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A Revised Approach to Reducing Labor Abuses and Human Trafficking

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A Revised Approach to Reducing Labor Abuses and Human Trafficking

Thomas Reuland¹

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Abstract

In this paper, I challenge current efforts to combat human trafficking. Trafficking is a problem that the law has difficulty preventing, in part, because of market forces. Moreover, the structure of many corporations responds to these market forces, implicates these enterprises in human trafficking, and encourages members of a company to remain complacent in the face of human rights abuses. As corporations strive to increase profit margins on each product they make, they demand low-cost labor and commodify the human beings who satisfy that demand. Meanwhile, branding provides a powerful tool that corporations use to prevent the consumer from recognizing the connection between the company’s product and the company’s human rights violations. I argue that the law, especially in the United States, overlooks the power of branding. Unfortunately, it will likely continue to do so unless it takes active steps to connect a corporation’s brand identity to that same corporation’s human trafficking abuses. I conclude by proposing some simple steps in the right direction—revisions to the law’s approach to trafficking.

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D) Introduction

Human trafficking is exploitation, a “crime against humanity.”² Trafficking is not a new atrocity, but legal developments that address trafficking as a distinct problem are relatively recent. The United Nations took years to develop this definition of trafficking:³

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the 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 . . . the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.⁴

Most scholars agree that the core elements of trafficking involve an act, a method, and a goal.⁵

The act typically involves moving a victim.⁶ The method includes force, abduction, fraud, and

² United Nations Office on Drugs and Crime, *Human Trafficking*, <http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html>; Office of Legal Policy, U. S. Department of Justice, *Human Trafficking* http://www.justice.gov/olp/human_trafficking.htm (last visited Oct. 1, 2010) (“Human trafficking is a violation of the human body, mind and spirit. . . . For this vile practice to be taking place in [the United States,] a country that the world looks to as a beacon of freedom . . . is a terrible irony and an utter tragedy.”).

³ See KEVIN BALES AND RON SOODALTER, *THE SLAVE NEXT DOOR: HUMAN TRAFFICKING AND SLAVERY IN AMERICA TODAY* 7 (2009) (describing today’s slavery in America as stemming from “an unbroken legacy of bondage”); *The Evolution of the Definition of Trafficking*, ADVOCATES FOR HUMAN RIGHTS (Sept. 2005), http://www.stopvaw.org/The_Evolution_of_the_Definition_of_Trafficking.html (tracing the historical development of an international definition of human trafficking and the difficulties of agreeing on one definition of human trafficking).

⁴ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, art. 3(a), U.N. Doc. A/RES/55/25 (Nov. 15, 2001) [hereinafter Protocol to Prevent Trafficking].

⁵ ALEXIS A. ARONOWITZ, *HUMAN TRAFFICKING, HUMAN MISERY: THE GLOBAL TRADE IN HUMAN BEINGS* 1–2 (2009). The United States has adopted a similar definition of trafficking. Congress defines “severe forms of trafficking in persons” to include “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.” 22 U.S.C. § 7102(8) (2010); U.S. State Dep’t, *Trafficking in Persons Report 6–7* (2009), available at <http://www.state.gov/documents/organization/123357.pdf> (on file with the author) [hereinafter TIP Report 2009].

⁶ This is not always the case, however. For instance, the U.S. Department of State has noted that trafficking victims “need not be physically transported from one location to another in order for the crime to fall within these definitions.” TIP Report 2009, *supra* note 5, at 5.

physical or psychological abuse.⁷ The goal entails some form of exploitation, like financial or sexual exploitation.⁸

The problem is pervasive, with conservative estimates reporting over eight million victims worldwide, and spans across the world economy.⁹ It takes place in the agricultural sector, which features millions of farmers working in poor conditions,¹⁰ bereft of fair wages earned for completing dangerous work in taxing climates.¹¹ Indoors, the garment industry evades regulations designed to shut down sweatshops.¹² Trafficking impacts large and small business enterprises alike, exploiting women as domestic workers for example.¹³ It spans both urban and

⁷ Protocol to Prevent Trafficking, *supra* note 4. Notably, this method distinguishes trafficking from human smuggling. Smuggling is “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a state party of which the person is not a national.” United Nations, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, art. 3, U.N. Doc. A/AC.254/4/Add.1/Rev.6 (2000).

⁸ Protocol to Prevent Trafficking, *supra* note 4.

⁹ Alexandra Vinogradova, et al., *Measuring the Costs of Coercion to Workers in Forced Labour*, INTERNATIONAL LABOUR ORGANIZATION (ILO) (2009), available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_106409.pdf.

¹⁰ “[N]early two million farm workers, mainly immigrants, toil without rights, earn sub-living wages and exist in dehumanizing conditions.” Oxfam America, Report Summary, <http://www.oxfamamerica.org/publications/like-machines-in-the-fields-workers-without-rights-in-american-agriculture>.

¹¹ National Economic & Social Rights Initiative, *Modern Day Slavery in U.S. Agriculture: Legal Failure and Corporate Complicity*, Sept. 2005, available at [http://www.nesri.org/fact_sheets_pubs/Modern Day Slavery in U.S. Agriculture.pdf](http://www.nesri.org/fact_sheets_pubs/Modern%20Day%20Slavery%20in%20U.S.%20Agriculture.pdf). Tomato farms that employ legitimate labor—non-trafficked labor—illustrate the hardships of the sector. Growers typically pay workers according to how many pounds of tomatoes they pick rather than by how many hours they work. Pay could be as low as forty cents for a thirty-two-pound bucket of tomatoes; in order to earn \$50, the worker must pick nearly two tons of tomatoes. OXFAM AMERICA, LIKE MACHINES IN THE FIELDS: WORKERS WITHOUT RIGHTS IN AMERICAN AGRICULTURE 12–13 (2004), available at <http://www.oxfamamerica.org/publications/like-machines-in-the-fields-workers-without-rights-in-american-agriculture>.

¹² Annette Bernhardt, et al., *Working Without Laws*, THE NATION, Sept. 4, 2009 (concluding that U.S. companies’ interest in cheap labor “has now taken us to a logical low point: many employers are ignoring workplace laws altogether”); Dennis Hayashi, *Preventing Human Rights Abuses in the U.S. Garment Industry: A Proposed Amendment to the Fair Labor Standards Act*, 17 YALE J. INT’L L. 195, 195 (1992) (“The U.S. garment industry has violated both international labor standards and federal and state labor laws with some degree of impunity for decades.”); cf. Sophie Richardson, *Not a sweatshop, but no “Workers’ Heaven”*, JOONGANG DAILY, Oct. 8, 2006, reprinted by HUMAN RIGHTS WATCH, available at <http://www.hrw.org/en/news/2006/10/07/not-sweatshop-no-workers-heaven> (concluding that “facilities in North Korea hardly live up to the government’s description of ‘workers’ heaven”).

¹³ NATIONAL DOMESTIC WORKERS ALLIANCE, <http://www.nationaldomesticworkeralliance.org/campaigns> (last visited Oct. 1, 2010); see also Maria L. Ontiveros, *A Vision of Global Capitalism that puts Women and People of*

rural environments.¹⁴ The problem of trafficking extends beyond any single economic sphere.¹⁵

Trafficking's connection to market dynamics is undeniable.¹⁶ A market is a forum for exchange. Tellingly, the goal element from the U.N.'s definition of trafficking involves some form of payment or profit—some form of consideration in exchange for the victim's exploitation.¹⁷ The market dynamic of human trafficking is clear when examining labor abuses: workers constitute the supply, and corporations make up the demand for human labor. Then, some of these corporations profit from these workers' products by selling them to consumers. In this paper, I focus on how this dynamic leads to human trafficking in general, and forced labor and labor abuses in particular.¹⁸

Color at the Center, 3 J. SMALL & EMERGING BUS. L. 27, 33 (1999). The isolation of domestic servitude occurs worldwide. As the TIP Report explains:

Foreign migrants, usually women, are recruited from less developed countries in South Asia, Southeast Asia, Africa, and Latin America to work as domestic servants and caretakers in more developed locations like the Gulf States, the Levant, Malaysia, Singapore, Taiwan, Europe, and the United States.

TIP Report 2009, *supra* note 5, at 18. In addition to financial hardships, domestic workers often face sexism and racism as they strive to establish themselves. National Domestic Workers Alliance, *Id.*

¹⁴ Debt bondage, for instance, is a problem that has recently spread beyond rural areas and into urban areas as well. TIP Report 2009, *supra* note 5, at 16. Debt bondage occurs when “traffickers or recruiters unlawfully exploit an initial debt the worker assumed as part of the terms of employment.” *Id.*

¹⁵ As one report concluded, “These tales are not limited to an underground economy or a few bad employers. The violations we found permeated every sector of the economy These are the industries and jobs that make our economy run” Annette Bernhardt, Ruth Milkman and Nik Theodore, *Working Without Laws*, THE NATION, Sept. 4, 2009.

¹⁶ That is, trafficking is tied to the market. See Berta Esperanza Hernandez-Truyol & Stephen J. Powell, JUST TRADE: A NEW COVENANT LINKING TRADE AND HUMAN RIGHTS 170 (2009) (describing how the “trade” in human beings “inextricably is linked to trade regimes, bolstered by their demand for cheap labor”). Some estimates have found that incidences of forced labor constitute the majority of all human trafficking cases worldwide. TIP Report 2009, *supra* note 5.

¹⁷ Protocol to Prevent Trafficking, *supra* note 4, at art. 1. Trafficking, in other words, is a human rights violation tied to a market. Of course, identifying the values at play within the market is sometimes difficult. See Judith Ennew, William E. Myers, & Dominique Pierre Plateau, Defining Child Labor as if Human Rights Really Matter, in CHILD LABOR AND HUMAN RIGHTS: MAKING CHILDREN MATTER 27, 27–28 (Burns. H. Weston ed., 2005) [hereinafter Weston] (characterizing child labor violations as a “social construct” and thus susceptible to idiosyncratic definitions and value judgments).

¹⁸ This focus excludes labor forced upon a victim for sexual or military purposes. The International Labor Organization (ILO) describes this focus as “Forced labor for economic exploitation . . . , which comprises all forced labor imposed by private agents and enterprises in sectors other than the sex industry. It includes forced labor in

In this paper, I argue that the laws regulating forced labor are inefficient because they largely ignore market dynamics of human trafficking. As a starting point for addressing this problem, Part II examines a particular element of the market—brands and corporate brand identity. Branding is a tool with potential to alter the market. It is a means of distorting the information that controls market supply and demand. Some corporations therefore use their brand identity to disassociate their products with their human rights violations. Indeed, consumers who chose not to purchase products made in dehumanizing working conditions nevertheless purchase such products because they are unaware of its connection to forced labor.

However, the legal responses to trafficking overlook this influence. Part III identifies the policies relating to human trafficking and to the corporations that exploit trafficking victims. Next, Part IV discusses some anti-trafficking laws in the United States. I describe how they are founded upon a narrow, statist approach to the problem, and largely ignore the importance of branding. This discussion reveals contradictions between the law’s treatment of corporations and its desire to reduce human trafficking. Moreover, laws that create and regulate corporations provide grounds for people working within those companies to rationalize poor labor conditions.

Part V imagines the consequences of the status quo. I argue that the fight against human trafficking will be prolonged and difficult.

In the final Part, Part VI, I propose ways to implement anti-trafficking efforts that harness the power of branding. These new methods stem from the perspective of consumers who must chose among a marketplace of products when some of these products have connections to forced labor.

II) Branding Impacts Human Trafficking

agriculture, industry, and services, as well as in some illegal.” Patrick Belser, *Forced Labour and Human Trafficking: Estimating the Profits*, 3, Declaration/WP/42/2005 (March 2005), [hereinafter *Estimating the Profits*] available at <http://digitalcommons.ilr.cornell.edu/forcedlabor/17> (citations omitted).

The legal efforts to combat human trafficking have ignored a major factor: a company's brand. A brand is a system of product identifiers that corporations disseminate through marketing.¹⁹ This link between a company's brand identity and the company's product is essential to a company's vitality: profits depend on how many products a corporation sells, and a product's brand contributes to a consumer's choice to purchase the product. Thus, laws that influence a corporate brand would reduce trafficking by shrinking the demand element of the market for forced labor.

The law is capable of changing brand identity. This is because brand identity and branding are malleable. As one scholar observed, "The search for the true meaning of brands—or the 'brand essence,' as it is often called—gradually took [advertising] agencies away from individual products and their attributes and toward a psychological/anthropological examination of what brands mean to the culture and to people's lives."²⁰ This malleability occurs on two levels. On one level, a brand identity can disassociate from the actual characteristics of the product. For example, Nike's slogan "Just Do It!" creates a brand identity that communicates little actual information about Nike products. Brands are malleable on a second level as well: consumer response to brands can change. For instance, a consumer could initially have positive associations with Nike running shoes, later learn that manufacturing of those shoes involved sweatshop labor, and ultimately have negative associations with Nike shoes.

This malleability is critical because many corporations survive not by manipulating their tangible product but by manipulating their intangible brand instead. For instance, corporations

¹⁹ In other words, a brand is an intangible ideal that corporations use in order to give consumers an understanding about their product. *See* BLACK'S LAW DICTIONARY 199 (8th ed. 2004) (brand: "[T]he term used colloquially in business and industry to refer to a corporate or product name, a business image, or a mark, regardless of whether it may legally qualify as a trademark."); *cf. id.* at 200 (brand architecture: "The strategic analysis and development of optimal relationships among the multiple levels of a company and its brands . . .").

²⁰ NAOMI KLEIN, *NO LOGO* 7 (2000).

that engage in human trafficking can veil their human rights violations from consumers through a brand. The malleability of a brand works both ways, however, in the sense that anti-trafficking advocacy groups can spotlight corporate improprieties for the consumer through the same tools of marketing that corporations use to develop their brand.²¹ Unfortunately, the policies that have developed in response to human trafficking largely ignore the power of branding.

III) Community policies

Treatises, federal laws, and governing bodies express a common ideal that nations should reduce trafficking.²² In more recent times, both the United Nations and the U.S. Department of State have adopted the “Three Ps” as part of their policy on trafficking: the law should *prevent* trafficking, *punish* traffickers, and *protect* trafficking victims.²³ Some authorities add a fourth P—*partnership*—to the policy.²⁴ These policies advocate for structural changes as well. The U.S. Department of Justice, for instance, has established over forty task forces “to help identify and rescue all kinds of trafficking victims and punish offenders.”²⁵

²¹ See *supra* note 19 (characterizing brand architecture as a corporate strategy).

²² Nations adopt policies to reduce trafficking and encourage others to do the same. For example, in 1815, a handful of major world powers, including Austria, France, Great Britain, Russia, and Spain, signed the 1815 Declaration Relative to the Universal Abolition of the Slave Trades. This declaration described a duty to prevent and punish practices of slavery. David Weissbrodt, *Abolishing Slavery and its Contemporary Forms*, Office of the United Nations High Commissioner for Human Rights HR/PUB/02/4, at 3 (2002) *available at* <http://www.ohchr.org/Documents/Publications/slaveryen.pdf>. Of course, general anti-slavery notions developed even before that. See *generally*, OXFORD READERS: SLAVERY (Stanley Engerman, et al. eds.2001).

²³ See, e.g., Protocol to Prevent Trafficking, *supra* note 4, at Arts. 1, 2, and 4; Background Paper for the General Assembly Thematic Debate on Human Trafficking, 1–2, 3 June 2008, *available at* <http://www.un.org/ga/president/62/letters/Background190308.pdf>; Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, Division A, § 103(8)(9), 114 Stat. 1464 (signed into law on October 29, 2000); codified as amended at 22 U.S.C. 7101(8)(9) (explaining the three Ps) [hereinafter TVPA]. (Please note that all uses of the acronym TVPA refer to the Trafficking Victims Protection Act, and not to the Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. 1350 note (2000)).

²⁴ Press Release, Deputy Secretary-General, Add ‘Partnership’ to ‘Three P’ Agenda of United Nations Anti-Trafficking Protocol, Deputy Secretary-General Urges General Assembly Thematic Debate, U.N. Doc. DSG/SM/397 (June 3, 2008).

²⁵ U.S. Dept. of Justice, *Facts About the Department of Justice’s Anti-Trafficking Efforts* (July 2008), *available at* <http://www.justice.gov/olp/pdf/myths-and-facts.pdf>.

Although corporations are fundamentally linked to trafficking,²⁶ U.S. law is far less quick to condemn corporate enterprises than it is to condemn trafficking enterprises.²⁷ Laws in the United States create corporations²⁸ and empower these business entities to be largely independent.²⁹ Moreover, the legal purpose of corporations is to make profits.³⁰ Broadly speaking, these policies motivate companies to increase profit by reducing costs.

Corporations adopt policies as well. From the standpoint of a corporation hoping to reduce costs, exploiting forced labor is a sound business idea because one way to cut costs is to spend less on workers. Indeed, they argue, one way to accomplish marginal profit increases is to reduce operating costs, even at the expense of human rights. Nevertheless, many corporations adopt policies that their operations should avoid labor abuses.³¹ These policies realize that poor working conditions can decrease productivity, attract legal sanctions, and outrage customers.

IV) Description and Analysis of Past Trends

Government policies against trafficking have led to behavior that overlooks the importance of branding. The United States in particular has responded to human trafficking with a statist legal framework that focuses on creating and enforcing positive law. Corporations,

²⁶ See *infra* Part IV.B (explaining the link between corporations and human trafficking).

²⁷ For a discussion of how these two types of enterprises are similar with respect to marketing, see Julie Pennington, Dwayne Ball, Ron Hampton, and Julia Soulakova, *The Cross-National Market in Human Beings*, 29 JOURNAL OF MACROMARKETING 2, 119–134 (2009).

²⁸ That is, corporations are legal constructions. *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819) (“A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law.”); BLACK’S LAW DICTIONARY 365 (8th ed. 2004) (corporation: “An entity having authority under law to act as a single person . . .”).

²⁹ U.S. corporate law treats the corporate enterprise as a person. See *generally*, *Dartmouth College v. Woodward*, 17 U.S. 518 (1819) (extending the right to contract to corporations); *Citizens United v. Federal Election Commission*, 588 U.S. ___ (2010) (extending first amendment protections from people to corporations as well).

³⁰ See *generally* *Dartmouth College v. Woodward*, 17 U.S. 518 (1819) (noting that a corporations purpose is to maximize profits for the shareholders).

³¹ David Weissbrodt, *Business and Human Rights*, in HUMAN RIGHTS AND CORPORATIONS 103, 119 (David Kinley ed., 2009).

meanwhile, rationalize their connection to human trafficking with free-market economics.

A) Legal Response to Trafficking

Major legal efforts have involved setting up enforcement mechanisms and gathering data. The Trafficking Victims Protection Act (TVPA) serves as an example.³² TVPA’s goals “are to combat trafficking in persons, . . . to ensure just and effective punishment of traffickers, and to protect their victims.”³³ It authorizes four strategies to accomplish this goal: first, it provides new resources to monitor trafficking within and outside the United States; second, it protects victims of human trafficking who are within the U.S. border; third, it increases the means of prosecuting traffickers through the U.S. judicial system; and fourth, it creates mechanisms to prevent trafficking in and out of the United States.³⁴

As part of its enforcement efforts, TVPA gives the executive branch power to sanction “any foreign person” who engages in “severe forms of trafficking.”³⁵ However, much of the legislative effort surrounding TVPA focused on punishing traffickers by revising the criminal code. For example, the mandatory minimum sentence for convictions relating to slavery doubled from ten to twenty years.³⁶ Congress also created four new trafficking-related crimes.³⁷ While

³² Trafficking Victims Protection Act (TVPA) of 2000, Pub. L. No. 106-386, Division A, § 103(8)(9), 114 Stat. 1464 (signed into law on Oct. 29, 2000); codified as amended at 22 U.S.C. 7101(8)(9). TVPA was the first comprehensive piece of legislation that addresses trafficking; Congress has since amended and revised the Act. *See* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (signed into law on Dec. 19, 2003); Heather J. Clawson, Nicole Dutch, Susan Lopez, and Suzanna Tiapula, *Prosecuting Human Trafficking Cases: Lessons Learned and Promising Practices*, research report for the U.S. Dept. of Justice (June 30, 2008) (on file with the author) [hereinafter *Prosecuting Trafficking Cases*], available at <http://www.ncjrs.gov/pdffiles1/nij/grants/223972.pdf>. *See* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (signed into law on Dec. 19, 2003).

³³ 22 U.S.C. § 7101(a).

³⁴ *See Prosecuting Trafficking Cases*, *supra* note 32, at 4.

³⁵ 22 U.S.C. § 7108; *see supra* note 5 (providing the definition of “severe forms of trafficking”).

³⁶ Congress raised the original ten-year mandatory minimum to a twenty-year minimum. *Prosecuting Trafficking Cases*, *supra* note 32, at 3 (citing TVPA of 2000 and 18 USC. §§ 1581(a), 1583-1584 (2006)).

³⁷ *See* 18 U.S.C. §§ 1589-92.

one of these new crimes related to sex trafficking, the other three related to trafficking for the sake of exploiting human labor.³⁸

Beyond enforcement and information gathering, TVPA increased the resources that the federal government can devote to working with other states and the international media on monitoring and sharing information about human trafficking.³⁹ The Act authorized the U.S. Department of State to compile and assess the international data that it gathers, submit a summary to Congress, and publish the Trafficking in Persons Report (“TIP Report”) every year.⁴⁰

In order to gather information for the TIP Report, TVPA requires any nation that receives aid or security protection from the federal government to file an annual report that measures their efforts to combat trafficking. As a guide for behavior, the Act provides minimum standards that each nation must meet in order to stay in good standing.⁴¹ The Act also provides for mandatory monitoring of a designated “Special Watch List”—a list of nations deemed the most egregious offenders of human trafficking abuses.⁴²

Ultimately, TVPA emphasizes the relationship between states, rather than the relationship between states and corporations. This reflects a statist approach to trafficking. States develop regulations, then control and enforce them.

This approach to trafficking depends on a positivist legal framework—a theoretical basis

³⁸ *Id.* at § 1591 (Sex trafficking of children or by force, fraud, or coercion).

³⁹ *Id.* at § 7104(b); *see Id.* at § 7104(d) (describing allocations for creating awareness through international media).

⁴⁰ TIP Report 2009, *supra* note 4. While this report is annual, the State Department provides reports to Congress twice a year. *See* Trafficking in Persons Interim Assessment, February 24, 2010, *available at* <http://www.state.gov/g/tip/rls/reports/2010/137250.htm> (explaining the development of TIP from TVPA, and the bi-annual reporting requirements).

⁴¹ *Id.* at § 7106.

⁴² *Id.*

for making law in which obedience to the lawmaker is central to social order.⁴³ To illustrate, TVPA created standards of good behavior for nations to follow. Furthermore, legal positivism often emphasizes the sovereign's ability to punish violators of the law as a tool for social order.⁴⁴ TVPA, for example, empowered the executive branch and created new legal sanctions for traffickers.⁴⁵

B) Corporate Response to Trafficking

Some companies recognize that human rights violations are bad for business and take active steps to safeguard against human trafficking involvement.⁴⁶ Yum! Brands is one such company. However, it did not take these steps alone. The National Economic and Social Rights Initiative (NESRI) helped Yum! Brands avoid working with suppliers that used forced labor.⁴⁷

NESRI sought to “build a broad movement for economic and social rights, including health, housing, education and work with dignity” through its own advocacy efforts, and through

⁴³ The Lawmaker is the central figure under this framework because, basically, the Lawmaker has the ultimate authority over what others admit is legal. In other words, the centralized power of a lawmaker creates a legal order. Early legal positivists like Jeremy Bentham emphasized obedience as the source of legal order. As Bentham summarized, “Under a government of laws . . . obey punctually and . . . censure freely.” JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT (J.H. Burns and H.L.A. Hart eds., 1977) (1776).

⁴⁴ JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Wilfrid E. Rumble ed., 1995) (proposing a command theory of the law). Frederick Schauer, *Positivism Before Hart*, Public Law and Legal Theory Research Paper Series No. 2010-01, available at <http://ssrn.com/abstract=1512646> (“It is scarcely an exaggeration to observe that most of today’s analytic jurisprudence starts with Hart, treats his arguments against Austin as conclusive” and defending Austin’s legacy) (footnotes omitted); see also Grant Lamond, *The Coerciveness of Law*, 20 OXFORD JOURNAL OF LEGAL STUDIES 39-62 (2000) (rejuvenating Austin’s foundation that the threat of sanctions are the backbone of any legal order).

⁴⁵ See *supra* notes 35-38 and accompanying text.

⁴⁶ Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 640 (2004) (“[M]any consumers have come to view themselves as purchasing . . . not only products, but also shares of responsibility in the moral and ecological economy that produces them.”). Corporations are aware that customers will chose products based on the company’s compliance with labor laws. David Weissbrodt, *Business and Human Rights*, in HUMAN RIGHTS AND CORPORATIONS, *supra* note 31, at 120.

⁴⁷ NESRI is a nonprofit 501(c)3 organization based in New York; Yum! Brands Inc. is a global corporation based in Kentucky that owns and operates Taco Bell, KFC, and other fast-food restaurants worldwide.

partnerships with other agencies.⁴⁸ It worked with the Alliance for Fair Food (AFF), a coalition of domestic and international groups that are concerned with reducing human rights violations in the agricultural sector.⁴⁹ NESRI, AFF, and others formed the Fair Food Campaign.⁵⁰

NESRI approached corporations like Yum!Brands and McDonalds that depend on the products produced and distributed by other companies in sectors with a high risk of modern-day slavery. They asked corporations purchasing agricultural products to do two things: first, to pay an extra penny per pound for produce that would go directly to the farm workers; and, second, to authorize and participate in a rights-based monitoring system of the company's suppliers. During negotiations, NESRI encouraged corporations to adopt practices that would prevent and monitor abuses within the corporate supply chain. Further, it promised to help monitor the corporation's supply chain if the corporation agreed to stop purchasing from any supplier that engages in modern-day slavery.

Yum! Brands agreed to the proposal. Notably, the corporation immediately released a self-congratulatory statement to the press: The release stated:

As an industry leader, we are pleased to lend our support to and work with the CIW to improve working and pay conditions for farm workers in the Florida tomato fields. . . . We recognize that Florida tomato workers do not enjoy the same rights and conditions as employees in other industries, and there is a need for reform. We have indicated that any solution must be industry-wide, as our company simply does not have the clout alone to

⁴⁸ National Economic and Social Rights Initiative, *About Us*, http://www.nesri.org/about_us/index.html. NESRI combines its social advocacy impact litigation in U.S. courts.

⁴⁹ AFF has focused on agricultural workers in Florida. The organization also engages directly with the large-scale purchasers of agricultural products and in political lobbying. The Governor of Florida, for example, has committed to partnering with NESRI to reduce labor abuses. Letter from Governor Charlie Crist to the Coalition of Immokalee Workers, *available at* <http://www.nesri.org/CristLetterToCIW-03.26.09.pdf>.

⁵⁰ The co-leader of this coalition was a group of agricultural workers based in Florida, the Coalition of Immokalee Workers (CIW). National Economic and Social Rights Initiative, Human Right to Work with Dignity Project, http://www.nesri.org/special_projects/index.html (The CIW is a community-based worker organization in Immokalee, Florida representing farm workers facing oppressive working conditions who earn sub-poverty wages that have barely risen in over 25 years."); *see also* ALLIANCE FOR FAIR FOOD (Oct. 1, 2010), <http://www.allianceforfairfood.org/>.

solve the issues raised by the CIW, but we are willing to play a leadership role within our industry to be part of the solution⁵¹

At first, NESRI was skeptical about whether the fast-food giant would follow its agreement.⁵²

However, the process has worked when Taco Bell, one of Yum! Brands' franchises, terminated a contract with a tomato farmer in Florida upon NESRI's request.⁵³

While corporations like Yum! Brands actively avoid trafficking, other companies passively accept the risk that their enterprise contributes to the plight of trafficking victims. Corporations justify their passivity on the grounds of free market capitalism and the complicated supply chain of modern industry.

A corporation with true fidelity to free market capitalism is primarily concerned with profit maximization. Milton Freedman, one of the modern leaders of free market capitalism, explained that "there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits"⁵⁴ This view is especially common in the United States, but derives from the principles in which nearly all of world's businesses operate. One commentator describes this economic structure:

The current techniques used by capitalism . . . are based on the premise that basic human needs—such as dignity, a living wage, job security, health care, the ability to participate in workplace governance, and equality—are not as important as competitiveness, efficiency, and profit maximization. The forces of capital have ingrained this idea in U.S.

⁵¹ Statement of Emil Brolick, President of Taco Bell, reprinted in National Economic and Social Rights Initiative, *Corporate Accountability Issue Brief, Modern Day Slavery in U.S. Agriculture: Legal Failure and Corporate Complicity*, available at http://www.nesri.org/fact_sheets_pubs/Modern%20Day%20Slavery%20in%20U.S.%20Agriculture.pdf.

⁵² Katherine L. Caldwell, Research Fellow at the National Economic & Social Rights Initiative, *Trafficking and Exploitation in U.S. Labor Markets*, Remarks at the 15th Annual Rebellious Lawyering Conference at Yale Law School (Feb. 20, 2009).

⁵³ *Id.*; National Economic & Social Rights Initiative, *The Role of Human Rights Protections in Sustainable Food Systems 2*, Aug. 2008, available at http://www.nesri.org/fact_sheets_pubs/Sustainable_Food.pdf.

⁵⁴ David Weissbrodt, *Business and Human Rights*, 74 UNIV. CINCINNATI L. REV. 55, 71 (2005), reprinted in HUMAN RIGHTS AND CORPORATIONS 119 (David Kinley ed., 2009).

society, and now we are exporting it to the rest of the world.⁵⁵

Thus, the capitalist world order provides a justification for companies to react to human rights violations only to the extent that the abuses change profits.⁵⁶ Indeed, corporations want to achieve marginal profit increases; one way to accomplish that goal is to reduce operating costs, even at the expense of human rights.⁵⁷

The commodification of labor is a related trend. When profit maximization is the ultimate priority of a corporation, the condition of workers is often an afterthought. Indeed, workers themselves become a commodity.⁵⁸ This commodification of labor itself hides the human impact of work-related abuses.⁵⁹ Corporations can ignore human capacity and make decisions only in terms of labor capacity, protecting human rights only to the extent required by labor and

⁵⁵ Maria L. Ontiveros, *A Vision of Global Capitalism that puts Women and People of Color at the Center*, 3 J. SMALL & EMERGING BUS. L. 27, 32–33 (1999).

⁵⁶ See Annette Bernhardt, Ruth Milkman & Nik Theodore, *Working Without Laws*, THE NATION, Sept. 4, 2009 (“[T]he gospel of lean and mean has reordered the world of work, setting off a race to the bottom [line] in which employers circumvent and evade standards that once seemed inviolate.”).

⁵⁷ Ontiveros, *supra* note 55, at 32 (observing that the “free market school of economics” has “‘taught’ America the virtues of profit-making and free enterprise,” and that this lesson has caused “the complete separation of ethics from economics”).

⁵⁸ Sociologist W.E.B. DuBois famously observed both the roots and implications of this commodification:

[I]n back of the industrial revolution, out of the experiences of which classical economics arose, lay African slavery; and that it was through the purchase of slaves in open market, where there was no floor to the price of labor, that the conception of labor as a commodity, and not as the effort of human beings, arose and became an axiom in modern industry.

W.E.B. DuBois, *Human Rights for All Minorities*, speech to the East and West Association in 1945, in THE SOCIAL THEORY OF W.E.B. DUBOIS 135, 136 (Phil Zuckerman ed., 2004).

⁵⁹ The law is complicit in this trend of worker commodification. For example, immigration policy in the United States also treats workers as a temporary dispensable commodity, providing thousands of temporary work visas efficiently but sluggishly responding to humanitarian needs. See Peter Andreas, *The Escalation of U.S. Immigration Control in the Post-NAFTA Era* POLITICAL SCIENCE QUARTERLY 113 (1999) (arguing that U.S. immigration policy encourages immigration for the sake of improving the economy while it also maintaining an incompatible anti-immigrant border control); Mark R. VonSternberg & Eric A. Jones, *Immigration and Nationality Law*, 42 INT'L LAW. 679, 684 (Summer 2008) (discussing the seven-year delay to implementing U-visas).

employment law.⁶⁰

In addition, a complex supply chain—the commercial relationships of distributors, subcontractors, intermediaries, subsidiaries, and similar financial stakeholders involved in a corporation’s product—creates many opportunities for nearly anyone within a market structure to defer responsibility.⁶¹ In other words, large corporations shift responsibility to other businesses along the supply chain, even when they are fully aware that human right abuses are taking place somewhere along that chain. One garment industry leader epitomized this sentiment when he explained, “Manufacturers have no control over any violations by the contractors. . . . There may be some rogue contractors out there who violate the law, and they should be flogged. . . . But the manufacturers can't be held responsible.”⁶² A corporation involved in human trafficking can thereby rationalize its behavior by thinking that it is innocent and the problem should fall on another corporation’s shoulders.

Finally, multi-national corporations are particularly difficult to regulate. To begin with, they often create their own form of sovereignty and fight to relinquish power.⁶³ “Corporate

⁶⁰ Cf. Martha C. Nussbaum, *Capabilities, Human Rights, and the Universal Declaration*, in *HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION* 27, 33–34 (Richard Pierre Claude & Burns H. Weston eds., 2006) (discussing capabilities as a human right).

⁶¹ The U.S. Supreme Court recognized this dynamic early on. In an 1864 decision, the Court advocated that companies ensure that their own operations avoid the improprieties that occur in supply chains:

It does not seem unreasonable, since it is the paramount interest of humanity that the traffic in men be, at all events, arrested, to require of the trader, who engages in a commerce, which, although not unlawful, is necessarily suspicious from its theatre and circumstances, that he keep his operations so clear and so distinct in their character, as to repel the imputation of prohibited purpose.

The Slavers (Kate), 69 U.S. 350 (1864) (part of a companion decision); *see also* The Slavers (Sarah) 69 U.S. 366 (1864); The Slavers (Weathergage) 69 U.S. 375 (1864); The Slavers (Reindeer) 69 U.S. 383 (1864)

⁶² Dennis Hayashi, *Preventing Human Rights Abuses in the U.S. Garment Industry: A Proposed Amendment to the Fair Labor Standards Act*, 17 *YALE J. INT'L L.* 195, 202 (1992) (omissions in the original).

⁶³ McDonald’s corporate sovereignty, for example, overpowered NESRI’s overtures regarding regulation. Negotiations led to no agreement. McDonald’s continued to monitor its supply chain by working with farm owners rather than with the farmers themselves. NESRI issued a statement decrying the fast-food giant’s decision, “McDonald’s has chosen to address human rights abuses against farm workers picking produce for its supply chain

sovereignty” becomes a barrier to reducing labor violations.⁶⁴ As one study analogized:

Just as states seek to control the territory and populations of their claimed jurisdictions, so business enterprises, in pursuit of market shares and profits, seek sovereignty over the means of production that principally define their more or less private jurisdictions (including of course their labor force).⁶⁵

In this respect, cooperation between a nation and a corporation is susceptible to the difficulties that inhibit cooperation between different nations. Compounding these difficulties is the fact that some corporations have capital that states hope to obtain; thus, states often and encourage the detachment of corporations from most legal regulations as a means to attract industry and encourage free enterprise.⁶⁶

Moreover, multi-national corporations often avoid regulation because corporate law protects them from liability.⁶⁷ According to a general rule of U.S. corporate law, corporations

through entering into a partnership that excludes farm workers from oversight and monitoring of human rights conditions.” Moreover, “[W]hile constructive engagement with growers is an essential component to addressing human rights abuses in the agricultural sector, its current approach is a poor substitute for working with farm workers themselves.” Finally, NESRI characterized McDonald’s lack of compliance with human rights monitoring as a contradiction to the corporation’s own policy: “This is directly in contravention to McDonald’s global code of conduct that not only requires that wages be paid according to law but also that supplier employees working on product supplied to McDonald’s must be fairly compensated.” NESRI statement on McDonald’s SAFE Code of Conduct, issued Nov. 23, 2005 (internal quotations omitted) *available at* <http://www.nesri.org/programs/mcdonalds%20statement%20nov%202005.htm> (last visited Oct. 1, 2010).

⁶⁴ More specifically, corporate sovereignty can reduce the power of *external* regulations. Regulations from within—from management or from labor—remain a possibility. See Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 510–12 (2007) (describing how laborers within a transnational corporation can influence the corporation’s decisions analogously to how citizens within a state can shape the decisions of a federal government).

⁶⁵ Burns H. Weston & Mark B. Teerink, *Rethinking Child Labor: A Multidimensional Human Rights Problem*, in Weston at 13.

⁶⁶ See Berta Esperanza Hernandez-Truyol & Stephen J. Powell, JUST TRADE: A NEW COVENANT LINKING TRADE AND HUMAN RIGHTS 5–6 (2009) (summarizing costs and criticisms of attracting foreign investment).

⁶⁷ This is not to say, however, that no tools within the legal system have potential to hold a corporation liable. For an example of one way to change the liability structure, see Shirley Lung, *Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers*, 34 LOY. U. CHI. L.J. 291, 21-19 (2003) (advocating for joint employer doctrine as a way to bundle different actors within the supply chain).

have similar rights as people.⁶⁸ Moreover, the legal structure of a corporation shields the people in charge of corporations from personal liability.⁶⁹ International law is not much different. As the International Bar Association describes:

States themselves may have a duty to ensure that their domestic law . . . affords adequate remedy against serious human rights violations . . . , this . . . would appear to be equally applicable to the activities of business corporations. However, this is not . . . the same as saying that these corporations are *themselves* incurring international legal responsibility for any wrongful acts.⁷⁰

Ultimately, the law has taken a limited role in holding corporations liable.⁷¹

Forced labor often raises legal complications regarding jurisdiction, standing, and agency law.⁷² Many of these problems erupted in *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003). Activist Marc Kasky sued Nike, a global company, in California state court using the state's progressive Unfair Competition Law.⁷³ Kasky argued that Nike's marketing material—the information it used to develop its brand—was misleading consumers about the company's connection to sweatshops. The lower courts held that the First Amendment protected Nike's material. The California Supreme Court, however, held that Nike's speech could be regulated as commercial speech under a threshold that provides more protections of consumers against

⁶⁸ For example, corporations enjoy First Amendment protections. *See generally*, *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010) (extending first amendment protections for corporations, including multinational corporations, despite legislative limitations); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) (“The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”)

⁶⁹ *See, e.g.*, *Walkovszky v. Carlton*, 223 N.E.2d 6 (NY 1966) (explaining that corporate enterprises protect the proprietors from liability).

⁷⁰ *Id.*

⁷¹ *Id.* (commenting that international law relating to business corporations “is still very much in its infancy”).

⁷² *See* UNITED NATIONS, HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A MANUAL ON HUMAN RIGHTS FOR JUDGES, PROSECUTORS AND LAWYERS 19 (2003) (describing how states have difficulty holding a particular multi-national corporation liable for a harm involving many enterprises).

⁷³ *Nike, Inc. v. Kasky*, 539 U.S. 654, 656 (2003).

misrepresentations.⁷⁴ Nike appealed to the U.S. Supreme Court with the issue of whether a corporation is liable for misleading statements about corporate responsibility when those statements influence consumer choice.⁷⁵ The Court refused to answer the case's central question, but dismissed the case on jurisdictional grounds instead.⁷⁶ Facing the possibility of additional litigation in the lower courts, Nike negotiated a settlement with Kasky and agreed to pay \$1.5 million to the Fair Labor Association.⁷⁷

Nike thus avoided a legal defeat from the Supreme Court because of standing and other procedural issues. Moreover, the Court effectively dodged writing an opinion that would harm corporate interests. Nike also avoided penalty from a state court by shielding itself with First Amendment rights, rights derived from its corporate structure. Without any final sanction from a court, the company prevented further litigation on the matter by settling with Kasky.

V) Projection of Future Trends

If the legal response to human trafficking continues to underestimate the influence that the private sector and branding have over forced labor, then the law will remain an inefficient tool to fight human trafficking. The statist legal approaches like TVPA are not only ineffective, but also internally flawed. For example, the United States emphasizes coordination among states in order to improve the data on human trafficking.⁷⁸ However, the emphasis on sanctions is inherently inconsistent with the coordination efforts: Nations have an incentive to share

⁷⁴ Kasky v. Nike, Inc., 45 P.3d 243, 260–61 (Cal. 2002).

⁷⁵ More specifically, the Court granted certiorari to decide “whether a corporation participating in a public debate may be subjected to liability for factual inaccuracies on the theory that its statements are commercial speech because they might affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decisions.” *Nike*, 539 U.S. at 657 (internal quotations omitted).

⁷⁶ The Court held, in part, that cert was improper because the case lacked standing. *Id.* at 657–58.

⁷⁷ Press Release, Fair Lab. Ass'n, Fair Labor Association Receives \$1.5 Million Settlement of Kasky v. Nike First Amendment Case (Sept. 12, 2003), available at http://dev.fairlabor.org/docs/Nike_Kasky.doc.

⁷⁸ See Part IV.B (discussing TVPA's efforts to improve data on human trafficking and punish traffickers).

information, but they will avoid sharing information that might attract sanctions or harm their reputation among the international community.⁷⁹

Moreover, the law's control over corporations that contribute to labor abuses and human trafficking will continue to dwindle as corporations gain power. Multinational corporations continue to grow, evading significant oversight from laws.⁸⁰ This growth can fortify their corporate sovereignty.⁸¹

The influence of branding, meanwhile, shows no signs of abatement. Corporations involved in trafficking will remain unmoved by the legal efforts to punish those responsible for trafficking. The law can disprove these projections. To do so, it must buttress its statist framework with an appreciation that corporate branding affects the demand for human trafficking.

VI) Invention and Evaluation of Alternatives

The law should assist people in connecting a brand and a human rights violation.

Corporations can avoid the power of law, but they cannot avoid the power of their brand.⁸² The

⁷⁹ The Trafficking in Persons Report (TIP Report) illustrates this dilemma with two of its goals. First, the Report sanctions countries that do not obey minimum legal requirements for human-trafficking deterrence. The U.S. Department of State involves a ranking system, in which some nations' anti-trafficking efforts are deemed better than those of other nations. Second, the TIP Report encourages cooperation in gathering and disseminating information about trafficking.

From the standpoint of a sovereign within the international community, the flow of information is good unless it harms one's standing. A nation that is on the verge of being blacklisted by the United States has an incentive to stifle bad news about its trafficking efforts. At the same time, the United States is trying to gather accurate data about trafficking abuses within that territory. Nations will want to share information, but only to the extent that the information reduces human trafficking and does not reduce their standing. In short, the statist legal effort becomes inefficient and counterproductive when it emphasizes the lawmaker's ability to punish states that do not meet its standards at the same time it tries to coordinate information-sharing among states.

⁸⁰ *See supra* text accompanying notes 67–71 (discussing how corporations evade legal sanctions on jurisdictional grounds).

⁸¹ *See supra* text accompanying notes 63–65 (explaining how multinational corporations can become so large that their corporate sovereignty overpowers the sovereignty of some nations).

⁸² If the law tries to regulate a corporation with a financial sanction, for example, then the company can minimize the sanction's impact by distributing liability across borders and jurisdictions, by insulating or shifting liability to a supplier, and through continued profitability. *See supra* Part III (discussing how companies rationalize labor abuse). By contrast, if the sanction harmed the corporation's brand, then the company would need to recapture

brand of a corporation is integral to a corporation's ability to sell its products and make a profit;⁸³ however, this same goal of making a profit is also used to rationalize modern-day slavery.⁸⁴ If consumers connected a labor abuse not only to the victim but also to the perpetrator and the perpetrator's brand, then that consumer will likely change his or her understanding of what that brand represents. That is, a previously enjoyable product will remind the consumer of a human rights violation. Thus, the law could reduce human trafficking by changing a corporation's brand identity. This section describes some ways to reach this goal.

A) Surround the Market: Increase Consumer Information before the Sale

The law can influence corporate behavior through mechanisms other than the rule–punishment dichotomy that previous legal frameworks have created.⁸⁵ It should deemphasize the statist approach and focus on the private sector instead. For example, the annual TIP Report could praise particular corporations that take measurable strides against human trafficking.⁸⁶ This would be a departure from the 2009 Report, in which the U.S. commended specific initiatives but attributed them to nations or individuals rather than to any particular corporation acting within that nation's markets.⁸⁷ The highlighted corporations would appreciate the praise and benefits to their brand, the overlooked corporations would change their behavior to attract praise in the

the business of consumers who stopped purchasing its products. Recovering from this type of sustained sanction is likely more difficult than recovering from a temporary financial loss.

⁸³ See *supra* Part II (discussing how corporations depend on brand identity).

⁸⁴ See *supra* note 16 and accompanying text (connecting a corporation's desire to make profit to the consequence of forced labor).

⁸⁵ See *supra* note 35–38 and accompanying text (discussing the top-down approach that TVPA embraces by extending executive privileges and criminal sanctions).

⁸⁶ Of course, a public–private conflict of interest might emerge when a government overtly praises a corporation. The conflict could emerge between the public interests that governments serve and the private interests that corporations serve. However, corporate–government relationships are not uncommon, and a clear rubric for measuring impact on human trafficking would minimize the risk of improprieties.

⁸⁷ TIP Report 2009, *supra* note 40 (reserving the “Commendable Initiatives Around the World” section to list particular nations).

future, and consumers would learn more about the connection between a corporation's products and human trafficking.⁸⁸

Also, governments and international legal bodies should develop a "brand infrastructure" for human trafficking. Constitutional law scholar Steven Calabresi has endorsed similar tools. While discussing how the law can change behavior that society disfavors (such as intoxication), Calabresi noted, "The government has another important tool, in addition to the law, that it ought to use more often: advertising."⁸⁹ This strategy essentially usurps the tools that corporations use to develop their brands and uses them to unveil, rather than cover up, human rights violations.⁹⁰ In other words, fight fire with fire. The anti-tobacco "Truth Campaign" in the United States exemplifies how the logistics of an anti-trafficking brand development could work.⁹¹ The advertising campaign changed people's attitudes about smoking and made them associate smoking with health problems.⁹² Analogously, a large-scale advertising campaign could change people's attitudes about a product or sector of the economy and its relation to human trafficking.

B) Enhance the Market: Increase Consumer Information at the Point of Sale

Some consumers wait until the point of sale to make purchasing decisions—they wait until they are "inside the market." Thus, if a product's connection to human trafficking was

⁸⁸ See Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 641 (2004) ("[I]nformation regarding processes increasingly is finding its way downstream [and] consumers are responding accordingly.").

⁸⁹ Steven G. Calabresi, *Slouching Towards Gomorrah: Modern Liberalism and American Decline*, 31 HARV. J.L. & PUB. POL'Y 495, 503 (2008).

⁹⁰ See *supra* Part I (discussing these tools).

⁹¹ This process took many steps. First, Congress passed laws that created a cause of action for a class-action lawsuit against tobacco companies. Then, litigation uncovered corporations' liability and imposed fines. Finally, the court arranged for those fines to support anti-smoking advertising campaigns. Currently, no laws have comparable power to fight human trafficking.

⁹² Matthew C. Farrelly et al., *Getting to the Truth: Evaluating National Tobacco Countermarketing Campaigns*, 92 AM. J. PUB. HEALTH 901 (2002) available at <http://ajph.aphapublications.org/cgi/content/full/92/6/901> (describing a market research study that demonstrated how the "truth campaign" increased anti-smoking attitudes in 12 to 24 year olds).

apparent at the point of sale, then the consumer will likely purchase products associated with humane labor practices. If consumers chose not to purchase a corporation's product, that corporation will eventually fail.

Labeling is one way that the law can change how consumers approach a product. Labels should notify individual consumers about a product's connection to trafficking.⁹³ This connection would be based on a standard rubric developed by a regulatory body in cooperation with public and private stakeholders.⁹⁴

Labeling works on more than one level. The same regulatory body that certifies a certain product could also certify a retailer, or a chain of retailers, or a corporation. In other words, the concept of labeling is scalable.

A simple label might not provide enough information when the "point of sale" is not between a casual customer and a company's product, but between two businesses contracting for services. In situations like these—say, when a grocery store is shopping for a produce supplier—communications within the private sector could brand a company's services. The next section describes how.

C) Synchronize the Stakeholders

The law should require stakeholders along the supply chain of human trafficking should share information through disclosure. States recognize the importance of good data, yet they

⁹³ Some corporations have already adopted a system of labeling their products with information about the social risks and safeguards involved during the product's creation and distribution. *See generally* Holly Cullen, *Child Labor Standards: From Treaties to Labels*, in Weston, *supra* note 17, at 107–109 (Burns. H. Weston ed., 2005) (discussing "social labeling" efforts and the RUGMARK label that many corporations use to distinguish hand-knotted carpets as child labor-free).

⁹⁴ By "stakeholders" I mean the people and organizations that are involved with trafficking, including the victims, perpetrators, corporations, governments, and advocacy groups.

respond with a flawed approach that focuses primarily on state-to-state communications.⁹⁵ The law should require corporations, governments, and other stakeholders to make key information available to advocacy groups with a legitimate interest in gathering data on human trafficking. Rather than consolidating information into the hands of a few, disclosure would empower any and all stakeholders to examine data. Openness also instills internal checks and balances along the entire supply chain. Moreover, disclosure is a safeguard against companies using branding to skew their relationship to trafficking.⁹⁶

Finally, the law could incentivize ethics codes. Corporations should work with community-based organizations and governments to negotiate ethics codes.⁹⁷ Currently, many corporations often develop ethics codes not to legalistically control company behavior, but to “function primarily as a public relations gesture” instead.⁹⁸ If a corporation works independently to develop its ethics code, the code will likely include negligible enforcement or regulatory mechanisms and will avoid increasing any forms of legal liability for the corporation. On the other hand, if outside organizations work with the corporation, then the corporation is more likely to implement the code if the other organization monitors its behavior and can publicize deviations from that code. Indeed, in this second scenario the corporation faces the threat of the outside organization tarnishing its brand by dispersing information about the company’s unethical behavior. This threat, however, also gives the corporation’s brand an air of legitimacy

⁹⁵ States have tried to improve the data on trafficking by collecting and consolidating the data. However, this approach has shortcomings because conflicting interests among states gives some states incentive to hide or mischaracterize data on human trafficking. *See supra* note 79 (describing these conflicts).

⁹⁶ *See supra* notes 73–77 and accompanying text (discussing Kasky’s legal allegations that Nike misled consumers through their commercial speech).

⁹⁷ *Cf. supra* notes 47–53 (discussing how NESRI forged an agreement with Yum! Brands that successfully eliminated suppliers that used forced labor).

⁹⁸ Laura Ho, Catherine Powell, and Leti Volpp, *(Dis)Assembling rights of Women Workers Along the Global Assembly Line: Human Rights and the Garment Industry*, 31 HARV. C.R.-C.L. L. REV. 383, 402 (1996).

in the eyes of the consumer. While the code of ethics functions as a “public relations gesture,” it also can function as an agreement to be monitored.⁹⁹

VII) Conclusion

Human trafficking and forced labor are complex problems with many stakeholders working to end these human rights violations. This paper showed how some of the legal responses to the problem were incomplete.

I began by describing how human trafficking involves a market, and that forced labor fulfills the insidious demands of that market. However, these demands can ebb and flow based on consumer interest and the viability of corporations that profit from products made with forced labor. Some lawmakers, including those in the United States, respond to this market through cooperative efforts between states—a response that has negligible influence on the markets in which multinational corporations reign and victims of trafficking suffer. One way to maximize influence over these markets is to harness the power of branding, a tool that can change demand for forced labor anywhere along the supply chain of modern industry.

⁹⁹ *See id.*