

John Caher:

Welcome to Amici, News and Insight from the New York Judiciary and Unified Court System. On June 17th 2015, the Historical Society of the New York Courts sponsored an extraordinary program on Human Trafficking, a tragedy that some have compared to modern day slavery.

The program which was held at the New York City Bar Association including the presentation by Anne Milgram, Vice President of Criminal Justice at the Laura and John Arnold Foundation and a senior fellow at the Center on the Administration of Criminal Law at New York University.

Ms. Milgram, a former New Jersey attorney general and former federal prosecutor in the Justice Department Civil Rights Division, was previously the lead federal prosecutor in the country for human trafficking crimes. She began her prosecution career as an assistant district attorney in Manhattan. Anne graduated summa cum laude from Rutgers, holds a masters of philosophy degree from the University of Cambridge in England and a law degree from New York University School of Law.

Today's Amici consists of the audio portion of Ms. Milgram's presentation on June 17th. We hope you enjoy the program.

Anne Milgram:

Good evening. It's a great pleasure to be here with you today. I have to tell you that I got a little bit worried when I first got the call to come give the history of human trafficking because I teach a course at NYU Law School, which is a seminar on human trafficking, and I spend probably about eight or ten hours on the historical background of human trafficking. I promise I will not spend eight or ten hours tonight. I will try to do it in about eight or ten minutes. That means it's a little bit of speed dating on human trafficking or, as Judge Lippman said it better, it's human trafficking in a nutshell.

When I teach my class, I start at a point that I think surprises a lot of people. I start with historical antebellum slavery in the United States. I don't think the conversation about modern day slavery can take place without going back and understanding at least a little bit about what slavery was in the United States and how the prohibition of slavery forms the basis for what are today our human trafficking laws.

Again, and I apologize for doing this pretty quickly, but I'm going to take you on about a 30 second review of your civics classes from elementary and junior high school. Of course, we have slavery that starts in the

United States in the 1500's and slavery is ultimately prohibited by the 13th Amendment to the U.S. Constitution in 1865. That amendment prohibits both slavery and involuntary servitude. People often forget the involuntary servitude part of that, which turns out to be critical in thinking about how we've been combating human trafficking and modern day slavery for many years.

We have this amendment that becomes part of the United States Constitution in 1865—slavery is prohibited. The question is, does slavery end completely at that moment and does involuntary servitude end completely at that moment? The answer is of course no. It changes almost overnight it changes from slavery where it was lawful to own people as chattel. It changes into something known as peonage or debt bondage where people were forced to work to pay off debts. You can understand if you think about it just for a moment that we went from a situation in which there was a lot of free, very inexpensive labor to a situation where many businesses, railroads, plantations didn't have free or available labor.

It transformed into peonage and debt bondage which was often coerced.

Often times, people manufactured debts in order to keep people working and if you start to think about debt bondage, you can see a clear parallel to some of the forced labor cases that we have in our country and around the world today where people are forced to work to pay off debts that they owe. In 1865, you've got the 13th Amendment that ends slavery and involuntary servitude then you've got what starts as peonage and debt bondage that goes all the way into the 1930's and the 1940's.

We're going pretty quickly so we're not going to talk about the efforts to prosecute those cases, but they were tough and there was not a lot of satisfaction that came out of the prosecution of peonage cases. There are about 35 cases that are brought. Only two are successfully brought, and there are a lot of reasons why but the bottom line is that the law wasn't able to get to the point of really attacking this situation as it existed.

In 1948, Congress passed the Involuntary Servitude Act. That's the first criminal prohibition of involuntary servitude and that's critically important because the 13th Amendment to the Constitution, as I'm sure all of you lawyers know, is self-executing—meaning you don't need a separate criminal statute in order to prohibit slavery. But there isn't a statute until 1948 that specifically criminalizes involuntary servitude.

The challenge there of course is that involuntary servitude wasn't defined. It wasn't defined in the 13th Amendment to the Constitution. It wasn't defined in the 1948 law.

So, everyone is left wondering what does it mean to commit involuntary servitude and as is so often the case that our country, the circuits split and there are two different competing definitions. One, is that involuntary servitude looks exactly like historical slavery. What those courts started to look for are the indicia of chattel slavery: chains, whips, bonds, people not being able to leave homes and things like that. Then there are other courts, the other circuits that take the position that coercion can be broader than physical violence or things like that, that you don't need chains and whips and bonds in order to find that somebody's been compelled to provide services or labor against their will.

Of course, there are cases that are brought under the statute. There are a number of prosecutions brought between 1948 and essentially 1988, many of which are successful. People in this room will remember the Deaf Mexican's case. That was in the late 90's actually where about 62 Mexican nationals, women, children and men were brought to the U.S. and were compelled to sell trinkets on subways and in airports. There were not a lot of cases being brought and the number of cases prosecuted under the involuntary servitude statute was small.

There were no state laws prohibiting human trafficking at that time. It wasn't something that was really thought about the way we think about trafficking today.

There are two things that happened that really caused us to have the conversation that we are having tonight and one of the important things I want everyone to be able to take away with you is to understand why we have a conversation in this room tonight about human trafficking as one of the great social ills of our country that we would never have had 15 or 20 years ago. We just we wouldn't have had it, and we couldn't have had it.

In 1988, there's a case that goes before the United States Supreme Court called *United States v. Kozminski*. Kozminski is a very tragic case in which there was a man named Ike Kozminski. He and his wife and his son ran a farm, and on that farm they had a number of workers, including two men who were severely developmentally disabled. These two men labored on that farm for years. They worked seven days a week, 17 hours a day.

Initially they were paid about \$15 a week. They ultimately were paid nothing.

There were beatings, there were threats. One of the men, the threat was frequently that he would be re-institutionalized. They were isolated. They lived in subhuman conditions and finally this came to light and the government bought a case against the Kozminski's. They did something that hadn't been really done before. They didn't just charge the violence and they didn't just charge the physical restraint. They charged the entire course of conduct that had happened over years.

They included in their charging documents things like the conditions in which the men lived. Things like the climate of fear that they had, that they were afraid that if they didn't provide labor, they would be beaten or hurt or someone else would be beaten or hurt. It's the first time that the government really goes this far in trying to say that trafficking isn't just violence, it isn't just what we think about is historical slavery, it's also forms of subtle coercion and intimidation. You don't always need to have chains and whips or beatings in order to have a case of involuntary servitude.

The Supreme Court issues a decision Justice O'Connor writing for the majority says, "No, you can't do that." She finds that under the 1948 involuntary servitude law that essentially the law required physical force, threats of physical force, physical restraint or threats of physical restraint or abuse of the legal process, for example threatening that someone would be re-institutionalized if they failed to provide labor. It's a really, really narrow definition that essentially requires force, restraint or abuse of the legal process.

She also said something else in the opinion that's rare, which is a Congress comeback: If you think that the law doesn't fit the situation of human trafficking or involuntary servitude, come back and pass a new law. It doesn't happen in that many Supreme Court opinions. Congress, I think, gets the message—takes them a little while to get it because the law isn't passed till 2000.

In 2000, Congress passes the Trafficking Victims Protection Act. That's one of the two things that leads us to be here today because that law expanded the definition of human trafficking vastly. It took a very narrow and limited situation in which you needed actual physical force or restraint in most situations and it made it one in which subtle forms of coercion and psychological intimidation could be used to criminalize behavior. It's unbelievably important because anyone who's worked on

trafficking cases understands the simple fact that traffickers use only the amount of force or restraint that's necessary.

When you talk about people who are incredibly vulnerable, it's often not a lot to overcome someone's will and those threats are often not made against individuals. They could be made against family members at home. They could be made against prior workers who have escaped and they could be basically instilled through a climate of fear that doesn't involve physical violence. It doesn't necessarily involve full physical restraint.

The law finally captures, I think, for the first time what modern day human trafficking looks like, because it is about subtle forms of coercion and there are often instances of violence or restraint, but those are rare and they're often only again as much as it's necessary and sometimes they're not against particular people. They might be against another worker. The law finally understands that those forms of subtle coercion are enough to overcome someone's will to make them work.

Of course, what happens with the Trafficking Victims Protection Act is that there are two different laws that are passed. I'll do this very quickly for anyone who doesn't know this, but there are specific statutes that prohibit sex trafficking and forced labor. The sex trafficking law essentially says that anyone under the age of 18 who is engaged in prostitution or in commercial sex acts is a victim of human trafficking. I'll say that again: Anyone under the age of 18 who's engaged in prostitution is per se under the federal law a victim of human trafficking.

If you stop and think for a moment, you have a sense of how vast the human trafficking problem is in the country, if anyone under the age of 18 engaged in prostitution could be a victim of human trafficking under the federal law. For people over the age of 18, the federal law requires forced fraud or coercion, basically meaning that their will was overcome either through physical violence, through a climate of fear that leads someone to think that they or someone else will be hurt if they do not comply. We see fraud cases very frequently in sex trafficking.

Then there is of course labor statute which is equally broad and really it does what Kozminski and the Supreme Court had said should happen, which is that it takes into account all these subtle forms of coercion. Congress of course does not define a lot of the parts of the law and the first case to go to trial under the Trafficking Victims Protection Act under many of the aspects of the Trafficking Victims Protection Act was a case in New Hampshire called Bradley and O'Dell.

What's really interesting about Bradley and O'Dell is that it was Jamaican workers who had been brought to New Hampshire to work at a tree cutting business. They were brought here legally under H2B visas. They came, they expected to be paid a certain amount of money. They were paid less than promised, but they were paid. They lived in terrible conditions, but they did have housing that was provided by the defendants in the case.

They were free to come and go in a limited way. They could go anywhere in the town. They weren't allowed to leave the state, but they were allowed to go out. They went to night clubs occasionally—and as you can probably tell from my expression—it was a tough part of the case. This was my case and I prosecuted it jointly with the U.S. Attorney's office in New Hampshire and there were a lot of challenges, like the night clubs. The guys had bikes, they went to night clubs occasionally. They were allowed to come and go, but in very limited ways.

There were threats made against a prior worker who'd escaped. There were no threats made upfront against either of these guys.

But there were key elements of human trafficking that existed in this case. Their passports had been taken when they landed. Their plane tickets back home had been taken. They really did feel like they lived in subhuman [conditions] and they did—they lived in a dog shed when they first came to New Hampshire with no heat or running water, and even though they were allowed to go out sometimes in the town, their liberty was restricted.

They couldn't leave the state. One of the guys, who had a dad who lived in Connecticut, wasn't allowed to go to Connecticut to visit. When they were hurt at work, they didn't get medical attention. They were paid less than they were promised and the threat against the prior worker who had escaped was very real to them being from Jamaica and believing that threats like that could be true. It was a tough case to prosecute. It took me about six months to convince the senior leadership at the Department of Justice that this should be the first case to go.

The assistant attorney general kept saying to me, "Are you sure this should be the first case to go?" And the short answer was, "No." If I were picking the facts of a great test case, this would never have been it. But it was the first case in line and it was a righteous case in which we all believed that the men's will have been overborne. We were successful in that case and what ended up happening is that the First Circuit defined

the law a lot deeper. They defined what serious harm means and that went on to become part of the federal law.

There are three types of trafficking and I think it's really important to just spend a moment talking about those. There is sex trafficking and then there is forced labor. In the U.S., about 75% of all cases that get prosecuted are sex trafficking and about 25% of cases are forced labor. But often times there are a lot more victims associated in forced labor cases.

We often see factory cases where there are hundreds of victims. With sex trafficking cases, I prosecuted *United States v. Carreto* in the Eastern District of New York. We thought we had about 60 victims total on the case, and that's really unusual. Most sex trafficking victims would bring cases with five to ten victims, sometimes one or two. But there's a third type of trafficking that I like to think about which is a form of forced labor called domestic servitude.

There is forced labor where people are forced to work in bars, restaurants, factories across the country, nail salons, hair braiding salons. Then there is domestic servitude where there are people who work in individual's homes, often times for many years and their liberty is restrained. There are threats that are made and it's a very prominent type of trafficking. We don't talk as much about it, but I think it's important just to think about forced labor as being two parts of what we traditionally think about and as domestic servitude.

I've given you a little bit of the background on trafficking but I want to give you a couple more statistics because I think it's really important to understand the whole picture.

Judge Lippman said, and I think it's so important to think about this, that the victims of human trafficking in the U.S. are both U.S. born victims and there are international born victims. We see both. When you think about the United States, this is something that we talk about a lot. whether the country is a source, a transit or a destination country.

A source country is a country where the victims come from that country, meaning that there are victims from the United States, and in the U.S. we have many victims both of sex trafficking and of forced labor. Transit means it's a country that people pass through. There are people who pass through the U.S. on their way to Mexico, on their way to Canada and so on. Finally, destination. The U.S. is a major destination country in the

world. There are a lot of people who are brought to the U.S. to engage in forced labor and sex trafficking.

The top countries of origin where victims come to the U.S. are obviously the U.S. We have a lot of homegrown victims, what we call domestic trafficking. Mexico, we have a huge percentage of victims in the United States that we see from Mexico. The Philippines, Thailand, Honduras, Guatemala, India and El Salvador. Also, in New York we see a lot of victims from Asia and that's not up there per say but we do see a lot victims from China and other parts of Southeast Asia. Thailand is noted.

Polaris is an organization in Washington D.C. and they run what's known as the national trafficking hotline. That means that anyone who suspects human trafficking can call Polaris and what happens then is that they forward those cases to local and state governments and to the federal government. This is just an indication in one year that there were about 21,000 calls made to the hotline and ultimately they thought about a quarter of those constituted human trafficking cases nationally.

You see about 71% of those cases are sex trafficking, 16% come out as labor and some are both. I think what's important is that we don't necessarily trust these statistics we have about trafficking nationally. This is one of the better statistics we have because we know these calls were actually made, but the estimates for trafficking in the U.S. are always much higher than these numbers. The federal agencies that work on trafficking reported 2,000 investigation in 2014 and 232 federal prosecutions.

New York State in the same year reported 900 calls to the Polaris hotline and about 300 cases. So, if that gives you any indication of how important the work at the state and local level is, the feds are doing fewer cases than the states and locals are doing now. It's inevitable if we want to do this work that the states and locals have to be the leaders and again, you see over a hundred cases were prosecuted at the state level. but the New York Numbers are, I think, considerably higher than that.

The last thing I'll say is that New York is one of the four biggest trafficking states in country. It's Florida, California, New York and Texas, and I think it's important when we talk about trafficking and how we approach trafficking to consider that we are one of the major states and that we do have to really be thoughtful about how we do business.

In the short time that I have left I want to talk about where I think that there needs to be changes in the law and in the way we practice.

The first relates to the conversation that Judge Lippman just had about the Trafficking Courts, which I think are absolutely extraordinary. New York was the first state in the country to do this. They have had an unbelievable impact on the way that trafficking victims are treated in New York. But I would suggest, and I would suggest this particularly to my friends from the DA's offices and the police departments, that it's not enough that the courts have done what's within their power to do, but that we should all be asking the question whether these cases should even get to the courts.

If we believe that people are victims of human trafficking, we should be asking whether we should have alternatives to arrest. If we believe people are victims of human trafficking, should we be making arrest? Obviously the police are going to engage with people, but should we be formally arresting them? Should we actually be charging them? Why are we waiting for the courts to solve a problem that can be dealt with earlier in the system? I want to say really, sincerely that I think the work that Judge Lippman and the courts have done is extraordinary and I think it's very important, but I think we need to challenge ourselves as to why we would wait until that point in the system.

Many of the potential human trafficking victims will plead out in arraignments. The cases that go to the trafficking courts are the ones that go beyond arraignments. We're putting this responsibility on courts that, in my view, we should be thinking about at the earliest possible point in the system.

The City of Seattle has an amazing program called LEAD, which is Law Enforcement Assisted Diversion, and that program addresses in two specific geographic locations, prostitution, minor drug sale and drug use.

What's extraordinary about LEAD is that it's an alternative to arrest program. It doesn't actually formally process people through the system. In dealing with people who've engaged in prostitution and drug sale and drug use, we've seen a 60% drop in recidivism, which is extraordinary, and that happens because of the case management process that Judge Lippman talks about. They're not waiting until somebody gets to a court a month or two later. They're doing it from the moment someone is arrested.

They've had unbelievable success with people who are high risk, meaning they come back very frequently, and people who are some of the most difficult people to treat, to figure out what the appropriate responses are. I think one of the first things we have to think about is are we doing

enough to address the problem at the earliest possible point that we can, and what can we think about in terms of arrest and prosecutions that might be different?

The second thing I want to suggest is that I think that after the TVPA was passed by the federal government in 2000 the international community also passes a protocol called the Palermo Protocol in 2000. The whole world changes in 2000. Of course, this is not just in response to the United States, it's in response to globalization. When you think about why we sit here today, the world changed vastly in 80s and 90s. You can think about how much people travel now, how the economy has changed, how the internet has changed our lives and you can understand a little bit of how the world has changed significantly.

In 2000, we've got the federal law and we've got this international law, and then states start to pass laws. I think actually all 50 states today have some law that prohibits human trafficking, including New York State, but they are all wildly different. New York has a law I think that does a lot of phenomenal things.

There is one thing I think the New York law doesn't do that I think we should think very much about changing. I told you earlier that the federal law says that anyone under the age of 18 is a per se victim of sex trafficking. There is no requirement of forced fraud and coercion. If you think about it, it makes sense. When you think about things like statutory rape, we take the view as a society that you cannot consent to sexual conduct under the age of 18 in most states. New York is obviously different with 16 and 17 year olds but we take the view that you can't consent. Yet when it comes to trafficking, we take the view in New York state that you need forced fraud and coercion in order to have a trafficking prosecution of a juvenile.

The federal law says you don't need forced fraud and coercion if you're under the age of 18, but the state of New York says you do need forced fraud and coercion, which is a hurdle to prove in many instances. You can understand with juveniles that it can be difficult to prove cases to begin with. That's a change I would strongly recommend.

The last couple of things I would suggest you is that I think that we've come a long way in identifying victims of human trafficking but there are countless other victims of human trafficking in New York and in our country that we have not identified.

I think one of the great failures of our society is that I have never once worked with a trafficking victim who has not touched multiple forms of government. It might be that they have been in foster care. It might be that they've been in schools, in New York state or in other places. It might be that they've gone through healthcare through hospitals, the publicly run hospitals. As a rule, we don't train people on how to identify or understand victims of human trafficking. We don't actually ask the questions in foster care that would lead us to figure out if we have victims of human trafficking with us.

I sit on the board of Covenant House International and a study was done by Jayne Bigelsen, who's here with us tonight, in both New York and New Orleans, which showed that about 25% of the kids in the homeless shelters at Covenant House have been victims of trafficking or something called survival sex. That's extraordinary. That means that one in four of the kids in our homeless shelters are essentially victims, potentially victims of trafficking, and yet they're only identified because of the work that Jayne and others have been doing to study it.

We as a society have not decided to ask the hard questions of the people that come across our desks in government as a rule. We're starting to train healthcare workers to identify victims of trafficking, but we don't train teachers. We don't train students in schools on what human trafficking looks like, and if you step back and think about it, you'll understand why this is a problem. No one self-identifies as a victim of human trafficking.

No one really knows that human trafficking is. You all now have this "human trafficking in a nutshell," but even still you can't imagine most people who have been in this situation that would identify and say, "I'm a victim of human trafficking, I need help." If we don't train people to identify or to explain to people why their rights may be being violated, we've absolutely no way of solving the problem.

I have a lot of other possible changes, but I have come to the end of my time and I am very excited to turn the panel over to Judge Kluger and to Cy [Vance] and John [Miller] for further conversation. Thank you.

Caher:

Thank you for listening to this edition of Amici. If you have a suggestion for a topic on Amici, call John Caher 518-453-8669 or send him a note at jcaher@nycourts.gov. In the meantime, stay tuned.