

PSYCHOLOGICAL COERCION IN THE CONTEXT OF MODERN-DAY INVOLUNTARY LABOR: REVISITING *UNITED STATES V. KOZMINSKI* AND UNDERSTANDING HUMAN TRAFFICKING

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I. INTRODUCTION

HUMAN trafficking is synonymous with modern-day slavery according to legislators, law enforcement, immigrant rights advocates, women's rights advocates, and the public at large. This characterization, however, has little resemblance to the chattel slavery that existed in the United States' antebellum South. A broader understanding of slavery has replaced the visceral imagery of the buying and selling of African slaves, and the state-sanctioned violence of whips and chains that prompted the passage of the Thirteenth Amendment. Through a diverse range of physical or non-physical methods including deception and mental manipulation, modern private actors have lured and compelled individuals to work in a variety of industries.

For example, in April 2001, Timothy Bradley and Kathleen O'Dell recruited three Jamaican men, Martin Sadler, Andrew Flynn, and David Hutchinson, to

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The idea for this article stems from the author's work representing a diverse range of trafficked individuals whose experience of being trafficked was unique in every instance—each characterized by subtle power dynamics that did not involve physical force, but were nonetheless debilitating. This article is the launching point to the author's parallel work-in-progress, *Toward a Legal Phenomenology of Psychological Coercion in the Context of Modern-Day Involuntary Labor*, which analyzes the law's current treatment of psychological coercion in human trafficking cases toward development of a legal model to evaluate psychological coercion in future cases.

work for their tree farm in New Hampshire.¹ The three men accepted the jobs when Bradley and O'Dell promised them over eleven dollars per hour in compensation, the costs of transportation, and room and board.² Bradley and O'Dell then made all arrangements for their travel and secured work visas for the workers' valid entry into the United States. Upon arrival, O'Dell confiscated their passports and explained that in the previous year, a worker had run away and that he would be "destroyed" as a consequence.³ The three men began work on the tree farm immediately. Bradley and O'Dell paid them eight dollars per hour and charged them fifty dollars per week in rent for housing in a dilapidated shed without utilities. They also told the men that they must work to repay \$1,000 in transportation fees to the United States. When not working, the three men traveled unaccompanied throughout the neighborhood, but their employers kept track of their whereabouts. In September 2001, the local police investigated the tree farm after receiving anonymous information that Bradley and O'Dell were holding the Jamaican workers against their will. When interviewed, Flynn and Hutchinson, complained about their work conditions, but the police left after speaking with O'Dell who explained that the workers were free to leave after they reimbursed the cost of their airline tickets. Bradley and O'Dell then chastised the men for complaining and became physically violent by choking and hitting one of the men. The workers ran away, reported the abuse to the authorities, and Bradley and O'Dell were convicted in federal court for the human trafficking-related crimes of forced labor and trafficking into servitude.⁴

Typical examples of human trafficking involve private actors recruiting one or more migrant workers by persuading them with false assurances of well-paying jobs. They then legally or illegally transport the migrant workers voluntarily into the United States. Subsequent to arrival, however, traffickers subject the workers to exploitive work conditions, such as little or no compensation, long workdays, and substandard living conditions. The workers' inability to leave the situation distinguishes human trafficking from other cases of labor abuse. Still, the exploitive labor at issue in trafficking cases is not chattel slavery in that a "master" does not *own* the trafficked worker, and there may be no visible signs of physical restraint.⁵ Instead, the trafficker constrains the workers' freedom to quit through numerous methods that are sometimes difficult to identify.

Overt methods of extracting services are commonly understood to include direct or threatened physical force, confinement, and peonage. Subtle methods of

1. *United States v. Bradley*, 390 F.3d 145, 148 (1st Cir. 2004) (deciding that the use of psychological coercion to induce another to work was sufficient for a finding of forced labor).

2. *Id.* at 149.

3. *Id.*

4. *Id.* This case signifies recent court recognition of the legal sufficiency of psychological coercion to compel involuntary labor.

5. The 1926 Slavery Convention defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised." U.N. Slavery Convention art. I, cl. 1 (Sept. 25, 1926), available at <http://www.ohchr.org/english/law/pdf/slavery.pdf>. Therefore, chattel slavery, in the classic sense, requires legal recognition of ownership of a person or persons, including the legal right to buy and sell them.

control, arguably more characteristic of human trafficking, are less obvious and may include case-specific circumstances, such as:

[A] nanny [that] is led to believe that children in her care will be harmed if she leaves the home. In other cases, a scheme, plan, or pattern intended to cause a belief of serious harm may refer to intentionally causing the victim to believe that her family will face harms such as banishment, starvation, or bankruptcy in their home country.⁶

In the context of modern Thirteenth Amendment doctrine, lawmakers and courts have broadly categorized such non-overt means of inducing labor as “psychological coercion.”⁷ Liberal application of this term encompasses a vast range of abusive elements of human trafficking situations from poor working conditions and cultural isolation to threats to harm a worker’s family members. Yet, while recognized as a key component of human trafficking, courts and legislatures have yet to define the legal dimensions of psychological coercion.

This article presents a framework for clarifying the role of psychological coercion in determining violations of human trafficking. By discussing the nature and legal significance of psychological coercion in cases of modern-day involuntary labor, this article critically examines the doctrinal limitations that have emerged and sets a foundation for ongoing evaluation of psychological coercion in future human trafficking cases.

This article arrives at a crucial time in the development of Thirteenth Amendment jurisprudence. In 2000, Congress passed the Trafficking Victims Protection Act (“TVPA”),⁸ which criminalizes the use of psychological means to induce labor. Pursuant to the Thirteenth Amendment’s section 2 enforcement power, the TVPA’s prohibitions on trafficking into servitude, forced labor, and sex trafficking are designed to provide prosecutors and courts with the tools to identify and convict modern-day slaveholders by capturing forms of forced labor that occur without visible signs of physical restraint.⁹ However, the TVPA’s open-ended prohibition on non-physical and nonviolent coercion does not provide further guidance on the exact range of coercive tactics sufficient to meet the legal standard.¹⁰

Moreover, the efficacy of psychological coercion to compel labor comes with a history of judicial controversy. Previous to the TVPA’s passage, circuit courts split on the question of whether psychological means were sufficient to create a

6. H.R. CONF. REP. NO. 106-939, at 101 (2000).

7. Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. § 7101(b)(6) (2000). *See also* United States v. Bradley, 390 F.3d 145, 151 (1st Cir. 2004).

8. 22 U.S.C. § 7101 (2000).

9. 18 U.S.C. §§ 1589-1591 (2000). *See generally* U.S. DEP’T OF JUSTICE, REPORT ON ACTIVITIES TO COMBAT HUMAN TRAFFICKING, FISCAL YEARS 2001-2005 (Feb. 24, 2006) [hereinafter COMBAT HUMAN TRAFFICKING REPORT], available at http://www.usdoj.gov/crt/crim/trafficking_report_2006.pdf.

10. 22 U.S.C. § 7102(13) (2000).

condition of involuntary servitude.¹¹ The U.S. Supreme Court resolved the debate with a narrow ruling in *United States v. Kozminski*, an involuntary servitude case involving two mentally challenged adult men allegedly forced by “brainwashing” to work on a farm.¹² In a five-four opinion authored by Justice O’Connor, the Court considered the impact of psychological coercion on the two men, yet concluded that it was insufficient to prove a violation of 18 U.S.C. § 1584, which Congress enacted under its section 2 Thirteenth Amendment power to criminalize involuntary servitude.¹³ Instead, the Court held that evidence of direct or threatened physical force or legal restraint¹⁴ was necessary.¹⁵

The TVPA reverses the *Kozminski* Court’s limited definition of involuntary servitude by expanding illegal means of coercion to include nonviolent methods of control.¹⁶ However, while Congress’ explicit repeal of the *Kozminski* decision diminishes legal barriers toward a more nuanced understanding of the way a perpetrator utilizes complex means of power to exploit another, the concept of psychological coercion continues to lack specific legal content.

This article aims to contribute to the development of Thirteenth Amendment jurisprudence by exploring the nature and legal function of psychological coercion in cases of modern-day slavery. Part II begins this endeavor by revisiting the Supreme Court opinion in *United States v. Kozminski* and identifying the practical reasoning behind the Court’s decision to exclude psychological coercion from the analysis. Part II suggests that the Court’s resistance to broader readings of involuntary servitude was not entirely a result of strict statutory interpretation, but that it also reflects a normative analysis favoring bodily coercion as objectively reasonable. Therefore, the Court considers bodily coercion more effective in forcing labor over psychological coercion, which may be ineffective because it is subjectively unreasonable.

Part III describes human trafficking as a multi-faceted global phenomenon inextricably connected to trends in international migration for labor. Part III discusses the conceptual complexity of human trafficking, which has demanded an equally nuanced legal regime to address it. The recognition of psychological coercion as sufficient to meet the legal standard for violations of involuntary labor is fundamental to the new laws addressing human trafficking. However, Part III explains that while current anti-trafficking laws acknowledge the psychological inducement of labor as criminal, the laws do not define psychological coercion, leaving its scope ambiguous and, ultimately, difficult to enforce.

11. See *United States v. Mussry*, 726 F.2d 1448, 1453-55 (9th Cir. 1984) (holding that non-physical forms of coercion could result in a violation of involuntary servitude laws); *United States v. Shackney*, 333 F.2d 475 (2d Cir. 1964) (holding to the contrary).

12. 487 U.S. 931, 936 (1988).

13. U.S. CONST. amend. XIII, § 2.

14. See *infra* notes 29-34 (discussing peonage as a form of legal restraint since it subjects a worker to criminal penalty for failure to “work off” a debt to the employer).

15. *Kozminski*, 487 U.S. at 949-53.

16. 22 U.S.C. § 7101(b)(13) (2000).

Part IV concludes with considerations for future research. Revisiting *Kozminski* highlights that the issue of psychological coercion in the context of involuntary labor raises a significant tension in the law. Namely, that while the very nature of psychological coercion may depend on the subjective response of the coerced person, the prevailing legal framework defines coercion based on the objective actions of the perpetrator applying the pressure. The persistent ambiguity of the meaning and scope of psychological coercion in current anti-trafficking laws falls short of providing the guidance necessary to resolve this tension. Thus, despite the TVPA's reversal of *Kozminski*, the notion of psychological coercion as legally sufficient to compel forced labor violations continues to lack substantive force.

The author's parallel project continues to survey the implementation of the TVPA to examine how the absence of a clear definition of psychological coercion may undermine the enforcement and adjudication of psychologically coerced forced labor cases.¹⁷ This concurrent work endeavors to strengthen the legal role of psychological coercion in human trafficking cases by developing an applicable legal model for its evaluation. Such a model approaches psychological coercion holistically to accommodate the subjective experience and context specific circumstances of the trafficked individual. Ultimately, this model advances cultural pluralism in the law by recognizing the trafficked individual's experience as a migrant subject within a dialectical power relationship impacted by race, gender, class, and culture.

II. PSYCHOLOGICAL COERCION AND INVOLUNTARY SERVITUDE: REVISITING *UNITED STATES V. KOZMINSKI*

Over the last decade, as human trafficking has gained widespread public attention, the term "human trafficking" has been used interchangeably with slavery, peonage, and involuntary servitude. Conceptually, there is tremendous overlap between these terms. All refer to forms of "unfree labor," in which private actors compel individuals to work for the benefit of another without the workers' fully informed consent.¹⁸ Although used interchangeably, these terms

17. The author's concurrent work-in-progress, *Toward a Phenomenology of Psychological Coercion in the Context of Modern-Day Involuntary Labor*, engages in an interdisciplinary analysis of psychological coercion in human trafficking cases toward development of an effective legal methodology to assess the sufficiency of psychological coercion in future human trafficking cases.

18. See generally *FREE AND UNFREE LABOUR: THE DEBATE CONTINUES* (Tom Brass & Marcel Van der Linden eds., 1997) (discussing the social, economic, and political factors that characterize free and unfree labor). This article uses the term "unfree labor" to encompass employment arrangements in which individuals are compelled to work under various forms of coercion including, but not limited to, threats of violence and confinement as well as threats of destitution and hardship to themselves or their family. It uses the term "involuntary labor" in the same manner. At the opposite end of the labor continuum, "free labor" includes employment relationships in which a worker may leave at any time. Moreover, this article recognizes that "unfree" and "involuntary" are terms of art that do not require literal involuntariness. The history of involuntary labor under the Thirteenth Amendment has demonstrated that workers assume some forms of "involuntary" service voluntarily and that individuals may make rational, albeit difficult, choices to remain in service. See, e.g., *Clyatt v. United States*, 197 U.S. 207, 215 (1905) ("Peonage

have specific legal meanings each signifying a particular socio-historical context. Human trafficking is only the most recent manifestation of unfree labor. Distinct from its predecessors, human trafficking includes the coercion of labor through psychological means alone.

To conceptualize human trafficking within an evolving discourse around the abuse of involuntary labor, this section first touches upon some of the definitional differences among various forms of unfree labor; however, it focuses primarily on the immediate precursor to human trafficking—involuntary servitude as understood under 18 U.S.C. § 1584, the Thirteenth Amendment involuntary servitude enforcement statute. Before the TVPA, cases of modern-day slavery typically arose under § 1584. However, the *Kozminski* Court significantly limited its reach by finding psychological coercion legally insufficient to induce involuntary servitude. Consequently, § 1584 proved ineffective to address the more nuanced forms of servitude typical in human trafficking cases.

A. *A Brief Thirteenth Amendment History*

Slavery is “the status or condition of a person over whom any or all powers attaching to the right of ownership are exercised.”¹⁹ Institutionalized by a governmental regime that permitted the absolute legal ownership of one person over another, chattel slavery once existed in the United States and the Thirteenth Amendment abolished slavery in 1865. However, the reach of the Thirteenth Amendment was not limited to chattel slavery. Recognizing that the nation could not immediately achieve the elimination of all “vestiges of slavery,”²⁰ section 2 of the Amendment empowered Congress to pass further legislation to respond to slavery’s persistent forms.

Pursuant to this enforcement power, Congress passed the Anti-Peonage Act²¹ in 1867. The measure criminalized peonage defined as the “status or condition of compulsory service, based upon the indebtedness of the peon to the master.”²² Peonage, a form of debt bondage, subjected a worker to criminal penalty for failure to repay the debt, imposing a significant legal restraint on the worker’s

is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, but none in the character of servitude.... [P]eonage, however created, is compulsory service, involuntary servitude.”). See also LINDA R. HIRSHMAN & JANE LARSON, *HARD BARGAINS: THE POLITICS OF SEX* 23-28 (1998) (discussing gaming theory and rational choices that individuals make in difficult circumstances with few options). “To take the classic example, when a captive agrees to slavery rather than be killed, the choice of enslavement is the making of a bargain.” *Id.* at 26. In the case of coercion or fraud, not only may options be few, but misinformation negates the meaningfulness of any bargain struck.

19. U.N. Slavery Convention art. I, cl. 1, *supra* note 5.

20. See David P. Tedhams, *The Reincarnation of “Jim Crow:” A Thirteenth Amendment Analysis of Colorado’s Amendment 2*, 4 TEMP. POL. & CIV. RTS. L. REV. 133, 137 (1994) (citing CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864)).

21. Act of March 2, 1867, ch. 187, 14 Stat. 546 (codified as amended at 18 U.S.C. § 1581 (2000)).

22. *Clyatt v. United States*, 197 U.S. 207, 215 (1905).

freedom to quit. Scholars have referred to peonage as the second progeny of slavery.²³ In addition, the Supreme Court recognized slavery's evolving manifestations in the 1872 *Slaughter-House Cases*, which involved Mexican peonage and the Chinese coolie system.²⁴ The Court prohibited "any other kind of slavery, now or hereafter."²⁵ Similarly, in *Clyatt v. United States*, the Supreme Court upheld the constitutionality of the Anti-Peonage Act by emphasizing that the Thirteenth Amendment established "universal freedom" and noting that peonage also constituted slavery.²⁶

B. Defining Involuntary Servitude: The Circuit Court Split

In 1948, Congress passed 18 U.S.C. § 1584, a new involuntary servitude statute authorizing criminal punishment of "[w]hoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term."²⁷ Section 1584 consolidated older anti-slavery statutes that addressed slavery-like practices beyond chattel slavery, theoretically broadening the scope of involuntary servitude to cover all persons laboring against their will to benefit another under some type of coercion. While involuntary servitude implied broader meaning than the complete lack of physical freedom experienced in chattel slavery or the legal restraint of peonage, the statute did not provide a specific definition. The statute left courts with little interpretive guidance, yielding inconsistent results.²⁸

Courts considering violations of § 1584 diverged on whether the methods used by defendants were sufficiently coercive to place a victim in a situation of literal involuntariness. However, courts seemed to agree that despite egregious work conditions in any given case, if the victim submitted to the labor by his or her own free will, courts could not find a violation of § 1584. Thus, the central focus

23. See generally Tobias B. Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973 (2002); Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981 (2002).

24. 83 U.S. (16 Wall.) 36 (1872).

25. *Id.* at 72.

26. 197 U.S. at 217-18.

27. 18 U.S.C. § 1584 (2000).

28. See, e.g., *United States v. Shackney*, 333 F.2d 475, 486 (2d Cir. 1964) (reversing the defendant's conviction under § 1584, finding that his threats of deportation were insufficient to violate the statute); *United States v. Mussry*, 726 F.2d 1448, 1453 (9th Cir. 1984) (reversing the district court's dismissal of § 1584 charges, finding that "the use, or threatened use, of law or physical force is not an essential element of a charge of 'holding' in involuntary servitude"); *United States v. Bibbs*, 564 F.2d 1165, 1168 (5th Cir. 1978) (affirming defendants' convictions under § 1584 and defining coercion under the statute as any situation in which an employer places his employee "in such fear of physical harm that the victim is afraid to leave, regardless of the victim's opportunities for escape") (emphasis added); *United States v. Harris*, 701 F.2d 1095, 1100 (4th Cir. 1983) (relying on the employers' "reign of physical terror" over their farm laborers, which included beatings and positioning guards outside their doors at night, to sustain their convictions); *United States v. Booker*, 655 F.2d 562, 566-67 (4th Cir. 1981) (affirming convictions under § 1584, finding that beatings, assaults, and threats of the same were sufficient to categorize the employment as involuntary).

was not on the *conditions* of the alleged servitude, but on whether the *means* of coercion were severe enough to render the victim with *no alternative* but to perform the labor.²⁹

The Second Circuit, in *United States v. Shackney*,³⁰ and the Ninth Circuit, in *United States v. Mussry*,³¹ presented two polar decisions. *Shackney*, a 1964 case, involved the recruitment of a Mexican family coerced to work on a chicken farm under threats of deportation and psychological intimidation; it represents the narrow end of the spectrum. Judge Friendly, writing for the court, determined that only the direct or threatened use of physical force or legal coercion³² were sufficiently “superior and overpowering” to subjugate the will of another.³³ Other means of coercion, while perhaps entailing “consequences that are exceedingly bad,” still left the worker with a choice.³⁴

In contrast, the Ninth Circuit, in *United States v. Mussry*, decided unanimously on a broader test. *Mussry* involved the recruitment of poor, non-English speaking and uneducated Indonesian men and women to serve as domestic workers in Mussry’s household.³⁵ The Ninth Circuit determined that “the realities of modern economic life” could compel labor by more subtle methods.³⁶ Certain methods of non-physical coercion, such as cultural and linguistic isolation, could be just as powerful, if not more powerful, than physical or legal coercion to induce a worker to perform services involuntarily.³⁷ Thus, it was necessary to consider forms of non-physical coercion to ensure the Thirteenth Amendment’s guarantee of a system of “free and voluntary labor.”³⁸

C. *United States v. Kozminski: The Insufficiency of Psychological Coercion*

In 1988, the Supreme Court resolved the circuit court split in *Kozminski*, a five-four opinion authored by Justice O’Connor.³⁹ At the core of *Kozminski* was the legal significance of psychological coercion in determining a violation of involuntary servitude. The case involved two mentally challenged farmworkers, Louis Molitoris and Robert Fulmer, who had intelligent quotients of 60 and 67, respectively.⁴⁰ The two men were more or less homeless, when one of the defendants, Ike Kozminski, recruited them to work on his dairy farm in Michigan. In exchange for room and board, Molitoris and Fulmer accepted the

29. *Mussry*, 726 F.2d at 1453.

30. 333 F.2d 475 (1964).

31. 726 F.2d 1448 (1984).

32. Legal coercion is the threat of a criminal penalty for failure to work. See *Peonage Cases*, 123 F. 671, 682-83 (M.D. Ala. 1903) (explaining the ways in which legal threats may be used to coerce one into a condition of peonage).

33. *Shackney*, 333 F.2d at 486-87.

34. *Id.* at 486.

35. *Mussry*, 726 F.2d at 1450.

36. *Id.* at 1451-52.

37. *Id.* at 1453.

38. *Id.* at 1451.

39. 487 U.S. 931 (1988).

40. *Id.* at 934.

job as general farm laborers. Unfortunately, the two men endured years of abusive conditions including substandard housing in a trailer with no running water, spoiled food, and physical and verbal abuse from the Kozminski family.⁴¹ The Kozminski family isolated the men from the public and discouraged them from speaking to visitors.

The government's chief argument was that through a pattern of isolation, verbal and physical abuse, and harsh living and working conditions, the Kozminski family subjected Molitoris and Fulmer to an extreme form of psychological coercion sufficient to constitute involuntary servitude.⁴² The government alleged that the Kozminski family intended to hold Molitoris and Fulmer as "psychological hostages" by continuously mistreating them to the point of brainwashing them into an "involuntary conversion."⁴³ The district court convicted the Kozminski family and "broadly defined 'involuntary servitude' to include pure[] psychological coercion."⁴⁴

On appeal, the Sixth Circuit reversed, objecting to the lower court's definition of involuntary servitude.⁴⁵ Instead, the Sixth Circuit defined involuntary servitude as occurring when a worker believed "he had no viable alternative but to perform service for the master ... because of" the direct or threatened use of physical force, or where the defendant used fraud, deceit, or the "use or threatened use of state-imposed legal coercion" to obtain the services of "a minor, an immigrant, or one who is mentally incompetent."⁴⁶

The Supreme Court affirmed the Sixth Circuit, settling widespread judicial inconsistency and providing yet another statutory analysis and final definition of involuntary servitude.⁴⁷ To determine the plain meaning of involuntary servitude, the Court first looked to its historical roots in the Thirteenth Amendment.⁴⁸ Citing turn-of-the-century Supreme Court cases applying the Thirteenth Amendment, the *Kozminski* Court found that the concept of involuntary servitude was intended to cover forms of "compulsory labor akin to African slavery."⁴⁹ The Court characterized these forms of compulsory labor as direct or threatened physical force—one of the more salient features of African chattel slavery. Further, the Court found that a long line of decisions in early peonage cases had prohibited conditions "in which the victim [wa]s coerced by threat of legal sanction to work off a debt to a master" as involuntary servitude.⁵⁰ Thus, referring to its own precedent, the Court concluded that involuntary

41. *Id.* at 935. See also *United States v. Kozminski*, 821 F.2d 1186, 1188 (6th Cir. 1987), *aff'd*, 487 U.S. 931 (1988).

42. *Kozminski*, 487 U.S. at 935-36.

43. *Id.* See also *Kozminski*, 821 F.2d at 1188.

44. *Kozminski*, 821 F.2d at 1188.

45. *Id.* at 1192.

46. *Id.*

47. *Kozminski*, 487 U.S. 931.

48. *Id.* at 941.

49. *United States v. Kozminski*, 487 U.S. 931, 942 (1988).

50. *Id.* at 943.

servitude consisted solely of direct or threatened physical force or legal coercion.⁵¹

The Court then addressed whether § 1584 had broadened the scope of involuntary servitude to reach forms of coercion beyond physical or legal coercion.⁵² Finding no indication of § 1584's scope in the statute's text, the Court considered its legislative history to derive its original intent. Section 1584 was a revision of the criminal code consolidating two earlier statutes, the Slave Trade statute of 1909 and the Padrone statute of 1874.⁵³ The Court analyzed each statute for an indication of the range of coercion that constituted involuntary servitude. The Court found that Congress enacted the Slave Trade statute to end the African slave trade, which suggested that the only proscribed conditions of servitude were of a physical or legal nature as they had applied to African slaves.⁵⁴

With the Padrone statute, Congress intended to dismantle a late nineteenth century exploitive system of contract labor whereby padrones lured young Italian boys into leaving their homes and then forced them to work as musicians or beggars in the United States.⁵⁵ The statute criminalized the kidnapping or inveiglement of a person with the intent to place that person in involuntary servitude.⁵⁶ While the term inveigle implied non-physical means of compulsion, the *Kozminski* Court concluded that the actual conditions of servitude that the Padrone statute forbade included only physical or legal coercion. The Court based its narrow reading of the statute on reasoning that the victims of the Padrone system were physically helpless to escape servitude due to their "special vulnerability" as youths, "stranded in large, hostile cities in a foreign country."⁵⁷ Thus, the Court recognized that a person's special characteristics could be relevant to determine the degree of physical or legal coercion required to hold that person to involuntary servitude.⁵⁸ However, the Court explicitly described the servitude experienced by the victims of the Padrone system as one of physical, not psychological, dependence.⁵⁹

The government and the four concurring Justices proffered evolutive interpretations of involuntary servitude, asserting that both the Thirteenth Amendment and § 1584 condemned only involuntary servitude without limiting the forms of coercion that would suffice to create it: "The Thirteenth Amendment denounces a status or condition, irrespective of the manner or authority by which it is created."⁶⁰ Though differing in their analytic approaches, the government

51. *Id.* at 943-44.

52. *Id.* at 945.

53. *Id.*

54. *Id.* at 946-47.

55. *Id.* at 947.

56. *Id.*

57. *Id.*

58. *Id.* at 948.

59. *United States v. Kozminski*, 487 U.S. 931, 948 (1988).

60. *Id.* at 954 (Brennan, J., concurring) (citing *Clyatt v. United States*, 197 U.S. 207, 216 (1905)).

and concurring Justices shared an expansive understanding of involuntary servitude that included psychological coercion.

The government's approach emphasized the victim's point of view to ascertain whether the defendant's conduct had left "the victim with no tolerable alternative but to serve the defendant or deprive[d] the victim of the power of choice."⁶¹ Under such an analysis, any method of compulsion that caused the victim to believe he was not free was sufficient to constitute involuntary servitude.⁶²

In his concurring opinion, Justice Brennan, joined by Justice Marshall focused on the existence of "slave-like conditions" of the alleged servitude.⁶³ Brennan contended that any means of coercion, including psychological, economic, or social coercion were unlawful if they "actually succeed[ed] in reducing the victim to a condition of servitude resembling that in which slaves were held before the Civil War."⁶⁴ In a separate concurrence joined by Justice Blackmun, Justice Stevens proposed that Congress intended judicial interpretation of the definition of involuntary servitude on a case-by-case basis.⁶⁵ According to Stevens, the term involuntary servitude was "sufficiently definite on its face" without need for further qualification.⁶⁶ Thus, whether a given case amounted to involuntary servitude would be up to a jury to decide based on the totality of circumstances.⁶⁷

Appealing to the rule of lenity, the majority flatly rejected the arguments of the government and concurring Justices. The rule of lenity or strict construction⁶⁸ directs courts to interpret ambiguous criminal statutes conservatively "to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress prosecutors, and courts."⁶⁹ The Court reasoned that any interpretation of involuntary servitude that encompassed psychological coercion would be far too amorphous to be consistent with lenity's maxims of fair notice and legislative supremacy.⁷⁰

The government's approach, relying on the victim's point of view, potentially criminalized a vast range of mundane situations; the Court hypothesized that involuntary servitude could even include the coercion of an adult son or daughter to work in a family business under a parent's threat to withdraw affection.⁷¹ Absent objective criteria, the government would deprive alleged perpetrators of

61. *Id.* at 949.

62. *Id.*

63. *Id.* at 956 (Brennan, J., concurring).

64. *Id.* at 962 (Brennan, J., concurring).

65. *Id.* at 965-66 (Stevens, J., concurring).

66. *Id.* at 967 n.1 (Stevens, J., concurring).

67. *Id.* at 970 (Stevens, J., concurring).

68. *See* *United States v. Bass*, 404 U.S. 336, 348 (1971) (explaining that the rule of lenity provides "a fair warning ... to the world in language that the common world will understand, of what the law intends to do if a certain line is passed") (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)).

69. *United States v. Kozminski*, 487 U.S. 931, 952 (1988).

70. *Id.* at 951-52.

71. *Id.* at 949.

fair notice of the prohibited conduct, and prosecutors and juries would assume the “inherently legislative task” of deciding whether a situation called for criminalization, ultimately subjecting individuals to arbitrary prosecution.⁷²

According to the Court, Justice Brennan’s approach suffered from the same pitfalls. The ambiguity of the term slave-like conditions would require prosecutors and juries to determine indiscriminately the type of working conditions that courts should criminalize.⁷³ Whether certain conditions amounted to involuntary servitude was a “value judgment ... best left for Congress.”⁷⁴ Finally, Justice Stevens’ case-by-case approach would create inconsistent criminal standards.⁷⁵

The alternative interpretations offered by the government and concurring Justices could not be reconciled with lenity. The Court held that lenity required a narrow reading of involuntary servitude as “a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process.”⁷⁶

D. *United States v. Kozminski: A Normative Analysis*

The rule of lenity has guided courts to construe vague criminal statutes in a manner favorable to criminal defendants. Rarely invoked in modern cases, courts reserve the rule for those situations in which “a reasonable doubt persists about a statute’s intended scope even *after* resort to ‘the language and structure, legislative history, and motivating policies’ of the statute.”⁷⁷ At first glance, *Kozminski*’s restrictive reading of involuntary servitude appears to be a practical outcome of the rule’s application. In the name of fair notice and legislative supremacy, the Court concluded that physical and legal coercion had objective certainty, while psychological coercion did not. A closer critique, however, reveals a significant normative component underlying the Court’s conclusion, as indicated by the Court’s somewhat unconvincing reasoning.

First, the Court proclaimed that any test of psychological coercion was too vague to provide criminal defendants with fair notice as to what constituted criminal conduct. The Court contended that the history of Thirteenth Amendment-related enforcement clearly supported physical and legal coercion as criminal. Yet, the Court’s perspective on physical coercion in the context of the *Padrone* system evidences little similarity to any conventional understanding of physical coercion. Put bluntly, instead of hitting or beating as examples of physical coercion, the Court regarded the cultural isolation and economic dependence of the victims of the *Padrone* system as physical coercion: “These

72. *Id.* at 951.

73. *Id.* at 950-51.

74. *Id.* at 951.

75. *Id.*

76. *Id.* at 952.

77. *Moskal v. United States*, 498 U.S. 103, 108 (1990) (citing *Bifulco v. United States*, 447 U.S. 381, 387 (1980)).

young children were literally stranded in large, hostile cities in a foreign country. They were given no education or other assistance toward self-sufficiency.... The padrones took advantage of ... their victims, placing them in situations where they were physically unable to leave.”⁷⁸ The Court’s characterization of this conduct as physical rather than psychological coercion would surely leave criminal defendants just as unaware that their conduct was criminal. As Justice Brennan remarked in his concurrence, the majority’s notion of physical coercion in the context of the Padrone system was tenuous at best: “[T]he coercion involved, even as the Court describes it, was obviously psychological, social, and economic in nature ... labeling such coercion ‘physical’ is at best strained and (other than making the legislative history fit the Court’s statutory interpretation) accomplishes little....”⁷⁹

Second, the Court argued that legislative supremacy demanded a narrow interpretation of § 1584. A more flexible reading of the statute invited prosecutors and courts to enforce actions beyond the statute’s original intent. However, the Court failed to recognize that its own restrictive definition of involuntary servitude may have impeded legislative desires, rather than advanced them. Section 1584 was part of a general revision of the criminal code consolidating the Slave Trade statute of 1909 and the Padrone statute of 1874. The consolidation simplified the language of the older statutes by eliminating the words bought, sold, or imported as a necessary element of involuntary servitude.⁸⁰ The resulting broadly worded § 1584 may indicate congressional intent to prohibit “any condition of involuntary servitude,” regardless of the specific means that created it.⁸¹

Moreover, given the diverse characteristics of modern-day involuntary servitude cases, the open-endedness of § 1584 may reflect legislative desire to delegate to the courts case-by-case adjudication to capture the evolving manifestations of involuntary servitude. As Justice Stevens remarked in his concurrence, the majority’s preoccupation with difficult hypothetical cases posed uncertainties best resolved by the adjudication of real cases.⁸² No legal rule, no matter how strict, produced certainty, including the “seemingly unambiguous rule adopted by the majority.”⁸³ Thus, Justice Stevens concluded that the plain text of § 1584 was adequate to direct courts to develop case-by-case standards.⁸⁴

78. *Kozminski*, 487 U.S. at 947-48.

79. *United States v. Kozminski*, 487 U.S. 931, 958 n.5 (Brennan, J., concurring). *See also id.* at 957 n.4 (Brennan, J., concurring) (“[T]he Court today adopts an expansive but rather obscure understanding of what ‘physical’ coercion encompasses it is difficult to tell which, if any, of the means of coercion described in the [Padrone system] the Court would deem ‘physical.’”) (internal citation omitted).

80. *United States v. Kozminski*, 821 F.2d 1186, 1191 & n.5 (6th Cir. 1987), *aff’d*, 487 U.S. 931 (1988) (explaining that the combined statute was a deliberate expansion of “involuntary servitude” eliminating the kidnapping or forcible importation of individuals to prove a condition of servitude).

81. *Id.* at 1190.

82. *Kozminski*, 487 U.S. at 967 (Stevens, J., concurring).

83. *Id.* at 968 (Stevens, J., concurring).

84. *Id.* (Stevens, J., concurring).

As an abstract matter, the Court's resistance to broader interpretations of involuntary servitude is somewhat persuasive when considering its numerous hypothetical examples. For instance, the Court noted that it sought to prevent the criminalization of everyday activities, such as parents pressuring their adult children to work for the family business.⁸⁵ However, the Court's affirmative creation of a bright-line rule limiting the scope of involuntary servitude to prevent these imaginary circumstances was inapt for the actual facts presented by *Kozminski*. As explained in Justice Brennan's concurrence, the majority opinion took lightly the psychological abuse that the workers underwent, such as:

disorienting the victims with frequent verbal abuse and complete authoritarian domination; inducing poor health by denying medical care and subjecting the victims to substandard food, clothing, and living conditions; working the victims from 3AM to 8:30PM with no days off, leaving them tired and without free time to seek alternative work; denying the victims any payment for their labor; and active efforts to isolate the victims from contact with outsiders who might help them.⁸⁶

According to Brennan, such conditions clearly indicated servitude of the kind that the Thirteenth Amendment prohibited regardless of the methods implemented.⁸⁷

Other commentators agree that the drafters of the Thirteenth Amendment and its enforcement statutes intended to capture evolving manifestations of slavery.⁸⁸ Likewise, earlier Supreme Court cases recognized the reach of the Thirteenth Amendment to extend beyond cases of chattel slavery: “[although] negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter.”⁸⁹ Surely, the egregious facts

85. *Id.* at 949.

86. *Id.* at 956 (Brennan, J., concurring).

87. *Id.* (Brennan, J., concurring).

88. *See, e.g.,* Azmy, *supra* note 23 (discussing the reach of the Thirteenth Amendment to human trafficking and modern-day slavery); Wolff, *supra* note 23 (applying the Thirteenth Amendment to U.S. corporations that participate in forced labor violations overseas); Maria L. Ontiveros, *Immigrant Workers' Rights in a Post-Hoffman World—Organizing Around the Thirteenth Amendment*, 18 GEO. IMMIGR. L.J. 651 (2004) (contemplating Thirteenth Amendment protection to undocumented migrant workers subjected to exploitive labor conditions); James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941 (1997); Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 438 (1989) (finding evidence in the congressional record and the history of the Thirteenth Amendment, that it stood for “a much broader idea of employee autonomy and independence”). *See also* William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17 (2004) (arguing that racial profiling, as a vestige of slavery, also violates the Thirteenth Amendment); Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307 (2004) (contending that the Thirteenth Amendment protects not only freedom from slavery, but also civil rights); Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CAL. L. REV. 171 (1951).

89. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72 (1873). *See also* *The Civil Rights Cases*, 109 U.S. 3, 20 (1883) (“[T]he [Thirteenth A]mendment is not a mere prohibition of State

presented by *Kozminski* called for a similarly expansive understanding of involuntary servitude. The Court, however, chose to resist evolutive interpretations that could accommodate new societal circumstances and factual scenarios. Instead of engaging in a more nuanced examination of the coercive effect of psychological pressure, the Court expressed apprehension and suspicion. According to the Court, any definition of involuntary servitude that included psychological coercion was improperly subjective and reliant on the victim's state of mind.⁹⁰ Such subjective determinations opened the door for individuals to erroneously assert that their “will to quit ha[d] been subdued by a threat which seriously affect[ed] his future welfare but as to which he still ha[d] a choice, however painful.”⁹¹

In a significant step, the Trafficking Victims Protection Act of 2000 overturned the narrow *Kozminski* holding. The emergence of human trafficking as the prevailing form of involuntary labor demanded new laws that could capture its complexity. Specifically, laws broader in scope, capable of addressing the more nuanced and psychological ways that modern-day involuntary laborers are forced to work.

As Part III explains, the newly enacted TVPA recognizes the legal sufficiency of psychological coercion to induce criminal violations of involuntary labor. Yet, it does not provide substantive guidance on discerning the scope of prohibited coercion; thus, it falls short of adequately defining psychological coercion for purposes of legal enforcement. Consequently, the persistent ambiguity of psychological coercion under the new anti-trafficking laws continues to face the *Kozminski* Court's normative concern that any test of psychological coercion would be simply too subjective and amorphous to evidence a violation of involuntary labor. Part III begins by discussing human trafficking—its global reach, its conceptual complexity, and the establishment of a new legal enforcement regime to combat it.

III. PSYCHOLOGICAL COERCION AND HUMAN TRAFFICKING

A. *The Dimensions and Manifestations of Human Trafficking*⁹²

According to the United Nations Office on Drugs and Crime, “trafficking in human beings has reached epidemic proportions”⁹³ in the last decade. Further, no country is immune from the effects of this highly profitable industry.⁹⁴ “Illegal migrants and trafficking victims have become another commodity in a

laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.”)

90. *United States v. Kozminski*, 487 U.S. 931, 949 (1988).

91. *Id.* at 950 (quoting *United States v. Shackney*, 333 F.2d 475, 487 (1964)).

92. This section is adapted from the author's previous work, Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN'S L.J. 1 (2004).

93. U.N. Office on Drugs and Crime, FAQ on Trafficking in Human Beings (Mar. 24, 2007), http://www.unodc.org/unodc/en/trafficking_victim_consent.html.

94. *Id.*

larger realm of criminal commerce involving other commodities, such as narcotic drugs and firearms or weapons and money laundering.”⁹⁵

Published numbers on the global scope of human trafficking vary widely. The U.S. State Department’s annual Trafficking in Persons Report (“TIP Report”) for 2003 estimated that approximately 800,000 to 900,000 people are traded worldwide.⁹⁶ The 2004 report inexplicably reduced that range to 600,000 to 800,000 people.⁹⁷ The 2005 and 2006 TIP Reports maintain the 600,000 to 800,000 figure while also acknowledging the existence of other estimates.⁹⁸ The United Nations, for instance, approximates as many as four million people trafficked annually worldwide.⁹⁹ Finally, the International Labor Organization calculates both internal and transnational modern-day slavery at 12.3 million people in forced or bonded labor, or sexual servitude at any given time.¹⁰⁰ The disparity in numbers may be due to political differences of opinion or methodological difficulties in obtaining accurate information about an underground industry. However, there are widespread reports that trafficking is one of the “fastest growing illegal businesses.”¹⁰¹ Moreover, due to the very high revenue-to-risk ratio and because humans are ““expendable, reusable, and resellable cheap commodities,”” the U.N. predicts human trafficking will soon surpass the trafficking of both arms and narcotics to become the world’s leading illegal industry.¹⁰²

Like the global figures, estimates of the scope of trafficking in the United States also vary widely. The 2003 TIP Report approximated that 18,000 to 20,000 trafficked persons enter the United States annually;¹⁰³ the 2004 TIP

95. *Id.*

96. U.S. DEP’T OF STATE, VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000: TRAFFICKING IN PERSONS REPORT 7 (June 2003) [hereinafter 2003 TRAFFICKING IN PERSONS REPORT], available at <http://www.state.gov/documents/organization/21555.pdf>.

97. U.S. DEP’T OF STATE, VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000: TRAFFICKING IN PERSONS REPORT 6 (June 2004) [hereinafter 2004 TRAFFICKING IN PERSONS REPORT], available at <http://www.state.gov/documents/organization/34158.pdf>.

98. U.S. DEP’T OF STATE, VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000: TRAFFICKING IN PERSONS REPORT 6 (June 2005), available at <http://www.state.gov/documents/organization/47255.pdf>. See also U.S. DEP’T OF STATE, VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000: TRAFFICKING IN PERSONS REPORT 6 (June 2006) [hereinafter 2006 TRAFFICKING IN PERSONS REPORT], available at <http://www.state.gov/documents/organization/66086.pdf>.

99. U.N. Econ. & Soc. Council, Integration of the Human Rights of Women and the Gender Perspective ¶ 5, U.N. DOC. E/CN.4/2003/NGO/40 (Feb. 22, 2003), available at [http://www.unhchr.ch/huridocda/huridoca.nsf/AllSymbols/68B98DB9CB4CBEA9C1256CFB004C53AD/\\$File/G0311186.pdf](http://www.unhchr.ch/huridocda/huridoca.nsf/AllSymbols/68B98DB9CB4CBEA9C1256CFB004C53AD/$File/G0311186.pdf).

100. 2006 TRAFFICKING IN PERSONS REPORT, *supra* note 98, at 6.

101. Juliet Stumpf & Bruce Friedman, *Advancing Civil Rights Through Immigration Law: One Step Forward, Two Steps Back?*, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 131, 150 (2003).

102. Jennifer Enck, *The United Nations Convention Against Transnational Organized Crime: Is It All That It Is Cracked Up To Be?*, 30 SYRACUSE J. INT’L L. & COM. 369, 374 (2003) (quoting Susan W. Tiefenbrun, *Sex Sells But Drugs Don’t Talk: Trafficking of Women Sex Workers*, 23 T. JEFFERSON L. REV. 194, 212-13 (2001)).

103. 2003 TRAFFICKING IN PERSONS REPORT, *supra* note 96, at 7.

Report reduced that estimate to 14,500 to 17,500.¹⁰⁴ Previous estimates placed the number of persons trafficked to the United States on an annual basis closer to 50,000.¹⁰⁵ The International Labor Organization estimates that human trafficking comprises over seventy-five percent of all forced labor cases in the United States.¹⁰⁶

In the United States, the profiles of trafficked individuals and the industries that exploit them encompass a diverse spectrum. In 2001, workers escaped from the Daewoosa garment factory in American Samoa, leading to the investigation of the largest human trafficking case ever prosecuted by the U.S. Justice Department.¹⁰⁷ Two hundred-fifty men and women, recruited from China and Vietnam, were forced to labor in the Daewoosa sweatshop for minimal pay and under abusive conditions. In 2002, a court convicted agricultural crew leaders for trafficking Mexican farmworkers to Florida—forcing them to “work off” their transportation debts and subjecting them to constant surveillance and threats of violence.¹⁰⁸ In 2003, a Maryland court convicted a husband and wife of trafficking a Ghanaian domestic worker, brought to the United States under false pretenses by a cabinet minister in the Ghanaian Parliament.¹⁰⁹ Though the cabinet minister was indicted, she never faced trial because she returned to Ghana and could not be extradited. In 2004, traffickers pled guilty to forcing over twenty-five Russian women to dance nude at various nightclubs in New York and New Jersey after recruitment to perform traditional folk dances at a nonexistent cultural event.¹¹⁰ Also in 2004, a landscape maintenance contractor in Hawaii was convicted of slavery and harboring offenses for forcing Tongan males to work in his business twelve hours per day for menial pay, under threats and violence.¹¹¹ The reach of traffickers is extensive in many industries including domestic service, restaurants, construction, agriculture, garment, and commercial sex.¹¹²

The types of traffickers and the methods they employ are equally diverse.¹¹³ They vary from complex transnational crime rings to small-scale family-style

104. 2004 TRAFFICKING IN PERSONS REPORT, *supra* note 97, at 23.

105. INT'L ORG. FOR MIGRATION, COMBATING TRAFFICKING IN SOUTH-EAST ASIA: A REVIEW OF POLICY AND PROGRAMME RESPONSES 5 (2000), available at http://www.iom.int/documents/publication/en/mrs_2_2000.pdf.

106. INT'L LABOUR ORG., REPORT OF THE DIRECTOR GENERAL: A GLOBAL ALLIANCE AGAINST FORCED LABOUR 14 (2005), available at http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=5059.

107. COMBAT HUMAN TRAFFICKING REPORT, *supra* note 9, at 75.

108. *Id.* at 76.

109. *Id.* at 77.

110. *Id.* at 79.

111. *Id.* at 80.

112. Stumpf & Friedman, *supra* note 101, at 153.

113. Kelly E. Hyland, *The Impact of the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children*, 8 No. 2 HUM. RTS. BRIEF 30 (2001), available at <http://www.wcl.american.edu/hrbrief/08/2protocol.cfm>.

channels to individuals.¹¹⁴ Trafficking generally involves some network, whether organized or not, including recruiters, document forgers, transporters, and contractors.¹¹⁵

Recruitment methods often involve luring people with misrepresented job opportunities. However, kidnapping, purchasing people from family members, and ordering mail-order brides can also occur.¹¹⁶ A trafficking recruiter can be a family friend, an employment agency, or even someone trusted and well known within the community.¹¹⁷ People may accept jobs that they know to be risky¹¹⁸ and become trafficked when exploitative working conditions replace the promised employment terms. Traffickers achieve compliance of a trafficked person through numerous ways including threats to harm the family of the trafficked person, threats to turn a trafficked person over to authorities,¹¹⁹ confiscation of documents, psychological abuse including intimidation or restriction of movement, the creation of artificial debts purportedly owed to the trafficker, and sometimes physical abuse, such as beatings and sexual assault.¹²⁰

B. *The Conceptual Complexity of Human Trafficking as a Form of Involuntary Labor*

Globalization and international migration play key roles in the creation of populations vulnerable to trafficking.¹²¹ A variety of factors may “push” trafficked persons from their countries of origin and “pull” them into destination countries. Trafficked persons are often in a precarious life situation in their country of origin.¹²² Their situations pressure them to migrate for economic reasons or “to escape gender discrimination, armed conflict, political instability,

114. Leroy G. Potts, Jr., *Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons*, 35 GEO. WASH. INT'L L. REV. 227, 232-33 (2003).

115. Hyland, *supra* note 113, at 37.

116. Margaret Murphy, *Modern Day Slavery: The Trafficking of Women to the United States*, 9 BUFF. WOMEN'S L.J. 11, 12 (2000-2001).

117. 2003 TRAFFICKING IN PERSONS REPORT, *supra* note 96, at 7.

118. See HIRSHMAN & LARSON, *supra* note 18, at 23-28 (discussing gaming theory and rational choices that individuals make in difficult circumstances with few options). “To take the classic example, when a captive agrees to slavery rather than be killed, the choice of enslavement is the making of a bargain.” *Id.* at 26. In the case of coercion or fraud, not only may options be few, but misinformation negates the meaningfulness of any bargain struck. *Id.*

119. Traffickers may accurately or inaccurately portray law enforcement as unsympathetic to the trafficked person's situation.

120. Potts, *supra* note 114, at 229-30. See also Murphy, *supra* note 116, at 14.

121. Aiko Joshi, *The Face of Human Trafficking*, 13 HASTINGS WOMEN'S L.J. 31, 36-37 (2002).

122. See Hyland, *supra* note 113, at 35-36 (citing several causative socioeconomic factors behind the vulnerability to being trafficked). See also Joshi, *supra* note 121, at 36-38 (discussing the impact of industrialization in the post-colonial era and modern globalization on the displacement of people that leads to trafficking, particularly the trafficking of women who are especially vulnerable due to their subordination within the socioeconomic pressures created by privatization and liberalization of markets).

and poverty.”¹²³ Frequently poverty, illiteracy, economic crises, and regional conflicts have a disproportionate effect on women.¹²⁴ Coupled with a low social status, such instability can make women especially vulnerable to trafficking in some regions.¹²⁵ In other contexts, children or men are particularly vulnerable for recruitment to labor in sweatshops and other jobs characterized as “three D-jobs—dirty, difficult, and dangerous.”¹²⁶

The demand for cheap labor in destination countries draws migrants susceptible to trafficking. Tight border controls and rigid immigration enforcement ironically facilitates their exploitation rather than prevents it: “A lack of viable and legal migration options leads people into trafficking; fear of deportation keeps them there.”¹²⁷ Thus, the relationship between human trafficking and global labor migration is inextricable: “Trafficking is a corrupted mode of migration, that transforms very specific migratory projects, such as the desire to accumulate savings or support one’s dependants by migrating to work, the dream of securing a better future ... into nightmares.”¹²⁸

The emergence of human trafficking as a multi-faceted epidemic has required a new legal regime to combat it. Previous understandings of chattel slavery, debt bondage, and involuntary servitude under the *Kozminski* standard proved inadequate to capture the conceptual complexity of human trafficking. Unlike those forms of unfree labor, human trafficking does not require a relationship of ownership, indebtedness, or direct or threatened physical or legal force. As described above, human trafficking refers to a broader global phenomenon involving the migration of workers for the purpose of exploitation. Exploitation may include previously recognized forms of unfree labor. More characteristic of human trafficking, however, are new forms of exploitation that utilize psychological means to coerce labor. Still largely undefined, examples of psychological coercion include a victim’s cultural isolation, dependency on the trafficker, and threats to harm a victim’s family members.¹²⁹

Furthermore, human trafficking is not simply migrant smuggling, which involves only the facilitation of movement across borders. Human trafficking requires a continued relationship of exploitation that profits the trafficker.¹³⁰ The boundary between smuggling and trafficking is crossed when a voluntary migrant utilizes the services of a smuggler, but is then forced to work off newly accrued debt under subsequent threats of harm, such as exposure to law enforcement or

123. Hyland, *supra* note 113, at 30.

124. *Id.* at 35.

125. *Id.*

126. U.N. Office on Drugs and Crime, FAQ on Trafficking in Human Beings, *supra* note 93.

127. Dina Haynes, *Used, Abused, Arrested and Deported: Extending Immigration Benefits to Protect the Victims of Trafficking and to Secure the Prosecution of Traffickers*, 26 HUM. RTS. Q. 221, 257 (2004).

128. BRIDGET ANDERSON & JULIA O’CONNELL DAVIDSON, IS TRAFFICKING IN HUMAN BEINGS DEMAND DRIVEN? A MULTI-COUNTRY PILOT STUDY 8 (Int’l Org. for Migration, Migration Research Series No. 15, (2003)), available at <http://www.compas.ox.ac.uk/about/publications/Bridget/Anderson04.pdf?event=detail&id=2932>.

129. See Potts, *supra* note 114, at 233.

130. Murphy, *supra* note 116, at 11-12.

deportation.¹³¹ The trafficker's coercive, deceptive, or abusive actions render the initial voluntariness of the trafficked person meaningless.¹³² Defining this turning point from initial consent to subsequent coercion is complicated, particularly when the coercion into exploitive labor conditions is purely psychological.

Both international and domestic legal forums have struggled to capture the conceptual complexity of human trafficking in consistent legal definitions that facilitate the enforcement of human trafficking crimes. In December 2000, the United Nations General Assembly approved the Protocol to Prevent, Suppress, and Punish Trafficking in Persons ("U.N. Protocol"), which establishes an international law on human trafficking.¹³³ In October 2000, the U.S. Congress adopted its own legislation to address human trafficking—the TVPA. Both laws call for a multi-tiered strategy to combat human trafficking that follows the "three P" approach: prosecution of traffickers, protection of trafficking victims, and prevention of trafficking. Both laws define human trafficking. While the U.N. Protocol's definition of human trafficking appears broader than the TVPA's definition, both instruments are similar in their emphasis on the element of psychological coercion. The recognition of psychological coercion as adequate means of compelling unlawful involuntary labor is a significant departure from previous understandings of slavery and slavery-like practices. However, an analysis of current laws addressing human trafficking reveals that the dimensions of psychological coercion continue to remain ambiguous and undefined.

C. *The U.N. Protocol: Addressing Coercion and Exploitation*

The U.N. Protocol defines human trafficking as:

- (a) ... the recruitment, transportation, transfer, harboring or receipt of persons by means of threat or use of force or other means of coercion, of abduction, of fraud, of deception, of abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.¹³⁴

131. See ANDERSON & O'CONNELL DAVIDSON, *supra* note 128, at 50.

132. U.N. Office on Drugs and Crime, FAQ on Trafficking in Human Beings, *supra* note 93.

133. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the U.N. Convention against Transnational Organized Crime, G.A. Res. 55/25, Annex II, U.N. Doc. A/Res/55/25 (Nov. 15, 2000), available at http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf [hereinafter U.N. Protocol].

134. *Id.* at 32.

This definition describes human trafficking as a process, encompassing multiple stages: (1) recruitment or movement; (2) means of force, fraud, or coercion; and (3) exploitation. Notably, the Protocol does not limit the range of possibilities within each stage of the trafficking process. The “means” of trafficking include not only force or threatened force, but also “other means of coercion,” and “abuse of power or of a position of vulnerability.”¹³⁵ The ambiguity of the language makes a variety of non-physical and psychological circumstances potentially applicable. Abuse of authority or position of vulnerability theoretically encompasses many traits of subordinate social status, such as poverty or lack of education. “Exploitation” is similarly ambiguous, which refers to slavery as well as forced labor, practices similar to slavery, and servitude as examples of what minimally constitutes exploitation.

The International Labor Organization defines forced labor as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”¹³⁶ Even in the strictest sense, this definition encompasses a wide range of abusive labor practices, covering all types of work acquired through the threat of any negative consequence or “menace of penalty” if the work is not performed. The U.N. Protocol does not define practices similar to slavery and servitude, implying an unrestricted a range of exploitive conditions. Finally, the U.N. Protocol considers the trafficked person’s consent irrelevant since it becomes meaningless by the subsequent exploitation.

The U.N. Protocol provides an expansive understanding of human trafficking by leaving open the elements of both coercion and exploitation. As a policy measure, however, the U.N. Protocol’s lack of specificity does not resolve definitional debates around human trafficking. During the U.N. Protocol’s development, there were highly polarized views over the significance of coercion in trafficking for prostitution.¹³⁷ Further, the U.N. Protocol’s broad vision makes identifying trafficking difficult as a practical matter. Depending on one’s ideological orientation, a given case may or may not be trafficking. For example, governmental agencies prioritizing enforcement of egregious sex crimes may identify as trafficking only those cases involving forced prostitution and coercion

135. *Id.* at 2.

136. INT’L LABOUR ORG., *supra* note 105, at 5 (citations omitted). Although “force” tends to imply physical violence, this is a term of art and both international and domestic definitions of “forced labor” include non-physical means of coercion.

137. The terms “autonomy” and “protectionist” describe the two contrasting approaches to the definition of trafficking. The focal point of contention between the autonomy and protectionist positions is the placement of prostitution within the trafficking context. The “protectionists” center the trafficking discussion on prostitution and view all prostitution as inherently coercive and involuntary. The “autonomy” advocates take the position that some prostitution may occur through the free choice and self-determination of the prostitute and therefore, may not qualify as trafficking since it is not coerced. Thus, the term “trafficking” should encompass all forms of forced labor in any industry. See generally Jane E. Larson, *Prostitution, Labor, and Human Rights*, 37 U.C. DAVIS L. REV. 673 (2004); Kara Abramson, *Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol*, 44 HARV. INT’L L.J. 473 (2003); Barbara Sullivan, *Trafficking in Women: Feminism and New International Law*, 5 INT’L FEMINIST J. POL. 67 (2003).

in the form of physical violence. Non-governmental human rights agencies, which seek the protection of victims' rights, may have a broad view of trafficking that includes all migrant workers subject to any type of labor exploitation, perpetrated by both physical and non-physical coercion.

D. The TVPA: The Legal Sufficiency of Psychological Coercion

1. Overview of the TVPA

The United States recently ratified the U.N. Protocol.¹³⁸ However, the TVPA, passed by Congress and signed into law by President Clinton in 2000, implements the United States' anti-trafficking enforcement strategy. The Act enacts new criminal statutes to prosecute traffickers, establishes immigration relief for certain trafficking victims in the United States, and requires the U.S. Department of State to study the global problem of trafficking and issue its findings in an annual report on the status of other states regarding their anti-trafficking efforts.¹³⁹

Commentators have criticized both the language of the TVPA and its implementation as being inappropriately restrictive—excluding from its definition and approach a category of exploited migrant workers who ought to be considered trafficked as a matter of human rights.¹⁴⁰ This author agrees with this assessment and has explored this critique in other works. However, this article argues that despite these criticisms, the actual text of the TVPA shares with the U.N. Protocol an expansive view on the role of psychological coercion to induce involuntary labor, thereby presenting a crucial opportunity to develop a contemporary understanding of modern-day slavery. It is this recognition of the efficacy of psychological coercion that comprises the Act's most significant

138. The impact of the United States' ratification of the U.N. Protocol on its current anti-trafficking enforcement scheme is an issue the author is exploring in her current work-in-progress. Specifically, the question of whether the Protocol's ratification expands the definition of coercion as it relates to trafficking in persons for purposes of legal enforcement in the United States.

139. Joan Fitzpatrick, *Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking*, 24 MICH. J. INT'L L. 1143, 1159-60 (2003).

140. The TVPA aims to combat human trafficking through a strategy that places primary emphasis on the criminal prosecution of traffickers. As a result of this focus, protection measures for trafficked individuals are contingent upon federal law enforcement choosing to investigate and prosecute trafficking violations. The inherent selectivity in the prosecutorial process and its focus on the utilization of trafficking victims as witnesses for the criminal process, leaves many trafficked persons excluded from protection benefits, and ultimately from full access to justice. Another major criticism of U.S. anti-trafficking policy is its blatant conflation of prostitution with trafficking. Human rights activists report that anti-trafficking policies under the Bush Administration have focused funding and resources on enforcement of only sex trafficking crimes, thereby withholding protection and alienating many trafficked persons in other labor sectors. See generally Kathleen Kim & Grace Chang, *Report on the Summit on Human Trafficking: Critiques and New Strategies*, 3 STAN. J.C.R.-C.L. (forthcoming 2007); Kim & Hreshchyshyn, *supra* note 92. See also Debbie Nathan, *Oversexed*, THE NATION, Aug. 29, 2005, at 27; Bernice Yeung, *Enslaved in Palo Alto*, S.F. WEEKLY, Feb. 18, 2004, <http://www.sfweekly.com/2004-02-18/news/enslaved-in-palo-alto/>.

contribution to Thirteenth Amendment jurisprudence and the evolving discourse on involuntary labor.

The TVPA defines “severe forms of trafficking” as either:

- (A) sex trafficking¹⁴¹ in which a commercial sex act¹⁴² is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
- (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.¹⁴³

The TVPA treats sex trafficking and trafficking for labor as conceptually distinct—a compromise measure, reflecting the polemic ideological opinions held by various proponents of this bipartisan legislation.¹⁴⁴ Nevertheless, the definition acknowledges that the various purposes of trafficking in persons include exploitation in the commercial sex industry as well as other industries, such as agriculture, domestic service, sweatshops, construction, and restaurants.¹⁴⁵ Similar to the U.N. Protocol, the TVPA defines trafficking as a process including migration, through coercive or deceptive means for the purpose of sexual or labor exploitation.¹⁴⁶ Though not explicit in the language, the TVPA’s practical effect also makes a trafficked individual’s initial consent immaterial due to the trafficker’s coercive or deceptive conduct and the subsequent exploitation.

2. *The TVPA: Repealing Kozminski and Prohibiting Psychological Coercion*

Like the U.N. Protocol, the TVPA supports a broad vision of coercion and exploitation. Importantly, the Act recognizes that in addition to physical force, psychological abuse and nonviolent coercion create an environment of fear and intimidation that may prevent a worker from leaving.¹⁴⁷ However, the TVPA is distinct from the U.N. Protocol in its description of terms—uniquely shaped by the United States’ own history of modern Thirteenth Amendment jurisprudence. The TVPA’s multiple references to the *Kozminski* Court’s narrow holding and its intended deviation from it underscore the contentious background regarding the scope of coercion in cases of involuntary labor.¹⁴⁸ As indicated in the Act’s Purpose and Findings, Congress explicitly proclaimed that crimes of involuntary

141. 22 U.S.C. § 7102(9) (2000) (defining sex trafficking as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act”).

142. *Id.* § 7102(3) (defining a commercial sex act as “any sex act on account of which anything of value is given to or received by any person”).

143. *Id.* § 7102(8).

144. See Kim & Hreshchyshyn, *supra* note 92, at 12-13.

145. Hyland, *supra* note 113, at 33.

146. 22 U.S.C. § 7101(b) (2000).

147. 22 U.S.C. § 7102(2), (5) (2000) (defining coercion and involuntary servitude for trafficking provisions).

148. 22 U.S.C. § 7101(b)(13) (2000).

servitude should include those perpetrated through psychological abuse and nonviolent coercion, effectively superseding the restrictive definition set forth in *Kozminski*:

Involuntary servitude statutes are intended to reach cases in which persons are held in a condition of servitude through *nonviolent* coercion. In *United States v. Kozminski*, 487 U.S. 931 (1988), the Supreme Court found that section 1584 of title 18, United States Code, should be narrowly interpreted, absent a definition of involuntary servitude by Congress. As a result, that section was interpreted to criminalize only servitude that is brought about through use or threatened use of physical or legal coercion, and to exclude other conduct that can have the same purpose and effect.¹⁴⁹

The TVPA's legislative conference report also emphasized the Act's intent to "provide federal prosecutors with the tools to combat severe forms of worker exploitation that do not rise to the level of involuntary servitude as defined in *Kozminski*."¹⁵⁰

With the objective to expand the legal meaning of involuntary servitude to address human trafficking, the TVPA enacts new criminal codes based upon a broadened version of coercion. The TVPA focuses on delineating coercion, adopting an analytical framework similar to the Court's framework in *Kozminski*. Thus, crimes of involuntary servitude depend not on the baseline conditions of the servitude, but rather on the coercive means, albeit broadened coercive means, perpetrated by the trafficker to achieve the servitude. In other words, legally sufficient coercion must exist to substantiate criminally enforceable exploitation.¹⁵¹

3. *Psychological Coercion as Defined Under the TVPA*

The TVPA defines coercion as:

- (A) threats of serious harm to or physical restraint against any person;
- (B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or
- (C) the abuse or threatened abuse of the legal process.¹⁵²

The Act further declares that "statutes on involuntary servitude have been narrowly construed, in the absence of a definition by Congress, to exclude certain cases in which persons are held in a condition of servitude by nonviolent

149. *Id.*

150. H.R. REP. NO. 106-939, at 101 (2000).

151. *Id.*

152. 22 U.S.C. § 7102(2) (2000).

coercion.”¹⁵³ Thus, the TVPA incorporates its description of coercion into a new definition of involuntary servitude:

The term involuntary servitude includes a condition of servitude induced by means of—

- (A) any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or
- (B) abuse or threatened abuse of the legal process.¹⁵⁴

Finally, the new crime of forced labor, like the new definition of involuntary servitude, also incorporates the broadened meaning of coercion, officially expanding the forms of unfree labor prohibited pursuant to Congress’ Thirteenth Amendment section 2 enforcement power:

Whoever knowingly provides or obtains the labor or services of a person—

- (1) by threats of serious harm to, or physical restraint against, that person or another 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 process¹⁵⁵

The accompanying legislative conference report instructs that Congress meant the above provisions to address the subtle methods that traffickers use to “place their victims in modern-day slavery.”¹⁵⁶ Such subtle methods include threats to “harm ... third persons, restraining [the] victims without physical violence or injury, or [threats of] dire consequences by means other than overt violence.”¹⁵⁷ “The term serious harm ... refers to a broad array of harms, including both physical and nonphysical.”¹⁵⁸ Moreover, in addition to direct threats, traffickers may employ “a scheme, plan[,] or pattern,” amounting to a more subtle, but equally effective, form of coercion.¹⁵⁹ The TVPA explains that Congress intended the language of serious harm and scheme, plan, or pattern to assist prosecutors in proving forced labor violations in the absence of “physical harm or threats of force against victims.”¹⁶⁰ Finally, in determining the degree of coercion that is criminally actionable, the TVPA instructs that courts must take into account the victim’s individual circumstances such as age and background.¹⁶¹

153. H.R. REP. NO. 106-939, at 89 (2000).

154. 22 U.S.C. § 7102(5) (2000).

155. 18 U.S.C. § 1589 (2000).

156. H.R. REP. NO. 106-939, at 101 (2000).

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

4. *The Ambiguity of Psychological Coercion*

The TVPA's designation of coercion provides more breadth. At the same time, it is more ambiguous than the *Kozminski* Court's limited definition of criminal coercion comprised of only the physical or legal variety.¹⁶² Congress characterized coercion as unequivocally broad, encompassing "threats of serious harm" that are both physical and non-physical.¹⁶³ Yet, the term serious harm lacks specificity. Serious harm of a physical form may not require explicit description, as it is commonly understood to include any type of offensive touching, such as hitting, pushing, sexual assault, or attacks with weapons.¹⁶⁴ Non-physical serious harm, however, is not commonly understood and examples do not readily come to mind. Rather than provide a more detailed definition of non-physical harm, the TVPA vaguely refers to it as all forms of harm in the absence of physical force.¹⁶⁵ Described in the negative, encompassing all that is simply not physical, the notion of non-physical serious harm provokes only more questions than answers. What is the range of non-physical harms that constitute coercion? What are examples of threats of dire consequences or serious harm? Is it serious harm when a trafficker threatens to withhold pay if the worker complains about poor working conditions? What is a scheme, plan, or pattern? Is it a scheme, plan, or pattern when a trafficker terminates noncompliant workers to pressure an economically dependent worker that she could also lose her job if she failed to comply with exploitive labor conditions?

Further complicating the analysis, the TVPA instructs that courts should consider an individual's specific characteristics to assess the degree of coercion sufficient to prove a violation under the Act.¹⁶⁶ This attention to individual context generates even more possible coercion scenarios. For example, an employer's threat to prevent the schooling of an uneducated worker may be serious harm, sufficiently coercive to gain that worker's compliance. However, the same threat to an educated worker would not have a similarly coercive effect. Likewise, an employer's threat to a migrant worker, unfamiliar with U.S. laws, that he has no legal redress to the employer's violation of wage and hour laws, may be serious harm sufficiently coercive to compel that worker to labor for the substandard pay. The same tactic with a citizen worker may be ineffective.

The TVPA's conference report illustrates subtle and non-physical methods of coercion with only three examples.¹⁶⁷ In one imagined scenario, the conference report states that a trafficked domestic worker suffers a threat of serious harm when a trafficker leads her to believe that "children in her care will be harmed if she leaves the home."¹⁶⁸ A trafficker subjects another worker to a "scheme, plan,

162. *United States v. Kozminski*, 487 U.S. 931, 943-44 (1988).

163. H.R. REP. NO. 106-939, at 101 (2000).

164. KENNETH S. ABRAHAM, A CONCISE RESTATEMENT OF TORTS § 7 (2000) (defining physical harm as "the physical impairment of the human body").

165. H.R. REP. NO. 106-939, at 101 (2000).

166. *Id.*

167. *Id.*

168. *Id.*

or pattern” when the worker is caused to believe that “her family will face harms such as banishment, starvation, or bankruptcy in their home country.”¹⁶⁹ In a third example, individuals traffic children into forced labor by means of “nonviolent and psychological coercion” including “isolation, denial of sleep, and other punishments.”¹⁷⁰

These examples describe forms of psychological coercion—where individuals mentally manipulate workers into submission by threatening consequences other than bodily harm. Yet, these examples appear to encompass more than a trafficker’s directly coercive conduct to include the worker’s individualized economic and social pressures. For instance, in the scenario of the domestic worker who faces her family’s banishment, starvation, or bankruptcy, one can imagine such a consequence for many workers who must migrate for work to sustain their families in their countries of origin. Economically dependent on his or her job, the worker may feel indirectly forced to endure exploitive labor conditions to send money to his or her family to prevent their starvation or bankruptcy.

By providing only these scenarios, the TVPA does not limit the range of conceivable possibilities within the realm of non-physical coercion. Non-physical coercion appears to embody direct psychological manipulation where a perpetrator “causes a victim to believe” that a negative consequence will result from non-compliance. However, without restricting the scope of coercion, the TVPA gives rise to a range of imagined situations including scenarios involving a worker’s individualized economic and social pressures that have an indirect coercive effect on the worker.

Such a broad view of coercion may be necessary to address fully the intricacies of trafficking cases. In actuality, many human trafficking cases appear to fall somewhere between consent and coercion. Those who are willing are easier to exploit. Thus, trafficked persons are often voluntary migrants who seek economic opportunity. Subsequent to arrival, the trafficked worker, legally disenfranchised and culturally alienated, is far more vulnerable to exploitation. Workers may receive compensation. They may even be free to run errands or move throughout their neighborhood. However, they may not have the freedom to leave their work situation through a mix of the employer’s threatening conduct with the workers’ own economic or social circumstances. As an exploited domestic worker from Guatemala told investigators:

I am the single mother of two daughters. The salary [in Guatemala] is not sufficient for their studies, their food, their clothes.... Sometimes one is pressured by the economic situation It’s terrible what one suffers Sometimes I ask myself why I put up so much. It’s for this, for my mother and my daughters.¹⁷¹

169. *Id.*

170. *Id.*

171. HUMAN RIGHTS WATCH, HIDDEN IN THE HOME: ABUSE OF DOMESTIC WORKERS WITH SPECIAL VISAS IN THE UNITED STATES 8-9 (June 2001), available at <http://www.hrw.org/reports/2001/usadom/usadom0501.pdf>.

Again, Congress may have intended the TVPA to contemplate such situations. However, the scope of prohibited coercion is not clear from the bill's language. Moreover, in lieu of a more exact explanation of non-physical coercion, the TVPA does not provide a method by which to determine whether particular coercive means are legally sufficient for criminal enforcement. With minimal guidance to resolve these uncertainties, implementation of the Act requires courts and prosecutors to interpret the definition of coercion—precisely what the *Kozminski* Court admonished as a serious violation of lenity's requirements of fair notice and legislative supremacy.

IV. ONGOING EVALUATION

A. *The Normative Challenges in Defining and Evaluating Psychological Coercion*

The TVPA has accomplished a significant change in the law by reversing *Kozminski's* narrow interpretation of involuntary servitude and criminalizing an expansive version of coercion that includes psychological coercion. The TVPA's incorporation of nonviolent coercion into a new definition of involuntary servitude and a new crime of forced labor makes an important contribution to the discourse of involuntary labor arising under the Thirteenth Amendment. Yet, the nature of psychological coercion is not well understood, and the TVPA does not provide a methodology that courts and prosecutors may utilize in actual cases to assess the legal sufficiency of coercion in the absence of physical force. Without such an instruction, the Act's unspecified prohibition on psychological coercion risks overbroad and underinclusive application, thereby falling short of addressing the normative concerns raised by the *Kozminski* Court.

As explained in Part II, the *Kozminski* Court excluded psychological coercion from the definition of involuntary servitude based on the rule of lenity. In the absence of a congressional mandate, the Court concluded that a strict interpretation of involuntary servitude was necessary to provide fair notice to criminal defendants as to what constituted criminal conduct. Further, the Court wished to ensure that indiscriminating courts and prosecutors would not usurp legislative supremacy. The TVPA has now provided a congressional mandate broadening the definition of involuntary servitude and codifying less restrictive criminal statutes. Presumably, the Act's new formulation of involuntary servitude, intended to include labor compelled by psychological coercion, resolves the *Kozminski* Court's concern that "the scope of conduct prohibited ... is a matter of statutory construction."¹⁷²

However, as Part II also explained, the *Kozminski* Court's reasoning evidenced significant normative concerns as well. Underlying the Court's statutory argument was its opinion that any interpretation of involuntary servitude that criminalized psychological coercion was impermissibly subjective and ambiguous. The Court contended that the notion of psychological coercion,

172. *United States v. Kozminski*, 487 U.S. 931, 940-42 (1988).

reliant on the victim's state of mind, would "criminalize a broad range of day-to-day activities."¹⁷³ Moreover, without objective criteria derived from specific statutory guidance, broad definitions of involuntary servitude would inevitably result in arbitrary enforcement and inconsistent criminal standards.

The TVPA did not address these concerns. By criminalizing a broadened version of coercion, which includes psychological and other forms of non-physical and nonviolent coercion, Congress left open the Act's scope of prohibited conduct. As explained in part III, coercion as defined under the Act is ambiguous, encompassing an unrestricted range of potential scenarios. Such a definition may be necessary to capture the conceptual complexity of trafficking—that is, the nuances of employer abuse intermingled with a victim's individual circumstances. However, without providing guidance for determining the sufficiency of coercion for forced labor crimes, the TVPA risks arbitrary application from courts and prosecutors who may incorrectly enforce or reject cases of psychologically induced forced labor, unaware of how to evaluate them. Thus, while judicial deference should be given "to Congress' expressed intention concerning the scope of conduct prohibited,"¹⁷⁴ part III illustrates that Congress has not adequately specified the TVPA's prohibited scope of conduct for deferring courts.

Finally, the issue of psychological coercion raises an important tension in the law. While the very nature of psychological coercion may depend on the subjective response of the coerced person, the prevailing legal framework defines coercion based on the objective actions of the perpetrator applying the pressure. The TVPA does not provide a methodology by which to resolve this tension. As a result, despite the Act's reversal of the *Kozminski* decision, the concept of psychological coercion as legally sufficient means of verifying forced labor violations continues to lack substantive force.

B. *Continuing Evaluation of Psychologically Induced Human Trafficking Cases*¹⁷⁵

Preliminary analysis of the TVPA's adjudication and enforcement indicates persistent difficulty in grasping coercion. For example, the First Circuit in *United States v. Bradley*¹⁷⁶—the case of the Jamaican tree farmworkers discussed in the Introduction—rendered a mixed interpretation of the TVPA's definition of coercion.¹⁷⁷ In this case, the *Bradley* court determined that the TVPA was indeed intended to encompass "subtle psychological methods of coercion."¹⁷⁸ The court

173. *Id.* at 949.

174. *Id.* at 939.

175. The cases described in this section are explored in greater depth in the author's concurrent work-in-progress evaluating psychological coercion in the context of modern-day involuntary labor.

176. 390 F.3d 145 (1st Cir. 2004), *vacated*, 545 U.S. 1101, *remanded to* 426 F.3d 54 (1st Cir. 2005).

177. *See supra* notes 1-4 (discussing facts of the case).

178. 390 F.3d at 150-51 (discussing various interpretations of coercion under the Act).

also affirmed the need to consider a worker's "special vulnerabilities" when gauging the sufficiency of coercion to evidence a forced labor violation.¹⁷⁹ Yet, the court contrarily proposed that the TVPA's language defining coercion could be misconstrued by a jury to encompass an employer's legitimate, non-criminal conduct:

[T]he phrase "serious harm," as extended to non-physical coercion, creates a potential for jury misunderstanding as to the nature of the pressure that is proscribed. Taken literally, Congress' "threats" and "scheme" language could be read to encompass conduct such as the employer's "threat" not to pay for passage home if an employee left early. Depending upon the contract, surely such a "threat" could be a legitimate stance for the employer and not criminal conduct.¹⁸⁰

Consequently, the First Circuit advised that other cases would require courts to distinguish between threats that are criminally coercive and those that constitute "permissible warnings of adverse but legitimate consequences."¹⁸¹ However, the *Bradley* court did not elaborate on how to instruct a jury to draw the boundary between unlawful coercion and lawful pressures. Nor did the court point to any guidance within the TVPA to clarify this obscurity.

Significantly, the TVPA survived a 2003 challenge in a federal district court that it was unconstitutionally "void for vagueness." In *United States v. Garcia*,¹⁸² the government indicted various agricultural growers for trafficking Mexican farm laborers to New York State and forcing them to work under threats of violence and deportation. The defendants sought to dismiss the forced labor charges against them, arguing that the TVPA's undefined nature—specifically, the terms "obtains," "threats of serious harm" and "abuse or threatened abuse of law," made it impermissibly vague.¹⁸³ The *Garcia* court rejected the claim, declaring that the statute provided the minimal guidance necessary to overcome the vagueness challenge.¹⁸⁴ However, the court did not interpret the meanings of "serious harm" or coercion.

Absent specific guidance, difficulties in evaluating coercion persist at the investigation and enforcement level of the TVPA's implementation, which may be resulting in the under-enforcement of psychologically induced trafficking

179. *Id.* at 152-53.

180. *Id.* at 151.

181. *Id.*

182. No. 02-CR-110S-01, 2003 U.S. Dist. LEXIS 22088, at *1-2 (W.D.N.Y. Dec. 2, 2003).

183. *Id.* at *15, 17.

184. *Id.* at *27. According to the court, § 1589, the forced labor statute enacted by the TVPA, was sufficiently definite on its face to provide fair notice to criminal defendants because it required scienter: "Since § 1589 only applies to a person who 'knowingly provides or obtains the labor or services of a person' ... the issue of notice is properly 'ameliorated.'" *Id.* at *18 (emphasis added). Additionally, the court stated that nothing in the statute encouraged indiscriminate over-enforcement by law officials: "There is nothing in § 1589 that would cause one to conclude that ... 'it furnish[es] a ... tool for harsh and discriminatory enforcement....'" *Id.* at *26 (quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972)). However, the court did not consider the *under-enforcement* of trafficking crimes that may result from a lack of understanding of the TVPA's prohibition on coercion.

crimes. For example, in a case involving young men and boys from Mexico trafficked to work in a chain of taquerias, government agents responded that the case was not trafficking because there were no physical barriers preventing the workers from leaving. Yet, a civil suit filed by the workers alleged that the employers forced workers, vulnerable due to their young age, lack of education, and linguistic and cultural isolation, to work eighteen hours a day, seven days per week for far less than minimum wage under their employers' harassment and intimidation, including threats to not pay the workers if they refused to work harder and comply with the conditions.¹⁸⁵ The employers housed the workers in overcrowded, unfurnished apartments with no utilities. They kept close surveillance of the workers by imposing strict rules including curfews and a prohibition on having girlfriends.¹⁸⁶ The employers, a large, wealthy family who owned substantial properties in both Mexico and the United States, exercised tremendous socio-economic power over the young workers who were uneducated, poor, and from small rural towns in Mexico.

In another case, an employer of Kenyan national origin trafficked a domestic worker from Kenya to the United States. The employer was a member of a much higher socio-economic class with ties to the Kenyan government. The worker toiled around the clock, cooking, cleaning, and caring for her employer's young child.¹⁸⁷ The employer forced the worker to do demeaning chores such as hand washing the employer's car every day and hand washing all laundry because the employer refused to pay for a washing machine. The employer paid the worker only fifty dollars per month. To gain compliance, the employer threatened that the worker's visa did not permit her to work for anyone else or leave the home unaccompanied. The employer psychologically abused the worker, often yelling and calling her degrading names. The employer's power in Kenya exacerbated the worker's fear of non-compliance, which the employer could use to culturally stigmatize and ruin the worker's reputation in Kenya. Such retaliatory actions would make it impossible for the worker or her family members to find new employment or be self-sufficient in Kenya. When brought to the attention of the authorities, the federal prosecutor rejected the case as trafficking due to the absence of physical proof of bondage, such as whips and chains.

Finally, in a case involving the trafficking of women for commercial sex services, individuals recruited women from Korea through Internet chat rooms with promises of good employment in the United States.¹⁸⁸ Upon arrival, the traffickers told the women that they must work in various massage parlors until they successfully paid off their transportation debts. The traffickers represented a powerful and extensive network of mostly male recruiters, cross-border smugglers, massage parlor owners, and taxi drivers responsible for transporting

185. Complaint, *Abrica v. Campestre Corp.*, No. 04-02723 (N.D. Cal. July 7, 2004) (on file with author).

186. *Id.*

187. Yeung, *supra* note 140.

188. Press Release, U.S. Dep't of Justice, 29 Charged in Connection with Alien Harboring Conspiracy (July 1, 2005), http://www.usdoj.gov/usao/can/press/2005/2005_07_01_Gilded_Cage.html.

the women to and from different massage parlors. In contrast, the workers were all women, lacking sustainable incomes in Korea and were relatively uneducated. The trafficking network housed and monitored the workers although they could more or less move freely and unaccompanied. However, through employer intimidation and cultural isolation of the workers who had no outside support network, the women felt compelled to comply with the working conditions. After interviewing one of the trafficked women, the federal prosecutor, frustrated by the lack of hard evidence to show physical restraint or force, argued that what occurred within the victim's own mind was impossible to prosecute.

Clearly, identifying psychological coercion is not a simple task. Its significant subjective component does not fit easily into universally applicable and objective legal frameworks. Furthermore, defining an objective legal standard for the level of psychological coercion sufficient to force an individual to work ultimately raises intricate normative questions about the nature of free will and voluntariness. Despite these complexities, both international and domestic legal instruments explicitly recognize the nature of human trafficking as intimately tied to nonviolent and non-physical pressures. To execute the mandates of these laws, society must condemn human trafficking and protect trafficked persons whether induced by physical or non-physical means. Therefore, the legal community requires additional guidance to understand and assess psychological coercion in human trafficking cases.

V. CONCLUSION

This article sets forth the foundation for further inquiry into the role of psychological coercion in human trafficking cases. It is the launching point for the author's parallel work-in-progress, which endeavors to strengthen the legal role of psychological coercion in human trafficking cases by: (1) continuing to examine the TVPA's implementation to psychologically coerced human trafficking cases; and (2) developing an effective legal model to guide the evaluation of psychological coercion in future human trafficking cases. Such a model should challenge the prevailing legal framework by embracing the subjective experience and context-specific circumstances of the trafficked individual. It should consider the dialectical power dynamic unique to trafficking cases. It should also recognize that each trafficking case occurs within a particular socio-cultural context, consisting of a diverse range of factors that facilitate the subordinate status of the trafficked person. These factors include race, class, and gender as well as certain culturally specific circumstances such as a trafficked individual's genuine fear that non-compliance may result in "banishment, starvation, or bankruptcy in their home country."¹⁸⁹ The model should holistically contemplate the psychologically coercive effect of social, economic, and cultural factors. Finally and most importantly, an appropriate model for evaluating psychological coercion should preserve and protect the self-expression of trafficked individuals, advancing cultural pluralism in the law.

189. H.R. REP. NO. 106-939, at 101 (2000).