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Chapter 240: Human Trafficking—Combating the Underground Slave Industry in California

Matthew Garber

Code Sections Affected

Civil Code § 52.5 (new); Evidence Code §§ 1038, 1038.1, 1038.2 (new); Government Code § 13956 (amended); Penal Code §§ 236.1, 236.2, 13990 (new), §§ 186.2, 273.7, 1202.4, 14023 (amended).
AB 22 (Lieber, Liu, & Kuehl); 2005 STAT. Ch. 240.

I. INTRODUCTION

Human trafficking, or trafficking in persons, is often referred to as “modern-day slavery.”¹ According to the United States State Department, approximately 800,000 to 900,000 people are trafficked across international borders each year and an estimated 18,000 to 20,000 of those victims are trafficked into the United States.² These numbers, however, do not include the estimated millions of victims held against their will within individual countries.³ Although it is a somewhat different concept, the phrase “trafficking in persons” is often used interchangeably with the term “forced labor.”⁴ Forced labor refers to one who “knowingly provides or obtains the labor or services of a person by threats of serious harm . . . [or] threatened abuse of law or legal process.”⁵ In contrast, human trafficking involves anyone who “knowingly recruits, harbors, transports, provides, or obtains by any means, any person for [forced] labor. . . .”⁶

Law enforcement agencies have uncovered human trafficking operations in nearly a dozen California cities, with most of the activity concentrated in San Francisco, Los Angeles, and San Diego.⁷ Human traffickers use increasingly sophisticated methods such as false business opportunities, educational or work programs, and domestic servant schemes to lure and entrap victims.⁸ California

1. *E.g.*, U.S. STATE DEP'T, TRAFFICKING IN PERSONS REPORT 6 (June 2005), available at <http://www.state.gov/documents/organization/47255.pdf> [hereinafter 2005 Trafficking Report] (on file with the *McGeorge Law Review*).

2. U.S. STATE DEP'T, TRAFFICKING IN PERSONS REPORT 7 (June 2003), available at <http://www.state.gov/documents/organization/21555.pdf> (on file with the *McGeorge Law Review*).

3. Rich Lowry, *Miller's Mission*, NAT'L REV., Jan. 24, 2005 at 79; 2005 Trafficking Report, *supra* note 1, at 79.

4. DAVID TULLER, HUMAN RIGHTS CENTER, FREEDOM DENIED: FORCED LABOR IN CALIFORNIA 3 (Feb. 2005), <http://hrcberkeley.org/download/freedomdenied.pdf> (on file with the *McGeorge Law Review*).

5. 18 U.S.C.A. § 1589 (West Supp. 2005); Convention Concerning Forced or Compulsory Labour art. 2(1), June 28, 1930, 39 U.N.T.S. 55, 58.

6. 18 U.S.C.A. § 1590 (West 2005).

7. Tuller, *supra* note 4, at 1.

8. SUZANNE SELTZER ET AL, NYC ANTI-TRAFFICKING NETWORK, IDENTIFICATION AND LEGAL ADVOCACY FOR TRAFFICKING VICTIMS A-1 (Mar. 2005), available at http://www.nyc-anti-trafficking.com/assets/docs/trafficking_manual_03_2005.pdf (on file with the *McGeorge Law Review*).

trafficking victims primarily come from developing countries and are particularly vulnerable to promises of job opportunities that offer higher earnings and a better way of life.⁹ Victims “enter California by several different modes of transportation, including aircraft, boat, overland vehicles, and on foot.”¹⁰ Eighty percent of trafficking victims within the United States are women and up to fifty percent are minors.¹¹

A survey of human trafficking patterns in California found that nearly half of all trafficking victims are involved in forced prostitution.¹² Victims are transported into the United States for prostitution through complex trafficking rings.¹³ In some trafficking rings, traffickers charge young girls as much as \$7,500 to cross the border, but once the girls arrive in the United States they realize they have been kidnapped and are then forced into prostitution without any compensation.¹⁴ Violence against these victims is severe and frequent;¹⁵ they are often denied food and medical treatment and are at great risk of contracting sexually transmitted diseases.¹⁶

Another one-third of California’s human trafficking victims become enslaved as domestic workers.¹⁷ Domestic worker cases can be difficult to detect because the victims work in private homes and are often completely isolated.¹⁸ Domestic employers entice impoverished victims with promises of good pay and a better life in the United States.¹⁹ Once the victims arrive, their “employers” use psychological domination and threats to make workers “believe they will suffer serious harm if they leave.”²⁰ Domestic workers may be paid as little as nothing to one hundred dollars per month for working up to nineteen-hour days.²¹

Despite significant resources allotted to fight human trafficking in the United States, and an increased awareness among the public, law enforcement has achieved little success in curtailing the problem.²² With enormous profits at stake,

9. Tuller, *supra* note 4, at 10.

10. *Id.* at 11.

11. 2005 Trafficking Report, *supra* note 1, at 16.

12. See Tuller, *supra* note 4, at 9 (documenting that of recent reported cases in California 47.7% involved prostitution, thirty-three percent involved domestic service, and 10.6% involved sweatshop workers and mail order brides).

13. Nicole Bode, *From the Mean Streets of Mexico to the Sad Streets of Queens*, N.Y. DAILY NEWS, Apr. 3, 2005, at 12.

14. *Id.*

15. *Id.*

16. Tuller, *supra* note 4, at 12.

17. *Id.* at 9.

18. Bernice Young, *Enslaved in Palo Alto*, S.F. WEEKLY, Feb. 18, 2004, available at <http://www.sfweekly.com/Issues/2004-02-18/news/feature.html> (on file with the *McGeorge Law Review*).

19. CAROL PIER, HUMAN RIGHTS WATCH, HIDDEN IN THE HOME: ABUSE OF DOMESTIC WORKERS WITH SPECIAL VISAS IN THE UNITED STATES 51 (June 2001), available at <http://www.hrw.org/reports/2001/usadom/usadom0501.pdf> (on file with the *McGeorge Law Review*).

20. *Id.*

21. *Id.*

22. Louise I. Shelley, *The Price of Sex*, MOSCOW TIMES, Sept. 17, 2004, at 104.

a relatively low risk of detection, and a seemingly endless supply of impoverished women, trafficking has expanded to reach a rising demand.²³ Chapter 240 is designed to address the problem of human trafficking by establishing new criminal penalties for traffickers and creating civil remedies and other legal protections for trafficking victims.²⁴

II. LEGAL BACKGROUND

A. Existing Federal Law

In October 2000, the Trafficking Victims Protection Act of 2000 (TVPA) became the first human trafficking law in the United States.²⁵ The law creates a Presidential-level task force with a three-pronged approach to combat human trafficking: prosecution of traffickers, protection of victims, and prevention of trafficking.²⁶ Four new crimes were added to the United States Code, two of which specifically criminalize trafficking.²⁷ The first trafficking crime targets “[w]hoever knowingly recruits, harbors, transports, provides, or obtains by any means, any person for labor or services in violation of [Chapter 77].”²⁸ The second creates additional criminal penalties if the person trafficked is a child under the age of fourteen.²⁹ A further provision criminalizes the act of destroying or concealing another person’s passport or immigration documentation.³⁰ To prevent future human trafficking, the TVPA mandates that the President carry out international initiatives to educate potential trafficking victims.³¹ One possible initiative includes programs designed to “keep children, especially girls, in elementary and secondary schools, and . . . educate persons who have been victims of trafficking.”³²

Finally, the TVPA creates provisions to protect victims of severe forms of human trafficking.³³ Victims who agree to cooperate with law enforcement in the

23. *Id.*

24. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 22, at 2-5 (Sept. 7, 2005).

25. Victims of Trafficking & Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of 8, 18, and 22 U.S.C.).

26. Hussein Sadruddin, *Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 STAN. L. & POL’Y REV. 379, 380 (2005).

27. *Developments in the Law—Jobs and Borders*, 118 HARV. L. REV. 2180, 2192 (2005).

28. 18 U.S.C.A. § 1590 (West Supp. 2005).

29. *Id.* § 1591(b).

30. *Id.* § 1592(a).

31. 22 U.S.C.A. § 7104(a)(3)-(5) (West Supp. 2005).

32. *Id.* § 7104(a)(3).

33. *Id.* § 7102(8) (defining “severe forms of trafficking in persons” as sex trafficking involving sex acts induced by force, fraud, or coercion; trafficking of a minor; or “the recruitment, harboring, transportation, provision, or obtaining of a person for [labor] through the use of force, fraud, or coercion[,] for the purpose of . . . involuntary servitude . . . or slavery”).

prosecution of traffickers can receive a T nonimmigrant visa,³⁴ which grants them temporary immigration status and allows them access to psychological counseling and other social services.³⁵ The T nonimmigrant visa is a special immigration status, available only to victims of human trafficking, which gives the holder legal status in the United States for three years.³⁶ In their visa applications, victims must show that they complied with reasonable requests for assistance from law enforcement investigating human trafficking.³⁷ To prove such compliance it is strongly advised that anyone applying for T nonimmigrant status submit a Law Enforcement Agency (LEA) endorsement with his or her application.³⁸ Once an application is received, immigration adjudicators have the power to deny applications to victims, even if the victims cooperated with law enforcement; they may base their denials on whether the evidence submitted sufficiently shows that a victim actually provided law enforcement with assistance.³⁹ As a result, applying for a T nonimmigrant visa has proven to be a complex and difficult process.⁴⁰

B. *Prior and Existing California Law*

Prior to the adoption of Chapter 240, California was among forty-six states without legislation criminalizing human trafficking.⁴¹ Instead, human traffickers could be punished only under various sections of the Penal Code that criminalize slavery, kidnapping, or procurement of a prostitute.⁴² Under California's slavery law it is a crime to claim the right of ownership over any person, but it is not a crime to recruit, entice, or transport another person for the purpose of forced labor or trafficking.⁴³ Consequently, prosecutors had limited recourse against persons who transported victims but never personally took part in using the victims as forced laborers.⁴⁴

34. 8 U.S.C.A § 1101(a)(13)(T) (West Supp. 2005).

35. Tuller, *supra* note 4, at 5.

36. 8 C.F.R. § 214.11(b), (p)(1) (2005).

37. Stephanie Richard, Note, *State Legislation and Human Trafficking: Helpful or Harmful?*, 118 U. MICH. J.L. REFORM 447, 465 (2005).

38. DEP'T OF HOMELAND SECURITY, OMB No. 1115-0246, APPLICATION FOR T NONIMMIGRANT STATUS (Feb. 18, 2005), available at <http://www.usa-federal-forms.com/usa-fedforms-dhs-uscis-i/dhs-uscis-i-914-nonfillable.pdf> pdf (on file with the *McGeorge Law Review*).

39. *Id.*

40. Sadruddin, *supra* note 26, at 398.

41. Richard, *supra* note 37, at 456.

42. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 22, at D-E (Apr. 28, 2005).

43. CAL. PENAL CODE § 181 (West 2005).

44. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 22, at F-G (Apr. 28, 2005).

C. Existing Law in Other States

Prior to Chapter 240, only Washington, Texas, Missouri, and Florida had legislation that specifically criminalized human trafficking.⁴⁵ The provisions of those statutes create criminal penalties for traffickers, but do not contain any provisions that provide protection to trafficking victims (as modeled in the TVPA).⁴⁶ In July 2004, the United States Department of Justice (DOJ) prepared a model state human trafficking statute.⁴⁷ The DOJ's model statute contains general language describing victim protection, but provides little explanation as to what protection may be appropriate.⁴⁸ The model trafficking legislation overlaps with federal legislation in an effort to allow local prosecutors the ability to respond most appropriately to human trafficking in their own jurisdictions.⁴⁹

III. CHAPTER 240

Chapter 240 creates the crime of human trafficking and provides criminal penalties for its violation.⁵⁰ Additionally, Chapter 240 creates a new civil cause of action for human trafficking.⁵¹ Chapter 240 also sets forth provisions to protect victims from the adverse immigration consequences that may result from reporting a human trafficking violation.⁵²

By creating new crimes for persons who benefit from, or participate in, the forced labor of human beings, Chapter 240 broadens the scope of charges that may be brought against someone who violates the personal liberty of another to obtain forced labor or services.⁵³ Formerly, it was a crime to assume a right of ownership over a person, or to sell or attempt to sell a person to another, and the crimes were punishable by imprisonment for two to four years.⁵⁴ Chapter 240 retains the former crime under the new heading of "Human Trafficking" and expands that crime to cover anyone who commits "substantial and sustained restriction of another's liberty accomplished through fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury"⁵⁵ The penalties for

45. Richard, *supra* note 37, at 456.

46. *Id.*

47. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., MODEL STATE ANTI-TRAFFICKING CRIMINAL STATUTE 7 (July 2001), http://www.usdoj.gov/crt/crim/model_state_law.pdf (on file with the *McGeorge Law Review*).

48. *Id.* (explaining that states should determine how well current state programs serve the needs of trafficking victims).

49. *Id.* (explaining that states may wish to tailor human trafficking statutes to compliment current state legislation).

50. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 22, at 1-2 (Sept. 7, 2005).

51. *Id.* at 2.

52. CAL. PENAL CODE § 236.2 (enacted by Chapter 240).

53. *Id.* § 236.1.

54. *Id.* § 181 (West Supp. 2005).

55. *Id.* § 236.1(d)(1) (enacted by Chapter 240).

human trafficking range from three to five years in state prison and up to eight years in prison if the person trafficked is a minor.⁵⁶

Upon conviction of a human trafficking offense, traffickers are liable to their victims in restitution; the restitution is based on the value of the victim's services or the actual income the trafficker derived from those services (whichever is greater).⁵⁷ After restitution is awarded to a victim, the order is enforceable as if it were a civil judgment.⁵⁸ Chapter 240 also adds a new cause of action to the Civil Code, which allows victims of human trafficking to sue those who trafficked them for actual and punitive damages.⁵⁹

Chapter 240 also has provisions that encourage victims to report human trafficking violations by protecting such victims from adverse immigration consequences.⁶⁰ Chapter 240 requires law enforcement officials to file an LEA endorsement with the United States Immigration Service within fifteen days of the identification of a victim, regardless of who reports the trafficking violation.⁶¹ By filing an LEA endorsement, a victim is more likely to qualify for T nonimmigrant status because the endorsement demonstrates the victim's reasonable cooperation with enforcement officials as required by federal law.⁶² Chapter 240 further protects victims by creating an evidentiary privilege between victims and caseworkers.⁶³ This new privilege may ease the hesitation of some victims who fear that coming forward to detail the activities of traffickers will place them in jeopardy.⁶⁴

IV. ANALYSIS OF CHAPTER 240

A. *Why California Needs Human Trafficking Legislation*

Congress has recognized that in addition to the TVPA, states need to enact supplemental human trafficking legislation to combat trafficking at the local level.⁶⁵ Research shows that because state statutes often codify crimes similar to trafficking in unrelated parts of the state code, prosecutors may be unclear as to how to charge trafficking suspects.⁶⁶ Such is the case in California, where prior

56. *Id.* § 236.1(b)-(c).

57. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 22, at A-B (Apr. 26, 2005).

58. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 22, at B (Apr. 28, 2005).

59. ASSEMBLY RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 22, at 2 (Sept. 7, 2005).

60. CAL. PENAL CODE § 236.2 (enacted by Chapter 240).

61. *Id.*

62. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 22, at L (Apr. 26, 2005).

63. CAL. EVID. CODE § 1038(a) (enacted by Chapter 240).

64. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 22, at M (Apr. 26, 2005).

65. Tuller, *supra* note 4, at 1.

66. U.S. DEP'T OF JUSTICE, *supra* note 47, at 6-7.

and existing law applicable to trafficking suspects spans multiple sections of the Penal Code.⁶⁷ For example, prior California law that specifically addressed slavery was written nearly one hundred years ago and has almost never been utilized in the human trafficking context.⁶⁸ As a result, legal reforms were necessary to more effectively assist law enforcement in combating human trafficking in California.⁶⁹ To effectively uncover and rescue trafficking victims, various human trafficking enforcement teams emphasize that proactive law enforcement strategies must be coupled with involvement from all levels of government and community members.⁷⁰

Since there was no state legislation in California that addressed modern-day trafficking, state law enforcement personnel were often unfamiliar with the concepts of trafficking and forced labor and were far more likely than federal agents to treat trafficking victims as criminals who needed to be deported.⁷¹ State and local law enforcement are also far more likely than federal agents to encounter trafficking cases because of their greater number and street-level presence.⁷² Therefore, by implementing state trafficking legislation, state police officers are in a better position than their federal counterparts to effectively charge traffickers.⁷³

B. Chapter 240 is Comprehensive in Scope

Most scholars in the area of human trafficking agree that criminal penalties are only part of an effective legislative remedy.⁷⁴ Instead, trafficking legislation that exclusively criminalizes trafficking activities may effectively ignore the problem of protecting victims' human rights.⁷⁵ To correct this problem, Chapter 240 contains provisions that protect victims' rights and provide restitution, in addition to creating civil and criminal penalties for traffickers.⁷⁶

67. See ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 22, at D-I (Apr. 26, 2005) (listing various existing California Penal Code sections under which trafficking violators could be prosecuted).

68. LAWYERS' COMM. FOR CIVIL RIGHTS OF THE S.F.BAY AREA, CALIFORNIA ANTI-TRAFFICKING INITIATIVE: ASSEMBLY BILL 22: COMPREHENSIVE CALIFORNIA ANTI-TRAFFICKING LEGISLATION, *available at* <http://www.ewfa.org/images/content/AB22%20talking%20points.pdf> (on file with the *McGeorge Law Review*).

69. Tuller, *supra* note 4, at 2.

70. Press Release, U.S. Dep't of Justice, Bush Administration Hosts First National Training Conference to Combat Human Trafficking (July 16, 2004), http://www.usdoj.gov/opa/pr/2004/July/04_ag_489.20points.pdf (on file with the *McGeorge Law Review*).

71. Tuller, *supra* note 4, at 6.

72. Daniel J. Bryant, Assistant Att'y Gen., Address at the United States Department of Justice Conference on Human Trafficking (July 16, 2004) (on file with the *McGeorge Law Review*).

73. *Id.*

74. Richard, *supra* note 37, at 462.

75. *Id.*

76. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 22, at A-D (Apr. 26, 2005).

If state trafficking laws do not provide a comprehensive approach to trafficking that includes victim protection, a victim may potentially be denied the benefits she would receive had she brought her case under the TVPA.⁷⁷ Victims of human trafficking often experience severe physical and emotional abuse.⁷⁸ Once they escape from their captors they have an immediate need for shelter and human services.⁷⁹ To protect victims from deportation, Chapter 240 has provisions that satisfy both requirements necessary for trafficking victims to receive T nonimmigrant visas.⁸⁰ First, Chapter 240 defines a human trafficking victim according to the federal "severe trafficking victim" definition.⁸¹ Second, Chapter 240 requires state law enforcement officials to submit an LEA endorsement to federal officials within fifteen days of the first encounter with a trafficking victim.⁸² It is unclear, however, whether federal officials will recognize LEA endorsements made in this manner because federal law specifies that an LEA endorsement shall be made at the discretion of the issuing law enforcement agency.⁸³

C. Have Other Human Trafficking Laws Been Effective?

It has been nearly five years since the federal government enacted the TVPA.⁸⁴ According to the DOJ, the United States has assisted only about 580 trafficking victims during that time,⁸⁵ even though current estimates show that 18,000 to 20,000 people continue to be trafficked into the United States each year.⁸⁶ Scholars point out that the TVPA may lack effectiveness because it does not have an enforcement arm to enact its three-pronged strategy of prevention, prosecution, and protection.⁸⁷ Perhaps in recognition of its inability to find and aid the vast majority of trafficking victims, the DOJ has emphasized that it is

77. Richard, *supra* note 37, at 462.

78. *Id.*

79. Tuller, *supra* note 4, at 1.

80. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 22, at L (Apr. 26, 2005).

81. CAL. PENAL CODE § 236.1(f) (enacted by Chapter 240); 22 U.S.C.A. § 7102(8) (West Supp. 2005).

82. CAL. PENAL CODE § 236.2(a) (enacted by Chapter 240).

83. *See* ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 22, at L (Apr. 26, 2005) (contrasting federal regulations, which provide that an LEA endorsement is discretionary, with AB 22, which requires that law enforcement complete an LEA endorsement for all victims within fifteen days).

84. *Developments in the Law*, *supra* note 27, at 2188.

85. R. Alexander Acosta, Assistant Att'y Gen., Address at the National Conference on Trafficking in Persons (July 15, 2004) (on file with the *McGeorge Law Review*).

86. International Rescue Committee, Trafficking in the United States, <http://www.theirc.org/index.cfm/wwwID/1886> (last visited June 17, 2005) (on file with the *McGeorge Law Review*).

87. HEATHER J. CLAWSON ET AL., HAWAII AIDS EDUCATION AND TRAINING CENTER, NEEDS ASSESSMENT FOR SERVICE PROVIDERS AND TRAFFICKING VICTIMS, at 5 (Oct. 2003), available at www.hawaii.edu/hivandaids/Needs_Assessment_for_Service_Providers_and_Trafficking_Victims.pdf (on file with the *McGeorge Law Review*).

critical for local law enforcement to provide assistance to federal officials.⁸⁸ Government reports suggest some explanations for the disparity between the vast number of estimated victims and the small number of victims actually assisted: the law is new, law enforcement personnel need training to understand and recognize trafficking, and human trafficking prosecutions are extremely complex and require a tremendous amount of resources.⁸⁹ Additionally, foundation for coordinated efforts among law enforcement is still developing and has made noticeable progress in a short amount of time.⁹⁰ Because the first state trafficking statutes were enacted as late as 2003,⁹¹ it is likely too early to determine whether they have been effective in curtailing or prosecuting traffickers. Now that Chapter 240 has been enacted, California law enforcement officials have the opportunity to prove that human trafficking legislation can be used to effectively combat this growing epidemic.

V. CONCLUSION

Human trafficking is becoming more prevalent in the United States and trafficking victims are entering the country from all parts of the world.⁹² Although the federal government made human trafficking a federal crime in 2000, federal law enforcement has not been able to assist the vast majority of trafficking victims in the United States.⁹³ By enacting Chapter 240, California joins four other states in creating legislation to combat human trafficking.⁹⁴ In addition to the existing federal law against human trafficking, state legislators should promote a more effective strategy to combat trafficking by updating criminal statutes and partnering with the federal government.⁹⁵

88. Acosta, *supra* note 86.

89. Sadruddin, *supra* note 26, at 393-94.

90. CLAWSON ET AL, *supra* note 88, at 1.

91. Richard, *supra* note 37, at 456.

92. Bode, *supra* note 13, at 12.

93. *See supra* Part IV.C.

94. Richard, *supra* note 37, at 456.

95. Bryant, *supra* note 73.