TVPRA of 2013 requires submission of the TVPRA List to Congress not later than December 1, 2014, and every two years thereafter.⁴ Consistent with its TVPRA of 2005 mandate,⁵ ILAB maintains the TVPRA List primarily to raise public awareness about forced labor and child labor around the world and to promote efforts to combat them; it is not intended to be punitive, but rather to serve as a catalyst for more strategic and focused coordination and collaboration among those working to address these problems.

Publication of the TVPRA List has resulted in new opportunities for ILAB to engage with foreign governments to combat forced labor and child labor. It can also serve to complement existing U.S. Government engagement. For example, the U.S. Government is already involved in productive high-level discussions with the Government of Malaysia to address forced labor- and child labor-related concerns. For companies, the TVPRA List has become an effective resource in carrying out risk assessment and due diligence on labor rights in their supply chains. For civil society groups, it has been a useful tool for advocating on behalf of working children and victims of forced labor.



TVPRA List

The 2014 update to the TVPRA List includes 136 goods, 74 countries and 353 line items. A line item is a combination of a good and country. This edition of the TVPRA List adds 2 new goods, alcoholic beverages and meat, and 1 new country, Yemen. Overall, this update adds 11 new line items to the TVPRA List. It also adds a “child labor” designation to one good that was already on the TVPRA List in the “forced labor” category: palm oil from Malaysia. Given the current state of research on child labor and forced labor, the TVPRA List – while as comprehensive as possible – includes only those goods for which ILAB is able to document that there is reason to believe that child or forced labor is used in their production. It is likely that many more goods are produced through these forms of labor abuse. Figure 1 shows various breakdowns of the TVPRA List by country and sector.



Additions in 2014

The chart below identifies the goods and countries added to the TVPRA list in 2014.

COUNTRY	GOOD	CATEGORY
Bangladesh	garments	child labor
Cambodia	alcoholic beverages	child labor
Cambodia	meat	child labor
Cambodia	textiles	child labor
Cambodia	timber	child labor
India	cotton	child labor
India	sugarcane	child labor
Kenya	fish	child labor
Madagascar	vanilla	child labor
Malaysia	electronics	forced labor
Malaysia	palm oil	child labor
Yemen	fish	child labor

LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR

By Country

KEY
FORCED LABOR

CHILD LABOR

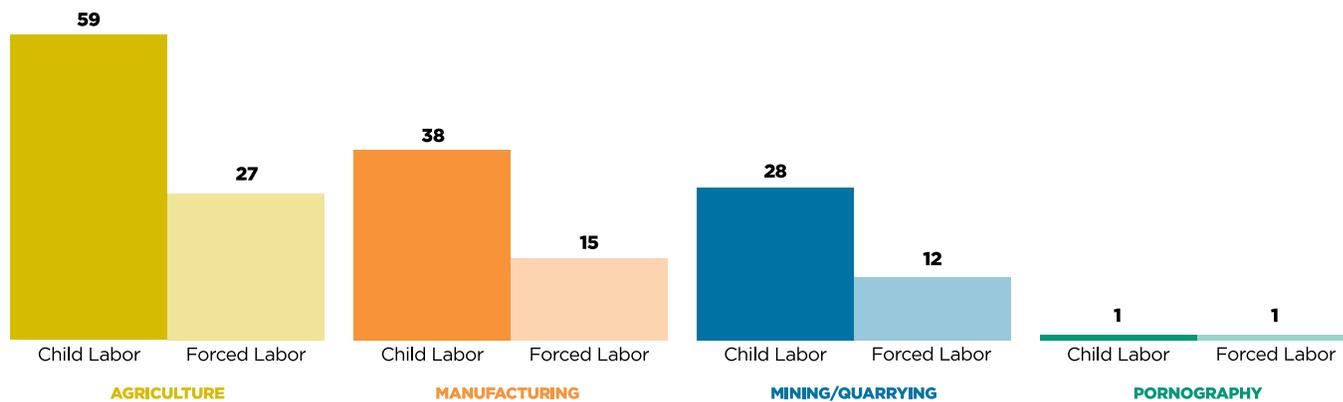
BOTH
* good added in 2014, *child labor*† good added in 2014, *forced labor*

Afghanistan	BRICKS • CARPETS • COAL • POPPIES
Angola	DIAMONDS
Argentina	BLUEBERRIES • BRICKS • COTTON • GARLIC • GARMENTS • GRAPES • OLIVES • STRAWBERRIES • TOBACCO • TOMATOES • YERBA MATE
Azerbaijan	COTTON
Bangladesh	BIDIS • BRICKS • DRIED FISH • FOOTWEAR • STEEL FURNITURE • GARMENTS* • GLASS • LEATHER • JUTE TEXTILES • MATCHES • POULTRY • SALT • SHRIMP • SOAP • TEXTILES
Belize	BANANAS • CITRUS FRUITS • SUGAR CANE
Benin	COTTON • CRUSHED GRANITE
Bolivia	BRAZIL NUTS/CHESTNUTS • BRICKS • CATTLE • CORN • GOLD • PEANUTS • SILVER • SUGARCANE • TIN • ZINC
Brazil	BEEF • BRICKS • CASHEWS • CATTLE • CERAMICS • CHARCOAL • COTTON • FOOTWEAR • GARMENTS • MANIOC/CASSAVA • PINEAPPLES • RICE • SISAL • SUGARCANE • TIMBER • TOBACCO
Burkina Faso	COTTON • GOLD
Burma	BAMBOO • BEANS • BRICKS • JADE • PALM THATCH • PHYSIC NUTS/CASTOR BEANS • RICE • RUBBER • RUBIES • SESAME • SHRIMP • SUGARCANE • SUNFLOWERS • TEAK
Cambodia	ALCOHOLIC BEVERAGES* • BRICKS • CASSAVA • FISH • MEAT* • RUBBER • SALT • SHRIMP • TEXTILES* • TIMBER* • TOBACCO
Cameroon	COCOA
Central African Rep.	DIAMONDS
Chad	CATTLE
China	ARTIFICIAL FLOWERS • BRICKS • CHRISTMAS DECORATIONS • COAL • COTTON • ELECTRONICS • FIREWORKS • FOOTWEAR • GARMENTS • NAILS • TEXTILES • TOYS
Colombia	CLAY BRICKS • COAL • COCA • COFFEE • EMERALDS • GOLD • PORNOGRAPHY • SUGARCANE
Cote d'Ivoire	COCOA • COFFEE
Congo, Dem. Rep.	CASSITERITE • COLTAN • COPPER • DIAMONDS • HETEROGENITE • GOLD • WOLFRAMITE
Dominican Republic	BAKED GOODS • COFFEE • RICE • SUGARCANE • TOMATOES
Ecuador	BANANAS • BRICKS • FLOWERS • GOLD
Egypt	COTTON • LIMESTONE
El Salvador	COFFEE • FIREWORKS • SHELLFISH • SUGARCANE
Ethiopia	CATTLE • GOLD • HAND-WOVEN TEXTILES
Ghana	COCOA • FISH • GOLD • TILAPIA
Guatemala	BROCCOLI • COFFEE • CORN • FIREWORKS • GRAVEL • SUGARCANE
Guinea	CASHEWS • COCOA • COFFEE • DIAMONDS • GOLD
Honduras	COFFEE • LOBSTERS • MELONS
India	BIDIS • BRASSWARE • BRICKS • CARPETS • COTTON* • EMBELLISHED TEXTILES • FIREWORKS • FOOTWEAR • GARMENTS • GEMS • GLASS BANGLES • HYBRID COTTONSEED • INCENSE • LEATHER GOODS/ACCESSORIES • LOCKS • MATCHES • RICE • SILK FABRIC • SILK • THREAD • SOCCER BALLS • STONES • SUGARCANE* • THREAD/YARN
Indonesia	FISH • GOLD • PALM OIL • RUBBER • SANDALS • TOBACCO
Iran	CARPETS
Jordan	GARMENTS
Kazakhstan	COTTON

Kenya	COFFEE • FISH* • MIRAA • RICE • SISAL • SUGARCANE • TEA • TOBACCO
Kyrgyz Republic	COTTON • TOBACCO
Lebanon	TOBACCO
Lesotho	CATTLE
Liberia	DIAMONDS • RUBBER
Madagascar	SAPPHIRES • STONES • VANILLA*
Malawi	TEA • TOBACCO
Malaysia	ELECTRONICS† • GARMENTS • PALM OIL*
Mali	COTTON • GOLD • RICE
Mauritania	CATTLE • GOATS
Mexico	CHILE PEPPERS • COFFEE • CUCUMBERS • EGGPLANTS • GREEN BEANS • MELONS • ONIONS • PORNOGRAPHY • SUGARCANE • TOBACCO • TOMATOES
Mongolia	COAL • FLUORSPAR • GOLD
Mozambique	TOBACCO
Namibia	CATTLE
Nepal	BRICKS • CARPETS • EMBELLISHED TEXTILES • STONES
Nicaragua	BANANAS • COFFEE • GOLD • GRAVEL • PUMICE STONE • SHELLFISH • TOBACCO
Niger	CATTLE • GOLD • GYPSUM • SALT • TRONA
Nigeria	COCOA • GRANITE • GRAVEL • MANIOC/CASSAVA • SAND
North Korea	BRICKS • CEMENT • COAL • GOLD • IRON • TEXTILES • TIMBER
Pakistan	BRICKS • CARPETS • COAL • COTTON • GLASS BANGLES • LEATHER • SUGARCANE • SURGICAL INSTRUMENTS • WHEAT
Panama	COFFEE • MELONS • SUGARCANE
Paraguay	BRICKS • CATTLE • COTTON • LIMESTONE • PORNOGRAPHY • SUGARCANE
Peru	BRAZIL NUTS/CHESTNUTS • BRICKS • COCA • FIREWORKS • FISH • GOLD • TIMBER
Philippines	BANANAS • COCONUTS • CORN • FASHION ACCESSORIES • FISH • GOLD • HOGS • PORNOGRAPHY • PYROTECHNICS • RICE • RUBBER • SUGARCANE • TOBACCO
Russia	PORNOGRAPHY
Rwanda	TEA
Senegal	GOLD
Sierra Leone	COCOA • COFFEE • DIAMONDS • GRANITE • PALM OIL
South Sudan	CATTLE
Suriname	GOLD
Tajikistan	COTTON
Tanzania	CLOVES • COFFEE • GOLD • NILE PERCH • SISAL • TANZANITE • TEA • TOBACCO
Thailand	FISH • GARMENTS • PORNOGRAPHY • SHRIMP • SUGARCANE
Turkey	CITRUS FRUITS • COTTON • CUMIN • FURNITURE • HAZELNUTS • PEANUTS • PULSES • SUGAR BEETS
Turkmenistan	COTTON
Uganda	BRICKS • CATTLE • CHARCOAL • COFFEE • FISH • RICE • SUGARCANE • TEA • TOBACCO • VANILLA
Ukraine	COAL • PORNOGRAPHY
Uzbekistan	COTTON
Vietnam	BRICKS • GARMENTS
Yemen	FISH*
Zambia	CATTLE • COTTON • GEMS • STONES • TOBACCO

Figure 1.
The List in Numbers

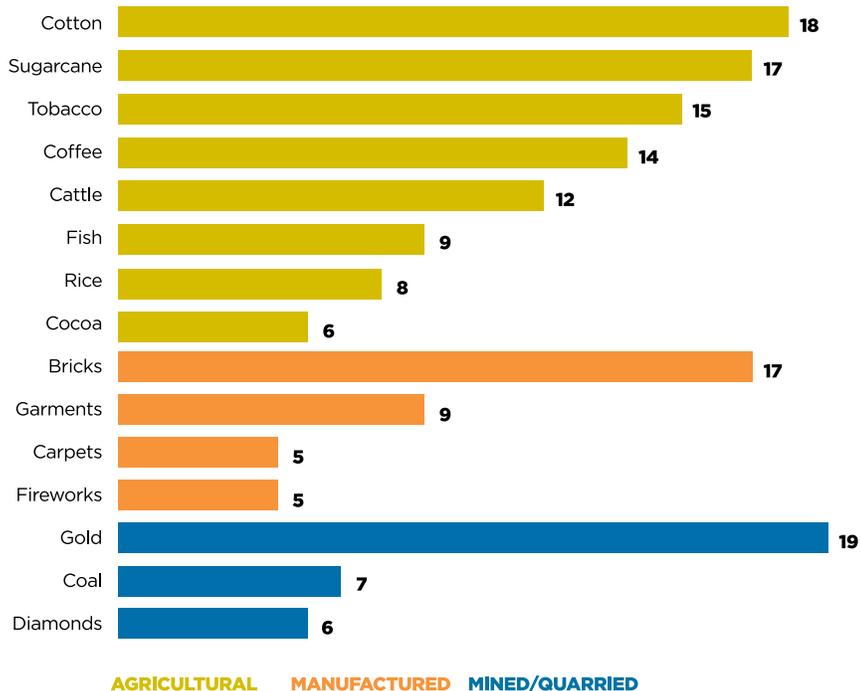
Number of Goods Produced Globally by Child Labor and Forced Labor by Production Sector



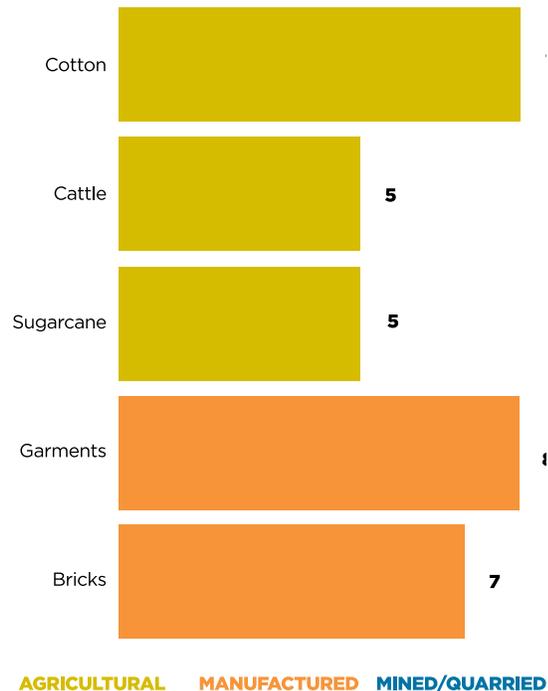
126 goods, plus pornography, are produced globally by **child labor**.

55 goods, plus pornography, are produced globally by **forced labor**.

Goods with Most Child Labor and Forced Labor Listings by Number of Countries and Sector



Goods with Most Forced Labor Listings by Number of Countries and Sector



List of Goods Produced by Child Labor or Forced Labor by Sector

bamboo • bananas • beans • blueberries • brazil nuts/chestnuts • broccoli • cashews • cattle • charcoal • chile peppers • citrus fruits • cloves • coca • cocoa • coconuts • coffee • corn • cotton • cucumbers • cumin • eggplants • fish • flowers • garlic • goats • grapes • green beans • hazelnuts • hogs • hybrid cottonseed • lobsters • manioc/cassava • melons • miraa • nile perch • olives • onions • palm oil • palm thatch • peanuts • physic nuts/castor beans • pineapples • poppies • poultry • pulses • rice • rubber • sesame • shellfish • shrimp • sisal • strawberries • sugar beets • sugarcane • sunflowers • tea • teak • tilapia • timber • tobacco • tomatoes • vanilla • wheat • yerba mate

64



Agriculture/Forestry/Fishing

42

alcoholic beverages • artificial flowers • baked goods • beef • bidis • brassware • bricks • carpets • cement • ceramics • christmas decorations • clay bricks • dried fish • electronics • embellished textiles • fashion accessories • fireworks • footwear • furniture • garments • glass • glass bangles • hand-woven textiles • incense • jute textiles • leather • leather goods/accessories • locks • matches • meat • nails • pyrotechnics • sandals • silk fabric • silk thread • soap • soccer balls • steel furniture • surgical instruments • textiles • thread/yarn • toys

Manufacturing



cassiterite • coal • coltan • copper • crushed granite • diamonds • emeralds • fluor spar • gems • gold • granite • gravel • gypsum • heterogenite • iron • jade • limestone • pumice stone • rubies • salt • sand • sapphires • silver • stones • tanzanite • tin • trona • wolframite • zinc

29



Mining/Quarrying

1

pornography

Other



Country-Level Efforts to Combat Child Labor and Forced Labor in the Production of Goods

Foreign governments, industry groups, individual companies, and other stakeholders frequently inquire about the process for removing a good from the TVPRA List. According to ILAB’s Procedural Guidelines,⁶ ILAB must have reason to believe that a problem of child or forced labor is significantly reduced if not eliminated from the production of the particular good in the country in question for it to be removed. ILAB researches potential removals on an ongoing basis.

In 2013, ILAB removed three goods from the TVPRA List: tobacco from Kazakhstan (forced labor and child labor), charcoal from Namibia (child labor), and diamonds from Zimbabwe (child labor). The Kazakhstan case is discussed below. The situation of each item removed from the TVPRA List was unique, but typically, some combination of government, private sector, and civil society action, in some cases coupled with macro-level changes in a particular industry, are critical in bringing about the changes needed to “significantly reduce or eliminate” the problem. Under international standards, the primary responsibility for eliminating child and forced labor falls to governments. In fulfilling this responsibility, governments must enact laws on child labor and forced labor consistent with international labor standards and effectively enforce those laws. They must also provide basic social services, such as education, as well as social protections for individuals and households. And they must enact policies that promote the development of decent work for adults and stable livelihoods for entire families, so that

parents do not choose work over education for their children. But companies and industry groups, as well as other civil society actors, also have key roles to play. Companies should implement social compliance systems to ensure they are not directly or indirectly causing or contributing to labor abuses in their supply chains. Where safe and accessible channels are available, workers can lodge complaints about labor abuses to be investigated by the government, companies, or monitors. Workers’ organizations can bargain collectively to improve working conditions and can participate directly in monitoring and remediation processes. Civil society groups can engage with both governments and companies in a variety of ways, from advocating for government policies, to implementing government-funded programs, to helping companies identify areas of child and forced labor risk and providing rehabilitative services to former child laborers and survivors of forced labor.

The following pages highlight a few examples of leadership and good practice across all sectors to combat child labor or forced labor in the production of several of the goods on the TVPRA List. The eradication of child labor or forced labor in a sector is a process that can take many years, even decades. While in most cases these efforts have not yet achieved “significant reduction or elimination,” and therefore the goods remain on the TVPRA List, these examples demonstrate what can be achieved through both individual and collective efforts. It is ILAB’s hope that the TVPRA List will continue to encourage such actions.



No to Nicotine

Effective Business Action to Eliminate Forced Labor and Child Labor in Tobacco Production in Kazakhstan

In 2009, ILAB placed tobacco from Kazakhstan on the TVPRA List based on sources dating from 2003-2008. These sources indicated that children—both Kazakh children and children of migrant families—worked in a variety of tobacco-related activities, including performing strenuous, labor-intensive tasks. The sources also indicated that adult migrant laborers faced passport confiscation, coercive recruitment, induced indebtedness, and other forced labor-related practices. That same year, Philip Morris Kazakhstan (PMK), the sole buyer of tobacco in Kazakhstan, began to implement its Agricultural Labor Practices program, developed in consultation with the non-governmental organization (NGO) Verité and the International Labor Organization. The program includes comprehensive monitoring of labor practices on all tobacco farms in Kazakhstan, including child labor and forced labor. Along with this monitoring, PMK and its local NGO partners educate agricultural workers and families about their rights, available grievance mechanisms, and alternatives to child labor; and the Government of Kazakhstan carries out enforcement actions in areas where child labor is suspected. Concurrent with these efforts, the size of the tobacco sector declined steeply. In 2011, ILAB began to receive reports that child and forced labor were no longer present in the country's relatively few remaining tobacco farms.

Following up on these reports, ILAB carried out research in 2012 and 2013 to understand current labor conditions in the sector, analyze efforts on the part of various stakeholders to combat child labor and forced

labor, and determine whether child labor and/or forced labor remained significant problems in the sector. ILAB carried out a qualitative assessment that included a desk review, field research to Kazakhstan for key informant interviews, and follow-up interviews with other key informants. In all, 6 documents were analyzed and 17 interviews were conducted.

Informants confirmed that the size of the industry had decreased from over 300 farms in 2010 to 74 farms in 2013. With the reduction in the number of farms and land used for tobacco production, the use of migrant labor had also declined. During the 2012 peak season, only 140 migrants worked on tobacco farms in Kazakhstan. Informants—including government officials and NGO representatives—confirmed that the PMK monitoring system is comprehensive and credible, and that NGO efforts are highly effective in educating agricultural workers about their rights, available grievance mechanisms, and educational opportunities as alternatives to child labor. Since its inception in 2009, the comprehensive monitoring system had not identified any cases of forced labor, and informants confirmed that previous forced labor-related practices had been abolished. A minority of ILAB's informants stated that child labor may still occur in rare cases, but fewer than 200 children (native Kazakh and migrant) currently live on tobacco farms, and the comprehensive monitoring system in place in the sector identified only one child working in 2012.

ILAB concluded that child labor in Kazakhstan's tobacco sector has been significantly reduced. In addition, there had been no evidence of forced labor in Kazakhstan's tobacco sector in recent years, and ILAB's research suggested the practice has been virtually eliminated. If a case of child labor or forced labor were found in the sector, there are mechanisms in place to address the situation in an appropriate manner. As a result, ILAB removed tobacco from Kazakhstan from the TVPRA List in 2013. •



Positive Buzz

Public-Private Partnerships to Eliminate Child Labor in Nicaragua's Coffee Fields

The Government of Nicaragua (GON), civil society organizations, and the private sector have worked together for several years to combat child labor in coffee production. The Ministries of Labor, Health, Education, and more recently, the Ministry of Welfare, have formed a partnership with civil society organizations and coffee producers called Educational Bridges (*Puentes Educativos*) to keep children from working in coffee fields during the harvest seasons. Through this partnership, coffee producers in the departments of Jinotega and Matagalpa built schools and provide ongoing funding for children's education and meals. The GON accredited these schools and provides support for teachers. The GON has also passed regulations that prohibit children from working in the harvest and supports the Coffee Harvest Plan, a policy that promotes a comprehensive approach to eliminating child labor in coffee production in Jinotega.

The partnership expanded in 2012 and 2013, with additional coffee producers pledging to eliminate child labor from their plantations and making commitments to provide decent salaries and working conditions for adult employees. For his leadership in this program, one of these coffee producers, Mr. Isidro León-York, was awarded DOL's 2013 Iqbal Masih Award for the Elimination of Child Labor. Mr. León-York, the first recipient of this award from the private sector, has eliminated child labor from his own coffee farm, which employs over 760 workers. He used a portion of his farm's profits to fund a school for the children of workers and has helped provide workers and their families with decent wages, food, and health care.⁷ Mr. León-York and other producers have fostered partnerships with coffee roasters, exporters, and international actors in the value chain to further advocate for a reduction in child labor and promote children's access to education across the Nicaraguan coffee sector. •



Taking Steps Forward

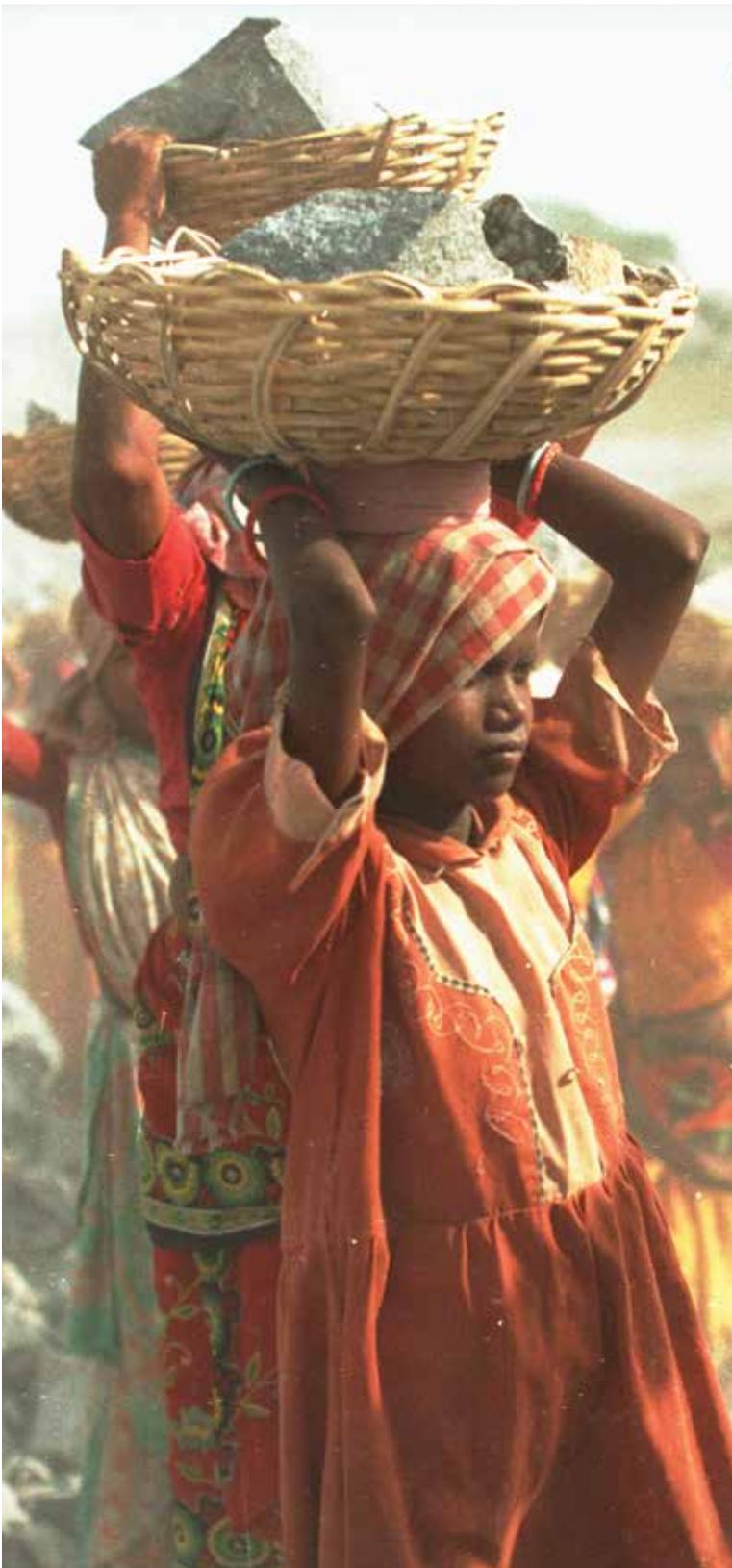
Child Labor in Cocoa Production in Cote d'Ivoire

In 2013, the Government of Côte d'Ivoire (GCI) made important strides in efforts to reduce child labor, particularly in the cocoa sector. Under the direction of the First Lady of Côte d'Ivoire, the GCI committed over \$10 million to implement the National Action Plan Against Trafficking, Exploitation and Child Labor (NAP). The GCI also continued to participate in three DOL-funded regional projects, totaling \$22.9 million, to reduce the worst forms of child labor in cocoa-growing regions of both Côte d'Ivoire and Ghana. The government has an approval and coordination process for proposed child labor projects in order to ensure the projects are strategically coordinated and meet the objectives outlined under the NAP. The process involves approval and coordination committees, consisting of government officials, international organizations, and civil society representatives.

The GCI also has established a child labor monitoring system (CLMS) in 19 cocoa-growing communities.

The CLMS uses regional, departmental, and community-based committees to monitor for child labor, identify children in or at risk of becoming involved in child labor, and connect them to appropriate services. The committees are comprised of governmental, non-governmental, and international organizations. The GCI plans to expand its CLMS to all cocoa-growing communities in the future. Information gathered through the CLMS will provide a more comprehensive picture of child labor in these communities. The GCI has also increased funding for child labor law enforcement, hired new inspectors and trained them on child labor issues, and tried cases of child trafficking.

Under the coordination of the government and in alignment with the NAP, the International Chocolate and Cocoa Industry (Industry) funds and implements projects to combat child labor in the cocoa sector. In particular, Industry has provided \$10 million in funding for projects in Côte d'Ivoire and Ghana as part of their commitment under the *Declaration of Joint Action to Support Implementation of the Harkin-Engel Protocol*, signed by the U.S. Secretary of Labor, the Governments of Côte d'Ivoire and Ghana, and Industry in 2010. Industry's funding matches the amount pledged by DOL under this Declaration. •



Quarries are No Place for Kids

Child Labor in Benin's Granite Industry

In 2013, the Government of Benin (GOB), supported by the DOL-funded Economic Community of West African States II (ECOWAS II) project, made progress in eliminating child labor in the granite sector. Since the beginning of the ECOWAS II program in 2011, more than 1,700 children working in granite have received educational services, and over 1,100 households have received livelihoods support. The GOB, together with the project, implemented a pilot CLMS in several granite quarry communities within five zones. The CLMS operates through local child protection committees, enabling a community-based response to the worst forms of child labor. In addition, the GOB's Director General of Mines established two "children's spaces" in Parakou, a granite-mining area of the country. These spaces are designed to protect children less than 6 years who previously accompanied their mothers in the quarries from illness or injury in the workplace and increase their mothers' productivity. Furthermore, in their Annual Work Plan 2014, the Directorate General of Labor made an initial provision of \$34,000 to fund small activities related to the CLMS, demonstrating the GOB's commitment to ensuring the sustainability of the program's goals.

Private sector actors and civil society in Benin, both independently and together with the GOB, are also working to combat the phenomenon. The GOB and Beninese Workers Associations signed a bipartite declaration to increase efforts and collaboration to reduce child labor. The joint declaration encourages the GOB to strengthen the public procurement systems so that public funds are not used to buy goods and services made with child labor. In addition, the Ministry of Labor and the Ministry of Mines signed a commitment charter with artisanal mining associations to eliminate child labor in mines and quarries. The charter calls on artisanal miners to prohibit children under 18 years from working in mines and quarries, identify cases of child labor in mines and quarries, remove and rehabilitate children working in mines and quarries, and sensitize parents to the dangers children face while working in mines and quarries. •



Safe Waters

Public-Private Action in the Thai Shrimp and Seafood Processing Industry

When ILAB placed shrimp from Thailand on the TVPRA List in 2009, the Thai government and international buyers of Thai shrimp products put substantial pressure on the industry to improve its practices. The resulting Good Labor Practices program (GLP), developed by the ILO in cooperation with the Thai Ministry of Labor's Department of Labor Protection and Welfare (DLPW), the Department of Fisheries (DoF) and the Thai Frozen Foods Association (TFFA), supports the improvement of industry-wide labor standards through self-regulation with the goal of giving enterprises a competitive edge in export markets. More specifically, it promotes training and good practices for the prevention and elimination of forced and child labor and the general improvement of workplace conditions at all points in the shrimp and seafood processing supply chain.

The GLP *Guidelines for Primary Processing Workplaces in the Shrimp and Seafood Industry of Thailand* was developed by the key stakeholders and signed and launched by the Thai Minister of Labor in 2013. These Guidelines provide information for supply chain enterprises on developing human resource management, worker support and occupational safety and health (OSH) management systems that help them identify the flaws in policies and procedures that enable hazardous child labor, as defined under the Labor Protection Act, B.E. 2541, and forced labor to occur.

The TFFA and the ILO work together to use the *Guidelines* to raise awareness, consult, and train businesses in the industry. Awareness campaigns aim to dispel

misconceptions about child and forced labor and highlight employers' obligations, children's rights, and hazardous child labor, and provide concrete, practical resources for employers from each industry in the supply chain to recognize risks and take concrete steps to prevent them. Direct consultations with enterprises provide insight into companies' operations and how and where hazardous child labor occurs in the industry supply chain. The consultation process provides a non-threatening and constructive forum for dialogue. These consultations with stakeholders throughout the supply chain encourage employers to take ownership of eliminating forced and child labor through providing tools, such as OSH manuals and checklists, and to empower enterprises to conduct their own internal evaluations and create a platform for dialogue to discuss industry concerns, capacity and strategies. Training programs are designed to directly address key areas identified during consultations. Training is provided through industry associations, NGOs and workshops to both formal and informal enterprises to build understanding and awareness of GLP and internalize and effectively implement the GLP principles and standards. GLP training programs include community engagement and outreach in order to account for the living and working situations of the workers and their families. This area of work is coordinated with local government and NGOs active in the area and ensures that GLP training programs are informed by local context and workers priorities. Some of the specific worker priorities that have been incorporated into GLP trainings include the integration of complaints mechanisms, encouraging workplaces to provide daycare facilities, providing OSH training, and supporting flexible education for children of legal working age.

In today's global supply chains, ensuring compliance with labor standards is a complex undertaking, and a variety of actors have important roles to play. First and foremost, governments must pass strong laws and enforce them effectively. During 2013, the Thai DLPW Labor Inspectorate targeted workplace inspections to include enterprises at highest risk of violating laws on child labor, forced labor and migrant employment, including in the shrimp, fishing and seafood processing industries. It is critical that the Government of Thailand provide a sufficient number of inspectors, including interpreters to facilitate communication with migrant workers, to adequately enforce labor laws. It also must improve mechanisms for labor complaints, and apply penalties to violators of labor laws that adhere to the penalties prescribed by law and will deter future violations.

Nothing can substitute for the critical role of governments and workers' organizations in ensuring compliance with labor standards, but in places where these mechanisms are not fully developed, private sector compliance initiatives fill an important gap. The GLP provides shrimp and seafood processing companies the opportunity to demonstrate how improving labor practices and standards throughout the supply chain, combined with human resource and other social service initiatives, gives enterprises a competitive edge in export markets. The Thai Government is exploring opportunities to apply the GLP to other export industries in Thailand, such as sugar and garments. •

Stitching Together

Collaborative Efforts to Combat Forced Labor in Brazil's Garment Sector

In 2012, DOL placed garments from Brazil on the TVPRA List based on sources dating from 2006-2012. These sources indicated that adults - mostly immigrants from Bolivia, Peru and Paraguay, but also some Brazilian nationals - worked under forced labor conditions in a variety of labor-intensive, garment production-related activities. The sources also indicated that adult migrant laborers faced retention of identity documents, physical confinement, withholding of wages, degrading living conditions, forced overtime, threat of dismissal, and other practices that are indicators of forced labor. These forced labor practices in the production of garments were taking place in small workshops across the metropolitan region of São Paulo.

In September 2013, representatives from the *Associação Brasileira da Indústria Têxtil e de Confecção* (ABIT), the Brazil Industries Coalition (BIC), and the Brazilian Trade and Investment Promotion Agency (ApexBrasil) contacted DOL to discuss the possibility of removal of garments from the TVPRA List. To consider such removal, DOL has engaged with ABIT, BIC, and ApexBrasil to implement a Joint Action Plan. Through the Joint Action Plan, the participants sought to better understand the current prevalence and nature of forced labor in the garment sector; analyze efforts on the part of various government, industry, and civil society actors to combat forced labor in the sector; and determine whether forced labor remains a problem.

As part of this process, DOL received and analyzed various materials on Brazilian government efforts to combat forced labor, including a report with data on labor inspections in garment production provided by Brazil's Ministry of Labor and Employment (MTE). Key government efforts include:

- A robust legal framework on forced labor.
- MTE inspections for forced labor in the garment sector.
- The *Lista Suja* (Dirty List), a listing of employers found exploiting workers under slave-like conditions; listed companies are banned from acquiring credit from state-owned banks.
- The Second National Plan to Eradicate Slave Labor, which establishes the policy framework to address forced labor.
- The National Commission on the Eradication of Slave Labor (CONATRAE), which is responsible for implementing the Second National Plan to Eradicate Slave Labor, with participation of representatives from the executive, legislative, and judicial branches and representatives of civil society.
- The Parliamentary Investigation Commission on Slave Labor, which investigates slavery or slave-like labor in rural and urban activities throughout Brazil.
- Assistance to victims of forced labor such as unemployment benefits, social services, and permanent visa status for foreign victims of forced labor.

In addition to these government efforts, DOL also sought to better understand the efforts of industry and civil society groups. ABIT is a member of the National Pact for the Eradication of Slave Labor, a multi-stakeholder initiative that seeks to improve working conditions in sectors where forced labor has been found. Brazilian private sector organizations have established supply chain social compliance programs, including ABIT's *Selo Qual* program and the Brazilian Association of Textile Retail's *ABVTEX* program. ABIT, BIC, and other private sector groups also engage in various forms of consultation with communities affected by forced labor. Civil society efforts to combat forced labor in the sector are also robust. NGOs participate with government agencies on committees such as the CONATRAE, to discuss and help to develop policies and activities to address immigration, forced labor, and trafficking in persons. Some NGOs monitor the forced labor

inspections made by the government; some NGOs periodically visit sewing shops to conduct technical evaluations of occupational safety and health issues and disseminate information to employers and employees about safety, legal procedures regarding company regularization, employee registration, and other topics. Many NGOs offer legal advice to immigrants, especially in cases of labor problems.

While government, private sector, and civil society efforts in the sector had been robust, information was still needed on the current prevalence of forced labor in the sector. To this end, ApexBrasil funded a research study carried out by University of São Paulo between March and May 2014, which provided a historical and legal analysis of Brazil's garment sector, with a focus on the formal sector. This report was presented to DOL representatives in Washington, D.C. by the chief investigator on June 17, 2014. The study did not include any information about the prevalence of forced labor in the sector.

Simultaneously, DOL carried out a qualitative assessment that included a desk review of current academic research on the subject, monitored credible

media outlets in Brazil and Bolivia, and interviewed key informants from civil society and academic institutions. In all, DOL analyzed 21 documents and conducted five key informant interviews. These new sources indicate that that forced labor in garment production continues to persist in the metropolitan region of São Paulo and surrounding areas. New forced labor victims continue to be identified, some working in unregistered businesses and some working “under the table” in registered businesses. DOL's interviews confirmed that the government has increased the number of inspections in the formal sector, but not necessarily in the informal sector. DOL remains committed to continuing to engage in the Joint Action Plan process with ABIT, BIC, ApexBrasil, and other interested parties in order to continue to expand our shared understanding of forced labor in the garment sector. More data is needed on the extent of the problem in both registered and unregistered businesses. In addition, it is critical that the GOB continue its efforts to formalize garment workers, and step up efforts to identify forced laborers in all types of workplaces and enforce laws enacted to protect them. •

Research Methodology

Research Focus

The research methodology used to compile the TVPRA List is based on ILAB's Procedural Guidelines. For this edition, ILAB reviewed new information on goods from 150 countries and territories. See below for a link to the list of these countries and territories. ILAB continues to carry out research for future editions of the TVPRA List.

Population Covered

In researching child labor, ILAB focused on children under the age of 18 years. For forced labor, the research covered workers of all ages. The population included persons in foreign countries only, as directed by statute. Populations within the United States were not included in this study.

Nature of Employment

Where ILAB research indicated situations of exploitative working conditions, these situations were reviewed to determine whether they constituted “child labor” or “forced labor” under international labor standards. ILAB's complete definitions of child labor and forced labor can be found in its Procedural Guidelines.

“**Child labor**” under international standards means all work performed by a person below the age of 15. It also includes all work performed by a person below the age of 18 in the following practices: (A) All forms of slavery or practices similar to slavery, such as the sale or trafficking of children, debt bondage and serfdom, or forced or compulsory labor, including forced or compulsory recruitment of children for use in armed conflict; (B) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic purposes; (C) the use, procuring or offering of a child for illicit activities in particular for the production and trafficking of drugs; and (D) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.⁸

The definitions used in developing the TVPRA List are based on standards adopted by the ILO. The ILO has adopted two conventions relating to child labor, the Minimum Age Convention, 1973 (C. 138) and the Worst Forms of Child Labor Convention, 1999 (C. 182). The ILO has also adopted two conventions relating to forced labor, the Forced Labor Convention, 1930 (C. 29) and the Abolition of Forced Labor Convention, 1957 (C. 105).

“**Forced labor**” under international standards means all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily, and includes indentured labor. “Forced labor” includes work provided or obtained by force, fraud or coercion, including: (1) by threats of serious harm to, or physical restraint against any person; (2) by means of any scheme, plan or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or (3) by means of the abuse or threatened abuse of law or the legal process.⁹

Evidence of child labor and forced labor was considered separately to determine whether – for each good on the TVPRA List – there should be a finding that child labor, forced labor, or both were used in the production of the good in violation of international standards. Some goods are listed as produced with both child labor and forced labor, but this does not necessarily mean that the goods were produced with *forced child labor*.

Sector of Employment

The TVPRA List comprises goods from the agricultural, manufacturing, and mining/quarrying sectors, as well as pornography. ILAB's research did not include the service sector, which was beyond the scope of the legislated mandate.

Type of Employment

Research covered all economic activity for adults and children in the production of goods, including formal and informal sector production and goods produced for personal and family consumption.¹⁰ Examples of informal sector activity include day labor hired without contract; small-scale farming and fishing; artisanal mining and quarrying; and manufacturing work performed in home-based workshops.

The TVPRA List includes many goods for which ILAB has evidence of child labor or forced labor only in informal sector production. These include garments from Bangladesh, gold from Suriname, and tobacco from Tanzania.

Some illicit goods are also included in the TVPRA List; this is not intended to condone or legitimize the production or consumption of these goods.

Stage of Production

Goods are placed on the TVPRA List at the stage of production at which ILAB determined that there was reason to believe that child labor or forced labor was involved. For example, if there was reason to believe that child labor or forced labor was used in the extraction, harvesting, assembly or production of raw materials or component articles and these materials or articles are subsequently used as inputs in the manufacture or processing of final goods under non-violative conditions, only the raw materials or component articles are included on the TVPRA List and only for those countries where they were extracted, harvested, assembled or produced. If child labor or forced labor was used in both the production or extraction of raw materials or component articles and the manufacture or processing of final goods, the raw materials or component articles and the final goods are included on the TVPRA List for those countries where the violative conditions were found. In placing items on the TVPRA List, ILAB names the most specific good possible given the available evidence. Therefore, ILAB may identify child labor or forced labor in the

production of a general category of good from one country (e.g., stones from Nepal), while it may have evidence of labor exploitation in the production of a more precise good from another country (e.g., limestone from Egypt). However, ILAB does not place broad sectors on the TVPRA List. For example, though there is evidence of child labor in agriculture in nearly every country in the world, ILAB would not include “agricultural goods” on the TVPRA List. However, when there is credible evidence of child labor or forced labor in a particular agricultural good, that specific good would be included on the TVPRA List.

Market for Goods

Most economically active children are involved in the production of goods or services for local consumption,¹¹ rather than for international trade. Data is limited on the consumption patterns of goods made with forced labor. In conducting research, ILAB did not distinguish between goods produced for domestic consumption and for export, due to data limitations and because this was not part of the mandate of the TVPRA.

Data Sources and Analysis

Sources and Collection of Data

To ensure a transparent process, ILAB did not use any information in developing the TVPRA List that is unavailable to the public, such as government-classified information. ILAB utilized a wide variety of publicly-available primary and secondary sources to conduct the research. Primary sources include original quantitative and qualitative research studies and other data or evidence gathered first-hand, while secondary sources are those that cite, comment on or build upon primary sources. ILAB’s primary sources included surveys carried out by foreign governments in conjunction with the ILO; site visits and data gathered by ILAB staff and other U.S. Government personnel; and quantitative and qualitative studies carried out by a variety of governmental and nongovernmental entities, including academic institutions. Where

available, ILAB relied on statistically representative studies in which participants are chosen through random sampling. This type of research produces reliable estimates of the number of individuals in child labor or forced labor working in particular activities in a given sector or geographic area. Because these studies provide empirical, quantitative evidence about both the nature and prevalence of the problem, ILAB sometimes based a determination to add a good to the TVPRA List on a single, representative survey when it was confident in the rigor of the methodology and execution.

ILAB's secondary sources included information reported by U.S. Government agencies, foreign governments and civil society organizations, including reporting from U.S. Government-funded technical assistance projects. The Department of State and U.S. embassies and consulates abroad provided important information by gathering data from local contacts, conducting site visits and reviewing local media sources. ILAB issued a notice in the *Federal Register* requesting information from the public on child labor and forced labor in the production of goods globally and reached out to the embassies of all countries researched (see Appendix A) requesting this information, as well. ILAB monitored reports from international institutions, non-governmental organizations, academic journals and media sources on an ongoing basis.

Data Analysis

The TVPRA mandates DOL to publish a list of goods that ILAB has “reason to believe” are produced using forced or child labor in violation of international standards. ILAB implemented this “reason to believe” standard by establishing five factors to be considered in evaluating information. These five factors were included in ILAB's Procedural Guidelines.

1. *Nature of information.* Whether the information about child labor or forced labor gathered from research, public submissions, hearing testimony or other sources is relevant, probative and meets the definitions of child labor or forced labor.

2. *Date of information.* Whether the information about child labor or forced labor is no more than 7 years old at the time of receipt. More current information will generally be given priority, and information older than 7 years will generally not be considered.¹²
3. *Source of information.* Whether the information, either from primary or secondary sources, is from a source whose methodology, prior publications, degree of familiarity and experience with international labor standards and/or reputation for accuracy and objectivity warrants a determination that it is relevant and probative.
4. *Extent of corroboration.* The extent to which the information about the use of child labor or forced labor in the production of a good(s) is corroborated by other sources.
5. *Significant incidence of child labor or forced labor.* Whether the information about the use of child labor or forced labor in the production of a good(s) warrants a determination that the incidence of such practices is significant in the country in question. Information that relates only to a single company or facility or that indicates an isolated incident of child labor or forced labor will not ordinarily weigh in favor of a finding that a good is produced in violation of international standards. Information that demonstrates a significant incidence of child labor or forced labor in the production of a particular good, although not necessarily representing a practice in the industry as a whole, will ordinarily weigh in favor of a finding that a good is produced in violation of international standards.

For each good that was reviewed, ILAB evaluated each data source against each of the five criteria. ILAB researchers applied the criteria consistently across goods and countries so that ultimate findings of “reason to believe” are consistent worldwide.

When ILAB found reason to believe that child labor or forced labor was used in the production of a particular good, prior to adding that good to the TVPRA List ILAB also considered evidence of government,

industry or third party initiatives to combat the problem. This included evidence about ongoing initiatives brought to our attention through public submissions. If ILAB determined that the problem of child labor or forced labor persisted despite existing efforts to address the issue, the good was still added to the TVPRA List.

Limitations

Data Availability

A wide range of challenges contributes to the continued scarcity of information on international child labor and forced labor.

Countries Not Appearing on the TVPRA List

A country's absence from the TVPRA List does not necessarily indicate that child labor and/or forced labor are not occurring in the production of goods in that country. Data can be unavailable for various reasons, including both research and policy considerations. Forced laborers often work in isolated locations, such as rural areas, or clandestine settings, such as workshops hidden in large cities. Research survey methodologies on such hard-to-reach populations, especially for individuals in forced labor, are still in developmental stages and continue to be piloted and refined in order to capture the appropriate constructs. While research on child labor is more advanced, and has gone beyond population estimates, data on the specific types of work in which children are involved beyond aggregated industry data is still not collected in a universal manner. For example, national child labor surveys often produce estimates of the number of children working in agriculture, but statistics are often not available on the specific agricultural goods children are producing. Policy decisions that affect the availability of data on child labor or forced labor include government failure to allocate sufficient financial resources or hesitancy to collect and make publicly available data on such sensitive issues. The existence of child labor and forced labor also often involves violations of laws and regulations, including serious criminal violations in some cases. Information may

be intentionally suppressed to protect powerful interests, in the face of which the victims of these egregious labor practices may be too vulnerable or politically weak to assert their rights or even communicate their situations. Among the 150 countries and territories researched for this edition of the TVPRA List, there were several for which ILAB could not find adequate information to determine that any goods should be placed on the TVPRA List because very little recent research has been done. This was the case, for example, in Algeria, Gabon, Guyana, Jamaica, Maldives, Morocco, South Africa, Swaziland, Togo, Tunisia, and Venezuela.

Countries with Data Gaps on the TVPRA List

ILAB's TVPRA List includes goods from some countries known to restrict data collection on forced labor and child labor or to suppress information dissemination. Examples include Burma, China, Iran, North Korea, and Uzbekistan. If ILAB was able to find even limited sources, despite data availability constraints, indicating significant incidence of forced labor or child labor in the production of a particular good, and these sources were judged credible and timely, ILAB determined that there was "reason to believe" that child labor or forced labor was occurring with respect to that good.

Countries with Disproportionate Representation on the TVPRA List

Some countries with relatively large numbers of goods on the TVPRA List may not have the most serious problems of child labor or forced labor. Often, these are countries that have more openly acknowledged the problems, have better research and have allowed information on these issues to be disseminated. Such countries include Argentina, Bolivia, Brazil, Colombia, Ecuador, El Salvador, India, Kenya, Mexico, Philippines, Tanzania, Turkey, Uganda, and Zambia. The number of goods on the TVPRA List from any particular country should not be interpreted as a direct indicator that these countries have the most extensive problems of child labor or forced labor.

Generalizability of Findings

The TVPRA List is comprised of goods and countries that ILAB found to have a significant incidence of child labor and/or forced labor. However, it is important to understand that a listing of any particular good and country cannot be generalized to *all* production of that good in the country. In a given country there may be firms that produce the good in compliance with the law and international standards, and others that employ child labor and forced labor. The TVPRA List does not name specific companies using child labor or forced labor. It would be immensely difficult for ILAB to attempt to track the identity of every company producing a good using child labor or forced labor. In addition, it is ILAB's experience that child labor and forced labor frequently occur in small local enterprises, for which company names, if they are available, have little relevance. ILAB is also aware that it is often a simple matter to change or conceal the name of a company. Consequently, ILAB has concluded that seeking to track and name individual companies would be of limited value to the primary purpose of the TVPRA List, which is to promote ameliorative efforts at the country level.

Endnotes

¹ILO, *Protocol to the Forced Labour Convention, 1930*, Provisional Record, Geneva, 2014; available from http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_246615.pdf, ILO, *Recommendation on Supplementary Measures for the Effective Suppression of Forced Labour*, Provisional Record, Geneva, 2014; available from http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_246617.pdf.

²International Labour Office, *Profits and Poverty: The Economics of Forced Labour*, Geneva, 2014; available from http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_243391.pdf.

³"Hazardous work" refers to work which, by the nature or circumstances in which it is carried out, it likely to harm the health, safety or morals of children. See International Labour Office and International Programme on the Elimination of Child Labour (IPEC), *Marking Progress Against Child Labour: Global Estimates and Trends 2000-2012*, ILO, Geneva, 2013; available from http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipec/documents/publication/wcms_221513.pdf.

⁴*Violence Against Women Reauthorization Act of 2013, codified as 22 USC 7112(c)*, 113-4, (2013); available from <http://www.gpo.gov/fdsys/pkg/PLAW-113publ4/pdf/PLAW-113publ4.pdf>.

⁵*Codified as 22 USC 7112(c)*.

⁶U.S. Department of Labor, "Notice of Procedural Guidelines for the Development and Maintenance of the List of Goods From Countries Produced by Child Labor or Forced Labor", Vol. 72, No. 247 (December 27, 2007), Fed. Reg. 73374 available from <https://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=20376>.

⁷Congress established the Iqbal Masih Award for the Elimination of Child Labor in 2009 to recognize exceptional efforts by an individual, company, organization or national government to end the worst forms of child labor.

⁸*Procedural Guidelines*, 72 Fed. Reg. at 73378.

⁹*Procedural Guidelines*, 72 Fed. Reg. at 73378.

¹⁰ILO, *Resolution concerning statistics of the economically active population, employment, unemployment and underemployment*, ILO, Geneva, October 1982; available from http://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/normativeinstrument/wcms_087481.pdf. See also ILO, *18th International Conference of Labour Statisticians*, Geneva, November, 2007; available from: http://ilo.org/global/statistics-and-databases/meetings-and-events/international-conference-of-labour-statisticians/WCMS_092024/lang--en/index.htm.

¹¹Eric Edmonds, "Trade, Child Labor, and Schooling in Poor Countries", in *Trade Adjustment Costs in Developing Countries: Impacts, Determinants, and Policy Responses*, ed. G. Porto and B. Hoekman, Washington, DC: The World Bank Press, 2010; available from http://siteresources.worldbank.org/INTRANETTRADE/Resources/239054-1239120299171/5998577-1244842549684/6205205-1247069686974/Trade_Adjustment_Costs.pdf.

¹²Since 2011, ILAB has chosen to rely on sources that are no more than 5 years old. This policy is to ensure consistency with other ILAB reporting on international child labor.

Acknowledgements

This report was prepared under the direction of Carol Pier, Deputy Undersecretary for International Affairs; Eric Biel, Associate Deputy Undersecretary for International Affairs; Mark Mittelhauser, Associate Deputy Undersecretary for International Affairs; Marcia Eugenio, Director, OCFT; and Kevin Willcutts, Deputy Director, OCFT. Preparation of the report was coordinated by Rachel Phillips Rigby and Elizabeth Wolkomir, with key support from Leyla Strotkamp, Randall Hicks, Sarah Newsome, Austin Pedersen, and Charita Castro of OCFT. The underlying research, writing, editing and administrative support were carried out by the following ILAB staff: Christine Camillo, Christine Carlson-Ajilani, Angela Chen, Kathryn Chinnock, Marissa Cramer, Kwamena Atta Cudjoe, Lauren Damme, Lorena Dávalos, Rana Dotson, Tina Faulkner, Amy Firestone, Sonia Firpi, Mary Francis, Alexa Gunter, Sharon Heller, Margaret Hower, Maureen Jaffe, Brianna January, Malaika Jeter, Joyce YunSun Kang, Anna Lopera, Marie Ledan, Celeste Lemrow, Merima Lokvancic, Deborah Martierrez, Eileen Muirragui, Karina Noyes, Kristen Pancio, Kimberly Parekh, Angela Peltzer, Karrie Peterson, Ingris Ramos, Tanya Rasa, Brandie Sasser, Melissa Schaub, Doris Senko, Sherry Smith, Shelley Swendiman, Chanda Uluca, Jon Underdahl-Peirce, Regina van Houten, Pilar Velasquez, Cara Vileno, Pamela Wharton and Bruce Yoon.

ILAB would like to note the important contributions to the report made by Matthew Levin, Heather Filemyr, and William Stone in the Office of the Solicitor, Jay Berman in the Office of the Assistant Secretary for Policy, and Terri DeLeon in the Executive Secretariat.

Suggested Additional Resources

List of Countries Researched by ILAB in 2014

<http://www.dol.gov/ilab/reports/child-labor/list-of-goods>.

Procedural Guidelines for the Development and Maintenance of the List of Goods From Countries Produced by Child Labor or Forced Labor (*Procedural Guidelines*)

<http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=20376>.

Submissions

The Procedural Guidelines provide a process by which the public may submit comments regarding the addition or removal of an entry from the TVPRA List. ILAB has received over 100 such submissions, which are available on the Internet at: <http://www.dol.gov/ilab/submissions>.

Bibliography

A bibliography listing the sources used to place each good on the TVPRA List is found at: http://www.dol.gov/ilab/reports/pdf/2013TVPRA_Bibliography.pdf. To ensure transparency, ILAB identifies all the sources it used in making decisions.

Related Reports

U.S. Department of Labor's *Findings on the Worst Forms of Child Labor*
<http://www.dol.gov/ilab/reports/child-labor/findings/>

U.S. Department of Labor's *Reducing Child Labor and Forced Labor: A Toolkit for Responsible Businesses*
<http://www.dol.gov/ilab/child-forced-labor/>

Executive Order 13126 *List of Products Produced by Forced or Indentured Child Labor*
<http://www.dol.gov/ilab/reports/child-labor/list-of-products/>

U.S. Department of State's *Country Reports on Human Rights Practices*
<http://www.state.gov/j/drl/rls/hrrpt/>

U.S. Department of State's *Trafficking in Persons Report*
<http://www.state.gov/j/tip/rls/tiprpt/index.htm>

International Labor Organization, *Marking Progress Against Child Labour*
http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipecc/documents/publication/wcms_221513.pdf

International Labor Organization, *Hard to See: Harder to Count: Survey Guidelines to Estimate Forced Labour of Adults and Children*
http://www.ilo.org/global/publications/books/WCMS_182084/lang--it/index.htm

International Labor Organization, *Profits and Poverty: The Economics of Forced Labour* http://www.ilo.org/global/topics/forced-labour/publications/WCMS_243391/lang--en/index.htm.

This report was published by the U.S. Department of Labor. Copies of this and other ILAB reports may be obtained by contacting the Office of Child Labor, Forced Labor, and Human Trafficking, Bureau of International Labor Affairs, U.S. Department of Labor, 200 Constitution Avenue, NW, Room S-5317, Washington, D.C. 20210. Telephone: (202) 693-4843; Fax: (202) 693-4830; email: ilab-tvptra@dol.gov. The report is also available on the Internet at: <http://www.dol.gov/ilab/>. Comments on the report are welcomed and may be submitted to the e-mail address listed above.

Procedural Guidelines for the Development and Maintenance of the List of Goods From Countries Produced by Child Labor or Forced Labor



Type of Review: Extension of a currently approved collection of information.

Agency: Office of the Solicitor.

Title: Equal Access to Justice Act.

OMB Number: 1225-0013.

Affected Public: Individuals or household; Business or other for-profit; Not-for-profit institutions; Federal Government; State, Local or Tribal Government.

Number of Respondents: Varies by year; usually less than 10.

Frequency: On occasion.

Total Responses: See Number of Respondents.

Average Time per Response: 5 hours.

Estimated Total Burden Hours: 50 hours.

Total annualized capital/startup costs: \$0.

Total Annualized costs (operation and maintenance): \$0.

Comments submitted in response to this notice will be summarized and may be included in the request for OMB approval of the final information collection request. The comments will become a matter of public record.

Signed this 19th day of December, 2007.

William W. Thompson, II,

Associate Solicitor for Management and Administrative Legal Services.

[FR Doc. E7-25120 Filed 12-26-07; 8:45 am]

BILLING CODE 4510-23-P

DEPARTMENT OF LABOR

Office of the Secretary

Notice of Procedural Guidelines for the Development and Maintenance of the List of Goods From Countries Produced by Child Labor or Forced Labor; Request for Information

AGENCY: Bureau of International Labor Affairs, Department of Labor.

ACTION: Notice of procedural guidelines for the development and maintenance of a list of goods from countries produced by child labor or forced labor in violation of international standards; Request for information.

SUMMARY: This notice sets forth final procedural guidelines ("Guidelines") for the development and maintenance of a list of goods from countries that the Bureau of International Labor Affairs ("ILAB") has reason to believe are produced by child labor or forced labor in violation of international standards ("List"). The Guidelines establish the process for public submission of information, and the evaluation and reporting process to be used by the U.S. Department of Labor's ("DOL") Office of

Child Labor, Forced Labor, and Human Trafficking ("Office") in maintaining and updating the List. DOL is required to develop and make available to the public the List pursuant to the Trafficking Victims Protection Reauthorization Act of 2005. This notice also requests information on the use of child labor and/or forced labor in the production of goods internationally, as well as information on government, industry, or third-party actions and initiatives to address these problems. This information will be used by DOL as appropriate in developing the initial List.

DATES: This document is effective immediately upon publication of this notice. Information submitted in response to this notice must be received by the Office no later than March 26, 2008. Information received after that date may not be taken into consideration in developing DOL's initial List, but such information will be considered by the Office as the List is maintained and updated in the future.

TO SUBMIT INFORMATION, OR FOR FURTHER INFORMATION, CONTACT: Director, Office of Child Labor, Forced Labor, and Human Trafficking, Bureau of International Labor Affairs, U.S. Department of Labor at (202) 693-4843 (this is not a toll-free number). Information may be submitted by the following methods:

- *Facsimile (fax):* ILAB/Office of Child Labor, Forced Labor, and Human Trafficking at 202-693-4830.
- *Mail, Express Delivery, Hand Delivery, and Messenger Service:* Charita Castro or Rachel Rigby at U.S. Department of Labor, ILAB/Office of Child Labor, Forced Labor, and Human Trafficking, 200 Constitution Ave., NW., Room S-5317, Washington, DC 20210.
- *E-mail:* ilab-tvpra@dol.gov.

SUPPLEMENTARY INFORMATION: Section 105(b)(1) of the Trafficking Victims Protection Reauthorization Act of 2005 ("TVPRA of 2005"), Public Law 109-164 (2006), directed the Secretary of Labor, acting through the Bureau of International Labor Affairs, to "carry out additional activities to monitor and combat forced labor and child labor in foreign countries." Section 105(b)(2) of the TVPRA, 22 U.S.C. 7112(b)(2), listed these activities as:

(A) Monitor the use of forced labor and child labor in violation of international standards;

(B) Provide information regarding trafficking in persons for the purpose of forced labor to the Office to Monitor and Combat Trafficking of the Department of State for inclusion in [the] trafficking in persons report required by section

110(b) of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7107(b));

(C) Develop and make available to the public a list of goods from countries that the Bureau of International Labor Affairs has reason to believe are produced by forced labor or child labor in violation of international standards;

(D) Work with persons who are involved in the production of goods on the list described in subparagraph (C) to create a standard set of practices that will reduce the likelihood that such persons will produce goods using the labor described in such subparagraph; and

(E) Consult with other departments and agencies of the United States Government to reduce forced and child labor internationally and ensure that products made by forced labor and child labor in violation of international standards are not imported into the United States.

The Office carries out the DOL mandates in the TVPRA. These Guidelines provide the framework for ILAB's implementation of the TVPRA mandate, and establish procedures for the submission and review of information and the process for developing and maintaining the List. In addition to the Office's efforts under the TVPRA, the Office conducts and publishes research on child labor and forced labor worldwide. The Office consults such sources as DOL's *Findings on the Worst Forms of Child Labor*; the Department of State's annual *Country Reports on Human Rights Practices* and *Trafficking in Persons Reports*; reports by governmental, non-governmental, and international organizations; and reports by academic and research institutions and other sources.

In addition to reviewing information submitted by the public in response to this Notice, the Office will also conduct a public hearing to gather information to assist in the development of the List. The Office will evaluate all information received according to the processes outlined in these Guidelines. Goods that meet the criteria outlined in these Guidelines will be placed on an initial List, published in the **Federal Register** and on the DOL Web site. DOL intends to maintain and update the List over time, through its own research, interagency consultations, and additional public submissions of information. Procedures for the ongoing maintenance of the List, and key terms used in these Guidelines, are described in detail below.

Public Comments

On October 1, 2007, ILAB published a **Federal Register** notice of proposed procedural guidelines, requesting public comments on the proposed guidelines (72 FR 55808 (Oct. 1, 2007)). The notice provided a 30-day period for submitting written comments, which closed on Oct. 31, 2007. Written comments were received from nine parties. Several of the comments strongly supported the Department's efforts to combat child labor and forced labor. All of the comments were given careful consideration and where appropriate, changes were made to the Guidelines. The comments and any revisions to the proposed Guidelines are explained in detail below.

A. Comments Concerning the Office's Evaluation of Information

Several commenters questioned the Department's decision to consider information up to seven years old. One commenter asserted that even one-year-old information should be considered too dated to be relevant. The Department appreciates the importance of using up-to-date information. It is also the Office's experience that the use of child labor and forced labor in a country or in the production of a particular good typically persists for several years, particularly when no meaningful action is taken to combat it. Information about such activities is often actively concealed. Information that is several years old therefore can provide useful context for more current information. The Office will consider the date of all available information, and, as stated in the proposed Guidelines, "more current information will generally be given priority."

One commenter questioned how the Office would treat information on government efforts to combat the use of child labor and forced labor, stating that where a government undertakes voluntary efforts to regulate the production of goods and/or prosecutes incidents of child labor or forced labor, such government initiatives should not result in designating a particular good on the List. In response, the Office affirms the important role of government law enforcement, as well as other government, private sector, and third-party voluntary actions and initiatives to combat child labor and forced labor such as company and industry codes of conduct. However, the Office notes that some voluntary actions, as with some enforcement actions, are more effective than others. For example, some prosecutions may result in minimal or suspended

sentences for the responsible parties, and some voluntary actions by government, industry, or third parties, may be ineffective in combating the violative labor practices at issue. Accordingly, in determining whether to include a good and country on the List, the Office will consider particularly relevant and probative any available evidence of government, industry, and third-party actions and initiatives that are effective in significantly reducing if not eliminating child labor and forced labor.

Two commenters questioned why the Office would not consider confidential information in a submission, with one commenter stating that a submitter should have the option of providing information containing confidential information to the Office while also providing a redacted version for public release. In response, the Office has clarified its handling of submissions containing confidential, personal, or classified information. In the interest of maintaining a transparent process, the Office will not accept classified information in developing the List. The Office may request that any such information brought to its attention be declassified. The Office will accept submissions containing confidential or personal information, but pursuant to applicable laws and regulations may redact such submissions before making them publicly available.

B. Comments Concerning the List of Goods and Countries

Several commenters questioned why the List includes raw materials and/or components directly produced using child labor and forced labor, but not final goods made in part (indirectly produced) with such materials or components. Another commenter suggested that any final good produced indirectly with child labor or forced labor at any point in its production chain should be placed on the List, and that the List should specify where in the production chain the child labor or forced labor occurred. While the Office appreciates the importance of tracking raw materials or components produced in violation of international child labor or forced labor standards through the production chain, the difficulty of accurately conducting such tracking places it beyond the scope of these Guidelines. Ideally, the Office would have access to public information that would permit the comprehensive tracking of raw materials and component parts in the global supply chain, but the Office is unaware of any such publicly available information. Moreover, the Office is aware that many

goods used as raw materials or components in the production of other goods may be sourced from multiple locations within a country or even from several different countries.

Consequently, it would likely be extremely difficult to develop reliable information on the final destination or use of every good produced with child labor or forced labor. Inasmuch as the primary purpose of the List is to promote efforts at the country level to combat child labor and forced labor, that purpose is best served by identifying goods directly produced with child labor and forced labor. The Office observes that nothing in these Guidelines would prevent a member of the public from tracking the final destination or use of any good on the List.

Several commenters requested that the List name individual companies using child labor or forced labor, with two commenters suggesting that this practice would protect entities that do not use child labor or forced labor in their supply chains, or that might otherwise unknowingly trade in such goods. One commenter suggested that, in addition to listing goods and countries, the Office name industries using such goods. Another commenter suggested that the Office distinguish among individual factories within a country on the List, to ensure that goods not produced with child labor or forced labor are not subject to the same treatment as goods that are so produced. Another commenter suggested that the Department hold individual violators publicly accountable.

The TVPRA mandated a List of goods and countries, not company or industry names. It would be immensely difficult for the Office to attempt to track the identity of every company and industry using a good produced with child labor or forced labor. In addition, it is the Office's experience that child labor and forced labor frequently occur in small local enterprises, for which company names, if they are available, have little relevance. The Office is also aware that it is often a simple matter to change or conceal the name of a company. Consequently, the Office has concluded that seeking to track and name individual companies would be of limited value to the primary purpose of the List, which is to promote ameliorative efforts at the country level. Moreover, holding individual violators accountable would exceed the mandate of the TVPRA of 2005. However, the TVPRA of 2005 requires that the Department work with persons who are involved in the production of goods on the List to create a standard set of

practices to reduce the likelihood that such persons will produce goods using such labor. The Department intends to work with such persons once the initial List is developed.

C. Comments Concerning the Development and Maintenance of the List

One commenter suggested that the List be updated at regular intervals, and at least annually. Another commenter noted that the proposed Guidelines do not set a limit on how long a good may remain on the List, or a time period within which DOL must review the designation of a particular good. The Office anticipates that the addition, maintenance, or removal of an item on the List will be driven largely by the availability of accurate information. The Office will conduct its own research on goods produced with child labor and forced labor, and anticipates that additional information used to develop and maintain the List will be provided by the public. Consequently, the Office considers it a more efficient use of resources to re-examine goods on the List as pertinent information becomes available, rather than adhering to a fixed review schedule.

One commenter suggested that the Office provide a fixed time period within which it will decide whether to accept a submission of information. The Office has revised section B.3 of the Guidelines to remove the possibility that a submission of information will not be accepted. All submissions of information (with the exception of those containing classified information) will be accepted and evaluated for their relevance and probative value.

One commenter suggested that the Guidelines provide that the Office make a final determination whether to place a good on the List within a specific timeframe, such as within 120 days of receiving the submission. Although the Office intends to expedite its evaluation of any information submitted in response to this notice, it cannot guarantee that the Office's evaluation of a particular submission will be completed within a set timeframe. Some submissions may require further investigation by the Office, and other submissions may result in responsive submissions by other parties. Setting a fixed deadline may result in the inclusion or exclusion of a good on the List without the most comprehensive review possible.

One commenter suggested that before an entry is removed from the List, the Office should publish a notice in the **Federal Register** announcing its intention to consider removal of the

entry and giving interested parties an opportunity to comment. The Office does not intend to provide advance notice before an item is added to or removed from the List; however, if information is submitted that tends to support a change to the List, that information will be publicly available on the Office's Web site and will provide notice to the public that the status of a particular good is under review. Moreover, the Office retains the discretion to request additional information from time to time concerning a particular good; such a request will also provide notice to the public that the status of a good is under active consideration.

One commenter suggested that the Office ensure that any information indicating a possible violation of U.S. law is referred to an appropriate law enforcement agency. The Department has well-established procedures for the referral of information indicating a possible violation of U.S. laws to appropriate law enforcement agencies, and these procedures will be followed throughout the development and maintenance of the List.

D. Comments Concerning Definitions and Terms

Two commenters were concerned about the definitions of child labor and forced labor in the proposed Guidelines, questioning why they did not expressly reference International Labor Organization (ILO) conventions addressing child labor and forced labor. The commenters questioned why there were apparent differences between the definitions of terms in the proposed Guidelines and the corresponding definitions in the relevant ILO conventions. The Office has carefully considered these comments. Consequently, the definitions used in the final Guidelines have been revised to clarify that the Office will apply international standards.

Four commenters questioned the use of the terms "significant incidence" and "isolated incident" in the proposed Guidelines. One commenter raised an apparent inconsistency between the terms "significant," "prevalent," and "pattern of practice," in the proposed Guidelines' description of the amount of evidence that would weigh in favor of a finding that a particular good is produced in violation of international standards. Another commenter stated that the terms "significant" and "prevalent" provide inadequate guidance, because they do not address the percentage of workplaces in a country producing a particular good in violation of international standards, or

whether a good produced in one location represents a large or small share of a country's total exports of the good. One commenter recommended that the terms "significant" and "prevalent" be replaced with "recurring." Another commenter recommended that a more precise guideline be developed with respect to how much child labor or forced labor warrants the placement of a good on the List. One final commenter on this issue suggested that a good be removed from the List only if the use of child labor or forced labor is "insignificant," stating that that term is more precise than the terms used in the proposed Guidelines.

It is neither possible nor useful to precisely quantify the amount or percentage of child labor or forced labor that will be considered "significant," since what is considered "significant" will vary with a number of other factors. For that reason, the Guidelines provide that a "significant incidence" of child labor or forced labor occurring in the production of a particular good is only one among several factors that would be weighed before a good is added to, or removed from, the List. Other factors include whether the situation described meets the definitions of child labor or forced labor; the probative value of the evidence submitted; the date and source(s) of the information; and the extent to which the information is corroborated. The Guidelines also make clear that the Office will consider any available evidence of government, industry, and third-party actions and initiatives that are effective in significantly reducing if not eliminating child labor and forced labor. However, in response to these comments, the Office has decided to clarify the nature of the information sought by deleting the use of the term "prevalent." The Office will also change the phrase, "pattern of practice," to "pattern or practice." The suggested terms "recurring" or "insignificant" provide no additional precision.

Two commenters requested that the goods on the List be identified as specifically as possible, to avoid confusion with similar goods that have not been produced using child labor or forced labor in violation of international standards. Some commenters suggested that the List use product codes developed for the Harmonized Tariff Schedule (HTS), reasoning that the use of such codes would both provide more specificity and improve interagency consultation. The Office intends to identify all goods on the List as specifically as possible, depending on available information. However, parties submitting information on a particular

good may not have the necessary expertise to properly utilize the product codes developed for the HTS.

Another commenter suggested that the Office specifically include agricultural commodities in the definition of "goods." The Office considers that the term "goods" includes agricultural products and the definition of "produced" in the Guidelines expressly covers goods that are harvested or farmed.

Final Procedural Guidelines

A. Sources of Information and Factors Considered in the Development and Maintenance of the List

The Office will make use of all relevant information, whether gathered through research, public submissions of information, a public hearing, interagency consultations, or other means, in developing the List. In the interest of maintaining a transparent process, the Office will not accept classified information in developing the List. The Office may request that any such information brought to its attention be declassified. If submissions contain confidential or personal information, the Office may redact such information in accordance with applicable laws and regulations before making the submission available to the public.

In evaluating information, the Office will consider and weigh several factors, including:

1. *Nature of information.* Whether the information about child labor or forced labor gathered from research, public submissions, hearing testimony, or other sources is relevant and probative, and meets the definitions of child labor or forced labor.

2. *Date of information.* Whether the information about child labor or forced labor in the production of the good(s) is no more than 7 years old at the time of receipt. More current information will generally be given priority, and information older than 7 years will generally not be considered.

3. *Source of information.* Whether the information, either from primary or secondary sources, is from a source whose methodology, prior publications, degree of familiarity and experience with international labor standards, and/or reputation for accuracy and objectivity, warrants a determination that it is relevant and probative.

4. *Extent of corroboration.* The extent to which the information about the use of child labor or forced labor in the production of a good(s) is corroborated by other sources.

5. *Significant incidence of child labor or forced labor.* Whether the

information about the use of child labor or forced labor in the production of a good(s) warrants a determination that the incidence of such practices is significant in the country in question. Information that relates only to a single company or facility; or that indicates an isolated incident of child labor or forced labor, will ordinarily not weigh in favor of a finding that a good is produced in violation of international standards. Information that demonstrates a significant incidence of child labor or forced labor in the production of a particular good(s), although not necessarily representing a pattern or practice in the industry as a whole, will ordinarily weigh in favor of a finding that a good is produced in violation of international standards.

In determining which goods and countries are to be placed on the List, the Office will, as appropriate, take into consideration the stages in the chain of a good's production. Whether a good is placed on the List may depend on which stage of production used child labor or forced labor. For example, if child labor or forced labor was only used in the extraction, harvesting, assembly, or production of raw materials or component articles, and these materials or articles are subsequently used under non-violative conditions in the manufacture or processing of a final good, only the raw materials/component articles and the country/ies where they were extracted, harvested, assembled, or produced, as appropriate, may be placed on the List. If child labor or forced labor was used in both the production or extraction of raw materials/component articles and the manufacture or processing of a final good, then both the raw materials/component articles and the final good, and the country/ies in which such labor was used, may be placed on the List. This is to ensure a direct correspondence between the goods and countries which appear on the List, and the use of child labor or forced labor.

Information on government, industry, or third-party actions and initiatives to combat child labor or forced labor will be taken into consideration, although they are not necessarily sufficient in and of themselves to prevent a good and country from being listed. In evaluating such information, the Office will consider particularly relevant and probative any evidence of government, industry, and third-party actions and initiatives that are effective in significantly reducing if not eliminating child labor and forced labor.

Goods and countries ("entries") that meet the criteria outlined in these procedural Guidelines will be placed on

an initial List, to be published in the **Federal Register** and on the DOL Web site. This initial List will continue to be updated as additional information becomes available. Before publication of the initial List or subsequent versions of the List, the Office will inform the relevant foreign governments of their presence on the List and request their responses. The Office will review these responses and make a determination as to their relevance. The List, along with a listing of the sources used to identify the goods and countries on it, will be published in the **Federal Register** and on the DOL Web site. The List will represent DOL's conclusions based on all relevant information available at the time of publication.

For each entry, the List will indicate whether the good is made using child labor, forced labor, or both. As the List continues to be maintained and updated, the List will also indicate the date when each entry was included. The List will not include any company or individual names. DOL's postings on its website of source material used in identifying goods and countries on the List will be redacted to remove company or individual names, and other confidential material, pursuant to applicable laws and regulations.

B. Procedures for the Maintenance of the List

1. Following publication of the initial List, the Office will periodically review and update the List, as appropriate. The Office conducts ongoing research and monitoring of child labor and forced labor, and if relevant information is obtained through such research, the Office may add an entry to, or remove an entry from the List using the process described in section A of the Guidelines. The Office may also update the List on the basis of public information submissions, as detailed below.

2. Any party may at any time file an information submission with the Office regarding the addition or removal of an entry from the List. Submitters should take note of the criteria and instructions in the "Information Requested on Child Labor and Forced Labor" section of this notice, as well as the criteria listed in Section A of the Guidelines.

3. The Office will review any submission of information to determine whether it provides relevant and probative information.

4. The Office may consider a submission less reliable if it determines that: the submission does not clearly indicate the source(s) of the information presented; the submission does not identify the party filing the submission

or is not signed and dated; the submission does not provide relevant or probative information; or, the information is not within the scope of the TVPRA and/or does not address child labor or forced labor as defined herein. All submissions received will be made available to the public on the DOL Web site, consistent with applicable laws or regulations.

5. In evaluating a submission, the Office will conduct further examination of available information relating to the good and country, as necessary, to assist the Office in making a determination concerning the addition or removal of the good from the List. The Office will undertake consultations with relevant U.S. government agencies and foreign governments, and may hold a public hearing for the purpose of receiving relevant information from interested persons.

6. In order for an entry to be removed from the List, any person filing information regarding the entry must provide information that demonstrates that there is no significant incidence of child labor or forced labor in the production of the particular good in the country in question. In evaluating information on government, industry, or third-party actions and initiatives to combat child labor or forced labor, the Office will consider particularly relevant and probative any available evidence of government, industry, and third-party actions that are effective in significantly reducing if not eliminating child labor and forced labor.

7. Where the Office has made a determination concerning the addition, maintenance, or removal of the entry from the List, and where otherwise appropriate, the Office will publish an updated List in the **Federal Register** and on the DOL Web site.

C. Key Terms Used in the Guidelines

“Child Labor”—“Child labor” under international standards means all work performed by a person below the age of 15. It also includes all work performed by a person below the age of 18 in the following practices: (A) All forms of slavery or practices similar to slavery, such as the sale or trafficking of children, debt bondage and serfdom, or forced or compulsory labor, including forced or compulsory recruitment of children for use in armed conflict; (B) the use, procuring, or offering of a child for prostitution, for the production of pornography or for pornographic purposes; (C) the use, procuring, or offering of a child for illicit activities in particular for the production and trafficking of drugs; and (D) work which, by its nature or the

circumstances in which it is carried out, is likely to harm the health, safety, or morals of children. The work referred to in subparagraph (D) is determined by the laws, regulations, or competent authority of the country involved, after consultation with the organizations of employers and workers concerned, and taking into consideration relevant international standards. This definition will not apply to work specifically authorized by national laws, including work done by children in schools for general, vocational or technical education or in other training institutions, where such work is carried out in accordance with international standards under conditions prescribed by the competent authority, and does not prejudice children’s attendance in school or their capacity to benefit from the instruction received.

“Countries”—“Countries” means any foreign country or territory, including any overseas dependent territory or possession of a foreign country, or the Trust Territory of the Pacific Islands.

“Forced Labor”—“Forced labor” under international standards means all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily, and includes indentured labor. “Forced labor” includes work provided or obtained by force, fraud, or coercion, including: (1) By threats of serious harm to, or physical restraint against any person; (2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or (3) by means of the abuse or threatened abuse of law or the legal process. For purposes of this definition, forced labor does not include work specifically authorized by national laws where such work is carried out in accordance with conditions prescribed by the competent authority, including: any work or service required by compulsory military service laws for work of a purely military character; work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country; work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations; work or service required in cases of emergency, such as in the event of war or of a calamity or threatened

calamity, fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population; and minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives have the right to be consulted in regard to the need for such services.

“Goods”—“Goods” means goods, wares, articles, materials, items, supplies, and merchandise.

“Indentured Labor”—“Indentured labor” means all labor undertaken pursuant to a contract entered into by an employee the enforcement of which can be accompanied by process or penalties.

“International Standards”—“International standards” means generally accepted international standards relating to forced labor and child labor, such as international conventions and treaties. These Guidelines employ definitions of “child labor” and “forced labor” derived from international standards.

“Produced”—“Produced” means mined, extracted, harvested, farmed, produced, created, and manufactured.

Information Requested on Child Labor and Forced Labor

DOL requests current information about the nature and extent of child labor and forced labor in the production of goods internationally, as well as information on government, industry, or third-party actions and initiatives to address these problems. Information submitted may include studies, reports, statistics, news articles, electronic media, or other sources. Submitters should take into consideration the “Sources of Information and Factors Considered in the Development and Maintenance of the List” (Section A of the Procedural Guidelines), as well as the definitions of child labor and forced labor contained in section C of the Guidelines.

Information tending to establish the presence or absence of a significant incidence of child labor or forced labor in the production of a particular good in a country will be considered the most relevant and probative. Governments that have ratified International Labor Organization (“ILO”) Convention 138 (Minimum Age), Convention 182 (Worst Forms of Child Labor), Convention 29

(Forced Labor) and/or Convention 105 (Abolition of Forced Labor) may wish to submit relevant copies of their responses to any Observations or Direct Requests by the ILO's Committee of Experts on the Application of Conventions and Recommendations.

Where applicable, information submissions should indicate their source or sources, and copies of the source material should be provided. If primary sources are utilized, such as research studies, interviews, direct observations, or other sources of quantitative or qualitative data, details on the research or data-gathering methodology should be provided.

Information should be submitted to the addresses and within the time period set forth above. Submissions made via fax, mail, express delivery, hand delivery, or messenger service should clearly identify the person filing the submission and should be signed and dated. Submissions made via mail, express delivery, hand delivery, or messenger service should include an original and three copies of all materials and attachments. If possible, submitters should also provide copies of such materials and attachments on a computer disc. Note that security-related screening may result in significant delays in receiving comments and other written materials by regular mail.

Classified information will not be accepted. The Office may request that classified information brought to its attention be declassified. Submissions containing confidential or personal information may be redacted by the Office before being made available to the public, in accordance with applicable laws and regulations. All submissions will be made available to the public on the DOL Web site, as appropriate. The Office will not respond directly to submissions or return any submissions to the submitter, but the Office may communicate with the submitter regarding any matters relating to the submission.

Announcement of Public Hearing

DOL intends to hold a public hearing in 2008 to gather further information to assist in the development of the List. DOL expects to issue a **Federal Register** Notice announcing the hearing at least 30 days prior to the hearing date. The scope of the hearing will focus on the collection of information on child labor and forced labor in the production of goods internationally, and information on government, industry, or third-party actions and initiatives to combat child labor and forced labor. Information tending to demonstrate the presence or

absence of a significant incidence of child labor or forced labor in the production of a particular good in a country will be considered the most relevant and probative.

Signed at Washington, DC, this 20th day of December, 2007.

Charlotte M. Ponticelli,

Deputy Undersecretary for International Affairs.

[FR Doc. E7-25036 Filed 12-26-07; 8:45 am]

BILLING CODE 4510-28-P

DEPARTMENT OF LABOR

Bureau of Labor Statistics

Proposed Collection; Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c) (2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Bureau of Labor Statistics (BLS) is soliciting comments concerning the proposed revision of the "Current Population Survey (CPS)." A copy of the proposed information collection request (ICR) can be obtained by contacting the individual listed below in the **ADDRESSES** section of this notice.

DATES: Written comments must be submitted to the office listed in the Addresses section below on or before February 25, 2008.

ADDRESSES: Send comments to Amy A. Hobby, BLS Clearance Officer, Division of Management Systems, Bureau of Labor Statistics, Room 4080, 2 Massachusetts Avenue, NE., Washington, DC 20212, 202-691-7628. (This is not a toll-free number.)

FOR FURTHER INFORMATION CONTACT: Amy A. Hobby, BLS Clearance Officer, 202-691-7628. (See **ADDRESSES** section.)

SUPPLEMENTARY INFORMATION:

I. Background

The CPS has been the principal source of the official Government

statistics on employment and unemployment for over 60 years. The labor force information gathered through the survey is of paramount importance in keeping track of the economic health of the Nation. The survey is the only source of monthly data on total employment and unemployment, with the Employment Situation report containing data from this survey being a Primary Federal Economic Indicator (PFEI). Moreover, the survey also yields data on the basic status and characteristics of persons not in the labor force. The CPS data are used monthly, in conjunction with data from other sources, to analyze the extent to which, and with what success, the various components of the American population are participating in the economic life of the Nation.

The labor force data gathered through the CPS are provided to users in the greatest detail possible, in conjunction with the demographic information obtained in the survey. In brief, the labor force data can be broken down by sex, age, race and ethnic origin, marital status, family composition, educational level, and other characteristics. Beginning in 2009, a breakdown by disability status will also be possible. Through such breakdowns, one can focus on the employment situation of specific population groups as well as on general trends in employment and unemployment. Information of this type can be obtained only through demographically oriented surveys such as the CPS.

The basic CPS data also are used as an important platform on which to base the data derived from the various supplemental questions that are administered in conjunction with the survey. By coupling the basic data from the monthly survey with the special data from the supplements, one can get valuable insights on the behavior of American workers and on the social and economic health of their families.

There is wide interest in the monthly CPS data among Government policymakers, legislators, economists, the media, and the general public. While the data from the CPS are used in conjunction with data from other surveys in assessing the economic health of the Nation, they are unique in various ways. Specifically, they are the basis for much of the monthly Employment Situation report, a PFEI. They provide a monthly, nationally representative measure of total employment, including farm work, self-employment and unpaid family work; other surveys are generally restricted to the nonagricultural wage and salary sector, or provide less timely



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For more information or to contact us, please visit DOL's Web site at:
<http://www.dol.gov/ilab/reports/child-labor/list-of-goods>
or email us at: **ocft@dol.gov**

My Journey Through Madness: the Experience of Mental Illness and Its Impact on the Law

Citations

Elyn R. Saks, *The Center Cannot Hold: My Journey Through Madness* (Hachette 2007) and several foreign presses, including the UK, Italy, China, the Czech Republic, and Holland.

Elyn R. Saks, *Refusing Care: Forced Treatment and the Rights of the Mentally Ill*, University of Chicago Press, 2002

Website Link

[Elyn R. Saks, **The TED Talk, June 27, 2012**](#)

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Competency to Decide on Treatment and Research: MacArthur and Beyond

ELYN R. SAKS*
STEPHEN H. BEHNKE**

Every competent adult has the right to informed consent. These words carry with them the weight of a rich, yet troubled, history. They state a maxim of late 20th century bioethics, a maxim that was borne, in part, of horrific abuses during a holocaust without parallel in human history. While today the concept of a right to informed consent is firmly enconced in the culture of United States medicine, much work remains to be done to pour content into key elements of this right: How can it be determined when an adult's consent is "competent"? When is consent truly "informed"? And what exactly constitutes "consent"?

This article will discuss the competency of psychiatric patients in the contexts of treatment and research. Our hope is to identify areas where further normative discussion about instruments designed to assess competence—the MacArthur instruments being the premier example—will be fruitful. We first argue that any instrument designed to aid in assessing competency to consent to treatment necessarily implicates normative considerations, that is, entails identifying and balancing values. We then review the MacArthur instruments to explore their normative underpinnings. Next, we examine how the MacArthur investigators have balanced three values—autonomy, paternalism, and

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The authors wish to thank Professors Thomas Lyon and Alexander Meiklejohn for their helpful comments on an earlier draft of this paper.

nondiscrimination against the mentally ill—and suggest different ways of balancing these values against one another when doing so seems appropriate. Finally, we ask what additional normative considerations arise in the context of psychiatric research.

I. NORMATIVE JUDGMENTS IN CREATING INSTRUMENTS DESIGNED TO AID IN ASSESSING COMPETENCY

Adopting an instrument to aid in assessing competency requires careful normative analysis.¹ A critical issue is how to strike the balance between autonomy and paternalism. While bioethicists have moved beyond this dichotomy in many areas, the tension between autonomy and paternalism remains central to the assessment of competency. Indeed, standards for competency are the lines drawn between those who may exercise autonomous choices and those on behalf of whom—*over* whom—decisions will be made.

Striking the balance between autonomy and paternalism by holding that competent patients alone have the right to exercise autonomous choices is of little help. Such a tautological statement merely restates the problem: competent patients are free to make choices, while incompetent patients are not and must allow others to make choices on their behalf. One challenge in defining competency is therefore to show *where* autonomy ends and paternalism begins. Perhaps the most subtle and even important part of defining competency requires that we decide how much latitude to give the decision maker in selecting a method of decision making. Are intuitive methods adequate? Must all alternatives be compared and contrasted? How much scope will the decision maker have to select a particular version of the truth, even if that version is idiosyncratic and unpopular?

To begin our search for a definition of competency, we attempt to identify all the values at play. First, we want to protect the vulnerable who are unable to make decisions for themselves. We call this value

1. Since the writing of this article, the MacArthur researchers, Thomas Grisso and Paul Appelbaum, have published a book that bears on this critique. THOMAS GRISSE & PAUL S. APPELBAUM, *ASSESSING COMPETENCE TO CONSENT TO TREATMENT* (1998) [hereinafter *ASSESSING COMPETENCE*]. In this book, the researchers lay out the kind of normative analysis that an individual must undertake in using the instrument they have designed to assess competency in a treatment setting. See *infra* note 5. Grisso and Appelbaum point out that a competency judgment must balance autonomy and paternalism, and that the balance may change depending upon the consequences of deciding one way or the other. This paper attempts to contribute to the discussion over the values at stake in assessing competency.

“paternalism.” Paternalism requires that we ask what abilities are essential for making decisions, so that we can determine when those abilities are lacking. Second, we want to protect the right to make choices, even when those choices are unconventional and stray from commonly held beliefs, views, and desires. We call this value “autonomy.” Finally, we must be mindful what mental health professionals—particularly psychoanalysts, have discovered—namely, that irrationality permeates decision making. As examples, people commonly misunderstand statistics, overvalue vivid memories, and form distorted beliefs about their doctors.² Our knowledge of the pervasive irrationality that governs decision making—indeed, that governs all human activities—serves as reason for extreme caution. We must be careful not to label as incompetent individuals with a mental illness who suffer no more irrationality in the relevant regard than many, if not most, other people. Not to heed this caution is to risk stigmatizing the mentally ill. Here is our third value, “nondiscrimination.”

Our definition of competency must be founded upon a clear conception of how autonomy, paternalism, and nondiscrimination work together and are weighed against one another. Clarity about what values are at play and how those values work together is the watch word. Concretely, we must first justify *which* abilities competency requires and what *level* of these abilities must be present. Thus, the researcher must ask: are *these* abilities, with *this* level of performance, really necessary, and if so, why? Conversely, might an ability be desirable, but inessential, much as speaking a foreign language with a good accent is not essential to basic communication? Deeming a particular skill helpful is also not necessarily definitive to making a decision. Other questions arise: Will requiring this skill for competency tread too greatly on autonomy? And if the absence or impairment of a skill is widespread, do we risk discrimination by requiring this skill only of the mentally ill? In short, defining competency is a thoroughly normative endeavor.³

2. See, e.g., SIGMUND FREUD, *PSYCHOPATHOLOGY OF EVERYDAY LIFE* (1901); JAY KATZ, *THE SILENT WORLD OF DOCTOR AND PATIENT* (1984); Daniel Kahneman, *New Challenges to the Rationality Assumption*, 150 *J. INSTITUTIONAL & THEORETICAL ECON.* 18 (1994); Donald A. Redelmeier et al., *Understanding Patients' Decisions: Cognitive and Emotional Perspectives*, 270 *JAMA* 72 (1993); Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 *J. BUS.* S251 (1986).

3. We do not mean to suggest that choosing a competency standard is *completely* normative, just that it is *in large part* normative. Choosing such a standard also depends on empirical findings—such as what impairments lead to substandard decisions, what

II. THE MACARTHUR INSTRUMENTS

The premier work on competency to make treatment and research decisions has been produced by the MacArthur network on law and mental health.⁴ The work of the MacArthur researchers, in particular Paul Appelbaum and Thomas Grisso, has been impressive indeed. The MacArthur researchers have developed three research instruments and one instrument designed for use in direct care settings. The instruments have achieved high reliability, can be administered with relative ease, and have been studied in interesting and informative ways.⁵ The

abilities people actually use when they are deciding, and how psychiatric impairments can affect the ability to make a decision.

4. The literature contains studies of only a few other treatment capacity/competency instruments. See, e.g., C. Dennis Barton, Jr. et al., *Clinicians' Judgment of Capacity of Nursing Home Patients to Give Informed Consent*, 47 *PSYCHIATRIC SERVICES* 956 (1996) (using Hopkins Competency Assessment Test [HCAT]); Jeffrey S. Janofsky et al., *The Hopkins Competency Assessment Test: A Brief Method for Evaluating Patients' Capacity to Give Informed Consent*, 43 *HOSP. & COMMUNITY PSYCHIATRY* 132 (1992) (utilizing the HCAT); Gary N. Sales, *Assessing Competency*, 43 *HOSP. & COMMUNITY PSYCHIATRY* 646 (1992) (discussing article on HCAT); Michael Lavin, *Assessing Competency*, 43 *HOSP. & COMMUNITY PSYCHIATRY* 646-47 (1992) (discussing same); Jay Englehart, *Assessing Competency*, 43 *HOSP. & COMMUNITY PSYCHIATRY* 647 (1992) (discussing same); Graham Bean et al., *The Assessment of Competence to Make a Treatment Decision: An Empirical Approach*, 41 *CAN. J. PSYCHIATRY* 85 (1996) (evaluating the Competency Interview Schedule [CIS]); Graham Bean et al., *The Psychometric Properties of the Competency Interview Schedule*, 39 *CAN. J. PSYCHIATRY* 368 (1994) (evaluating CIS); Daniel C. Marson et al., *Cognitive Models That Predict Physician Judgments of Capacity to Consent in Mild Alzheimer's Disease*, 45 *J. AM. GERIATRICS SOC'Y* 458 (1997) (testing of Alzheimer patients based on vignette procedure intended to identify incompetency based on Roth, Meisel, and Lidz' discussion of different standards in *Tests of Competency to Consent to Treatment*, 134 *AM. J. PSYCHIATRY* 279 (1977)); Daniel C. Marson et al., *Neuropsychologic Predictors of Competency in Alzheimer's Disease Using a Rational Reasons Legal Standard*, 52 *ARCHIVES OF NEUROLOGY* 955 (1995) (using same instrument); Daniel C. Marson et al., *Toward a Neurologic Model of Competency: Cognitive Predictors of Capacity to Consent in Alzheimer's Disease Using Three Different Legal Standards*, 46 *NEUROLOGY* 666 (1996) (using same instrument); Daniel C. Marson et al., *Determining the Competency of Alzheimer Patients to Consent to Treatment and Research*, 8 *ALZHEIMER DISEASE & ASSOCIATED DISORDERS* 5 (Supp. 1994) (discussing the same instrument); Atsuko Tomoda et al., *Validity and Reliability of Structured Interview for Competency Incompetency Assessment Testing and Ranking Inventory*, 53 *J. CLINICAL PSYCHOL.* 443 (1997) (evaluating Structured Interview for Competency and Incompetency Assessment Testing and Ranking Inventory [SICIATRI]). The MacArthur instruments appear to be the most carefully constructed, best studied, and most discussed instruments in the literature.

5. The MacArthur researchers have written a number of articles describing the development of the three MacArthur research instruments and the treatment competence instrument (the MacCAT-T), as well as their application to patient populations and

MacArthur instruments will undoubtedly be the “gold-standard” for assessing competency for many years to come.

The three MacArthur research instruments are: (1) the Understanding Treatment Disclosures instrument (UTD), which measures understanding;⁶ (2) the Perceptions of Disorder instrument (POD),

matched controls. See, e.g., Paul S. Appelbaum & Thomas Grisso, *The MacArthur Treatment Competence Study. I: Mental Illness and Competence to Consent to Treatment*, 19 LAW & HUM. BEHAV. 105 (1995); Thomas Grisso et al., *The MacArthur Treatment Competence Study. II: Measures of Abilities Related to Competence to Consent to Treatment*, 19 LAW & HUM. BEHAV. 127 (1995) [hereinafter *MacArthur I*]; Thomas Grisso & Paul S. Appelbaum, *The MacArthur Treatment Competence Study. III: Abilities of Patients to Consent to Psychiatric and Medical Treatments*, 19 LAW AND HUM. BEHAV. 149 (1995); Thomas Grisso & Paul S. Appelbaum, *Comparison of Standards for Assessing Patients' Capacities to Make Treatment Decisions*, 152 AM. J. PSYCHIATRY 1033 (1995); Jessica Wilen Berg et al., *Constructing Competence: Formulating Standards of Legal Competence to Make Medical Decisions*, 48 RUTGERS L. REV. 345 (1996) [hereinafter *Constructing Competence*]; Paul S. Appelbaum & Thomas Grisso, *Capacities of Hospitalized, Medically Ill Patients to Consent to Treatment*, 38 PSYCHOSOMATICS 119 (1997) [hereinafter *Hospitalized*]. They have also recently published a book on the MacCAT-T. See ASSESSING COMPETENCE, *supra* note 1. They have an article in press on the application of their instruments to the research context. See Jessica Wilen Berg & Paul S. Appelbaum, *Subjects' Capacity to Consent to Neurobiological Research*, in ETHICAL ISSUES IN PSYCHIATRIC RESEARCH: A RESEARCH MANUAL ON HUMAN SUBJECTS PROTECTION (Harold Alan Pincus et al. eds., forthcoming 2000) [hereinafter *Subjects' Capacity*]. Finally, considerable literature discusses the MacArthur instruments, most notably the articles in volume 2 of PSYCHOLOGY, PUBLIC POLICY, AND LAW EXPLORING A SPECIAL THEME: A CRITICAL EXAMINATION OF THE MACARTHUR TREATMENT COMPETENCE STUDY: METHODOLOGICAL ISSUES, LEGAL IMPLICATIONS, AND FUTURE DIRECTIONS. See 2 PSYCHOL. PUB. POL'Y & L. (1996).

6. The best way to understand the MacArthur instruments is to look at their manuals. For the UTD, see THOMAS GRISSO & PAUL S. APPELBAUM, MANUAL FOR UNDERSTANDING TREATMENT DISCLOSURES (1992) (unpublished manual available from authors). The UTD measures the subject's understanding of treatment disclosures about the illness he or she suffers from and its treatment. Form disclosures were devised for schizophrenia, depression, and ischemic heart disease (angina). Each disclosure, using language understandable at the junior high level, consists of five simple paragraphs briefly describing the illness and its treatment.

The first paragraph focuses on the illness itself, as well as on two common symptoms of the illness (“Schizophrenia is a mental disorder. People with schizophrenia often have unpleasant experiences, called symptoms. For example, they . . . may hear voices talking about what they are doing, even when there are no other people around.”). *Id.* at 24. The second paragraph discusses treatment, how it is administered, and what is required of the patient for treatment to be effective (“Fortunately, schizophrenia can be treated with medicine. . . . But if patients stop taking this medicine, their symptoms may come back.”). *Id.* The third examines the potential benefits of the treatment (“The medicines used to treat schizophrenia help many patients to think more clearly. They often stop the

which measures one's appreciation of disclosures about illness and treatment as they apply to one's own situation;⁷ and (3) the Thinking

frightening voices that some patients with schizophrenia hear.”). *Id.* The fourth paragraph notes the potential side-effects of the treatment (“[T]he medicine might make patients restless or cause their muscles to tighten up.”). *Id.* The fifth paragraph considers alternatives, benefits of the alternatives, and potential problems with the alternatives (“There is also psychotherapy [to help treat schizophrenia]. . . . This talking therapy may help patients better understand themselves and their feelings. But psychotherapy alone does not usually help with schizophrenia by itself. . . . [it] is most helpful when the patient is also taking medicine.”). *Id.*

The UTD is administered in three forms. First, the patient is read the entire disclosure and asked to paraphrase what has been said (with questions prompting him if need be). Second, the patient is then read each element of the disclosure format again and asked, after each element, whether a statement read is “the same as or different from” what has been said.

Patients receive points depending on how much they have remembered and (presumably) understood. For example, if two symptoms of schizophrenia have been disclosed, a patient will receive a full score on that issue if he or she repeats or paraphrases those two symptoms. The patient will also receive a maximum score (but no additional points) if he or she includes those two but adds others that were not disclosed to him or her. The patient will receive no credit if he or she remembers none of the symptoms or if he or she brings up other symptoms—even if they are bona fide symptoms of schizophrenia—that he or she did not hear in the disclosure and he or she fails to name disclosed items.

7. The POD measures people's appreciation of their illness and its treatment. The POD requires that one apply general information to one's own situation. There are two subtests, the Non-Acknowledgment of Disorder (NOD) subtest and the Non-Acknowledgment of Treatment Potential (NOT) subtest. The NOD measures the patient's failure to acknowledge his or her diagnosis, the severity of his or her condition, or the symptoms he or she has been demonstrating. “Objective” measures of these three are provided by the diagnosis given in the patient's medical chart, the severity of his or her symptoms as measured by the Brief Psychiatric Rating Scale, and the symptoms recently reported in his or her medical chart.

The NOT measures patients' failure to acknowledge the potential value of treatment for their illnesses even when successful treatment is likely. It focuses on the extent to which patients believe (1) any treatment might be of benefit to them, (2) medication specifically might benefit them, and (3) the course of improvement is likely to be lessened absent treatment. If patients fail to acknowledge the potential benefits of treatment, they are provided a hypothetical premise that logically nullifies their reasoning (*e.g.*, “imagine that a doctor tells you that there is a medication that has been shown in research to help 90% of people with your problem, *even people who had not gotten better with any other medication*). Non-acknowledgment is scored only if the patient fails to acknowledge the potential benefits of treatment under the hypothetical condition. The NOT does not assess whether patients would agree to the medication—just whether they believe it might be of possible benefit.

There are three additional elements of the POD that have been included for exploratory reasons only. These items assess patients' acknowledgment of potential side-effects of medication generally, their perceptions of the beneficence of the hospital staff, and their perceptions of their own need for hospitalization.

Rationally About Treatment instrument (TRAT), which measures one's reasoning skills as one decides about a hypothetical treatment dilemma based on one's own condition.⁸ A subset of the TRAT measures one's

See Paul S. Appelbaum & Thomas Grisso, *Manual for Perceptions of Disorder (POD)* (1992) (unpublished manual available from authors).

8. The TRAT measures patients' ability to think rationally about treatment. The instrument gives a vignette including information about a disorder, various treatment alternatives, and their probable risks and benefits. It then asks the subject to recommend one of the treatments to a friend with the relevant illness and to describe the reasons for the selection. The patient's reasoning is scored for various cognitive activities that are considered important to making a decision. A second set of procedures examines more formal cognitive functions relevant to decision making.

The cognitive functions identified are Seeking Information (tendency to seek information beyond what is provided), Consequential Thinking (consideration of consequences of treatment alternatives), Comparative Thinking (simultaneous processing of information about two treatment alternatives, such that they are considered in relation to each other), Complex Thinking (attention to the full range of treatment alternatives), and Generating Consequences (generation of potential real-life consequences of the liabilities described in the informed consent disclosure, such as how a side-effect of medication might affect job performance). The TRAT measures three additional cognitive functions independent of the vignette: Weighting Consequences (tendency for consistent application of preferences), Transitive Thinking (assessment of relative quantitative relationships between several alternatives based on paired comparisons), and Probabilistic Thinking (ability to distinguish correctly the relative values of percentage probabilities). The abilities measured by the TRAT were derived from discussions in the literature on essential reasoning abilities.

The vignette abilities are scored by presenting the vignette to the patient, asking him or her if he or she needs further information, and asking him or her to choose one of the alternatives and give him or her reasons for doing so. The patient is then asked for further reasons, as well as for his or her least preferred choice and his or her reasons for his or her preferred choice. Scoring occurs by seeing how many of the kinds of cognitive operations identified earlier occur. For instance, did the patient compare risks and benefits of the alternatives with each other? The three further abilities (weighting consequences, transitive thinking, and probabilistic thinking) are scored by presenting the patient with a series of questions that tap into those abilities. For instance, to test Probabilistic Thinking the patient is told that some event has a 90% probability of occurring and is then asked if he or she thinks it likely to occur.

Finally, the TRAT has a question that measures the patient's ability to Express a Choice. A full score is received if the patient unambiguously chooses an option, and partial credit is received if the patient initially chooses two or no alternatives, but then chooses one alternative during a "repeat" inquiry.

Early indications are that two of the cognitive operations—Weighting Consequences and Seeking Information—are frequent outliers, and when factor analyses are performed with these subscales removed, they produce two very consistent factors; Consequential, Comparative, and Complex Thinking on the one hand, Transitive and Probabilistic Thinking together with Generating Consequences on the other. *See* THOMAS GRISSE &

ability to express a choice. Appelbaum and Grisso have designed these instruments to comport with standards of legal competency found in case law and statutes⁹ and are careful to distinguish between capacity and competency. "Capacity" refers to abilities relevant to performing a task, while "competency" is a legal judgment that one has sufficient abilities to perform the task. Appelbaum and Grisso have designed their instruments to measure *capacities*.¹⁰ A subject is "impaired" when he or she scores two standard deviations below the mean of those studied.¹¹

The MacArthur researchers have recently designed a treatment capacity instrument to be used for actual evaluations rather than for research purposes (the MacArthur Competence Assessment Tool-Treatment, or MacCAT-T).¹² The MacCAT-T incorporates many of the questions found in the research instruments, yet is more efficient to administer and is tailored to the individual's particular situation. The investigators are careful to say that MacCAT-T scores do not determine competency.¹³ Clinical judgment is required to make a definitive finding. The authors suggest that the MCAT-T be used in conjunction with a clinical evaluation that takes into account such things as contextual variables.

The results of the MacArthur research are intriguing. The most important is that a significant proportion of patients and nonpatients in all categories scored in the non-impaired range, although the schizophrenic patients did the least well. "Impaired" was defined as two standard deviations below the mean for the aggregate of everyone studied, patients and nonpatients alike. Given this definition,

PAUL S. APPELBAUM, *MANUAL FOR THINKING RATIONALLY ABOUT TREATMENT* (1993) (unpublished manual available from authors).

9. See, e.g., *Constructing Competence*, *supra* note 5, at 363; *Hospitalized*, *supra* note 5, at 121; *MacArthur I*, *supra* note 5, at 108.

10. See, e.g., *ASSESSING COMPETENCE*, *supra* note 1, at 11.

11. See, e.g., *Constructing Competence*, *supra* note 5, at 373. This paper uses the terms "competency," "capacity," and "impaired" in the same way as do Berg, Appelbaum, and Grisso.

12. THOMAS GRISSO & PAUL S. APPELBAUM *MACARTHUR COMPETENCE TOOL-TREATMENT (MCCAT-T)* (1995) (unpublished manual available from authors). The MacCAT-T is a streamlined version of the MacArthur research instruments which aggregates all three research instruments (the UTD, POD, and TRAT). The evaluator is required to personalize the questions to the patient's particular situation. There is a greater effort than in the research instruments to try to determine the bases for the patient's answers, counting as impaired only answers based on considerations that appear grossly to distort reality. The researchers do not offer standardized means of determining what constitutes impairment. Rather, according to the MCAT-T the evaluator uses clinical judgment in determining which responses are impaired.

13. See, e.g., *id.*

approximately 25% of the schizophrenic patients scored in the impaired range on each of the three principal instruments, and approximately 50% scored as impaired when the scores on the different instruments were aggregated. (This means, of course, that 50% of the schizophrenic patients scored in the *nonimpaired* range when the scores were aggregated.)¹⁴

The second important finding of the study was that the three different instruments seemed to be picking out different patients. While scores on the UTD and the TRAT correlated well, scores on the POD did not correlate with scores on either the UTD or TRAT. The researchers conclude that because the research instruments pick out different groups of people as impaired, all should be incorporated in the MacCAT-T.

In terms of setting an actual standard for competency, the researchers consider two alternatives. The first is to use a fixed level of performance as a basis for a finding of competency—such as understanding, appreciating, and reasoning about 75% of the information provided. The second way of setting a standard is to vary the level of ability required based upon the net balance of expected benefits and risks of the patient's choice compared to the alternatives (i.e., more capacity is required for decisions when the risks are greater). The researchers suggest that they prefer the latter.¹⁵

III. CHALLENGES TO THE MACARTHUR RESEARCH

The MacArthur instruments are based upon normative choices. A challenge to the MacArthur studies is to explain and justify these choices in a more detailed manner than has been done to date. Consider the

14. The researchers noted that their study likely understated the rate of impairment, because the most disturbed patients were not deemed suitable for participation. Yet, this point is not entirely clear. The study looked only at recently hospitalized patients who were likely to be in the throes of the most acute phase of their illness. Later in their hospital stay their capacities may have improved. And a study evaluating schizophrenics in different settings, such as day hospitals, community mental health centers, and group homes, might well have found a higher percentage of schizophrenic patients scoring in the nonimpaired range. These patients, of course, also have to make treatment decisions. Insofar as schizophrenia is a chronic illness, studying schizophrenics' decision making abilities should include schizophrenic patients in a variety of settings, across a variety of times. In short, many patients—even those with the most severe psychiatric disorder—may be capable of making their own decisions.

15. See *infra* note 16.

following three areas that merit further normative discussions. First, the MacArthur researchers pick out certain capacities for their instruments to measure and label specific levels of these capacities “impaired.” Clearly, the researchers have deemed the chosen capacities relevant to competency and have determined that a certain level of the capacities—or their absence—is significant and should be considered in assessing competency. Next, the MacArthur researchers suggest that we should adopt a variable competency standard so that choices with a higher potential cost would require a higher level of competency.¹⁶ Finally, the MacArthur researchers point out that the three main research instruments seem to be picking out different populations of patients, so that a treatment capacity instrument (the MacCAT-T) should aggregate the three measures. This judgment presupposes that all the skills measured by the three instruments are important to competency—a claim that merits further attention.¹⁷

Below we examine the MacArthur instruments in more detail. We first identify the abilities identified as essential to competency and then examine the extent to which the specific instruments protect all the values implicated in defining competency.

IV. EVALUATING SPECIFIC RESEARCH INSTRUMENTS

The MacArthur research instruments are designed to measure capacities relevant to the assessment of competency. The capacities measured by the instruments are: 1) pure comprehension of relevant information (the UTD);¹⁸ the ability to assess evidence and form appropriate beliefs about that information (the POD);¹⁹ the ability to

16. See, e.g., *Constructing Competence*, *supra* note 5, at 385-87; ASSESSING COMPETENCE, *supra* note 1, at 127-48.

17. See, e.g., *Constructing Competence*, *supra* note 5, at 380-81. The authors suggest that there are *empirical* grounds to aggregate the standards because they pick out different groups. Aggregating the standards also raise a *normative* consideration, however, given that the standards pick out different groups. The normative consideration speaks to whether we think the capacities judged are important to competency.

18. By “pure comprehension” we mean grasping the meaning of what is said without necessarily believing what one has grasped. See Elyn R. Saks, *Competency to Refuse Treatment*, 69 N.C. L. REV. 945, 952-56 (1991).

19. The MacArthur’s UTD and POD incorporate more than merely the distinction between pure understanding and formation of beliefs. This distinction, however, between pure understanding and formation of beliefs, is an important aspect of the distinction drawn between what the UTD and POD measure. Elyn R. Saks & M. Litt, *Competency to Decide on Treatment and Research: The MacArthur Capacity Instruments*, in 2 NAT’L BIOETHICS ADVISORY COMM’N, RESEARCH INVOLVING PERSONS

reason with that information (the TRAT); and the ability to evidence a choice (subset of the TRAT). All of these abilities can be normatively justified as necessary for competent decision making.

Pure comprehension or understanding of relevant information is essential to competence. Imagine being asked to make an important decision, the implications of which are described in a foreign language. One is simply not in a position to decide. Pure understanding, then, is a clear prerequisite for competency.²⁰

Pure understanding, while necessary, is not sufficient. The ability to assess evidence and form appropriate beliefs is also necessary. MacArthur's inclusion of this ability in its capacity instruments makes eminent sense. Because making a decision in one's best interests requires assessing how those interests are likely to be affected, the patient must be able to form adequate beliefs in order to be a competent decision maker.²¹

In addition to pure understanding and the ability to assess evidence and form appropriate beliefs, one also must be able to reason with some degree of intactness. Reasoning allows one to put together the relevant information one has purely understood and, having assessed, has formed beliefs about. Consider the following. A person desires *x* and wants to obtain *x*. She believes that *y* is the way to get *x* and knows that *not*

WITH MENTAL DISORDERS THAT MAY AFFECT DECISIONMAKING CAPACITY 59 (1999).

20. Consider as well the following thought experiment. John, a captive, is forced, on pain of death, to decide between two contraptions. One of the contraptions will torture him and the other will grant his every wish. John cannot tell from looking at the contraptions what they will do, and he cannot understand his captors' explanation of them because they speak a foreign language that he does not understand. It seems plausible to say that John is incompetent to decide between the two contraptions—with one reservation. We may want to reserve the term "incompetent" for people who are not simply ignorant. Although well-known philosophers have justified paternalism in the face of ignorance (recall, e.g., John Stuart Mill's example of stopping a person from crossing an unsafe bridge in JOHN STUART MILL, *ON LIBERTY* 97-98 (Alburey Castell ed. 1947)), the law may prefer to reserve the term "incompetent" for those who lack abilities, perhaps as a function of their mental illness, rather than those who simply lack knowledge. Whatever we decide in the real world, surely most people would want, in our example above, to be disabled from deciding for themselves, and to have benign and knowledgeable others decide for them.

21. Decisions are based on desires and beliefs: One desires *x*, and believes that *y* is the way to get *x*, and thus one decides to do *y*. A deficiency in one's beliefs may therefore severely affect one's decision making capacity. One forms beliefs as a result of assessments of the evidence, so that the skill tapped here is the ability to assess evidence. This skill is clearly needed in some degree or another for competency.

doing y will guarantee *not* getting x. If she then concludes *not* to do y on the basis of deficient reasoning, her choice not to do y is not a competent choice. The MacArthur instruments rightly contain a measure of reasoning.

Finally, should making known (i.e., conveying to another) one's choice be considered a necessary skill for making a competent choice? It could reasonably be argued that making a choice known is not necessary to make a competent choice.²² Nevertheless, *assessing* competency requires the communication of a choice that can then be assessed. Thus, the subtest in the MacArthur instruments measuring the ability to communicate a choice is justified.

The MacArthur instruments identify and assess abilities necessary and helpful in making decisions: understanding relevant information; assessing the evidence and forming appropriate beliefs about it; reasoning about the evidence with a degree of intactness; and communicating a choice. As such, the MacArthur Instruments are clearly sensitive to ensuring that vulnerable patients have the skills required to make important choices. In a word, the instruments safeguard the value of paternalism. How do the instruments factor in the values of autonomy and nondiscrimination?

A. *The UTD and TRAT*

The UTD is an impressive instrument. It spells out items of information that patients ought to understand, explains the information with a simple vocabulary, and tests understanding of the information in several different ways in order to allow patients full scope to demonstrate what they have learned. We would like to raise the question of whether the manner in which the UTD assesses pure understanding requires too high a price in the way of autonomy.

Consider that the UTD does not give credit for information patients give about their disease over and above what is recited in the UTD. Thus, a patient receives no points if she mentions real symptoms that were not part of the disclosure. The UTD's treatment of extra-disclosure information makes sense up to a point. It is important to assess whether the patient is able to listen and understand what he or she has been told.

22. Consider, for example, a man who is paralyzed and unable to communicate. He may very well decide after careful consideration that he would like some procedure done. Suppose that by any (other) measure we could formulate he would be deemed competent. Does his inability to say what he wants make him incompetent? Not necessarily, insofar as we distinguish between *making* and *communicating* a choice. Of course, one can only *assess* a choice if that choice has been communicated.

Absent this ability, a patient cannot assimilate (and eventually assess) information relevant to his or her decision. On the other hand, respect for unconventionality—and so autonomy—might counsel allowing the patient completely to diverge from what has just been read, provided the patient recites *true* information about the relevant illness. Patients may get just as good information—or better information for their situation—from other sources. Perhaps they should be entitled to choose what information is important to them about their illness, as long as they understand *that* information. Indeed, given the patient's unique symptomatology, he or she may have better information relevant to his or her particular decision than that which the researcher has provided. What may be most salient about schizophrenia to the patient, for instance, may not be the voices mentioned in the disclosure, but the disorganization of his or her thinking process. That is what the patient recites as a symptom of schizophrenia. By slight alterations in the UTD, we might be able both to protect the vulnerable and to further promote their autonomy.

The TRAT does an impressive job in identifying and testing reasoning abilities necessary for competency. Just as with the UTD, however, a question can be raised concerning whether the TRAT requires too high a price in terms of protecting other values. The TRAT runs this risk in two ways: First, it may sometimes require abilities that do not really add to the individual patient's decision making process, and second, it may underestimate how often the cognitive processes deemed essential for competency are actually occurring.

Assessing the ability to reason is essential to assessing competency. Yet, how much reasoning ability should be required? It is unclear that pure or pristine reasoning plays an essential role in *all* effective decision making. Intuitive and idiosyncratic processes may actually improve decision making in certain instances (consider cases in which people dream of solutions to difficult mathematical problems, or police officers who solve a case on a "hunch"). Perhaps more important, even generally effective decision makers who indisputably have the ability to form accurate beliefs misuse statistics, misunderstand probabilities, and accord undue weight to vivid examples. They may also be profoundly affected by irrational and unconscious factors. Unless we are willing to declare most people incompetent, declaring only the mentally ill who lack reasoning skills incompetent risks unjustifiably discriminating against individuals on the basis of mental illness.

While the TRAT does seem to require the presence of only basic

abilities (e.g., in testing the understanding of probabilities, it requires only the understanding of a grossly obvious inference), it must also attempt to justify giving better scores for showing *more* abilities. A particular decision, for instance, may involve only two alternatives. In such a case, the relevance, say, of transitive thinking or complex versus comparative thinking may not be pertinent. More important, a patient might not engage in many of these cognitive functions because, for her, one consideration is decisive. As an example, she may so disvalue a risk of one of the alternatives that thinking consequentially is all she needs to do to choose between two alternatives. Thus, the patient's autonomy may be undervalued.

Another challenge to the TRAT is its requirement that one *evidence* (indicate the presence of) all of these other functions—functions that may be occurring at an implicit level. For instance, a woman who says “I want x and not y because I am terribly frightened of the significant seizure risk carried by y—my father died in a car accident as a result of a seizure when I was three” will often have gauged that x does not carry such a seizure risk (or anything equally aversive to the patient). She may well have done so and may simply not *say the words* “and I have compared x to y and x does not have any such abhorrent consequences to me.” In this case, she would not receive full credit on the TRAT. Perhaps instead of simply asking for reasons, the patient, once having given a reason, should be asked *directly* if she compared y to x and, if so, what in the comparison led to her choice. By possibly overlooking the patient's acceptable reasons for her choice, the TRAT may unnecessarily tread upon her autonomy.

B. *The POD*

The POD taps the ability to assess evidence. As a consequence, it examines the quality of the patient's beliefs. Deciding what beliefs a patient must have to be deemed competent is a precarious endeavor indeed.

Accurate beliefs about the world are essential to competency, because decisions take effect in the world. Yet consider the following points. First, more often than we like to think, whether a belief is true is an open question. Very few beliefs are indisputable. As a consequence, requiring particular beliefs may not further our interest in protecting the vulnerable; if the belief we require is wrong, the patient is in no better position to decide. Freedom includes freedom to decide what is *true* no less than what is *good*. If we require particular beliefs, we prevent the patient from pursuing the truth according to his or her own lights. While

limits should be placed on what a patient can believe, too stringent limits severely curtail patients' freedom to be unconventional in their pursuit of truth. Moreover, many people have distorted beliefs that form the bases for their decisions. We risk discriminating against the mentally ill if we hold schizophrenics not competent on the basis of beliefs held by other, presumptively competent decision makers. Thus, too strictly assessing beliefs may infringe upon autonomy and nondiscrimination without offering clear protection to the vulnerable. How does the POD balance these three values?

The POD appears to require that patients believe what their doctors believe about their illness and treatment. A lower score is given on the POD for a patient who denies that he or she is ill, disagrees with the diagnosis given by his or her treater, or is more pessimistic about his or her prognosis than the treater. A subset of the POD, the NOD (Non-Acknowledgment of Disorder) measures appreciation of one's illness. The patient receives a full score if he or she accepts the diagnosis the doctor has provided, judges the illness as severe as a particular measure of symptom severity does, and accepts the symptoms reported in the chart. A second subset of the POD, the NOT (Non-Acknowledgment of Treatment Potential), measures acknowledgment of treatment potential. The NOT requires one to accept a good prognosis when treatment and medication exist for the condition, and a worse prognosis without treatment.²³

Two challenges can be raised to the NOD. First, a doctor may be wrong about a patient's diagnosis. The reliability and validity of psychiatric diagnoses are often in doubt. Doctors often disagree about diagnoses, and sometimes disagree about the category of illness (e.g. psychotic disorder vs. mood disorder vs. personality disorder) and about whether a patient even has a significant illness. Put another way, the NOD is limited by the reliability and validity of psychiatric diagnosis. While the patient may be quite willing to believe an earlier doctor's diagnosis or even that he or she is seriously ill, the patient is counted as impaired by the NOD if he or she disagrees with this particular diagnosis.²⁴

23. If the patient has reasonable grounds to disagree with the doctor's judgment, a hypothesis nullifying his or her premise is presented, and he or she is again asked his or her beliefs. ("Imagine that a doctor tells you there is a medication that has been shown in research to help 90% of people with your problem, *even people who had not gotten better with any other medication.*").

24. The patient is told what diagnosis he or she has been given and then is asked

Second, the NOD asks whether the patient rates his or her symptoms as severe as the Brief Psychiatric Rating Scale (BPRS) does. A deviation from the BPRS counts against the patient. Yet, a response that diverges from the BPRS is not necessarily a profound distortion of reality. Moreover, the NOD is limited to the extent that the severity ratings of the BPRS are not highly reliable or valid.²⁵

A challenge to the NOT is that doctors may simply be wrong about one's *particular* likelihood of benefiting from treatment and deteriorating without treatment. For instance, some patients may become demoralized and depressed at the need to take medication. Some of these patients may give up, stop trying to get better, just as some patients may regress in hospitals and never want to leave. It may be clear how patients on average do with and without a particular treatment—but averages don't speak to this particular patient, who may be *right* that he will be in the 10% that do not respond to a treatment.²⁶ Because no one can predict the future with complete confidence, it may be problematic to require patients to form beliefs about a particular outcome they will experience in the future. Asking patients to understand what happens generally makes sense; asking them to believe that the general rule will apply to them is a more complicated affair.²⁷

whether he or she agrees with this diagnosis. If the patient strongly or probably disagrees with the diagnosis, he or she receives a “zero” (as opposed to a “one” or “two”) on that item. The POD asks not only whether your doctor thinks you have this illness, but whether you think you have this illness as well. Because there are six parts of the POD (three for denial of illness and three for disagreement about prognosis with and without treatment), denial of illness alone would probably not render one incompetent, although it might render one “impaired.”

25. The third measure of the NOD seems less of a challenge to the value of autonomy. It asks whether patients acknowledge the presence of symptoms mentioned in their chart. Many of these symptoms will be grossly demonstrable. If a patient denies that he or she has just been frenetically pacing, or hasn't slept in days, he or she is severely distorting reality. Some symptoms, on the other hand, involve more interpretation. Is the patient agitated? Maybe not for him or her. Still other symptoms essentially duplicate the illness question, such as whether the patient is experiencing hallucinations or delusions (as opposed to asking whether the patient is seeing or hearing things that are not really there, or believing things that others don't believe). Alternatives should be considered to framing the question in terms of whether the patient is experiencing “delusions” or “hallucinations.”

26. In the MacCAT-T, the MacArthur researchers allow a patient to get a full score if he or she says he or she expects to be in the bottom 10% because previous treatments have failed for him or her. But the patient may also have his or her own reasons—perhaps even superstitious ones—for thinking that treatment will fail now and he or she will be in the bottom 10%. Once again, he or she may be right—many people are simply pessimistic about treatment. Or, the patient may be reacting defensively to guard against the possibility of future disappointments, a recognized and sometimes effective strategy.

27. To look at this in another way, the NOT may actually measure optimism and

How might these challenges to the POD be met? Beliefs one could require for competency cover a range. At the far end is the view incorporated in the POD, which provides full credit when the patient believes what the doctor believes. At the other end of the range is the view that patients can believe virtually anything, except, perhaps, things impossible by their very nature. Within these extremes other standards are possible. Perhaps competency should be premised on believing what *most* doctors would believe about an illness and treatment. Or perhaps competency should be premised on believing what most *people* would believe. Or upon what most *reasonable* people believe. Or perhaps we should dispense with norms altogether and attempt to characterize a competency standard in a way that does not refer to majorities.

We suggest a standard for competency that finds a middle ground between an “impossible belief” standard, on the one hand, and a “believe what your doctor believes” standard, on the other. As we see it, a standard of competency should not turn on whatever a doctor believes about an illness and its symptoms, treatment, and prognosis. Conversely, beliefs that grossly distort reality, that are based on little or no evidence, or that are indisputably false or patently delusional should, in our opinion, render one incompetent.

The standard we propose is a “patently false delusional belief” standard. Patently false beliefs are beliefs that are grossly improbable, for any one of several reasons. First, patently false delusional beliefs may violate the laws of nature. An example would be that *thoughts can kill*. Second, a patently false delusional belief may also be a belief that does not violate the laws of nature, but one that is practically impossible; that is, a belief so improbable that we feel confident in saying it is false without additional evidence. An example would be that one is able to calculate as fast as a supercomputer. Finally, a patently false delusional belief may be a belief that represents a gross distortion of obvious facts; that is, a belief that flies in the face of empirical happenings obvious to everyone. An example would be that a large spaceship lies in the middle of New York’s Central Park. Patently false delusional beliefs are beliefs that are grossly improbable in one of these three ways. Religious and cultural beliefs are exempted from the definition of patently false beliefs, as are beliefs commonly held in a society or culture even if they appear odd or idiosyncratic to people outside the society or culture.

pessimism. Many people are unduly optimistic or pessimistic about many things. The NOT may require patients to manifest a trait—optimism—that many people may lack.

We would like to propose further normative discussion about the POD in another regard by suggesting that mere denial of mental illness should not necessarily count against one in a competency assessment.²⁸ This claim—that denial of a mental illness does not always count against competency—can be made without denying either the reality of mental illness or the severe suffering it causes. One can also hold this view and continue to subscribe to the medical model.²⁹ Consider the following seven reasons a patient might deny his or her illness.

First, a person denying he or she is mentally ill may simply not be willing to admit to something that is stigmatizing and carries negative consequences in our society. Attempting to avoid the negative consequences of a diagnosis may be a rational strategy as a way to move on in one's life.

Second, a person denying his or her illness may be acting on the basis of an understandable defense. Denial of difficult things is quite common. Denial can be a way to protect one from the narcissistic injury of having a mental illness.

Third, denial can be adaptive. Evidence suggests that people with serious physical illnesses live longer if they deny the seriousness of their illness.³⁰ A person denying he or she is mentally ill might draw on resources he or she would be too discouraged to use if the person admitted the illness.

Fourth, diagnoses of mental illness are generally less certain than many diagnoses of physical illnesses. Unlike physical illnesses, where there often are definitive findings that unequivocally establish the diagnosis, there are no physical tests for any nonorganic mental illness. This point is epistemological, not ontological. To say that we cannot definitively prove someone has soft tissue damage is not to deny that there is such an illness as soft tissue damage or that soft tissue damage can cause considerable pain and disability. The two issues are different. We can hold to the medical model, retain our belief in the reality of mental illness, and still claim that denial of mental illness ought not automatically to count against competency.

Fifth, many members of society are skeptical about mental illness—or at least about whether particular behavior patterns or symptom

28. See Saks, *supra* note 18, at 988-92 (discussing denial of mental illness). Since that publication, Saks' views on denial have changed somewhat.

29. In this context, the "medical model" is the model according to which mental illnesses are real disease entities, as much so as any physical illnesses, and therefore respond to treatments of various kinds. According to the medical model, mental illness is not simply "problems in living."

30. See Saks, *supra* note 18, at 990 (mentioning sources supporting this claim).

constellations amount to a mental illness.³¹ Beliefs that mental illness is a failure of will, consists of problems in living, or is motivated by a desire to be cared for are not uncommon. While some such beliefs amount to frank prejudice, or are at the very least based on ignorance, the point is that if these beliefs are not uncommon, then a particular patient's similar belief does not represent a gross departure from ordinary ways of thinking. To hold that such a belief should render one incompetent is to risk discriminating against the mentally ill.

Sixth, it *does* represent a patent distortion of reality to deny that one is suffering from grossly demonstrable symptoms. But the patient who can admit that he or she is agitated, pacing, scared—whatever his or her symptoms happen to be—has reason to accept treatment that doctors say will help those symptoms abate. It is not clear that we need to make the patient admit to having a mental illness. It risks forcing a humiliation on the person to do so.³²

Finally, many populations of patients are notoriously noncompliant with treatment recommendations.³³ Such noncompliance could be

31. Beliefs such as these about mental illness seem much more common than beliefs about physical illness. Even certain mental health professionals have similar views about mental illness; Szasz, for instance, denies that any nonorganic mental illness is real. See, e.g., THOMAS S. SZASZ, *THE MYTH OF MENTAL ILLNESS: FOUNDATIONS OF A THEORY OF PERSONAL CONDUCT* (2nd ed. rev. 1974).

32. Perhaps, however, we should require more. For example, we should require that patients need to accept not only that they are pacing, but that they have *some* condition, even if it is not the condition their doctors say they have. Or perhaps we should require the patient to admit that he or she has some condition that *looks like* schizophrenia that most doctors would so diagnose, and that is thought antecedently to be as likely to benefit from treatment as any other similar presentation. These claims are fairly indisputable in many cases. We don't *need* a physiological test to establish them. Thus, while a patient may not trust what the individual doctor is telling him or her about his or her diagnosis, the patient can and should accept the fact he or she has symptoms commonly used by psychiatrists to identify mental disorders (e.g., the patient simply denies their significance in terms of whether he or she "has" the illness.). See AMERICAN PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV)* (4th ed. 1994). It seems a close call whether we require these additional beliefs or whether simply admitting to one's symptoms and one's doctor's belief in potential benefit of treatment is enough to establish competency. An intermediate position would be to require patients to admit, simply, that "something's wrong."

33. See, e.g., Joyce A. Cramer et al., *How Often Is Medication Taken as Prescribed? A Novel Assessment Technique*, 261 JAMA 3273 (1989); Richard L. Ruffalo et al., *Patient Compliance*, 31 AM. FAM. PHYSICIAN 93 (1985); Barbara J. Stephenson et al., *Is This Patient Taking the Treatment as Prescribed?*, 269 JAMA 2779 (1993).

interpreted as an unconscious denial of illness. To the extent this interpretation is plausible, we risk discriminating against the mentally ill by penalizing *their* denial.

Given these reasons for denial, it seems appropriate to probe when a patient denies he or she is mentally ill in order to see if the patient's reasoning is understandable.³⁴ Perhaps the patient is not speaking honestly. For example, perhaps a man is narcissistically wounded but, in his heart of hearts, knows the truth. Perhaps he thinks of his behaviors as his choice. Perhaps he holds widely held views about mental illness that lead him to think he is not really ill, beliefs that are reinforced by his family or friends. In short, one should explore whether a given case of denial amounts to a patent distortion of reality (e.g., "aliens are causing me to suffer to save the world"). On this view, if a belief is not impossible, then one must consider how plausible it is, and whether it is an understandable or common belief, to determine whether the belief patently distorts reality.

One final cautionary note about denial: Allowing denial to be a basis for a finding of incompetency—and thus forced treatment—is fraught with danger. Not only would finding incompetency on the basis of denial permit us to force treatment on an obsessive-compulsive person who denies that he or she is ill—and who among us is free of maladaptive personality traits?—but it would also allow us to characterize political dissidents as ill, and then to use their understandable denial that they are ill as a basis for their involuntary treatment.

In sum, more substantive points for future normative discussion can be raised about the POD than about the UTD or TRAT. This discussion might fruitfully explore what kind of beliefs are sufficient for competency and what kind of beliefs are not. As examples, a standard might look to whether the patient denies what his or her doctor says, what most doctors say, what most reasonable people would say, what is patently true, what must be true, and what cannot be true. Future

34. A failure to probe may result in *underestimating* the presence of incompetency by focusing too exclusively on disavowal of what one's doctor believes and not enough on the degree of distortion which the belief represents. Take the patient who admits he or she has the diagnosis the doctor gives and agrees with the doctor's prognosis with and without treatment. This person would receive a full score on the POD. But suppose he or she also believes that he or she has the diagnosis the doctor gives because aliens are manipulating his or her neurotransmitters from afar, and that taking the medication will enrage the aliens and cause them to destroy the earth—even though he or she thinks it will cure his illness. Again, this person would receive a full score on the POD. But is he or she really competent to refuse treatment? Do we not want to look for patently false beliefs and not just disagreement (or agreement) with what one's doctor says?

scholars would establish which level of each belief to require. We suggest a patently false belief standard as a likely candidate to separate those competent to make decisions from those who are not. Whichever standard is chosen, serious consideration will need to be given to the role of denial in assessing competency.

The MacArthur research instruments identify the abilities both helpful and necessary to make decisions and thus serve the value of protecting the vulnerable. Their emphasis on protecting the vulnerable, however, necessarily comes at the price of placing less emphasis on other values implicated in setting standards for competency: the value of protecting autonomy, even when autonomous choices are unconventional, and the value of safeguarding against discrimination. A challenge to the MacArthur researchers is to justify striking this balance in the manner they have. For example, an objection could be raised to their way of balancing values by claiming that freedom of choice includes both the freedom to choose and the freedom to choose *how* to choose—the patient’s decision making *process* implicates the same normative issues as does the patient’s *choice*. And we should not require more of mentally ill patients in this regard than we do of any other individuals.

C. *The MacCAT-T*

The MacCAT-T is a streamlined version of the three research instruments. It is designed to aid in assessing competency in an actual clinical setting. The MacCAT-T is the best instrument currently available of its kind. We raise three points to consider about the MacCAT-T’s application in direct clinical care.

First, the “appreciation” component of the MacCAT-T acknowledges the difference between nonagreement with one’s doctor that is nondelusional (i.e., has some reasonable explanation) and nonagreement that is “based on a delusional premise or some other belief that seriously distorts reality and does not have a reasonable basis in the patient’s cultural or religious background.”³⁵ The range of “reasonable explanations” given, however, may be overly narrow. Only culturally or religiously sanctioned beliefs are permitted to ground “reasonable” disagreements. The MacCAT-T scores as “zero” a patient’s belief that

35. THOMAS GRISSO & PAUL S. APPELBAUM, MACARTHUR COMPETENCE ASSESSMENT TOOL—TREATMENT (MACCAT-T) 12 (1995) (unpublished manual available from authors).

his symptoms are related to circumstances other than a psychiatric disorder, such as stress or overwork. Given widespread beliefs in our society about psychological distress, a patient could be holding non-*patently* false ideas were he to attribute the cause of his symptoms to reasons outside what the MacCAT-T views as permissible.

A second point to consider about the MacCAT-T, insofar as it will be the instrument used in an actual clinical setting, is the suggestion³⁶ that competency exists on a sliding scale, and that the individual evaluator will play a central role in setting the standard when the patient is faced with a choice about treatment. If the patient chooses an alternative that goes against conventional wisdom—say, to reject a treatment with proven efficacy for a serious illness—the evaluator could require a higher level of abilities of the patient. Put another way, according to the MacCAT-T the standard for competency will vary as if on a sliding scale: If patients are about to choose something that will not help them and may harm them, the MacCAT-T deems it especially important to assess whether they know what they are getting themselves into. The evaluator conducting the assessment would judge whether the level of ability would need to be raised given the particular choice at issue and would do so according to how he or she deemed it appropriate.

A challenge to this proposal arises. Doing so seems only a distant cousin to declaring people who make good choices competent and people who make bad choices incompetent. One might respond to the challenge by pointing out that in assessing competency, autonomy is balanced against well-being, so that striking the balance differently when well-being is likely to be affected more seriously makes perfect sense. But there is a difference between saying that one must have certain abilities as a general matter in order to take responsibility for one's own choices, without scrutiny of particular choices, and saying that one must have *more* abilities when society judges that a *particular* choice is bad, or at least not as good as other choices. In addition, this manner of assessing competency allows the evaluator to determine that a choice is problematic based upon his or her own values, rather than on a set of values identified through normative discussion.³⁷ Perhaps at the end of the day competency doctrine should set the balance once, in order to avoid second-guessing patients' decisions. It could convincingly be argued, for example, that giving a third party the power to decide what is

36. See *supra* note 16.

37. Individual evaluators will make decisions regarding which direction, and how far, the scale should "slide." These decisions will inevitably be based upon normative considerations. It is not clear that such considerations should be left to individual mental health professionals, rather than made through normative deliberation.

a good and a not-so-good choice defeats the very notion of competency—that the concept of competency leaves the choice up to the *patient*. One possibility would be to increase the level that we require of patients only in the most exigent circumstances: when a choice exposes the patient to a serious risk of very substantial, perhaps irreversible harm. This policy would minimize the occurrence of individual evaluators making normative judgments about a patient's choice of treatment.

Third, there is a real danger that an investigator faced with a requirement to use the MacArthur instruments may simply adopt its definition of "impairment" as the cutoff point for incompetence, or decide that the line the MacArthur researchers say indicates clear competence should also be the line below which a person is deemed incompetent. That is to say, in practical terms future competency administrators may mistake the nature of certain of the instruments so that "impairment" simply translates into "incompetency," or that the standard given for "clearly competent" on the MacCAT-T is used to divide the competent from the incompetent. It will be important to see whether such mistakes are being made.

V. IMPORTING THE MACARTHUR INSTRUMENTS INTO THE RESEARCH CONTEXT

The MacArthur instruments were designed for measuring capacities relevant to competency to consent to treatment. Two questions arise at the prospect of importing the instruments into the research arena: First, what, if any, normative considerations unique to participation in research will need to be addressed?³⁸ Second, to the extent that the same abilities are relevant in both the treatment and research contexts, will the manner of assessing these abilities need to be adapted to the research setting?

In regard to the first question, research implicates normative issues not raised in the treatment context. As an example, we must factor into our

38. The MacArthur researchers have a book chapter in press that discusses adapting their instruments to the research context. See *Subjects' Capacity*, *supra* note 5. The authors state that the instruments must be adapted to the research context (e.g., the UTD must disclose information appropriate to participation in research), and they point to the added value of increasing scientific knowledge. The authors also suggest adopting a sliding scale approach, so that each evaluator is free to draw the line between autonomy and paternalism as he or she sees best.

balance of autonomy, paternalism, and nondiscrimination a new value: that of advancing science. A question raised by the addition of this new value is whether competence in the research context requires greater capacities. Reasons argue both for and against requiring greater capacities.

In terms of reasons for raising the standard for capacity, consider that the patient/subject will be consenting to participate in activities for the benefit of others, possibly to his or her detriment.³⁹ We may therefore want patient/subjects to play a larger role in evaluating a decision to participate in research, so that correspondingly higher capacities are required. In addition, we may think that as a risk-of-error matter evaluators are likelier to have an interest in finding competency so that their patients will be able to consent to research that will help the researchers. To offset this likely bias, the standard for competency should likewise be raised.⁴⁰ Finally, given the intense transference people sometimes bring to doctor/patient interactions, the patient/subject may not be in a good position to protect himself or herself—that is, to make the best judgment for himself or herself in the absence of a doctor whose *sole* concern it is to assist in making a good judgment for the patient.⁴¹ Reasons that speak against requiring a higher level of competency include a desire to participate in therapeutic research when nothing else seems to help. In addition, people can derive great utility from the thought of helping others and can feel terribly demeaned when their choice to do so is not respected.

39. A variation on this position is that not a great deal is lost by not allowing patient/subjects the opportunity to participate in research. A second variation is that the decision to participate in research is of less benefit to the patient/subject than is the decision to consent to conventional treatment. While the reader will readily appreciate situations in which the second variation is not true, as a broad generality it seems sound.

40. The National Bioethics Advisory Commission recommends an independent professional to assess the subject's capacity to consent to research that involves more than a minimal risk. See *Recommendation 8*, 1 NAT'L BIOETHICS ADVISORY COMM'N, RESEARCH INVOLVING PERSONS WITH MENTAL DISORDERS THAT MAY AFFECT DECISIONMAKING CAPACITY (1998) (visited July 2, 1999) <<http://www.bioethics.gov/capacity/TOC.htm>>.

41. Patients may have many unconscious reasons to consent to research when a doctor asks them to do so. A positive transference—a desire to please the doctor—may be the most powerful, but the subject/patient may also experience a desire not to be the object of the doctor's animus; a belief that the doctor offers protection from all harm and that the doctor *must* have only the patient's interests at heart. In addition, patients may believe that they will not get other therapeutic treatment if they are unwilling to participate, will get the best treatment only if they participate, will be able to survive financially only if they are treated through a research protocol. Finally, the doctor may put some pressure on the patient to consent, and many people have a difficult time saying no.

The question of whether additional capacities are appropriate for competency to consent in the research context will require a thorough normative discussion. The fundamental condition of research, that the patient/subject serves the interests of both the patient and another,⁴² speaks in favor of protecting the vulnerable. Allowing patient/subjects the choice to participate in research, and not requiring more of the mentally ill than other populations before consent is valid, speak in favor of autonomy and nondiscrimination. Discussion and debate are required to find the best balance of the values at play.

Second, the MacArthur instruments have been designed to aid in assessing competence to consent to treatment, and their manner of assessing capacities will therefore need to be adapted for the research context. The UTD, for example, will need to include the most important information patient/subjects need to understand about the research.⁴³ Most important, patient/subjects will need to understand that nontherapeutic research will not help them, and that research doctors have a primary interest in conducting research, not in providing care. The POD will need to be adapted in order to assess the patient's appreciation (belief formation) on these and other matters relevant to the research. Thus, the various instruments will need content that speaks to research.

VI. CONCLUSION

The MacArthur instruments make an enormous contribution to the literature on competency. This article has raised and discussed areas where further discussion may prove fruitful. First, the normative underpinnings of the project merit further discussion. Second, the balance between autonomy, paternalism, and nondiscrimination merits further examination with an eye toward possible reassessment in certain, specific areas. Third, the role of denial merits reconsideration, especially the question of whether denying one's mental illness is in all cases relevant to the question of competency. Finally, a standard of belief in the appreciation instrument could be adopted. To the extent that the normative inquiry leads to a "patently false belief" standard, that

42. In nontherapeutic research, the patient may have a strong interest in wanting to help others.

43. See *supra* note 6.

standard will need to be operationalized.⁴⁴ Notwithstanding these areas

44. A 1996 symposium issue of *Psychology, Public Policy, and Law* that was devoted to the MacArthur Treatment Capacity research instruments contains a number of articles critiquing the POD. See Christopher Slobogin, "Appreciation" as a Measure of Competency: Some Thoughts About the MacArthur Group's Approach, 2 PSYCHOL. PUB. POL'Y & L. 18 (1996) (critiquing approach based on earlier writings of Elyn Saks); Susan Stefan, *Race, Competence Testing, and Disability Law: A Review of the MacArthur Competence Research*, 2 PSYCHOL. PUB. POL'Y & L. 31 (1996) (critiquing instrument on similar grounds); Trudi Kirk & Donald Bersoff, *How Many Procedural Safeguards Does It Take to Get a Psychiatrist to Leave the Lightbulb Unchanged? A Due Process Analysis of the MacArthur Treatment Competence Study*, 2 PSYCHOL. PUB. POL'Y & L. 45 (1996) (critiquing instrument).

The authors have several responses to this critique. First, they note that the critics all seem to want *some* measure of appreciation of illness and treatment to be included in a competency instrument, even if they object to the precise measure used. Second, they suggest that they may well not be all that far apart from their critics in the measure they want: The researchers acknowledge that mere nonacknowledgment of one's disorder, or of the realistic consequences of treatment, is not enough to constitute incapacity. The MacArthur researchers believe that, to speak to the question of capacity, the acknowledgment must be related to delusional thinking or other medical or psychological conditions that are responsible for a serious distortion of reality. They add that they accept the concept of a "patently false belief," provided it is not restricted to delusions but may also include nondelusional reasons for denying the existence of one's disorder, such as parietal lobe damage or intolerable anxiety related to recognition of the disorder. Third, they acknowledge that their instrument does not formulate a criterion for "patently false beliefs," and suggest that it was difficult for them to operationalize this concept; they invite others to try. Finally, the MacArthur researchers note that the MacCAT-T requires clinicians to make a judgment about patients' reasons for denial of their symptoms in order to rate their appreciation. The requirement represents an effort to include the "patently false belief" component in the capacity standard. The authors thought it possible to do so only by relying on clinical judgment, at the cost of sacrificing some psychometric reliability. Thomas Grisso & Paul S. Appelbaum, *The Values and Limits of the MacArthur Treatment Competence Study*, 2 PSYCHOL. PUB. POL'Y & L. 167 (1996).

The authors' first point is well-taken. A decision maker's beliefs are central to competency. The authors' second point, however, merits further discussion. The authors say they want to pick out only beliefs that seriously distort reality. While there may be a variety of reasons for serious distortions of reality, such as anxiety or dissociation (although if the distortions are serious, don't they necessarily *amount* to delusions?), it remains that denial of *mental* illness is often *not* a sufficient distortion of reality to justify a finding of incompetency.

The authors' third point, that (although they generally approve of the notion), they find the concept of a "patently false belief" difficult to operationalize, is a challenge that awaits future research. It will be important first to define a patently false belief as precisely as possible. The manner in which the MacArthur researchers discuss this concept indicates important conceptual differences in how a "patently false delusional belief" has been defined and discussed elsewhere.

Finally, the authors note that the MacCAT-T attempts to introduce the notion of a "patently false belief" by requiring examiners to assess the reasons for patients' denial.

of future work, the MacArthur instruments are an enormously impressive achievement and will no doubt be a focal point for the discussion of competency for many years to come.

Given this approach, well-reasoned bases for disagreement with one's doctor would not count against one's competency, as they currently do according to the POD. While this approach seems correct and workable, the reasons that the researchers *would* allow to justify disavowals may be overly restrictive.



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The Use of Mechanical Restraints in Psychiatric Hospitals

Elyn R. Saks†

Julia, a newly admitted psychotic patient, suddenly breaks a plastic spoon while she is eating lunch. She appears amused, slightly fearful, and a touch defiant. Staff suggest that she needs to be restrained. When Julia resists, six orderlies converge on her, pin her to her bed, and, despite her struggles, cuff her limbs with thick leather straps. Finally, they immobilize her torso with a body net. Tied spread-eagle to the bed, unable to move, Julia is now in "six point" restraints.¹

In time Julia's physical pain will increase. Her ankles and wrists will bruise, her body will ache from the forced immobility. Although she will beg for release (many patients do), Julia will neither be let go, nor be told when staff plan to untie her. Alone, frightened, and in pain, she will begin to struggle again—a signal to the staff that she needs to be restrained longer.²

Julia was a patient in a well-staffed, highly regarded university hospital when this episode occurred. In most jurisdictions, she would not even have a colorable claim that any of her civil rights or liberties had been violated. Her case is by no means unique; in New York state, which has one of the most stringent and carefully written restraints statutes in the country, in a single month's time in 1984, nearly 500 patients were restrained in well over 1,100 incidents.³ In fact, Julia was lucky, because she left the hospital unharmed. Between 1979 and 1982, nearly 30 psychi-

† I wish to thank Stephen Behnke for his extensive assistance in the preparation of this Note.

1. "Mechanical restraints" will be used in this Note to refer to the more severe restraining devices, such as "four" and "six point" restraints, body sacks, and camisoles. It will not be used to refer to less severe restraining devices such as arm splints or geriatric chairs, which raise some different issues. This Note takes no position on the acceptability of such devices.

2. For a personal account of a disturbing time in restraints, see C. BEERS, *A MIND THAT FOUND ITSELF* (5th ed. 1921).

3. See Way, *The Use of Restraint and Seclusion in NYS Psychiatric Centers: February 15-March 14, 1984* (Dec. 1984), reprinted in N.Y. STATE COMM'N ON QUALITY OF CARE FOR THE MENTALLY DISABLED & MENTAL HYGIENE MED. REV. BD., *IN THE MATTER OF CHRISTOPHER DUGAN*, Attachment II, at 1-3 (Jan. 1985) (Executive Summary) (one month study shows 397 individuals in restraints or seclusion and 2,228 episodes of restraint or seclusion in N.Y. facilities; patients with six or fewer episodes, amounting to 95% of total, studied in greater detail; 54% in restraints). It is difficult to estimate nationwide how often restraints are used. Only one other incidence study exists: Soloff, *Behavioral Precipitants of Restraint in the Modern Milieu*, 19 *COMPREHENSIVE PSYCHIATRY* 179, 182 (1978) (3.6% of patients in two wards of military teaching hospital restrained at least once) [hereinafter cited as *Precipitants*].

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atric patients died in New York state from being restrained or secluded.⁴ Ironically, what we allow to happen daily to hundreds of psychiatric patients, we, as a society, would not allow to happen to a person who had committed even the most heinous of crimes.⁵

I. A DEVIATION IN THE LEGAL LANDSCAPE

Concern for the liberty and dignity of the members of our society permeates American jurisprudence.⁶ Our legal system has spent much effort balancing these extremely personal and highly individual rights against other societal interests. The law's treatment of mechanical restraints deviates sharply from this legal landscape. Compared to the balance struck between other medical interests and patients' interests in liberty and dignity, the rules that govern restraints are disturbing anomalies.

Both the common law and statutes zealously safeguard the liberty and dignity of the patient by protecting the individual's right to choose what is

4. During the four year period between 1979 and 1982, 19 patients died in state facilities and 11 in private facilities as a result of being restrained or secluded. 89.4% of the 19 examined deaths involved restraints only. *See Way, Restraint and Seclusion Deaths in NYS Psychiatric Centers: 1979-1982* (Dec. 1983), reprinted in N.Y. STATE COMM'N ON QUALITY OF CARE FOR THE MENTALLY DISABLED & MENTAL HYGIENE MED. REV. BD., IN THE MATTER OF CHRISTOPHER DUGAN, Attachment I, at 1, 2 and Table 4 (Jan. 1985).

5. Restraining a prisoner to his bed at four points would seem to be impermissible for either safety or punishment reasons. *See, e.g., Spain v. Procunier*, 600 F.2d 189, 198-99 (9th Cir. 1979) (tying prisoner to object permitted only in emergency); *Pena v. State Division for Youth*, 419 F. Supp. 203, 211 (S.D.N.Y. 1976) (restraining youth to furniture impermissible); *Gates v. Collier*, 349 F. Supp. 881, 900 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291, 1306 (5th Cir. 1974) (enjoining handcuffing to fences, bars, fixtures); *Landman v. Royster*, 333 F. Supp. 621, 647-48 (E.D. Va. 1971) (chaining prisoner where unable to eat or use toilet, resulting in lack of sleep, pain, and scars, violated Eighth Amendment). The Ninth Circuit has held that restraints may be used on prisoners only in transport, if there is danger, or under medical advice, *Spain v. Procunier*, 600 F.2d 189, 198-99 (9th Cir. 1979). The Fifth Circuit has declared that they may not be used as a punishment. *Ruiz v. Estelle*, 666 F.2d 854, 866 (5th Cir. 1982). At least two courts have considered the use of restraints for medical purposes in prisons. *See French v. Owens*, 538 F. Supp. 910, 919, 928 (S.D. Ind. 1982) (chaining psychotic prisoners spread-eagle to their beds without medication enjoined); *Inmates of Allegheny County Jail v. Wecht*, 565 F. Supp. 1278, 1284-86 (W.D. Pa. 1983) (restraining women stripped to underwear to cot without mattress unacceptable).

6. Liberty, of course, is explicitly recognized in our Constitution. Dignity has received less formal recognition, but is vital nonetheless. To violate a person's dignity is to pay insufficient regard to his intrinsic worth as a human being. Cruel and unusual punishments do just that; they are so painful or degrading that they demean the human spirit. Thus the Eighth Amendment may be seen as a dignity measure. *See Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."); *Furman v. Georgia*, 408 U.S. 238, 291 (1972) (Brennan, J., concurring) ("[T]he deliberate extinguishment of human life by the State is uniquely degrading to human dignity."); *Glass v. Louisiana*, 105 S. Ct. 2159, 2168 (1985) (Brennan, J., dissenting from denial of cert.) (execution by electrocution violates "dignity of man"); *Jackson v. Bishop*, 404 F.2d 571, 579-80 (8th Cir. 1968) (whipping prisoners violates Eighth Amendment because it violates human dignity of prisoners).

Similarly, common law rules on battery, false imprisonment, and reasonable force all implicate dignity. *See, e.g., W. PROSSER & W. KEATON, THE LAW OF TORTS* 41 (West 1984) ("The element of personal indignity involved [in batteries] always has been given considerable weight."). *See generally id.* §9, at 39, § 11, at 47, § 19, at 124, and § 20, at 129.

in his own best interests. Except in an emergency, patients have the right under the common law to choose which treatments they will and will not undergo, including the right to elect a treatment that doctors do not believe is the best choice.⁷ "Death with dignity" statutes allow a patient to choose even death over what he perceives to be violations of his personal dignity.⁸ And by looking to what the patient would have wanted if competent, rather than to what is medically indicated, certain states guard even an incompetent patient's right to choose medical treatment.⁹ In short, our law has given primacy to individual dignity over medical interests by allowing patients to choose how their dignity will best be preserved.¹⁰

Civil commitment for mental illness involves issues closely analogous to those implicated in mechanical restraints cases. Like restraints, civil commitment represents "a massive curtailment of liberty,"¹¹ a fact which has led the Supreme Court to hold that certain alleged "treatment-benefits" of commitment (that it affords a patient "milieu therapy," or raises his stan-

7. See generally W. PROSSER & W. KEATON, *THE LAW OF TORTS* § 32, at 189-92 (1984). The most helpful work on this subject of informed consent is J. KATZ, *THE SILENT WORLD OF DOCTOR AND PATIENT* (1984). Originally, all that was required before a doctor could "touch" a patient was consent. *Pratt v. Davis*, 118 Ill. App. 161 (1905), *aff'd*, 224 Ill. 300, 79 N.E. 562 (1906). However, *Salgo v. Leland Stanford Jr. University Bd. of Trustees*, 154 Cal. App.2d 560, 317 P.2d 170 (1957), introduced the idea that the consent must be *informed*. See also *Natanson v. Kline*, 186 Kan. 393, 350 P.2d 1093 (1960). This notion was extended in *Canterbury v. Spence*, 464 F.2d 772, 786-87 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972) and *Cobbs v. Grant*, 8 Cal.3d 229, 243, 104 Cal. Rptr. 505, 514, 502 P.2d 1, 10 (1972), which introduced the notion that the disclosure standard must be patient-based. The development of the informed consent doctrine has accorded increasing weight to patients' autonomy and dignity; patients must be given enough information to make a decision that best accords with their personal values. Furthermore, in giving this information, doctors must take account of what patients want and need to know, not of what other doctors think it medically best for them to know. See also Katz, *Informed Consent—A Fairy Tale? Law's Vision*, 39 U. PITT. L. REV. 137 (1977); Plante, *An Analysis of "Informed Consent,"* 36 *FORDHAM L. REV.* 639 (1968). For a strong defense of patient autonomy, see Shultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 *YALE L.J.* 219 (1985).

8. See, e.g., Freeman, *Death with Dignity Laws: A Plea for Uniform Legislation*, 5 *SETON HALL LEGIS. J.* 105 (1982); Martyn & Jacobs, *Legislating Advance Directives for the Terminally Ill: The Living Will and Durable Power of Attorney*, 63 *NEB. L. REV.* 779 (1984).

9. For the substituted judgment standard as used in the case of the mentally ill, see, e.g., *Rogers v. Comm'r of Mental Health*, 390 Mass. 489, 458 N.E.2d 308, 315 (1983) ("The recognition of that right [to refuse treatment] must extend to the case of an incompetent, as well as a competent, patient because the value of human dignity extends to both. . .") (quoting Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 745, 370 N.E.2d 417, 427 (1977)); *In re Boyd*, 403 A.2d 744, 750-51 (D.C. 1979). Notice that a "best medical interests" standard rather than a "substituted judgment" standard may reflect a judgment that searching for a patient's competent wishes is generally fruitless, and most patients want what their doctors advise anyway, rather than a judgment that a patient's medical interests are more important than his dignity interests.

10. Religious values have also been held to supersede medical interests, sometimes even if refusal of treatment will mean death. See *In re Osborne*, 294 A.2d 372, 374-75 (D.C. 1972). Religious refusals of treatment are more commonly upheld when death is not an issue, however. For cases where the patient is mentally ill, see *Winters v. Miller*, 446 F.2d 65 (2d Cir.) *cert. denied*, 404 U.S. 985 (1971) (Christian Scientist has right to refuse psychotropic medication), and *Osgood v. District of Columbia*, 567 F. Supp. 1026 (D.D.C. 1983) (same).

11. *Humphrey v. Cady*, 405 U.S. 504, 509 (1972).

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dard of living) are constitutionally insufficient to justify commitment.¹² Most states have gone even farther. They have forbidden commitment for the sake of any kind of treatment at all,¹³ and have limited it solely to those who are dangerous to themselves or others or who are gravely disabled. Only in these extreme circumstances are liberty and dignity violations believed to be justified.

Accordingly, substantial procedural protections accompany civil commitment to ensure that the infringement upon an individual's dignity and liberty is justified.¹⁴ To determine whether patients meet the commitment criteria, most states entitle patients to a hearing:¹⁵ to notice, to a right to confront and cross examine witnesses, and to representation by counsel.¹⁶ Moreover, the Supreme Court has held that patients must be found to meet the commitment criteria by "clear and convincing" evidence.¹⁷ Mandatory review procedures are common.¹⁸

A substantial majority of states also apply a "least restrictive alternative" mandate to civil commitment, requiring that any infringement upon a patient's liberty must be the absolute minimum necessary to achieve the

12. See *O'Connor v. Donaldson*, 422 U.S. 563 (1975). The Court did not reach the issue of whether treatment in general justifies commitment, *id.* at 573, but it did consider these particular alleged "treatment benefits." The court below had found that milieu therapy in this case was nothing more than confinement in the milieu of the hospital—not enough treatment to justify the patient's injuries. *Id.* at 569. And if treatment is a defense to commitment, then whether something is treatment is justiciable. *Id.* at 574 n.10. Moreover, the "mere presence of mental illness," the Court found, "does not disqualify a person from preferring his home to the comforts of an institution," *id.* at 575. The Court found a person's desire for freedom more important than the material gains provided by institutionalization.

13. As of 1974, only 17 states still allowed commitment based on the "need for treatment" alone. See Note, *Developments in the Law: Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1201-07 (1974) [hereinafter cited as *Developments*].

14. *But cf.* *Parham v. J.R.*, 442 U.S. 584 (1979), which gives children fewer procedural protections than adults. *Parham* also seems to give doctors more authority, and to view commitment as more a medical decision, than did *O'Connor v. Donaldson*. But in *Parham* the determination that doctors are called on to make—that the child is mentally ill and could benefit from hospital treatment—is a medical determination, while the value-decision of whether the benefits of treatment are worth the detriments of hospitalization has already been made by the parents. The parents have decided that their child's being "in need of treatment" is a good enough reason for hospitalization.

15. As of 1974, only ten states used administrative, rather than judicial, hearings to make this determination (although some provided for judicial hearings as an alternative). See *Developments supra* note 13, at 1269 n.36.

16. On notice, see, e.g., CONN. GEN. STAT. § 17-178(a) (1985); IOWA CODE ANN. § 229.7 (West 1985); MONT. CODE ANN. § 53-21-121(3) (1983); WASH. REV. CODE ANN. § 71.05.460 (1975). On the right to cross-examine, see, e.g., CONN. GEN. STAT. § 17-178(c) (1985); IOWA CODE ANN. § 229.12(1) (West 1985); MONT. CODE ANN. § 53-21-126(3) (1983); WASH. REV. CODE ANN. § 71.05.200(1)(d) (1975). On the right to appointed counsel, see, e.g., CONN. GEN. STAT. § 17-178(b) (1985); IOWA CODE ANN. § 229.8(1) (West 1985); MONT. CODE ANN. § 53-21-122(3) (1983); WASH. REV. CODE ANN. § 71.05.460 (1975).

17. *Addington v. Texas*, 441 U.S. 418 (1979).

18. Most states require periodic judicial review of commitment decisions. See, e.g., CONN. GEN. STAT. § 17-178(g) (1985); MONT. CODE ANN. § 53-21-128(2) (1983); S.D. CODIFIED LAWS ANN. § 27A-12-17 (1984); WASH. REV. CODE ANN. § 71.05.320(2) (West 1986). Of course, habeas corpus review is available to anyone who believes he or she is illegally committed.

state's end.¹⁹ These least restrictive alternative statutes are in keeping with the long-articulated principle that intrusion upon an individual's constitutional rights will be permitted only to the extent necessary to achieve another legitimate state interest.²⁰

One area, however, in which some courts and legislatures have been striking the balance in favor of the state interest has been the field of psychotropic medication. Patients' choices not to have psychotropic medication have been overridden in these jurisdictions not only in situations of danger, but also when the treatment-benefits have been deemed great enough,²¹ such as when there are no other less intrusive ways to bring about improvement or when other treatments will take significantly longer to be effective.²² In reaching these decisions, the jurisdictions have given great weight to the vast and largely undisputed literature which asserts that medication is a very effective treatment for most major mental illnesses.²³ But even here—where nearly the entire medical community

19. Least restrictive alternative mandates have been incorporated into at least twenty state statutes explicitly, and fourteen implicitly. *See Note, The Right to Treatment in the Least Restrictive Alternative: The Confusion Remains After Youngberg v. Romeo*, 19 *NEW ENG. L. REV.* 175, 182-88 (1983) (twenty states have least restrictive alternative mandate explicitly, fourteen, implicitly); *see also Hoffman & Foust, Least Restrictive Treatment of the Mentally Ill: A Doctrine in Search of its Senses*, 14 *SAN DIEGO L. REV.* 1100 (1977); Comment, *The Scope of the Involuntarily Committed Mental Patient's Right to Refuse Treatment with Psychotropic Drugs: An Analysis of the Least Restrictive Alternative Doctrine*, 28 *VILL. L. REV.* 101 (1982).

20. Historically, this doctrine has been applied to cases involving the First Amendment, *see, e.g., Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (right of association); the due process clause, *see, e.g., Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (right of privacy); and the equal protection clause, *see, e.g., Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) (right to vote). The doctrine has also been extended to the mental health context. *See, e.g., Lake v. Cameron*, 364 F.2d 657, 660 (D.C. Cir. 1966) (civil commitment); *Covington v. Harris*, 419 F.2d 617, 623-25 (D.C. Cir. 1969) (intra-hospital disposition to high security ward); *De Angelas v. Plaut*, 503 F. Supp. 775, 781 (D. Conn. 1980) (civil commitment of incompetent accused). The constitutional status of the doctrine in the mental health context, however, is uncertain in light of the failure of *Youngberg v. Romeo*, 457 U.S. 307 (1982), to adopt the least restrictive alternative analysis of the lower court.

21. A small number of states expressly allow involuntary psychiatric medication of patients without providing a standard for when such action is acceptable. *See, e.g., ALASKA STAT. § 47.30.772* (1984); *ARK. STAT. ANN. § 59-1415(2) & (4)* (Supp. 1985); *CONN. GEN. STAT. § 17-206d(b)* (1985).

22. *See, e.g., Delaware Department of Health and Social Services, Division of Mental Health, Delaware State Hospital Policy § 1.50* (1985) (on file with author) [hereinafter cited as *Delaware State Hospital Policy § 1.50*]; *Michigan Department of Mental Health, Public Mental Health Manual: Administration of Psychotropic Medication and For Protection of Recipients' Rights* 6 (Aug. 2, 1984) [hereinafter cited as *Michigan Administration of Psychotropic Medication*]; *N.J. Reg § II(2)(a) & (b)*; *North Carolina Department of Human Resources, Division of Mental Health, Mental Retardation, and Substance Abuse Services, Human Rights for Clients of State Owned and Operated Facilities*, APSM 95-1, at J. 0400-1 to J.0400-2 (1984) [hereinafter cited as *North Carolina, Human Rights*].

23. *See, e.g., Appleton, Fourth Psychoactive Drug Usage Guide*, 43 *J. CLIN. PSYCHIATRY* 12 (1982); *R. BALDESSARINI, CHEMOTHERAPY IN PSYCHIATRY* (1985); *L. KOLB & H. BRODIE, MODERN CLINICAL PSYCHIATRY* 809 (10th ed. 1982); *D. MORGAN, PSYCHOPHARMACOLOGY: IMPACT OF CLINICAL PSYCHIATRY* (1985); *GUIDELINES FOR THE USE OF PSYCHOTROPIC DRUGS* (H. Stancer, P. Garfinkel & V. Rakoff eds. 1984).

Mechanical Restraints

agrees upon the efficacy of psychotropics—a number of states have adopted procedural protections governing involuntary medication.²⁴

From these four areas of law, it is possible to draw four general principles which seem to guide society's balance of medical interests against a patient's liberty and dignity interests. First, a patient should be deprived of his liberty only when failure to do so either presents a risk of serious physical harm to himself or others or prevents medical treatment which has clearly been shown to be effective. Second, a patient should be deprived of his liberty only to the extent necessary to achieve the desired goal. Third, a patient's right to choose among treatments should be protected wherever possible. Fourth, when a patient must be deprived of liberty, a set of strict procedures should be imposed to ensure that the infringements upon his liberty and dignity will be kept to an absolute minimum.

The law's current treatment of restraints substantially departs from these principles. Most states allow hospital staff to put patients in restraints when there is no serious threat of injury and without any clear showing of their efficacy.²⁵ Little effort is made to ensure that only that

24. A number of states provide for review by statute. *See, e.g.*, IND. CODE ANN. § 16-14-1.6-7 (Burns 1983); KY. REV. STAT. ANN. § 202A.196 (Baldwin 1985); MD. HEALTH-GENERAL CODE ANN. § 10-708 (Supp. 1985). A number of other states provide for review in regulations or policy directives. *See, e.g.*, Delaware State Hospital Policy § 1.50 (1985), *supra* note 22; Michigan Administration of Psychotropic Medication, *supra* note 22; North Carolina, Human Rights, *supra* note 22; TEX. ADMIN. CODE tit. 25, § 405.808 (1984).

25. Most state restraints statutes do not use a dangerousness standard. Restraints statutes may be divided into seven categories. First is the statute that requires the use of restraints to be recorded: W. VA. CODE § 27-5-9(e) (1980).

Second are the statutes that proscribe unnecessary or excessive restraints: ARK. STAT. ANN. § 59-1416(23) (Supp. 1985); KY. REV. STAT. ANN. § 202A.191(h) (Baldwin 1985); N.D. CENT. CODE § 25-03.1-40(4) (1978); VA. CODE § 37.1-84.1(6) (1984).

Third are the statutes that require restraints to be prescribed by a designated authority, usually a physician: D.C. CODE ANN. § 21-563 (Supp. 1985); NEV. REV. STAT. § 433.484(2) (1985); OHIO REV. CODE ANN. § 5122.27(F)(7) (Page 1981); TEX. REV. CIV. STAT. ANN. art. 5547-86 (Vernon 1986).

Fourth are the statutes that allow restraints only if required by the "medical needs" of the patient: ME. REV. STAT. ANN. tit. 34-B, § 3803(3) (Supp. 1985); OKLA. STAT. ANN. tit. 43A, § 92 (West 1979); OR. REV. STAT. § 426.385(3) (1985); PA. STAT. ANN. tit. 50, § 4422 (Purdon 1969); S.C. CODE ANN. § 44-23-1020 (Law. Co-op. 1985); TENN. CODE ANN. § 33-3-104(4) (Supp. 1985); UTAH CODE ANN. § 64-7-47 (Supp. 1985); VT. STAT. ANN. tit. 18, § 7704 (1968); WYO. STAT. § 25-10-119 (1982).

Fifth are the statutes that allow restraints, roughly, for either safety in an emergency or on a professional's written order explaining the rationale for the restraint: MONT. CODE ANN. § 53-21-146 (1983); N.J. STAT. ANN. 30:4-24.2(d)(3) (West 1981); S.D. CODIFIED LAWS ANN. § 27A-12-6 (Supp. 1986).

Sixth are the statutes that allow restraints, roughly, for either the safety or the treatment of the patient: ARIZ. REV. STAT. ANN. § 36-513 (1986); HAWAII REV. STAT. § 334E-2(18) (Supp. 1980); IND. CODE ANN. § 16-14-1.6-6 (Burns 1983); LA. REV. STAT. ANN. § 28:171(D) (West Supp. 1986); MICH. COMP. LAWS ANN. § 330.1742(2) (West 1980) (seclusion); N.C. GEN. STAT. § 122C-60 (Supp. 1985); WIS. STAT. ANN. § 51.61(1)(i) (West Supp. 1985).

Seventh are the statutes that do require dangerousness to self or others: ALASKA STAT. § 47.30.825(d) (1984); CONN. GEN. STAT. § 17-206e(a) (1985); GA. CODE ANN. § 37-3-165 (Supp.

amount of restraint is exercised which is required to achieve the desired end,²⁶ and, as a matter of course, patients are given no choice in the manner of restraint.²⁷ Finally, few, if any, procedural safeguards attend the patient's initial deprivation of liberty, or are called into play to determine how long the deprivation will continue.²⁸ Overall, current law overwhelmingly sees restraints as a practice best regulated by internal professional norms, and thus leaves to doctors and hospital staff most decisions about how restraints are to be used.²⁹

II. IS A LAISSEZ-FAIRE POLICY JUSTIFIED?

Three reasons may be offered in defense of the law's laissez-faire attitude toward the use of mechanical restraints: first, that the medical benefits derived from their use justify the intrusion into patients' liberty and dignity; second, that the mentally ill do not have as great an interest in liberty and dignity as do other patients; third, that a strict legal standard governing the use of restraints would be too great an intrusion into medical institutions. A close examination of each of these reasons indicates that none warrants the law's "hands-off" policy toward the use of mechanical restraints.

1985); IDAHO CODE § 66-345 (Supp. 1986); ILL. REV. STAT. ch. 91 ½, § 2-108 (1982); KAN. STAT. ANN. § 59-2928 (1983); MD. HEALTH-GENERAL CODE ANN. § 10-701(c)(3) (Supp. 1985); MASS. GEN. LAWS ANN. ch. 123, § 21 (West Supp. 1985); MICH. COMP. LAWS ANN. § 330.1740 (West 1980) (restraints); MINN. STAT. ANN. § 253B.03(1) (West 1982); MO. ANN. STAT. § 630.175 (Vernon Supp. 1986); N.Y. MENTAL HYG. LAW § 33.04 (Consol. 1978). *See also* Tardiff & Mattson, *A Survey of State Mental Health Directors Concerning Guidelines for Seclusion and Restraint* in *THE PSYCHIATRIC USES OF SECLUSION AND RESTRAINT* 141, 144 (K. Tardiff ed. 1984) [hereinafter cited as *USES*] (21 states have regulations that allow restraints only to prevent harm to self, others, or property, but some may not apply state-wide). These statutes, however, contain inadequate procedures and other deficiencies. *See infra* notes 71-85 and accompanying text.

26. No statute adequately distinguishes between restraints and seclusion, resulting in the use of restraints even when there are less restrictive alternatives. *See infra* note 76. The proposal below does limit restraints to when they are the least restrictive alternative. *See infra* notes 72-77 and accompanying text.

27. Only two states mention the issue of choice. Oklahoma allows patients to choose seclusion or restraints over medication (but not vice versa) "if practical." OKLA. STAT. ANN. tit. 43A, § 54.8D (West Supp. 1985). Alaska requires that the patient's choice among forms of restraint be consulted and "considered," if "practicable." ALASKA STAT. § 47.30.825(d) (1985). The proposal below, *see infra* notes 78-80 and accompanying text, goes beyond these statutes.

28. *See infra* notes 81-83.

29. In *Youngberg v. Romeo*, 457 U.S. 307, 321-23 (1982), the Supreme Court decided that the constitutional standard is an "actual professional judgment" standard. Existing common law restraints cases rely on a malpractice standard, which is also based on professional norms. *See* Annot., 8 A.L.R.4th 509, 512 §§ 13, 15 (1981); 25 A.L.R.3d 1450 (1969).

Mechanical Restraints

A. Casting Doubt on Treatment Efficacy: The British Experience

A comparison of British and American practices governing the use of restraints raises serious doubts about the alleged "medical benefits" offered by mechanical restraints.

The American medical community readily accepts the use of physical controls.³⁰ American psychiatrists do not even see mechanical restraints as a "regrettable but permissible emergency liberty infringement."³¹ Rather, in their view, restraints can be justified by one of two "medical benefits" theories: they are either a form of therapy (the "treatment" view) or a form of patient management, with medical indications and contraindications (the "management" view).³²

30. Although this Note focuses on restraints, and discusses seclusion and emergency medication only insofar as they bear upon the use of restraints, in discussions of the theory and practice of restraints, some reference will be made to the more voluminous literature on seclusion. Seclusion is different from restraints in some respects: it may be used for destimulation, and it may result in sensory deprivation. If care is taken to except these features, however, the literature on seclusion can be helpful, for seclusion and restraints share the important feature of limiting destructive behavior, and may be presumed to have similar causes and effects. Some commentators go so far as to suggest that seclusion and restraints are interchangeable, *see infra* note 80—not a position held in this Note. Moreover, restraints often take place in seclusion; thus a knowledge of seclusion is helpful to an understanding of restraints.

31. Guthell & Tardiff, *Indications and Contraindications for Seclusion and Restraint*, in *USES*, *supra* note 25, at 11.

32. For some of the most important discussions in favor of the use of restraints and seclusion, see, e.g., *THE PSYCHIATRIC USES OF SECLUSION AND RESTRAINT*, *supra* note 25 (discussing restraints and seclusion in wide variety of contexts, e.g. use on the psychiatrically ill, the elderly, and the developmentally disabled); Bursien, *Using Mechanical Restraints on Acutely Disturbed Psychiatric Patients*, 26 *HOSP. & COMM. PSYCHIATRY* 757 (1975) (giving indications for use of restraints); Rosen & DiGiacomo, *The Role of Physical Restraint in the Treatment of Psychiatric Illness*, 39 *J. CLIN. PSYCHIATRY* 228 (1978) (same). The most important discussion opposing the use of restraints is Guirguis, *Management of Disturbed Patients: An Alternative to the Use of Mechanical Restraints*, 39 *J. CLIN. PSYCHIATRY* 295 (1978) (discussing disadvantages of use of restraints).

See also Cubbin, *Mechanical Restraints: To Use or Not to Use?* 66 *NURSING TIMES* 752 (1970); Fitzgerald & Long, *Seclusion in the Treatment and Management of Severely Disturbed Manic and Depressed Patients*, 11 *PSYCHIATRIC CARE* 59 (1973); Gair, *Limit-Setting and Seclusion in the Psychiatric Hospital*, *PSYCHIATRIC OPINION*, Feb. 1980, at 15; Guthell, *Observations on the Theoretical Bases for Seclusion of the Psychiatric Inpatient*, 135 *AM. J. PSYCHIATRY* 325 (1978); Guthell, *Restraint Versus Treatment: Seclusion as Discussed in the Boston State Hospital Case*, 137 *AM. J. PSYCHIATRY* 718 (1980); Kilgalen, *The Effective Use of Seclusion*, *J. PSYCHIATRIC NURSING & MENTAL HEALTH SERVICES* Jan. 1977, at 22; *ASSAULT WITHIN PSYCHIATRIC FACILITIES* (J. Lion & W. Reid eds. 1983); Plutchik, Karasu, Conte, Siegel & Jerrett, *Toward a Rationale for the Seclusion Process*, 166 *J. NERVOUS AND MENTAL DISEASE* 571 (1978) [hereinafter cited as Plutchik]; Reid, *Controlling the Fight/Flight Patient*, *CAN. NURSE* Oct. 1973, at 30; *CLINICAL TREATMENT OF THE VIOLENT PERSON* (L. Roth ed. 1985); Soliday, *A Comparison of Patient and Staff Attitudes toward Seclusion*, 173 *J. NERVOUS & MENTAL DISEASE* 282 (1985); McElroy, *Consumers of Psychiatric Services and Staff: Worlds Apart on the Issue of Seclusion*, 173 *J. NERVOUS & MENTAL DISEASE* 287 (1985); Chamberlin, *An Ex-Patient's Response to Soliday*, 173 *J. NERVOUS & MENTAL DISEASE* 288 (1985); Jensen, *Comments on Dr. Stanley M. Soliday's "A Comparison of Patient and Staff Attitudes toward Seclusion,"* 173 *J. NERVOUS & MENTAL DISEASE* 290 (1985); Soloff, *Physical Restraint and the Nonpsychotic Patient: Clinical and Legal Perspectives*, 40 *J. CLIN. PSYCHIATRY* 302 (1979) [hereinafter cited as *Restraint and the Nonpsychotic Patient*]; Strutt, Bailey, Peermohamed, Forrest & Corton, *Seclusion: Can It Be Justified?*, 76 *NURSING TIMES* 1629 (1980) [hereinafter cited as Strutt].

The "treatment" view³³ sees restraints as therapy for psychotic patients who are disorganized, delusional, and often impulsive. Restraints are supposed to calm these patients by reassuring them that they will not be allowed to lose control,³⁴ and are said to "give definition [to] disrupted ego-boundaries."³⁵ The literature analogizes the restraining process to a mother holding her crying, kicking child until the child is able to regain control.³⁶

Under the "management" view, restraints are indicated to prevent violence, to calm agitated patients, and to preserve the "therapeutic milieu."³⁷ In practice, restraints are most often used for the latter two reasons.³⁸ Management theorists recommend that restraints be used at the earliest sign of disturbance.³⁹

For discussions of the legal issues raised by seclusion and restraints, see Wexler, *Seclusion and Restraint: Lessons from Law, Psychiatry, and Psychology*, 5 INT'L J. L. & PSYCHIATRY 285 (1983) (discussing implications of *Youngberg v. Romeo* for restraint and seclusion practices); Wexler, *Legal Aspects of Seclusion and Restraint*, in USES, *supra* note 25, at 111 (same) [hereinafter cited as *Legal Aspects*]; Dix, *Legal and Ethical Issues in the Treatment and Handling of Violent Behavior*, in CLINICAL TREATMENT OF THE VIOLENT PERSON, *supra*, at 187 (discussing issues raised by emergency and behavior modification uses of restraints and seclusion).

33. Several commentators state or suggest that restraints are a form of "treatment." See, e.g., Straker, *Guidelines for the Elderly*, in USES, *supra* note 25, at 103. Nowhere in the literature on restraints is this treatment theory spelled out, however. This Note therefore borrows from the literature on seclusion, as well as from discussions with numerous professionals, to piece together the "treatment" view of restraints.

This treatment view of restraints is not new. In the past restraints were thought to torture patients out of "their madness," see THREE HUNDRED YEARS OF PSYCHIATRY 254 (R. Hunter & I. MacAlpine eds. 1963) (section discussing and quoting F. van Helmont) [hereinafter cited as 300 YEARS]; THREE HUNDRED YEARS OF PSYCHIATRY 325 (R. Hunter & I. MacAlpine eds. 1963) (section discussing and quoting P. Blair), or to suppress physical excitement and thereby tranquilize the mind, see THREE HUNDRED YEARS OF PSYCHIATRY, 473, 478 (R. Hunter & I. MacAlpine eds. 1963) (section discussing and quoting W. Cullen).

Even pro-restraints theorists have long been aware that restraints can put patients in a *more* disturbed state of mind. See Reid, *supra* note 32, at 33; Kronberg, in ASSAULT WITHIN PSYCHIATRIC FACILITIES, *supra* note 32, at 23; Rosen & DiGiacomo, *supra* note 32, at 232; Mattson & Sacks, *Seclusion: Uses and Complications*, 135 AM. J. PSYCHIATRY 1210, 1212 (1978). Opponents of restraints, such as Guirguis, think that exacerbation of disturbance is the usual result of restraints. See Guirguis, *supra* note 32, at 297. See also Conolly, *infra* note 42.

34. See, e.g., Kilgalen, *supra* note 32, at 24; Soloff, *Precipitants*, *supra* note 3, at 180; Wells, *The Use of Seclusion on a University Hospital Psychiatric Floor*, 26 ARCH. GEN. PSYCHIATRY 410, 412 (1972).

35. See Soloff, *Restraint and the Nonpsychotic Patient*, *supra* note 32, at 302; see also Soloff, *Precipitants*, *supra* note 3, at 188; Soloff, *Physical Controls: The Use of Seclusion and Restraint in Modern Psychiatric Practice*, in CLINICAL TREATMENT OF THE VIOLENT PERSON, *supra* note 32, at 124, 129 [hereinafter cited as *Physical Controls*]. In a related vein, Soloff also sees restraints as bringing about the restitution of internal controls. See Soloff, *Restraint and the Nonpsychotic Patient*, *supra* note 32, at 305.

36. See Reid, *supra* note 32, at 32; Gair, *supra* note 32, at 15-16.

37. See Gutheil & Tardiff, *supra* note 31, at 11-12. The "therapeutic milieu" is that atmosphere of the ward which is supposed to be therapeutic for patients. Simply stated, "preserving the milieu" means maintaining calm on the ward.

38. See, e.g., Gutheil, *Review of Quantitative Studies*, in USES, *supra* note 25, at 125, 130-37; Soloff, *Physical Controls*, *supra* note 35, at 129-35.

39. See Gutheil & Tardiff, *supra* note 31, at 11.

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On both the “treatment” and “management” views, then, it is clear that restraints are recommended for earlier and longer use than they would be for safety reasons alone.⁴⁰

In contrast to their American counterparts, British psychiatrists have successfully done without the major forms of mechanical restraint for many years.⁴¹ The non-restraint movement in Britain was begun by John Conolly in the last century,⁴² and today’s British psychiatrists recommend using physical controls (like seclusion) only when absolutely necessary,

40. For the “management” theorist’s position, see *id.* For the “treatment” theorist’s position, see Rosen & DiGiacomo, *supra* note 32, at 230–31.

41. Although the British do still use minor restraining devices such as arm splints and geriatric chairs, they do not employ the major forms of restraint. See British Mental Health Act Commission, Patients Presenting Particular Management Problems § 8.6.1 (Proposed Regulations) (on file with author). These recommendations of the Mental Health Act Commission, a body established to write a Code of Practice for psychiatrists, will be submitted to the Secretary of State, who will “consult such bodies as appear to be concerned” and then lay the proposals before Parliament. See Mental Health Act 1983, at § 118 (3) & (4), 1983 PUB. GEN. ACTS & MEAS. ch. 20. While Patients Presenting Particular Management Problems § 8.6.1 prescribes procedures to be used in the case of the minor restraining devices, this proposed regulation also states that: “In Britain, major forms of mechanical restraint have long been abandoned. . . .” The Mental Health Act Commission has stated that “major forms of mechanical restraint” include manacles, straightjackets, and four point restraints. Letter from Mental Health Act Commission (Feb. 20, 1986) (on file with author). See also Dewhurst, *The New Methods of Restraint*, 66 NURSING TIMES 749, 751 (1970) (finding no evidence that major forms of restraint, including posey vest and four points, used in British psychiatric hospitals).

42. Conolly was the most famous spokesperson for the non-restraint movement in Britain. His book, *THE TREATMENT OF THE INSANE WITHOUT MECHANICAL RESTRAINTS* (1856), thoroughly documented the salutary effects of removing patients’ shackles. Although Conolly did allow for the use of seclusion in some circumstances, *id.* at 212, 232–33, he recommended a policy of forbearance toward patients’ inappropriate behavior, *id.* at 235, 40, 115–16, and managed to forego the use of restraints for over ten years. His accomplishment was even more remarkable in that he did not have antipsychotic drugs with which to calm his patients. Moreover, contrary to what Soloff suggests in *Physical Controls*, *supra* note 35, at 125–26, Conolly’s hospital did care for acute as well as chronic patients; see, e.g., *THE TREATMENT OF THE INSANE WITHOUT MECHANICAL RESTRAINTS* (1856), at 35–37, 224–25, and 262. Forty other large public asylums quickly replicated Conolly’s success. *Id.* at 342.

Conolly did have some predecessors. Philippe Pinel began the non-restraint movement in Europe in 1793. R. Hill experimented with the total abolition of restraint at the small hospital in Lincoln, England: “in a properly constructed building, with a sufficient number of suitable attendants, restraint is never necessary, never justifiable, and always injurious, in all cases of Lunacy whatever.” See 300 YEARS, *supra* note 33, at 890 (emphasis in original); see also *id.* at 897 (discussing and quoting Prichard, credited by Hill as first person to adopt non-restraint system in full); Knoff, *Modern Treatment of the “Insane”: An Historical View of Nonrestraint*, 60 N.Y.S. J. MED. 2236 (1960); Soloff, *Historical Notes on Seclusion and Restraint*, in USES, *supra* note 25, at 1.

For accounts of more recent efforts to reduce the use of restraints and seclusion in America, see Greenblatt, *Seclusion as a Means of Restraint*, PSYCHIATRIC OPINION, Feb. 1980, at 13; Solomon, *Half a Century of Hospital Psychiatry*, 19 HOSP. & COMM. PSYCHIATRY 367 (1968). See also M. GREENBLATT, R. YORK & E. BROWN, FROM CUSTODIAL TO THERAPEUTIC CARE IN MENTAL HOSPITALS 60, 307 (1955) (patient hours in seclusion dropped from over 600 hours a month to under 50 hours a month within two and a half years at one hospital; from 265 hours a week to one hour a week within four months at another hospital); Jacoby, Babikian, McLamb & Hohlbein, *A Study in Non-Restraint*, 115 AM. J. PSYCHIATRY 114, 119 (1958) (40 patients in restraints a day to zero a day in six weeks; no seclusion used). While these studies show that American hospitals are able to reduce the use of seclusion and restraints, despite their initial pessimism about the process, comparison with the British experience suggests that American hospitals still have a long way to go.

and then only to the smallest possible degree.⁴³ For example, a British Commission has recommended that using physical controls to preserve the milieu in British hospitals be forbidden.⁴⁴

The statistics demonstrate the success of the British philosophy. Despite the absence of mechanical restraints, the British use seclusion less often than American psychiatrists,⁴⁵ and there is no evidence that they use medication or physical restraint⁴⁶ more than American psychiatrists.⁴⁷ Indeed, the British mental hospital today uses little coercion of any kind; most

43. As the Royal College of Psychiatrists says:

The degree of force should be the minimum required to control the violence and it should be applied in a manner that attempts to reduce rather than provoke a further aggressive reaction. The number of staff involved should be the minimum necessary to restrain the patient while minimizing injury to all parties.

British Department of Health and Social Security, Health Services Management: The Management of Violent, or Potentially Violent, Hospital Patients, Health Circular HC[76]11, Appendix by Royal College of Psychiatrists. Compare Lion & Soloff, *Implementation of Seclusion and Restraint*, in USES, *supra* note 25, at 19, 23 (discussing American psychiatry's recommendation of "show of force" as best means of averting or minimizing violence). Similarly, British Mental Health Act Commission, Patients Presenting Particular Management Problems (Proposed Regulations) (on file with author) clearly and cogently states a minimalist approach to the use of physical controls.

For further examples of British seclusion guidelines, see Royal College of Nursing, *Seclusion and Restraint in Hospitals and Units for the Mentally Disordered* (April 1979) (on file with author); Nursing Management Directive: Seclusion—The Use of Single and Protective Rooms, No. 3 (April 1984) (on file with author); Royal College of Psychiatrists, *Locking up Patients By Themselves*, 6 BULL. ROYAL COLLEGE OF PSYCHIATRISTS 199 (1982). See also Royal College of Psychiatrists, *Isolation of Patients in Protected Rooms During Psychiatric Treatment*, 5 BULL. ROYAL COLLEGE OF PSYCHIATRISTS 96 (1981).

44. See British Mental Health Act Commission, Patients Presenting Particular Management Problems §8.2 (Proposed Regulations) (on file with author): "Both informal and detained patients may exhibit behaviour other than violence which may cause management problems. This may include irresponsible behaviour; un-cooperativeness; socially embarrassing behaviour; sexually inappropriate behaviour; aimless wandering; self-injury. Only close supervision, individual plans of care, and a suitable setting or environment should be used for such behaviour."

45. For British seclusion rates, see Strutt, *supra* note 32, at 1632 (average secluded in month: .26%; maximum time: 2 hours and 40 minutes); Mental Health Act Commissioner, *The Practice of Seclusion in Psychiatric Hospitals* (on file with author) (only 35 of 42 public hospitals use seclusion; average time: one half hour to an hour); Higgins, *Four Years' Experience of an Interim Secure Unit*, 282 BRIT. MED. J. 889, 890 (1981) (seclusion used for only "a few hours in four years" in facility for most difficult patients). But cf. Campbell, *The Use of Seclusion*, 78 NURSING TIMES 1821, 1822-23 (1982) (seclusion used on 75% of patients; still, average only 2.6 hours, maximum, 23 hours; year long study with no control for days at risk). Compare American rates, cited in Gutheil, *Review of Quantitative Studies*, *supra* note 38, at 126-27 (range from 1.9% to 44%, with an average of 18.8%; range in average times from less than three hours to 20 hours, with an average of 9.7 hours).

On restraints rates in America, see *supra* note 3. But note also that in Schwabb & Lahmeyer's study, *The Uses of Seclusion on a General Hospital Psychiatric Unit*, 42 J. CLIN. PSYCHIATRY 228, 230 (1979), 18% of the patients in seclusion were also in restraints, and that in Tardiff's study, *Emergency Control Measures for Psychiatric Inpatients*, 169 J. NERVOUS & MENTAL DISEASE 614, 615 (1981), the figure of 1.9% refers to patients in seclusion or restraints.

46. "Physical restraint" means holding a patient down but not tying him up.

47. Nor is there evidence that the British have a higher rate of injuries as a result of not using restraints. Indeed, the evidence that restraints prevent violence is somewhat equivocal: half of all assaults on staff in American psychiatric hospitals occur during restraint and seclusion episodes. See Lion & Soloff, *supra* note 43, at 22, citing ASSAULT WITHIN PSYCHIATRIC FACILITIES, *supra* note 32. Restraints and seclusion may so frighten or anger some patients that they are likelier to become violent.

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wards are unlocked, and voluntary patients—the vast majority—are free to leave the hospital without notice.⁴⁸

That British psychiatrists so vigorously oppose the use of mechanical restraints, and that they care for their patients with little recourse to them, calls the American “treatment” view into doubt. Indeed, the evidence in favor of the efficacy of restraints is at best anecdotal,⁴⁹ and even proponents of the “treatment” view would be hard-pressed to claim that this evidence is anything like that in favor of psychotropic medication. If it is permissible to deprive a patient of his liberty for treatment purposes only when the benefits of the treatment are clear, then the “treatment” rationale for the use of restraints must fail.

The British experience provides an even stronger case against the “management” theory of restraints. British psychiatrists have found that mechanical restraints are simply not needed in order to manage patients and maintain the therapeutic milieu. In contrast, American “management” practice calls for restraints early and often, encouraging psychiatrists to act immediately rather than to wait and see if the perceived threat materializes.

Some examples of the use of restraints give a flavor of what the “management” theory will justify. In the first a patient is subjected to physical controls for repeatedly lacerating himself superficially to get staff attention; the “treatment” provided a “face-saving way to give up the regressive behavior.”⁵⁰ In the second, a patient—never actually violent—is restrained for pacing more vigorously than usual.⁵¹ In the third, a patient is

48. See Public Policy Committee of the Royal College of Psychiatrists, *Locked Wards and Informal Patients*, 4 BULL. ROYAL COLLEGE OF PSYCHIATRISTS 8, 9 (1980) (“the vast majority of psychiatric patients are cared for and treated in open wards”); MIND, A PRACTICAL GUIDE TO MENTAL HEALTH LAW ch. 1 (1983) (90% admissions “informal;” informal or voluntary patients may leave hospital without notice).

49. No *experimental* evidence documents the effects of restraints or seclusion. Anecdotal evidence goes both ways, but where studies have been done, physical controls appear in a uniformly bad light.

The most impressive study of how patients in fact react to seclusion (often, seclusion and restraints) is in Wadeson & Carpenter, *Impact of the Seclusion Room Experience*, 163 J. NERVOUS & MENTAL DISEASE 318 (1976). This study was not intended to document the effects of seclusion, thus the danger of patients attempting to please their doctors is minimized. Wadeson and Carpenter found that:

Delusional material and affective response to seclusion directly represent fear, terror, anger, and resentment. In the art productions, patients presented a universally negative view of the seclusion experience when reacting directly to the event. . . . The nonpsychotic feeling of bitterness over being placed in seclusion was usually a prevailing attitude, even at 1-year follow-up, not simply an immediate reaction. For a few of our patients, bitterness about being secluded colored their entire perception of their hospitalization.

Id. at 327–28. See also Soliday, *supra* note 32 (study showing patients have much more negative view of seclusion than staff); Chamberlin, *supra* note 32, at 288 (ex-patient reports that patients find seclusion form of “torture”); Plutchik, *supra* note 32, at 575 (study showing patients have largely negative response to seclusion).

50. Wells, *supra* note 34, at 412–13. The patient was secluded.

51. Confidential source in New Haven hospital.

restrained for being rude to staff.⁵² The spoon-breaker discussed earlier could be cited under each category: as potentially violent, as agitated, and as disruptive of the milieu.⁵³

Professor Wilhelm Griesinger long ago addressed the danger of the argument that the use of restraints is good and only the abuse is blameable. "No one," he said, "can say where the use ends and the abuse begins. . . ."⁵⁴

B. *The "Lesser Liberty" Argument*

The second justification for a laissez-faire attitude toward the use of mechanical restraints is that society need not weigh the liberty and dignity interests of psychiatric patients as heavily as it does those of other individuals. Psychiatric patients, the argument might run, cannot appreciate their actions in the way other individuals can. As a consequence, we should be less concerned about protecting their liberty.

This argument fails for two reasons. First, nothing suggests that psychiatric patients do not value and appreciate their freedom at least as much as anyone else does.⁵⁵ On the contrary, familiarity with the commitment

52. Binder, *The Use of Seclusion on an Inpatient Crisis Intervention Unit*, 30 HOSP. & COMM. PSYCHIATRY 266, 268 (1979) (also giving examples of patients secluded for yelling at staff, being sarcastic, and refusing medications).

53. Restraints and seclusion may easily be used in inappropriate and untherapeutic ways. See, e.g., Gutheil & Tardiff, *supra* note 31, at 14 and 17; Soloff, *Physical Controls*, *supra* note 35, at 139-40. The most disturbing cases are those in which restraints seem to be used as a form of punishment. Consider these cases: patient restrained for not getting out of bed (confidential source in Connecticut hospital); not remaining in day area (confidential source in Philadelphia hospital); cutting loose a restrained patient, Soloff, *Restraint and the Nonpsychotic Patient*, *supra* note 32, at 304; repeated slamming of doors, Mattson & Sacks, *supra* note 33, at 1211.

It is true that a number of statutes proscribe the use of restraints as punishment. See, e.g., ILL. REV. STAT. ch.91 ½, § 2-108 (1982); LA. REV. STAT. ANN. § 28:17(D) (West Supp. 1986). Yet it is difficult to argue with the claim that restraints were used, not as punishment, but because the milieu was disrupted, or because the patient's "medical needs" called for the use of restraints (i.e. punishment will help him).

The danger that staff will use restraints to meet their own needs (to punish or to manage), whatever the ostensible reason for the restraints, is noted even in the pro-restraints medical literature. Thus Gutheil & Tardiff, *supra* note 31, at 16-17, acknowledge that staff may use restraints or seclusion inappropriately to deal with their own problems—to avoid dealing with difficult patients, to engage a distant doctor, or to scapegoat. Binder, *supra* note 52, at 268, notes that seclusion, in his study, appeared sometimes to be used as a method of retaliation.

Guirguis, who disapproves of restraints, points out similar dangers. The habituation potential in staff is too great: restraints may replace more appropriate measures because they are an easy way to handle patients. Similarly, there is the potential for a more profound kind of abuse: "staff can act out their own conflicts by way of punishing the patient." *Supra* note 32, at 297. See also Strutt, *supra* note 32, at 1631.

54. 300 YEARS, *supra* note 33, at 1032 (quoting Griesinger's 1867 comment).

55. During the course of personal conversations, a number of psychiatrists have suggested that restraining a mentally ill patient is not like restraining a "normal" person, that mentally ill patients experience being restrained "differently" than would a "normal" person. Conversations with patients who have been restrained, however, strongly suggest that they are no less sensitive to the pain and indignity of being strapped down than any other person would be.

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system, where patients confined involuntarily in hospitals strenuously contest their confinement, may well lead one to precisely the opposite conclusion.⁵⁶ Second, a standard of liberty based upon an individual's level of functioning would require troubling decisions about the weights and merits of the liberty interests of different individuals and groups in our society.⁵⁷

Indeed, by protecting patients' freedom, society can, first, reinforce in these individuals what freedom they do retain,⁵⁸ second, give these individuals the dignity of making those choices they are in the best position to make, and third, reaffirm its commitment to the dignity and value of each of its members. As a consequence, the decision to restrain a patient, if it is to be made at all, should be made in response to his dangerous actions, not to assumptions about the relative value of his freedom.

C. *The "Intrusion" Justification*

The claim that the law should allow a liberal use of restraints because a more restrictive standard would be too great an intrusion into the medical milieu⁵⁹ fails for two reasons. First, medical regulation of restraints is often not even *conceptually* sound. Second, no convincing argument has been put forth that a new law governing the use of restraints would make institutional life worse.

We may be wary of intruding too much on medical practice because we think that doctors are best situated to know what their patients need. Thus, we hesitate to burden the profession with extra-medical rules which we fear will not serve patients' interests well. But we often subject medical practice to outside constraints in the belief that patients' needs and interests go beyond the purely medical.⁶⁰

In fact, many decisions to restrain (like decisions to commit) are not medical decisions at all. What degree or imminence of danger justifies restraints? Do the social consequences of mental regression justify re-

56. Interview with Professor Stephen Wizner, Director of Clinical Studies and Professor (Adjunct) of Law, Yale Law School (June 6, 1986).

57. Thus the law seems to shun this kind of argument: in deciding the civil commitment issue in *O'Connor v. Donaldson*, 422 U.S. 563 (1975), e.g., the Court was not heard to argue that the liberty of mentally ill people was less valuable than that of others. *But cf.* *Schall v. Martin*, 467 U.S. 253 (1984) (youths' interest in freedom weakened by fact that youths always in someone's custody).

58. *See, e.g.*, Nigrosh, in *ASSAULT WITHIN PSYCHIATRIC FACILITIES*, *supra* note 32, at 269.

59. This is one of the Court's main concerns in *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982). It may be some reassurance to note that the non-restraint movement in England, while launched by physicians, was fueled by Parliamentary inquiries in 1815 and 1816, as well as by legislation on restraints some years later. 300 YEARS, *supra* note 33, at 696-97.

60. I have already discussed how patients must give their informed consent before being treated, and may not be civilly committed solely on the ground that commitment is medically the optimal course. *See supra* notes 7-13 and accompanying text.

straints?⁶¹ These questions implicate acute moral and social values such as the importance of freedom and the rights of the individual against the group. The physician's superior medical knowledge does not vest him with a unique ability to make these collective, ethical choices. The questions are properly social, not medical, and the answers should properly be supplied by social mechanisms.⁶²

A second concern with intruding on medical practice within institutions is that it may have unpredictable effects, actually harming instead of improving institutional life. The success of the non-restraint movement in Britain, however, suggests that this fear is unfounded. Moreover, present rules governing the use of restraints⁶³ have clearly negative consequences in that they do little to discourage the use of restraints and much to encourage it. Current law credits doctors with predictive powers they do not have⁶⁴ and indulges doctors' fears of liability for injuries they could not have predicted.⁶⁵ As a consequence, current law actually *encourages* doctors to over-predict violence, and thus to restrain patients unnecessarily.⁶⁶

III. A MODEL RESTRAINTS STATUTE

The abuse of mechanical restraints needs to be addressed in a legislative rather than judicial forum. The recent Supreme Court case of *Youngberg v. Romeo*⁶⁷ has effectively foreclosed federal constitutional law as a source of controlling the use of restraints, and, if history is any guide, state court

61. See *O'Connor v. Donaldson*, 422 U.S. 563, 575-76 (1975) for a negative answer to the similar question of whether the vagrant mentally ill can be committed for the sake of the public.

62. Naturally, the precise nature of the distinction between social and medical judgments is unclear. Still, one may at least tentatively call "social" those judgments about people that do not depend on esoteric knowledge of the body or mind.

For an interesting discussion of the distinction between "political" and "medical" decisions, see Gelman, *Mental Hospital Drugs, Professionalism, and the Constitution*, 72 GEO. L. J. 1725 (1984).

63. Notice that with these existing rules we *already* intrude into medical institutions. Thus the issue is not whether to intrude, but how to do so in the manner best to protect society's and individuals' interests.

64. See J. MONAHAN, *PREDICTING VIOLENT BEHAVIOR* (1981) (psychiatrists wrong in two out of three long-term predictions of violent behavior).

65. For liability for patients injuring themselves, see, e.g., 70 A.L.R.2d 347 (1960); 19 A.L.R.4th 7 (1983). The duty is to exercise such reasonable care for the patients' safety as their mental condition may require. Notice that doctors appear to fear liability more than is warranted. See Kroll & MacKenzie, *When Psychiatrists are Liable: Risk Management and Violent Patients*, 34 HOSP. & COMM. PSYCHIATRY 29, 29 (1983). Nevertheless, the fear does still govern their behavior.

66. Restraints laws are so loose that liability for inappropriately restraining patients is almost impossible to prove. Moreover, most often the injuries resulting from restraints are dignitary; injured patients may feel it is not worth their while—or the publicity—to sue when an award for damages is not likely to be great.

It might be argued that the present liability scheme is sound, because we are more interested in deterring serious physical injuries than in deterring dignitary violations. But the harms to be compared here are the *many* serious assaults on dignity and liberty caused by restraints as against the *rare* physical injury.

67. 457 U.S. 307 (1982) ("professional judgment" standard).

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interpretations of their own constitutions⁶⁸ are likely to follow the federal.⁶⁹ Common law approaches to the problem face a number of serious doctrinal and statutory roadblocks,⁷⁰ and are in any event unable to provide the detailed and certain guidelines which a statute can provide.

A. A Rigorous "Dangerousness" Standard

A new statute should use a high threshold dangerousness standard. Because the treatment benefits of restraints are highly speculative, a practice so restrictive and degrading as mechanical restraints is justified only in the face of imminent and serious danger. A new statute should therefore state that restraints are permissible only to protect a patient from imminent and serious violence to himself that there is a substantial likelihood of occurring. Examples of serious violence would be significant disfigurement, impairment of bodily function, or grave physical injuries which would require immediate medical attention.⁷¹

B. Distinguishing Between Restraints and Seclusion

The second important feature of a new statute should be to distinguish between restraints and seclusion. Of the two, restraints are the more serious deprivation,⁷² and patients overwhelmingly prefer seclusion to re-

68. The most powerful state constitutional argument against unnecessary restraint is that liberty is a fundamental interest which should be abridged only for compelling reasons—hence, not for speculative treatment benefits or in the face of minor or remote risks.

69. See, e.g., Note, *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. R. 1324, 1493-94 (1982).

70. At least three common law arguments are possible: 1) the conventional argument that, absent an emergency, treatment without consent is a battery (but "emergency" can be interpreted weakly enough that many impermissible uses of restraints would be permitted by this argument); 2) a novel argument that restraints decisions should be subject to assessment by a reasonable person standard as to whether the injuries to liberty and dignity are outweighed by the benefits; 3) a similarly novel argument that restraints decisions should be assessed by ordinary battery standards applicable to restraint of the non-ill. All of these arguments could be undermined, however, by the fact that many states statutorily permit restraints for the sake of treatment or to meet patients' "medical needs." See *supra* note 25.

71. See similar standard proposed by INST. JUD. ADMIN.—ABA JOINT COMM'N ON JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO ABUSE AND NEGLECT § 2.1A commentary at 63-65 (1981). The high threshold of danger set forth in this standard for removal of a child from his home seems appropriate in the restraints context for similar reasons: Intervention is only clearly advantageous in extreme situations.

72. Different commentators and states have ranked restraints and seclusion (as well as emergency medication) in different ways, see Wexler, *Legal Aspects*, *supra* note 32, at 115-16, although some of these differences may relate to whether medication is used merely as a restraint or also as a form of treatment, whether the restraint is envisioned as public, etc. That reasonable people may differ does not mean that an effort to adopt a presumptive ranking of modalities is misplaced. Indeed, ranking these modalities is made easier now that we know of *patients'* clear preference for seclusion over restraints. See *infra* note 73. Doctors' arguments for a different ranking, in light of this preference, are unpersuasive. See, e.g., Soloff, *Physical Controls*, *supra* note 35, at 140, who prefers restraints to seclusion because staff can feel less fearful of contact with patients. See also Rosen and DiGiacomo, *supra* note 32, at 232, who inexplicably state that locked seclusion (or even locked wards) cannot be

straints.⁷³ A patient in a seclusion room can walk around, do jumping jacks, lie in a corner; a patient in restraints can do nothing. A patient in restraints suffers the physical pain of forced immobility; a patient in seclusion does not. Finally, restraints are the more severe dignity violation. Nothing in our day-to-day routine prepares us for being strapped down, while being alone in a room—even in a locked room—is a part of most individuals' life experience.⁷⁴

Today, however, restraints are recommended, and are being used, where seclusion would do just as well: for danger to others, agitation, regression, and the preservation of the "therapeutic milieu."⁷⁵ No existing statute properly distinguishes between restraints and seclusion.⁷⁶

A model statute, therefore, would confine the use of restraints to when there is an imminent danger of harm to self.⁷⁷ Seclusion can be substituted when there is danger of harm to others, but not to self. The main exception to this rule is triggered when a patient chooses restraints in public over seclusion.

considered less restrictive than restraints, even though they advocate that restraints take place in a solitary room, *id.* at 228.

73. See Soliday, *supra* note 32, at 284 (74% of patients surveyed think restraints are more unpleasant than seclusion).

74. On the other hand, patients restrained in public, but not secluded, can socialize with others. Observation and discussion with patients suggest that most feel too humiliated to do so, however. This point may be less valid when patients are in less degrading forms of restraint, e.g., restrained unobtrusively to a chair.

Consider further that being restrained to a bed would be impermissible punishment in a prison, because it is too degrading, *see supra* note 5. Moreover, 89.4% of the seclusion/restraints deaths in the N.Y. study were a result of restraints only. *See Way, supra* note 4.

75. *See, e.g., Rosen & DiGiacomo, supra* note 32, at 229-30; Soloff, *Physical Controls, supra* note 35, at 135-37.

76. Fifteen states have a law only on restraints, not on seclusion. Of the states that have laws referring to both, only two have different laws for each. Michigan allows restraints only for safety, MICH. COMP. LAWS ANN. § 330.1740(2) (West 1980), but seclusion if it would be "of clinical or therapeutic benefit for the resident," MICH. COMP. LAWS ANN. § 330.1742(2) (West 1980). Illinois requires a two-day break—unless authorized by the facility director—after 24 hours of restraints, ILL. REV. STAT. ch. 91 ½, § 2-108 (e) (1982). In the case of seclusion the break is to occur after only 16 hours, ILL. REV. STAT. ch. 91 ½, § 2-109 (d) (1982). *See also* Tardiff & Mattson, *supra* note 25, at 144 ("Indications for seclusion and restraint were basically the same.").

This legal indifference to the distinction between seclusion and restraints is paralleled by a medical indifference. Some institutions show a clear preference for restraints, others for seclusion, but there is no evidence that the behaviors triggering the different controls are distinguishable. This means that in the former facilities, restraints are often (or always) used where seclusion would be sufficient.

In New York State facilities, for example, 53.6% of control episodes involved restraints, and 46.4% involved seclusion. Ten of the thirty one facilities surveyed used only restraints. *Way, supra* note 3, Table 6.

77. In addition to using restraints for danger to self, restraints may be used in three further, limited situations: a concurrent medical condition requires an unwilling patient to stay in bed; the medical condition requires an initial physical examination; or it requires physical monitoring more than four times an hour (for the doctor to be non-negligent). On the other hand, if a patient is too violent to be given a mental status exam, then that exam must wait.

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C. *Allowing The Patient Choice*

The third general feature of a new statute should be to give the patient a choice among appropriate control measures, and to require staff to respect his choice. For instance, to avoid extended seclusion (and loneliness), a patient dangerous to others might sometimes choose restraint in the company of other patients instead of seclusion.

It makes sense to give patients a choice among appropriate control measures,⁷⁸ even if the patients are of questionable competence,⁷⁹ because doctors have failed to make a persuasive medical case for any particular ranking of these measures.⁸⁰ Furthermore, patients are most likely to know their own states of mind and how the various measures will affect them. In any case, if no ranking can be shown to be objectively better or worse than the others, the patient's choice will never be wrong, and allowing him to choose intrudes less on his liberty and dignity than does imposing one control or another.

To maximize the role patients play in determining which control measure shall be used, they should be advised, on admission, of the advantages and disadvantages of each method. They should be asked to rank these measures in order of their personal preference. Any change of heart during an emergency, however, should be respected, and the patient's choice should be sought every half hour he spends controlled.

D. *Procedural Safeguards*

A new statute should also impose a series of procedural requirements to ensure that patients are appropriately restrained and are released once the requisite degree and imminence of danger has passed. First, a doctor should be required to renew her order for restraints each hour, after having personally examined the patient each time.⁸¹ Second, every two hours

78. Patients dangerous to others should have a choice of medication, seclusion, or restraints in the company of staff or other patients. Patients dangerous to self should have a choice of medication or restraints in the company of staff or other patients. These patients should be told that medication may prove insufficient alone, but may be tried first at their request.

79. *But cf.* Note, *Developments*, *supra* note 13, at 1359 n.193 (desirable to give patients choice, but *parens patriae* patient's choice may be overridden if it does not comport with treatment program).

80. Doctors widely disagree on rankings of measures. Rosen and DiGiacomo prefer restraints, but admit the choice is "subjective." Rosen & DiGiacomo, *supra* note 32, at 232. And while Gair thinks physical restraint is, for some patients, too stimulating and diverting, Gair, *supra* note 32, at 16, Cubbin regards it as the preferred method, Cubbin, *supra* note 32, at 752. In the absence of a medically supported ranking, patients should be permitted to make their own choice.

81. Three states in the "safety or other rationale" category now require the first type of protection—the order must be renewed every 24 hours. *See* MONT. CODE ANN. § 53-21-146 (1983); N.J. STAT. ANN. § 30:4-24.2(d)(3) (West 1981); S.D. CODIFIED LAWS ANN. § 27A-12-6 (Supp. 1986). One state in the "safety or treatment" category also requires renewal every 24 hours. *See* WIS. STAT. ANN. § 51.61(1)(i)(1) (West Supp. 1985). Six of the ten "safety only" states require the order to be renewed: Georgia every 24 hours, GA. CODE ANN. § 37-3-165(b) (Supp. 1985); Illinois every 16

the patient should be released, and should remain out of restraints unless he makes an overt attempt to injure himself.⁸² Third, every fifteen hours the facility director should be required to personally examine the patient, and renew the order for restraints.⁸³

In addition, there should be extra-institutional protections. At the end of 24 hours, a legal representative should be required to attend the patient (to inform him of his rights and watch him being released from restraints). At the end of 72 hours, an independent psychiatrist should be required to assess the patient's restraint in the presence of his counsel. If the patient remains in restraints after 72 hours, he should have a hearing before a judge, and should again be represented by counsel.⁸⁴

hours, ILL. REV. STAT. ch. 91 ½, § 2-108(a) (1982); Kansas every 3 hours (except between 12 a.m. and 8 a.m.), KAN. STAT. ANN. § 59-2928 (1983); Massachusetts every 3 hours, MASS. GEN. LAWS ANN. ch. 123, § 21 (West Supp. 1985); N.Y. every 4 hours (except between 9 p.m. and 9 a.m.), N.Y. MENTAL HYG. LAW § 33.04(d) (Consol. 1978); *see also* Tardiff & Mattson, *supra* note 25, at 146 (most states have 24 hour time limit; Florida has one hour time limit).

A short initial review time for restraints makes sense, especially in light of Soloff's finding that the duration of seclusion and restraints appears to be independent of patient behavior. *See* Soloff, *Physical Controls*, *supra* note 35, at 135.

82. Four states now require release every two hours. In three of the four, it is unclear whether this is to enable the patient to exercise his limbs, or to test his readiness for release. Tardiff & Mattson, *supra* note 25, at 146. In New York it is to test readiness for release. N.Y. MENTAL HYG. LAW §33.04(f) (Consol. 1978).

83. Off-unit review of the staff's decision to restrain a patient is uncommon, and, even then, often does not require personal examination of the restrained patient. For example, Georgia statutorily requires review by the chief medical officer, but only of a written report. GA. CODE ANN. § 37-3-165(b) (Supp. 1985). Illinois requires daily review (of some unspecified kind) by the director of the facility. ILL. REV. STAT. ch. 91 ½, § 2-108(d) (1982). *See also* Tardiff & Mattson, *supra* note 25, at 146 (nine states require off-unit review of some kind after 24 hours, three states, after eight hours).

84. The experience of New York, the state with one of the strictest restraints laws, suggests that, with adequate and frequent checks, prolonged restraint is minimized. Thus, in a one-month study in New York, most restraints orders were for four hours (the length before required physician review), followed by a large minority which were for two hours (the length before test-release). Way, *supra* note 3, at Table 8. Moreover, 95.5% of the patients were restrained no longer than four hours, with most of these under two hours. *Id.* at Table 9.

Nevertheless, the first two procedures are insufficient to keep restraints within reasonable bounds. Consider that 2% of the cases in the New York study were restraint episodes of nine hours or more, and 1% were episodes of twelve hours or more. *Id.* at Table 9. Moreover, the figures are for patients restrained six or fewer times in the month studied. Patients restrained over six times were likelier to receive orders for nine hours or more (11% vs. 2%, *id.* at 4; 24% vs. 16% in one facility, *id.* at 5), and these individuals accounted for 39% of all episodes of restraint or seclusion. *Id.* at 1.

Connecticut provides examples of prolonged restraint as well. One doctor candidly acknowledges that he restrains patients, on occasion, for several weeks at a time (confidential source in New Haven hospital). Another hospital has restrained a small girl, whenever she is not in locked seclusion, for over two years (confidential source in New Haven hospital).

The last three procedural protections are therefore offered as failsafe measures, to protect patients from the prolonged restraint which now occurs, and which is legally permitted in many states. Only the first has even a rough parallel in existing law: ILL. REV. STAT. ch. 91 ½, § 2-201(c) (1982) (notice to the "Guardianship and Advocacy Commission" if the patient desires).

The use of independent psychiatrists to review restraints episodes would be perhaps less costly than might at first appear, for some states are now adopting regulations on medication refusal which call for or authorize evaluation by independent psychiatrists. *See, e.g.*, N.J. Ad. Bull. 78-3 § II(E)I; Ohio Department of Mental Health, Policy on Client Participation in Medication Decisions 18-19 (June 13, 1984); 25 TEX. ADMIN. CODE tit. 25, § 405.808 (6) (1984). The same is true for representation.

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While requiring such an extensive set of procedures would be costly,⁸⁵ the hope is that the costliness of the procedures—as well as the high degree of danger required—will deter the use of restraints in all but the most exigent circumstances.

E. *Liability Limits For Doctors*

To redress the flaws of the existing liability scheme, a new principle of liability should be designed to deter doctors from using restraints out of a fear that malpractice suits will be brought. Liability should be strengthened for unreasonably restraining patients.⁸⁶ Doctors, however, should not be held liable for injuries resulting from a failure to restrain patients, unless a person of the most common understanding⁸⁷ would have foreseen serious injuries of the kind described in the statute.⁸⁸

This principle of liability⁸⁹ recognizes the limits of doctors' ability to

See, e.g., Michigan Administration of Psychotropic Medication, *supra* note 22; N.Y. ADMIN. CODE tit. 14, § 27.8 (d) (1984) (attorney or other "concerned person"); Ohio Department of Mental Health, Policy on Client Participation in Medication Decisions 12 (June 13, 1984).

85. Note that while the proposed procedures are designed especially to protect against the prolonged use of restraints, all but the last should also be in force whenever the total length of time a patient spends in separate periods of restraint, within 30 days, equals the specified number of hours. When a patient spends 72–120 non-successive hours in restraints, a hearing should be provided only if his representative alleges an impermissible use of restraints. When he spends more than 120 non-successive hours in restraints, a hearing should automatically be provided.

Note also that if a patient is claimed to have consented to treatment by restraints, he should nonetheless be seen after 15 hours by the facility director to ensure that the consent is genuine and competent, and similarly by the patient advocate after 24 hours. Patients are often said to go "willingly" into restraints when they do not resist, even if they have been presented with a show of force and given no alternative. The patient advocate should determine whether review by an independent psychiatrist or the court is warranted.

86. For example, one could establish some specific damages for violating the statute; these would have to be set not so high as to risk jury nullification, nor so low as to become merely a cost of doing business. Alternatively, one could raise a presumption of a battery for violation of the statute, to be rebutted only by a showing that extraordinary circumstances existed.

87. Compare *McCall v. McDowell*, 15 F. Cas. 1235, 1240 (C.C.D. Cal. 1867) (obeying superior's commands defense to illegal action unless person of the most common understanding would know command illegal).

Other ways of weakening liability for injuries resulting from failure to restrain a patient would be to put a cap on damages or to use a "gross negligence" standard. But the former penalizes doctors for proper behavior—i.e. waiting to restrain a patient until the danger is patent—and protects doctors for improper behavior—i.e. not restraining a patient when the danger is patent. And the latter misleadingly implies that waiting to restrain a patient until the danger is patent is negligent.

88. This is not to say that failing to use measures short of restraints—e.g. restricting a patient to a lounge, "specialling" a patient—would not subject a doctor to liability unless a person of the most common understanding would predict violence; on the contrary, an "ordinary doctor" standard would be used in such a case.

89. There are other situations in tort law in which the standard of care is lowered in order that concerns about malpractice not govern physicians' actions. The most notable is the situation covered by "Good Samaritan" laws. These attempt to encourage physicians (and others) to intervene to help a person toward whom no duty of care was owed at common law. Most such statutes hold a physician who so intervenes liable for injuries caused only by "gross negligence," or some similar form of misconduct. *See* Mapel & Weigel, *Good Samaritan Laws—Who Needs Them? The Current State of Good Samaritan Protection in the United States*, 21 S. TEX. L. J. 327, 342–46 (1981); Note, *Good*

predict violence. It eases the pressure on doctors who may feel besieged by conflicting demands—both to protect patients and not to restrain them—by making a clear value-choice: Great numbers of patients should not be restrained in order to protect against the rare occurrence of self-inflicted injury.

Most importantly, the rule is designed to reduce both the use of restraints and the supervision of patients' choices. The fear that, if effective, the rule would cause a dramatic rise in self-injuries is unfounded, as may be seen from the situation in England. A serious increase in the use of other controls also need not occur: English doctors have not significantly resorted to seclusion or medication to compensate for not using mechanical restraints.

In America, a proposed restraints law may eventually have to be supplemented by a seclusion and emergency medication law. In the meantime, a new statute would spare some patients the pain of unnecessary restraint. Given the grave injury to individual liberty and dignity caused by restraints, that alone would be well worth achieving.

Samaritan Statutes: Time for Uniformity, 27 WAYNE L. REV. 217, 224-25 (1980). The idea of such a lower standard, as in the case of the restraints law, is to encourage physicians to act (or not act) by lowering the risks of malpractice consequent upon their action (or inaction).

Consider also the area of constitutional torts, where an objective standard of qualified immunity limits government actors' liability so as to encourage vigorous decision-making. For the standard, see *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). On appropriate incentives for government actors, see P. SCHUCK, *SUING GOVERNMENT* (1983).

MENTAL HEALTH LAW: THREE SCHOLARLY TRADITIONS

ELYN R. SAKS*

For the last quarter-century there has been considerable court activity in the arena of mental health law, much of it based on federal and state constitutions.¹ As in other areas of law, advocates for the civil rights of patients made more strides earlier in this period than later.² On the other hand, antidiscrimination and provision-of-benefits-type actions have made

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1. On civil commitment, substantive and procedural, see, for example, *Addington v. Texas*, 441 U.S. 418, 419 (1979); *O'Connor v. Donaldson*, 422 U.S. 563, 565 (1975). On criminal commitment, see, for example, *Foucha v. Louisiana*, 504 U.S. 71, 73 (1992); *United States v. Jones*, 463 U.S. 354, 356 (1983). On sexual predator commitment, see *Kansas v. Hendricks*, 521 U.S. 346 (1997). On right to refuse medication, there are two U.S. Supreme Court cases in the criminal area. See *Riggins v. Nevada*, 504 U.S. 127, 129 (1992); *Washington v. Harper*, 494 U.S. 210, 213 (1990). In the civil arena, the Court has remanded these cases. See, e.g., *Rennie v. Klein*, 458 U.S. 1119 (1982); *Mills v. Rogers*, 457 U.S. 291, 293 (1982). There are a considerable number of state law cases granting competent patients the right to refuse medication. See, e.g., *Mills*, 457 U.S. at 293; *Riese v. St. Mary's Hosp. & Med. Ctr.*, 271 Cal. Rptr. 199, 201 (1987); *Rivers v. Katz*, 495 N.E.2d 337, 339 (N.Y. 1986). Right-to-treatment cases did not get too far, see *Youngberg v. Romeo*, 457 U.S. 307, 309 (1982), although there may now be impetus under the Americans with Disabilities Act (ADA) to provide care in the community. See, e.g., *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 583 (1999). There have also been civil cases about restraints and seclusion. See, e.g., *Youngberg*, 457 U.S. at 309. On confidentiality, see *Speaker v. County of San Bernardino*, 82 F. Supp. 2d 1105, 1106 (C.D. Cal. 2000). On duty to warn, see, for example, *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 339 (Cal. 1976). And there have been criminal cases on the guilty-but-mentally-ill plea, e.g., *People v. Crews*, 522 N.E.2d 1167, 1169 (Ill. 1988), on the right to an expert in an insanity case, e.g., *Ake v. Oklahoma*, 470 U.S. 68, 70 (1985), and on competency to be executed, e.g., *Ford v. Wainwright*, 477 U.S. 399, 401 (1986).

2. Compare, e.g., *O'Connor*, 422 U.S. at 576 (adopting autonomy-protective standard for civil commitment in 1975), with *Washington*, 494 U.S. at 236 (adopting paternalistic standard for prisoners refusing medication in 1990).

more headway, largely as a result of federal legislation interpreted liberally by the courts.³

This article will not trace the development of the case and statutory law in this arena, but rather three traditions of mental health law scholarship. These are doctrinal treatments, therapeutic jurisprudence treatments, and philosophical treatments of mental health law issues. After discussing these three traditions, I will locate myself within the third, discussing both some of my work to date and future work I propose in the area of competency and responsibility.

I. THREE TRADITIONS OF MENTAL HEALTH LAW SCHOLARSHIP

As I noted, there are three central traditions of scholarship in mental health law: doctrinal constitutional scholarship focusing on rights, therapeutic jurisprudence scholarship focusing on the therapeutic implications of different laws, and theoretical scholarship focusing on philosophical issues underpinning mental health law.

A. DOCTRINAL CONSTITUTIONAL SCHOLARSHIP

The first tradition, doctrinal constitutional law scholarship, was quite prominent at the beginning of the mental health rights movement,⁴ although this is not to say that many do not continue to work in this tradition.⁵ Arguments tended to be framed in doctrinal terms. A right to refuse treatment, for example, was based in a Fourteenth Amendment privacy

3. For litigation under the ADA, see, for example, *Olmstead*, 527 U.S. at 583; Kathleen S. v. Dep't of Pub. Welfare, 10 F. Supp. 2d 460, 462 (E.D. Pa. 1998); *Doe v. Stincer*, 990 F. Supp. 1427, 1428 (S.D. Fla. 1997). For litigation under the Individual Disabilities Education Act (formerly the Education for All Handicapped Children Act), see, for example, *J.B. v. Killingly Bd. of Educ.*, 990 F. Supp. 57, 61 (D. Conn. 1997); *Unified Sch. Dist. No. 1 v. Dep't of Educ.*, 1999 WL 74531 (Conn. Super. Ct. 1999).

4. See, e.g., Alexander D. Brooks, *The Constitutional Right to Refuse Antipsychotic Medications*, 8 BULL. AM. ACAD. PSYCHIATRY & L. 179, 190-91 (1980); Alexander D. Brooks, *The Right to Refuse Antipsychotic Medications: Law and Policy*, 39 RUTGERS L. REV. 339 (1987); George E. Dix, *Major Current Issues Concerning Civil Commitment Criteria*, 45 LAW & CONTEMP. PROBS. 137 (1982); George E. Dix, *The 1983 Revision of the Texas Mental Health Code*, 16 ST. MARY'S L.J. 41 (1984); Robert Plotkin, *Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment*, 72 NW. U. L. REV. 461 (1978); Bruce J. Winick, *Legal Limitations on Correctional Therapy and Research*, 65 MINN. L. REV. 331 (1981); Bruce J. Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. REV. 921 (1985); Bruce J. Winick, *The Right to Refuse Mental Health Treatment: A First Amendment Perspective*, 44 U. MIAMI L. REV. 1 (1989) [hereinafter *Right to Refuse*].

5. E.g., BRUCE J. WINICK, *THE RIGHT TO REFUSE MENTAL HEALTH TREATMENT* (1997).

claim,⁶ a First Amendment right to mentation claim,⁷ or an Eighth Amendment cruel and unusual punishment claim.⁸ The various constitutional bases for different rights were explored, and courts indeed closely followed the scholarship in this area.⁹

Of course, the Court (and courts) changed, and advocates became much more ambivalent about articulating federal constitutional bases to support the civil liberties of psychiatric patients. Simply put, the Federal Constitution was interpreted in such a way that it was not too protective of patients' rights.¹⁰

Nevertheless, some legal scholars continued to write in this doctrinal tradition, framing their arguments on state constitutional, common law, or statutory grounds.¹¹ Or perhaps they were hoping for a change in the courts again, such that the federal constitutional arguments they were advancing would be better received. Some doctrinal scholars tried to put the most favorable spin on the Supreme Court's mental health law jurisprudence, hoping to influence further cases on doctrinal grounds.¹² In addition, new laws, such as the American with Disabilities Act (ADA), created new opportunities for doctrinal scholars to frame legal arguments in order to achieve the results they thought best.¹³

In sketching this history, I do not mean to imply that mental health law scholars were primarily advocates and, therefore, not scholars. Many had a law reform agenda, but were likely putting forward the interpretation of the Constitution they thought to be correct and best justified normatively. But the fact that these scholars framed their arguments in

6. E.g., WINICK, *supra* note 5, at 193–94; Fakre Gibson, *A Bright Thread for California's Legal Crazy-Quilt: A Proposed Right to Refuse Antipsychotic Drugs*, 22 U.S.F. L. REV. 341, 370–73, 379 (1988); Plotkin, *supra* note 4, at 491.

7. E.g., Michael H. Shapiro, *Legislating Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. CAL. L. REV. 237 (1973); Winick, *Right to Refuse*, *supra* note 4, at 132–51.

8. E.g., Plotkin, *supra* note 4, at 491–92.

9. See, e.g., Lessard v. Schmidt, 413 F. Supp. 1318, 1319 (E.D. Wis. 1976).

10. Consider, for example, the Supreme Court's jurisprudence on the right to refuse medication compared with state law claims. See cases cited *supra* note 1.

11. E.g., Jessica Litman, Note, *Common Law Remedy for Forcible Medication of the Institutionalized Mentally Ill*, 82 COLUM. L. REV. 1720, 1738–43 (1982).

12. E.g., Bruce J. Winick, *New Directions in the Right To Refuse Mental Health Treatment: The Implications of Riggins v. Nevada*, 2 WM. & MARY BILL RTS. J. 205 (1993); Bruce J. Winick, *The Side Effects of Incompetency Labeling and the Implications for Mental Health Law*, 1 PSYCHOL. PUB. POL'Y & L. 6 (1995).

13. E.g., SUSAN STEFAN, *UNEQUAL RIGHTS: DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT* (2001).

terms of doctrine meant that the arguments could be used practically by advocates in actual cases.

Thus, the first tradition of mental health law scholarship was doctrinal—in particular, constitutional. For the most part, the arguments advanced were civil libertarian and, thus, quite focused on rights. While some continue to write in this tradition, most of the doctrinal arguments have been well rehearsed, and appear, at least with the current Court, not to have carried the day.

B. THERAPEUTIC JURISPRUDENCE SCHOLARSHIP

The second tradition of mental health law scholarship is quite different from the first. Unlike the constitutional scholarship, this tradition is of recent vintage. Dubbed “therapeutic jurisprudence,” its agenda is to explore the therapeutic dimensions of various laws.¹⁴ At the inception of the therapeutic jurisprudence movement, traditional mental health law issues were looked at through this lens,¹⁵ but over time all manner of issues came to be scrutinized in this way.¹⁶

One might have thought that practitioners of therapeutic jurisprudence would tend to be paternalists, because they seemed to care so much about the therapeutic implications of a law; but that is not how this school played out. Often writers in this tradition argued that what would be therapeutic was also most protective of autonomy. For example, a right to refuse treatment serves patients’ therapeutic interests, because it is mostly willing patients who benefit from treatment anyway.¹⁷ Further, incompetency findings should be made sparingly, because they are stigmatizing and,

14. *E.g.*, DAVID B. WEXLER & BRUCE J. WINICK, *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* 1 (1996); Dennis P. Stolle, David B. Wexler, Bruce J. Winick & Edward A. Dauer, *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15 (1997); David B. Wexler, *The Development of Therapeutic Jurisprudence: From Theory to Practice*, 68 REV. JUR. U.P.R. 691 (1999) [hereinafter *Theory to Practice*]; David B. Wexler, *Redefining the Insanity Problem*, 53 GEO. WASH. L. REV. 528 (1985); David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence and Criminal Justice Mental Health Issues*, 16 MENTAL & PHYSICAL DISABILITY L. REP. 225 (1992); Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37 (1999).

15. *See, e.g.*, DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* 3–38 (1991); Wexler, *Theory to Practice*, *supra* note 14, at 691.

16. *See, e.g.*, Ellen Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence*, 82 MARQ. L. REV. 155 (1998); Patricia Monroe Winsom, Note, *Probate Law and Mediation: A Therapeutic Perspective*, 37 ARIZ. L. REV. 1345 (1995).

17. *See, e.g.*, WINICK, *supra* note 5, at 328–38.

therefore, do not contribute to a patient's therapeutic interests.¹⁸ Indeed, many who came to the therapeutic jurisprudence school were originally in the constitutional scholarship camp and shared the agenda of that camp.¹⁹

Therapeutic jurisprudence explicitly fashioned itself as having a law-reform agenda.²⁰ All other things being equal, we should strive to make law as therapeutic as possible. Therapeutic proponents would also make the other side see, so to speak, that what the rights theorists wanted would also serve the interests central to the paternalists: patients' therapeutic interests.²¹ Indeed, some saw proponents of therapeutic jurisprudence as advocates, rather than scholars—at least as much as some saw the constitutional scholars as advocates.

In certain hands, therapeutic jurisprudence could also lead to the opposite outcome: letting us do what is therapeutically best for the patient notwithstanding his autonomy interests. For instance, if you care most about therapeutic benefits, it is arguable that you make people take medication even though that trenches on their autonomy and makes them feel bad, because forced medication works well enough that the pain of not being listened to is outweighed by the treatment benefits. A paternalist slant is certainly a danger of the therapeutic jurisprudence lens.

This brings me to my last point about therapeutic jurisprudence: It is utterly nonnormative.²² Above I said that all other things being equal, we should strive to make laws as therapeutic as possible. But all other things are rarely equal. And when a patient's treatment interests conflict with his autonomy interests, how do we decide which to prefer? Therapeutic jurisprudence offers no answer to this question.

Not all scholarly traditions need to be normative to be valuable, and therapeutic jurisprudence has had and continues to have some useful things to say. But it remains somewhat disappointing that the tradition gives no guidance as to the degree of importance of therapeutic interests. And without the normative orientation, one wonders what is jurisprudential

18. See Bruce J. Winick, *Competency to Consent to Treatment: The Distinction Between Assent and Objection*, 28 HOUS. L. REV. 15, 46–53 (1991).

19. Compare WINICK, *supra* note 5 (doctrinal account of right to refuse treatment), with Winick, *supra* note 14 (therapeutic jurisprudence account of civil commitment), and Winick, *supra* note 18 (therapeutic jurisprudence account of assent to treatment).

20. See, e.g., Stolle, *supra* note 14, at 36–37; Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184, 192 (1997).

21. See Winick, *supra* note 20, at 191–92.

22. See Stephen H. Behnke & Elyn R. Saks, *Therapeutic Jurisprudence: Informed Consent as a Clinical Indication for the Chronically Suicidal Patient with Borderline Personality Disorder*, 31 LOY. L.A. L. REV. 945, 980–81 (1998).

about therapeutic jurisprudence.²³ Perhaps it is even a school of scholarship best practiced by clinicians.

C. THEORETICAL SCHOLARSHIP

The third tradition of mental health law is more theoretical than the other two. It has tended to focus more on philosophical issues raised by mental health such as autonomy versus paternalism, the nature of mental illness, what it is to be a person, and responsibility and competency.²⁴ For instance, Stephen Morse has discussed responsibility,²⁵ including volitional tests of insanity.²⁶ And Michael Moore has discussed the nature of mental illness, responsibility, and the unity of the self.²⁷

At its best, this tradition has laid the normative groundwork for the first two traditions. A due process analysis of a right to refuse medication is, or should be, founded on some notion of when autonomy should prevail over the patient's interests in well-being. While the constitutional scholars framed the argument in doctrinal terms, the philosophical scholars talked about the important values that underlay such a focus. In the same way, proponents of therapeutic jurisprudence may tell us when a particular procedure is therapeutic, while the philosophical theorists should help us see how to adjudicate the dispute when therapeutic interests conflict with justice.

Indeed, scholars in the third tradition have focused on those issues which should help us decide when a rights-based civil libertarian focus is appropriate (the first tradition) and when we should be concerned primarily with the patient's treatment interests (in some hands, the second tradition). For this genre of scholarship has a considerable amount to say about not only autonomy and paternalism, but also personhood, responsibility, and competency, as well as their relationship to each other. Indeed, it is arguable that when the patient is a "person," a full moral agent, and therefore competent to make choices, then, and only then, should we support her autonomy.

23. *See id.*

24. *See, e.g.,* MICHAEL S. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP (1984); Stephen J. Morse, *Crazy Reasons*, 10 J. CONTEMP. LEGAL ISSUES 189 (1999); Elyn R. Saks, *Competency to Refuse Psychotropic Medication: Three Alternatives to the Law's Cognitive Standard*, 47 U. MIAMI L. REV. 689 (1993) [hereinafter *Refuse Psychotropic Medication*]; Elyn R. Saks, *Competency to Refuse Treatment*, 69 N.C. L. REV. 945 (1991) [hereinafter *Refuse Treatment*].

25. Morse, *supra* note 24, at 190–204.

26. Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587 (1994).

27. MOORE, *supra* note 24, at 155–216, 249–383, 387–415 (respectively).

These then are three important traditions in mental health law scholarship, and each has contributed in some way to doctrinal developments in the law. Additionally, each has contributed to our theoretical understanding quite apart from its practical implications for the law, which has been of utmost importance as well.²⁸

II. A PROPOSAL FOR FUTURE WORK IN THE THIRD TRADITION

My own work is located mostly in the third tradition.²⁹ I will elaborate briefly on two contributions I have made to this tradition: on competency to make treatment decisions³⁰ and on the criminal

28. Of course I do not mean to imply that these are the only mental health law traditions of scholarship. For instance, some scholars (often in the hermeneutic tradition) have focused on the contribution of psychoanalysis, and different versions of psychoanalysis, to the law. *E.g.*, David S. Caudill, *Freud and Critical Legal Studies: Contours of a Radical Socio-Legal Psychoanalysis*, 66 *IND. L.J.* 651 (1991). Some critical legal realists have written in the area attempting to deconstruct certain concepts and focus our attention more on relationships. *E.g.*, Caudill, *supra*, at 651; Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 *MD. L. REV.* 563 (1982). And some psychologists have made important contributions to our understanding of eyewitness testimony and juries through purely empirical research. *E.g.*, ELIZABETH F. LOFTUS & GARY L. WELLS, *EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES* (1984); Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 *LAW & CONTEMP. PROBS.* 205 (1989). Also in the empirical vein are those scholars who work on child testimonial capacity and childhood abuse and neglect. *E.g.*, Thomas D. Lyon & Jonathan J. Koehler, *The Relevance Ratio: Evaluating the Probative Value of Expert Testimony in Child Sexual Abuse Cases*, 82 *CORNELL L. REV.* 43 (1996); John E.B. Myers, *The Child Witness: Techniques for Direct Examination, Cross-Examination, and Impeachment*, 18 *PAC. L.J.* 801 (1987). For an especially insightful look at abuse and neglect through a psychoanalytic lens, see JOSEPH GOLDSTEIN, ALBERT J. SOLNIT, SONJA GOLDSTEIN & ANNA FREUD, *THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* (1996). In addition, there are those studies bringing cognitive psychology to bear on the law. *E.g.*, Edward J. McCaffery, Daniel J. Kahneman & Mathew L. Spitzer, *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 *VA. L. REV.* 1341 (1995); Richard E. Redding, *How Common-Sense Psychology Can Inform Law and Psychological Research*, 5 *U. CHI. L. SCH. ROUNDTABLE* 107 (1998); Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 *RUTGERS L.J.* 1 (1998). Still, the three traditions I describe are important traditions in mental health law.

29. *See, e.g.*, ELYN R. SAKS WITH STEPHEN H. BEHNKE, *JEKYLL ON TRIAL: MULTIPLE PERSONALITY DISORDER AND CRIMINAL LAW* (1997); Saks, *Refuse Psychotropic Medication*, *supra* note 24; Saks, *Refuse Treatment*, *supra* note 24. I am also in the process of completing a book on the normative dimensions of forced treatments of a variety of kinds in the mental health context. ELYN R. SAKS, *LAW, ETHICS, AND SEVERE MENTAL ILLNESS: QUESTIONING OUR VALUES* (forthcoming 2001).

30. *See* Elyn R. Saks, *Competency to Decide on Treatment and Research: The MacArthur Capacity Instruments*, in 2 *NAT'L BIOETHICS ADVISORY COMM'N, RESEARCH INVOLVING PERSONS WITH MENTAL DISORDERS THAT MAY AFFECT DECISIONMAKING CAPACITY* 59 (1999) [hereinafter *MacArthur Capacity Instruments*]; Saks, *Refuse Psychotropic Medication*, *supra* note 24; Saks, *Refuse Treatment*, *supra* note 24; Elyn R. Saks & Stephen H. Behnke, *Competency to Decide on Treatment and Research: MacArthur and Beyond*, 10 *J. CONTEMP. LEGAL ISSUES* 103 (1999).

responsibility of people with multiple personality disorder (MPD).³¹ I will then sketch a current project extending my research on treatment capacity and some ideas about the civil capacity (as opposed to the criminal responsibility) of people with MPD, which is something I would like to focus on in a more systematic way in my future work.

A. TREATMENT CAPACITY

I have long retained an interest in treatment capacity. In my first article after beginning to teach law, I discussed several standards of treatment capacity, and endorsed one that required an understanding of relevant information and the formation of no “patently false beliefs” (PFBs).³² I controversially argued that denial of mental illness did not amount to a patently false belief. I then contributed to a symposium on treatment capacity, where I wrote about noncognitive standards and argued against adopting them.³³

More recently, the field has been advanced considerably by the MacArthur Mental Health Law Network researchers, one of whose topics has been treatment capacity.³⁴ The MacArthur researchers identify four abilities arguably necessary for capacity and study them empirically. I have criticized the MacArthur research in two further articles, arguing that they need to address the important normative questions raised by a capacity instrument, that they indeed smuggle in normative judgments while denying doing so, and that their “appreciation” instrument is flawed.³⁵

Their appreciation instrument (the Perceptions of Disorder Instrument or the POD) is flawed, I argue, because it essentially requires agreement with one’s doctor about one’s diagnosis and prognosis with and without treatment. Such an approach is misguided. For example, it ignores the possibility that the patient could believe an earlier doctor’s diagnosis. It is implausible to make an individual doctor the final authority on truth. What would become of second opinions if we were to do so?³⁶

31. See SAKS WITH BEHNKE, *supra* note 29; Elyn R. Saks, *The Criminal Responsibility of People with Multiple Personality Disorder*, 66 PSYCHIATRIC Q. 169 (1994); *Does Multiple Personality Disorder Exist? The Beliefs, the Data, and the Law*, 17 INT’L J.L. & PSYCHIATRY 43 (1994); *Integrating Multiple Personalities, Murder, and the Status of Alters as Persons*, 8 PUB. AFF. Q. 169 (1994); *Multiple Personality Disorder and Criminal Responsibility*, 25 U.C. DAVIS L. REV. 383 (1992).

32. See Saks, *Refuse Treatment*, *supra* note 24, at 455–56, 962–65, 984–92.

33. See Saks, *Refuse Psychotropic Medication*, *supra* note 24.

34. See Saks & Behnke, *supra* note 30, at 106–07 n.5.

35. See Saks, *MacArthur Capacity Instruments*, *supra* note 30; Saks & Behnke, *supra* note 30.

36. See Saks, *MacArthur Capacity Instruments*, *supra* note 30, at 69–71; Saks & Behnke, *supra* note 30, at 117–18.

The MacArthur researchers' clinical instrument, the MacArthur Competence Assessment Tool for Treatment (MacCAT-T), is somewhat of an improvement, because it focuses on beliefs that grossly distort reality as opposed to simply disagreeing with one's doctor's beliefs. However, it makes no effort to operationalize that concept.³⁷ Thus, I suspect that reliability and validity will suffer as a result. I am also concerned that, even with this language, most denials of mental illness will unjustifiably be taken to vitiate capacity.

In response to the flaws of the MacArthur instrument and other instruments on appreciation, my collaborators at the University of California, San Diego School of Medicine³⁸ and I are developing a new instrument to measure appreciation that will redress some of these problems. In particular, our development of the concept of a PFB to measure the adequacy of the patient's beliefs goes a long way in addressing the problems posed by requiring true beliefs according to the individual doctor.

What does our instrument, which makes use of this concept of a PFB, look like? We are aiming our instrument in the first instance at decisions to participate in psychiatric research. There are two versions of our instrument: one relating to "direct benefit" psychiatric research and the other to "no direct benefit" psychiatric research. The instruments start with a very simple informed consent form, different parts of which are labeled and cover the standard items, including those items which are research-specific. A questionnaire with fourteen questions is then administered to the subject. At the end, there are five more open-ended questions that try to get at the same things in a different way.

To take a closer look at what our instrument asks, our "direct benefit" instrument has four questions that relate to the nature of the procedure, four to risks and benefits, one to the status of the researcher, four to the status of the subject, and one to voluntariness. For example, under the nature of the procedure, subjects are asked whether they understand they will be undergoing a randomized clinical trial. Under risks and benefits, subjects are asked if they understand that nothing terrible or supernatural will happen depending on their choice. Under the status of the subject, subjects are asked if they understand that they do not have special powers that will

37. See Saks, *MacArthur Capacity Instruments*, *supra* note 30; Saks & Behnke, *supra* note 30, at 123-24.

38. Dilip Jeste, Laura Dunn, Laurie Lindamer, Barbara Marshall, and Larry Schneiderman are foremost among them.

protect them from harm. Under voluntariness, they are asked if they realize they can say “no” to the procedure. Then there are the five more open-ended questions that get at the same things in a slightly different way.

Detailed scoring instructions say which beliefs should vitiate consent and make use of a residual category of any PFB. Unlike the MacCAT-T, we provide an operational definition of a PFB and a series of a couple dozen examples of delusional beliefs with a discussion of why they are or are not PFBs. Subjects who, in any of their answers, evidence one of the impermissible beliefs or any other PFB are deemed incapable. Of course, the PFB must relate to the research and must have an effect on the subject’s decision. And there are questions at the end of the instrument probing the relation of the suspect answers to the subjects’ decisions.

We have begun administering our instrument in a pilot study and intend to administer the instrument to fifty middle-aged and older inpatients with a psychotic disorder, fifty middle-aged and older outpatients with a psychotic disorder, and fifty matched normal controls. We will not now be studying subjects about to embark on a research protocol, but will ask subjects to act as if they were about to embark on the research protocol that we describe in our informed consent. Thus a “vignette” procedure will be used. The instrument will be administered twice within a few days of each other by two different evaluators to test for inter-rater and test-retest reliability.

We hope to learn a number of things from our pilot study. For one, we want to refine our instrument as a result of the study. Are all the items needed? Are any duplicative? Are any outliers? Do the closed-ended and open-ended questions get at the same things, or does one set do a better job than the other, or are they best when both are administered? Moreover, does the test achieve good inter-rater reliability and good test-retest reliability? Equally important are what are our preliminary findings on how patients with psychosis and matched controls fare on this capacity measure. Do any other demographic variables explain our results?

After we refine our instrument, we want to do a much larger study with a much larger subject group. In our larger study we want to compare patients with schizophrenia, other psychotic disorders, depression, and some chronic medical condition such as ischemic heart disease, as well as normal controls, to see how they fare on our measure. We want to study such patients at different stages of their illness, such as acute, decompensating, and in remission. Thus, we would study both inpatients

and outpatients and hope to enroll some of the same patients in both conditions.

Once again, we will want to collect data on reliability—inter-rater and test-retest. We will also again want to see how different populations compare on the measure—different in terms of diagnosis, phase of illness, and other demographic variables. We will probably want to compare the results on our instrument with the results on the MacArthur instrument measuring appreciation and a clinical capacity exam. In this way, we will test for consistency among measures and, thus, move towards establishing the validity of our instrument.

Eventually, we will want to study subjects about to undergo research, and their appreciation of the issues involved in the research they are about to undergo. This will, of course, require adapting our instrument to the particular research about to be undertaken by the subjects. In the course of doing this, we hope to explore ways to help clinical evaluators to devise quickly an instrument modeled on ours and tailored to the specific information pertinent to their project.

Our final hope is to be able to construct a normatively justified, psychometrically sound, and easily administrable instrument to measure the appreciation component of capacity to decide on treatment or research. Capacity to consent to treatment and research is immensely important. I hope our project furthers thinking and greater public debate about this important issue.

B. CRIMINAL RESPONSIBILITY OF PEOPLE WITH MULTIPLE PERSONALITY DISORDER

Another contribution I have made to the third tradition of research in mental health law is on the criminal responsibility of people with MPD.³⁹ Like competency, responsibility is a crucial feature of moral agency. Indeed, responsibility can be thought of as competency to commit a crime.

Our standard accounts of criminal responsibility do not speak to MPD. Typically, insanity refers to a condition in which persons have a cognitive or volitional impairment which prevents them either from knowing or being able to control what they are doing.⁴⁰ But people with MPD are often cognitively and volitionally intact at any one given time. However,

39. See sources cited *supra* note 31.

40. See DONALD H.J. HERMANN, MENTAL HEALTH AND DISABILITY LAW 262–65 (1997).

over time they are simply so divided that it may be wrong to see them as single, responsible agents.

To consider the criminal responsibility of people with MPD, I first evaluate three different ways of conceptualizing alter personalities: as people by the best criteria of personal identity, as personlike centers of consciousness, or as nonpersonlike parts of a deeply divided person. I conclude that the jury is still out on how best to conceptualize alter personalities.⁴¹

Still, when considering criminal responsibility of these people on each of the three accounts, I conclude that most people with MPD should be found nonresponsible. If alters are people, then it is unjust to punish any innocent alters. Recall the law's edict that it is better to let ten guilty people go free than to punish one innocent person. If alters are personlike centers of consciousness, then, since alters are as capable of guilt and of innocence and of suffering from punishment as persons are, we shouldn't punish innocent alters any more than we should punish innocent persons. If alters are nonpersonlike parts, multiples are often still nonresponsible. Just as in the case of sleepwalkers or those acting under posthypnotic suggestion, multiples are not sufficiently integrated to make it just to hold them responsible. Since much of the person cannot be brought to bear on whether the act occurs, it is not, in a sense, *the person's* act.⁴²

I, therefore, conclude that unless all alters acquiesced in the crime—i.e., were complicit, or could have stopped the act but did not—the multiple should be nonresponsible. Interestingly, it is not all that uncommon for multiples to have all of their alters acquiescing in a crime.⁴³

C. CIVIL RESPONSIBILITY OF PERSONS WITH MULTIPLE PERSONALITY DISORDER

In my book on MPD and the criminal law, I also look at other criminal law issues, such as competency to stand trial and competency to be executed.⁴⁴ However, I in no way look at civil capacities. What is it for a multiple to be able to consent to treatment, enter a contract, write a will, or be parentally fit? Need all the alters agree to such a decision, as I claim they must in the criminal arena?

41. SAKS WITH BEHNKE, *supra* note 29, at 39–66.

42. *Id.* at 67–105.

43. *Id.* at 106–40.

44. *Id.* at 141–71.

Although these are questions that I need to think about more, I nevertheless have a few thoughts to share for now. First, it does not seem to me that we must take the same position for criminal responsibility and civil competencies. These are different contexts with wholly different purposes, and there may be reasons for taking a different position in one context than in the other. The same is true for the different civil competencies. For example, given the need for the security of transactions, we may have a different competency standard for contracts than for wills.⁴⁵

In the criminal law context, finding the person nonresponsible allows the justice system to accomplish most of the purposes of the criminal law without compromising the principle that only the guilty shall suffer punishment. We simply confine the person in a nonretributive institution. By contrast, finding a person generally incompetent means that he loses all decisional authority. The consequences are simply much greater, and it is not possible to satisfy most of the goals of the civil law while finding the person generally incompetent.

Indeed, even in the context of imposing punishment, we may have different rules for what the state may impose than for what individuals, like therapists, children, or parents, may impose. For example, parents can punish their young children, even though the law would never hold them criminally accountable for their actions. In the same way, it may be wrong for the state to imprison an innocent alter, but perfectly fine for a therapist to hold an alter accountable for what another alter does. Staff in psychiatric hospitals can seclude an acting-out multiple even if all of her alters are not acting out. Both the contexts and the principles governing acceptable actions are different.⁴⁶

But then what should the rule for civil competency be in the case of MPD? Because, as noted above, different civil competencies may call for different rules, let us focus on one: capacity to decide on treatment. When a doctor decides a person with MPD needs antidepressants because the patient seems depressed across all alters, can the doctor simply take the

45. See, e.g., *In re Estate of Dokken*, 604 N.W.2d 487, 491–95 (S.D. 2000).

46. See *SAKS WITH BEHNKE*, *supra* note 29, at 136–40.

If another example of the context-bound nature of most of our normative concepts is needed, consider, for example, the concept of a person. Depending on the context, we may have quite different views about whether an entity is a person. For instance, an alter should arguably be construed as a person for purposes of the criminal law, but not for purposes of getting unemployment benefits. And this could be justified because the multiple does the work of only one person notwithstanding her different alters. Or as another example, we should hold multiples to be only one person for purposes of voting, if for no other reason than that the possibilities of fraud are otherwise too great. Context is immensely important.

patient's assent at that moment to be valid consent? Or does the doctor need all of the alters to consent? What about an individual alter's refusing? In such cases should a guardian be appointed to make decisions like these?

The argument in favor of requiring all of the alters to decide is the same as that in the criminal law context: We should not burden "innocent," nonassenting alters with the consequences of what their "guilty" brethren have chosen. Suppose the alter who refuses treatment is opposed to the use of drugs, while all the other alters desperately want the medication or have other acceptable values that make them welcome pharmacological help for depression. Suppose that these others cannot come out for a time. Why should the assenting alters have to live with the consequences of what the nonassenting one has chosen?

On the other hand, the doctor on notice that the patient is a multiple may not be able to get the opinions of all or even most of the alters. What then? Do we want busy doctors trying to interact with what may be a great many alters? But if we don't expect the doctor to negotiate consent, should we appoint a guardian to make the decision?

A guardian making a decision for the multiple is an ironic solution at best. It seems to add just one more competent alter, so to speak, to the mix. The guardian is simply going to decide, more likely than not, as the guardian sees best. But why is that decision any better than the decision of any competent alter within the system of the multiple?

One response is that a guardian could be under a duty to try to negotiate consent among the alters. The guardian could be required to speak with as many of them as possible, and try to get them all to agree. If negotiating a settlement, so to speak, is not possible, the guardian could be under a duty to make the choice that best meets the needs and desires of most of the alters. By contrast, any competent alter may not have the interests of the brethren alters in mind in the same way.

On the other hand, it may be well-nigh impossible for such a solution to be reached. In that case, adding the guardian helps very little and, of course, has huge costs of its own in terms of time expended, stigma imposed, and all the discomforts of not having one's choice respected. Whether we think a guardian should be imposed depends on how likely we think the guardian able to negotiate a solution and how often the guardian will just impose what the guardian thinks best. Moreover, even if we think the former more likely, the decision depends on how much we think the costs of imposing a guardian outweigh the benefits of hearing out as many alters as possible on a decision.

My tentative view is that imposing a guardian does not make sense because a guardian will generally be no better a decisionmaker than any competent alter. I have one reservation, though, about letting any competent alter decide. What if the alter is deciding something that's really unconscionable and totally against the interests of all of the other alters? This is the case, for example, of the suicidal alter, even if suicidal for a good reason.

Suppose, for instance, that a multiple shows up at an emergency room acknowledging that she is a multiple, and it turns out she needs an immediate blood transfusion in order to survive. Suppose further that, when consent is sought, the alter who is out says "no," because he is a Jehovah's Witness. None of the other alters is a Jehovah's Witness, and they are each desperate to say "yes" to the transfusion in order to survive. But the Jehovah's Witness alter stays in control of the body and won't let the others out. Should the doctor accept the refusal of the Jehovah's Witness alter and let the patient die?

Or take another, less extreme case in a different competency context that also makes the point. A very wealthy multiple with several children in dire need goes to make a will, announcing to his lawyer that he is a multiple. But the alter who comes out in the lawyer's office is one who identifies with his aggressors and his abusers and, thus, wants to leave his vast estate to a pedophile organization. Should he be able to bind his fellow alters to this course even though it's exactly what they would *not* have chosen? If the multiple is hit by a car on the way out of the lawyer's office, is this will valid?

Clearly, cases like this give pause about a view that would allow any competent alter to decide for the whole. But there is a possible solution to this problem that is less intrusive than simply giving all multiples guardians: Any competent alter's decision is valid so long as it is not unconscionable. Indeed, this position would make civil competency equivalent to criminal responsibility, for in the latter context the competent alter's choice is in fact unconscionable.

One may think this idea too favorable to multiples: We honor only their good choices and protect them from any bad ones. But this is, I think, not entirely a fair criticism of this view. For we do allow bad choices—just not unconscionable ones. Moreover, we prevent multiples from making "unconscionable" choices, which we allow other people to make; and one person's unconscionable choice may be in another person's best interest, at least as she sees it. So this view does take away some of multiples'

decisional authority, with all its stigmatizing consequences and other possible detrimental effects. Multiples do not, so to speak, get all good things with no bad ones. And indeed, would it be so horrible to arrange institutions in such a way that one did get all good things?

If all of this is right, at least a first cut on competency to make treatment decisions for multiples would allow any competent alter's consent to be valid, unless the choice were unconscionable. A close second to this position would be to require a guardian to try to find the choice that best represents what most alters want (again so long as that is not unconscionable). Different civil competency contexts may require different rules. And indeed further thought might lead me later to take a different position even in this context.

CONCLUSION

Mental health law is an interesting and exciting field in which to work. Great strides have been made in the law in the last twenty-five years. Scholars have made important contributions as well. I, myself, find issues around personhood, moral agency, responsibility, and competency the most intriguing, at least in part because they implicate many different areas of the law. I feel privileged that USC Law School has given me the opportunity to think about these issues in a sustained way.