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Washington, DC 20530

Monty Wilkinson
Director

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Human Trafficking

In This Issue

Introduction

Rod Rosenstein
Deputy Attorney General of the United States

It is with great pleasure that I introduce the November 2017 issue of the *USA Bulletin* focused on human trafficking. Combating the scourge of human trafficking is one of the top priorities of the U.S. Department of Justice.

The articles in this issue embody lessons learned by the Department's prosecutors, investigators, and victim assistance specialists as they tackled this often hidden crime. The Trafficking Victims Protection Act (TVPA) of 2000 created the modern human trafficking statutes. We constantly strive to improve upon our successes and build upon the Department's legacy of prosecuting involuntary servitude, peonage, and other crimes that violate the principles set forth in the Thirteenth Amendment to the U.S. Constitution.

There is no more honorable endeavor than assuring that everyone in the United States enjoys the Constitution's promise of freedom. To achieve this lofty goal, we must employ a range of multidisciplinary skills. Successful prosecutions begin with a keen understanding of the federal human trafficking statutes and cases interpreting those statutes, and an appreciation of the special needs of the victims for whom we seek justice. This includes being mindful of the victim-centered, trauma-informed approach that prepares victims to serve as effective witnesses. With this approach, victims are empowered to become full partners in seeking justice for the crimes they have endured.

The prosecution of human trafficking cases entails unique challenges. The Department's goal is to assist you in becoming better prosecutors of human trafficking crimes. I hope that you will find the articles contained in this issue of the *USA Bulletin* helpful. Do not hesitate to contact the experienced authors with requests for advice and assistance. Together, we will prevail in stopping violent and ruthless criminals from taking advantage of vulnerable victims. The Attorney General and I appreciate all that you do to make America a better and safer place for everyone.

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Human Trafficking: The Fundamentals

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I. Introduction

In passing the Trafficking Victims Protection Act of 2000 (TVPA), Congress described the trafficking of human beings as "a contemporary manifestation of slavery" that "involves grave violations of human rights" and is "abhorrent to the principles upon which the United States was founded."[1]

Recognizing that existing laws were "inadequate to deter trafficking and bring traffickers to justice,"[2] the TVPA expanded the reach of criminal statutes, extended protections to trafficking victims, and established programs to enhance national anti-trafficking efforts. Since enactment of the TVPA, the United States has made significant strides in prosecuting traffickers, dismantling trafficking networks, assisting victims and survivors in restoring their lives, and collaborating with survivors to develop innovative strategies to prevent the proliferation of human trafficking. However, while our nation's anti-trafficking efforts are more effective than ever before, we continue to encounter new challenges as trafficking threats continue to evolve, and as trafficking enterprises become ever more adept at evading detection.

This article aims to serve as a resource for federal prosecutors nationwide as we work together to meet the challenges of bringing traffickers to justice and vindicating the rights of trafficking victims and survivors. The article will begin by defining human trafficking under federal statutes, contrasting these definitions against myths and misconceptions that can impede detection of trafficking crimes, and identify trafficking victims. The article will also discuss federal criminal anti-trafficking statutes, focusing on the elements of the most commonly charged offenses of sex trafficking and forced labor and case law interpreting these provisions.

II. Myths and Misconceptions: What Trafficking Is and Is Not

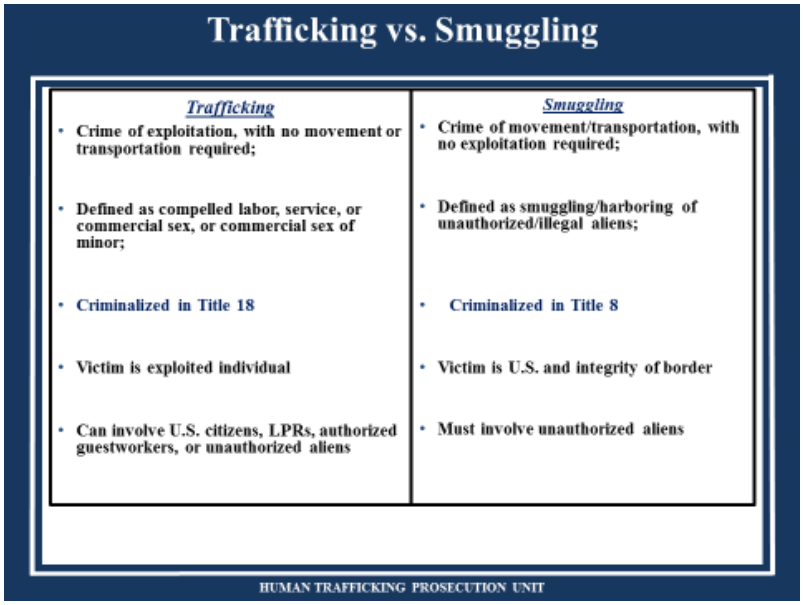
The Department of Justice—across Administrations—has consistently declared the fight against human trafficking to be a top priority. While public awareness campaigns have brought increased attention to the issue, public discourse is rarely precise in defining "human trafficking," and the term can evoke numerous different connotations in different contexts. Although closely related concepts are

[1] VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000. Pub. L. No. 106-386, §114, Stat. 1464, Div. A, Sec. 102 (to be codified at 22 U.S.C. § 7101(b)(1), (22)-(23) (2000)).
[2] *Id.* at (b)(13)-(14).

defined in varying terms in international treaties,[3] state statutes,[4] and victim protection provisions,[5] this article focuses on definitions set forth in the federal criminal anti-trafficking statutes, which are codified in Title 18, Chapter 77, of the United States Code.

Chapter 77, which is titled "Peonage, Slavery, and Trafficking in Persons," proscribes over a dozen distinct criminal violations, and none of them is captioned "human trafficking." None, in fact, even includes the term "human trafficking." Thus, the term does not reference a specific statutory violation, but rather denotes more broadly the category of conduct criminalized throughout Chapter 77, the essence of which is compelling or coercing another person to perform labor, services, or commercial sex acts. Therefore, the Chapter 77 crimes are, at their core, crimes of exploitation, and all require proof of coercion, with one exception: where a minor is exploited for commercial sex, no proof of coercion is required, reflecting a recognition of the inherently coercive nature of exploiting a minor who cannot legally consent to commercial sex.

Despite the concepts of coercion and exploitation that lie at the core of the Chapter 77 offenses, the term "trafficking" tends to evoke images of smuggling, transportation, or movement, generating significant confusion about the relationship between smuggling and trafficking. Further compounding this confusion, and perpetuating common misconceptions, anti-trafficking awareness campaigns are replete with images of fearful migrants cowering in shipping containers, truck beds, and airports. Contrary to the assumptions implicit in this conflation of trafficking and smuggling, the elements of Chapter 77 trafficking crimes, which are discussed in greater detail below, do not require any smuggling, movement, or transportation—international, interstate, or otherwise. While trafficking is a crime of exploitation, committed against an individual victim with no movement required, smuggling is a crime of transportation, committed against the integrity of the nation's borders, with no exploitation required. Traffickers frequently exploit victims without transporting anyone anywhere, just as smugglers regularly convey migrants across borders illegally without exploiting anyone for anything. These distinctions can be summarized as follows:



[3] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Nov. 15, 2000. 2237 U.T.N.S. 319, https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-12-a.en.pdf.
[4] *State Laws & Issue Briefs*, POLARIS, https://polarisproject.org/state-laws-issue-briefs.
[5] *See, e.g.,* 22 U.S.C. § 7102(8) (2012).

Because trafficking need not involve any smuggling or movement, it can target anyone, including undocumented migrants, guest workers entering on valid visas, lawful permanent residents, and United States citizens. Traffickers target vulnerable individuals, manipulating and intimidating them into compliance. While precarious immigration status is a vulnerability that traffickers often seek to exploit, many prove equally adept at identifying and exploiting vulnerabilities of U.S.-born victims, including homelessness, addiction, cognitive disabilities, child custody struggles, or psychological trauma resulting from prior abuse.

Just as the term "trafficking" is often used imprecisely to reference smuggling-related crimes, it is frequently invoked in reference to a wide range of offenses involving prostitution and sexual exploitation. Sexually evocative images used in anti-trafficking public awareness campaigns are highly effective at garnering attention, but can also perpetuate misconceptions, equating trafficking with prostitution. In reality, however, numerous trafficking victims are exploited for compelled or coerced labor as domestic servants, hair braiders, agricultural workers, or nursing aides with no nexus to prostitution. Conversely, numerous commercial sex transactions occur, some involving interstate transportation for purposes of prostitution in violation of other federal statutes. While this conduct is often referred to colloquially as "trafficking," it does not constitute a federal human trafficking crime unless it involves the use of force, fraud, coercion, or the commercial sexual exploitation of a minor. In reality, the exploitation-based crime of human trafficking can occur in virtually any sector of our economy, whether legal or illegal, compelling its victims into compliance for the trafficker's gain. Labor traffickers exploit victims in farm fields and factories, cantinas and construction sites, nursing homes and nail salons, while sex traffickers operate not only through internet sites, brothels, and street prostitution scenes, but also through escort services, massage parlors, karaoke bars, strip clubs, casinos, and enterprises masquerading as modeling agencies.

Images associated with human trafficking often include provocative depictions of young women and girls, their faces contorted in fear and despair; their bodies confined in boxes, cages, and chains; their wrists restrained by ropes and shackles; their flesh bruised and branded with bar codes, price tags, symbols, and signs; their cries silenced by hands clamped across their faces or rags stuffed in their mouths; all against a bleak backdrop of brutal concrete and barbed wire. However, with a few rare and notable exceptions, this is not what trafficking looks like. Coercion can take many forms, many of them wholly invisible. The TVPA expressly rejects any notion that coercion must be physical to be effective in compelling a victim into compliance with a trafficker's demands.

While the original Chapter 77 statutes, which are codified at 18 U.S.C. §§ 1581-88, criminalized iterations of involuntary servitude and slavery, pursuant to the Thirteenth Amendment's guarantee that "[n]either slavery nor involuntary servitude … shall exist within the United States,"[6] the Supreme Court, in *United States v. Kozminski*, construed these statutes narrowly, to reach only physical force or restraint, threatened force or restraint, or threats of legal coercion tantamount to incarceration, reflecting notions of servitude as understood by the framers of the Thirteenth Amendment.[7] In doing so, the Supreme Court reversed the involuntary servitude convictions of defendants who had compelled two men, both with pronounced cognitive disabilities, to labor without pay seventeen hours a day, seven days a week at the defendant's dairy farm. While the government had argued involuntary servitude, the jury found that the defendants held the men as "psychological captives" by isolating them, verbally abusing them, and preying on their vulnerabilities and fears. The Court held that "absent change by Congress," the involuntary servitude statute did not extend to non-physical forms of coercion.[8] In passing the TVPA, Congress expressly cited *Kozminski* in expressing its intent to "reach cases in which persons are held in a

[6] U.S. CONST. amend. XIII § 1.
[7] United States v. Kozminski, 487 U.S. 931 (1988).
[8] *Id.* at 952.

condition of servitude through nonviolent coercion."[9] Images of physical force and restraint, while effective at raising concerns about human trafficking, can distort conceptions of what human trafficking is—and what it is not. More often, trafficking victims are deceived, manipulated, coerced, and exploited by invisible schemes deliberately deployed to demean, demoralize, isolate, and intimidate them, to reinforce their sense of dependence on the trafficker, and to hold them in fear of harms they will suffer if they try to leave. As discussed below, the TVPA expressly set out to criminalize these invisible—yet powerful—chains of psychological coercion that bear little resemblance to the vivid depictions of captivity and restraint often associated with popular misconceptions of modern-day slavery.

While these are among the most common myths and misconceptions, the term "human trafficking" has also, on occasion, been used imprecisely to reference other conduct, such as organ trafficking, adoption fraud, forced marriage, female genital mutilation, parental abduction, and plural marriage. While some of these may be characterized as human trafficking in international treaties, state statutes, foreign legal systems, or media coverage, in this article, the term "human trafficking" refers to the conduct criminalized under Chapter 77: compelled or coerced labor, services, or commercial sex, and commercial sexual exploitation of a minor.

III. Human Trafficking Crimes: Chapter 77

Crimes of exploitation can take many forms, and Chapter 77 accordingly includes over a dozen distinct violations, some enacted before the TVPA,[10] some enacted in the TVPA of 2000, then later amended,[11] and still others introduced by subsequent Trafficking Victims Protection Reauthorization Acts (TVPRAs).[12] Together, they prohibit a broad range of conduct related to the trafficking crimes of exploiting another person for compelled or coerced labor, services, or commercial sex, or exploiting a minor for commercial sex. This broad range of prohibited conduct includes recruiting or transporting a person into a trafficking offense,[13] manipulating a person's identification documents in furtherance of enumerated trafficking crimes,[14] benefitting financially from specified trafficking crimes,[15] and conspiring or attempting to commit such trafficking crimes.[16]

Several of the Chapter 77 statutes contain internal subsections prohibiting attempts to obstruct their enforcement.[17] Chapter 77 also includes mandatory restitution and forfeiture provisions,[18] and an extraterritorial jurisdiction statute enacted in 2008.[19] While these Chapter 77 statutes provide numerous charging options with many overlapping theories of liability, this article focuses on the two most

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[9] 22 U.S.C. § 7101(b)(13) (2000); *see also* H.R. REP. NO. 106-939 at 100-01 (2000) (Conf. Rep.), 2000 WL 1479163 (TVPA legislative history stating intent "to address the *increasingly subtle methods* of traffickers who place their victims in modern-day slavery, such as where traffickers threaten harm to third persons, restrain their victims *without physical violence or injury*, or threaten dire consequences *by means other than overt violence* . . . [F]ederal prosecutors will *not have to demonstrate physical harm or threats of force* against victims") (emphasis added).

[10] 18 U.S.C. §§ 1581, 1582, 1584 (2000); 18 U.S.C. §1583 (2012).

[11] 18 U.S.C. §§ 1589, 1590, 1592, 1593 (2012); 18 U.S.C. §§ 1591, 1594 (2012 & Supp. III 2015).

[12] 18 U.S.C. § 1593A (2012); 18 U.S.C. § 1597 (2012 & Supp. III 2015).

[13] 18 U.S.C. § 1590 (2012).

[14] 18 U.S.C. § 1592 (2012).

[15] 18 U.S.C. § 1593A (2012).

[16] 18 U.S.C. § 1594(a)-(b) (2012 & Supp. III 2015).

[17] 18 U.S.C. §§ 1590(b) (2012), 1592(c) (2012); 18 U.S.C. § 1591(d) (2012).

[18] 18 U.S.C. § 1593 (2012).

[19] 18 U.S.C. § 1596 (2012).

commonly charged offenses, Sex Trafficking in violation of § 1591, and Forced Labor in violation of § 1589.

IV. Sex Trafficking

The sex trafficking statute sets forth two distinct criminal offenses: sex trafficking of a minor, which requires no proof of force, fraud, or coercion, and sex trafficking of an adult, which requires proof of force, fraud, or a prohibited means of coercion[20].

These two distinct offenses have elements in common. Both require that the defendant, acting knowingly, "recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person,"[21] or, alternatively, that the defendant "benefits, financially or by receiving anything of value, from participation in a venture which has engaged in" one of these enumerated acts.[22] While the first six of these enumerated verbs were included in the original TVPA of 2000, the word "maintains" was added in the TVPRA of 2008, and the remainder were subsequently inserted by the TVPRA of 2013 and the Justice for Victims of Trafficking Act (JVTA) of 2015,[23] requiring careful consideration of the statutory language in effect at the time of the offense.

In addition, both offenses require proof that the conduct was "in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States."[24] The requisite effect on interstate or foreign commerce can be established through the aggregate impact of intrastate commercial transactions, as recognized in well-established commerce clause case law, and the effect need only be de minimis.[25] Alternatively, the requisite interstate commerce nexus can be proven through the use of facilities and instrumentalities of interstate commerce such as cellular telephones, internet sites, financial institutions, interstate transit systems, and hotels, or by the use of products moving in interstate commerce such as condoms, pharmaceuticals, and prostitution paraphernalia.[26]

While child and adult sex trafficking offenses share these elements in common, they otherwise diverge in several respects. The final element of child sex trafficking requires proof that the defendant acted knowingly or in reckless disregard of the fact that the person "has not attained the age of 18 years and will be caused to engage in a commercial sex act."[27] No proof of force, fraud, or coercion is required, as minors are, in effect, presumed to be inherently vulnerable and unable to legally consent to commercial sex. The "reckless disregard" language was added in the TVPRA of 2008, and therefore applies only to conduct occurring or continuing on or after its effective date of December 23, 2008. However, where the defendant's liability arises from advertising a person for commercial sex, as opposed to any of the other proscribed acts, the "reckless disregard" standard does not apply, as Congress expressly exempted

[20] 18 U.S.C. §§ 1591(a) and (b)(1) (2012).
[21] 18 U.S.C. § 1591(a)(1) (2012 & Supp. III 2015).
[22] 18 U.S.C. § 1591(a)(2) (2012).
[23] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No.110-457, 122 Stat. 5044; Justice for Victims of Trafficking Act of 2015, Pub. L. No.114-22, 129 Stat. 227.
[24] 18 U.S.C. § 1591(a)(1) (2012 & Supp. III 2015).
[25] United States v. Evans, 476 F.3d 1176, 1179 (11th Cir. 2007) (internal citations omitted) (rejecting defendant-appellant's contention that Section 1591 Commerce Clause jurisdiction did not extend to wholly intrastate commercial sex transactions, based on their "aggregate economic impact on interstate and foreign commerce.").
[26] *See, e.g.,* United States v. Walls, 784 F.3d 543, 548 (9th Cir. 2015); Evans, 476 F.3d at 1179 (finding requisite interstate commerce nexus under section 1591 based on defendant's "use of hotels that served interstate travelers and distribution of condoms that traveled in interstate commerce.").
[27] 18 U.S.C. § 1591(a)(2) (2012).

advertising-based liability from the broader mens rea standard when adding "advertises" to the enumerated acts in the JVTA of 2015.[28]

In addition to expanding the mens rea requirement to include reckless disregard, the TVPRA of 2008 added a special evidentiary provision which obviates the need to prove knowledge or reckless disregard of the victim's minor age, provided that the defendant had a "reasonable opportunity to observe" the minor.[29] Specifically, the TVPRA inserted § 1591(c), which provides in pertinent part that "[i]n a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited, the Government need not prove that the defendant knew . . . that the person had not attained the age of 18 years."[30] This language caused some confusion because the substantive offense set forth in § 1591(a) referred to both knowledge and reckless disregard of the victim's age, while § 1591(c) only referred to knowledge and made no specific reference to reckless disregard. For the most part, courts have interpreted this language as providing a third method of proof so that sex trafficking of a minor may be proven by establishing any one of the three: (1) that the defendant knew the victim was a minor; (2) that the defendant recklessly disregarded the fact that the victim was a minor; or (3) that the defendant had a reasonable opportunity to observe the victim.

In *United States v. Duong*, the Tenth Circuit held that the version of § 1591(c) created by the TVPRA's enactment is not ambiguous, and on its face, provides an additional method by which the government can satisfy the mens rea element, i.e., by proving that the defendant had a reasonable opportunity to observe the victim.[31] The Court reasoned that because § 1591(a) permits the government to meet its burden of proving the relevant mens rea by showing either knowledge or reckless disregard, in order for § 1591(c) to have independent force, it should be interpreted as adding a third method of proving mens rea: that the defendant had a reasonable opportunity to observe the victim. The Court noted that the stated purpose behind § 1591(c), namely, to bolster the government's ability to regulate human trafficking, weighed in favor of this interpretation.[32] This holding is consistent with case law in the Second, Third, Fifth, Sixth, and Ninth Circuit Courts of Appeals.[33]

In the Eleventh Circuit, however, prosecutors should be aware of *United States v. Mozie*, which rejected the defendant's claim that § 1591 unconstitutionally lowers the government's burden of proof below the beyond-a-reasonable-doubt standard.[34] The Court stated:

> [t]he government must prove beyond a reasonable doubt all elements of the § 1591 crime, including the mens rea. If the government proves by that standard that the defendant had a

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[28] 18 U.S.C. § 1591(a)(1) (2012 & Supp. III 2015) (requires, in relevant part, that the defendant acted "knowing[ly], or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact . . . that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act.").
[29] 18 U.S.C. § 1591(c) (2012 & Supp. III 2015).
[30] *Id*.
[31] United States v. Duong, 848 F.3d 928 (10th Cir. 2017).
[32] *Id*. at 934.
[33] *See e.g*., United States v. Robinson, 702 F.3d 22, 34 (2d Cir. 2012) (government may satisfy its burden of proof regarding defendant's awareness of victim's age by proving beyond a reasonable doubt *any* of the following: (1) the defendant knew that the victim was under 18, (2) the defendant recklessly disregarded the fact that the victim was under 18, *or* (3) the defendant had a reasonable opportunity to observe the victim) (citations omitted); United States v. Smith, 662 F. App'x. 132, 136 (3d Cir. 2016); United States v. Copeland, 820 F.3d 809, 813 (5th Cir. 2016) (citing *Robinson* and holding that government may meet its burden on *mens rea* as to victim's age by proving that the "defendant had a reasonable opportunity to observe the victim"); United States v. Jackson, 622 F. App'x 526 (6th Cir. 2015); United States v. Bolds, 620 F. App'x 592, 593 (9th Cir. 2015) (holding that defendant's reasonable opportunity to observe victim is a distinct theory of culpability with respect to age).
[34] United States v. Mozie, 752 F.3d 1271, 1282 (11th Cir. 2014).

> reasonable opportunity to observe the victim, it need prove only that he recklessly disregarded the fact that she was under the age of eighteen, not that the defendant knew she was." Mozie appears to suggest that the government could not prove the mens rea element solely by proving that the defendant had a reasonable opportunity to observe the victim. However, the statutory interpretation question was not squarely presented in this case. Prosecutors in the Eleventh Circuit should discuss with their Office whether this portion of Mozie should be characterized as non-binding dicta.[35]

Given the lack of clarity in the statutory language and the limited number of published opinions at the time, Congress amended § 1591(c) in the Justice for Victims of Trafficking Act of 2015 (JVTA) to clarify the mens rea requirement regarding age.[36] The amended language of § 1591(c) clarifies that: "[i]n a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited, the Government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years."[37] Thus, for offenses occurring after May 29, 2015, the government may rely on the amended language of § 1591(c), which clearly establishes that the government does not need to prove that the defendant knew or recklessly disregarded the victim's age in cases where it is alleged that the defendant had a reasonable opportunity to observe the victim.

It is therefore clear that for all offenses occurring on or after May 29, 2015, and in the Second, Third, Fifth, Sixth, Ninth, and Tenth Circuits for all offenses occurring on or after December 23, 2008, prosecutors can meet the mens rea element regarding the victim's age by proving any one of the three theories of culpability: (1) that the defendant knew the victim was a minor, (2) that the defendant recklessly disregarded the fact that the victim was a minor, and/or (3) that the defendant had a reasonable opportunity to observe the victim. Prosecutors must include the requisite language for each theory in the indictment, and should ensure that the jury instructions track the indictment. That is, none of those means of proving mens rea should be included in the jury instructions if it was not also charged in the indictment. Although it is not legally necessary, when proceeding on multiple theories of meeting the mens rea element regarding the victim's age, it can be helpful to include a special verdict form asking if the jury found each individual theory beyond a reasonable doubt. Such a finding can preempt certain arguments on appeal.

It should also be noted that, although sex trafficking of a minor can be proven without any evidence of coercion, a defendant can be charged with "sex trafficking of a minor and by force, fraud, or coercion,"[38] where there is sufficient evidence to prove both theories. Charging both potentially expands the scope of admissibility of the defendant's abusive, deceptive, and coercive conduct, and sex trafficking by force, fraud, or coercion carries a higher 15-year mandatory minimum compared to the 10-year minimum for sex trafficking of a minor aged 14 or older.[39] Because the two theories are considered alternate means of committing the same violation, they can be charged in the same count.[40] However, because the applicable mandatory minimum can be different for each theory, prosecutors should include a unanimity instruction and ask the court to use a special verdict form recording the jury's finding on each theory.[41]

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[35] *Id*.
[36] Justice For Victims of Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat. 227.
[37] 18 U.S.C. § 1591(c) (2012 & Supp. III 2015).
[38] 18 U.S.C. § 1591(2012 & Supp. III 2015).
[39] 18 U.S.C. § 1591(b)(1)-(2) (2012 & Supp. III 2015).
[40] United States v. Powell, No. 04 CR 855, 2006 WL 1155947 (N.D. Ill. 2006).
[41] Alleyne v. United States, 133 S. Ct. 2151 (2013).

V. The Element of Coercion: Prohibited Means in Sex Trafficking and Forced Labor Cases

Sex trafficking by force, fraud, or coercion requires proof that the defendant acted with knowledge or reckless disregard of the fact that "means of force, threats of force, fraud, coercion . . . or any combination of such means will be used to cause the person to engage in a commercial sex act."[42] Because the definitions of coercion used in §1591 closely parallel those used in § 1589 (Forced Labor), much of the statutory language and relevant case law analyzing coercion pertains to both sex trafficking and forced labor cases. This section examines coercion-related principles applicable under both statutes, before turning to distinct elements of § 1589 that diverge from § 1591.

Coercion is defined to include:

> (A) threats of serious harm to or physical restraint against any person; (B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or (C) the abuse or threatened abuse of law or legal process.[43]

"Serious harm," as used in the first two prohibited forms of coercion, is defined as:

> any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.[44]

The gravity of the harm must therefore be analyzed in the context of the victim's background and circumstances, such as lack of immigration status, linguistic isolation, disabilities, and drug addictions that are known or apparent to the trafficker, making the victim's vulnerabilities directly relevant to the coercion analysis.[45] Courts have recognized that people who struggle with opiate addiction live in fear of the intense physical and psychological harm that withdrawal sickness inflicts. Traffickers who manipulate victims' access to addictive drugs to compel them to commit acts of prostitution to avoid the serious harm of withdrawal sickness, use prohibited means of coercion to compel the victim's participation in commercial sex acts.[46]

To hold victims in fear of serious financial harm, traffickers often lure victims on false promises of good earnings, then manipulate debts, impose inflated charges, control all earnings, and withhold promised pay, leaving victims completely dependent on the trafficker for shelter and sustenance, fearing homelessness, destitution, and insurmountable debts if they attempt to leave. For foreign victims, vulnerability to serious financial harm often arises from debts incurred to pay recruitment or smuggling fees in anticipation of falsely promised future earnings, leaving victims at risk of losing family homes mortgaged to secure the debts. Domestically, traffickers often use false promises of good earnings to lure victims who are homeless, destitute, facing imminent eviction or foreclosure, leaving abusive relationships, trying to regain custody of their children, and those recently arrested or in other desperate

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[42] 18 U.S.C. § 1591 (2012); 18 U.S.C. § 1591(a)(2) (2012).
[43] 18 U.S.C. § 1591(e)(2) (2012).
[44] 18 U.S.C. § 1591(e)(4) (2012).
[45] *See, e.g.,* United States v. Bradley, 390 F.3d 145 (1st Cir. 2004); United States v. Veerapol, 312 F.3d 1128 (9th Cir. 2002).
[46] *See, e.g.,* United States v. Fields, 625 F. App'x 949 (11th Cir. 2015); United States v. Mack, 808 F.3d 1074 (6th Cir. 2015).

circumstances. Traffickers often isolate their victims from friends, family, and any other means of support. They charge inflated debts for drugs supplied, bail bonds posted, or bus tickets purchased, and they control their victim's earnings and threaten them with destitution or even more desperate financial strains if they attempt to leave without paying off ever-escalating debts.[47]

Traffickers threaten victims with reputational harm by threatening to expose sexually explicit images, arrests, drug use, or abortions to their families or communities; often, the traffickers deceive and manipulate the victim into committing the very acts that the traffickers then threaten to expose.

In addition to actual threats of serious harm, the definition of coercion is broadly defined to also include any "scheme, plan, and pattern"[48] intended to cause the victim to believe she would face serious harm if she did not comply. This provision recognizes that traffickers can hold victims in fear of serious harm without resorting to actual threats. Because the provision reaches serious harm to "any person," examples can include a trafficker producing a picture of the victim's child while demanding that the victim continue prostituting, with the intent of sparking fear of harm to the child. A typical "scheme, plan, or pattern"[49] to cause fear of serious harm will often involve a combination of factors. Traffickers may make ominous references to violent gangs in the surrounding area to make victims believe they cannot safely leave without risking serious harm. They may further intensify the victims' fears by confiscating their identification, phone, and money; enforcing strict rules against communicating with others; subjecting them to continual verbal abuse; and depriving them of adequate food and rest. In combination, these actions isolate the victim from alternatives, increase her dependence on the trafficker, and diminish her resistance, compounding her fears of the risks of attempting to leave.[50]

The third form of coercion, "abuse or threatened abuse of law or legal process," is defined, for sex trafficking and forced labor alike, as "the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action."[51] Often, abuse of legal process involves threatening an undocumented victim with arrest, detention, or deportation if the victim does not accede to the trafficker's demands. Courts have rejected the defense that invoking an undocumented person's risk of deportation is merely an accurate statement of the law rather than an abuse of the legal process. As these courts have explained, immigration laws are intended to protect the integrity of a nation's borders, not to compel a person into service for the financial benefit of a private individual, so threatening adverse immigration consequences to compel continued service is an abuse of the law.[52]

Outside the immigration context, traffickers engage in similar forms of legal coercion by threatening to report probation or parole violations, holding the victim in fear of incarceration, or by threatening to report conduct to child protective services, jeopardizing the victim's attempts to recover access to their children. In doing so, traffickers invoke the law and legal process, not to uphold the law for its intended purpose, but rather to exert pressure on the victim to comply with the trafficker's demands. Some traffickers target victims with pre-existing vulnerabilities to legal coercion based on immigration status, criminal history, or child custody struggles; others deliberately create the very vulnerabilities they then exploit, whether by illegally smuggling in undocumented victims, by manipulating lawfully admitted

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[47] *See, e.g.,* United States v. Dann, 652 F.3d 1160 ((9th Cir. 2011).
[48] 22 U.S.C. § 7102(8) (2012).
[49] *Id*.
[50] *See, e.g.,* United States v. Calimlim, 538 F.3d 706 (7th Cir. 2008).
[51] 18 U.S.C. § 1591 (e)(1) (2012).
[52] Calimlim, 538 F.3d at 706.

guest workers into violating the terms of their visas, or by inducing victims to violate court-imposed conditions in criminal or child welfare proceedings.[53]

These definitions of coercion apply to both the sex trafficking and forced labor statutes. For both sex trafficking by force, fraud, or coercion and forced labor, the statutes require a causal nexus between the coercive means and the compelled labor, services, or commercial sex acts. For sex trafficking, the defendant must have the requisite knowledge or reckless disregard that the coercion "will be used to cause"[54] the person to engage in a commercial sex act, and for forced labor, the person's labor or services must be provided or obtained "by any one of, or by any combination of"[55] the prohibited means of coercion. Proving this causal nexus between the defendant's coercive conduct and the victim's continued labor, services, or commercial sex acts can be one of the most challenging aspects of prosecuting coercion-based trafficking crimes. Victims are often recruited from troubled backgrounds or desperate circumstances, leaving them with limited alternatives, and traffickers are skilled at preying on psychologically vulnerable victims who have a history of trauma and abuse. Traffickers and their associates deliberately target victims who, without stable, supportive homes, are drawn to false promises of love and acceptance into a surrogate "family." Victims form strong psychological bonds with their traffickers that persist even when traffickers brutally abuse them. Many victims insist that they remained with the trafficker at least partially out of love or loyalty rather than fear, which can significantly complicate the ability to prove beyond a reasonable doubt that the prohibited means of coercion caused the victim's continued labor, services, or commercial sex acts.

Analyzing whether the victim's continued service was coerced requires an examination of the totality of the defendant's conduct and its effect on the victim under the relevant surrounding circumstances. Defendants often contend that the victim's continued service was consensual rather than coerced if the victim had an opportunity to escape but did not do so. Courts have, however, rejected this argument, holding that, where the defendant's conduct places the victim in fear that they cannot leave without risking serious harm, the continued service is compelled by the defendant's conduct and the victim's failure to escape does not negate the defendant's culpability.[56]

Courts have also rejected the argument that if a victim has consented to prior acts of commercial sex, they have effectively consented to prostitution in general, rendering the acts of prostitution directed by the defendant consensual rather than coerced. Applying FED. R. EVID 412, courts have recognized that, just as a victim's prior sexual history does not denote consent to future sex acts, so a victim's prior commercial sex acts do not establish consent to future prostitution under different circumstances.[57] Traffickers often recruit victims who are already engaged in prostitution, promising them high earnings and better treatment, but then withholding all their earnings; imposing strict rules, controls, and quotas; requiring them to perform sex acts they object to performing and serving customers they object to serving; demanding that they continue prostituting even when sick, injured, or exhausted; punishing them for failing to meet these rules and requirements; and isolating and intimidating them to prevent them from leaving the trafficker's control. Well-established case law holds that even if a victim previously consented to prostitution, when a defendant uses prohibited means to compel the victim to perform subsequent commercial sex acts under other circumstances to which they did not consent, the defendant's conduct is used to cause the commercial sex acts, satisfying the force, fraud, or coercion element of § 1591.[58]

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[53] *See, e.g.,* United States v. Farrell, 563 F.3d 364 (8th Cir. 2009); United States v. Kalu, 791 F.3d 1194 (10th Cir. 2015).
[54] 18 U.S.C. § 1591(a)(2) (2012).
[55] 18 U.S.C. § 1589(a) (2012).
[56] Bradley, 390 F.3d at 153.
[57] FED. R. EVID. 412.
[58] United States v. Cephus, 684 F.3d 703, 708 (7th Cir. 2012) (holding that pursuant to FED. R. EVID 412 victim's

VI. Forced Labor

The forced labor statute prohibits knowingly providing or obtaining a person's labor or services by prohibited means of coercion, enumerating those prohibited means in language nearly identical to the definitions of coercion under § 1591, which are discussed above.[59] However, the forced labor statute differs from the sex trafficking statute in several notable ways, in addition to its obvious application to labor and services rather than to commercial sex.

First, while § 1591 prohibits the use of "force, threats of force, fraud, or coercion," § 1589 does not include fraud among its enumerated prohibited means, which otherwise parallels § 1591's prohibited means. Labor traffickers commonly use fraud as part of a broader scheme, plan, or pattern to hold victims in fear of serious harm, often luring them on false promises, inducing them to incur debts that place them at risk of serious financial harm, and falsely claiming that pay is being sent to their families or held for them. Although this fraudulent conduct can be a powerful means of deceiving victims into laboring for little or no pay, fraud alone is insufficient to establish that labor was obtained by prohibited means, so it can only be charged as part of a broader "scheme, plan or pattern" to cause the victim to fear "serious harm," such as where the defendant combines this fraudulent conduct with isolation, intimidation, and control over the victim's identification documents.[60]

Second, § 1591 contains an additional jurisdictional element requiring that the conduct affect interstate commerce or occur in the special maritime and territorial jurisdiction, whereas § 1589 contains no such jurisdictional element. Third, in contrast to § 1591, which requires no proof of coercion when the victim is a minor, § 1589 does not distinguish between adult and minor victims, requiring the same proof of prohibited means of coercion, regardless of the victim's age.

Fourth, while § 1591's "benefitting financially" language was codified in the original TVPA of 2000, the original forced labor statute contained no such "benefitting financially" theory of liability. A parallel "benefitting financially" provision was, however, inserted into § 1589 and codified as § 1589(b) as part of the TVPRA of 2008. This provision therefore applies only to conduct occurring or continuing on or after December 23, 2008.

Fifth, while forced labor, like most Chapter 77 offenses, generally has a 10-year statute of limitations,[61] sex trafficking has no limitation period.[62] And finally, while sex trafficking violations carry mandatory minimum penalties of ten years, or of fifteen years when the offenses involve sex trafficking by force, fraud, or coercion or trafficking of a minor under age 14,[63] forced labor carries no statutory mandatory minimum penalty.

Forced labor cases, like coercion-based sex trafficking cases, turn largely on the evidence of the prohibited means the defendant used to compel the victim. Both types of cases can present similar challenges involving victims who are both afraid of and loyal to the trafficker, distrustful of law enforcement, hesitant to cooperate, and unlikely to come forward and identify themselves as victims.

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prior acts of prostitution were irrelevant to whether the defendant coerced her into prostitution); United States v. Valenzuela, 495 F. App'x 817, 820 (9th Cir. 2012) (holding that under Rule 412 "evidence of prior prostitution is irrelevant to whether the victims consented" to prostituting).

[59] 18 U.S.C. § 1589(a)(1)-(4) (2012).

[60] *See, e.g.,* Dann, 652 F.3d at 1169-73; 18 U.S.C. § 1589(a) (2012).

[61] 18 U.S.C. § 3298 (2012).

[62] 18 U.S.C. § 3299 (2012).

[63] 18 U.S.C. § 1591(b)(1)–(2) (2012).

Identifying and prosecuting labor trafficking cases can also present some additional challenges. In sex trafficking cases, the unlawful nature of the underlying act of prostitution brings law enforcement into contact with potential victims and traffickers in the course of enforcing anti-prostitution laws. In labor trafficking cases, by contrast, the underlying acts of braiding hair, harvesting crops, staffing nursing homes, or cleaning commercial buildings are not inherently unlawful, diminishing the encounters between law enforcement and the victims being exploited. And finally, commercial sex acts involve direct contact with customers, requiring traffickers to advertise victims to potential clients, whether through websites, cards distributed at migrant worker camps, or sending the victim out to "the track" area known for street prostitution or to casinos, strip clubs, or cantinas where women are exploited for prostitution. The necessity of advertising or presenting the victim to potential customers, whether online on in person, brings the victim into contact with multiple individuals, affording law enforcement an opportunity to make contact covertly by posing as potential clients. By contrast, a labor trafficking victim may work for years providing childcare, eldercare, and domestic service to a family, or may work long shifts harvesting crops or processing agricultural products, with only minimal contact outside the immediate work environment controlled by the traffickers. These distinctions can compound the challenges of identifying labor trafficking cases; they are often detected only through proactive efforts to engage community partners or regulatory agencies who may come into contact with vulnerable populations, and who can take note of potential indicators of coercion such as monitoring and surveillance of workers, isolation, control over their movements and communications, and unusually overcrowded, unsanitary, or onerous living or working conditions.

VII. Conclusion

Despite some notable contrasts between sex trafficking and forced labor, ultimately, these offenses both involve compelling or coercing another person's labor, services, or commercial sex acts; while sex trafficking of a minor does not require proof of coercion, the law in effect recognizes their inherent vulnerability to coercion and the fact that they cannot legally consent to commercial sex. Proving coercion can be challenging, particularly when the means of coercion are psychological and invisible, and when traumatized victims are reluctant to cooperate with law enforcement and may have difficulty articulating the complex combinations of fear, dependence, love, and loyalty that compel them to remain under a trafficker's control.

The Department's Human Trafficking Prosecution Unit (HTPU) and the Child Exploitation and Obscenity Section (CEOS) have extensive experience working with United States Attorneys' Offices around the country who are at the forefront of the Department's efforts to bring traffickers to justice. Drawing on experiences from trafficking cases around the country, these units provide specialized prosecutorial expertise, technical assistance, and victim-witness support to strengthen trafficking investigations and prosecutions, working collaboratively with USAOs in a variety of roles, depending on the needs of the case.

AUSAs are encouraged to consult with these specialized units, contacting HTPU in cases involving forced labor, transnational sex trafficking, or sex trafficking of adult victims, and contacting CEOS in cases involving sex trafficking of minors within the United States. We look forward to working with our AUSA colleagues nationwide to build on the Department's momentum in bringing traffickers to

justice and vindicating the rights of trafficking victims and survivors. Contact information for CEOS is available at https://www.justice.gov/criminal-ceos.

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The Civil Rights Division's Human Trafficking Prosecution Unit (HTPU) and the Criminal Division's Child Exploitation and Obscenity Section (CEOS): An Overview

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I. Introduction

Human trafficking—the crime of "compelling or coercing another person's labor, services, or commercial sex acts" or exploiting a minor for commercial sex—can take many forms.[1] It can target adults or minors, U.S. citizens, lawful permanent residents, authorized guest workers, or undocumented migrants. While the conduct can be highly localized, preying on vulnerable individuals within their own urban, suburban, or rural communities, it can also involve luring victims across state lines and international borders. Traffickers can exploit their victims in a range of legitimate industries like agriculture, hospitality, health care, and manufacturing, or in illegal sex markets, whether online, on street corners, or in massage parlors, strip clubs, cantinas, and casinos. Perpetrators can operate individually, through loosely affiliated family-based networks, at the behest of violent street gangs, or in association with transnational criminal enterprises. Traffickers can compel and coerce their victims through overt threats and violence, or through subtler schemes of deception, isolation, and psychological manipulation.

Because trafficking violations vary so widely, effective anti-trafficking enforcement calls for specialized strategies to detect, investigate, and prosecute specific aspects of the broad array of human trafficking threats, and to help stabilize traumatized victims with distinct needs. Accordingly, multiple specialized units within the Department of Justice (DOJ) partner with one another and with United States Attorney's Offices (USAOs) to bring relevant expertise to the Department's broad-based efforts to combat all forms of human trafficking. While multiple partners across DOJ play critical roles in DOJ's comprehensive anti-trafficking programs generally, and in advancing federal trafficking prosecutions more specifically, two specialized prosecution units serve as the Department's subject matter experts in federal human trafficking prosecutions: the Civil Rights Division's Human Trafficking Prosecution Unit (HTPU), which focuses on forced labor, transnational sex trafficking, and sex trafficking of adults; and

[1] HUMAN TRAFFICKING PROSECUTION UNIT (HTPU), U.S. DEP'T JUSTICE (Updated July 28, 2017).

the Criminal Division's Child Exploitation and Obscenity Section (CEOS), which focuses on sex trafficking of minors within the United States and the sexual exploitation of minors outside of the United States when it is committed by United States citizens or permanent residents.

This Article discusses the specific roles of each of these units in broader Departmental anti-trafficking efforts. The Article begins by surveying the multiple DOJ anti-trafficking partners, with an emphasis on the Main Justice units that, along with USAOs, play significant roles in federal criminal trafficking prosecutions. The Article then discusses the roles of HTPU and CEOS, focusing on their respective areas of specialized subject matter expertise, distinct priority initiatives, and key strategic partnerships. The Article concludes by addressing common questions about coordinating with HTPU and CEOS, and accessing the resources they provide to support federal trafficking investigations, prosecutions, enforcement strategies, and victim stabilization efforts.

II. DOJ's Anti-Trafficking Efforts: Broad-Based Partnerships

In discussing the respective roles of HTPU and CEOS, it is important to emphasize that these prosecution units are part of a much broader multi-disciplinary, multi-faceted Department-wide strategy aimed at prosecuting human traffickers, dismantling trafficking networks, protecting and stabilizing trafficking survivors, strengthening anti-trafficking partnerships, and increasing capacity to detect and prevent trafficking crimes.[2] As detailed in DOJ's National Strategy to Combat Human Trafficking and the Attorney General's Annual Report to Congress on Human Trafficking, numerous partners across the Department collaborate to advance DOJ's broad-based anti-trafficking enforcement, prevention, and victim protection programs.[3]

U.S. Attorney's Offices operate at the forefront of the Department's human trafficking prosecution efforts, leading landmark trafficking prosecutions, often in partnership with HTPU or CEOS. While HTPU and CEOS are discussed at length below, numerous other parts of Main Justice play key roles in federal trafficking prosecutions. The Executive Office of United States Attorneys (EOUSA) coordinates USAOs' District-Specific Anti-Trafficking Plans in accordance with the Justice for Victims of Trafficking Act,[4] develops anti-trafficking training programs, and provides support for USAO-led human trafficking task forces and USAO victim-witness coordinators. The Office of Enforcement Operations (OEO) and Office of International Affairs (OIA) each play key roles in reviewing, approving, and coordinating critical procedural aspects of trafficking investigations and prosecutions. In transnational cases, the Office of Prosecutorial Development, Assistance, and Training (OPDAT) coordinates exchanges of expertise with international anti-trafficking authorities who can prove to be key partners, and the INTERPOL United States National Central Bureau (USNCB) provides critical support in locating, apprehending, and extraditing fugitives.

Along with HTPU, CEOS, and USAOs, other Main DOJ units that specialize in prosecution serve as critical partners in trafficking cases that involve additional criminal violations calling for other areas of specialized expertise. The Criminal Division's Organized Crime and Gang Section (OCGS), Money Laundering and Asset Recovery Section (MLARS), and Human Rights and Special Prosecutions Section (HRSP) have each played significant roles in trafficking cases that implicate their respective areas of subject matter expertise in organized crime and financial crime, while the Computer Crime and Intellectual Property Section (CCIPS) provides guidance in cyber-related challenges arising in trafficking investigations and prosecutions. These Main DOJ partners collaborate with HTPU, CEOS, and USAOs, bringing highly relevant expertise to bear to enhance the impact and success of trafficking prosecutions.

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[2] *See* U.S. DEP'T JUSTICE, HUMAN TRAFFICKING: DEPARTMENT OF JUSTICE COMPONENTS (Updated Jan. 6, 2017).
[3] *See* U.S. DEP'T JUSTICE, NATIONAL STRATEGY TO COMBAT HUMAN TRAFFICKING (Jan. 2017); U.S. DEP'T JUSTICE, ATTORNEY GENERAL'S TRAFFICKING IN PERSONS REPORT (Updated Mar. 16, 2017).
[4] *See generally* U.S. DEP'T JUSTICE, NATIONAL STRATEGY TO COMBAT HUMAN TRAFFICKING (Jan. 2017).

III. HTPU and CEOS: Two Specialized Units

HTPU and CEOS each provide unique areas of specialized subject matter expertise in human trafficking prosecutions. While they collaborate and coordinate extensively, their discrete areas of specialization also require them to engage in distinct strategic partnerships targeted at specific human trafficking enforcement priorities and challenges. As noted above, HTPU specializes in prosecutions involving forced labor, transnational sex trafficking, and sex trafficking of adults, while CEOS specializes in prosecutions involving sex trafficking of minors within the United States.[5]

Before turning to distinctions between the two, it is important to note some areas of significant overlap between them. Both HTPU and CEOS partner with USAOs to prosecute crimes which, unlike most gun, drug, immigration, or property crimes, tend to rely heavily on testimony of traumatized victims. Both HTPU and CEOS work extensively with victims who are, at least initially, extremely reluctant to cooperate with law enforcement and who often require intensive efforts to establish trust and rapport. Accordingly, both HTPU and CEOS are committed to a victim-centered and trauma-informed approach that stabilizes traumatized victims, earns their trust, and facilitates their access to legal protections and support programs to help them restore their lives and empower them to participate actively in the criminal justice process.

As a result, both HTPU and CEOS have substantial experience navigating the complex litigation impacts that can arise from such intensive engagement with victim-witnesses. Both units work with law enforcement partners to advance victim-centered best practices, and are committed to engaging with survivors and survivor advocates to incorporate survivor expertise into federal enforcement strategies. The two units share responsibility for enforcing the federal sex trafficking statute, 18 U.S.C. § 1591.[6] They both prosecute an array of other violations against traffickers who engage in related criminal conduct, and the two units coordinate with one another in cases involving both minor and adult victims. However, despite these commonalities, HTPU and CEOS each have distinct areas of primary subject matter expertise, and each participate in specially targeted enforcement partnerships and priorities, such as the Anti-Trafficking Coordination Team (ACTeam) Initiative and U.S.-Mexico Bilateral Human Trafficking Enforcement Initiative, in the case of the HTPU, and Project Safe Childhood, in the case of CEOS.[7]

A. HTPU

HTPU was formed within the Criminal Section of the Civil Rights Division in 2007 to consolidate the human trafficking prosecution expertise the Criminal Section had developed over decades of enforcing the pre-Trafficking Victims Protection Act (TVPA) involuntary servitude and slavery statutes, including 18 U.S.C. § 1581 (peonage) and § 1584 (involuntary servitude).[8] After enactment of the TVPA of 2000, the number of federal human trafficking prosecutions rose significantly as a result of the TVPA's broader criminal statutes, expanded victim protections, and enhanced outreach, training, and coordination programs.[9] HTPU partners with USAOs nationwide to prosecute human trafficking cases involving forced labor, transnational sex trafficking, and sex trafficking of adults by force, fraud, or coercion, specializing in novel, complex, multijurisdictional, and international cases, particularly those

[5] *See* U.S. DEP'T JUSTICE, HUMAN TRAFFICKING: DEPARTMENT OF JUSTICE COMPONENTS (Updated Jan. 6, 2017).
[6] *See generally* 18 U.S.C. § 1591 (2012 & Supp. 2015).
[7] *See generally* U.S. DEP'T JUSTICE, HUMAN TRAFFICKING: SPECIAL INITIATIVES (Updated May 26, 2017); U.S. DEP'T JUSTICE, PROJECT SAFE CHILDHOOD (last visited Sept. 1, 2017).
[8] *See* U.S. DEP'T JUSTICE, HUMAN TRAFFICKING PROSECUTION UNIT (HTPU) (Updated July 28, 2017); *see generally* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386 (HR 3244) (2000); 18 U.S.C. § 1581 (2012); 18 U.S.C. § 1584 (2012).
[9] *See* U.S. DEP'T JUSTICE, HUMAN TRAFFICKING PROSECUTION UNIT (HTPU) (Updated July 28, 2017).

where the criminal conduct spans international borders, requiring international coordination to investigate and prosecute the offense.[10]

HTPU's structure includes: Trial Attorneys who partner with AUSAs across the country to prosecute human trafficking cases and provide expertise and guidance to support USAOs' anti-trafficking efforts; a Senior Policy Counsel who advocates for anti-trafficking policy and programmatic priorities; a National Program Manager who coordinates HTPU-led anti-trafficking enforcement initiatives and training programs; an Investigator who coordinates deconfliction of cases and investigations implicating multiple jurisdictions or multiple law enforcement agencies; and a Victim-Witness Coordinator who provides expertise in stabilizing traumatized victims and facilitating their participation in investigations and prosecutions.

HTPU's role in any given trafficking prosecution can vary widely. In some instances, an AUSA may contact HTPU for guidance on legal issues, charging options, or trial strategy matters. Because of its role in trafficking cases nationwide, HTPU can draw on experience and expertise from analogous cases in other Districts to help anticipate issues and defenses. HTPU often provides sample indictments, pleadings, and jury instructions, and assists in charging consultations and trial strategy conferences. HTPU takes a flexible, collaborative approach, consulting with USAOs as to how HTPU can best support an individual case. Depending on the needs of the case, HTPU's role can include anything from joining the trial team as co-counsel, to brainstorming and troubleshooting through trial strategy consultations, to providing specialized victim-witness support to stabilize victims throughout trial preparation and trial. Especially in multiple-victim cases involving highly traumatized victims, many USAOs have limited victim-witness resources and are not able to simultaneously address the intensive needs of multiple victims who often need varying combinations of culturally appropriate linguists, trauma counseling, substance abuse treatment, and medical care, in addition to logistical support traveling from outside the District for trial preparation and trial. HTPU's Victim-Witness Coordinator plays a critical role in accessing available resources and programs to ensure that victims are available and able to testify as witnesses in trafficking trials. The United States Attorneys' Manual (USAM) in § 8-3.120 requires notification to HTPU at the outset of the criminal investigation, or at least ten days before indictment.[11] While USAOs are encouraged to alert HTPU as early as possible, it is never too early or too late.

Although many cases are first initiated in the Districts, in some instances HTPU may initiate an investigation and then contact the relevant USAO. Occasionally, a federal investigative agency may alert HTPU to a new trafficking complaint, as HTPU has direct notification protocols with the Federal Bureau of Investigation (FBI), Immigration and Customs Enforcement (ICE), Department of Homeland Security (DHS), the State Department's Diplomatic Security Service, and the Department of Labor (DOL). HTPU also predicates new trafficking investigations on direct reports from victims, non-governmental organizations, foreign consulates, and interagency fusion centers or working groups, then identifies the appropriate venue and alerts the USAO in the appropriate District or Districts. HTPU may also contact a USAO to initiate a new human trafficking matter after identifying a nexus to that District in a multi-District trafficking investigation, or after identifying actionable trafficking indicators in an ongoing transnational organized crime, human smuggling, or visa fraud investigation. Just as in cases within a given District, HTPU will work collaboratively with the USAO to determine the most appropriate role for HTPU, from intermittent consultant to full trial partner, based on the needs of the case.

In addition to prosecuting trafficking cases in partnership with USAOs, HTPU leads enforcement initiatives designed to enhance the federal law enforcement response to human trafficking crimes. HTPU leads the Anti-Trafficking Coordination Team (ACTeam) Initiative, a partnership of DOJ, FBI, DHS, and DOL, that convenes specialized teams of federal agents and federal prosecutors in select Districts, with

[10] *Id.*

[11] *See* U.S. DEP'T. OF JUSTICE, U.S. ATTORNEYS' MANUAL § 8-3.120 (2002).

the goal of developing high-impact human trafficking cases involving forced labor and adult and international sex trafficking, in coordination with national anti-trafficking subject matter experts.[12] ACTeam Districts are designated through a "competitive, nationwide, interagency selection process."[13] There are currently six Phase II ACTeams which were designated in 2015 to build on the momentum of Phase I.[14] The U.S.-Mexico Bilateral Human Trafficking Enforcement Initiative, a collaboration between DOJ, DHS, and Mexican law enforcement, facilitates coordination of complex human trafficking investigations and prosecutions to "dismantle human trafficking networks operating across the U.S.-Mexico border."[15] As recognized in the Department's National Strategy to Combat Human Trafficking,[16] the U.S.-Mexico Bilateral Human Trafficking Enforcement Initiative establishes direct operational coordination channels between specialized anti-trafficking enforcement partners on both sides of the border, enabling them to engage in "direct exchanges of leads, evidence, intelligence, and expertise," thereby generating "significant momentum in bilateral enforcement operations and prosecutions dismantling notorious transnational organized human trafficking enterprises."

Finally, HTPU provides advanced anti-trafficking training to enforcement partners nationwide, focusing on trauma-informed, survivor-centered strategies for effectively identifying, investigating, and prosecuting human trafficking cases. In addition to human trafficking prosecution seminars at the National Advocacy Center and national trainings of federal investigative agency partners, HTPU participates in numerous trainings organized by USAOs and anti-trafficking task forces. USAOs are encouraged to contact HTPU to address specific training needs, ranging from broad topics, such as proactive case identification strategies and federal human trafficking statutes, to more specialized subjects, such as trauma-informed victim interview techniques, coordinating overseas investigations, or anticipating defenses in labor trafficking cases.

B. CEOS

CEOS presently has nineteen prosecutors, five Digital Investigative Analysts, a Child Victim Witness Administrator, an Investigative Analyst, two Paralegal Specialists, and one Administrative Assistant.[17] CEOS partners with all United States Attorney's Offices, all federal law enforcement agencies, and foreign law enforcement entities to operate nationally and transnationally. This includes the FBI's Violent Crimes Against Children Section and Office of Victim Assistance, Homeland Security Investigations, the Postal Inspection Service, the U.S. Marshals, and Internet Crimes Against Children Task Forces. CEOS has developed critical partnerships with key non-governmental organizations, foreign governments, and entities. Such allies include INTERPOL, EUROPOL, the National Center for Missing and Exploited Children, ECPAT (End Child Prostitution in Asian Tourism), the Polaris Project, the International Centre for Missing and Exploited Children, and the WePROTECT Global Alliance to End Child Sexual Exploitation Online.[18]

CEOS's Digital Investigative Analysts (DIAs) constitute the High Technology Investigative Unit (HTIU), which provides critical and innovative case support, working both to achieve a favorable outcome in individual cases, and also to systematically improve law enforcement's response to vexing

[12] *See* Press Release, Dep't Justice, Dep't Justice, Homeland Sec. and Labor Announce Selection of Phase II Anti-Trafficking Coordination Teams (Dec. 17, 2015) (on file with Dep't Justice, Office Pub. Affairs).
[13] Fact Sheet, Anti-Trafficking Coordination Team (ACTeam) Initiative Fact Sheet (last visited Sept. 13, 2017).
[14] *See id.*
[15] *See* Press Release, Dep't Justice, Eight Members Of Mexican Sex Trafficking Enterprise Plead Guilty To Racketeering, Sex Trafficking, And Related Crimes (Apr. 21, 2017) (on file with Dep't Justice, Office Pub. Affairs).
[16] *See* Press Release, Dep't Justice, Attorney General Loretta E. Lynch and U.S. Attorney Preet Bharara Announce Indictment of Seven Individuals and Six Arrests in United States and Mexico on Sex Trafficking and Related Charges (Nov. 1, 2016) (on file with Dep't Justice, Office Pub. Affairs).
[17] *See* U.S. DEP'T JUSTICE, NATIONAL STRATEGY TO COMBAT HUMAN TRAFFICKING 7 (Jan. 2017).
[18] *See id.*

technological challenges. HTIU's Digital Investigative Analysts often discover key evidence that leads to the identification and rescue of children being abused; the identification and arrest of online, anonymized offenders; the conviction of a dangerous sex offender; or the conviction of an offender for a more serious offense. Whenever a DIA provides forensic support on a case, a CEOS Trial Attorney will also join the case to prosecute it in partnership with the local AUSA.

The Child Victim Witness Administrator provides critical assistance to U.S. Attorney's Offices. For example, the Administrator can help AUSAs find appropriate services or shelter for a child victim or support victims when a case goes to trial. In child sex trafficking cases, the Investigative Analyst can develop supplemental information related to the means in which the child was exploited as well as potentially associated trafficking networks.

CEOS's primary responsibility is to prosecute cases involving child sexual exploitation, and it does so as part of Project Safe Childhood. This nationwide initiative, which is led by the U.S. Attorney's Offices and CEOS, was launched by the Department of Justice in May 2006 to marshal federal, state, and local resources to better combat the growing epidemic of child sexual exploitation. CEOS gets involved in a case in any number of ways. Often, a district will contact CEOS to ask for prosecution support. This may occur because the case involves a novel factual scenario or defense; because it tests a new statute or legal theory; because the AUSA handling the case needs a co-counsel with subject matter expertise; or because HTIU's expertise is needed. Other times, CEOS may develop the investigation in-house and then bring the case to the district to partner on the prosecution. Occasionally, CEOS will handle the prosecution solo because the U.S. Attorney's Office is recused or declines to co-counsel the case. CEOS can get involved in a case at any point, from the start of the investigation to the eve of trial.

CEOS also conducts a variety of training and outreach activities. CEOS authors and publishes a newsletter that is distributed to AUSAs and federal agents. The newsletter provides updates on changes to legislation, tips for trial and forensic examination, guidance on recurring legal issues and defense motions, and other useful topics. CEOS regularly publishes a case digest that summarizes the significant federal cases addressing child exploitation topics.[19]

CEOS also maintains and updates the Child Exploitation Intranet, accessible by all United States Attorney's Offices and Main Justice components, that provides links to the current and previous newsletters, topical indices for the newsletter articles, the case digest, a library of go-by indictments, motions, jury instructions, memoranda, ISP contacts, expert witness resources, and other useful documents. Agents and AUSAs who need immediate assistance can also call the CEOS duty line, staffed by CEOS Trial Attorneys who can provide particularized, on-the-spot guidance.

CEOS and its HTIU offer extensive, nationwide, in-person training through its participation in national conferences, including the 2017 National Law Enforcement Training on Child Exploitation in Atlanta, Georgia.[20] CEOS also routinely helps design and host courses at the National Advocacy Center (NAC), and supports local, regional, and international trainings. A sampling of the legal issues on which CEOS commonly provides guidance and training are the privacy protections afforded children in 18 U.S.C. § 3509,[21] Federal Rules of Evidence 412 (limiting the admissibility of a victim's sexual history) and 414 (permitting propensity evidence in child exploitation cases);[22] how to apply the "reasonable opportunity to observe" language in 18 U.S.C. § 1591(c);[23] how to obtain restitution for child victims; the best way to provide discovery in a manner that protects the victim's privacy; and a variety of questions related to search warrants and sentencing.

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[19] *See id.*
[20] *See id.*
[21] 18 U.S.C. § 3509 (2012).
[22] FED. R. EVID. 412, 414.
[23] 18 U.S.C. § 1591(c) (2012 & Supp. 2015).

IV. Conclusion

As discussed above, HTPU and CEOS share the common goal of working with USAOs, law enforcement partners, NGOs, and survivors to detect trafficking crimes, protect victims, and bring traffickers to justice. Each unit brings unique, specialized, subject-matter expertise and partnerships to the Department's broader anti-trafficking efforts, and both provide significant prosecutorial experience gained from participating in cases across multiple Districts, as well as litigation support resources and specialized victim-witness expertise. In cases that implicate both HTPU's and CEOS's areas of expertise, such as those involving both adult and minor sex trafficking victims or those raising statutory interpretation issues under the TVPA, the two units coordinate directly with one another. USAOs can be assured that they can contact either office, and the two units will work together to continue to seek justice on behalf of human trafficking victims.[24]

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[24] Contact information for CEOS is available at https://www.justice.gov/criminal-ceos. HTPU can be contacted at htpu@usdoj.gov.

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Proactive Case Identification Strategies and the Challenges of Initiating Labor Trafficking Cases

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I. Introduction

Narratives and incidents of commercial sex trafficking, and particularly the commercial sexual exploitation of children, are common in public life, regularly appearing in national and local news stories, as plot points in movies and television, and on federal and local criminal court dockets—and rightly so. But only a fraction of that attention is paid to labor trafficking, or forced labor. This could be due to a general lack of awareness, limited resources, the relatively hidden nature of labor trafficking, potential underreporting of labor trafficking to law enforcement, or any other number of reasons. The U.S. State Department's 2017 Trafficking in Persons Report,[1] an annual global resource on anti-trafficking efforts, recommends that the United States increase the investigation and prosecution of labor trafficking cases and cases involving nonviolent forms of coercion. In fiscal year 2016, the Department of Justice (DOJ) initiated 241 human trafficking prosecutions. Of these, only 13 involved labor trafficking. This disparity is consistent with the low number of labor trafficking cases prosecuted, relative to sex trafficking cases, since the passage of the Trafficking Victims Protection Act of 2000 (TVPA).[2]

This landscape is not new to those who work to combat human trafficking. The call for increased attention to labor trafficking has come from leadership, legislative bodies, survivors, the victim advocate community, and others for several years. In response to that call, and a desire to investigate potential abuses of vulnerable populations, DOJ's Human Trafficking Prosecution Unit (HTPU) and many USAOs have worked with investigators to look for the labor cases, but this effort has yielded relatively few prosecutable cases compared to sex trafficking. Challenges have included allegations involving historical facts, limited or no corroboration of force or coercion, or facts that do not substantiate a human trafficking charge. In some cases, cultural and foreign language barriers may also limit the ability to identify and investigate forced labor.

The techniques involved in the investigation and prosecution of labor trafficking are often different from those involved in sex trafficking cases. To overcome the challenges attendant to those

[1] U.S. DEP'T OF STATE, OFFICE TO MONITOR & COMBAT TRAFFICKING IN PERSONS, TRAFFICKING IN PERSONS REPORT (2017).
[2] VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000, Pub. L. No. 106-386, §114, Stat. 1464, Div. A, Sec. 102 (to be codified at 22 U.S.C. § 7101(b)(1), (22)-(23) (2000)).

different techniques and available evidence, new and innovative strategies must be used to identify and prosecute more labor trafficking cases.

II. Traditional Approaches to Sex and Labor Trafficking Investigations

As a general matter, the approaches to finding and investigating sex trafficking and labor trafficking cases differ. The traditional approach for conducting sex trafficking investigations is to work in a task force model, engaging partners already working on law enforcement within the commercial sex industry. These task forces regularly perform operations targeting both sex buyers and sex sellers within the industry. Using a trauma-informed, victim-centered approach, task forces provide services and work to build rapport and identify if those in prostitution are minors, and if, or if, others are using force, fraud, or coercion to cause them to engage in commercial sex acts. Other task forces perform physical and electronic surveillance, use historical data on the commercial sex industry in their area, perform financial investigations, and conduct outreach to groups and individuals who potentially will come in contact with sex workers or children engaged in commercial sex acts.

The traditional approach to labor trafficking cases typically has been much more reactive. Successful cases are more often the result of victims or survivors who have the ability and courage to report abuses to law enforcement on their own, or of reports made on their behalf by an "outcry" witness, like a victim advocate, such as an immigration attorney, a member of the victim's community, or another third party. Many of the techniques used to target trafficking in the commercial sex industry do not work in labor trafficking. For example, forced labor is not advertised online in an obvious, illicit manner, as is very often the case with prostitution. Additionally, most of the work where forced labor might exist is, as a general matter, lawful. There are many other obstacles to reporting, such as insulated communities, language barriers, mistrust of law enforcement, and fear of immigration consequences, as well as work that simply is not public-facing in nature. Thus, it can be perceived as difficult to investigate labor industries for human trafficking.

III. Where to Look and with Whom to Partner

Finding potential forced labor starts with some basic questions. Task forces trying to identify potential labor trafficking cases should first perform an assessment to identify potential locations, industries, and categories of victims that are susceptible to this type of trafficking. To this end, task forces should ask a series of questions. For example, what industries in our area of responsibility or district have the most labor-intensive, unsafe, and unstable jobs? Which locations have a history of labor, immigration, or safety violations? What are the most insular, isolated, impoverished, and transient local communities in our area, and are they generally associated with certain types of work or locations? Are groups of vulnerable individuals concentrated in specific jobs, industries, or work sites?

Most human trafficking task forces, or other agencies wanting to add forced labor to their dockets, do not possess or have ready access to the answers to these questions. To work toward answers, task forces should bring the right partners to the table beyond the most readily apparent federal, state, and local law enforcement partners.

Many of these partners are already within the federal government. For example, the U.S. Department of Labor's Office of the Inspector General (DOL-OIG) and Wage and Hour Division (DOL-WHD) are essential partners that have technical and practical knowledge related to, among other things: common labor abuses in specific industries (home healthcare, agriculture, etc.); regionally prevalent labor-related problems; the use of labor contractors to recruit, transport, and manage workers; and the use and abuse of specific work-related visas, such as H-2A and H-2B visas, to bring foreign workers into the United States. Similarly, the U.S. State Department's Diplomatic Security Service (DS) is an invaluable partner in understanding the working and living conditions in foreign workers' home countries. They

originate and know the types of visas and visa fraud schemes that can be used to bring workers into the United States. Other agencies, like U.S. Citizenship and Immigration Services (USCIS), U.S. Equal Employment Opportunity Commission (EEOC), the U.S. Department of Agriculture's Office of Inspector General, and the Occupational Safety and Health Administration (OSHA), are also valuable in identifying human trafficking and providing insights into the way individuals enter the country and perform work in a given industry.

Beyond the federal government, there are myriad state and local agencies that enforce labor laws, regulate workplaces, or observe workplaces that may be able to partner or consult with a task force. Task forces should consider reaching out to state and local departments, including those that regulate labor, industrial relations, workplace safety, environmental management, fair housing and employment, workplace safety, employment development, and business taxation, to name a few. They go by various names and may regulate different aspects of labor markets, depending on the state. Many state and local agencies already have their own anti-trafficking or anti-exploitation initiatives in place and can be a source of information and a force-multiplier in identifying potential forced labor. In addition, inspectors and regulators with these types of agencies may have an opportunity to observe specific industries and how work is done in them (fire marshals, code inspectors, health inspectors, etc.). Partnering with, or at a minimum, training these inspectors and regulators can lead to increased understanding of industries and referrals and provide them with the tools to identify human trafficking indicators and potential forced labor cases.

As in the sex trafficking context, tasks forces and investigators should also consider reaching out to first responders and healthcare workers. For example, firefighters, paramedics/EMTs, and county health clinic and emergency room personnel might have occasion to observe workplace injuries, persistent injuries, and other indicators of force or coercion that support a labor trafficking investigation. They might also have practical information about regional industries and recurring health issues in those industries.

Because potential labor trafficking victims often do not self-identify as victims and are often fearful of reporting abuses to law enforcement directly, prosecutors, investigators, and task forces should consider identifying non-governmental organizations that work with vulnerable communities and whose work with these communities place them in a position to observe and report potentially exploitative activity. Non-governmental organizations (NGOs) who provide direct services to trafficking victims, refugees, asylum seekers, and other immigrants are vital. NGOs that serve farm workers or other information sector workers, and unions and other formal and informal worker associations, may also have important insights and information about potential cases. Immigration, labor advocacy, and other specialty attorneys who have clients who may be victims of labor trafficking will also have specific knowledge and contacts needed by the task force. NGOs working in the human trafficking space, and especially those working with foreign nationals, often have a human trafficking service coordinator already knowledgeable about labor trafficking. Task forces can build bridges between law enforcement and these NGOs through, for example, joint participation in the task force, joint trainings with law enforcement and others, and participation in grant-funded activities, such as the U.S. Department of Health and Human Services' (DHHS) funded Rescue & Restore Victims of Human Trafficking campaign, which seeks to identify and serve potential victims of trafficking.

The list of potential task force partners is only limited by the types of industries in a given district and the agencies and people that interact with them. Finding the right mix of partners and consulting sources can take time, but building a network of interested and informed partners can yield increased and timely referrals.

IV. Vulnerable Populations

While all populations can be susceptible to labor trafficking under the right conditions, certain categories of vulnerable populations have specific vulnerabilities that make them more susceptible to traffickers. An understanding of a population's needs, fears, and other vulnerabilities, and the traffickers' exploitation of them, is needed to engage and build trust within those communities and identify additional partners who can assist.

Undocumented workers can be especially vulnerable to labor trafficking. Traffickers and exploitative employers use workers' lack of immigration status, threats of immigration and criminal enforcement, and false threats of what might happen to workers in the world outside of the trafficking relationship, to control them. Additionally, foreign national victims might already have a mistrust of law enforcement given their own prior dealings with abusive law enforcement in their country of origin. Because of these potential fears, as well as possible unfamiliarity with English and broader American culture, it may become critical to engage with NGO-type partners who can act as trusted intermediaries with potential undocumented victims to encourage victims to report and to arrange law enforcement interviews. Unfortunately, involvement of an NGO is no guarantee that potential trafficking will be reported to law enforcement, but NGOs can assist vulnerable persons in understanding their rights and own potential victimization, achieving stabilization, and, hopefully, promptly reporting exploitive employers to law enforcement.

Guest workers and others lawfully in the United States through a visa program face many of the same vulnerabilities as the undocumented population. Guest worker's visas are not "portable," i.e. they require working for one designated employer, so they may also have fears about immigration enforcement if they leave an undesirable work situation. These populations can include, for example, non-immigrants on H-2A seasonal agricultural worker visas or H-2B temporary non-agriculture visas used to bring in workers for a specific employer for a specific time period. These workers may have been recruited under a set of fraudulent promises or agreements and then exploited during their travel to, and work in, the United States. In addition, many do not have an accurate understanding of their rights while working in the United States. The different rules and regulations governing the various visa programs for guest workers (H1A, H2B, J1, etc.) and those related to tourists, students, and others (B1/B2, F1, etc.) are complex and require partners who work with these programs on a daily basis. Both governmental and non-governmental partners with expertise about this population, while abroad and in the United States—such as DS, DOL-OIG, and certain NGOs—are vital to the investigation and prosecution of labor trafficking of this population.

A subset of this group are nonimmigrant domestic workers employed by diplomats, military officials, and other foreign governments in the United States on a temporary basis (A3, G5, etc.). These cases involving diplomats and other foreign government officials are highly sensitive and require specific expertise. Task forces with potential cases involving this population should immediately consult with the DOJ Human Trafficking Prosecution Unit, which can offer guidance and help coordinate with the Department of State when necessary.

Recent reports of labor trafficking involving refugees, asylum seekers, and unaccompanied minors show many similar vulnerabilities to those of the undocumented and guest worker populations. The power dynamics experienced by these population and the dependence on others make these populations vulnerable to labor trafficking. The Department of Health and Human Services' Administration for Children and Families regional staff should be added to task forces, or consulted in a given investigation, for their knowledge and relationships with these populations.[3] Last, task forces

[3] *See* 22 U.S.C. § 7105 (2016) (The TVPA requires federal, state, or local officials to notify HHS within 24 hours after discovering credible evidence that a foreign national child under the age of 18 is a victim of sex or labor trafficking).

should also engage those investigating the fraud and theft of social benefits that these populations may be eligible to receive, as recent reports indicate that theft and fraud surrounding these specific benefits are commonly coincident with labor trafficking.

Another population to remember when identifying labor trafficking cases is workers living with a disability. One landmark human trafficking case, which led to current statutes and case law, involved the trafficking of this population.[4] People living with a physical or cognitive disability inherently have a dependency on others in their life in some way. This role is normally held by family members, professional caregivers, and others who do this work and, thankfully, have a sense of devotion as part of their profession. Unfortunately, others see this type of relationship as an opportunity to control another person for their own financial benefit. Investigators who work on health care and similar types of fraud should be engaged in looking for trafficking among this population. Task forces should engage members of the National Disability Rights Network and other similar organizations that work with, advocate for, and serve this population, in order to draw on their expertise and long-standing relationships among this group.

These examples of vulnerable populations are not all inclusive, and other specific populations (runaway/homeless youth, people living with drug dependencies, tribal members, etc.) should be identified and engaged within each task force's area of responsibility.

V. Targeted Outreach

As described above, one of the key ways to find additional labor trafficking referrals is to raise the awareness to others. However, the first outreach to be done is internal. This should begin with those in the organization already working on investigations and prosecutions and who have an opportunity to observe labor trafficking. Given the potential breadth of contexts in which forced labor can occur, this "inreach" should include, among others, those investigating or prosecuting gangs, organized crime, drug trafficking, healthcare fraud, environmental crimes, Indian country cases, and national security and financial crimes. And despite the existence of strong anti-trafficking statutes in some states, training state and local law enforcement patrol officers and detectives is crucial because not all officers have had specific labor trafficking training. In addition, professional staff who do outreach to the community (Law Enforcement Coordinating Committee Chiefs (LECCs), Community Outreach Specialists, Victim-Witness Coordinators, etc.) should also be provided with, or be part of, awareness training.

We should also be incorporating human trafficking education as part of other DOJ/USAO initiatives that foster outreach to specific communities (tribal, Arab-Muslim, refugee, LGBTQ, etc.). Other partners in your organization can use their existing relationships and networks to raise awareness and to provide additional avenues for reporting potential labor trafficking cases. For example, if your district conducts civil rights/hate crimes outreach, include awareness training on labor trafficking. Groups interested in more commonly discussed civil rights issues, such as bias-motivated crimes, will also typically be interested in learning more about forced labor once they have been introduced to the issue.

Think creatively in crafting outreach initiatives, and consider direct outreach to potentially vulnerable populations. For example, some states house migrant workers lawfully in the United States for seasonal work, and housing authorities may be amenable to a visit from an AUSA or investigator to talk about labor exploitation and trafficking. Consider contacting foreign consulates in the district, as those consulates are charged with protecting their nationals who are in the United States and have an interest in preventing labor abuses. Consulates may also be able to foster direct outreach to vulnerable populations or those who interact with such populations.

Most task forces have a limited bandwidth with which to do their own outreach to the community at large or to specific organizations, so this work should be targeted and organized to yield the best

[4] United States v. Kozminski, 487 U.S. 931 (1988).

results. In examining who the right partners are, and evaluating the industries and populations vulnerable to trafficking, task forces should identify those governmental and non-governmental organizations with the greatest opportunity to observe potential trafficking; the groups and agencies identified above provide a starting place for this identification process. Leadership of these organizations should be engaged to schedule training sessions for their staff. If they are willing and able, workers themselves, and formal and informal workers' associations and other types of grassroots associations, will be able to design the best outreach strategies into their own communities. If they have been identified, survivors of human trafficking in relevant industries or geographic areas may be a resource as well.

In addition to providing awareness training to organizations and agencies, trainers should suggest that the organizations also establish protocols to report potential trafficking when observed, as well as procedures to direct their members to make such reports. Many prosecutors and investigators who do this training and outreach ask attendees to call them directly with tips they may receive in the future. This works well in many cases because referrals are made directly to an investigator or prosecutor with experience and a knowledge of the referring party's opportunity to observe the conduct. However, the changing of task force personnel through promotions, retirements, transfers, role changes, and other attrition does not always allow the presenter to be available to receive the referral in the future. Other task forces have considered encouraging attendees to use the National Human Trafficking hotline, as it is available 24 hours, 7 days a week, is available by phone and text message (1-888-373-7888 or text 233733 (BEFREE)), can take calls in approximately 200 languages, and the tip can be referred to the appropriate task force.[5]

Finally, when conducting outreach, consider the positive impact of providing repeated training or refresher trainings and providing feedback to tipsters after an investigation/prosecution. While maintaining confidentiality requirements during an investigation/prosecution, task force members should consider keeping the referring party informed when possible and in an appropriate manner. This will lead to more substantive referrals in the future, while not taking this step may discourage future referrals from this source and others from the same organization.

VI. Leveraging Data and Intelligence

Traditionally, task forces have utilized existing relationships, new partnerships, and targeted outreach to identify persons and populations susceptible to forced labor. Building this network of informed eyes and ears in various communities and industries has been effective in learning more about specific vulnerabilities. However, it has only led to reactive—even if more timely—labor trafficking cases.

To develop purely proactive investigations, task forces should consider leveraging existing data sources to perform intelligence analysis of potential labor trafficking cases in their area of responsibility. This analysis can include assessments of various types of data, such as previously issued visas and prior investigations into visa abuses, debarment lists, prior safety or labor/wage violations and investigations, civil complaints and administrative actions against employers and labor contractors, and financial records and reporting. Accessing and comparing some of this data will require selecting partners who have access to it, while other data are open-source on various government and other web sites (U.S. DOL, U.S. State Department, USCIS, etc.).

Threat assessments should be performed among partners, using all available data to identify the industries in their area with a likelihood of labor trafficking occurring, and to locate high concentrations of vulnerable workers. Last, look at past exploitative practices (debt bondage, quotas, wage kickbacks, restricted access to earnings and/or documents, changing housing costs, safety violations, etc.) which have the potential to create a coercive environment for workers. These assessments will either give task

[5] NATIONAL HUMAN TRAFFICKING HOTLINE, https://polarisproject.org/national-human-trafficking-hotline (last visited September 18, 2017).

forces a path to develop specific cases or guide their continued outreach and source development efforts. Steps to develop cases, once targets are identified, are outside the scope of this article, but agents and prosecutors are encouraged to contact the HTPU for support.

In addition, task forces should engage the intelligence analysts and others in their districts who have existing resources and tradecraft utilized in the investigation and prosecution of organized crime, drug trafficking, and national security and other similar cases. These skills and resources should be utilized once the available data sources are identified and intelligence personnel are trained on the signs of labor trafficking. These additional efforts can make threat assessments and follow-up investigations more thorough, which will result in the identification of more potential cases as well as successful prosecutions.

VII. Conclusion

Proactive techniques are needed to find more and better labor trafficking cases. Each task force needs a concerted strategy to identify potential trafficking in its area of responsibility. This can be accomplished by educating your team and your partners; ensuring the right partners are at the table; adapting traditional case identification strategies to the human trafficking context; looking outside of traditional channels; leveraging data and intelligence; and conducting effective threat assessments through sector-specific strategies of targeting and focused outreach.

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Domestic Child Sex Trafficking and Children Missing from Care

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I. Introduction

Predators who exploit children through the buying or selling of sex frequently target children who have a history of childhood abuse, disconnected families, and/or a history of running away from home. Because children within the care of child welfare agencies often have such histories, they are particularly vulnerable to sex traffickers, buyers, and others who target and take advantage of the emotional and physical needs of these children.

One in six of the runaways reported missing to the National Center for Missing and Exploited Children (NCMEC) in 2016 were "likely victims of child sex trafficking."[1] Of those, 86 percent were in the care of social services when they went missing. Recognizing that a child who goes missing from the care of a child welfare agency becomes even more vulnerable to becoming a sex trafficking victim or could be missing from care as a result of being sex trafficked, Congress recently enacted two pieces of legislation aimed at strengthening protections for at-risk children. In September 2014, the Preventing Sex Trafficking and Strengthening Families Act was enacted, and the Bringing Missing Children Home Act was enacted in May of the following year. Both of these laws are designed, in part, to bolster the ability of law enforcement and the NCMEC to respond to instances in which children in care go missing.

II. The Recent Legislation

The Preventing Sex Trafficking and Strengthening Families Act requires that state social service agencies report to NCMEC and law enforcement, within twenty-four hours, any child under their care

[1] Identification as a "likely victim of child sex trafficking" means that NCMEC received specific case information indicating sex trafficking victimization of the child. The data does not reflect an extrapolation to develop the trend but, instead, reflects the actual trend based on specific information reported to NCMEC in each missing child case. From intake and first notification that a child in care is missing and until that child is recovered, NCMEC remains in contact with the child's legal guardian (parent, family member, or social worker) and law enforcement to provide resources to help safely locate the missing child. It is through the provision of these resources that information on a case-by-case basis about likely victimization of child sex trafficking is obtained. That data revealed the alarming trend of runaways from care who are likely being exploited through child sex trafficking and has prompted a closer analysis of NCMEC data.

who goes missing or is abducted.[2] States were given two years to fully implement the law's reporting requirement.

The Bringing Missing Children Home Act, a part of the Justice for Victims of Trafficking Act of 2015, amended federal law regarding state reporting requirements concerning missing children.[3] Among other improvements related to record-keeping, this legislation aimed to improve the law enforcement response to reports received concerning missing foster children, and law enforcement coordination with NCMEC and social service agencies when a child has gone missing from state care.

As this article will describe, the ongoing implementation of these important laws is already helping to close the reporting gaps in children missing from care and is providing crucial data on the true scope of the number of children missing from care and the proportion of those children who are "likely victims of child sex trafficking."

III. Analysis of the Data

Since the passage of the Preventing Sex Trafficking and Strengthening Families Act in September 2014, NCMEC has seen a dramatic rise in the number of reports it has received involving children missing from care. Based on internal analysis, NCMEC has already experienced a 167 percent increase in reports received concerning children missing from care over a four-year time span (October 1, 2012 through September 30, 2016).[4] This increase in reporting has allowed for a more thorough analysis of who these children are, how long they are missing, and the dangers they face. Awareness of these trends will help child welfare professionals, prosecutors, and law enforcement agents as they evaluate and respond to the increased number of cases being reported.

NCMEC has always offered resources when a child in care goes missing, but it is instructive to look at how trends have changed or grown since these legal reporting requirements were implemented. Significantly, over the four-year time span of October 1, 2012 through September 30, 2016:

- There were 30,051 children reported to NCMEC as missing from care. More than 90 percent were runaways, a category of children who frequently have one or more endangerments or factors—such as their age, a history of alcohol or drug use, or a gang affiliation—that could make them particularly vulnerable to traffickers or other predators.
- African-American children were reported to NCMEC as missing from care more often (42 percent) than any other race, and of the children reported to NCMEC as missing from care, African-American children were disproportionately represented among those who were identified as being a "likely victim of child sex trafficking."[5]
- More than 60 percent of the children who were reported to NCMEC as missing from care during the four-year time span were female. However, only 48 percent of all children in foster care are female.[6] Female children missing from care were significantly more likely to be identified as a "likely victim of child sex trafficking" than male children missing from care.

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[2] Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183 (2014) (amending 42 U.S.C. § 671(a)(34)(A) (2012 & Supp. III 2015)).
[3] Bringing Missing Children Home Act, Pub. L. No. 114-22 (2015) (amending 42 U.S.C. § 5780 (2012 & Supp. III 2015)).
[4] John F. Clark, T*he Scope of Children Missing From Care Coming Into Focus*, OFFICE OF JUSTICE PROGRAMS (May 25, 2017) https://www.ojpdiagnosticcenter.org/blog/scope-children-missing-care-coming-focus
[5] U.S. DEP'T HEALTH AND HUM. SERVICES, CHILD. BUREAU, THE AFCARS REPORT (2016) (showing that in the last fiscal year—October 1, 2015, through September 30, 2016—Caucasian children made up the majority of children in the foster care system).
[6] *Id.* at 1.

- Children missing from care reported to NCMEC ranged in age from twelve to seventeen. In each of the four years analyzed, the most common ages of a child reported as being missing from care were sixteen and seventeen years of age. The most common age range when children who were identified as a "likely victim of child sex trafficking" went missing was fourteen to seventeen years of age.
- Twelve of the children who went missing while in care were deceased when they were found.

As the statistics described above demonstrate, children who go missing from the care of a child welfare agency are particularly vulnerable to becoming trafficking victims. It is therefore critical that all available resources be brought to bear to expeditiously locate and recover a child who goes missing from care.

IV. The Role of NCMEC

Established in 1984 as a private, nonprofit 501(c)(3) organization, NCMEC is the national resource center and information clearinghouse on all issues relating to missing and exploited children.[7] Since its establishment, NCMEC has assisted law enforcement and families in the recovery of more than 243,000 children.[8] NCMEC's mission is to help find missing children and reduce child sexual exploitation, including child sex trafficking. To further this mission, NCMEC provides free support, information, and technical assistance to families, law enforcement agents, prosecutors, and child-serving professionals to help identify, locate, recover, and support missing and exploited children.[9] Among the resources it dedicates to victims of child sex trafficking, NCMEC provides analysis, technical assistance, victim support services, and case management to help recover victims and stop individuals involved in trafficking children in an effort to prevent future victimization.[10]

When a child goes missing, NCMEC provides critical support to the search efforts of law enforcement in the jurisdiction where the child went missing and broadens the safety net for recovery beyond that single jurisdiction. The reality is that missing children do not always remain within the jurisdiction from which they originally go missing. This is especially true in cases of children who are exploited by sex traffickers. In these situations, traffickers may move their victims from city to city or even across state lines to evade detection by law enforcement. NCMEC's analytical assistance can greatly help law enforcement in identifying information that could indicate travel or movement of the child outside of the missing location. Subsequently, NCMEC can help connect and align the law enforcement resources in any other relevant jurisdictions through the law enforcement points of contact that NCMEC has established in every state to work specifically on child recovery. NCMEC provides a unique ability to connect information on potential victims and offenders in multiple states or locations by leveraging the information it has available in its internal missing child case report records and its CyberTipline® reports, both of which are discussed further below. Since traffickers can be transient, this link analysis resource can help connect information about both potential victims and offenders to other ongoing cases, as well as other missing children. NCMEC is also able to conduct deconfliction queries to assist law enforcement who may be working the same case in different jurisdictions.

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[7] *About Us*, NAT'L CTR. FOR MISSING AND EXPLOITED CHILDREN, http://www.missingkids.com/footer/aboutus (last visited August 11, 2017). (hereinafter About Us)
[8] *Key Facts*, NAT'L CTR. FOR MISSING AND EXPLOITED CHILDREN, http://www.missingkids.com/footer/keyfacts (last visited August 11, 2017).
[9] *About Us*, *supra* note 7.
[10] *Child Sex Trafficking*, NAT'L CTR. FOR MISSING AND EXPLOITED CHILDREN, http://www.missingkids.com/theissues/cse (last visited August 11, 2017).

As a clearinghouse, NCMEC securely maintains case records of all missing child reports it has received, even after a case is resolved. These records include information on the child, details of the missing incident, recovery information, updates, important medical needs, endangerments, and physical descriptors—including photos. These records, or historical profiles, are reviewed and updated each time the child is reported missing to NCMEC. The ongoing maintenance of this information by NCMEC can greatly assist in the recovery of children because the information is made readily available to law enforcement and prosecutors. In the case of a child missing from care, the historical information can be especially valuable, particularly when the child has run away multiple times.

To further its mission, NCMEC operates the CyberTipline®, the national reporting mechanism for the public and electronic service providers to report instances of suspected child sexual exploitation.[11] Since its inception, the CyberTipline® has received more than 58,000 reports regarding possible child sex trafficking. NCMEC staff utilize their specialized skills and ability to access multiple donated, public records databases to add information and value to the CyberTipline® reports, which are made available to law enforcement for their independent review. All CyberTipline® reports are archived and searched against incoming missing child reports to see if connections can be made between online child victimization and a missing child.

In child sex trafficking cases, the assistance NCMEC can render to law enforcement includes linking analysis about child sex trafficking victims or potential victims and providing information related to specific individuals' names, aliases, unique tattoos, telephone numbers, addresses, or online postings. By accessing and querying publicly available databases and records, NCMEC can provide biographical reports about potential traffickers and child victims that include timeline and mapping resources, such as potential travel patterns and historical information related to an individual.

Planning for the recovery of a child sex trafficking victim is crucial to stabilizing the child. Child sex trafficking recoveries can be complex due to potential factors such as a child's abuse history, trauma bonds with an abuser or /trafficker, and involvement with multiple systems such as social and juvenile services. NCMEC can assist with system advocacy, such as within the child welfare and juvenile justice systems, in situations when the trafficked child does not have a family to return to following recovery. NCMEC also helps families, law enforcement, and social service agencies by providing a support network for child victims, including referrals for specialized victim services and resources after the child is recovered.

V. Conclusion

It is the responsibility of all agencies and organizations dedicated to protecting children to expand conversations that connect systems in an effort to eliminate barriers and streamline responses when a child is missing or being exploited. The failure to communicate or share information that could lead to the protection and recovery of a child, or could identify a child as a victim, creates a gap that allows sex traffickers and their associates to more easily target and exploit our nation's most vulnerable persons.

Increased reporting of children missing from care is providing NCMEC a better ability to assist families and law enforcement in missing child cases and to support prosecutors' efforts to build strong cases against individuals involved in sex trafficking children, which helps prevent future victimization. The additional data provided through increased reporting has also made it easier to identify trends and,

[11] *CyberTipline*, NAT'L CTR. FOR MISSING AND EXPLOITED CHILDREN (last visited August 11, 2017).

thereby, provide a broader safety net to craft prevention, education, and safety materials and to improve the nation's response to missing and exploited children.

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The Survivor-Centered, Trauma-Informed Approach

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I. Introduction

Cases involving human trafficking are among the most challenging that law enforcement agents will encounter because of the complex effects traumatization has on the victims who will serve as witnesses. Sex and labor trafficking victims commonly experience a panoply of neurological, biological, psychological, and social effects that require unique interventions. This article will discuss the various strategies law enforcement officers (LEOs) should use to successfully stabilize victims, gain their trust, and secure their effective cooperation in investigations and prosecutions. Survivor-centered, trauma-informed law enforcement interviews and investigations will be emphasized in order to foster effective collaboration among law enforcement victim assistance specialists and non-governmental organization (NGO) victim advocates.

II. The Hidden Crime and Its Effects on the Victims

Human trafficking—compelling another person's labor, services, or commercial sex acts, or exploiting a minor for commercial sex—is often referred to as a hidden crime, and measuring its prevalence is extremely difficult precisely because of its often invisible nature.[1] Traffickers employ a mix of force, fraud, and coercion to exert control over their victims.

Human trafficking remains mostly hidden as victims seldom come forward because of language barriers, fear of those trafficking them, or reluctance to become involved with the criminal justice system. Traffickers identify people who display psychological or emotional vulnerability, economic hardship, or a lack of a social safety net. These include people with substance abuse issues, acute financial problems, and uncertain immigration statuses. Traffickers employ a mix of force, fraud, and coercion to entrap their victims. Traffickers later amplify these techniques to assure that their victims will be unable or unwilling to leave. As a result of the elaborate network of abuse, the trauma experienced by victims often renders them unable to identify themselves as victims or ask for help.

[1] Wendy Macias-Konstantopoulos, *Human Trafficking: The Role of Medicine in Interrupting the Cycle of Abuse and Violence*, 165 ANNALS OF INTERNAL MED., Aug. 2016, 582–88.

While the participation of these victims is essential to the mounting of any credible prosecution, the trauma they have experienced can greatly complicate their involvement in the legal process. Like most people who experience traumatic events, victims of human trafficking suffer significant alterations to their brain chemistry and functioning. The amygdala, hippocampus, and prefrontal cortex in the brain experience profound changes following the trauma associated with human trafficking.[2] Further, traumatic stress increases the levels of cortisol and norepinephrine response.[3] These changes can cause victims to suffer hyperarousal, intrusive thoughts and flashbacks, nightmares and sleep disturbances, and most importantly, changes in memory and concentration.[4] Therefore, victims are often unable to provide chronological and coherent testimony to law enforcement. The impression of inconsistency that would in other contexts indicate unreliability as a witness is a natural consequence of the trauma the trafficking victims have experienced. Further, the changes to the brain can result in extreme anxiety, fear, and mistrust. These feelings, coupled with the shame, embarrassment, or guilt for what has happened to them, can make for particularly problematic interactions with the criminal justice system. Not surprisingly, it is precisely these feelings of isolation and mistrust that the trafficker exploits to maintain a hold on the victim.

III. Trauma-Informed Interventions

It follows that, to effectively usher victims through their role in litigation, trauma-informed interventions that account for these concerns must be employed. Trauma-informed care comprises the victim-centered practices that allow the victim to begin working through the trauma while simultaneously participating in the criminal justice process. This type of intervention is essential to avoid the likely pitfalls of re-traumatization, feelings of insecurity, and withdrawal of cooperation, which can be consequences of insensitive care.

Having knowledge of the nature of trauma and its psychobiological effects, along with an awareness of what trauma-informed care is, one can build a toolbox of skills for working with a variety of trafficking victims. The urgency of a criminal case can often burden staff with an artificial timeline that encourages adherence to a schedule rather than recognition of what will best serve the victim. Staff should always endeavor to create genuine rapport and trust before attempting to engage a victim in the process. It is not always about the facts of the investigation or case, and not building rapport and trust creates the risk of re-traumatization and damage to the working relationship.

This relationship can be established in numerous ways. It is important to restore feelings of self-efficacy and control to the victims by providing them with opportunities for choice and consistency. Allowing them to meet with an agent whose gender puts the victim at ease, or allowing them to select the location for meetings, greatly empowers victims. Also, to the extent possible, minimize unexpected changes in meeting times or locations. It is most important to demonstrate honesty and respect.

The nature and location of the victim interview is vital to the success of any agent-victim relationship. The agent's attitude and behavior during the interview are critical. It is essential to monitor your own comportment to guard against actions that can be interpreted as biased or judgmental. Remain honest and respectful, and strive to honor all commitments. A familiarity with and keen attention to the meaning of both verbal and nonverbal cues are also essential. Crossed arms, lack of eye contact, and changes in facial expression can all indicate shifts in victim comfort during the interview. Also, consider the location and timing of the interview. Victims will respond differently in different environments and are unlikely to be as forthright if the timing does not feel right or if they feel someone is watching or listening. For children younger than twelve, a Children's Advocacy Center (CAC) is an excellent

[2] *Id.*
[3] *Id.*
[4] *Id. See also* Vedat Sar & Erdinc Ozturk*, What Is Trauma and Dissociation?*, 4 J. OF TRAUMA PRACTICE*,* 7, 7-9 (2006).

resource. CACs were created specifically to be a neutral, non-intimidating, child-appropriate environment that can help reduce the stress of the child. Further, CACs boast of expertly trained child interview specialists and can assist victims' families in obtaining medical, mental health, and advocacy services. For older children and adults, a private yet informal office setting provides an excellent environment with few distractions. An environment that allows the victim to feel safe, relaxed, and comfortable is indispensable for gaining cooperation and trust.

It bears mentioning that these feelings of safety and comfort can be compromised if the victim has any immediate needs that have not been met. Finding secure housing and reliable transportation can provide a base from which to build a sincere connection and confidence with a victim. Assuring that they have eaten recently, have no outstanding medical concerns, and have sufficient and comfortable clothing is of utmost importance. Ensure that both children and adults have had ample rest prior to the interview.

Of equal importance to the comfort of the victim is the structure of the interview and how questions are posed. It is crucial to make the distinction between an interview and an interrogation. While an interrogation is often adversarial, an interview is yet another opportunity to build rapport and trust with the victim. Forensic interviewing is designed with children in mind, yet it can be used with a wide variety of victims. It is a structured conversation meant to elicit detailed information about specific events the victim has experienced or witnessed. Questions should be open-ended, allowing for a narrative response. Open-ended questions are those that require elaboration and cannot be answered with a "yes" or "no" response. The responses to these questions can be further expanded with phrases such as, "can you describe what happened next?" or, "please tell me more about that." Inevitably, some victims will not respond freely using these techniques. The urge to force the conversation should be suppressed. Instead, shift from open-ended questions to those that offer a choice, such as, "was it blue, red, or some other color?" Allowing the victims latitude in how they answer questions can only enhance their sense of control and feelings of efficacy.

It is likely that the above will serve to enrich the relationship between the agent and the victim. It then becomes important for the agent and prosecutor to maintain that trust and cooperation until the trial. It is necessary not only that the agent, but also the Victim Assistance Specialist (VAS), as well as the United States Attorney's Office (USAO), establish a positive professional relationship with the victim. The VAS can maintain contact with the victim and their family to assure that they are receiving the appropriate services and assistance or to provide additional referrals as necessary. They can facilitate meetings with the agent or prosecutor, coordinate trial preparation, such as court school or travel logistics, and provide a consistent point of contact between staff and the victim. This consistency enriches the relationship and increases the likelihood of continued cooperation.

Also important to victims' comfort and continued cooperation is their awareness of the roles LEOs, victim specialists, NGOs, or community-based victim advocates will play in criminal cases. When victims are identified in a criminal case, they will often encounter any number of people in these positions. The difference between positions can best be described in terms of the specialist's interaction with the identified victim and how the specialist is obligated to navigate the confidentiality of the victim's story.[5]

Housed in an investigative agency or prosecution office, an LEO victim specialist works in conjunction with the investigation and prosecution of a criminal case. The LEO specialist identifies and refers a victim to appropriate services and organizations, such as an NGO, to assist in the stabilization and support of a victim. An important element of the relationship between LEO victim specialists—including the United States Attorney's Office—and victims is that there is no confidentiality. Any resources, referrals, and information that LEOs obtain from victims are subject to disclosure during the prosecution of a criminal case. Many victims that LEO specialists assist may feel encumbered by this, and it may limit

[5] *See* CTR. FOR SEX OFFENDER MGMT., COMPARING COMMUNITY-BASED AND SYSTEM-BASED ADVOCATES (2000).

their ability to seek the full extent of services that the victims need in order to successfully leave their situation. Nevertheless, LEO victim specialists are able to assist victims in navigating the criminal justice system and informing them of their statutory rights under the Crime Victims' Rights Act.[6] It is most often the LEO victim specialists that are tasked with identifying and addressing the victim-survivor's immediate needs mentioned above. As such, the LEO victim specialist is indispensable to ensuring that victims will be able and willing to assist with the investigation and prosecution.

In contrast, NGO victim advocates provide direct services and make referrals, including housing, emotional support, case management, and documentation. The NGO advocate, unlike the LEO, has confidentiality with victims. This allows victims the ability to fully disclose the extent of their needs and to access emotional and mental health services that they might not otherwise be willing to use if referred by a system-based victim specialist, since their conditions could be shared during a prosecution. The community-based advocate is generally prohibited from disclosing confidential information without the permission of the victim. NGO victim advocates also engage with the victim-survivors regardless of whether they are prepared or interested in participating in an investigation or prosecution of a case. The instability of victims, which may stem from housing issues, lack of proper identification, or uncertain immigration status, can often take months if not years to normalize. The role of the NGO advocate is to maintain an ongoing relationship with victim-survivors, to provide stability and support, and to interact with them on their terms and with an eye on what they are prepared for—the very definition of a victim-survivor-informed approach.

The importance of a successful collaboration between LEO specialists and NGO advocates to effectively identify and target potential victim needs is essential for the rehabilitation of the victim-survivor. Both positions provide a foundation for victim-survivors to begin to emerge and overcome their circumstances. Victims have been manipulated and psychologically abused by their traffickers, which fosters distrust with law enforcement. They have been made to feel fearful that they themselves may be in trouble, a feeling that may be exacerbated for those who have been arrested prior to their situation as a trafficking victim. Collaboration with an agency that is not law enforcement-based can make the difference in the victim's ability to sustain cooperation for the length of an investigation and prosecution.

While LEO and NGO positions differ in focus and responsibilities, the combined resources and experience they offer victims often provide the best possible scenario to facilitate the process for victim-survivors to successfully leave their trafficker and recover from the abuse. The relationships that are fostered and developed between the LEOs and NGOs are critical for survivors of human trafficking and their process.

IV. Conclusion

Victims of human trafficking are in the unenviable position of being both the objects of and participants in a highly traumatic criminal enterprise. For survivors, inherent in participation in the legal process is the requirement that they relive their ordeal, and this can present ample possibilities for re-traumatization. It is clear that while serving as a witness, it is essential that survivors receive proper assistance from qualified and well-trained staff who are aware of the psychological effects trauma will have on their participation. Law enforcement and prosecutors would be well served to become familiar with and learn to effectively use the trauma-informed techniques discussed above. Further, they should seek to form positive working relationships with LEO victim specialists and their NGO counterparts.

[6] Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771 (2012 & Supp. III 2015).

Traumatized survivors are indispensable in holding accountable the perpetrators of human trafficking, and law enforcement needs to deal sensitively with them to assure their participation.

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Chapter 77 and Beyond: Charging Strategies in Human Trafficking Cases

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I. Introduction

From violent assaults to alien smuggling, human traffickers regularly engage in wide-ranging criminal conduct to carry out their schemes. The United States Code contains countless federal statutes proscribing much of that conduct, including human trafficking offenses, interstate prostitution offenses, child pornography, immigration offenses, financial crimes, fraud offenses, violent crimes, and drug trafficking. The purpose of this article is to provide federal prosecutors with a survey and overview of some of the more common federal statutes that may apply in human trafficking cases and to offer general thoughts on when to consider charging such statutes.

II. Charging Strategies

When developing charging strategies in human trafficking cases, prosecutors should consider three overlapping and related concepts, in addition to current Department of Justice policies: 1) foundational charges, 2) complimentary charges, and 3) alternative charges.

"Foundational charges" are supporting charges that strengthen the prosecution because they typically do not require victim testimony to sustain a conviction. Human trafficking cases involve a myriad of challenges. For example, it may be difficult to gain a victim's complete and truthful cooperation for any number of reasons, such as fear of the trafficker, mistrust of law enforcement, or trauma suffered. It can take time to identify victims and elicit all relevant information, and even then, victims may later become unavailable at time of trial, placing any human trafficking charges associated with them in jeopardy. As such, foundational charges can be used in an initial indictment, allowing for the start of criminal proceedings while the investigation continues in anticipation of a superseding indictment. Foundational charges also allow for justice in the event that sex or labor trafficking charges later become unprovable. For example, in a recent prosecution, prosecutors initially charged a sex trafficker with production of child pornography in connection with a single video he recorded of himself having sex with one of his child sex trafficking victims. The investigation continued after the defendant's arrest, and additional victims were identified and interviewed, leading to a multi-count superseding indictment that

included sex trafficking. Although the victims testified at trial, had they become unavailable, the prosecutors would have still been able to proceed on the production of child pornography count and held the defendant accountable.

"Complementary charges" can be the same as foundational charges, but they serve a different purpose—they enhance the prosecution by emphasizing certain aspects of it. Complimentary charges can help frame the theory of the case, provide the full scope of the defendant's conduct, highlight evidence for the jury, and overcome potential evidentiary challenges. For example, in a recent prosecution involving a defendant who used violence and drug-involved coercion to compel several victims to prostitute, prosecutors charged the defendant with sex trafficking and maintaining a drug-controlled premise. The latter charge enabled prosecutors to provide a complete narrative at trial and to focus on the prominent role that the defendant's drug distribution played in his trafficking scheme. The drug charge also underscored the relevancy of witness testimony concerning the defendant's assault of a drug customer in front of several victims. Although such evidence would have been admissible on its own to establish the victims' fear of the defendant, the drug charge strengthened the prosecutors' arguments.

Last is the idea of "alternative charges." Alternative charges are brought when sex or labor trafficking is not readily provable but prosecution of the defendant is otherwise warranted. In some cases, evidence may exist to suggest that a defendant used force, fraud, or coercion to cause a victim to engage in labor or commercial sex, but that evidence may be otherwise insufficient to prove the allegation beyond a reasonable doubt for any number of reasons. In those situations, prosecutors should consider whether other statutes are available to hold the defendant accountable and vindicate the rights of the victim, to include obtaining restitution for the victim. For example, in a recent prosecution, two defendants used false promises to recruit a young, poor, and uneducated foreign woman to work as their domestic servant; obtained a fraudulent tourist visa for purposes of facilitating her entry into the United States; continued to harbor her after the temporary visa expired; and required her to work long hours for virtually no pay. Although there were allegations that the defendants threatened to arrest and deport the victim, there was insufficient evidence to prove forced labor charges beyond a reasonable doubt. As a result, the defendants were charged with harboring an alien for financial gain and other charges and were convicted at trial.

III. Human Trafficking Related Offenses

Chapter 77 of Title 18, United States Code, collects the federal peonage, slavery, and trafficking in persons statutes. Two of those statutes—18 U.S.C. §§ 1589 (2012) (Forced Labor) and 1591 (2012)[1] (amended 2015) (Sex Trafficking)—were enacted in October 2000 as part of the Trafficking Victims Protection Act (TVPA) and form the basis of nearly every human trafficking prosecution today.[2] Although the slavery, peonage, and involuntary servitude statutes—18 U.S.C. §§ 1581 to 1588[3] (2012)—remain in effect, they are rarely, if ever, charged today, in part because courts have construed them narrowly, and §§ 1589 and 1591 reach the same conduct and are also broader.[4] For a more in depth

[1] 18 U.S.C. §§ 1589, 1591

[2] Congress enacted the (TVPA) "to address the increasingly subtle methods of traffickers," H.R. Conf. Rep. No. 106-939 at 100-01 (2000), and in recognition that "nonviolent coercion . . . can have the same purpose and effect [as the use or threatened use of physical restraint or injury]," 22 U.S.C. § 7101(b)(13) (2012).

[3] 18 U.S.C. §§ 1581 to 1588.

[4] *See* United States v. Kozminski, 487 U.S. 931 (1988) (limiting involuntary servitude under 18 U.S.C. § 1584 (2012) to physical or legal coercion); United States v. Shackney, 333 F.2d 475, 481 n.9 (2d Cir. 1964) (explaining that peonage under 18 U.S.C. § 1581 (2012) requires proof of involuntary servitude and "the additional element that the involuntary servitude is tied to the discharge of an indebtedness").

discussion on forced labor and sex trafficking, see *Human Trafficking Statutes and Elements: The Fundamentals*, also included in this issue. [5]

As part of the TVPA, and in the intervening years, Congress enacted additional statutes penalizing a range of conduct involved in human trafficking schemes, including 18 U.S.C. §§ 1590 (2012) (Trafficking with Respect to Forced Labor), 1592 (2012) (Unlawful Conduct with Respect to Documents in Furtherance of Forced Labor), 1593A (2012) (Benefitting from Trafficking in Persons), 1594 (2012) (amended 2015) (Conspiracy and Attempt), 1596 (Extraterritorial Jurisdiction), and 1597 (2013) (Unlawful Conduct with Respect to Immigration Documents)[6], which are each discussed below. Prosecutors should familiarize themselves with these statutes at the onset of any investigation and consider them as charging options to help frame the theory of the case and highlight certain evidence for the jury, and to hold less culpable co-defendants and aiders and abettors accountable. Additionally, because these statutes are in Chapter 77, restitution is mandatory under 18 U.S.C. § 1593 (2012)[7], making them important options to consider when considering how best to resolve a case prior to indictment or trial.

Section 1590 makes it a crime to knowingly recruit, harbor, transport, provide, or obtain a person for labor or services in violation of Chapter 77. The penalty provision mirrors § 1589 and provides for a maximum sentence of twenty years' imprisonment or Life if the offense involved one of the enumerated aggravated factors. Prosecutors should be aware that the statute has not been meaningfully tested in court, and relevant case law is scarce, if not nonexistent. As a practical matter, § 1590 simply adds three verbs to § 1589: recruit, harbor, and transport. By doing so, Congress provided the means to prosecute aiders and abettors as principals. Thus, prosecutors should consider charging § 1590 where a defendant played a specific supporting role in a forced labor scheme, such as human smugglers or overseas labor recruiters who are knowing participants in the scheme. Furthermore, prosecutors may want to consider charging § 1590 when a defendant engaged in obstructive conduct. Section 1590(b) prohibits obstructing the enforcement of § 1590(a), while § 1589 is unexplainably missing a similar provision.

Sections 1592 and 1597 specifically target traffickers and their associates who prey on the vulnerabilities of immigrant victims by controlling their identification documents. Section 1592, which is commonly referred to as "document servitude," makes it a crime to knowingly destroy, conceal, remove, confiscate, or possess a person's actual or purported passport, immigration documents, or government identification documents either in the course of violating one of several statutes, including §§ 1589 and 1591, or with the intent to violate the same statutes.[8] It carries a maximum sentence of five years' imprisonment. Although the penalty is not as significant as §§ 1589 and 1591, charging document servitude can be an effective way to highlight for the jury the fact that victims are often immobilized without their documents, and losing their documents to traffickers has a real and significant impact on their ability to leave.[9] Section 1592 also has the benefit of turning certain attempts into completed crimes—for example, where the evidence establishes the defendant's intent to engage in forced labor or

[5] Hilary Axam and Jennifer Toritto Leonardo, *Human Trafficking Statutes and Elements: The Fundamentals,* U.S. ATTORNEYS BULL., Nov. 2017.
[6] 18 U.S.C. §§ 1590, 1592, 1593A (2012), 1594 (2012 amended 2015), 1596, 1597 (2013).
[7] 18 U.S.C. § 1593 (2012).
[8] *See, e.g.*, United States v. Dann, 652 F.3d 1160, 1173-74 (9th Cir. 2011) (affirming conviction of defendant who "possessed" victim's passport and noting that § 1592 does not require that "the defendant lock it up").
[9] *See* United States v. Farrell, 563 F.3d 364, 375-77 (8th Cir. 2009) (recognizing that the victims "needed their passports and immigration documentation to leave the country," and "[r]ealistically, without these documents, the workers were required to remain in the command, if not the employment, of the [defendants]").

sex trafficking, and the defendant takes the substantial step towards committing the crime by confiscating the victim's passport but does not complete the crime.[10]

On May 7, 2013, Congress enacted § 1597 to address similar situations where defendants withhold passports or immigration documents in furtherance of 18 U.S.C. § 1351 (2013) (Fraud in Foreign Labor Contracting) and 8 U.S.C. § 1324 (Alien Harboring and Smuggling). Unlike § 1592, it is only a misdemeanor, but it may be appropriate to charge in certain circumstances or to resolve some cases, depending on the circumstances.[11] As with § 1590, both §§ 1592 and 1597 also contain obstruction provisions.

Section 1593A applies to defendants who benefit from participating in ventures that engage in document servitude in violation of § 1592. Like § 1592, it carries a maximum sentence of five years' imprisonment. Although the statute also cites §§ 1581 (Peonage) and 1595 (Civil Remedy), peonage is not regularly charged today as previously noted, and inclusion of a civil remedy is believed to be a drafting mistake. Section 1593A may be appropriate to charge in some circumstances, but those situations are likely rare since both §§ 1589 and 1591 include identical benefiting provisions and carry higher penalties. In some instances, § 1593A may be used to resolve a case pre-indictment or pre-trial and obtain restitution.[12]

Section 1594 contains the statute specific attempt and conspiracy provisions. Notably, the attempt provision does not apply to unlawful conduct with respect to documents or benefiting from such conduct in violation of §§ 1592, 1593A, and 1597. An attempted violation of §§ 1589, 1590, and 1591 is sentenced in the same manner as a completed violation.

With respect to the § 1594 conspiracy provisions, proof of an overt act is not required, though prosecutors should consider whether it is helpful to allege overt acts in each case.[13] Prosecutors should also be aware of the conspiracy date range when alleging the § 1594 conspiracy provisions, since they did not become law until December 23, 2008. The more time passes, the less the enactment date is likely to be an issue, but prosecutors may still encounter conspiracies that started before December 23, 2008, and continued within the statute of limitations period. In those instances, prosecutors should consider either alleging the entire date range and request a special instruction requiring the jury to find that the conspiracy continued after the enactment date, or begin the conspiracy on or after the enactment date.

Relatedly, there appears to be a gap in the law concerning the statute of limitations for conspiracy to commit sex trafficking. Generally, charges must be brought within five years of the commission of an offense, "[e]xcept as otherwise expressly provided by law."[14] In July 2006, Congress eliminated the statute of limitations for "any offense . . . under section 1591."[15] However, Congress did not appear to do the same for sex trafficking conspiracies.[16] In cases involving the sex trafficking of children, the issue may be resolved by 18 U.S.C. § 3283[17], which allows for offenses "involving the sexual or physical

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[10] United States v. Sabhnani, 599 F.3d 215, 245 (2d Cir. 2010) (rejecting notion that § 1592 is "merely 'derivative' of . . . [the crime of] forced labor" because withholding documents "merely 'with the intent to violate' the forced labor . . . statute" is sufficient to convict).

[11] *See, e.g.*, https://www.justice.gov/usao-sdca/pr/local-couple-pays-over-18000-worker-held-unlawfully-their-home.

[12] *See, e.g.*, https://www.justice.gov/opa/pr/louisiana-motel-owner-pleads-guilty-sex-trafficking-case.

[13] *See* United States v. Shabani, 513 U.S. 10 (1994) (holding that the government does not have to prove the commission of an overt act where Congress did not expressly make it an element of the offense); Whitfield v. United States, 543 U.S. 209 (2005) (same).

[14] 18 U.S.C. § 3282 (2012).

[15] 18 U.S.C. § 3299 (2012).

[16] *Compare* § 3299 (providing for no statute of limitations for sex trafficking, without reference to conspiracy) *with* 18 U.S.C. § 3298 (2012) (providing for a 10-year period for forced labor *and conspiracy*).

[17] 18 U.S.C. § 3283 (2012).

abuse, or kidnaping [sic], of a child under the age of 18" to be charged "during the life of the child, or for ten years after the offense, whichever is longer."

Finally, § 1596 provides for extraterritorial jurisdiction for violations of §§ 1589, 1590, and 1591, as well as attempts and conspiracies, where the conduct happened abroad and the defendant is either a United States national or legal permanent resident or the defendant is present in the United States regardless of nationality. Section 1596 is limited to instances where a foreign government has either declined to prosecute the defendant or the Attorney General, Deputy Attorney General, or his or her delegate has otherwise approve its use.[18]

As a matter of first impression for any of the court of appeals, the Eleventh Circuit upheld § 1596 as a constitutional exercise of Congress's authority under the Foreign Commerce Clause.[19] The court concluded that Congress has the power to regulate "activities that have a 'substantial effect' on commerce between the United States and other countries," while acknowledging that the Supreme Court has never "thoroughly explored the scope of Foreign Commerce Clause."[20] In that case, prosecutors in the Southern District of Florida charged the defendant, who was a Jamaican national, with sex trafficking multiple victims "around the world, from Florida to Australia to the United Arab Emirates."[21] In early 2017, the Supreme Court denied certiorari, with Justice Clarence Thomas dissenting.[22] Before charging § 1596 in any case, prosecutors should consult with the Human Trafficking Prosecution Unit and the Child Exploitation and Obscenity Section.

IV. Prostitution Related Offenses

Sex trafficking reaches all commercial sex acts—*i.e.*, sex acts on account of which anything of value is given to or received by any person—and is not limited to prostitution in both the colloquial or legal sense of the word.[23] However, a vast majority of sex trafficking cases do involve prostitution. The United States Code contains several interstate prostitution statutes, which are found in Chapter 117—18 U.S.C. §§ 2421 (2015), 2422 (2012), 2423 (2015), 2425 (2012)—otherwise known as the Mann Act, 8 U.S.C. § 1328 (2012) (Importation for Prostitution), and 18 U.S.C. § 1952 (2014) (Interstate Travel in Aid of Racketeering), which is commonly referred to as the Travel Act or ITAR. As discussed below, there are various benefits to charging these statutes in addition to or in lieu of § 1591, depending on the circumstances.[24]

Congress has recognized the severity of Mann Act violations involving both adults and children, and as such, those statutes are sometimes treated similarly to § 1591. For example, under 18 U.S.C. § 3299 (2012), there is no statute of limitations for Chapter 117 offenses; they are considered sex offenses for purposes of determining sex offender registration under federal law regardless of age, though consent may be an issue, 34 U.S.C. §§ 20911(5)(A)(iii) and (5)(C) (2012); supervised release is five years to Life

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[18] 18 U.S.C. § 1596(b) (2012).
[19] United States v. Baston, 818 F.3d 651 (11th Cir. 2016).
[20] *Id.*
[21] *Id.*
[22] Baston v. United States, 137 S. Ct. 850 (2017) (mem.) (Thomas, J. dissenting) (expressing concern that "[w]ithout guidance . . . the courts of appeals have construed [the Foreign Commerce Clause] expansively").
[23] *See, e.g.,* United States v. Cook, 782 F.3d 983 (8th Cir. 2015) (affirming conviction of defendant who benefited from sex trafficking venture involving sexual torture by receiving photographs and videos); United States v. Flanders, 752 F.3d 1317 (11th Cir. 2014) (affirming convictions of defendants who drugged young women to cause them to engage in sex acts, which defendants filmed and distributed commercially over the internet).
[24] 18 U.S.C. §§ 2421 (2015), 2422 (2012), 2423 (2015), 2425 (2012); 8 U.S.C. § 1328 (2012); and 18 U.S.C. § 1952 (2014).

for most of the statutes, 18 U.S.C. § 3583(k) (2012); and in cases involving children, there is a rebuttable presumption for detention for most of the statutes, 18 U.S.C. § 3142(e)(3)(e) (2012). [25]

In cases involving adult sex trafficking victims, prosecutors should consider charging §§ 2421 and § 2422(a) if the defendant caused the victim to cross state lines for purposes of prostitution, and § 1328 if the defendant arranged to smuggle the victim into the United States unlawfully for purposes of prostitution. These offenses do not require proof of force, fraud, or coercion, so consent is not a defense.[26] As a result, charging them may be useful to overcome various evidentiary challenges—for example, where the evidence of force, fraud, or coercion is limited to uncorroborated testimony or there are witness credibility concerns; where there is no evidence of force, fraud, or coercion with respect to a particular person and the evidence related to that conduct is helpful to the overall prosecution and presentation of the case to the jury; or the defendant's prostitution of that person simply warrants prosecution based on the facts of the case. Even though proof of force, fraud, or coercion is not necessary, it may still be admissible as other acts evidence under FED. R. EVID. 404(b).[27] Furthermore, because §§ 2421, 2422(a), and 1328 do not carry mandatory minimum sentences, they may be appropriate to consider charging or using to resolve certain cases, depending on the circumstances.

Section 2421 prohibits the transportation of any person, regardless of age, in interstate or foreign commerce with the intent that the person engage in prostitution or any sexual activity for which a person can be charged. It carries a maximum term of ten years' imprisonment. Unlike § 1591, it does not apply to purely intrastate conduct that affects interstate commerce and requires crossing of a state line or foreign border. The defendant's intent to prostitute the victim must also be formed prior to the transportation, and courts have generally found that prostitution must be the dominant or significant purpose of the transportation, though it need not be the only purpose.[28] Defendants also do not have to physically transport the victim if the evidence establishes that the defendant caused the transportation.[29] In those instances, it is often advisable to charge aiding and abetting under 18 U.S.C. § 2.[30] Prosecutors may also want to consider instead charging § 2422(a), which prohibits the persuasion, inducement, enticement, or coercion of an individual, regardless of age, to travel in interstate or foreign commerce to engage in prostitution or any sexual activity for which any person can be charged. It has a maximum sentence of twenty years' imprisonment, which is higher than the maximum for § 2421.

Section 1328[31] prohibits the unlawful importation of an alien, regardless of age, into the United States for purposes of prostitution or the harboring of that person for the same purpose in pursuance of such unlawful importation. It carries a maximum sentence of ten years' imprisonment.

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[25] 18 U.S.C. § 3299 (2012); 34 U.S.C. § 20911(5)(A)(iii) & (5)(C) (2012);18 U.S.C. § 3583(k) (2012); and 18 U.S.C. § 3142(e)(3)(e) (2012).

[26] United States v. Lowe, 145 F.3d 45, 52 (1st Cir. 1998); United States v. Pelton, 578 F.2d 701, 712 (8th Cir. 1978).

[27] *See, e.g.,* United States v. Saunders, 641 F.2d 659, 666 (9th Cir. 1982) (evidence of assaults in Mann Act case was "admissible to show [defendant's] forcible domination of the women"); United States v. Wright, 573 F.2d 681, 683 (1st Cir. 1978) ("[T]he beatings and threats were probative of the relationship between appellant and the witness and of appellant's control over the witness.").

[28] *See, e.g.*, United States v. McGuire, 627 F.3d 622, 625 (7th Cir. 2010) (noting that "[i]t would be better to ask whether, had a sex motive not been present, the trip would not have taken place or would have differed substantially").

[29] *See, e.g.*, United States v. Holland, 381 F.3d 80, 86 (2d Cir. 2004) (finding sufficient evidence where defendant purchased bus tickets for women from Vermont to New York for purposes of prostitution and accompanied the women to New York).

[30] *See, e.g.*, United States v. Footman, 215 F.3d 145, 152-53 (1st Cir. 2000) (affirming convictions of §§ 2421 and 2423(a) where defendant's co-conspirator and agent "acted on [the defendant's] behalf as transporter of the women, arranger of the details of the business, occasional money handler, and enforcer").

[31]

For cases involving child sex trafficking victims, prosecutors should consider charging §§ 2423(a), 2423(b), and 2422(b), depending on the circumstances. These statutes either address conduct that is not covered by § 1591 or otherwise provide some charging benefit.

Like § 2421, § 2423(a) similarly prohibits transportation for purposes of prostitution. Accordingly, most of the relevant case law and legal principles are the same for the two statutes. The major difference is that § 2423 applies only to children, and therefore, proof that the child had not attained the age of 18 years is required. Importantly, however, the government is not required to prove the defendant's knowledge of the child's age, and mistake of age is not a defense to this offense.[32] In contrast, § 1591 requires proof that the defendant knew or recklessly disregarded the child victim's age or, alternatively, that the defendant had a "reasonable opportunity to observe" the child victim, the boundaries of which continue to be tested and defined. Section § 2423(a) has a minimum sentence of ten years' imprisonment and a maximum sentence of Life.

Section 2423(b) prohibits travel in interstate or foreign commerce for the purpose of engaging in "illicit sexual conduct" with a child. It has a maximum sentence of 30 years' imprisonment. The term "illicit sexual conduct" is defined as a commercial sex act, production of child pornography, and other specified sexual acts.[33] Notably, a mistake of age defense is available with respect to commercial sex acts and certain sexual acts. 18 U.S.C. § 2423(g) (commercial sex acts; reasonable belief that child was 18 years old or older); 18 U.S.C. § 2243(c)(1) (statutory rape; reasonable belief that child was 16 years old or older). In a child sex trafficking case, where § 2423(b)'s elements are met, charging an offense without a mandatory minimum penalty may be appropriate in some circumstances.

Finally, § 2422(b) prohibits the use of a facility or means of interstate or foreign commerce to persuade, induce, entice, or coerce a child to engage in prostitution or any sexual activity for which any person can be charged. It has a minimum sentence of 10 years' imprisonment and a maximum sentence of Life. Courts are split on whether proof of the defendant's knowledge of the minor's age is required.[34] Completed and attempted violations of § 2422(b) may be particularly relevant in cases where the defendant engaged in a period of grooming the child victim for prostitution, and there is evidence of mobile or online communications reflecting efforts to persuade or entice the child.

In addition to the Mann Act, § 1952 (Travel Act), prohibits prostitution-related conduct. There are several ways to violate § 1952. Most relevant to sex trafficking cases, it criminalizes interstate travel or the use of an interstate facility with the intent to carry on or otherwise promote a business enterprise involving prostitution offenses and the subsequent commission or attempted commission of an act in furtherance of the business enterprise. §§ 1952(a)(3) & (b)(i)(1). Courts have defined "business enterprise" to mean a "continuous course of conduct, rather than a sporadic, casual, individual or isolated violation."[35] Although the conduct must be continuous, "[n]either evidence of a large-scale operation nor

[32] *See* United States v. Taylor, 239 F.3d 994, 997 (9th Cir. 2001); 18 U.S.C. § 2423(g) (limiting mistake of age defense to offenses under § 2423(b), (c), and (d) involving commercial sex acts).
[33] 18 U.S.C. § 2423(f) (2012).
[34] *Compare* United States v. Daniels, 685 F.3d 1237, 1245-46, 1250 (11th Cir. 2012) (holding that "[p]roof that the defendant knew the victim was under the age of eighteen is not required" in § 2422(b) prosecution where sufficient evidence existed that defendant induced the minor victim to engage in prostitution for another trafficker) *with* United States v. Cote, 504 F.3d 682, 686 (7th Cir. 2007) (interpreting § 2422(b) "to require proof of the defendant's knowledge of the age of the victim").
[35] *See, e.g.*, United States v. Gallo, 782 F.2d 1191 (4th Cir. 1986); United States v. Muskovsky, 863 F.2d 1319 (7th Cir. 1988) (rejecting defendants' argument that the prostitution activities were too sporadic to constitute a business enterprise).

long-term duration is necessary to support a . . . conviction,"[36] nor is it necessary to prove an organized crime nexus.

One of the advantages to charging § 1952 is that other acts evidence, which otherwise might be inadmissible under Rule 404(b), should be relevant and admissible to prove the business enterprise.[37] By way of example, a defendant who uses the internet (*i.e.*, uses an interstate facility) to post an online advertisement for a sex trafficking victim (*i.e.* promoting a prostitution business enterprise) and then drives the victim to a date (*i.e.*, a subsequent act in furtherance of the enterprise) only violates § 1952 if that conduct was part of a pattern of prostitution activity, thereby meeting the definition of business enterprise. Thus, evidence that the defendant prostituted other victims on other occasions is necessary to prove that the charged incident was not isolated. Accordingly, prosecutors should consider charging § 1952 to convey the entire scope of the defendant's conduct, particularly when there is insufficient evidence to charge the defendant with violating § 1591 with respect to certain victims. Testimony from those victims should be admissible for purposes of § 1952.

V. Child Pornography

Child pornography production and trafficking charges provide significant mandatory minimum and recidivist penalties and require defendants to pay mandatory restitution to their victims, and therefore, should be considered in any sex trafficking case where evidence of such offenses are found. When a defendant has a "relationship" with his child sex trafficking victim, the defendant may produce these contraband images while engaging in "sexually explicit conduct" with the child. Additionally, defendants often produce such images when preparing to post online advertisements of their child victims because the ads typically include suggestive or erotic photographs. Although the posted ads may not contain child pornography themselves, the series of images taken, and likely kept, by the defendant may include images that meet the definition of child pornography, which includes a visual depiction of "sexually explicit conduct" where the production of such depiction involved the use of a minor (*i.e.*, a person under the age of eighteen years) engaging in "sexually explicit conduct."[38]

Sexually explicit conduct is defined as sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; bestiality; masturbation; sadistic or masochistic abuse; or lascivious exhibition of the genitals or pubic area of any person.[39] Consideration of a number of factors is typically conducted to determine whether an image constitutes a lascivious exhibition of the genitals or pubic area.[40] Importantly, courts have found that images depicting a child's clothed genital or pubic area can constitute a "lascivious exhibition."[41]

Production of child pornography, which has a fifteen to thirty year imprisonment range, requires proof that the defendant employed, used, persuaded, induced, enticed, or coerced a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the

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[36] United States v. Tavelman, 650 F.2d 1133, 1140 (9th Cir. 1981); Spinelli v. United States, 382 F.2d 871, 879 (8th Cir. 1967) ("Congress made no attempt to differentiate the business enterprise of a national crime syndicate and a petty hoodlum."), United States v. Nader, 542 F.3d 713, 720-21 (9th Cir. 2008) (holding that the statute's "plain text prevents us from reading it to encompass only cases that involve organized crime or interstate criminal enterprises"); United States v. Welch, 327 F.3d 1081, 1091 (10th Cir. 2003) (rejecting district court's conclusion that § 1952 counts were insufficient for failing to allege defendants' involvement in organized crime).

[37] *See, e.g.,* United States v. Rawle, 845 F.2d 1244 (4th Cir. 1988).

[38] 18 U.S.C. § 2256(1), (8) (2012).

[39] 18 U.S.C. § 2256(2)(A) (2012).

[40] *See* United States v. Dost, 636 F. Supp. 828 (S.D. Cal. 1986) (outlining six nonexclusive factors often relied upon by courts).

[41] *See*, e.g., United States v. Price, 775 F.3d 828, 837 (7th Cir. 2014) (stating there is "no nudity requirement in the statutory definition of 'sexually explicit conduct'").

purpose of transmitting a live visual depiction of such conduct.[42] Sufficient evidence of a nexus to interstate or foreign commerce is also required, but is easily established with proof that the image, for example, was produced with a phone or camera that was manufactured outside the state of prosecution, was saved on a device that was manufactured outside the state of prosecution, or was transmitted itself over the internet. Courts unanimously have held that the government does not have to prove the defendant's knowledge of the child victim's age.[43] However, the Ninth Circuit has held that an affirmative mistake of age defense is required by the First Amendment.[44]

A defendant who knowingly transports, distributes, or receives child pornography via the internet faces a five to twenty year imprisonment range.[45] A defendant who knowingly possesses such images faces up to ten years imprisonment, but if the minors depicted are prepubescent, the maximum sentence increases to twenty years imprisonment.[46] For these offenses, unlike child pornography production, the government must prove that the defendant knew that the individual depicted is a child. In sex trafficking cases, where child victims are typically pubescent, it is likely not possible to rely on the content of an image itself to establish the defendant's knowledge. Accordingly, direct evidence that the defendant knew the age of the depicted victim may be necessary.

For additional guidance regarding child pornography, and all other child exploitation offenses, prosecutors are encouraged to consult the Child Exploitation and Obscenity Section.

VI. Immigration Offenses and Visa Fraud

"Traffickers often transport victims from their home communities to unfamiliar destinations, including foreign countries away from family and friends, religious institutions, and other sources of protection and support, leaving the victims defenseless and vulnerable."[47] Although traffickers occasionally bring their victims to the United States lawfully or otherwise find them already here, they also smuggle victims into the country or obtain fraudulent visas to facilitate their unlawful entry or require them to overstay their lawful visas. The resulting unlawful immigration status and risk of arrest and deportation can be isolating and debilitating, leaving victims particularly susceptible to traffickers' coercive schemes; limiting their opportunities to escape; and preventing them from seeking law enforcement assistance.[48]

Prosecutors should consider charging alien smuggling or harboring for financial gain under 8 U.S.C. § 1324 (2012) and visa fraud under 18 U.S.C. § 1546 (2012) when there is sufficient evidence.[49] Doing so not only holds the trafficker accountable for all conduct, but also emphasizes both the significance of the victim's unlawful status to the trafficker's scheme and the trafficker's role in placing the victim in such a vulnerable situation for the trafficker's own profit. As with other statutes discussed

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[42] 18 U.S.C. § 2251(a) and (e) (2012) (attempt and conspiracy).
[43] *See, e.g.*, United States v. Humphrey, 608 F.3d 955, 957-62 (6th Cir. 2010).
[44] United States v. U.S. District Court, 858 F.2d 534, 542 (9th Cir. 1988).
[45] 18 U.S.C. § 2252(b)(1) (2012); 18 U.S.C. § 2252A(b)(1) (2012).
[46] 18 U.S.C. § 2252(b)(2) (2012); 18 U.S.C. § 2252A(b)(2) (2012).
[47] 22 U.S.C. 7101(b)(5) (2012).
[48] *See, e.g.*, United States v. Sung Bum Chang, 237 Fed. Appx. 985, 988 (5th Cir. 2007) (explaining that victim's "impoverished background . . . limited English . . . and her illegal status made her particularly susceptible"); United States v. Calimlim, 538 F.3d 706, 712 (7th Cir. 2008) (noting that "[the victim] did not have an exit option: because the threats in her case involved her immigration status, she could not freely work for another employer in order to escape the threatened harm"); and United States v. Valenzuela, 495 Fed. Appx. 817, 821 (9th Cir. 2012) (explaining that victims were particularly susceptible because they "were predominantly poor, uneducated, far from home and without connections in the United States, unable to speak English, and unwilling to go to the police for fear of deportation").
[49] 8 U.S.C. § 1324 (2012) & 18 U.S.C. § 1546 (2012).

within this article, §§ 1324 and 1546 may also be appropriate to charge when there is insufficient evidence to prove force, fraud, or coercion beyond a reasonable doubt under §§ 1589 and 1591 and the case otherwise warrants prosecution.

Section 1324 criminalizes the smuggling or harboring of aliens who unlawfully entered or remained in the United States.[50] If the offense was done for the purpose of commercial advantage or private financial gain, it carries a ten-year maximum sentence.[51] Otherwise, it is five years. Like forced labor, § 1324 also has a ten-year statute of limitations.[52]

Section 1546 criminalizes a variety of conduct with respect to visas. The first paragraph in the statute specifically prohibits a person from "obtain[ing], accept[ing], or receiv[ing] any . . . visa . . . for entry into or as evidence of authorized stay or employment in the United States, knowing it . . . to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud."[53] A violation results in a maximum term of ten years' imprisonment.

VII. Financial Crimes

A primary motivation for traffickers is money, and as a result, financial crimes are often implicated in human trafficking cases. It is not uncommon for traffickers to launder their proceeds to promote their unlawful activity or conceal the nature of their proceeds, to distribute the proceeds to others within the United States and abroad, or to avoid paying taxes to conceal, and further benefit from, the victim's labor.

Sections 1956 and 1957, Title 18, United States Code, prohibit money laundering and money laundering conspiracy, and prosecutors should consider these offenses to emphasize evidence that the victims engaged in labor or commercial sex for the defendant's profit and that the defendant controlled the money and, by extension, their victims. For general guidance on charging money laundering offenses, prosecutors are encouraged to review *Follow the Money: Financial Crimes and Forfeiture in Human Trafficking Prosecutions*[54] in this edition of the USA Bulletin, as well as *The Money Laundering Statutes (18 U.S.C. §§ 1956 and 1957)* [55] from a previous edition. Prosecutors should be aware that issues involving concealment and merger may occur in human trafficking cases and are encouraged to consult with the Money Laundering and Asset Recovery Section at (202) 514-1263.

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[50] *See, e.g.*, United States v. Dann, 652 F.3d 1160, 1174 (9th Cir. 2011) (finding sufficient evidence of harboring in forced labor case where defendant restricted victim's movement and "forbade her from speaking to anyone outside the home"); United States v. Campbell, 770 F.3d 556, 570 (7th Cir. 2014) (finding defendant's efforts to profit from victims' labor "could be successful only if he were able to prevent law enforcement from detecting their illegal status and deporting them").

[51] *See, e.g.*, Calimlim, 538 F.3d at 714-115 (finding sufficient evidence of financial gain in forced labor case where defendants harbored domestic servant and failed to pay her minimum wage, thereby "receiv[ing] a manifest benefit at a drastically reduced price").

[52] 18 U.S.C. § 3298 (2012).

[53] United States v. Kouevi, 698 F.3d 126 (3rd Cir. 2012) (affirming conviction of defendant who "coordinat[ed] the preparation of false documents used to support . . . fraudulent visa applications," among other things, in scheme to obtain diversity visas for victims who were then compelled to work in hair braiding salons); United States v. Dann, 652 F.3d 1160 (9th Cir. 2011) (affirming conviction of defendant who procured fraudulent B1 tourist visa for victim and then compelled her to work as domestic servant); United States v. Kalu, 791 F.3d 1194 (10th Cir. 2015) (affirming conviction of defendant who procured H1-B specialty occupation visas for victims, overseeing the process, as part of forced labor scheme).

[54] Elizabeth Wright, *Follow the Money: Financial Crimes and Forfeiture in Human Trafficking Prosecutions,* U.S. ATTORNEYS' BULL. Nov. 2017.

[55] Stefan Cassella, *The Money Laundering Statutes*, U.S. ATTORNEYS' BULL. June 1999.

Additionally § 1952, discussed above, also prohibits the distribution of proceeds from a business enterprise involving prostitution offenses.[56] Unlike money laundering, it does not require proof of concealment or that the proceeds were used to promote the unlawful activity. Section 1952 can be an effective method to highlight a trafficker's control of the victim's proceeds. For example, in a recent sex trafficking prosecution, financial records showed that the trafficker distributed tens of thousands of dollars in proceeds to his family, while the victim sent only several thousand to her family in the same period of time. The large disparity in amounts supported the victim's account that the trafficker compelled her to prostitute for his profit.

Finally, prosecutors may want to consider tax charges in certain cases or, at the very least consider, obtaining tax records, particularly in forced labor cases. Prosecutors are encouraged to consult with the Tax Division.

VIII. Labor and Fraud Offenses

Fraud is often a key element of human trafficking schemes. Traffickers make false promises, such as legitimate job opportunities, high salaries, love, and marriage, to lure victims into vulnerable situations where they are more easily exploited. While fraud alone is sufficient to prove sex trafficking under § 1591,[57] forced labor under § 1589 requires proof of force or coercion. In both sex and labor trafficking cases, prosecutors should consider charging one of the fraud statutes contained in Chapter 63 of Title 18 if there is sufficient evidence, particularly where force or coercion is lacking. Such statutes can reinforce the theory of fraud at trial. For example, in a recent case, prosecutors charged a defendant with sex trafficking by fraud and wire fraud, among other violations, related to his scheme to recruit foreign students on false promises of legitimate summer jobs and then advertise them to customers of his prostitution enterprise. By including wire fraud, prosecutors were able to establish that, in addition to defrauding the victims, the defendant defrauded an educational exchange agency that sponsored the victims' visas.

Section 1351[58](Fraud in Foreign Labor Contracting) may be the most relevant statute in forced labor cases, as it prohibits recruiting a person outside the United States for employment in the United States using materially false promises regarding the employment.[59] In a recent prosecution, defendants were charged with fraud in foreign labor contracting related to a scheme to recruit seasonable agricultural workers using false promises related to wages and then requiring the workers to pay kickbacks. Section 1351 also targets fraudulent recruitment related to employment through a government contract or on a military installation or mission outside the United States. Prosecutors should be aware that the statute has not been challenged in the courts of appeal, though some of the statutory language is similar to other offenses and there is analogous case law.

Additionally, prosecutors should familiarize themselves with the Fair Labor Standards Act (FLSA), which addresses abusive employment conditions, including failure to pay overtime and minimum wage. For first time offenses, the penalty is only a fine or up to six months' imprisonment.[60] A

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[56] *See, e.g.*, United States v. Cole, 704 F.2d 554, 558-59 (11th Cir. 1983) ("When Western Union handed over money to appellants in Florida, which was wired to them at their direction by women working for them at a brothel in Mississippi, 'distribution' occurred, and such distribution took place, as the Travel Act requires, after the interstate transfer; the handing over in Florida was no less a distribution because it was triggered by the command of the distributing males themselves, and the result was the same as if the women, at the direction of the men, had physically travelled to Florida and personally delivered the prostitution proceeds.").

[57] *See, e.g.* United States v. McMillian, 777 F.3d 444, 447 (7th Cir. 2015).

[58] 18 U.S.C. § 1351.

[59] *See, e.g.*, https://www.justice.gov/opa/pr/uzbek-man-sentenced-role-multi-national-racketeering-and-forced-labor-enterprise.

[60] 29 U.S.C. §§ 215, 216 (2012).

historic benefit to using the FLSA in connection with trafficking cases was restitution, since it requires the payment of back wages and liquidated damages. With the addition of mandatory restitution in trafficking cases pursuant to § 1593, an FLSA violation is no longer necessary to charge for that purpose. It may, however, be useful to resolve certain forced labor cases where § 1589 is not a viable option. For example, it could be combined with 8 U.S.C. § 1324 (2012)[61] in cases where the evidence establishes that the defendant smuggled the victim into the United States and required the victim to work for no pay but there is insufficient corroboration to prove force or coercion to establish a violation of § 1589. Finally, there are civil FLSA provisions that are enforced by the Department of Labor, and prosecutors are encouraged to consult and coordinate with the Department of Labor, which can also ordinarily assist with back wage calculations.

IX. Violent Crime

Some traffickers resort to violence to maintain control over their victims and compel them to engage in labor or commercial sex. There are several federal statutes that may apply in such circumstances and which prosecutors should consider charging.

First, if a trafficker kidnaps a victim, 18 U.S.C. § 1201 may apply. Section 1201 makes it a crime "to seize, confine, inveigle, decoy, kidnap, abduct, or carry away and hold for ransom, reward or otherwise any person." Courts have construed the language "hold for ransom, reward or otherwise" broadly to mean "for any reason which would in any way be of a benefit [to the defendant]."[62] To sustain a conviction, prosecutors must also establish federal jurisdiction. Proof that the victim was physically transported across state lines is one way of doing so. Additionally, in 2006, as part of the Adam Walsh Child Protection and Safety Act, Congress expanded § 1201's jurisdictional reach to the use of interstate facilities, instrumentalities, or means in furtherance of the kidnapping.[63] Thus, for example, in a recent case, prosecutors charged a trafficker with using a cellular telephone to coordinate the abduction of a victim in retaliation for her leaving him. Use of the cellular telephone in furtherance of the kidnapping was sufficient to establish a § 1201 conviction, and there was no need to prove that the victim crossed state lines.

Second, if a trafficker used a firearm, 18 U.S.C. § 924(c) (2012)[64] may apply. However, prosecutors should be aware that following the Supreme Court's decision in *United States v. Descamps*, there is uncertainty as to whether sex trafficking and forced labor are categorically crimes of violence for purposes of § 924(c).[65] In back-to-back cases of first impression, the Fourth Circuit held that sex trafficking and conspiracy to engage in sex trafficking are not.[66] Because this is a developing area of law, prosecutors are encouraged to review materials and recent guidance when considering charging § 924(c) in human trafficking cases.

Finally, prosecutors may want to consider racketeering charges in certain cases involving criminal enterprises, particularly where there are multiple-venue or statute-of-limitations concerns.[67]

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[61] 8 U.S.C. § 1324 (2012).
[62] United States v. Lentz, 383 F.3d 191, 203 (4th Cir. 2004); *see also* United States v. Bordeux, 84 F.3d 1544, 1548 (8th Cir. 1996) (affirming conviction where defendant kidnapped victim to "continue [an] assault at a more isolated location and thus prevent detection").
[63] United States v. Morgan, 748 F.3d 1024, 1034 (10th Cir. 2014).
[64] 18 U.S.C. § 924(c) (2012).
[65] United States v. Descamps, 133 S. Ct. 2276 (2013).
[66] United States v. Fuertes, 805 F.3d 485, 500 (4th Cir. 2015); United States v. Naughton, 621 Fed. Appx. 170 (4th Cir. 2015).
[67] *See, e.g.*, United States v. Botsynyuk, 552 Fed. Appx. 178 (3d Cir. 2014) (affirming convictions of defendants charged with RICO conspiracy involving acts of compelled forced labor that were beyond the limitations period);

Prosecutors are encouraged to consult with the Organized Crime and Gang Section.

X. Drug Trafficking

Control over a victim's access to drugs can be a compelling coercive tactic.[68] When traffickers employ such tactics, prosecutors should consider Title 21 charges, including §§ 841 (Distribution of and Possession with Intent to Distribute a Controlled Substance), 844 (Simple Possession of a Controlled Substance), 856 (Maintaining a Drug Controlled Premises), and 846 (Conspiracy). Charging such violations can be important in cases involving victims with drug addictions, since they do not require victim testimony in the event that victims become unavailable at time of trial. These offenses can result in mandatory minimum sentences, depending on the type and quantity of the controlled substance, and there is a presumption of detention where the offense carries a maximum sentence of 10 years or more.[69]

XI. Conclusion

Depending on the facts and evidence in each case, non-human trafficking charges may be available to prosecutors to consider charging. Careful thought should be given to how such charges can strengthen the prosecution at trial and potentially resolve a case. Please feel free to direct any questions to the authors of this article or contact them to further discuss charging strategies in specific cases.

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United States v. Pipkins, 378 F.3d 1281 (11th Cir. 2004) (affirming convictions of pimps charged with participating in a RICO enterprise involving acts of compelled commercial sex).

[68] See United States v. Fields, 625 Fed. Appx. 949 (11th Cir. 2015) (affirming sex trafficking conviction where defendant supplied victims with prescription pills and "then coerced [them] to engage in commercial sex acts by withholding pills from them and thereby causing them to experience withdrawal sickness if they did not engage in prostitution"); United States v. Royal, 442 Fed. Appx. 794, 798 (4th Cir. 2011) ("[The defendant] . . . took advantage of all of the victims' drug dependencies by 'reduc[ing] their ability to say no and to make them easier to coerce.'").

[69] 18 U.S.C. § 3142(e)(3)(A) (2012).

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Whoever Knowingly Advertises: Considerations in Prosecuting Sex Trafficking

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I. Introduction

Online advertising has transformed the commercial sex industry and, in the process, facilitated the sex trafficking of numerous minors and adults. Sex trafficking previously took place on the streets, at truck stops, at motels, and in other physical locations. Today, it appears that the use of the internet is helping to expand the underground commercial sex market by providing a new venue to solicit sex work. Online-facilitated sex trafficking has thrived mainly because of the high profitability and relatively low risk associated with advertising trafficking victims' services online in multiple locations. Online advertising has provided an easily accessible forum that matches buyers of sex with traffickers selling the sexual services of minors and adults. With the assistance of online advertising, traffickers can maximize profits, evade law enforcement detection, and maintain control of victims by transporting them quickly within and between states. This article discusses the proof required in order to obtain a conviction for advertising commercial sex under 18 U.S.C. § 1591, investigative strategies and prosecution models pertaining to online services that facilitate prostitution and the sex trafficking of adults and minors, and it examines the Department's successful prosecution of the proprietor of the website myredbook.com for facilitating prostitution and money laundering.

II. Statutory Background

In recent years, Congress has refined the statutory framework for prosecuting sex trafficking of adults and minors in order to capture a broader scope of conduct and more effectively deter sex trafficking. For example, in 2000 Congress passed the Trafficking Victims Protection Act (TVPA) "to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominately women and children, to ensure just and effective punishment of traffickers, and to protect their victims."[1] The legislation was enacted because "Congress recognized that human trafficking, particularly of women and children in the sex industry 'is a modern form of slavery, and it is the largest manifestation of slavery

[1] VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000, Pub. L. No. 106-386, §§ 101–113, 114 Stat. 1464 (2000) (codified as amended in sections throughout Titles 8, 18, and 22 of the United States Code); 22 U.S.C. § 7101(a) (2012).

today."'[2] Accordingly, through the TVPA, Congress adopted "a comprehensive regulatory scheme that criminalizes and attempts to prevent slavery, involuntary servitude, and human trafficking for commercial gain."[3]

This comprehensive scheme proscribes "severe forms of tracking in persons," including "sex trafficking in which a commercial sex act is induced by force, threats of force, fraud, or coercion," and "sex trafficking . . . in which the person induced to perform such act has not attained 18 years of age."[4] Section 1591(a) of the statute, as originally enacted, imposed criminal penalties for any individual who knowingly:

> (a)(1) in or affecting interstate commerce recruits, entices, harbors, transports, provides, or obtains by any means a person; or (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing that force, fraud, or coercion … will be used to cause the person to engage in a commercial sex act, or that person has not attained the age of 18 years and will be caused to engage in a commercial sex act.[5]

However, with the enactment of the William Wilberforce Trafficking Victims Protection Act of 2008, Congress amended the mens rea requirement of § 1591(a), allowing the prosecution of a person who commits an "act identified in § 1591(a)(1) and (a)(2) where [the person] acted 'knowing, or in reckless disregard of the fact,' that force, fraud, or coercion [would] be used or that the individual involved is a minor."[6] Moreover, Congress added subsection (c) to the statute, which specifies that the government need not prove that a defendant knew or recklessly disregarded the fact that a victim the defendant caused to engage in a commercial sexual act prohibited by subsection (a)(1) had not reached the age of eighteen, provided that "the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited."[7]

Pertinent to this article, Congress, further amended § 1591(a) through the Stop Advertising Victims of Exploitation Act of 2015 (the SAVE Act) to include "advertis[ing]" as a type of conduct made criminal for sex trafficking acts covered by § 1591(a)(1).[8] Additionally, the SAVE Act "amended the mens rea requirement set forth in the language below § 1591(a)(2)."[9] Consequently, § 1591(a) now states:

> (a) Whoever knowingly –
>
> (1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, or maintains by any means a person; or
>
> (2) benefits financially or by receiving anything of value from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the

[2] United States v. Walls, 784 F.3d 543, 548 (9th Cir. 2015) (quoting 22 U.S.C. § 7101(b)(1)(2012)).
[3] *Id.*
[4] 22 U.S.C. § 7102(9)(A) (2012).
[5] 18 U.S.C. § 1591(a) (2012); *see also* Victims of Trafficking and Violence Protection Act of 2000, § 112.
[6] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 112 Stat. 5044 (2008).
[7] *Id.*
[8] Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 118(b)(1), 129 Stat. 227 (2015).
[9] *Id*. § 118(b)(2).

person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).[10]

III. "Knowledge" Mens Rea Requirement for Prosecuting Advertising Under § 1591

As previously noted, the SAVE Act adds "advertises" to the modes of commission of a § 1591 offense. This addition may facilitate the prosecution of online services that knowingly host advertisements promoting sex trafficking of a victim who is underage or subject to force, threats of force, fraud, or coercion. The offenders who actually place those advertisements may also be prosecuted under this theory or preexisting theories of liability, in particular, benefiting from participation in a sex trafficking venture pursuant to § 1591(a)(2).[11]

Notably, any prosecution of a defendant for advertising under § 1591 requires proof that the defendant knew the victim was a minor or that force, threats of force, fraud, or coercion would be used; proof of reckless disregard or a reasonable opportunity to observe the victim will be insufficient. Multiple statements by Congressional members contained within the legislative history of the SAVE Act suggest that the act was not intended to apply to online services absent proof of knowledge that the online service is hosting advertisements promoting sex trafficking of a minor or by force, threats of force, fraud, or coercion. For example:

a. Representative Shelia Jackson Lee (Texas): "[S]ome have raised questions about how the advertising prohibitions under this bill would apply to online companies," but "the standard of mens rea" protects websites that, "wind up finding things on their site that they may not have had anything to do with."
b. Representative Jim Sensenbrenner (Wisconsin): The "knowingly' standard" "emphatically" refutes concerns that the "net might be too broad" because a website "will not be caught up if any advertisement for sex trafficking appears without their knowledge."
c. Representative Blake Farenthold (Texas): "I want the legislative history of this bill to show that 'knowingly' is important"; the bill was "carefully crafted" so that "internet companies and legitimate Web sites are protected" unless "[t]they . . . know that they are advertising for victims of human trafficking."[12]

IV. Investigative Strategies and Prosecution Models Pertaining to Online Services That Facilitate Prostitution and the Sex Trafficking of Adults and Minors

As discussed below, there are multiple investigative and prosecution models that prosecutors may bring to bear in order to successfully prosecute online services that facilitate the unlawful sex trafficking of adults and minors.

A. Advertising Under 18 U.S.C. § 1591

As articulated above, a prosecution for advertising under § 1591 requires proof that the defendant knowingly advertised a sex trafficking victim who is underage or subject to force, threats of force, fraud,

[10] 18 U.S.C. § 1591(a) (2012).
[11] *Id*. § 1591(a)(2).
[12] 161 CONG. REC. H598–600 (Jan. 27, 2015).

or coercion; proof that the advertiser reckless disregarded a victim's age or had a reasonable opportunity to observe the victim would be insufficient.[13] Accordingly, individuals who advertise sex trafficking victims through online services may face criminal liability, under the advertising theory, where prosecutors can show that the defendant(s) were aware of the victim's minor status or that force, threats of force, fraud, or coercion was present. Moreover, online services where such advertisements are placed may also face criminal liability—again, where prosecutors can prove that the online service had knowledge of a victim's minor status or that force, fraud, or coercion was present. Whether or not such a prosecution can be brought against an individual defendant or an online advertiser in an individual case will accordingly be a fact-intensive inquiry, focusing on evidence of the individual defendant or online advertiser's knowledge regarding the victim or victims advertised.

B. Money Laundering

Past investigations of online services for facilitating prostitution and sex trafficking have successfully obtained evidence that the online service violated various money laundering statutes. A money laundering charge requires proof of the defendant's knowing facilitation of a specified unlawful activity (SUA), most likely a violation of Interstate Travel in Aid of Racketeering (Travel Act). "Specified unlawful activity" is defined in 18 U.S.C. § 1956(7)(A) as any act or activity constituting an offense under 18 U.S.C. § 1961(1).[14] Section 1961(1)(B) defines as "racketeering activity" "any act which is indictable under," inter alia, 18 U.S.C. § 1952.[15] An act that is a violation of 18 U.S.C. § 1952, for example, is therefore a specified unlawful activity for purposes of 18 U.S.C. § 1957.[16] In the sex trafficking scenario, that act would be the facilitation of prostitution in violation of a particular state law. The maximum penalty is ten years imprisonment and a $250,000 fine.

Promotion money laundering (18 U.S.C. § 1956(a)(1)(A)(i)) makes it a crime to knowingly conduct, or attempt to conduct, a financial transaction with the intent to promote the carrying on of SUA (e.g., prostitution) with proceeds that the defendant knows are derived from felonious criminal activity (federal, state, or foreign law) and which are, in fact, from the SUA.[17] The "intent to promote" forms part of the mens rea for the money laundering offense. Using proceeds of a crime to facilitate the SUA or to keep the SUA going constitutes an "intent to promote."[18]

The "specific intent to promote requirement" has been called the "gravamen" of a § 1956(a)(1)(A)(i) violation.[19] To prove it, the government must satisfy a "stringent" mens rea requirement.[20] In *Brown*, the Fifth Circuit held that the government must show that the transaction at issue was conducted with the intent to promote the carrying on of a specified unlawful activity.[21] It is not enough to show that a money launderer's actions resulted in promoting the carrying on of specified unlawful activity.[22] Nor may the government rest on proof that the defendant engaged in "knowing

[13] 18 U.S.C. § 1591 (2012).
[14] *Id.* § 1956(c)(7)(A).
[15] *Id.* § 1961(1)(B); *id.* § 1952.
[16] 18 U.S.C. § 1957 (2012).
[17] *Id.* § 1956(a)(1)(A)(i).
[18] United States v. Lee, 558 F.3d 638, 642 (7th Cir. 2009) (stating that rent payments on a spa offering prostitution services "clearly satisfy the requirement that the transactions were made with the intent to promote the carrying on of the underlying illegal operation").
[19] United States v. Carcione, 272 F.3d 1297, 1303 (11th Cir. 2001).
[20] United States v. Brown, 186 F.3d 661, 670 (5th Cir. 1999).
[21] *Id.*
[22] *Id.*

promotion" of the unlawful activity.[23] Instead, there must be evidence of intentional promotion.[24] In other words, the evidence must show that the defendant's conduct not only promoted a specified unlawful activity but that he engaged in it with the intent to further the progress of that activity.[25]

Thus, an online service may face criminal liability for promotion money laundering where the government can prove that: (1) the online service knowingly conducted a financial transaction (e.g., the receipt of payment(s) to post ads for unlawful prostitution, the payment of salaries or expenses with proceeds from posting prostitution ads, etc.); (2) the online service knew that the money involved in the transaction was the proceeds of some unlawful activity (i.e., the online service does not have to know the exact unlawful activity); (3) the proceeds were actually from a specified unlawful activity, at least in part (e.g., a Travel Act violation); and (4) the online service was involved in the transaction with the specific intent to promote that specific unlawful activity—for example, promoting unlawful prostitution by assisting a trafficker in maintaining his prostitution business through online ads, reaching a broader audience, or expanding the geographical scope of the business.

International money laundering (18 U.S.C. § 1956(a)(2)(A)) makes it a crime to knowingly transmit a monetary instrument between the United States and an extraterritorial location with the intent to promote the carrying on of SUA.[26] Section 1956(a)(2)(A) does not require proof of proceeds of SUA or that the defendant knew that the funds are proceeds of criminal activity. Thus, an online service may face criminal liability for international promotion laundering where the government can prove that (1) the online service provider knowingly received or sent money from a place in the United States from or through a place outside the United States, or attempted to do so (e.g., receiving a payment for an advertisement in the United States in connection with a SUA); and (2) the online service received the payment for that advertisement with the intent to promote some form of those SUA. For example, if the online service is utilizing payment processors located overseas, showing that payments for advertisements were routed through these foreign payment processors could support an international promotional money laundering charge.

Section 1957 can provide another potential money laundering charge option. That statute makes it unlawful to engage in monetary transactions in property derived from specified unlawful activity.[27] The elements of that crime require proof that: (1) the defendant knowingly engaged or attempted to engage in a monetary transaction; (2) the defendant knew the transaction involved criminally derived property; (3) the property had a value greater than $10,000; (4) the property was, in fact, derived from the particular alleged unlawful activity (specified unlawful activity); and (5) the transaction occurred in the United States.[28] Accordingly, an online advertiser may face criminal liability where the government can prove that criminal proceeds were moved within the United States in amounts greater than $10,000.

Where sufficient financial evidence exists—for example, movement of cash proceeds from advertisements for prostitution, in amounts greater than $10,000, from one account to another—charges under 18 U.S.C. § 1957 may be appropriate. Proof of the § 1957 violation requires the government to establish that the property was, in fact, derived from a particular alleged unlawful activity—that is, the facilitation of prostitution—and that the defendant knew that those transactions involved criminally derived property. As to the fact that the property was derived from the facilitation of prostitution and a defendant's knowledge of that fact, the evidence and proof is likely to substantially overlap with companion 18 U.S.C. § 1952 charges, in terms of the purpose of the online facility and how it operated.

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[23] *Id*.
[24] *Id.*
[25] *Id.*
[26] 18 U.S.C. § 1956(a)(2)(A) (2012).
[27] *Id.* § 1957.
[28] *Id*. § 1957(a).

That evidence should be supplemented with a financial analysis documenting the flow of money into the accounts of the person or entity charged and then to other accounts in sufficiently large amounts.

C. Interstate Travel in Aid of Racketeering (Travel Act)

A Travel Act violation, 18 U.S.C. § 1952, consists of use of the mails or interstate facilities with the intent to promote any unlawful activity and thereafter performing or attempting to perform an act to facilitate the unlawful activity.[29] In *United States v. Welch*, the Court states that "the Travel Act requires a defendant act not only with knowledge of what he is doing, but also with the objective of promoting some unlawful activity."[30] There is, however, authority to suggest that a willful blindness or deliberate ignorance instruction may be warranted in various Travel Act cases.[31]

An online service that facilitates the sex trafficking of adults and minors via web-based advertisements may face liability under the Travel Act where the government can prove that the advertisements on the online service: (a) actually promote prostitution; and (b) that the online service knows and intends that its business model facilitates the promotion of prostitution. Obtaining evidence that the online service helped develop the content of the offending advertisements through its posting rules, screening or moderation process, and content requirements would support a Travel Act charge. This evidence may be obtained from a variety of sources—for example, through undercover engagement with the online service and from former or current employees of the online service.

D. Criminal and Civil Forfeiture

In addition to criminal prosecution of the online service, criminal forfeiture under 18 U.S.C. § 982(a)(1) or civil forfeiture under 18 U.S.C. § 981(a)(1)(A) of the online service's assets may be warranted.[32] In the event of a successful criminal prosecution, it may be advisable to seek criminal rather than civil forfeiture in order to avoid duplicating litigation efforts. However, a civil forfeiture action against property involved in any money laundering conspiracy or transactions, or property traceable thereto, may be brought independent of a criminal investigation or prosecution because civil forfeiture actions are not dependent on the indictment or conviction of a wrongdoer.[33]

A civil forfeiture action against property obtained by an online service provider protected by the Communications Decency Act—based on its publication of third-party content—would be a case of first impression and not necessarily advisable given the uncertainty of the outcome and the possibility that an adverse decision may negatively affect broader forfeiture law and policy.

For this reason, whether and to what extent civil and criminal forfeiture is available based on a particular theory of liability is governed by statute. For example, property "involved in," and "proceeds" from, money laundering offenses under 18 U.S.C. §§ 1956 and 1957 may be civilly or criminally forfeited.[34] Accordingly, where sufficient evidence exists to prove that an online advertiser has committed such a money laundering violation, property involved in the violation and proceeds from it may be subject to civil or criminal forfeiture. The Money Laundering and Asset Recovery Section (MLARS) maintains a comprehensive guide to forfeiture available under particular theories of criminal liability.[35] Prosecutors

[29] *Id.* § 1952(a).
[30] United States v. Welch, 327 F.3d 1081, 1095 (10th Cir. 2003).
[31] United States v. Leahy, 598 F. App'x 210, 211 (4th Cir. 2015) (involving a Travel Act case); *see also* United States v. Caliendo, 910 F.2d 429, 433 (7th Cir. 1990) (providing an "ostrich" instruction in a prostitution case involving violations of the Travel Act).
[32] 18 U.S.C. § 982(a)(1) (2012); *id.* § 981(a)(1)(A).
[33] 18 U.S.C. § 981 (2012).
[34] *Id.* § 1956; *id.* § 1957.
[35] *Money Laundering and Asset Recovery Section*, U.S. DEP'T OF JUST. (last visited Sept. 29, 2017).

are strongly encouraged to coordinate any criminal or civil forfeiture of the online service's assets with MLARS.

V. The Prosecution of MyRedBook.com Proprietor Eric Omuro as an Example of a Successful Online Advertising Prosecution

The successful prosecution of Eric Omuro, the proprietor of the website myredbook.com, represents one potential prosecutorial roadmap for addressing an online facility that facilitates the sex trafficking of adults and minors.

The website myredbook.com purported to provide "Escort, Massage, and Strip Club Reviews" to a target audience originally focused on the San Francisco Bay area, but ultimately stretched both regionally and nationally.[36] In reality, the site was used to host advertisements for sexual services, complete with explicit photos, lewd physical descriptions, menus of sexual services, hourly and nightly rates, and customer reviews of the prostitutes' services.[37] In its advertisements, the website used acronyms for numerous sex acts, which were defined in graphic detail in the website's "Terms and Acronyms" section.[38] Although the website could be accessed (and advertisements placed) for free, myredbook.com offered additional options for a fee.[39] For example, prostitutes (or their procurers) could pay a fee to have their advertisement featured more prominently on the website.[40] Similarly, customers could access myredbook.com for free.[41] If a customer purchased a site membership, however, the customer obtained early and enhanced access to prostitute reviews, enhanced prostitute review search options, and access to additional VIP forums, among other things.[42]

Omuro, also known as "Red," was charged in June of 2014 with violating 18 U.S.C. § 1952 and twenty-four counts of money laundering under 18 U.S.C. § 1957.[43] The § 1952 violation charged that Omuro knowingly used the internet with intent to promote and facilitate the offense of prostitution in violation of California law.[44] The § 1957 violations alleged that he engaged in money transfers to move myredbook.com revenue into bank accounts which he controlled.[45] As charged in the pertinent Indictment, Omuro engaged in more than twenty monetary transactions (each greater than $10,000) to launder the profits derived from the facilitation of prostitution via the website.[46] The indictment also sought the forfeiture of more than $5 million in property and money derived from the facilitation of prostitution, as well as the internet domain names, myredbook.com and the related URL sfredbook.com.[47]

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[36] Press Release, U.S. Dep't of Just., California Operator of MyRedBook.com Sentenced to 13 Months in Prison for Facilitating Prostitution (May 21, 2015).
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] Indictment at 1–2, United States v. Omuro, No. CR-14-336 (N.D. Cal. June 24, 2014) (The conduct underlying the Omuro/myredbook prosecution occurred before the amendment of 18 U.S.C. § 1591 to add "advertising" as a means of committing an offense.).
[44] *Id.*
[45] *Id.* at 2.
[46] *Id.* at 2–3.
[47] *Id.* at 4–5.

Omuro pled guilty in December 2014 to the § 1952 violation. In connection with his plea, Omuro agreed to forfeit more than $1.28 million in cash and property, as well as the sfredbook.com and myredbook.com domain names. On May 21, 2015, Omuro was sentenced to thirteen months in prison.[48]

The seizure and forfeiture of the internet domains myredbook.com and sfredbook.com were a key feature of the investigation. Such a domain seizure may be obtained via seizure warrant that is based upon a showing of probable cause that such a domain, in this context, constitutes property "involved in" money laundering. Property involved in violations of §1957 is subject to civil forfeiture under 18 U.S.C. § 981(a)(1)(A) and criminal forfeiture under 18 U.S.C. § 982(a)(1).[49] In the myredbook context, the website was the primary means by which Omuro hosted advertisements for, and reviews of, sexual services, and received payments for premier ad placement and site memberships. As part of the operation, the FBI also seized two automobiles and substantial funds contained in numerous bank accounts.

VI. Conclusion

As this article and the successful prosecution of Eric Omuro and myredbook.com demonstrate, myriad potential avenues exist by which prosecutors might be able to successfully hold accountable those individuals or entities who engage in or facilitate the advertisement of sexual services involving trafficking victims who are minors or are subject to force, threats of force, fraud, or coercion. Holding those individuals and entities accountable for their criminal conduct is an essential component of the Department of Justice's strategy for combatting sex trafficking.

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[48] Press Release, Dep't of Justice, California Operator of MyRedBook.com Sentenced to 13 Months in Prison for Facilitating Prostitution (May 21, 2015).
[49] Indictment at 4–6, United States v. Omuro, No. CR-14-336 (N.D. Cal. June 24, 2014).

Federal Rule of Evidence 412: Admissibility of Prior and Subsequent Prostitution Evidence in Sex Trafficking Prosecutions

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I. Introduction

Sex trafficking cases pose unique challenges for both prosecutors and victims. Victims often have an especially difficult road to walk because participating in prosecutions can require them to share incredibly personal information with investigators, prosecutors, jurors, and the court. In addition, many victims fear that their past sexual experiences—including prior or subsequent involvement in prostitution—will be exposed during the process. Indeed, it is common for traffickers to utilize their victims' sexual histories to discredit, embarrass, or intimidate them.

While most sex trafficking trials involve extensive evidence corroborating the fact that the victims engaged in commercial sex acts, it is usually far more difficult for prosecutors to present concrete evidence of the means used to coerce the victims to engage in those acts. As a result, defense counsel will often attempt to elicit evidence at trial regarding a victim's engagement in prior or subsequent commercial sex acts to imply or argue that the defendant did not coerce the victim and that her prostitution-related acts were consensual.[1]

In reality, however, Federal Rule of Evidence 412 (Rule 412) plainly excludes evidence regarding a victim's prior or subsequent involvement in prostitution, except in very limited circumstances—and for good reason, as it has no bearing on the victim's reputation for truthfulness or whether this particular defendant compelled the victim to prostitute.[2] As discussed further below, consent in one sexual situation does not equate to consent in another. Although Rule 412 was originally promulgated to protect victims of sexual assault from dissemination of their sexual history, it has evolved into an important tool that prosecutors can use to protect victims of sex trafficking from enduring exposure of their prior sexual history during trial, as well as to protect the integrity of the trial and ensure that the jury focuses on the issues at hand.

This article examines the application of Rule 412 in the sex trafficking context to exclude unduly prejudicial evidence of other sexual acts and sexual predisposition, while admitting evidence that is

[1] Although both men and women can be traffickers and victims, for the ease of understanding, this article will use male pronouns when referring to traffickers and female pronouns when referring to victims.
[2] *See* FED. R. EVID. 412.

probative of coercion. This article reviews the history and purpose of Rule 412, examines the case law applying it to sex trafficking cases, and provides strategies for successfully litigating related evidentiary motions. It is the authors' hope that a full understanding of this rule will help prosecutors do the following: evaluate the merits of a case involving victims who were otherwise involved in prostitution, effectively interview victims and other witnesses, limit dissemination of discovery materials outlining a victim's sexual history to the extent appropriate,[3] and articulate why a victim's unrelated sexual conduct should not be admitted at trial.

II. History, Purpose, and Scope of Rule 412

A. History

The Federal Rules of Evidence passed as a new piece of legislation in 1975.[4] At that time, there was no rule that protected victims from having their sexual history used as impeachment evidence, other than the regular rules of admissibility and weight found in the newly created evidence code.[5] However, in 1978, Congresswoman Holtzman introduced the first iteration of Rule 412 in Congress, basing the rule in part on the following rationale:

> Too often in this country, victims of rape are humiliated and harassed when they report and prosecute the rape. Bullied and cross-examined about their prior sexual experiences, many find the trial almost as degrading as the rape itself. Since rape trials become inquisitions into the victim's morality, not trials of the defendant's innocence or guilt, it is not surprising that it is the least reported crime. It is estimated that as few as one in ten rapes is ever reported.[6]

In 1994, Congress expanded the rule further to include sex-based offenses other than rape.[7]

B. Purpose

Rule 412 is a rule of exclusion that imposes significant limitations on the admissibility of "evidence relating to [a] victim's other sexual behavior or alleged sexual predisposition, whether offered as substantive evidence or for impeachment" in "a civil or criminal proceeding involving alleged sexual misconduct."[8] It takes precedence over other Federal Rules of Evidence, including Rules 402, 404(b), 405, 607, 608, and 609.[9] The purpose of the Rule is to "safeguard . . . victim[s] against the invasion of privacy, potential embarrassment[,] and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact finding process," and thereby "encourage[] victims of sexual misconduct to institute and participate in legal proceedings against alleged offenders."[10]

Rule 412 accomplishes this purpose by barring evidence of a victim's "other sexual behavior" or alleged "sexual predisposition" from being introduced at trial, except in three narrow circumstances,

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[3] Prosecutors should always consider obtaining a discovery protective order in sex trafficking cases, particularly when sensitive information must be provided to the defense.
[4] *See* Josh Camson, *History of the Federal Rules of Evidence,* A.B.A. (last visited Sept. 8, 2017).
[5] *See id.*
[6] FED. R. EVID. 412, advisory committee notes to 1994 amendments.
[7] *Id.* ("The strong social policy of protecting a victim's privacy and encouraging victims to come forward to report criminal acts is not confined to cases that involve a charge of sexual assault.").
[8] *Id.*
[9] *Id.*
[10] *Id.*; *see also* United States v. Cephus, 684 F.3d 703, 708 (7th Cir. 2012) ("If admissible, such evidence would deter many victims of sexual abuse from testifying . . . .").

which are discussed below.[11] The phrase "sexual predisposition," as it is used in Rule 412, includes "evidence that . . . the proponent believes may have a sexual connotation for the factfinder," such as "the alleged victim's mode of dress, speech, or life-style."[12] Likewise, the phrase "sexual behavior" includes "all activities that involve actual physical conduct, i.e. sexual intercourse or sexual contact."[13] The word "other" refers to all other sexual behavior that is not at issue in the case.[14]

Rule 412(b) (1) outlines three narrow exceptions to this general rule of exclusion. Pursuant to Rule 412(b)(1), the Court "may admit" the following three categories of evidence:

> (A) "evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;"
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> (B) "evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent;" and
>
> (C) "evidence whose exclusion would violate the defendant's constitutional rights."[15]

If the defendant intends to introduce evidence of a victim's other sexual behavior or alleged sexual predisposition under one of these exceptions, he must file a sealed motion fourteen days before trial that "specifically describes the evidence and states the purpose for which it is to be offered."[16] The defendant not only must serve the motion on all parties, but also must "notify the victim or, when appropriate, the victim's guardian or representative."[17] Courts have held that a defendant's failure to comply with Rule 412's notice requirement can result in automatic exclusion of this evidence.[18]

Rule 412 further requires that before admitting evidence under this rule, a court "must conduct an in camera hearing and give the victim and parties a right to attend and be heard."[19] Unless the court orders otherwise, the motion and related materials "must be and remain sealed."[20] The purpose of the in camera hearing and sealing requirement is "to assure that the privacy of the alleged victim is preserved in all cases in which the court rules that the proffered evidence is not admissible, and in which the hearing refers to matters that are not received, or are received in another form."[21]

C. Applicability of Rule 412 to Sex Trafficking Prosecutions

As set forth in greater detail below, a majority of the federal courts have concluded that evidence of a sex trafficking victim engaged in prostitution or other sexual behavior before or after her encounter with the defendant is generally inadmissible under Rule 412(a). No courts addressing this issue have held otherwise. Despite this well-established precedent—and lack of negative case law—defense counsel continue to argue that Rule 412 does not apply to sex trafficking prosecutions, but rather applies only in

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[11] FED. R. EVID. 412.
[12] FED. R. EVID. 412, advisory committee notes to 1994 amendments.
[13] *Id*.
[14] *See id.* ("The word 'other' is used to suggest some flexibility in admitting evidence 'intrinsic' to the alleged sexual misconduct."); *see also* United States v. Torres, 937 F.2d 1469, 1472 (9th Cir. 1991) (construing phrase "past sexual behavior" in older version of Rule 412 to include "all sexual behavior of the victim . . . [that] precedes the date of the trial").
[15] FED. R. EVID. 412(b).
[16] FED. R. EVID. 412(c).
[17] *Id.*
[18] United States v. Ramone, 218 F.3d 1229, 1235–36 (10th Cir. 2000).
[19] FED. R. EVID. 412(c)(2).
[20] *Id.*
[21] FED. R. EVID. 412, advisory committee notes to 1994 amendments.

cases involving rape or sexual assault. Neither the language of Rule 412 nor the case law interpreting it supports this argument.

Indeed, Rule 412's ambit extends far beyond cases involving rape and sexual assault, and intentionally encompasses a broad category of cases involving sexual misconduct.[22] Nothing in either Rule 412 or the Advisory Committee Notes supports a conclusion that its applicability is limited to cases involving rape or sexual assault. On the contrary, as stated in the Advisory Committee Notes:

> The reason for extending the rule to all criminal cases is obvious. The strong social policy of protecting a victim's privacy and encouraging victims to come forward to report criminal acts is not confined to cases that involve a charge of sexual assault. The need to protect the victim is equally great when a defendant is charged with kidnapping, and evidence is offered, either to prove motive or as background, that the defendant sexually assaulted the victim.[23]

Rule 412's broad application is consistent with its dual purposes of "safeguard[ing] the alleged victim against the invasion of privacy, potential embarrassment[,] and sexual stereotyping that is associated with public disclosure of intimate sexual details" and "encourag[ing] victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders."[24]

Furthermore, federal courts have uniformly found that cases involving allegations of sex trafficking and interstate prostitution "involve alleged sexual misconduct" for purposes of Rule 412. These courts have applied Rule 412 to exclude evidence of a victim's sexual behavior that is not related to the charges, including a victim's alleged prior or subsequent involvement in prostitution.[25]

D. Admissibility Under Rule 412 of Evidence Regarding a Sex Trafficking Victim's Prior or Subsequent Involvement in Prostitution

Defense counsel in sex trafficking cases often attempt to raise doubts in the jury's mind about whether a victim was compelled to engage in commercial sex acts through force, fraud, and coercion by eliciting evidence regarding a victim's prior or subsequent involvement in prostitution. The purpose of introducing evidence is two-fold—it aims both to confuse the jury's understanding of an essential element of §1591 and to paint the victim as unsympathetic and complicit in her victimization. The collateral effects of the admission of such evidence include unnecessary and harmful humiliation of the victim, jury confusion regarding the relevant issues, and an increased risk that a victim may decline to participate in a prosecution to protect herself against the dissemination of allegations regarding her sexual behavior.

Federal prosecutors regularly rely upon Rule 412 to preclude the introduction of such irrelevant and prejudicial evidence. A majority of the federal appellate courts, including the First, Second, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits, have concluded that evidence that a victim may have

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[22] *See* FED. R. EVID. 412(a) (extending rule to "any civil or criminal proceeding involving alleged sexual misconduct").

[23] FED. R. EVID. 412, advisory committee notes to 1994 amendments.

[24] *Id.*

[25] *See* United States v. Rivera, 799 F.3d 180, 185–86 (2d Cir. 2015); *see also* United States v. Alvarez, 601 F. App'x 16, 18 (2d Cir. 2015) (applying Rule 412 where defendant was charged with counts of interstate prostitution pursuant to 18 U.S.C. § 2422(a) and sex trafficking pursuant to 18 U.S.C. § 1591); United States v. Campbell, 764 F.3d 880, 888 (8th Cir. 2014) (applying Rule 412 to case involving sex trafficking of a minor); United States v. Williams, 564 F. App'x 568, 575–77 (11th Cir. 2014) (applying Rule 412 to sex trafficking prosecution under 18 U.S.C. § 1591); United States v. Cephus, 684 F.3d 703, 708 (7th Cir. 2012) (affirming district court's application of Rule 412 in case involving 18 U.S.C. § 1591); United States v. Valenzuela, 495 F. App'x 817, 819–20 (9th Cir. 2012) (assuming without deciding that Rule 412 applies to prosecutions under 18 U.S.C. § 1591).

engaged in commercial sex acts before or after the time she was exploited by the defendant is irrelevant to the determination of whether the defendant committed the crimes of sex trafficking through force, fraud, and coercion and should be excluded pursuant to Rule 412.

In *Cephus*, the defense had sought to introduce at trial evidence that one of the defendant's victims had previously worked as a prostitute before she was recruited by the defendant.[26] The proffered relevance of this evidence was "that having already been a prostitute she would not have been deceived by [the defendant] and therefore her testimony that she was coerced into working for him should not be believed," but the district court concluded that evidence regarding the victim's prior involvement in prostitution was barred by Rule 412.[27] On appeal, the Seventh Circuit, in an opinion by Judge Posner, affirmed the district court's ruling and held that exclusion of this evidence did not violate the defendant's constitutional rights, such a violation being the only exception to Rule 412 cited by the defendant. The *Cephus* Court explained its conclusion as follows:

> [T]he testimony sought to be elicited by the cross-examination would have been irrelevant. Even if no promises were made to [the victim], this would not be evidence that she consented to be beaten and to receive no share of the fees paid by the johns she serviced. And even if she knew going in, from her prior experience, that [the defendant] probably would beat her, it was still a crime for him to do so. And finally the fact that she'd been a prostitute before does not suggest that he didn't beat and threaten her—that was his modus operandi and there's no evidence that he would have made an exception for [the victim].[28]

Similarly, in *United States v. Elbert*, the Eighth Circuit rejected a defendant's argument that the exclusion of evidence that a minor victim had worked as a prostitute before and after her encounter with the defendant violated his constitutional right to present a "far more powerful defense."[29] In reaching its decision, the court appropriately noted that "[w]hether the children engaged in acts of prostitution before or after their encounters with [the defendant] is irrelevant, and *would only prove other people may be guilty of similar offenses* of recruiting, enticing, or causing these victims to engage in a commercial sex act."[30]

In *United States v. Roy*, the Eighth Circuit reaffirmed that these principles also fully apply to adult sex trafficking victims.[31] In affirming a district court's ruling to exclude evidence of a victim's prior and subsequent sexual history in a sex trafficking prosecution under §1591, the *Roy* Court held that:

> At issue here is not recruiting an individual to engage in commercial sex for the first time, but doing an act with the use of force, threats, fraud, or coercion to cause the victim to engage in commercial sex. The victim's participation in prostitution ***either before or after*** the time period in the indictment has no relevance to whether [the defendant] beat her, threatened her, and took the money she made from prostitution in order to cause her to engage in commercial sex.[32]

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[26] *Cephus*, 684 F.3d at 708.
[27] *Id.*
[28] *Id.*
[29] United States v. Elbert, 561 F.3d 771, 777 (8th Cir. 2009).
[30] *Id.* (emphasis added).
[31] United States v. Roy, 781 F.3d 416, 421 (8th Cir. 2015).
[32] *Id.* at 420 (emphasis added).

The *Roy* court further noted that even if there was some basis to think that the victim was motivated to testify against the defendant in order to mitigate potential consequences for sex trafficking charges, the defense could cross-examine her about her motive without specifying her crimes.[33]

In *United States v. Gemma*, the trial court ruled—incorrectly as the First Circuit later noted on appeal—that the defendant was entitled to certain social service agency records relating to his minor victim's prior involvement in prostitution.[34] The trial court ordered the social service agency to produce an email from one of its caseworkers. This email repeated hearsay statements from a fellow runaway that the victim had previously offered men sexual services in exchange for a place to stay.[35] The court permitted the defense to cross-examine the victim about these allegations, but it denied the defense's request for production of additional social service records that potentially related to his victim's alleged prior prostitution.[36]

The First Circuit rejected the defendant's argument on appeal that the district court's denial of his request for additional records violated his constitutional rights. Instead, the court held that such evidence was properly excluded as being "either entirely irrelevant or of such slight probative value in comparison to its prejudicial effect that a decision to exclude it would not violate [the defendant's] constitutional rights."[37] The Court stated:

> In this case, there was no dispute that [the victim] engaged in prostitution; the only question was whether [the defendant] acted as her pimp. Rather than evincing [the defendant's] intent at the time of the offense, introducing [the victim's] alleged acts of prior prostitution would have only strengthened [the defendant's] hand by reinforcing a narrative that [the victim] acted consistent with prior sexual behavior. This evidence and line of reasoning falls squarely within a class deemed so extremely prejudicial as to warrant special treatment under the Federal Rules of Evidence.[38]

The Court further suggested that it had been inappropriate for the district court to permit *any* cross-examination regarding the victim's prior sexual history, noting that if the defendant "was deprived of anything, it was the opportunity to seek unspecified and presumably inadmissible evidence to engage in additional cross examination on a topic of questionable relevance to begin with."[39]

The Second, Fifth, Ninth, and Eleventh Circuits have similarly held that evidence of a victim's involvement in prostitution that is unrelated to the offense should be excluded under Rule 412.[40]

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[33] *Id*. at 421.
[34] United States v. Gemma, 818 F.3d 23, 33 (1st Cir. 2016) cert. denied October 31, 2016.
[35] *Id.*
[36] *Id.*
[37] *Id.* at 34.
[38] *Id*. at 34–35.
[39] *Id*. at 35.
[40] *See* United States v. Lockhart, 844 F.3d 501, 510 (5th Cir. 2016) ("[E]vidence of the victims' pre- and post-indictment prostitution is not relevant to prove an element necessary to convict [the defendants], and therefore, the district court did not violate the Fifth Amendment when it excluded such evidence pursuant to Rule 412."); *see also* United States v. Rivera, 799 F.3d 180, 185–86 (2d Cir. 2015) (affirming exclusion under Rule 412 in sex trafficking case of evidence related to victims' prior involvement in sex industry and rejecting argument that such prior involvement is "relevant to whether she was coerced or whether, on the other hand, she *knew precisely what she was getting into* and accepted it as part of a money-making endeavor); United States v. Williams, 564 F. App'x 568, 575–77 (11th Cir. 2014) (affirming exclusion under Rule 412 in sex trafficking case of evidence related to pre-offense and post-offense sexual activity (including prostitution) of minor victims); United States v. Valenzuela, 495 F. App'x 817, 819–20 (9th Cir. 2012) (affirming exclusion of evidence regarding the victims' possible prior acts of prostitution).

III. Overcoming Defense Attempts to Introduce Evidence Regarding a Defendant's Prior or Subsequent Involvement in Prostitution

Prosecutors should affirmatively move to preclude evidence of their victims' prior or subsequent involvement in prostitution pursuant to Rule 412, regardless of defendant's position, to avoid issues arising at trial. As set forth below, pretrial litigation can preclude such irrelevant and prejudicial evidence at trial, protect the privacy rights of victims, and avoid jury confusion.

A. Filing an Affirmative Motion to Exclude Evidence Pursuant to Rule 412

Rule 412 places the onus on defense counsel to give notice at least two weeks before trial of its intent to introduce such evidence.[41] As set forth below, some defense counsel are unaware of this rule and may nevertheless attempt to introduce such evidence at trial without having previously complied with the rule's notice requirements. In order to prevent such "surprise" testimony and protect the victims from unnecessary publication of their prior sexual histories, prosecutors should always consider filing a brief in advance of trial affirmatively seeking to exclude such evidence. Prosecutors should request an order precluding the defense from introducing evidence of unrelated prostitution activity, questioning the victims about such activities, or referencing such evidence during *voir dire*, opening statements, and closing arguments.

Filing a preemptive motion gives the government the opportunity to ensure that the trial court is made aware of Rule 412's requirements and of the long line of case law affirming exclusion of evidence relating to prior or subsequent prostitution. The government should argue that evidence that the victims may have engaged in commercial sex acts before or after their time with the defendant is entirely irrelevant to the question of whether the defendant committed the crimes charged—or, in other words, the defendant committed these crimes regardless of the victims' prior or subsequent commercial sex acts.

Sex trafficking prosecutors seeking to exclude evidence of unrelated prior or subsequent prostitution may make analogies to situations involving forced labor. The fact that a farm worker had previously or subsequently worked on a farm does not suggest that a defendant did not use force, fraud, or coercion to compel the worker to labor on the defendant's farm during the dates alleged. No one has the right to compel someone to work against his free will. This principle applies with equal force whether the labor in question involves farming or commercial sex acts. Or, put simply, consent in one situation does not equate to consent in the other.[42] Regardless of what choices a sex trafficking victim may have made before or after the charged time period, it was still a crime for the defendant to recruit, entice, harbor, transport, provide, or obtain the victim while knowing that force, fraud, or coercion would be used to cause her to engage in commercial sex acts.

B. Introduction by the Government of a Victim's Unrelated Sexual Activity

In some sex trafficking cases, it may be necessary for the government to introduce some limited evidence regarding a victim's prior involvement in sex trafficking in order to provide context to establish the defendant's intent to cause or coerce the victim to engage in commercial sex acts. For example, the fact that a defendant recruited a victim after seeing one of her prostitution advertisements on Backpage.com may be relevant to establishing the defendant's intent. It also tells the victim's story and how the defendant met her; furthermore, its absence may cause jury confusion. Similarly, the fact that a

[41] FED. R. EVID. 412(c).

[42] *See* United States v. Goodwin, 982 F.2d 464, 471 (11th Cir. 1993) ("A woman's consensual sexual activities with certain individuals in no way imply consent to similar activities with others."); *see also* United States v. Saunders, 943 F.2d 388, 392 (4th Cir. 1991) ('[I]t is intolerable to suggest that because the victim is a prostitute, she automatically is assumed to have consented with anyone at any time.").

defendant had a sexual relationship with the victim may be relevant to establishing his use of emotional coercion to compel her to engage in prostitution.[43]

Before seeking to introduce such evidence, prosecutors should seriously analyze the importance of the evidence to establish guilt. Prosecutors should also consider that if the government affirmatively introduces such evidence, the defendant may cross-examine the victims regarding such testimony. Cross-examination nevertheless may not "stray into areas barred by Rule 412(a)—that is, the Defendant's cross-examination may not inquire into the victims' 'other sexual behavior' or any alleged 'sexual predisposition.'"[44] The opinion states:

> Allowing the Government to introduce evidence under Rule 412(b)(1)(B) does *not* open the door to the Defendant introducing evidence that is otherwise inadmissible under Rule 412(a). Interpreting Rule 412 in that way would entirely undermine Rule 412's purpose. Rule 412 comes into play in a criminal case only when the charged crimes involve some form of "sexual misconduct." FED. R. EVID. 412(a). Proving such crimes necessarily requires the Government to introduce evidence of the victim's sexual behavior—namely, evidence of the sexual behavior underlying the crimes charged in the indictment. If the introduction of that evidence opened the door to the introduction of "other sexual behavior" evidence, Rule 412(a) would serve no purpose.[45]

C. Defense Failure to Provide Sufficient Notice Pursuant to Rule 412(c)

According to Rule 412(c), no less than fourteen days before trial, a defendant must advise both the government and the victim of his intent to introduce evidence of a victim's unrelated sexual history via sealed motion.[46] The sealed motion must "specifically describe [] the evidence and state [] the purpose for which it is to be offered."[47] Prior to admitting such evidence, the court must hold an in camera hearing and give the parties and the victim the right to be heard.[48]

Failure to comply with these notice requirements—which are intended to protect victims, courts, and the government from surprise—can and should render such evidence *per se* inadmissible**.** As the Eighth Circuit held in *United States v. Rouse*, Rule 412 "has strict procedural requirements, including a timely offer of proof delineating what evidence will be offered and for what purpose, and an *in camera* hearing at which the victim may respond."[49] Because the defense became aware of the alleged incidents of sexual conduct almost three months before trial but failed to file a written motion to offer such evidence at least fourteen days before trial, the *Rouse* court concluded that the district court properly excluded such evidence. The court came to this conclusion because the evidence was offered in violation of Rule 412 and the defense had no good cause for its untimely attempts to offer the evidence.[50]

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[43] *See* FED. R. EVID. 412(b)(1)(B) (including an exception for introduction of "evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct . . . if offered by the prosecutor").
[44] United States v. Thompson, 178 F. Supp. 3d 86, 94 (W.D.N.Y. 2016).
[45] *Id.*
[46] FED. R. EVID. 412(c).
[47] FED. R. EVID. 412(c)(1)(A).
[48] FED. R. EVID. 412(c)(2).
[49] United States v. Rouse, 111 F.3d 561, 569 (8th Cir. 1997).
[50] *Id.*; *see also* United States v. Ramone, 218 F.3d 1229, 1235–36 (10th Cir. 2000) (affirming district court's exclusion of defendant's proffered evidence regarding entire sexual history with victim where defendant failed to file written notice of intent to introduce such evidence fourteen days before trial and finding that exclusion did not violate defendant's Sixth Amendment rights).

Furthermore, the Supreme Court has held, in a case not dealing with § 1591, that exclusion of evidence based on the failure to comply with a notice provision in a state rape shield statute does not necessarily violate the Sixth Amendment.[51]

More recently, in *United States v. Backman*, the Ninth Circuit upheld a district court's denial of a defendant's untimely and non-specific notice of intent to introduce evidence relating to the victims' alleged involvement in prostitution after the time frame charged in the indictment.[52] Although the district court did not base its decision on the untimeliness of the motion (albeit not before imposing a $100 fine on defense counsel), the court did conclude that the notice was not sufficiently specific regarding the details of the allegations to comply with the requirements of Rule 412.[53] The district court also denied the defense's request to amend its notice due to its untimeliness and prejudice to the government.[54]

The Ninth Circuit affirmed the district court's denial of both the motion and the request to amend, noting that:

> Because Defendant's Rule 412 motion specified neither the precise evidence sought to be admitted nor the particular victims at issue, the court was unable to comply with the Rule's procedural requirements. Given all the circumstances, including that trial was scheduled for less than two weeks from the date of the hearing and that consideration of an amended motion would require a response from the government and an additional hearing involving the parties and victims, it was not an abuse of discretion to deny Defendant an eleventh-hour opportunity to amend the Rule 412 motion.[55]

The Court also held that "the exclusion of the proffered evidence was within constitutional bounds, because the exclusion was 'neither arbitrary nor disproportionate to the purposes of the notice requirement."[56]

D. Rebutting Defense Attempts to Introduce Evidence of Unrelated Sexual Activity into the Delineated Exceptions to Rule 412

Defendants seeking to introduce evidence of a sex trafficking victim's sexual behavior or sexual history often rely on Rule 412(b)(1)(C).[57] They argue that excluding such evidence would violate their constitutional rights, including the right to present a complete defense, the right to cross-examine witnesses, and the right to impeach witnesses by disproving prior false statements or showing bias or motivation to lie. Although a few courts have admitted such evidence on these grounds, prosecutors can and should argue that these exceptions are rarely applicable in sex trafficking cases.

1. Right to Present a Complete Defense

The Fifth Amendment guarantees the right to a fair trial, and courts have "long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a

[51] *See* Michigan v. Lucas, 500 U.S. 145, 151–53 (1991).
[52] United States v. Backman, 817 F.3d 662, 669 (9th Cir. 2016).
[53] *Id.*
[54] *Id.*
[55] *Id.* at 670.
[56] *Id.*
[57] FED. R. EVID. § 412(b)(1)(C).

complete defense."[58] A defendant nevertheless "does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence."[59]

Most courts have rejected attempts by defense counsel to characterize evidence relating to a victim's unrelated sexual activity as necessary to present a complete defense. These courts have held that "evidence of prior prostitution is irrelevant to a charge under §1591(a) and thus is properly barred."[60]

In responding to a motion seeking admission of evidence of unrelated sexual activity on Fifth Amendment grounds, a prosecutor should argue that whether a victim previously or subsequently engaged in prostitution does not make more or less probable any fact that the government needs to prove to establish a §1591 violation; therefore, exclusion of such evidence does not violate a sex trafficking defendant's Fifth Amendment rights. Nor would this evidence provide a defense to the crimes charged. Accordingly, sex trafficking defendants have no Fifth Amendment right to present such irrelevant evidence to the jury.[61]

2. Right to Cross-Examine Witnesses

"The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him."[62] Supreme Court "cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination."[63]

A defendant's interest in impeaching a witness (and the impeachment value of the evidence) nevertheless must be weighed against the privacy interests and other interests Rule 412 protects, as well as the risk of unfair prejudice.[64] The Confrontation Clause only requires admission of probative evidence, but if evidence is minimally probative and highly prejudicial, exclusion will not violate the Confrontation Clause or the defendant's other constitutional rights.[65]

A defendant is "not constitutionally entitled to present irrelevant evidence,"[66] and "[t]he Confrontation Clause only requires admission of probative evidence."[67] Moreover, a defendant's right to introduce evidence is "not without limitation" and must "bow to accommodate other legitimate interests," such as safeguarding a victim against the invasion of privacy and harassment.[68] As the Supreme Court has recognized, "trial judges retain wide latitude . . . to impose reasonable limits on [testimony] based on

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[58] United States v. Gemma, 818 F.3d 23, 34 (1st Cir. 2016) (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)).
[59] Taylor v. Illinois, 484 U.S. 400, 410 (1988).
[60] *Gemma*, 818 F.3d at 34 (holding that evidence of prior acts of prostitution "is either entirely irrelevant or of such slight probative value in comparison to its prejudicial effect that a decision to exclude it would not violate [the defendant's] constitutional rights"); *see also* United States v. Rivera, 799 F.3d 180, 185 (2d Cir. 2015); United States v. Roy, 781 F.3d 416, 420 (8th Cir. 2015); United States v. Cephus, 684 F.3d 703, 708 (7th Cir. 2012); United States v. Valenzuela, 495 F. App'x 817, 819–20 (9th Cir. 2012).
[61] United States v. Powell, 226 F.3d 1181, 1199 (10th Cir. 2000) (holding that evidence offered to support defense that victim consented to travel with defendant and to rebut inferences that victim was sexually naïve, innocent, and unsophisticated prior to her alleged kidnapping was not relevant and was properly excluded under Rule 412).
[62] Davis v. Alaska, 415 U.S. 308, 315 (1974).
[63] Douglas v. Alabama, 380 U.S. 415, 418 (1965).
[64] United States v. Davis, No. CR-13-589-CAS, 2015 WL 519455, at *7 (C.D. Cal. Feb. 5, 2015); *see also* United States v. Thompson, 178 F. Supp. 3d 86, 93 (W.D.N.Y. 2016); United States v. Elbert, 561 F.3d 771, 777 (8th Cir. 2009).
[65] *Elbert*, 561 F.3d at 777.
[66] Doe v. United States, 666 F.2d 43, 47 (4th Cir. 1981).
[67] *Elbert*, 561 F.3d 777–78 (upholding exclusion of evidence in sex trafficking case that victim had engaged in commercial sex acts before and after encounter with defendant).
[68] Michigan v. Lucas, 500 U.S. 145, 149 (1991).

concerns about, among other things, harassment, prejudice, confusion of the issues, the [witness's] safety, or interrogation that is repetitive or only marginally relevant."[69]

The Ninth Circuit has recognized that the Sixth Amendment right to confront and cross-examine witnesses is not unlimited and that a trial judge has "wide discretion in limiting the scope of cross-examination."[70] In *Payne,* the court recognized that the Confrontation Clause does not automatically trump the protections of Rule 412 and that evidence of a victim's prior sexual conduct can properly be excluded where the probative value is minimal compared to the prejudicial effect.[71] The *Payne* Court further noted that the Ninth Circuit had previously found that "a trial court's limitation of cross-examination on an unrelated prior incident, where its purpose is to attack the general credibility of the witness, does not rise to the level of a constitutional violation of the defendant's confrontation rights."[72]

3. The Right to Impeach Witnesses

Most courts have held that impeaching a victim's truthfulness is not a recognized exception to Rule 412.[73] This is because evidence of a victim's alleged sexual predisposition, other sexual behavior, and unrelated prostitution acts has no bearing on a victim's credibility.[74]

United States v. Thompson noted that, on the one hand,

> [a] prior prostitution conviction . . . has relatively little impeachment value. On the other hand, in addition to possibly serving to harass or embarrass the victim, impeaching a victim in a prostitution case with the victim's prior prostitution conviction has the potential to unnecessarily confuse the jury by suggesting that, because prostitution is illegal, the victims' testimony is inherently suspect or that the defendant's alleged conduct is less culpable.[75]

Courts have split on whether evidence that the victim has accused others of sexual abuse—even when those allegations are later determined to be false—are subject to Rule 412's limitations. In *United States v. Willoughby*, the defendant argued that evidence of the victim's previous recantation of an unrelated sexual abuse allegation was probative of her truthfulness.[76] The district court acknowledged the

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[69] Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986).
[70] United States v. Payne, 944 F.2d 1458, 1469 (9th Cir. 1991).
[71] *Id.*
[72] *Id*. (citations omitted).
[73] United States v. Withorn, 204 F.3d 790, 795 (8th Cir. 2000) (holding that "impeaching the victim's truthfulness and showing her capability to fabricate a story 'are not recognized exceptions to Rule 412'" and concluding that the application of Rules 412, 413, and 414 in concert did not violate the defendant's constitutional right to a fair trial).
[74] *See* United States v. Elbert*,* 561 F.3d 771, 777 (8th Cir. 2009) ("[U]nchastity of a victim has no relevance whatsoever to [the victim's] credibility as a witness.") (quoting United States v. Kasto, 584 F.2d 268, 271 n.3 (8th Cir. 1978)).
[75] United States v. Thompson, 178 F. Supp. 3d 86, 94 (W.D.N.Y. 2016); *see also* United States v. Powell, 226 F.3d 1181, 1198–99 (10th Cir. 2000) (explaining that evidence of minor victim's past sexually suggestive behavior with other men was properly excluded); United States v. Anderson, 139 F.3d 291, 303 (1st Cir. 1998) (using prior commercial sex acts to impeach victim's credibility "embod[ies] a particularly offensive form of stereotyping" and is not permissible); Wood v. Alaska, 957 F.2d 1544, 1550 (9th Cir. 1992) (holding that the "fact that [the victim] posed in the nude or acted in pornographic performances does not in any way indicate that she is a dishonest person or had a motive to lie in this case"); United States v. Torres, 937 F.2d 1469, 1469 (9th Cir. 1991) (stating that evidence of incident that occurred approximately six months after alleged aggravated sexual abuse of victim was not admissible under Rule 412 and court properly rejected defense argument that this evidence was admissible because it was relevant to victim's credibility).
[76] United States v. Willoughby, 742 F.3d 229, 234 (6th Cir. 2014).

evidence was potentially probative of her credibility, but ultimately excluded it because the recantation "was interwoven with her sexual conduct."[77] The Sixth Circuit, however, agreed with the defendant that this was a misapplication of Rule 412 and held that the evidence should have been admitted because it was offered to prove the victim's credibility, not to prove that she engaged in other sexual behavior or to prove her sexual predisposition.[78]

In contrast, the Eighth Circuit has held on several occasions that evidence that a victim had previously accused another of sexual misconduct is inadmissible under Rule 412.[79]

IV. Conclusion

Evidence of a §1591 victim's sexual behavior or alleged sexual predisposition is not relevant to the charges, does not support a defense, has no impeachment value, and ordinarily should not, on its own, dissuade prosecutors from considering sex trafficking charges. Allowing this evidence to be introduced puts victims on trial and risks distracting the jury from the defendant's criminal conduct. Attorneys prosecuting sex trafficking cases must utilize Rule 412 to protect victims and ensure that trials are not infected by prejudicial and irrelevant evidence.

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[77] *Id.*
[78] *Id.*
[79] *See* United States v. Provost, 875 F.2d 172, 177–78 (8th Cir. 1989) (upholding district court's exclusion of evidence, pursuant to Rule 412 and 403, that victim had alleged that another individual had attempted to sexually molest her on different occasion); *see also* United States v. Withorn, 204 F.3d 790, 795 (8th Cir. 2000) (upholding district court's exclusion of evidence that victim had made a prior rape allegation against another individual where defense intended to argue that victim was not credible due to fact that both defendant and other individual claimed that victim had consented to intercourse); United States v. Bartlett, 856 F.2d 1071, 1088–89 (8th Cir. 1988) (finding prior false rape accusation inadmissible under either Rule 412 or Rule 608(b), which prohibits use of extrinsic evidence to prove specific instances of conduct for purpose of attacking witness's credibility except where such evidence is "probative of [witness's] truthfulness or untruthfulness").

Follow the Money: Financial Crimes and Forfeiture in Human Trafficking Prosecutions

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I. Introduction

Many human trafficking crimes generate substantial criminal proceeds resulting from the exploitation of vulnerable victims for commercial sex or labor. Financial investigations have proven highly effective in developing high-impact human trafficking cases. This Article examines the role of financial investigations and financial crime charges in human trafficking prosecutions—including the role of financial evidence in identifying additional victims and perpetrators, corroborating testimonial evidence, and proving coercion—and encourages the forfeiture of criminal proceeds and related assets to dismantle and deter trafficking enterprises. The Article promotes incorporating financial investigations and financial crime charges, including money laundering charges, into effective anti-trafficking enforcement strategies, and provides guidance on procedures for remission of seized assets to satisfy restitution orders benefiting trafficking victims.

II. Why Financial Investigations Are Important to Human Trafficking Prosecutions

Human trafficking has been estimated to generate more than $150 billion in illicit proceeds each year, according to the calculation most recently released by the International Labor Organization.[1] It has also been ranked among the top three most lucrative criminal businesses, after drug trafficking and counterfeiting, for instance, by the United Nations Office on Drugs and Crime (UNODC).[2]

The profit motive certainly plays out in domestic human trafficking cases as well, and the regularly charged Chapter 77 offenses from Title 18 of the United States Code are specifically geared towards the financial orientation. Looking to both sex trafficking and forced labor under 18 U.S.C. §§ 1589 and 1591, the commercial nexus is plain. Section 1589 prohibits "provid[ing] or obtain[ing] the *labor or services* of a person" through the prohibited means.[3] Section 1591 prohibits taking actions while knowing that prohibited means will be used to "cause [a] person to engage in a *commercial* sex act," or in connection with "a *commercial* sex act" by a minor.[4]

[1] *See, e.g.*, *Forced Labour, Modern Slavery and Human Trafficking*, INT'L LABOUR ORG. (last visited July 20, 2017).
[2] *See, e.g.*, Press Release, UNODC, New UNODC Campaign Highlights Transnational Organized Crime as a US $870 Billion a Year Business (July 16, 2012).
[3] 18 U.S.C. § 1589(a) (2012) (emphasis added).
[4] *Id.* § 1591(a) (2012 & Supp. III 2015) (emphases added).

Often, when criminals earn money from their illegal acts, they seek ways to hide those funds; they spend them, often to benefit or perpetuate their criminal organizations; or they try to get them into, or move them through, the financial system without attracting attention, for future use. Frequently, these transactions occur internationally and involve large amounts of money. And also, frequently, these efforts can violate anti-money laundering laws such as 18 U.S.C. §§ 1956 and 1957 or the prohibition against structuring in 31 U.S.C. § 5324. Financial investigations can uncover these illegal activities and enable charges that accurately reflect and address what has occurred. Financial investigations, through these charges and otherwise, can often better enable the use of forfeiture as well, which is critical to depriving criminal organizations of their illegal earnings and the tools they use to conduct and promote illegal activity.

Accordingly, attending to the financial aspects of human trafficking cases is very important and increasingly recognized as a fundamental method for effectively combatting human trafficking. When dealing with such financially motivated and highly profitable crimes, which need illicit funds in order to keep functioning, it is essential to recognize that those involved will be working both to earn more money and to preserve their assets in ways that law enforcement can pursue. This Article addresses several facets of the effectiveness of financial investigations and charges in developing high-impact human trafficking cases. It further recommends including financial charges and pursuing forfeiture whenever appropriate in anti-trafficking law enforcement strategies.

III. The Specific Utility of Financial Investigations in These Cases

Combatting human trafficking from a financial vantage point has many benefits that have helped develop—and are expected to play an increasing role in—powerful prosecutions in this area. As examples:

A. Financial Evidence Highlights the Traffickers' Motive and Knowledge

Whether or not financial charges appear in a human trafficking case, financial investigations regularly provide valuable evidentiary contributions. Showing why traffickers engage in their exploitative activity—to make money and enjoy an expensive lifestyle—can be key to painting the appropriate picture of the traffickers' profit and greed. Following both the money (held by the traffickers) and the debt or lack of money (held by the victims) tracks the relationships' power structure and coercion. In addition, acts of hiding the money and the criminal activity through structuring or other financial crimes can provide significant evidence of the traffickers' consciousness of guilt. That evidence can also demonstrate the traffickers' and their co-conspirators' knowledge of the initial illegal activity because it explains why they may have avoided banks or used deceptive corporate forms to conceal assets, for instance, thereafter.

B. Financial Evidence Distinguishes the Traffickers from the Victims and Other Players—and Can Also Help Identify Additional Victims and Perpetrators

The contrasts presented between the traffickers and victims through financial evidence are immense. In sex trafficking cases, for instance, the victims are regularly distinguished by being unable to keep or spend the proceeds of their work; instead, the trafficker controls the funds—and juries can readily understand that this situation stands in stark contrast to less exploitative relationships. Juxtaposing the wealth of those who hold others in domestic servitude with the abuse and starvation of labor trafficking victims in the traffickers' beautiful residences brings home the horror of that exploitation. And jurors well understand that employees would not sign their full paychecks back to their employers under normal circumstances. Thus, financial evidence alone can provide effective evidence of coercion.

Following the bank record paper trail can have significant benefits beyond helping to show coercion as well. A financial investigation can identify prior or additional victims (who may also have been induced to sign over "paychecks" to their traffickers, for instance, or deposited money into the traffickers' bank accounts). It can illustrate the evolution of individuals' roles, including where some individuals who were victims may also begin to exercise coercion in a sex trafficking scheme. And it can identify additional perpetrators. Those perpetrators may have taken victims to a bank in order to facilitate sign-overs, directed financial transactions into specific bank accounts, or made their own accounts or accounts they control available for exploitative collection of victims' earnings. Tracking where the money goes can also identify co-conspirators by showing who is receiving money from the illegal activity or spending money on behalf of the scheme. These individuals often have power, control, and responsibility, or are operating at a higher level in the criminal organization, sometimes overseas.

C. Financial Evidence Helps Identify Gatekeepers and Their Roles

Some individuals, referred to as "gatekeepers," help people who they know are involved in illegal activity launder their proceeds. By doing so, they commit their own financial crimes, including when they operate as unlicensed money transmitting businesses in violation of 18 U.S.C. § 1960. Because gatekeepers may work with several different traffickers or criminal organizations, prosecuting them can help disrupt and dismantle pathways for illicit activity in unique and desirable ways. Tracking funds flowing to a single gatekeeper, for instance, can lead to multiple criminal organizations and result in additional targets and more cases. And often, it can present the best chance to accomplish such law enforcement goals as dismantling criminal groups and arresting those whose incarceration will have the greatest impact on the organization.

D. Financial Evidence Can Enable Additional Charges and Higher Penalties

Pursuit of financial evidence can enable an array of financial charges, including multiple forms of money laundering and structuring and other financial crimes, such as bank fraud. Such charges allow prosecutions to better capture the breadth of an individual's or organization's criminal conduct. Often, financial charges will also enable higher sentences by increasing the relevant statutory maximum penalties and advisory sentencing ranges under the United States Sentencing Guidelines. Additionally, familiarity with the financial side of the criminal activity facilitates forfeiture, which can expand the consequences to fit the crimes and deter criminal conduct by depriving the traffickers of the fruits and tools of their illegal activity. (Further, money laundering charges regularly expand the scope of forfeiture to include different and additional property that would not be forfeitable under other statutes, as discussed below.) In other words, through financial investigations, a more thorough case can be brought against the traffickers, and higher penalties may be imposed. Indeed, traffickers may have factored jail into their calculus as a cost of doing business, expecting to exit to the comfort of the houses and expensive cars they have accumulated; hence, depriving them of that opportunity can be especially powerful.

E. Financial Evidence Corroborates Victims and Other Witnesses

Having financial evidence, often from disinterested third parties such as banks and unrelated businesses, also benefits human trafficking cases by providing corroboration to victims and other witnesses. This evidence includes bank withdrawal and deposit slips; credit or debit card payment records documenting travel, such as flight, gas, and hotel expenses; advertising payments; and other purchases that may match victims' memories, even if the victims do not recall specific dates or locations otherwise. (Advertising payments and other expenditures can often be the basis for specific money laundering charges, as well.) In addition, one credit report or bank account or corporate registration document can lead to multiple others and help establish relationships and patterns of activity that shed true light on how the criminal enterprise works.

With or without financial charges, having this impartial documentation and the financial trail reduces pressure on victims by providing independent evidence of the occurrence of events, and supplements their testimony in black-and-white. This evidence will remain available and unintimidated for trial, even if witnesses may not be—including evidence against traffickers who are accustomed to dominating their victims and expect to do so at trial as well. And the documents will say what the documents say even when memories may fade.

Financial evidence is also useful for interviewing traffickers and can both establish relationships (for instance, through bank or ATM video showing a victim accompanied by the trafficker) and contradict the traffickers' accounts in indisputable ways, including in such areas as illustrating early on that the traffickers know the victims. Bank tellers may have overheard conversations between a trafficker and victims or witnessed the trafficker instructing victims on how they must deposit money into particular accounts, or may have observed forceful actions, bruises, or other injuries that otherwise are hidden from public view. Financial evidence can also be a basis for expert witness testimony and other perspectives that can be persuasive for the jury and that responds to different jurors' learning styles. That tailoring can be especially useful given the uncomfortable topics of coercion and abuse that are present in these cases.

F. Financial Evidence Enables Forfeiture and Helps Facilitate the Satisfaction of Victims' Restitution Orders

Even without money laundering charges, financial investigations often enable identifying assets for forfeiture, and having the ability to seize the traffickers' assets to help victims recover is highly rewarding. Forfeiture provides unique tools for restraint of assets, so assets that would otherwise be spent or hidden by the end of a case can be brought into government custody for forfeiture at the beginning, even before indictment. The use of both civil and criminal forfeiture tools can enable the forfeiture of certain properties that facilitated the crimes, or proceeds, as well, even where they may be titled in others' names, in order again to both prevent the traffickers from further benefiting from their crimes and to help get recovery to victims where possible.

Forfeiture orders may be used to collect against assets of the traffickers for lengthy periods after the crime, too, and help eliminate windfalls to traffickers if they managed to secrete, or if they later procure or even inherit, assets. Even when forfeitures are limited, even nominal payments to victims from the traffickers' assets may have desirable, empowering effects. This Article discusses forfeiture and the process for helping to get forfeited assets to victims in further detail below.

IV. Elements of Financial Investigations

A financial investigation occurs alongside a criminal investigation and focuses on the money generated by and spent on criminal activity, often dealing with "specified unlawful activity" based on that term's use in the money laundering statutes and for forfeiture. At times, the financial investigation may comprise the entire investigation, such as in tax and some fraud cases, but it may also complement the criminal investigation that is underway on any other substantive crimes. Financial investigations are especially important in money-motivated and profitable crimes to better understand the motivation and additional criminal activity of these enterprises.

Goals of a financial investigation include: (1) understanding the flow of money and developing evidence for money laundering or other financial charges (including tax charges) against all defendants, if applicable; and (2) identifying assets for seizure or forfeiture before they are spent or hidden. This often includes identifying specific relevant transactions and their role in connection with the criminal conduct (promotion, for instance), as well as working to evaluate the overall picture of incoming funds and outgoing expenses to understand the traffickers' finances as fully as possible.

This type of evaluation is important in part because money laundering is essentially the second step in a two-step process: first, one is looking for a completed crime that generated money or "proceeds;" and second, one identifies what the perpetrators did with those proceeds (spending, hiding, or otherwise) that might generate a money laundering charge or further investigation. Seeing how money is used (where the proceeds end up) also enables tracing of assets back to the crime in a valuable way because forfeiture covers such proceeds in many forms—and financial documents are key to this process. They can show, for instance, that a trafficker had no assets as of a particular date when the trafficker declared bankruptcy—which establishes a baseline for the illegal earnings since that time.

Insurance information, income reported (or notably, not reported), and other information appearing on tax returns can also provide valuable leads for both the overall case and forfeiture. This information can, as examples, document a trafficker's claimed lack of legitimate income compared to a lavish lifestyle; provide (or refute) claimed employment information; reveal jewelry and other assets; or indicate corporate forms that may have facilitated concealment. (Businesses can be subject to forfeiture on that basis.)

It must be kept in mind, though, that financial investigations take time, and some tools—such as through a grand jury—may only be available before indictment, so starting those processes as early as possible is the most helpful, especially when responses may be desired from outside the United States. In addition, an early start can help capture additional assets before they are spent or moved overseas, for instance, either as part of the normal operations of the criminal enterprise or if the traffickers learn about law enforcement's investigation.

It is helpful as part of the financial investigation, too, to think broadly about what types of financial evidence and documents may be available in a case. A great deal of evidence is available publicly and on the Internet, including through typical search engines, social networks (where traffickers may accumulate celebratory photographs of cash), advertising, and property-related searches such as Zillow (for both valuation and timing-of-transfer information) and mortgage searches. Electronically available documents may also include court records, which provide information on property ownership, company information, bankruptcies, and family relationships and events, including divorces, births, and deaths (and which can be used to identify family members who may be "straw owners" of certain properties). Other evidence entails some expectation of privacy and may require legal process, and some evidence almost always requires specific legal process, such as a grand jury subpoena or search warrant.

Traditional law enforcement methods such as detailed interviews, surveillance (including of trips to and from banks), use of subscription databases regarding both people and assets, and searches (which should cover financial documents wherever applicable, in any event), can also readily be adapted to the financial angle. This should always receive attention separately from other pursuits in the course of the criminal investigation. Public records and other sources of information may assist in identifying additional witnesses or assets, including a review of bills, utility information, bank statements, mail, receipts, and notes that traffickers throw away. This evidence supplements formal banking records and both domestic and international money transfer records that may be obtained. And much of a financial investigation may be pursued well before the investigation is known to the traffickers, which can facilitate accumulating the desirable variety of evidence that will be useful in the prosecution down the road.

Documents created and retained pursuant to the Bank Secrecy Act of 1970 ("BSA")[5] and its accompanying regulations—which, among other things, introduced multiple reporting requirements designed to prevent criminals from exploiting the U.S. financial system—can also be useful in financial

[5] *See* 31 U.S.C. §§ 5311–5332 (2012 & Supp. III 2015).

investigations in human trafficking cases, as elsewhere. Their utility includes identifying bank accounts, financial activity, and other accountholders, which may help lead to the early determination of traffickers' identifiers, their locations and the locations of their assets, and the identification of co-conspirators, as well as enabling early analysis of financial flows.

The key BSA reports include currency transaction reports ("CTRs" and "CTR-Cs") that must be completed by "financial institutions" (including check cashers and casinos) for deposits, withdrawals, or exchanges of currency over $10,000; Forms 8300 that must be filed by non-financial trades and businesses, including lawyers, when a single or related or connected transaction(s) totals more than $10,000 in cash (including cashier's checks, money orders, and traveler's checks with lower face values) within a 12-month period; currency and monetary instrument reports ("CMIRs") that must be completed by individuals when transporting (or causing the transportation of) monetary instruments totaling more than $10,000 into or out of the United States; and suspicious activity reports ("SARs") that banks must file "relevant to a possible violation of law or regulation" pursuant to 31 C.F.R. § 1020.320. Penalties also apply to individuals or entities failing to file or evading these reports, which can be pursued, if appropriate (and other laws provide reporting requirements that can regularly be useful as well).

V. Money Laundering Charges

After crimes generate money, money laundering is generally "the processing of these criminal proceeds to disguise their illegal origin."[6] Money laundering entails hiding the existence or the illegal source of income, often by disguising the income to make it appear legitimate so that it can be spent without arousing suspicion—or trying to use such illicit funds for some purpose within the criminal scheme (which is commonly referred to as "promotion" money laundering)[7]—among other activity. Essentially, money laundering takes "dirty" money, or illegally earned "proceeds," and attempts to make that money look "clean," often combined with using that money to advance the criminal cause.

Federal money laundering charges almost always must begin with the illegal proceeds generated by an "SUA" or "specified unlawful activity," and many crimes relevant to human trafficking constitute SUAs.[8] "Proceeds" include the amounts earned from sex acts or earnings traceable to forced labor in human trafficking cases. Money laundering may occur, for instance, when money goes into banks, introducing illicit moneys into a financial system and using them for even legitimate purposes. And the point when money is first introduced into a financial system can be a useful time to identify it as

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[6] *What Is Money Laundering?*, FINANCIAL ACTION TASK FORCE ("FATF") (last visited July 20, 2017); *see also, e.g.*, *Money Laundering*, U.S. DEP'T OF TREASURY ("Treasury Department") (last visited July 20, 2017).

[7] Certain money laundering cases and, specifically, cases involving "merger"—which arises regularly in human trafficking cases—require prior consultation with the Money Laundering and Asset Recovery Section. *See, e.g.*, U.S. DEP'T. OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-105.330 (2016).

[8] SUAs relevant to human trafficking cases include a variety of offenses listed under 18 U.S.C. §§ 1956(c)(7) and 1961(1), such as these (which appear in Title 18, unless otherwise specified): human trafficking (§§ 1581–1597); the Mann Act (§§ 2421–2424); interstate (or foreign) travel or transportation in aid of racketeering enterprises ("ITAR" or the "Travel Act") (§ 1952); sexual exploitation of children (§§ 2251, 2252, 2252A (if an actual minor), and 2260); alien harboring or smuggling (8 U.S.C. §§ 1324, 1327, and 1328) for financial gain; citizenship or naturalization fraud (§§ 1425, 1426, and 1427); passport or visa fraud (§§ 1542, 1543, 1544, and 1546); fraud in foreign labor contracting (§ 1351); identification document fraud and access device fraud (§§ 1028 and 1029); money laundering (§§ 1956, 1957, and 1960); the RICO offenses at Section 1961(1) (except Title 31 offenses); mail and wire fraud (§§ 1341, 1343); some extortion and hostage-taking-related offenses (§§ 875, 1116, 1201, and 1203); state-law kidnapping and extortion; obstruction of justice; and some foreign offenses and offenses in violation of other laws. Further, the statutory definition includes "trafficking in persons, selling or buying of children, sexual exploitation of children, or transporting, recruiting or harboring a person, including a child, for commercial sex acts." 18 U.S.C. § 1956(c)(7)(B)(vii) (2012).

"proceeds," in part because that introduction often requires personal interaction with a bank or other entity before the money is able to be transferred electronically.

Key money laundering charges relevant to human trafficking investigations include the basic and international money laundering provisions of 18 U.S.C. §§ 1956(a)(1) and (a)(2); the "spending statute," 18 U.S.C. § 1957; structuring in violation of 31 U.S.C. § 5324; operating unlicensed money transmitting businesses in violation of 18 U.S.C. § 1960; and conspiracy to violate either Section 1956 or Section 1957 (or both) in violation of 18 U.S.C. § 1956(h).

Although the four provisions of Section 1956(a)(1) contain different elements, it is key to note that "laundering" can be as simple as the transfer of SUA proceeds from one person to another, if the intent requirements are met. And money laundering is not limited to any specific monetary amount or to cash or other funds moving into banks or out of the country. Instead, the required "financial transaction" (an element of any charge under Section 1956(a)(1)) is defined broadly, including the transfer of title to any real property, vehicle, vessel, or aircraft, even when no exchange of funds occurs—and transactions involving use of a "financial institution" which is engaged in, or the activities that effect, interstate or foreign commerce in any way or degree.[9] The term "transaction" itself, indeed, includes loans, pledges, gifts, "or other disposition[s]," and with respect to financial institutions, includes "use of a safe deposit box."[10] In addition, financial institutions may include not only domestic and foreign banks, but also casinos, currency exchanges, insurance companies, jewelers, travel agencies, and car and boat dealerships.

Financial transactions for purposes of charging money laundering under Section 1956(a)(1) can include purchases of items, such as renting hotel rooms in new areas, paying advertising or recruiting expenses to expand geographic reach, or buying supplies for future use such as in a "massage" parlor or forced labor operation. Moreover, while the prosecution must prove the type of SUA that generated the proceeds, the specific crime transaction need not be proven (and one can use proof of lack of other income). And the defendant does not need to know the SUA; he or she need only know that the funds were from some form, but not necessarily what form, of felony (federal, state, or foreign). That knowledge can be proven by circumstantial evidence.

Similarly, it is useful to remember that Section 1956(a)(2), prohibiting international money laundering, can be violated by moving *any* money internationally with the intent to promote an SUA, whether or not that money constituted "proceeds." And the violation includes attempted transfers of funds and transactions designed "in whole or in part" to conceal that nature of proceeds or to avoid a transaction reporting requirement. The "monetary instruments" covered by these provisions include coin and currency, foreign money, personal and bank and travelers' checks, and money orders, as well as investment securities or negotiable instruments. Further, as to both basic and international money laundering, there is not a general requirement of the involvement of a bank.

Section 1957(a) prohibits knowingly engaging or attempting to engage in a "monetary transaction" with proceeds of an SUA in an amount greater than $10,000. It omits the required intent elements of Section 1956(a)(1), but does include a threshold amount ($10,000). A "monetary transaction" differs somewhat from a "financial transaction," and generally requires the involvement of a domestic or foreign bank.[11] Section 1957(a) applies in the United States *or* to non-U.S. persons outside the United States. And again, the SUA does not need to be known by the defendant. Indeed, under Section 1957, the defendant need only have known that the proceeds were criminally derived, which includes from a

[9] *See id.* § 1956(c)(3)–(4).
[10] Id. § 1956(c)(3).
[11] *See id.* § 1957(f)(1).

misdemeanor (rather than a felony). Section 1957(a) can be specifically geared, therefore, towards third parties who knowingly deal with traffickers and help them to spend their ill-gotten gains.

The crime of "structuring" pertains to breaking up cash transactions (or attempting to do so) in order to evade the BSA reporting requirements, as defined in 31 C.F.R. § 1010.100(xx). As noted above, the BSA imposes reporting requirements on banks and other institutions, and intentional efforts to stay below the CTR reporting threshold or otherwise avoid the BSA reporting requirements (including pertaining to CMIRs, Forms 8300, and an identification requirement applying to transactions greater than or equal to $3,000) constitute the crime of structuring.[12] Proof is required that the traffickers knew of the relevant reporting requirements, but not that they knew that structuring was illegal—and even when direct evidence of this is lacking, one can infer the trafficker's motive and intent to evade the reporting requirements based upon the transactions themselves, either alone or in combination with the criminal origin of the funds. Notably, structuring can include transaction amounts that are *not* just under $10,000; deposits in lower amounts at different locations or on successive days, for instance, can similarly constitute structuring.[13]

Section 1960—which is highly relevant to "gatekeepers" (those laundering money for criminal organizations of which they may not otherwise be a part)—makes it a crime to conduct a money transmitting business that operates without a state license (whether the defendant knows of that licensing requirement or not—and many states do have such licensing requirements) *or* fails to register with the Financial Crimes Enforcement Network ("FinCEN") *or* knowingly transports or transmits funds that the defendant knows are derived from a criminal offense or that are intended to promote unlawful activity. Money transmitting businesses include check cashers, currency exchanges, and any person who engages as a business in the transmission of funds, by any and all means, including by fax or courier.[14] Individuals can also conspire to structure or operate an illegal money transmitting business in violation of 18 U.S.C. § 371.

The money laundering conspiracy provision criminalizes conspiring to commit any of the offenses set forth in Sections 1956 or 1957. For the conspiracy, there must be at least two participants (not including any undercover agent or informant), and the government must prove, stated generally, that each defendant joined the conspiracy at some point with knowledge of at least some of its purposes or objectives and with the intent to accomplish them. The government does not need to prove that the conspirators knew the precise SUA that generated the proceeds being laundered, or that any transactions were actually conducted, just that two or more people intended to launder "dirty" money. In addition, unlike other conspiracy provisions, there is no requirement of proof of an "overt act" in furtherance of the conspiracy; the proof boils down to the agreement. This statute can facilitate prosecution of spouses in domestic servant cases and others who join in a human trafficking scheme. It is also a useful tool for charging money laundering over a period of time without accumulating multiple counts (because each act of money laundering itself must be charged as a separate offense)—as well as broadening the scope of relevant and admissible evidence in the case to include all of the financial information that has been gathered.

Accordingly, with money laundering, there are a number of charging options that can be appropriately tailored to fit the facts of each prosecution, including to accommodate considerations of venue and admissibility. Different case law considerations come into play in different circuits and

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[12] *See* 31 U.S.C. § 5324 (2012).

[13] In order to prioritize addressing the most serious structuring offenses, the Internal Revenue Service and the Department of Justice have specific policies pertaining to structuring cases and forfeiture in relation to structuring. Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Attorney General Restricts Use of Asset Forfeiture in Structuring Offenses (Mar. 31, 2015).

[14] *See* 31 U.S.C. § 5330(d)(1) (2001).

districts, so circuit case law must be consulted in connection with any case.[15] But the incorporation of potential money laundering charges—separately from the financial investigations themselves—as a critical component of an effective anti-trafficking enforcement strategy bears noting for these charges' adaptability and accessibility in human trafficking cases. The charges are also adaptable to the evolution of human trafficking methods—including the use of gift cards and virtual currency—and the fact that criminal organizations regularly utilize multiple methods at a time for financial transactions. Therefore, this Article recommends always considering these additions in order to capture the money-moving conduct of these profit-motivated defendants.

VI. Forfeiture

Financial investigations are also pivotal in enabling forfeiture in human trafficking cases, which regularly provides the best mechanism and opportunity to restrain and secure assets for recovery by victims. Forfeiture is the taking of property by the government, without compensation, because it was obtained or used in a manner contrary to the law. Purposes of forfeiture include: punishing the criminal, deterring illegal activity, removing the tools of the trade, disrupting and dismantling the organization, protecting the community (such as by possibly assisting in the removal of nuisance properties that may be utilized by traffickers), and returning assets to victims in a fair and orderly way (which can be accomplished most effectively through the combination of restitution orders with forfeiture tools in these cases). In short, the work that law enforcement does in this area is designed to ensure that crime does not pay, and to assist victims where possible.

The background principle of forfeiture is that a defendant relinquishes his right to property by using it in an illegal way or if it is derived from illegal activity. Proof of this illegal use or acquisition (often referred to as the "nexus" of the property to the crime, and which must be proved by a preponderance of the evidence, including hearsay evidence) is often developed as part of the overall investigation in these cases. Financial investigations, though, including with agents and analysts specializing in the review and understanding of financial documents (and who can similarly free up other law enforcement officers to assist with other challenges in human trafficking cases), can be especially valuable to see what property is viable for forfeiture, including analyzing ownership and other records to appraise how forfeiture should best proceed.

Forfeiture has both judicial (civil and criminal) and administrative processes. All forms of federal forfeiture hinge, though, on nexus, the property's relationship to the crime at issue. Except for certain terrorism offenses or in certain circumstances *after* a judicial forfeiture order is entered (by the mechanism of "substitute property" under 21 U.S.C. § 853(p)), there is no ability to forfeit *other* funds just because they belong to a defendant. So linking property to its specific relationship to the offense is key. Because, like other aspects of financial investigations, this takes time, beginning these inquiries as early as possible in any investigation is important. Additionally, there are timing requirements and deadlines attached to forfeiture proceedings that also merit early attention.

A misperception regarding forfeiture is that it is perhaps duplicative or unnecessary when restitution will be ordered, but the opposite is true. Both should be pursued in every case. Notably, restitution and forfeiture serve different purposes, restitution being geared towards making victims whole and relating to losses, whereas forfeiture is a form of punishment and relates to money earned or property used in the criminal enterprise, so they are not mutually exclusive, and both are mandatory in criminal cases where their prerequisites are met. In addition, due to its accompanying tools for seizure and restraint

[15] Certain consultation or approval requirements apply to a variety of money laundering charges as well, and the Money Laundering and Asset Recovery Section is available to assist on any questions that arise.

of forfeitable assets (seizure warrants, arrest warrants *in rem*, and protective orders to secure and maintain assets, *e.g.*), forfeiture offers opportunities that pursuit of restitution alone does not. Additionally, forfeiture complements restitution because forfeited funds, whether forfeited administratively or through judicial (civil or criminal) processes, can be directed to fulfilling restitution orders (through remission or restoration) or potentially used to cover victims' losses even where no restitution order was entered (through remission). The specific procedures and decision-makers for each process may differ—as they may depending on the identity of the agency involved—but the goals remain the same. Informing everyone involved that a case is a victim case can facilitate those efforts—as can making sure that the Department of Justice or Treasury agency forfeiture personnel (if a Treasury Department agency is involved) obligate the funds for victim compensation as soon as assets are seized.

Property subject to forfeiture includes real property (houses, restaurants, stores, strip malls, hotels, farms, and office parks); tangible personal property (cash, jewelry, art, boats, airplanes, and cars); and intangible personal property (professional licenses (medical, pharmacy, liquor, and potentially licenses to practice law), bank and investment accounts, business entities, permits, website domain names, stocks, lien interests, and virtual currency (*e.g.*, Bitcoin)). Thus, it is useful to think broadly when evaluating property for forfeiture. It can include a corporate form that owns property, such as the business engaging in labor trafficking. Every asset should be analyzed, and there are multiple possible avenues to accomplish forfeiture. Pre-trial seizure or restraint should also be considered in order to divest the traffickers of control of the assets as early as possible.[16]

Substantive theories of asset forfeiture—essentially, the nexus or how the property is related to the crime (what role it played) in order to be subject to forfeiture—include proceeds, facilitating, and "involved in" property. More than one theory, and indeed whichever theories apply pursuant to the statutes, can and should be pursued at the same time in a forfeiture investigation or case. For instance, property (a vehicle or house, *e.g.*) may have been purchased with ill-gotten trafficking gains as well as used to transport or restrict movement by trafficking victims—so both proceeds and the facilitating property theories should be pursued. Unique forfeiture provisions also apply to crimes under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), so when RICO is charged, that can provide additional forfeiture options.

Beyond RICO cases, forfeiture is available either where a crime occurs that constitutes an SUA under the money laundering statutes (18 U.S.C. § 981(a)(1)(C) provides for the forfeiture of proceeds for all SUAs, and that civil authority is incorporated for criminal forfeiture through 28 U.S.C. § 2461(c)) or wherever else there is specific statutory authority for forfeiture. (There is no universal statute or common-law authority for forfeiture, so forfeiture must always be tied to a specific statute; but in the area of human trafficking, there are many options that enable this possibility. It should be kept in mind, though, that statutes and forfeiture authorities change over time, so the effective dates of each relevant statute should be considered.)

"Proceeds" is broadly read and generally pertains to any property or interest in property, real or personal, that is derived from or traceable to, directly or indirectly, the illegal activity for which the applicable statute provides forfeiture authority—essentially, starting with all money that is generated by the illicit activity and tracking where it goes. As noted above, this theory of forfeiture applies to many crimes, and the government is usually entitled to forfeit the gross proceeds of the crime, not just the net

[16] To restrain real property, which absent a higher showing, cannot be seized, notices of *lis pendens* are valuable tools. It is important to keep in mind that all assets must be evaluated before they are seized or restrained, including with respect to ownership, net equity, custodial or management, disposal, and others questions, in order to ensure that law enforcement is only pursuing properties for forfeiture consistently with its overall Asset Forfeiture Program. *See* U.S. DEP'T OF JUSTICE, ASSET FORFEITURE POLICY MANUAL [hereinafter *Policy Manual*] 23–31 (2016). Note as well that all contraband and other property illegal to possess is subject to forfeiture.

proceeds—because defendants should not be entitled to benefit by deducting the operating expenses of their illicit activities.

Directly traceable proceeds would include the money a smuggler receives from a border crossing and what labor traffickers earn through the coerced labor, and indirect proceeds would include any winnings on a lottery ticket purchased with that money from the border crossing or other illicit earnings. They also include interest on proceeds and the appreciation of art or real property. Although they can be difficult to calculate, "proceeds" can include money that traffickers avoid having to spend, for instance, by using forced labor rather than legitimately hiring employees, as part of the calculation of their earnings. One way to think about this is through a "but for" test, that is, without the criminal activity, would the defendant have this property?

"Facilitating property" refers to assets that make a crime easier to commit or harder to detect.[17] In that regard, the government must generally prove a "substantial connection" between the property at issue and the crime. This theory of forfeiture generally includes a broader category of property than proceeds, but it is available for fewer crimes. It does include Chapter 77 offenses (unless the violation pre-dated January 26, 2001), passport and visa fraud, and also drug crimes, as examples—which is increasingly relevant where traffickers use drugs and addiction as tools of coercion. In terms of the "substantial connection," there cannot be simply an incidental or fortuitous connection between the property and the crime, but the item does not need to be indispensable to the crime; so "facilitating property" includes bank accounts used to fund internet access for child exploitation crimes, houses or land where forced labor occurs (but probably not the vacation home where a domestic servant is brought for only a few days), and vehicles used to transport trafficking victims.[18]

Several of the key statutes relevant to human trafficking have their own provisions enabling, in particular, the forfeiture of specific kinds of facilitating or related property in addition to proceeds.[19] The most important provision in this regard is 18 U.S.C. § 1594, which through the Justice for Victims of Trafficking Act of 2015 ("JVTA"), enables forfeiture of property "involved in" any Chapter 77 offense, in addition to proceeds, facilitating property, and property traceable to any of that property. Thus, for criminal activity on or after May 29, 2015, the available property for forfeiture has expanded, and all notices of forfeiture should be adapted accordingly, as applicable.

Traditionally, "involved in" property has primarily been forfeitable under the money laundering statutes (18 U.S.C. §§ 1956, 1957, and 1960, under 18 U.S.C. §§ 981(a)(1)(A) and 982(a)(1)), and that capability continues to invite inclusion of money laundering charges in human trafficking cases, whether or not a Chapter 77 offense is charged. Although houses and land used for domestic servitude or forced labor may be forfeited as facilitating property under various statutes, the "involved in" coverage expands the realm of property of which trafficking defendants can be deprived. One distinction pertains to bank accounts: although assets within bank accounts can be forfeited as proceeds, and bank accounts (or, more accurately, funds from those bank accounts) can be facilitating property and subject to seizure and forfeiture in human trafficking cases under that theory, additional bank accounts and assets may be forfeitable as "involved in" the crimes that might not otherwise be directly forfeitable, so pursuing all available avenues in this regard is likely to assist in accomplishing law enforcement's goals. The "involved in" theory may apply, for instance, to the full balance of a bank account, even funds deposited into it later, if a smaller amount was funneled through it on an earlier date (subject to the "substantial

[17] *See* 18 U.S.C. § 982(a)(6)(A)(ii)(II) (2012).

[18] Typical language in this regard refers to property "used[] or intended to be used to commit or to facilitate the commission of such violation[] and any property traceable to such property." 18 U.S.C. § 1594(d)(1) (2012 & Supp. III 2015). Also see the summary of the Department of Justice's facilitating property policy. *Policy Manual*, *supra* note 16, at 71–77.

[19] *See, e.g.*, 8 U.S.C. § 1324(b) (2012).

connection" requirement again and an Eighth Amendment proportionality analysis that applies to forfeiture proceedings).

To explain that in further detail, property that is "involved in" a money laundering scheme or human trafficking crime (as of May 29, 2015) can include both "dirty" (whether by being proceeds or conventional facilitating property) and "clean" money. This constitutes the broadest theory available for most crimes, and is useful because under this theory, for instance, if improvements are made to a house that was purchased with "clean" money, but the improvements were paid from "dirty" money as part of a money laundering scheme, then the entire house can be subject to forfeiture (subject to the forfeiture not being grossly disproportionate to the crime). If a trafficker uses the books and records of her restaurant, bar, spa, or massage parlor to pay for supplies for a sex trafficking operation, that business and its business accounts (and the funds therein) are presumptively forfeitable because the business was involved in the human trafficking scheme.

Each viable theory should be included in the forfeiture notice stated in the criminal indictment or information for criminal forfeiture.[20] Criminal forfeiture is tied to the defendant, and thereby enables the pursuit of substitute property from the defendant under certain circumstances. For instance, civil forfeiture is tied to the property. A key benefit of civil forfeiture (separately from its application to assets that are not owned by a defendant in a criminal case but that play a role in crimes (and lack innocent owners, as defined in the statutes)) is that it can be used to pursue the assets of fugitives and deceased individuals. And it can be pursued even if no criminal charges or different criminal charges are filed (although each relevant crime must still be proven in the civil proceeding). Civil forfeiture may also be useful because criminal forfeiture only applies if the defendant is actually convicted of a crime enabling the specific forfeiture desired (forfeiture can also be agreed to in a plea agreement). Keep in mind that even where there are no specific assets to be recovered, law enforcement should always calculate at least the amount of illegal proceeds obtained by each defendant, respectively, and seek individualized forfeiture orders for those amounts. Subsequently, substitute property should be pursued, if applicable.

Although the precise approach depends on the facts of each case and the assets involved, criminal forfeiture should be pursued, if applicable, in every criminal case, and civil forfeiture should also be considered, depending on the ownership of the subject assets and other factors. A civil forfeiture proceeding is subject to a stay, which can be requested from the court so that it will not interfere with a pending criminal case. By whichever mechanism, however, forfeiture can be expected to enhance restitution and recovery to victims. No matter the mechanism by which assets are forfeited, they may be pursued after forfeiture by way of remission and restitution on victims' behalf.[21]

VII. Remission and Restoration

Once assets are forfeited, there are a variety of purposes for which they can be used. In human trafficking cases, as elsewhere, compensating victims is a key priority, and victims receive compensation from forfeited funds *before* money would go to law enforcement or other purposes.[22] Tools for that provision include remission and restoration, with restoration being essentially a shortcut to the remission process if there is a restitution order in the case. Notably, for Chapter 77 offenses, the JVTA explicitly directs that "[n]otwithstanding any other provision of law, the Attorney General shall transfer assets

[20] Forfeiture may also be pursued as part of administrative proceedings or in parallel (or stand-alone) civil forfeiture cases, in compliance with the applicable statutes and procedures.

[21] Guidance on all aspects of forfeiture is available through the Money Laundering and Asset Recovery Section, which has a number of resources available to assist in these efforts. The Section also has a number of resources tailored to international capabilities in this area and tools to assist, in consultation with the Office of International Affairs, when assets are located overseas.

[22] *See Policy Manual*, *supra* note 16, at 161; 28 C.F.R. § 9.9(a) (2017).

forfeited pursuant to [18 U.S.C. § 1594], or the proceeds derived from the sale thereof, to satisfy victim restitution orders arising from violations of this chapter."[23] Accordingly, when a Chapter 77 offense is charged, the abilities to provide forfeited funds to victims further expand, as described below. As mentioned above, providing *any* funds to victims can have powerful effects, and provides the central reason why these efforts should be pursued as diligently as possible. And everything that law enforcement does to trace, seize, and restrain assets early will make sure that more funds are available for victims at the end of the case.

In "remission," the Attorney General, acting through the Money Laundering and Asset Recovery Section (for assets forfeited via judicial forfeiture) or the agency that seized the funds for forfeiture (for assets forfeited via administrative forfeiture) has discretion to compensate "persons" who have suffered a "pecuniary loss" as a direct result of the offense that gave rise to the forfeiture or a "related offense."[24] "Persons" include individuals as well as estates and business entities, and "victim" is defined as "a person who has incurred a pecuniary loss as a direct result of the commission of the offense underlying a forfeiture." In turn, "pecuniary loss" is defined as "the fair market value of the property of which the victim was deprived as of the date of the occurrence of the loss."

Under the current regulations, physical injuries, torts, and property damage are not coverable by remission. Accordingly, remission for trafficking victims is often limited to a calculation of lost wages based upon a minimum-wage calculation for hours worked, which prosecutors should assist in pursuing. Past medical and counseling bills may also be covered when they are supported by documentation. (Please contact the Money Laundering and Asset Recovery Section regarding the treatment of future expenses.) Any victim, to receive remission, completes a petition for remission that is submitted to the prosecutor for processing according to the applicable procedures—and prosecutors should work to identify all potential victims and provide them with notice of the opportunity to file a petition for remission.

Once a petition for remission is submitted, remission may be granted if the provisions of 28 C.F.R. § 9.8 are satisfied and "the victim satisfactorily demonstrates that":

> (1) A pecuniary loss of a specific amount has been directly caused by the criminal offense, or related offense, that was the underlying basis for the forfeiture, and that the loss is supported by documentary evidence including invoices and receipts;
>
> (2) The pecuniary loss is the direct result of the illegal acts and is not the result of otherwise lawful acts that were committed in the course of a criminal offense;
>
> (3) The victim did not knowingly contribute to, participate in, benefit from, or act in a willfully blind manner towards the commission of the offense, or related offense, that was the underlying basis of the forfeiture;
>
> (4) The victim has not in fact been compensated for the wrongful loss of the property by the perpetrator or others; and
>
> (5) The victim does not have recourse reasonably available to other assets from which to obtain compensation for the wrongful loss of the property.[25]

Documentary evidence includes receipts, invoices, and bank records, and can include evidence gathered by the government that was not previously in the victims' possession. Petitions may be decided any time while forfeited assets remain, and anyone denied remission may request reconsideration of the

[23] 18 U.S.C. § 1594(f)(1) (Supp. III 2015).
[24] *See* 28 C.F.R. §§ 9.2, 9.8 (2017).
[25] 28 C.F.R. § 9.8(b).

denial within 10 days of receiving notification thereof. Requests for reconsideration must include new information and are considered by a different decision-maker.

Under restoration (the shortcut to the remission process when there is a restitution order in the case), the U.S. Attorney's Office consults with the seizing agency and then certifies to the Attorney General that all known victims were properly notified and are accounted for in the restitution order; that the losses described in the restitution order have been verified and reflect all sources of compensation received by the victims; that the victims do not have recourse reasonably available to obtain compensation for their losses from other assets; and that the victims essentially were not complicit in or willfully blind to the offenses.[26] Restoration is considered a shortcut to remission because the individual victims do not need each to file their own petitions (and if some assets have been forfeited judicially and some administratively, more than one petition may otherwise be required), and the process therefore generally proceeds more quickly, but it does hinge on accurate restitution orders. Again, too, the decisions on these petitions are within the Attorney General's discretion. Guidance and model documents for both remission and restoration appear at https://www.justice.gov/criminal-mlars/victims.

Ultimately, under either remission or restoration, victims are paid from the available net proceeds of assets forfeited in the case, which underscores the need for pre-seizure planning and attention to net equity thresholds in forfeiture so that particular forfeitures do not diminish the amounts ultimately available to victims. Expenses from "underwater" properties must be offset against available proceeds from other assets, and all recoveries are generally limited to what was forfeited *in that case*, so law enforcement should not hold assets longer than necessary because that may diminish the funds ultimately available for victims. Interlocutory sales and receipt of cash in lieu of forfeiting specific other assets are tools to avoid these issues. Additionally, it may be decided to discontinue forfeiture efforts if defendants will agree to provide otherwise-forfeitable funds directly to the clerk of court for payment of restitution, or otherwise, to facilitate getting funds to victims as quickly as possible. Please contact the Money Laundering and Asset Recovery Section for assistance on any of these options.

The JVTA provision directing that forfeited funds be paid to satisfy restitution orders essentially bypasses the regulatory requirements for remission and restoration and enables the coverage of losses (more closely with the provisions of the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A, *e.g.*) that might not otherwise be recoverable. Accordingly, with charges of a Chapter 77 offense and a restitution order, additional losses to the victims can be recovered from forfeited funds, including non-pecuniary losses if those are covered in the restitution order—and this can generally occur through the restoration process. Because losses in human trafficking cases are often heavily weighted towards medical and counseling bills and there is often a lack of documentation, the JVTA (when combined with a restitution order) is especially powerful: all losses covered in restitution orders of the victims of these offenses will be paid, up to whatever the value is of the forfeited funds. (Cases under the JVTA are still working their way through the system, and the amendment left some ambiguity in certain circumstances which are still to be resolved.)

Because returning assets to victims of crime is a top priority of the Asset Forfeiture Program, whichever of these procedures are applicable should be pursued—and all should be kept in mind for planning in human trafficking cases, in order to work to best facilitate this type of recovery. Additional resources to assist in this effort are available at https://www.justice.gov/criminal-mlars/publications.

VIII. Conclusion

Given the substantial criminal proceeds generated by human trafficking, it is a significant priority of law enforcement to combat this exploitation of victims for commercial sex and labor as effectively as possible. Financial investigations are central to this effort and should be increasingly utilized, both in

[26] *Policy Manual*, *supra* note 16, at 166–67.

terms of using financial documents and information to strengthen cases generally and through proactive pursuit of money laundering and other financial charges and forfeiture. Using these tools, additional assets can be made available for victim compensation, and each tool provides a significant complement to law enforcement's other efforts to combat human trafficking and facilitate recovery for victims.

ABOUT THE AUTHOR

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Credit for this Article goes to the Money Laundering and Asset Recovery Section for the training materials and other publications from which the author has drawn heavily, adapting their discussion to the human trafficking context.

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Mandatory Restitution: Complying with the Trafficking Victims Protection Act

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I. Introduction

"He had me do ten appointments a day and I was there for six months. I never saw any of that money[,] and when I finally escaped I left with nothing[—]I just needed to get away from him and back to my son."[1]

To the federal prosecutor who has just heard a jury render a guilty verdict in a hard-fought human trafficking prosecution, a restitution order may seem like a far-off concern and not nearly as urgent as preparing for a sentencing hearing, but to the trafficking victim, the money associated with a restitution order can be life-changing. Although no amount of money can erase the pain the trafficker has inflicted, that money can fund much-needed transportation, opening doors to employment, school, and childcare. It can help pay for housing, food, and tuition, or be the means by which a victim seeks counseling for trauma or addiction. Most victims, like the young woman quoted above, are destitute when they finally escape the grip of their trafficker. Some literally escape with just the clothes on their back. Restitution can be a catalyst to independence and a critical factor in a survivor's efforts to avoid re-victimization. To the federal prosecutor who has just heard a jury render a guilty verdict, the upcoming restitution hearing is the government's opportunity to change a victim's life.

Skillfully advocating for restitution is a core component of the Department's victim-centered approach to trafficking enforcement. Enacted in 2000, the Trafficking Victims Protection Act (TVPA) mandates restitution for victims of human trafficking.[2] Specifically, the TVPA requires a defendant convicted of a trafficking crime under Title 18, Chapter 77, to pay restitution to the victim.[3] Chapter 77 includes, *inter alia*, crimes such as sex trafficking and forced labor.[4]

The most important aspect of the TVPA's restitution component is that restitution is mandatory.[5] Mandatory restitution for trafficking victims under 18 U.S.C. § 1593 is a powerful mechanism enabling federal prosecutors to restore to trafficking survivors the simple dignity of living free. This article

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[1] Survivor's Victim Impact Statement, United States v. Hamidullah, No. 6:16-cr-27 (M.D. Fla., filed Feb. 10, 2016).
[2] *See* 18 U.S.C. § 1593 (2012).
[3] *See id.* § 1593(b).
[4] *See* 18 U.S.C. §§ 1581–1597 (2012 & Supp. III 2015).
[5] *See* 18 U.S.C. § 1593(a) ("the court *shall order* restitution for any offense under this chapter") (emphasis added); United States v. Culp, 608 F. App'x 390, 392 (6th Cir. 2015) ("Courts must award restitution to victims of sex trafficking."); United States v. Robinson, 508 F. App'x 867, 870 (11th Cir. 2013) ("based on the plain language of § 1593, an award of restitution was mandatory"); *In re* Sealed Case, 702 F.3d 59, 66 (D.C. Cir. 2012) ("Because the appellant pleaded guilty to 18 U.S.C. § 1591, the district court was required to impose restitution under 18 U.S.C. § 1593").

discusses challenges that arise in interpreting and applying § 1593 and provides strategies for effectively enforcing the TVPA's mandatory restitution statute as an essential means of pursuing justice on behalf of victims of human trafficking.

II. Calculating Restitution Under § 1593: Defining a Victim's Losses

Section 1593(b) provides that "[t]he order of restitution . . . shall direct the defendant to pay the victim . . . the full amount of the victim's losses" and defines those losses in § 1593(b)(3) as the sum of two distinct types of compensation—personal losses and the economic value of the victim's services.[6]

The first part of the definition, which calculates the victim's personal losses, is given the same meaning as the phrase "the full amount of the victim's losses" as defined in 18 U.S.C. § 2259(b)(3).[7] Section 2259(b)(3), which is the restitution statute applicable to victims of child sexual exploitation, defines "the full amount of the victim's losses," including "any costs incurred by the victim for [the following]":

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys' fees, as well as other costs incurred; and

(F) any other losses suffered by the victim as a proximate result of the offense.[8]

In 1999, the Ninth Circuit Court of Appeals stated that § 2259(b)(3) is "phrased in generous terms, in order to compensate the victims of sexual abuse for the care required to address the long term effects of their abuse."[9] Because victims of human trafficking similarly suffer long-term effects associated with the abuse inflicted by their traffickers, Congress required the same restitution calculations mandated in cases involving the sexual exploitation of children to apply to victims of human trafficking.

As noted in subsection (F), the costs incurred by the victim must be proximately caused by the defendant's conduct in committing the trafficking offense.[10] "In other words, the defendant should not be required to pay restitution for harm he did not cause. This does not mean, however, that the defendant must be the sole cause of the harm."[11]

Notably, "costs incurred by the victim" are not limited to losses incurred during the offense conduct. That is, restitution also includes compensation for estimated costs of future medical and mental health needs as well.[12]

For example, in *In re Sealed Case*, the court awarded restitution based on calculations of the cost of future mental health services, which were presented in mental health assessment reports that a

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[6] *See* 18 U.S.C. § 1593(b); *see also* United States v. Cortes-Castro, 511 F. App'x 942, 947 (11th Cir. 2013); *In re* Sealed Case, 702 F.3d at 66.
[7] *See* 18 U.S.C. § 1593(b)(3).
[8] 18 U.S.C. § 2259(b)(3)(A)–(F) (2012).
[9] United States v. Laney, 189 F.3d 954, 966 (9th Cir. 1999).
[10] *See* 18 U.S.C. § 2259(b)(3)(F).
[11] *In re* Sealed Case, 702 F.3d at 66 (citing United States v. Monzel, 641 F.3d 528, 538 (D.C. Cir 2011)).
[12] United States v. Pearson, 570 F.3d 480, 486 (2d Cir. 2009) (citing United States v. Doe, 488 F.3d 1154, 1159–60 (9th Cir. 2007); United States v. Danser, 270 F.3d 451, 455 (7th Cir. 2001); United States v. Julian, 242 F.2d 1245, 1247 (10th Cir. 2001)) ("Three of our sister circuits have considered this language and concluded that § 2259 authorizes compensation for future counseling expenses.").

psychologist prepared for each of the victims in preparation for the restitution hearing. The psychologist interviewed the victims, reviewed their prior mental health history, and diagnosed each victim's mental health and substance abuse problems, including Post-Traumatic Stress Disorder. While some of the victims had pre-existing mental health and substance abuse problems, the psychologist "concluded there was 'little doubt' that the . . . [defendant] 'exacerbated' any preexisting mental health problems" and that each of the victims would require "significant mental health services, in different stages and to differing degrees, for the rest of her life."[13] The psychologist calculated estimated lifetime costs of those mental services for each of the four victims, and the court cited these reports in awarding restitution for each victim in amounts ranging from $570,000 to $850,000.[14]

The second part of the "the full amount of the victim's losses" definition seeks to compensate the victim for the value of the services the defendant caused the victim to perform.[15] Said another way, § 1593 seeks to restore to the trafficking survivor the stolen wages and profits realized by the trafficker during the commission of the trafficking offense. In this regard, the statute defines such losses to include, "the greater of the gross income or value to the defendant of the victim's services or labor or the value of the victim's labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act (29 U.S.C. § 201 et seq.)."[16]

In calculating "the gross income or value to the defendant of the victim's services or labor," courts have used various methods to estimate the value of the victim's work, including relying upon victims' accounts of the work they performed and prices charged for such work, as well as evidence gathered during the government's investigation regarding the work performed. In a sex trafficking case, the value of a victim's services to a defendant is calculated based upon a defendant's gross income from the commercial sex acts performed by the victim. This is sometimes referred to as the "unjust enrichment" calculation. For example, in *United States v. Lewis*, the court's restitution figures were based on the length of time the victims were engaged in commercial sex at the direction of the defendant, the average number of clients the defendant compelled the victims to service per night, and the average price charged per client.[17]

Courts do not require exacting precision to establish the amount of the losses but, rather, require only that the restitution calculation be based on some reasonable certainty. For example, the restitution figures in *Lewis* were not exact accountings of the work performed and the prices charged, but they were the court's best estimation based upon the evidence.[18] One of the victims in *Lewis*, "S.H.," testified before the grand jury that prostitution clients paid her between $300 and $500 per day, which she turned over to the defendant. As part of his plea agreement, the defendant admitted that he prostituted S.H. for 914 days. In calculating the unjust enrichment of the defendant for purposes of restitution, the court multiplied $400 (an average of the daily proceeds from the prostitution) by 914 to arrive at a total of $365,000.[19] For another victim, "T.S.," the court multiplied the number of days the defendant trafficked T.S. by the daily quota of $500 that the defendant required T.S. to earn, as established by T.S.'s testimony.[20]

Similarly, in *United States v. Webster*, the Ninth Circuit affirmed a restitution order that the trial court calculated by multiplying the number of weeks the victim was trafficked by the average number of

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[13] *In re* Sealed Case, 702 F.3d at 62.
[14] *See id.*
[15] 18 U.S.C. § 1593(b)(3) (2012).
[16] *Id.*
[17] United States v. Lewis, 791 F. Supp. 2d 81, 92–94 (D.C. Cir. 2011).
[18] *See id.*; *see also* United States v. Nash, 558 F. App'x 741, 742 (9th Cir. 2014) ("The district court appropriately 'estimate[d], based upon facts in the record,' the victims' losses 'with some reasonable certainty.'") (quoting United States v. Doe, 488 F.3d 1154, 1160 (9th Cir. 2007)).
[19] *Lewis*, 791 F. Supp. 2d at 92, 95 n.12.
[20] *Id.* at 92, 95 n.15.

clients per week and multiplying that product by the minimum amount charged per client.[21] The court noted:

> Any error in the district court's figure is more than offset by the conservative estimate of the fee per date used to determine restitution. The court used $150 per date in determining restitution, while most of the girls testified that they regularly made substantially more per date. Three of the women testified that they regularly made between $400 and $700 per date and sometimes thousands.[22]

Notably, because the statute defines losses by the "gross income or value to the defendant," the amount of proceeds generated should not be offset by expenses incurred by the defendant or proceeds shared with the victim.[23] Often in sex trafficking cases, the trafficker pays for the hotel rooms where the victims slept and showered, as well as for food, clothing, hair styling, manicures, and even "gifts" for the victims, all with the proceeds of the prostitution. None of those expenses, however, are deducted from the "unjust enrichment" restitution calculation because the statute is clear that this calculation calls for the "gross" income or value generated. In effect, the statute views the trafficker's outlays for such expenses—including any "allowance" the victim is permitted to keep—as costs of maintaining the ongoing sex trafficking operation, reducing only the net profits and not the gross income or value.

As an alternative to the "unjust enrichment" method discussed above, the value of the victim's losses may be calculated according to the minimum wage and overtime guarantees of the Fair Labor Standards Act (FLSA), effectively compensating the victim at minimum rates for the services the victim performed for the defendant's gain.[24] In cases where the services are illegal—most commonly prostitution in sex trafficking cases—it is important to emphasize that this formula does not treat an illegal service as minimum wage employment, but it instead seeks to compensate the victim for the lost opportunity to pursue legitimate employment on the victim's behalf. For this reason, the calculation under the FLSA guarantees is sometimes referred to as the "opportunity loss" calculation. In many sex trafficking cases, this amount is lower than the "unjust enrichment" calculation described above. Nevertheless, it can provide an important alternative means of proving the victim's losses in cases where there is insufficient evidence to estimate, with reasonable certainty, the number of clients served or the price per client. This calculation is also useful in cases involving forced labor, where "opportunity loss" is often the most appropriate measure of the victim's losses for restitution purposes. The U.S. Department of Labor's Wage and Hour Division often plays an invaluable role in performing this calculation by reviewing the evidence, interviewing the victim, and computing lost wages in accordance with the FLSA.

The FLSA calculation is derived by multiplying the number of hours worked by the applicable minimum or prevailing wage rate in effect at the relevant time and place; one can then add overtime pay, if applicable, and subtract any money actually paid to the victim. The FLSA also provides for liquidated damages in an amount equal to double the amount of back wages owed, and the courts have upheld the application of this liquidated damages provision in labor trafficking cases.[25]

For example, in *United States v. Sabhnani*, the defendants trafficked two victims in their home as domestic servants.[26] A jury convicted the defendants of peonage, forced labor, document servitude, and alien harboring. Among the many facts demonstrating the defendants' crimes, the evidence at trial

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[21] United States v. Webster, Nos. 08–30311 & 09–30182, 2011 WL 8478276, at *3 (9th Cir. Nov. 28, 2011).
[22] *Id.*
[23] 18 U.S.C. § 1593(b)(3) (2012); *see also Lewis*, 791 F. Supp. 2d at 93 n.14 (acknowledging testimony that the victim kept some money she earned but declining to subtract it from restitution amount because "restitution must be awarded in the amount of the defendant's gross, rather than net, proceeds").
[24] *See generally* 29 U.S.C. §§ 206–207 (2012 & Supp. III 2015).
[25] *See* 29 U.S.C. § 216 (2012).
[26] United States v. Sabhnani, 599 F.3d 215, 215 (2d Cir. 2010).

showed that the victims "performed household work between 4:00 AM and late at night seven days a week."[27] The victims testified that they were sleep deprived and sometimes worked between twenty-two and twenty-four hours a day.[28] The victims testified that they "didn't dare" leave their employ due to the threats of serious harm made by the defendants.[29] In awarding restitution, the district court first calculated the "net back pay" pursuant to FLSA, specifically 29 U.S.C. § 216(b), and then doubled that figure as liquidated damages to arrive at a restitution award nearing $1 million.[30] The defendants argued that the liquidated damages provision of the FLSA did not apply to restitution awards under 18 U.S.C. § 1593.[31] The court, however, disagreed, relying on three "significant" points regarding the statutory language of § 1593.[32]

First, the court explained that § 1593's reference to the FLSA "does not limit the 'minimum wage and overtime guarantees' that determine the 'value' of the victim's labor solely to §§ 206 and 207, the specific provisions of FLSA setting out the definitions of minimum wage and overtime and when they apply."[33] According to the court, this implied that the other provisions of the FLSA are relevant in calculating restitution.[34] Second, the court noted that the liquidated damages provision of the FLSA is "triggered automatically by a violation of §§ 206 or 207" and requires that employers who commit those violations "shall be liable" for liquidated damages.[35] Third, the court noted that the liquidated damages provision of the FLSA is "exclusively tied to violations of the minimum wage and overtime rules in §§ 206 and 207."[36] Accordingly, the court concluded that the liquidated damages provision of the FLSA is proper to apply when calculating the value of the victim's labor for restitution under § 1593.

III. Challenges in Securing Restitution Orders

The United States bears the burden of proving the proper amount of restitution by a preponderance of the evidence,[37] so it is critically important during the investigation, at trial, and in plea agreements to develop evidence that can support a reasonably certain estimation of the amount of the victim's loss. However, eliciting this evidence can be challenging, particularly when trauma symptoms or substance abuse issues complicate victims' ability to recount chronology or when traffickers keep victims unaware of how much customers are charged. Case law suggests that it is inappropriate for a defendant to object to the sufficiency of the government's evidence where the defendant has failed to keep records regarding the hours worked by the victim.[38]

In establishing proof for the restitution calculation, the government may rely on the evidence presented at trial,[39] presented to the grand jury,[40] or obtained during the government's investigation. There is no requirement that the victim testify at a restitution hearing.[41] When calculating restitution, a

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[27] *Id.* at 258.
[28] *Id.*
[29] *Id.*
[30] *Id.* at 224, 259.
[31] *Id.* at 258.
[32] *Id.* at 259.
[33] *Id.*
[34] *Id.*
[35] *Id.* (citing 29 U.S.C. § 216(b) (2012)).
[36] *Id.* at 259.
[37] 18 U.S.C. § 3664(e) (2012).
[38] *See* Gurung v. Malhotra, 851 F. Supp. 2d 583, 589 (S.D.N.Y. 2012); *see also* United States v. Fu Sheng Kuo, 620 F.3d 1158, 1167 (9th Cir. 2010).
[39] *See* United States v. Baston, 818 F.3d 651, 665 (11th Cir. 2016).
[40] *See In re* Sealed Case, 702 F.3d 59, 67 (D.C. Cir. 2012).
[41] *See* United States v. Sabhnani, 599 F.3d 215, 258–59 (2d Cir. 2010).

court may rely on any evidence "bearing 'sufficient indicia of reliability to support its probable accuracy.'"[42] "District courts have broad discretion in choosing the procedures to employ at a restitution hearing, 'so long as the defendant is given an adequate opportunity to present his position as to matters in dispute.'"[43]

Because the government is not required to present sworn testimony at a restitution hearing, and may rely on summary reports, law enforcement testimony, and other evidence that would be inadmissible at trial, prosecutors should aim to develop the necessary evidence for a restitution calculation from the earliest stages of the investigation. While much of the evidence relevant to calculating the value of the victim's labor or services likely will be obtained through the investigative process because such evidence relates closely to the trafficking crime itself, the restitution analysis can benefit from additional specifics on dates, hours, prices, and volume of customers served to aid in calculating the monetary value of the labor or services performed. The victim's account of dates and times can be corroborated by hotel receipts, travel reservations, text messages, or internet advertisements. Similarly, prices, average numbers of clients, and quotas can often be corroborated, at least circumstantially, by text messages between the trafficker and victim. The victim's statements as memorialized in law enforcement reports or grand jury transcripts, along with corroborating evidence, can form the basis for the restitution calculation and be attached to restitution motions and presented to the court at restitution hearings to meet the government's burden of proving the victim's losses. Because some courts are unfamiliar with the mandatory nature of the TVPA restitution provision and with methods of calculating the victim's losses under § 1593, filing a written restitution motion that cites relevant authorities and attaches relevant evidence can significantly enhance the likelihood of securing a restitution order that properly accounts for the full scope of the victim's losses.

A common defense in opposing restitution awards under § 1593 is that, because the victim's services were illegal (usually argued in sex trafficking cases regarding prostitution), it would be an affront to justice for the court to "reward" the victim for engaging in illegal conduct. Federal courts without exception have rejected this argument. It is simply not relevant that the defendant's unjust enrichment was derived from illegal means. In *United States v. Mammedov*, the court explained that such an argument lacks merit for two reasons: it ignores that the "defendant caused . . . [the] illegal conduct through force, fraud or coercion, or the inducement of a minor"; and restitution under the statute is mandatory, with no exception based on whether the services are legal or illegal.[44] "Thus, the express terms of 18 U.S.C. § 1593 require that the victims in this case, i.e., persons who engaged in commercial sex acts within the meaning of 18 U.S.C. § 1591, receive restitution, notwithstanding that their earnings came from illegal conduct."[45] Similarly, in *Fu Sheng Kuo*, the court explained that "the Trafficking Act mandates restitution that includes a defendant's ill-gotten gains."[46] And in *United States v. Cortes-Castro*, when the defendant argued that such a restitution calculation would reward the victim for her illegal activities, the court called that argument "preposterous" because the victims were "forced to prostitute."[47]

In some cases, the loss calculations result in small restitution awards that seem inappropriately low compared to the serious trauma the victim endured and the substantial prison sentence resulting from the mandatory minimum and the sentencing guidelines. For example, in a sex trafficking case, if a defendant forced a woman to engage in prostitution with two clients prior to the victim's escape or recovery, and in each instance the defendant received $100 from the prostitution proceeds, then the unjust enrichment calculation is only $200 and the "opportunity loss" calculation based on the FLSA could be

[42] United States v. Singletary, 649 F.3d 1212, 1217 n.21 (11th Cir. 2011) (quoting United States v. Bernardine, 73 F.3d 1078, 1080–81 (11th Cir. 1996)); *see also Baston*, 818 F.3d at 665 (quoting *Bernadine*, 73 F.3d 1080–81).
[43] *Baston*, 818 F.3d at 665 (quoting United States v. Maurer, 226 F.3d 150, 151 (2d Cir. 2000)).
[44] United States v. Mammedov, 304 F. App'x 922, 922 (2d Cir. 2008).
[45] *Id.* at 927.
[46] United States v. Fu Sheng Kuo, 620 F.3d 1158, 1164 (9th Cir. 2010).
[47] United States v. Cortes-Castro, 511 F. App'x 942, 947 (11th Cir. 2013).

even less. In contrast to the $200, the defendant will face a fifteen-year mandatory minimum sentence, and the victim may suffer a lifetime of trauma for having been forced to engage in prostitution, regardless of the number of commercial sex encounters. In these instances, prosecutors may be concerned that the court will not be receptive to a motion to recover a small amount of restitution or that the small dollar amount may appear to trivialize the severity of the victimization. However, because restitution is mandatory, prosecutors must file the motion even if the dollar amount is extremely low. They should present arguments, as necessary, to establish that the amount is a statutory measure of the defendant's unjust enrichment or the victim's lost opportunity, and emphasize that the amount does not purport to make the victim whole for the degrading and dehumanizing experience of being compelled to prostitute. Finally, while the calculation of the value of the victim's services may produce a small dollar amount, when they are added to other losses listed in § 2259(b)(3), particularly future mental health care expenses, the final amount may be more proportionate to the defendant's sentence and may more accurately reflect the survivor's victimization.

Additionally, when a victim becomes uncommunicative after the conviction, it is still necessary to seek restitution, to the extent possible, based on the evidence in the record because the court is nevertheless mandated to order restitution. In such cases, it may be that the record does not contain enough information to calculate losses under § 2259(b)(3) or an "unjust enrichment" estimate, but in most cases there is enough evidence to at least put forth an "opportunity loss" estimate. While it may be difficult to deliver any recovered funds to a victim who has ceased contact with the government, the court is still required to order mandatory restitution, and the government must make reasonable efforts to contact the victim and provide the restitution recovered.

Finally, because the restitution order is mandatory, a defendant's inability to pay is irrelevant. The defendant's ability to pay, however, is relevant to the court's duty to order a payment schedule. In *Mammedov*, the district court did not provide a payment schedule for the mandatory restitution it ordered against the defendant. The Second Circuit understood this lack of a payment schedule to mean the district court implicitly ordered the restitution to be paid immediately, although the record established that the defendant was unable to pay.[48] The Second Circuit found that requiring the defendant to immediately pay restitution when nothing in the record suggested the defendant had the ability to do so was an abuse of discretion.[49] The court vacated the restitution order and remanded the case to the district court for a new hearing.[50]

IV. Discretionary Restitution for Non-trafficking Offenses Such as 18 U.S.C. § 2421

Often, trafficking charges under Chapter 77, such as those involving § 1589 (forced labor) and § 1591 (sex trafficking), are brought alongside other charges that fall outside of Chapter 77. For instance, the Mann Act charges involving interstate transportation for purposes of prostitution under 18 U.S.C. § 2421 frequently accompany sex trafficking charges under § 1591.[51] And sometimes, either as the result of plea negotiations or acquittal, the defendant is not convicted of the Chapter 77 offense. Restitution in those instances cannot (unless specifically set forth in the plea agreement) be calculated in accordance with § 1593.

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[48] *Mammedov*, 304 F. App'x at 927 (citing 18 U.S.C. § 3572(d)(1) (2012)) ("A person sentenced to pay . . . restitution[] shall make such payment immediately, unless, in the interest of justice, the court provides for payment on a date certain or in installments.").
[49] *Id.* at 928 (citing United States v. Mortimer, 52 F.3d 429, 436 (2d Cir. 1995)).
[50] *Id.*
[51] Mann Act, 18 U.S.C. §2421 (Supp. III 2015).

Restitution for a conviction under 18 U.S.C. § 2421, for example, is governed by 18 U.S.C. § 3663.[52] Unlike § 1593, restitution is not mandatory under this provision.[53] Moreover, when calculating "the amount of loss sustained by the victim," the unjust enrichment calculation does not apply.

In *Fu Sheng Kuo*, the defendants fraudulently induced women from China to come to the United States in order to engage in prostitution.[54] The defendants falsely told the women that they would be employed as cashiers and that the defendants would handle all of the logistics for the travel and legal immigration.[55] When the women arrived in the American Samoa, they were taken to a three-story building that housed a brothel.[56] The building was locked at all times, and wire and plywood covered the windows and balcony areas to prevent the women from leaving.[57] The defendants entered into guilty pleas for violating 18 U.S.C. § 241, conspiracy to violate civil rights.[58] Following sentencing, the district court ordered the defendants to pay restitution. The court, however, calculated restitution using the "unjust enrichment" calculation under § 1593.[59] The Ninth Circuit reversed, explaining that the defendants were not convicted of a crime under Chapter 77 but, rather, were convicted under § 241. It therefore held that, because the defendants were not convicted of a Chapter 77 crime, "the restitution provisions of the Trafficking Act simply do not apply. Instead, the restitution provisions of § 3663 apply. And the calculation methods under § 3663 do not include a defendant's ill-gotten gains."[60]

The government argued that, "[a]lthough Section 1593 does not mandate restitution for violations of 18 U.S.C. [§] 241," because the facts were similar to trafficking offenses (i.e., forced prostitution), "it was reasonable . . . to look to Section 1593 for guidance" on formulating a fair restitution order.[61] The court disagreed and explained that restitution under § 3663 is limited to the "victim's actual losses."[62] The court concluded that the government "may seek only the penalties authorized by law for violations of that crime."[63] While the court ruled that the "unjust enrichment" calculation was erroneous, the court implied that it would be appropriate to apply the "opportunity loss" calculation as a means to determine "lost wages for legitimate employment" of adult victims transported interstate for purposes of prostitution in violation of § 2421.[64]

V. Restitution as Part of the Plea Agreement

As noted above, when entering into a plea agreement, it is certainly acceptable for the government and a defendant to agree to a stipulated amount of restitution or to agree that restitution will be calculated in accordance with § 1593, even in cases where the defendant is not pleading guilty to a Chapter 77 trafficking offense. An agreement to apply § 1593 is beneficial to the victim, both because loss calculations can be broader under § 1593's "unjust enrichment" measure than under § 3663 and because restitution awarded pursuant to § 1593 is not a taxable award under IRS Notice 2012-12.[65] As *Fu*

[52] 18 U.S.C. §3663 (2012).
[53] *See id.*
[54] United States v. Fu Sheng Kuo, 620 F.3d 1158, 1160 (9th Cir. 2010).
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.* at 1161.
[59] *Id.* at 1164.
[60] *Id.* at 1164–65.
[61] *Id.* at 1165.
[62] *Id.*
[63] *Id.*
[64] *Id.* at 1165–66.
[65] I.R.S. Notice 2012-12, 2012-6 I.R.B. 365 (Feb. 6, 2012).

Sheng Kuo illustrates, however, the plea agreement must expressly stipulate that restitution will be calculated pursuant to § 1593; otherwise, applying § 1593 to calculate restitution for non-trafficking offenses would constitute reversible error.[66] The exact amount of restitution does not need to be agreed upon in the plea agreement, but note that if the agreement does not specify the exact amount, the defendant does not waive the right to appeal the restitution ordered at a later date by the court.[67]

VI. Conclusion

As noted above, restitution awards can provide life-changing resources for a trafficking survivor. Restitution serves to restore a victim's losses, as measured either by the ill-gotten gains the defendant derives from exploiting the victim's services (stolen wages) or by the lost opportunity for the victim to obtain legitimate work. Moreover, disgorging the criminal proceeds serves as a deterrent to the defendant's conduct in misappropriating the victim's services for the defendant's own profit. The mandatory nature of the TVPA's restitution provision highlights the significance of restitution, both as a means of stabilizing and empowering the victim and as a means of deterring the trafficking conduct. Advocating effectively for restitution is, therefore, a critical component of the Department's victim-centered approach to combating human trafficking. Effective enforcement of the TVPA's mandatory restitution provisions frequently requires federal prosecutors to investigate evidence related to the victim's losses from the earliest stages of the investigation, and requires them to file briefs setting forth the applicable calculations and to present evidence of the victim's losses at contested hearings. Federal prosecutors encountering restitution-related issues are encouraged to contact the Civil Rights Division's Human Trafficking Prosecution Unit for assistance in pursuing restitution orders.

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[66] United States v. Fu Sheng Kuo, 620 F.3d 1158, 1164 (9th Cir. 2010).
[67] *See* United States v. Tsosie, 639 F.3d 1213, 1217 (9th Cir. 2011) ("appeal waiver was not knowing because [defendant] was not afforded notice of the amount of restitution to be ordered").

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Understanding and Applying the Sentencing Guidelines for Trafficking and Related Convictions

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I. Introduction

One of the major impacts of the Trafficking Victims Protection Act (TVPA) is the potential imposition of higher sentences for traffickers. Sex trafficking by force, fraud, or coercion, and sex trafficking of a minor under age fourteen are punishable by a statutory mandatory minimum of fifteen years and a maximum of life, while sex trafficking of a minor aged fourteen to eighteen carries a statutory minimum of ten years and a maximum of life. Although the forced labor statute imposes no mandatory minimum, it carries a maximum penalty of up to twenty years or up to life if certain aggravating factors are present.

However, while the statutes authorize significant sentences, calculating these sentences can be challenging in light of the often byzantine sentencing guidelines. As a prosecutor, understanding the factors that determine the applicable base offense level, that potentially raises the offense level through specific offense characteristics and cross-references or that could warrant possible enhancements in trafficking sentences, can be essential to securing appropriate sentences that reflect the full scope of the defendant's criminal conduct. Analyzing these sentencing considerations throughout an investigation and prosecution can assist prosecutors in formulating charging strategies, identifying the evidence that must be elicited from victims and witnesses in order to support these sentencing adjustments and enhancements, and advocating for appropriate sentences for each trafficker. Anticipating these sentencing considerations can be particularly important in cases where the defendant has been convicted of or has pleaded guilty to charges other than sex or labor trafficking, such as the Mann Act (18 U.S.C. § 2421 and 2422)[1] or the Travel Act (18 U.S.C. § 1952).[2] Convictions on such counts may occur when victim-related issues or other evidentiary challenges preclude the prosecution from proving trafficking crimes beyond a reasonable doubt, and where there is evidence of trafficking-related offense conduct related to other counts of conviction. In those cases, the appropriate application of specific offense characteristics and sentencing enhancements can significantly increase the defendant's exposure by accounting for the related criminal conduct. This article explores the application of relevant sentencing guidelines provisions in sex and labor trafficking cases. The article does not present an exhaustive list of all such provisions but, rather, focuses on some of the most frequently applied and potentially significant enhancements that may apply in trafficking cases.

[1] 18 U.S.C. §§ 2241–2242 (2012).
[2] *Id.* § 1952.

II. Sentencing Considerations in Sex Trafficking Cases

A. Sex Trafficking Convictions: 18 U.S.C. § 1591

Sentencing Guidelines § 2G1.1 governs sentences for charges that involve commercial sexual exploitation of adult victims.[3] These charges include the Importation of Alien for Immoral Purpose (8 U.S.C. § 1328), Sex Trafficking by Force, Fraud, or Coercion (18 U.S.C. § 1591), and the Mann Act (18 U.S.C. §§ 2421 and 2422(a)).[4] While the non-trafficking charges carry base offense levels of fourteen, convictions of sex trafficking by force, fraud, or coercion carry a much higher base offense level of thirty-four, pursuant to § 2G1.1(a)(1).[5]

Separate guidelines apply to offenses involving sexual exploitation of minors. The offense levels for sexual exploitation of minors are governed by U.S.S.G. § 2G1.3,[6] which applies to Importation of Alien for Immoral Purposes involving a minor (8 U.S.C. § 1328),[7] Sex Trafficking of a Minor (18 U.S.C. § 1591),[8] Mann Act involving a minor (18 U.S.C. §§ 2421 and 2422),[9] Transportation of Minors (18 U.S.C. § 2423),[10] and Use of Interstate Facilities to Transmit Information About a Minor (18 U.S.C. § 2425).[11] Base offense levels for convictions for trafficking offenses under this guideline are either thirty or thirty-four, while base offense levels for non-trafficking convictions are twenty-four or twenty-eight.

For sex trafficking of adult victims by force, fraud, or coercion, the applicable base offense level of thirty-four is already relatively high. Nonetheless, prosecutors should consider whether the evidence supports additional enhancements outside of § 2G1.1,[12] such as the vulnerable victim enhancement in § 3A1.1(b)(2),[13] or the various aggravating role enhancements in § 3B1.1.[14]

Apart from these Chapter 3 enhancements, Section 2G1.1 sets forth multiple factors that potentially raise the offense level.[15] Section 2G1.1(b)(1) imposes a four-level increase if the offense involved fraud or coercion.[16] However, it is unclear whether this increase should apply to sex trafficking convictions, since force, fraud, and coercion are already required elements of such violations of 18 U.S.C. § 1591.[17] The U.S. Sentencing Commission has, in at least one instance, expressed a view that this increase would not be applicable to convictions for sex trafficking by force, fraud, or coercion. According to the "Sex Offense Primer: Offenses Involving Commercial Sex Acts and Sexual Exploitation of Minors," which is published by the U.S. Sentencing Commission, the application of § 2G1.1(b)(1) should only apply to convictions other than those under 18 U.S.C. § 1591 in order to avoid double counting.[18]

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[3] U.S. SENTENCING GUIDELINES MANUAL (U.S.S.G.) § 2G1.1 (U.S. SENTENCING COMM'N 2015).
[4] 8 U.S.C. § 1328 (2012); 18 U.S.C. §§ 1591, 2421, 2422(a) (2012).
[5] U.S.S.G. § 2G1.1(a)(1) (U.S. SENTENCING COMM'N 2015).
[6] *Id.* § 2G1.3.
[7] 8 U.S.C. § 1328 (2012).
[8] 18 U.S.C. § 1591 (2012).
[9] *Id.* §§ 2421–2422.
[10] *Id.* § 2423.
[11] *Id.* § 2425.
[12] U.S.S.G. § 2G1.1 (U.S. SENTENCING COMM'N 2015).
[13] *Id.* § 3A1.1(b)(2).
[14] *Id.* § 3B1.1.
[15] *Id.* § 2G1.1.
[16] *Id.* § 2G1.1(b)(1).
[17] 18 U.S.C. § 1591 (2012).
[18] OFFICE OF THE GEN. COUNSEL, U.S. SENTENCING COMM'N, SEX OFFENSE PRIMER: OFFENSES INVOLVING COMMERCIAL SEX ACTS AND SEXUAL EXPLOITATION OF MINORS 12 (2016); *see also* United States v. Li, No. 1:12-CR-00012-2, 2013 WL 638601, at *1–2 (D.N. Mar. I. Feb. 21, 2013).

Questions frequently arise as to the appropriate Sentencing Guidelines for sex trafficking conspiracy under § 1594(c).[19] The starting place for determining the base offense level for sex trafficking conspiracies is U.S.S.G. § 2X1.1.[20] Section 2X1.1(a) provides that the base offense level is the same as the base offense level for the substantive offense.[21] The underlying substantive offense is § 1591, which implicates one of two guidelines, depending on the age of the victim: Sections 2G1.1 (adults) and 2G1.3 (minors).[22] In cases involving adults, the base offense level for the substantive offense is thirty-four, under § 2G1.1(a), and in cases involving minors, the base offense level is either thirty-four or thirty, depending on whether the offense was effected by force, fraud, or coercion, under sections 2G1.3(a)(1) & (a)(2).[23]

Some ambiguity is created by the guidelines reference to § 1591's penalty provision, subsection (b), as "the offense of conviction."[24] If read literally, the base offense levels of thirty-four or thirty would never apply because the offense of conviction is never subsection (b). Subsection (b) "does not create a new crime"; it simply "specifies the penalties for each of the crimes set out in (a)."[25] In other words, the substantive offense is the sum of its two parts—(a) and (b)—and neither ever stands alone. The Sentencing Commission's inclusion of subsection (b) is also understandable. Congress determined that offenses involving force, fraud, or coercion, and offenses involving minors under the age of fourteen, should be punished more severely than offenses involving minors between the ages of fourteen and seventeen, and the guidelines reflect that distinction by citing to (b)(1) and (b)(2).

The only Court of Appeals to interpret § 2X1.1's application to sex trafficking conspiracies held that the appropriate base offense level is fourteen under § 2G1.1(a)(2).[26] In that case, the Ninth Circuit held that "[t]he most straightforward interpretation of U.S.S.G. § 2G1.1(a)(1) is that a base offense level of 34 applies only when the defendant is actually convicted of an offense subject to the punishment provided in 18 U.S.C. § 1591(b)(1)"[27] Instead, the Court concluded that when the defendant is not originally charged with § 1591(b)(1), fourteen is the appropriate base level under § 2G1.1(a)(2).[28] At least one law review article has commented that the Ninth Circuit's decision was incorrect and "effectively rewrote" the guidelines.[29] The Court's conclusion and its practical result also stand in stark contrast to the history and purpose of § 1594(c). If the base offense level for § 1594(c) is only calculated at fourteen, the corresponding sentence for a Category 1 offender would be less than the statutory maximum of five years that accompanies a conspiracy conviction under 18 U.S.C. § 371.[30] This seems to conflict with Congress's intent of increasing penalties for sex trafficking conspirators because, by enacting § 1594(c) in December 2008, Congress significantly increased the maximum penalty for sex trafficking conspiracies from five years under 18 U.S.C. § 371 to life. Congress further reflected its purpose in the titles of the

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[19] 18 U.S.C. § 1594(c) (2012).
[20] U.S.S.G. § 2X1.1 cmt. n.1 (U.S. SENTENCING COMM'N 2015) (providing an exhaustive list of conspiracies expressly covered by other guidelines).
[21] *Id.* § 2X1.1(a).
[22] *Id.* §§ 2G1.1, 2G1.3.
[23] *Id.* §§ 2G1.1(a), 2G1.3(a)(1)–(2).
[24] 18 U.S.C. § 1591(b) (2012).
[25] United States v. Todd, 627 F.3d 329, 334–35 (9th Cir. 2010).
[26] United States v. Wei Lin, 841 F.3d 823, 825 (9th Cir. 2016).
[27] *Id.* at 826.
[28] *Id.* at 827.
[29] John C. Richmond, *Federal Human Trafficking Review: An Analysis & Recommendations from the 2016 Legal Developments*, 52 WAKE FOREST L. REV. 293, 337 (2017).
[30] 18 U.S.C. § 371 (2012).

William Wilberforce Trafficking Victims Protection Act, which created § 1594(c): "Enhancing Penalties for Trafficking Offenses" and "Holding Conspirators Accountable."[31]

B. Other Crimes Involving Commercial Sex

The adjusted offense levels under § 2G1.1 can become even more significant when sentencing a defendant convicted of crimes other than sex trafficking, such as the Mann Act or Travel Act, and may occur when the sex trafficking elements cannot be proven beyond a reasonable doubt. A Mann Act conviction carries a base offense level of fourteen, but this can quickly increase to eighteen, thirty, or thirty-four, depending on the facts. Under § 2G1.1(b)(1), if the underlying conduct involved fraud or coercion, the base offense level increases to eighteen.[32] "Coercion" is defined as any form of conduct that negates the voluntariness of the victim, such as impairment through use of drugs or alcohol, but does not generally apply if such drug or alcohol use is voluntary.[33] Notably, courts have increasingly recognized the manipulation of drug addiction as part of a coercive trafficking scheme.[34]

Even in cases where the drug-based coercion cannot be proven beyond a reasonable doubt to convict on sex trafficking by force, fraud, or coercion, there may be sufficient evidence to trigger the higher base offense level in a Mann Act or Travel Act conviction based on the manipulation of addictive drugs in connection with the commercial sex scheme.

The base offense level may further increase to thirty or thirty-four when applying the § 2G1.1(c) cross-reference.[35] Under this cross-reference, if the offense involves conduct described in 18 U.S.C. § 2241 or 18 U.S.C. § 2242, Aggravated Sex Abuse and Sexual Abuse, respectively, then § 2A3.1 should apply.[36] If this cross-reference to § 2A3.1 applies, the defendant's base offense level is increased to thirty-four (if the conduct falls under § 2241) or thirty (if the conduct falls under § 2242). Note that this cross-reference applies to underlying conduct that occurs during the offense of conviction. It is helpful, therefore, to carefully consider charging dates when drafting the indictment so that the offense date includes the cross-reference conduct, if appropriate. This is made simpler when charging courses of conduct, such as the Mann Act conspiracy or the Travel Act. For purposes of this discussion, key portions of 18 U.S.C. §§ 2241 and 2242 are as follows:

> (a) In order to satisfy the elements of 18 U.S.C. § 2241, the defendant must engage in or cause another person to engage in a sexual act by:
>
> (1) "[U]sing force against that other person;"
>
> (2) "[T]hreatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;"
>
> (b)(1) Rendering the victim unconscious; or
>
> (b)(2) Administering "by force or threat of force, or without the knowledge or permission of [the victim], a drug, intoxicant, or other similar substance and

[31] William Wilberforce Trafficking Victims Protection Act of 2008, PL 110-457, 122 Stat 5044 (2008).
[32] U.S.S.G. § 2G1.1(b)(1) (U.S. SENTENCING COMM'N 2015).
[33] *Id.* § 2G1.1 cmt. n.2.
[34] *See* United States v. Fields, No. 8:13-cr-198-T-24TGW, 2013 WL 11318863, at *2 (M.D. Fla. Dec. 11, 2013) (upholding drug-based coercion scheme as satisfying both the definition of "coercion" and "serious harm" as defined in 18 U.S.C. § 1591); *see also* United States v. Mack, 808 F.3d 1074, 1082 (6th Cir. 2015) (upholding defendant's § 1591 conviction, finding that he used victims' "addictions to his advantage by supplying 'free' drugs to the victims, which not only resulted in a high (and fictitious) drug debt, but also exacerbated their addictions").
[35] U.S.S.G. § 2G1.1(c) (U.S. SENTENCING COMM'N 2015).
[36] *Id.*

> thereby . . . substantially impair[ing] the ability of [the victim] to appraise or control conduct."[37]

In order to satisfy the elements of 18 U.S.C. § 2242(1), the defendant must engage in or cause another person to engage in a sexual act:

(1) "[B]y threatening or placing that other person in fear"; or

(2) With a victim who is "incapable of appraising the nature of the conduct" or who is "physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act."[38]

The primary distinction between these two provisions is that § 2241 requires force or fear of serious bodily injury or death, and § 2242 only requires fear. *United States v. Boyles* delineates the distinction between "force" under § 2241 and "fear" under § 2242, and states that:

> Force is the exertion of physical power upon another to overcome that individual's will to resist, whereas fear and threats are not classified as physical power, but rather overcoming one's will to resist through mental and emotional power. The very language of the two sexual assault statutes is different. One requires the overpowering of a victim's will by the use of force, while the other mandates overpowering the victim's will by use of threats or fear. . . .
>
> When proving the crime of sexual assault, the government must establish that the rapist overcame the victim's will to resist by the use of fear or threats. Aggravated sexual assault merely requires the use of force in the commission of the crime.[39]

In determining whether the defendant's actions satisfy the conduct described in 18 U.S.C. § 2242, we first look to *United States v. Monsalve*.[40] In this case, the defendant entered a guilty plea to the Mann Act, Alien Harboring, and related crimes, and appealed the sentence imposed by the district court, challenging the court's application of the § 2G1.1(c) cross-reference.[41] The defendant had been accused of trafficking two women by promising them waitressing jobs, confiscating their identification documents, controlling their access to food and water, and then making them engage in prostitution until they paid off their smuggling debts.[42] When one of the women expressed a desire to stop engaging in prostitution, the defendant threatened to deport her, leaving her in tears and causing her to continue prostituting for the defendant.[43] The Eleventh Circuit held that this conduct was sufficient to establish that the defendant had caused the victim to engage in prostitution by placing her in fear, and that the definition of "fear" under 18 U.S.C. § 2422 applied to these facts, which centered on a fear of deportation.[44] The Court went on to define "fear" under 18 U.S.C. § 2242, explaining that fear is not fear of serious harm, but merely fear of some bodily harm.[45] Citing *Castillo*, the Court emphasized that the definition of "fear" in the context of 18 U.S.C. § 2422 is viewed very broadly and considered that definition to include a fear of deportation.[46]

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[37] 18 U.S.C. § 2241(a)–(b)(2)(A) (2012).
[38] *Id.* § 2242.
[39] United States v. Boyles, 57 F.3d 535, 544 (7th Cir. 1995).
[40] United States v. Monsalve, 342 F. App'x 451 (11th Cir. 2009).
[41] *Id*. at 455.
[42] *Id*. at 453.
[43] *Id.* at 454.
[44] *Id.* at 457.
[45] *Id*. at 457 (quoting United States v. Castillo, 140 F.3d 874, 885 (10th Cir. 1998)); *see also* United States v. Gavin, 959 F.2d 788, 791 (9th Cir. 1992).
[46] *Castillo*, 140 F.3d at 885.

Similarly, in *United States v. Guidry*, the Court found that the district court did not err in applying the cross-reference where the defendant, who was convicted of interstate transportation for prostitution in violation of 18 U.S.C. § 2421, had exercised psychological and emotional power over his victims to induce them to work as escorts performing commercial sex acts.[47] In this case, the victims testified that they were afraid of the defendant and feared what would happen to them if they did not do what he said, and were further afraid that the defendant would cut off their access to heroin if they did not engage in sex acts.[48] The Court found that the defendant's actions more than satisfied the broad definition of fear in the context of 18 U.S.C. § 2242.[49] These cases illustrate how relevant offense conduct can increase the applicable offense level, even in cases where the defendant is convicted on charges other than sex trafficking.

Related conduct can similarly raise the offense level in convictions under the Travel Act, also known as the Interstate Travel in Aid of Racketeering (ITAR). These convictions are governed by U.S.S.G. § 2E1.2(a)(1), which starts with a base offense level of six.[50] However, subsection (a)(2) increases the base offense level to that of the underlying crime of violence or unlawful activity that served as the predicate activity for the ITAR enterprise.[51]

Thus, when ITAR is charged in a case involving illegal commercial sex as the underlying unlawful activity, the relevant sentencing guideline is § 2G1.1, and the base offense level begins at fourteen.[52] Therefore, the same calculus applies when determining the base offense level for an ITAR conviction and a Mann Act conviction, despite the different statutory maximums of five and ten years, respectively. There may be advantages to the prosecution in charging both crimes when the evidence supports both charges. Advantages may include broader scope of admissibility of relevant evidence and potentially increased exposure if the defendant is convicted of both violations.

C. Relevant Conduct

Section § 2G1.1 includes another powerful provision that may raise a defendant's sentencing exposure. This provision consists of a special instruction for relevant conduct set forth in § 2G1.1(d)(1).[53] Notably, this instruction applies to any of the statutory violations covered by this guideline. This instruction provides that if the offense involves unlawful commercial sex acts or prohibited sexual conduct with respect to additional victims, that conduct involving the additional victims should be treated as separate counts of conviction, even if those victims were not specifically referenced in the counts of conviction.[54] The applicable commentary section of this provision further clarifies that this instruction should apply separately to "each person transported, persuaded, induced, enticed, or coerced to engage in, or travel to engage in, a commercial sex act…"[55] That is, the court may consider the defendant's relevant conduct involving additional victims connected to the offense as "de facto" additional counts in the overall sentencing calculation, even if the defendant was not charged in substantive counts involving those victims. Moreover, these additional "de facto" counts will not group together with one another or with the original offense.[56] For example, if a defendant pleads guilty to one count of the Mann Act, but the evidence shows that there are four additional Mann Act victims, either named or unnamed in the

[47] United States v. Guidry, 817 F.3d 997 (7th Cir. 2016).
[48] *Id*. at 1008.
[49] *Id.*
[50] U.S.S.G. § 2E1.2(a)(1) (U.S. SENTENCING COMM'N 2015).
[51] *Id.* § 2E1.2(a)(2).
[52] *Id.* § 2G1.1(a)(2).
[53] *Id.* § 2G1.1(d)(1).
[54] *Id.*
[55] *Id.* § 2G1.1 cmt. n.5.
[56] *Id.*

indictment, each of those four victims should be treated as if contained in a separate count of conviction, and the defendant's base offense level could increase by four. Further, because each victim is treated as if contained in a separate count of conviction, the other subsections in § 2G1.1 apply to each of those "de facto" counts, including the § 2G1.1(d) sex abuse cross-reference discussed above.

Courts have found that the transportation of multiple people for the purpose of prostitution constitutes conduct relevant to a Mann Act sentence. In *United States v. Camuti*, the defendant simultaneously transported three women between Massachusetts and New Hampshire for the purpose of prostitution, and pleaded guilty to one count of the Mann Act.[57] The First Circuit found that the district court had correctly applied the special instruction for the two additional victims not included in the defendant's plea because the defendant had transported the two additional women in the same period and as part of the same scheme, thereby constituting relevant conduct.[58] As the two "de facto" counts for the additional women did not group, the defendant's base offense level was increased by two points.[59]

Similarly, in *United States v. Reiner*, the defendant was convicted after trial of the Mann Act, ITAR, interstate prostitution conspiracy, and conspiracy to commit money laundering for running a health club where women performed commercial sex acts.[60] While it is unclear how many victims were included in the crimes for which the defendant was convicted, the First Circuit found that the district court correctly applied the special instruction to include pseudo-counts for five additional victims because the evidence showed that these women traveled or were transported, persuaded, induced, or enticed to engage in commercial sex.[61]

While *Camuti* and *Reiner* analyze the scope of relevant conduct with respect to the Mann Act violations, *United States v. Rash* conducts this analysis in the context of ITAR violations.[62] In *Rash*, the defendant was convicted of one count of violating ITAR after running a prostitution enterprise from 1983 to 1990, during which time he recruited women to engage in prostitution and made arrangements for them to meet customers.[63] At sentencing, the district court found that the defendant had either transported or induced at least four women to travel interstate for prostitution over a period of years.[64] Although only two ITAR violations had been charged in the indictment, the court, applying § 2G1.1(d)(1), recognized two additional de facto counts for sentencing purposes.[65] The Court of Appeals held that the evidence supported the district court's application of the special instruction to consider the two additional de facto counts of ITAR, in addition to the two charged counts, based on the evidence that the defendant transported or induced four women in connection with the prostitution scheme.[66]

III. Labor Trafficking Cases

Compared to the somewhat circuitous guidelines analysis in sex trafficking and related cases, sentencing in labor trafficking cases appears somewhat more straightforward. Section § 2H4.1 governs

[57] United States v. Camuti, 950 F.2d 72, 74 (1st Cir. 1991).
[58] *Id.* at 75.
[59] *Id*. at 76.
[60] United States v. Reiner, 500 F.3d 10, 13 (1st Cir. 2007).
[61] *Id*. at 17.
[62] United States v. Rash, 48 F.3d 1218, 1995 WL 100569 (4th Cir. 1995).
[63] *Id.* at *1.
[64] *Id.* at *4.
[65] *Id.* at *3.
[66] *Id.*

sentencing for a number of different trafficking-related crimes, including Forced Labor (18 U.S.C. § 1589), Document Servitude (18 U.S.C. § 1592), and Benefitting Financially from Trafficking in Persons (18 U.S.C. § 1593A).[67] Forced Labor carries a base offense level of twenty-two, whereas both Document Servitude and Benefitting Financially begin at a base offense level of eighteen.[68] Typically, the statutory maximum for a Forced Labor conviction is twenty years, but this increases to life if the violation includes kidnaping, attempted kidnaping, aggravated sexual abuse, an attempt to kill, or death.[69] Such aggravating factors must be pled in the indictment and, ultimately, proven beyond a reasonable doubt at trial.[70] In order to employ one of these factors as a sentencing enhancement after trial, prosecutors must submit a special verdict form that allows the jury to determine separately whether the prosecution has proven both Forced Labor and the aggravating factor beyond a reasonable doubt.[71]

The applicable offense level then increases pursuant to various subsections of § 2H4.1, depending on the presence of specific offense characteristics, including whether a victim was injured and how seriously; whether a dangerous weapon was used, brandished, or threatened; the duration of the trafficking or servitude of the victim; and whether the defendant committed another felony in connection with trafficking the victim.[72] Notably, these offense characteristics differ from those that trigger increases in the offense level for sex trafficking and related sexual exploitation offenses discussed above. Section 2H4.1 also allows for an upward departure if more than ten victims are involved. [73]

Under § 2H4.1(b)(1), the base offense level increases four levels if the victim sustained permanent or life-threatening bodily injury, or two levels if the victim sustained serious bodily injury.[74] Note J of the commentary to U.S.S.G. § 1B1.1 defines permanent life-threatening bodily injury as: "injury involving a substantial risk of death; loss or substantial impairment of the function of a bodily member, organ, or mental faculty that is likely to be permanent; or an obvious disfigurement that is likely to be permanent."[75] This includes injuries "that may not be terribly severe but are permanent…"[76] Note B of the commentary defines bodily injury as "any significant injury; e.g. an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought."[77]

Section 2H4.1(b)(2) imposes a four-level increase if a dangerous weapon was used, and a two-level increase if a dangerous weapon was brandished or threatened.[78] Note D of the commentary to § 1B.1 further defines "dangerous weapon" as "any instrument capable of inflicting death or serious bodily injury and any object that…closely resembles such an instrument…"[79] Courts have looked to the function of the instrument when defining "dangerous weapon" and recognize that "in the proper circumstances, almost anything can count as a dangerous weapon, including walking sticks, leather straps, rakes, tennis shoes, rubber boots, dogs, rings, concrete curbs, clothes irons, and stink bombs."[80]

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[67] U.S.S.G. § 2H4.1 (U.S. SENTENCING COMM'N 2015); 18 U.S.C. §§ 1589, 1592, 1593A (2012).
[68] U.S.S.G. § 2H4.1 (U.S. SENTENCING COMM'N 2015).
[69] 18 U.S.C. § 1589(d) (2012).
[70] United States v. Booker, 543 U.S. 220 (2005).
[71] *See* United States v. Callahan, 801 F.3d 606, 625 (6th Cir. 2015).
[72] U.S.S.G. § 2H4.1 (U.S. SENTENCING COMM'N 2015).
[73] *Id.* § 2H4.1 cmt. n.3.
[74] *Id.* § 2H4.1(b)(1).
[75] *Id.* § 1B1.1 cmt. n.1(J).
[76] United States v. Torrealba, 339 F.3d 1238, 1246 (11th Cir. 2003).
[77] U.S.S.G. §1B1.1 cmt. n.1(B) (U.S. SENTENCING COMM'N 2015).
[78] *Id.* § 2H4.1(b)(2).
[79] *Id.* § 1B1.1 cmt. n.1(D).
[80] United States v. Callahan, 801 F.3d 606, 628 (6th Cir. 2015) (quoting United States v. Tolbert, 668 F.3d 798, 802–03 (6th Cir. 2012)).

The base offense level may also increase depending on the duration of the servitude or forced labor violation.[81] Under § 2H4.1(b)(3), the base offense level increases three levels if the victim was held more than one year, two levels if held between 180 days and one year, and one level if held more than 30 days but less than 180 days.[82] Thus, while the duration of the exploitation does not alter the sentencing calculation in sex trafficking and related offenses governed by § 2G2.1, it can affect the offense level in forced labor and related crimes sentenced under § 2H4.1.

The final subsection of § 2H4.1 applies when the defendant committed another felony offense in connection with the forced labor offense of conviction.[83] Such a felony offense refers to conduct that would constitute a felony under federal, state, or local law—except an offense that is already covered by § 2H4.1. When more than one felony offense is committed in connection with the count of conviction, the most serious is to be used.[84] The base offense level increases by two points regardless of the offense.[85] However, if the other felony carries a higher base offense level, then the higher base offense level would apply. For example, in *Callahan*, the jury's special verdict concluded that the forced labor offense had involved kidnapping.[86] Because kidnapping carries a higher base offense level of thirty-two, pursuant to § 2A4.1, the kidnapping conduct committed in connection with the underlying forced labor conviction elevated the offense level to thirty-two, pursuant to the § 2H4.1(4)(B) cross-reference.[87] Similarly, in *United States v. Calimlim*, the Court upheld the two-level increase to the defendants' base offense level for a forced labor conviction because during that offense, the defendants had also committed the separate felony offense of 8 U.S.C. § 1324(a)(1), harboring of an alien for private financial gain.[88] Although the defendants argued that all of their crimes fell under § 2H4.1 and, therefore, contended that application of this cross-reference would result in double-counting, the Court disagreed, emphasizing the distinctions between the underlying forced labor offense and the alien harboring felony committed in connection therewith.[89] The Court stated that, "[t]here is nothing artificial about treating forced labor and harboring as two separate offenses. They are based on different conduct, and neither necessarily encompasses the other."[90] Accordingly, in prosecuting forced labor and other violations sentenced under § 2H4.1, prosecutors should ensure that evidence of other felony conduct committed in connection with the underlying violation is investigated and presented to trigger application of the § 2H4.1(b)(4)(B) cross-reference, even where legal or evidentiary challenges preclude charging and proving the other felony conduct beyond a reasonable doubt in separate counts.

IV. Conclusion

The Trafficking Victims Protection Act introduced significant statutory penalties for human trafficking offenses, including potential life sentences for sex trafficking and for forced labor where aggravating factors are present. The sentencing guidelines address numerous variations in the nature of the offense conduct committed in connection with the underlying trafficking or trafficking-related offense, and the applicable guidelines calculation may be increased substantially by the application of relevant specific offense characteristics, cross-references, and enhancements. The Sentencing Guidelines account for a broad scope of criminal conduct related to the count of conviction, even where evidentiary challenges may preclude charging and proving that related conduct beyond a reasonable doubt as a

[81] U.S.S.G. § 2H4.1 cmt. n.1 (U.S. SENTENCING COMM'N 2015).
[82] *Id.* § 2H4.1(b)(3).
[83] *Id.* § 2H4.1(b)(4).
[84] *Id.* § 2H4.1 cmt. n.2.
[85] *Id.* § 2H4.1 (b)(4).
[86] United States v. Callahan, 801 F.3d 606, 613 (6th Cir. 2015).
[87] U.S.S.G. § 2A4.1 (U.S. SENTENCING COMM'N 2015); *id.* 2H4.1(b)(4)(B).
[88] United States v. Calimlim, 538 F.3d 706, 716 (7th Cir. 2008).
[89] *Id*.
[90] *Id.*

separate offense. These sentencing provisions can, therefore, play a significant role in securing sentences that hold perpetrators accountable for the full scope of their criminal conduct. Understanding these sentencing considerations at the outset of an investigation can therefore guide prosecutors in developing and eliciting appropriate evidence and in utilizing well-informed charging strategies to vigorously pursue justice on behalf of victims of human trafficking.

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Evidence Considerations in Proving Sex Trafficking Cases without a Testifying Victim

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I. Introduction

Sex trafficking plagues every corner of our nation and leaves victims in its wake to suffer long lasting effects of physical, mental, and emotional abuse. According to a 2014 Urban Institute study[1] and a 2015 University of San Diego study[2], sex trafficking ranks in the top three highest underground economies in the United States, next to narcotics and gun trafficking. The Department of Justice has made investigating and prosecuting sex trafficking a national priority within the National Strategy to Combat Human Trafficking (2017) and by expanding the Project Safe Childhood initiative to include trafficking offenses where minor victims are involved.

These types of offenses can be challenging to prosecute, even for the most experienced and seasoned prosecutors, for a variety of reasons. One of the more challenging aspects is gaining the full cooperation of trafficking victims. Trafficking victims are not always willing or able to tell their story (at least, at first) to law enforcement and prosecutors, much less to a petite or grand jury. Why is this so? Many reasons come to mind, including physical, mental, and emotional obstacles, such as the ability to recall events due to injuries, controlled substances, and mental health conditions such as PTSD. Other reasons include a fear of retaliation by the trafficker, shame or embarrassment by the victim, and the victim's inability or apparent unwillingness to leave the "life"—a term used to describe the pimping and prostitution culture.

So, no victim, no case, right? Not always! As with any case, prosecutors must gather evidence to prove each and every element of the charged crime beyond a reasonable doubt. Although a victim's testimony is often essential to proving sex trafficking, in some instances, there may be sufficient evidence to do so without the victim's testimony. For example, convictions have been obtained using a combination of percipient witnesses, experts, and other evidence discussed further in this article. This article discusses different sources of available evidence to consider gathering during the course of an investigation, especially in cases where the victim later becomes unavailable for trial.

II. The Benefits of Victim Testimony at Trial

Victims provide the best account of the events that tell the story surrounding the offense. Did the victim tell the trafficker the victim's true age? Was the victim subject to force, fraud, or coercion to cause the victim to engage in commercial sex acts? Where did the offense occur? Over what period of time?

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[1] Meredith Dank et al., *Estimating the Size and Structure of the Underground Commercial Sex Economy in Eight Major U.S. Cities*, URBAN INSTITUTE (March 11, 2014), http://www.urban.org/research/publication/estimating-size-and-structure-underground-commercial-sex-economy-eight-major-us-cities.
[2] *Study of Human Trafficking in San Diego*, UNIVERSITY OF SAN DIEGO, https://www.sandiego.edu/peace/faculty-and-research/research/human-trafficking-study.php.

Were there any other witnesses? Victim testimony can provide evidence to substantiate some of the most difficult elements to prove, such as knowledge of age, or use of force, fraud, or coercion. Victim testimony can also provide leads and other helpful information to identify additional evidence or, in many cases, other victims. In a perfect world, each trafficking victim would share his or her story in an effort to prosecute his or her trafficker. However, that is not always possible for the reasons mentioned above, such as physical, mental, and emotional obstacles, fear of retaliation and/or shame, and embarrassment. So, while having a victim testify truthfully, completely, and succinctly is important for sex trafficking prosecutions, when the victim is unavailable or unwilling to testify, there may be other means and alternatives to prove your case.

III. Proving the Essential Elements without a Victim

There are several statutes that address offenses involving sex trafficking and prostitution, including 18 U.S.C. §§ 1591, 2421, 2422 and 2423, to name a few.[3] This article will focus primarily on § 1591 cases even though there are other statutes that address trafficking-related conduct. Section 1591 criminalizes sex trafficking of children or sex trafficking of anyone regardless of age by force, fraud, or coercion. The elements are:

> The defendant knowingly (1) recruited, enticed, harbored, transported, provided, obtained, maintained, patronized or solicited by any means a person, OR (2) benefited, financially or by receiving anything of value, from participation in a venture which engaged in an act described in (1);
>
> The defendant knowing, or in reckless disregard of the fact, that (1) force, threats of force, fraud, coercion or any combination of such means would be used to cause the person to engage in a commercial sex act, OR (2) the person had not yet attained the age of 18 years and would be caused to engage in a commercial sex act; and
>
> The defendant's actions were in or affecting interstate or foreign commerce.[4]

Section 1591(c) provides that the government need not prove that the defendant knew or was in reckless disregard of the fact that the person had not attained the age of eighteen in a prosecution if the defendant had a reasonable opportunity to observe the person who was recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited.[5] Although §1591 also prohibits advertising, it limits the mens rea in that instance to knowledge of force, fraud, coercion, or age, and does not allow for reckless disregard or reasonable opportunity to observe.[6]

In §1591 prosecutions, the most challenging elements to prove without a testifying victim typically are: (1) proof of force, fraud, or coercion; (2) knowledge of the victim's age for prosecutions involving a minor victim; and (3) evidence that a commercial sex act would occur.

A. Social Media

The use of social media is quickly becoming the most common form of evidence in a variety of cases. Sex trafficking is no different. It is not uncommon to see traffickers post their whereabouts on social media sites such as Facebook, Instagram, or Twitter. Use of social media not only reveals the traffickers' whereabouts, but also whom the traffickers are with, what they are doing, and why they are in a particular location. Evidence such as photos of the trafficker and the victim can help to show the

[3] 18 U.S.C. §§ 1591, 2421, 2422, 2423 (2012).
[4] 18 U.S.C. § 1591 (2012); *see also* United States v. Garcia-Gonzalez, 714 F.3d 306, 312 (5th Cir. 2013); *see also* United States v. Todd, 627 F.3d 329, 332–334 (9th Cir. 2010).
[5] 18 U.S.C. § 1591(c) (2012).
[6] 18 U.S.C. § 1591 (2012).

relationship between them, or at the very least, that they knew each other. A trafficker may also post a video to his social media account of the victim being "disciplined" by the trafficker in the form of beatings, ridicule or, as happened in one particular case, being made to sit fully clothed in an ice water bath with the air conditioning running, as a means to brag to the trafficker's Facebook friends. Photos or videos combined with "check ins" may also prove where the trafficker actually was at any given time. Did the trafficker "check in" at the local motel or at a particular restaurant? The location of the trafficking may be important to establish venue. It may also be important to search for additional evidence outside of your jurisdiction for the purpose of admitting it at trial as other acts evidence under FRE 404(b).[7] Likewise, photos of a trafficker holding large sums of cash or in possession of high ticket items might be useful to show unexplained income and that the trafficker was the one profiting from the victim's sex acts.

Social media platforms typically allow the account holder to post messages or "comments" for their social media "friends" or the general public, and for others to respond to those messages and comments. For example, the trafficker may post a picture of his victim in front of a hotel. A third party may comment on the picture that the trafficker is "trappin"—a word used to describe pimping activity. The trafficker may respond affirmatively or "like" the comment. Such evidence is probative of the knowledge that commercial sex acts are taking place and that the victim depicted in the photo is the person being trafficked. Statements made by third parties may be admissible when they provide "context for other admissible statements [and] are not hearsay because they are not offered for their truth."[8]

Depending on the amount of data seized on the social media account, it may show that the trafficker had a "reasonable opportunity to observe" a particular victim.[9] Contemporaneous photos of child victims are helpful to show juries what the victim looked like at the time of the conduct, since trials may occur long after a victim turned eighteen and became an adult. Moreover, if the account shows photos or comments about the victim or between the trafficker and the victim that span a considerable period of time, such evidence may prove that the trafficker knew or recklessly disregarded the victim's age or had a reasonable opportunity to observe the victim under 18 U.S.C. §1591(c).[10]

Texting or "messaging" is a popular form of communication for everyone, including traffickers. Platforms such as Facebook Messenger, WhatsApp, and textPlus offer texting type programs that should be explored, if possible. If the victim provides information that the victim communicated with the trafficker using such a program, downloading the victim's phone to gather those communications is critical. Likewise, issuing legal process (if possible) to those companies for a suspected trafficker's communications might yield vast amounts of evidence, as well as create avenues for further investigation.

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[7] FED. R. EVID. 404(b).

[8] United States v. Tolliver, 454 F.3d 660, 666 (7th Cir. 2006); *see also* United States v. Louis, 233 F. App'x 933, 935 (11th Cir. 2007) (affirming that statements offered to give context to the defendant's statements were not offered for the truth and, therefore, did not fall within the ambit of the Confrontation Clause); *see also* United States v. Bermea-Boone, 563 F.3d 621, 626 (7th Cir. 2009) (affirming that it is "well-settled" that statements that are offered for context and not for the truth of the matter asserted, are not hearsay, and do not present a Crawford issue); *see also* United States v. Detelich, 351 F. App'x 616, 623 (3rd Cir. 2009); *see also* United States v. Payne, 944 F.2d 1458, 1472 (9th Cir. 1991) (finding out-of-court statements to a victim questioning whether she had been sexually abused were non-hearsay because they were offered to show their effect on the victim and to explain the circumstances under which her initial denial of molestation by the defendant took place).

[9] 18 U.S.C. § 1591(c) (2012).

[10] *Id.*

You should consider obtaining a search warrant for a suspected trafficker's social media accounts in most trafficking cases where probable cause exists. If the social media posts belong to the defendant, the statements written are not hearsay.[11]

B. Electronic Evidence

Consider obtaining other types of electronic evidence to the extent they are available. Cell phones and email accounts are the most common. Cell phones may contain large amounts evidence, such as text messages, photos, GPS data, and social media and email accounts. A search warrant may be obtained to search through the entire phone seeking evidence to show trafficking activity.

Email accounts are frequently associated with online prostitution ads, travel websites, and hotel reservations. If an online prostitution ad is located, a subpoena will reveal the email account and subscriber information for the person who posted the ad. Once an email address is obtained from the online ad, a search warrant into that email account may yield additional evidence such as travel plans, communications showing threats made to victims, or recruiting other victims to be posted online.

Another helpful type of electronic evidence is cell site data. Cell site data can show where a particular cell phone is located at any given time. How can this information be helpful? First, it can show a pattern of where a victim is being exploited and that the trafficker is nearby during the exploitation.[12] This evidence may be critical to show the reasonable opportunity to observe elements in a prosecution involving a minor victim. It may also be relevant to show the trafficker's proximity to the victim walking the "track"—a term used to describe an area where prostitution activity frequently occurs. Second, it can provide leads for investigators to seek out other types of evidence, such as hotel registries, percipient witnesses to commercial sex acts (such as hotel cleaning staff), and camera footage from local businesses showing the trafficker and victim together. Cell site data may be obtained under 18 U.S.C. §2703 and requires "articulable suspicion" by the AUSA.[13]

As with social media discussed above, third party statements in emails may be admissible to provide context.[14]

C. Music Videos, Documentaries, and Photo Shoots

Traffickers may also create music videos or documentaries, which may be posted online to websites like YouTube. Many traffickers sing or rap about pimping activity, gang violence, or other illicit activity. For many traffickers, rapping or talking about such activity is part of the pimping culture and is a way to recruit trafficking victims. Rap music is also a way to brag about the criminal activity to obtain "street cred"—prestige and status in the gang or pimping world. Traffickers use video shoots for music videos as a way to lure potential victims and manipulate them to believe that the trafficker is a successful music artist. Traffickers may also create documentary-style videos where they are interviewed about their life, their childhood, and how they make money through pimping.

Music videos depicting the trafficker with the victim are probative since the videos show that the trafficker and the victim know each other. The lyrics of a particular song might be evidence of knowledge of the commercial sex activity or age of the victim. In one case, the convicted trafficker sang "Puttin' the bitch on the mother—kin' Craiglist…. 16 and up, and I don't give a f—k," which was highly probative of

[11] United States v. Brinson, 772 F.3d 1314, 1320 (10th Cir. 2014) (finding posts written by defendant are non-hearsay under FED. R. EVID. 801(d)(2)).
[12] *See* United States v. Steele, 664 F. App'x 260, 261 (3rd Cir 2016).
[13] 18 U.S.C. § 2703(d) (2012).
[14] United States v. Dupre, 462 F.3d 131, 137 (2d Cir. 2006) (finding that emails were not offered to prove the truth of the matter asserted, but rather they provided context for the defendants' messages sent in response).

the age of the victim as well as the commercial sex activity. In another documentary style video, a trafficker stated, "I got no problem with slapping a bitch," as he slapped a victim's face.

Once relevance is established, music videos or documentary style videos obtained from a website such as YouTube may be authenticated and admitted as business records under Federal Rule of Evidence 902(11).[15]

Alternatively, an investigator may be able to testify that the video depicts the trafficker based upon personal knowledge. If the trafficker is making the statement in the video, it falls outside the hearsay rule, as it is a party opponent admission.[16] In addition, third party statements in a video may also be admissible to provide context to a declarant's response. In *United States v. Macari*, the court stated that, "[i]t is well-settled that statements that are offered for context, and not for the truth of the matter asserted, are not hearsay as defined in Rule 801 of the Federal Rules of Evidence."[17]

Defendants may assert that the lyrics are protected speech under the First Amendment. However, if the nature of the implicated speech is integral to criminal conduct, courts have determined that it is unworthy and undeserving of legal protection under the First Amendment.[18] The Supreme Court has also recognized that "[t]he First Amendment ... does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."[19] The Second Circuit has also upheld the use of evidence of political speech or beliefs to prove the existence of a conspiracy and its motive.[20]

D. Percipient Witnesses/Prior Victims/Sex Buyers

Witness testimony may also provide first person testimony about the trafficker's activity towards the victim in lieu of the victim's testimony. The witness could be anyone who has had contact with the trafficker and the victim and observed some relevant aspect of the crime. Such examples include the trafficker's associates, such as a fellow pimp or a "bottom bitch," the most trusted prostitute for the

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[15] United States v. Hassan, 742 F.3d 104, 132–134 (4th Cir. 2014) (stating that Facebook posts, including YouTube videos were self-authenticating under 902(11) where accompanied by certificates from Facebook and Google custodians "verifying that Facebook and YouTube videos had been maintained as business records in the course of regularly conducted business activities"); *see also* Randazza, Cox, No. 2:12-CV-2040-JAD-PAL, 2014 WL 1407378, at *4 (D. Nev. Apr. 10, 2014) (stating that videos posted to YouTube "are self-authenticating as a certified domestic record of regular conducted activity if their proponent satisfies the requirements of the business-records hearsay exception"); *see also Brinson*, 772 F.3d at 1320; *but see* United States v. Browne, 834 F.3d 403, 412–413 (3d Cir. 2016) (stating that use of a 902(11) declaration along with extrinsic evidence to prove authentication was proper).

[16] FED. R. EVID. 801(d)(2); *see also* United States v. Lang, 364 F.3d 1210, 1222 (10th Cir. 2004).

[17] United States v. Macari, 453 F.3d 926, 941 (7th Cir. 2006).

[18] United States v. Stevens, 559 U.S. 460, 468 (2010); *see also* United States v. Osinger, 753 F.3d 939, 946 (9th Cir. 2014); *see also* United States v. Norwood, No. 12-CR-20287, 2015 WL 2343970, at *10–11 (E.D. Mich. May 14, 2015) (explaining that the district court rejected the defendant's argument that the rap lyrics were mere artistic expression because they helped establish the existence of the enterprise, its members, and at least one of its alleged purposes); *see also* United States v. Wilson, 493 F. Supp. 2d 460, 462–463 (E.D. N.Y. 2006) (stating that the district court admitted the lyrics because they were "relevant to determining whether the [group] exists and whether it is 'an enterprise engaged in racketeering activity'"); *see also* United States v. Rivera, No. 13-CR-149(KAM), 2015 WL 1757777, at *4–5 (E.D. N.Y. Apr. 17, 2015) (affirming that rap videos bear directly on the proof related to the existence of the Enterprise).

[19] Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993); *see also* Dawson v. Delaware, 503 U.S. 159, 165 (1992) ("[T]he Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations….").

[20] *See* United States v. Salameh, 152 F.3d 88, 110, 112 (2d Cir. 1998) (stating that terrorist materials consisting of videos, handwritten notebooks, and literature used as evidence of bombing conspiracy and motive).

trafficker. These individuals may choose to testify as cooperating witnesses, including through a cooperation agreement if they are also criminally liable.

Another type of witness could be additional trafficking victims who witnessed the physical abuse or commercial sex acts either before or after the charged offense.[21] This evidence may be considered FRE 404(b) evidence if it does not directly involve the charged victim.[22] Additionally, sex buyers or "johns" could provide evidence that a commercial sex act occurred with a particular victim or provide testimony of bruises or other injuries on the victim. Lastly, family members may provide testimony about the victim's age, identify photos in prostitution ads, and may provide other relevant evidence.[23]

Businesses associated with trafficking might be another source of evidence. For example, hotel cleaning staff might provide evidence of the number of people who came in and out of a particular room, or they might provide testimony about used condoms in the trash. A hotel clerk might provide similar testimony, as would a neighboring hotel guest.

These witnesses may also present evidence of the trafficker's state of mind under FRE 803(3).[24]

In sum, other witnesses may be able to provide sufficient evidence to prove the elements beyond a reasonable doubt without the actual victim testifying at trial.

E. Police Observations

Testimony by law enforcement who have had encounters with both the trafficker and the victim might provide further evidence to prove your case. For example, an officer who conducted a traffic stop with the trafficker and the victim in the car on some prior occasion might recall injuries on the victim. The officer's testimony might only be able to provide that the trafficker and victim were together in a particular location. An officer who conducted a field interview of the trafficker near a motel might lead to finding a local motel where the trafficker rented rooms. Was the victim also encountered in and around the same time and location as the trafficker?

These types of encounters might also provide insight into the type of vehicle the trafficker was driving. Was the trafficker wearing a baseball cap with a "P" on it? Many pimping and trafficking experts will say that "P" stands for "pimp," and often traffickers will wear certain clothing indicative of pimping activity.

F. Experts

Use of pimping experts is not new to trafficking cases.[25] Prosecutors should assess the pros and cons to calling experts, as there can be risks, and experts are not always necessary. In some instances,

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[21] *See* United States v. Mohr, 318 F.3d 613, 617 (4th Cir. 2003) (explaining that Rule 404(b) "covers evidence of both prior and subsequent acts").
[22] United States v. Willoughby, 742 F.3d 229, 236 (6th Cir. 2014) (permitting testimony from prior victim about pimping activity).
[23] United States v. Mozie, 752 F.3d 1271, 1287 (11th Cir. 2014) (stating that father testified about victim's age and identified photos of his daughter in sex trafficking case).
[24] United States v. Barraza, 576 F.3d 798, 805 (8th Cir. 2009) (finding statements of one's intention to travel to Mexico admissible under Federal Rule of Evidence 803(3)); *see also* United States v. Nersesian, 824 F.2d 1294, 1325 (2d Cir. 1987); *see also* United States v. Natson, 469 F. Supp. 2d 1243, 1249 (M.D. Ga. 2006) (admitting statements as then existing state of mind and plan since they involved plans for the declarant and the defendant to get gas before driving to Columbus); *see also* United States v. Smallwood, 299 F. Supp. 2d 578, 585 (E.D. Va. 2004) (admitting statements that under FED.R.EVID. 803(3) to show that the victim intended to meet with the defendants on the day of his murder and that he in fact did so).
[25] *See Brinson*, 772 F.3d at 1318–1319; *see also* United States v. Brooks, 610 F.3d 1186, 1195–1196 (9th Cir. 2010).

experts can provide valuable insight to explain the terminology or lingo used by many traffickers and can provide explanations of the roles of the pimp and the prostitute. An expert may also be able to provide the different ways victims are controlled by the trafficker through physical abuse, guilt, love, fear of deportation, or removal of children. However, prosecutors should be mindful that not all trafficking schemes are the same, and in some instances, the expert's testimony may contradict the witnesses.[26] Experts can also explain the pimp/prostitute relationship because "[b]y and large, the relationship between prostitutes and pimps is not the subject of common knowledge."[27] In sum, experts can provide the how and why answers to many questions, and the prosecutor can argue how various types of evidence are probative of guilt.

Medical records showing injuries on the victim might be helpful to show force. Statements made by the victim to medical personnel may be admitted into evidence under FRE 803(4).[28] Medical records might corroborate a witness' statement that the victim had a particular injury on a particular date.

G. Victim's Prior Arrests for Prostitution

Evidence related to a victim's prior prostitution arrests could help prove the case against a trafficker. Evidence identifying the person who posted the victim's bail, who placed money on a victim's books while in custody, or whom a victim called on the phone while in custody may provide evidence that she is working for a particular trafficker or organization. Prior prostitution acts of a victim and identifying who the victim was with at the time of an arrest or prostitution activity may be helpful to identify the trafficker or may be helpful to provide evidence that the acts are not consensual. Some states, such as California, do not allow this type of evidence to be presented at trial in state court.[29] However, it is permissible under federal law.

How is the victim's prior record relevant in a case against a trafficker? If the victim was arrested for prostitution ten times during the same time frame the victim was alleged to been trafficked by the trafficker, perhaps delving into the prior arrests would yield evidence against the trafficker. At the very least, it will prove up the acts of prostitution necessary to show that commercial sex acts were involved. Listening to jail calls between the incarcerated victim and the trafficker might yield evidence where, for example, the trafficker advises the victim that when he bails her out, she should go back to the hotel room where she was arrested and get back to work to make up for lost time, or suffer physical abuse.

A victim's prior record might also identify the victim's prior trafficker, who might have knowledge about the victim's current pimp. Perhaps the former pimp told the charged trafficker the victim was underage.

IV. Confrontation Clause Challenges

The Confrontation Clause guarantees every defendant the opportunity for effective cross-examination of any witness at trial. It does not provide an obligation for the United States to call all witnesses against a defendant, including a victim.[30] Instead, it prohibits the introduction of out-of-court

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[26] *Brooks*, 610 F.3d at 1195–1196 n.3 ("To the extent that the testimony of witnesses . . . contradicted [the expert's] testimony concerning the general practices of pimps and prostitutes, [the] divergence simply went to the weight of the expert testimony, not its admissibility.").
[27] United States v. Taylor, 239 F.3d 994, 998 (9th Cir. 2001) (stating that the district court properly admitted expert testimony "on the relationship between prostitutes and pimps").
[28] FED. R. EVID. 803(4).
[29] *See, e.g.*, CAL. EVID. CODE § 1161 (West 2014).
[30] *See, e.g.*, United States v. Gray-Sommerville, 618 F. App'x 165, 168–169 (4th Cir. 2015).

testimonial evidence used for establishing the truth of the matter asserted, unless the witness is unavailable and the defendant has had a prior opportunity for cross-examination of such witness.[31]

V. Conclusion

Victims are an important part of trafficking cases, but in some instances, they are simply unavailable. In those cases, it is important to think critically about the available evidence and whether it is sufficient to prove the elements beyond a reasonable doubt.

ABOUT THE AUTHOR

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[31] Crawford v. Washington, 541 U.S. 36, 59–60 (2004).

Human Trafficking and Organized Crime: Combating Trafficking Perpetrated by Gangs, Enterprises, and Criminal Organizations

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I. Introduction

Criminal organizations and gangs are notorious for their use of violence and the many crimes that they commit. They are well known for their extortions, robberies, loan sharking, and drug distribution, among other crimes. Many criminal organizations also engage in prostitution and human trafficking, as Congress recognized when it enacted the Trafficking Victims Protection Act of 2000.[1] Human trafficking offers gangs and organized criminal enterprises a consistent stream of revenue. Sex trafficking frequently carries less risk of detection than other criminal activities, in part because many victims can be intimidated into silence.

Trafficking perpetrated by organized criminal enterprises can take many forms, including labor trafficking committed by transnational criminal organizations, international sex trafficking through family-based networks, and sex trafficking within the United States by both domestic gangs and international criminal syndicates.

The organized nature of criminal syndicates makes them particularly effective at committing crimes such as sex trafficking. Whether they are informal networks or highly structured command-and-control syndicates, their organizational structure, discipline, division of labor among multiple criminal

[1] *See* United States v. Todd, 627 F.3d 329, 336 n.2 (9th Cir. 2010) ("[I]n enacting section 1591 Congress found that trafficking in persons is increasingly perpetrated by organized, sophisticated criminal enterprises.") (citation omitted).

associates, access to narcotics and weapons, and their penchant for violence make gangs and criminal organizations especially formidable as sex traffickers. Indeed, they are among the most effective sex traffickers in the United States.

Although organized sex traffickers use many of the same techniques and tools employed by individual or independent sex traffickers, prosecuting gang-based and organized sex traffickers presents some unique challenges and opportunities. This article discusses some of those challenges and opportunities, as well as successful strategies developed in prosecutions involving organized and gang-affiliated sex traffickers.

II. Understanding and Identifying Gang-Based Sex Trafficking Threats

Gangs and criminal organizations are likely engaging in human trafficking and other criminal activity in your district. Enterprise-based trafficking crimes have been detected operating in many jurisdictions, whether urban, suburban, or rural. They operate near state and international borders, along major transit routes, and deep within more insular communities.

Often law enforcement agents—typically, the local police—encounter these enterprises unexpectedly. They quickly realize the need to shelter and stabilize victims, frequently through the assistance of task force partners. Advance planning for separating targets from one another, ensuring the safety of victims, and capturing evidence of attempts to intimidate potential witnesses can be critical to persuading victims, witnesses, and subjects to cooperate in the investigation.

Many gangs and criminal organizations prey upon illegal aliens and foreign-born victims, often luring them with false promises and smuggling them into the United States. They then compel the victims through threats and violence, and by exploiting their fears of being arrested and detained.

These transnational enterprises pose serious threats not only to the victims, but also to the integrity of international borders, and often launder substantial criminal proceeds back out of the country. Whether the victims are brought into the United States via smuggling across the U.S.-Mexico border, or through visa fraud schemes, it is critical to use victim-centered strategies to build trust with the victims in order to effectively investigate, prosecute, and dismantle these enterprises.

Well-qualified linguists are critical to communicating with victims in their first language, and victim specialists who can facilitate victims' access to shelter, counseling, and other critically important services, offered by non-governmental victim assistance organizations, are essential. The Trafficking Victims Protection Act affords temporary immigration status to foreign-born victims so they can assist in law enforcement investigations and prosecutions of their traffickers.[2]

A. Victim Recruitment Mechanisms

Criminal organizations use many of the same recruitment mechanisms that individual or autonomous sex traffickers use. For example, they sometimes use the violence typical of a "gorilla pimp"; others employ the faux romance associated with "Romeo" pimps.[3] Others seek to offer a sense of "belonging" to victims who are searching for support and love due to their own troubled backgrounds. Like individual sex traffickers, sophisticated organized sex traffickers will generally use whatever works to control a particular victim.

[2] *See* 8 U.S.C. § 1101(a)(15)(T).
[3] *See generally* Oliver v. Ducart, 15-CV-397(JD), 2016 WL 627363, at *4 (N.D. Cal. Feb. 17, 2016) (summarizing expert testimony regarding the tactics used by "Romeo" and "gorilla" pimps)..

One mechanism common among violent street gangs is "sexing" females as an initiation ritual signifying induction into the gang. Gangs such as MS-13 have initiation rituals such as enduring beatings inflicted by other members, sometimes known as being "jumped" into the gang. Some gangs recruit sex trafficking victims by ostensibly offering them membership in the gang, then using sexual assaults by multiple gang members, purportedly as an initiation ritual of being "sexed" rather than "jumped" into the gang. This sham initiation rite is used to manipulate victims into identifying with the gang and perceiving themselves as members, who are then directed to "pull their weight" by prostituting at the gang members' direction and surrendering all or nearly all of the proceeds to the gang.[4]

Once initiated in this fashion, many women and girls never even fully realize that the gang is exploiting them. Rather, they often feel extreme loyalty to the gang and are unlikely to self-identify as a victim. Should this loyalty ever wear off, the gangs will use a variety of tactics to retain victims, including threats, beatings, rape, and shaming.

In other instances, members of an organized trafficking enterprise will use promises of love and romantic relationships to exert psychological control over victims. In gang-based and enterprise-based trafficking cases, therefore, look for psychological coercion and be prepared for victims to identify with the traffickers, initially maintaining loyalty to perpetrators and rejecting law enforcement efforts to secure their cooperation.

B. Be Cognizant of the Organization's "Family" Structure

Many sex trafficking victims come from fatherless and unstable homes, some with a history of foster care, homelessness, and/or physical or sexual abuse. Sex traffickers exploit these vulnerabilities by creating a warped "father-child" relationship with victims and manipulating their need for love and acceptance.

Bereft of parental attention, many victims find in gangs or sex trafficking organizations the "love," structure, discipline, and sense of belonging that they crave, which can make gang-controlled victims especially uncooperative with law enforcement.

Indeed, many victims firmly believe that they are full-fledged members of the criminal organization and are, therefore, hostile to efforts to prosecute gang members. The victims are not cooperative until after they are removed from the gang, stabilized, and gain some emotional and psychological distance from the deception and manipulation, and are then able to assist in the investigation and prosecution of their traffickers.

Their loyalty to particular gang members may also be difficult to overcome in the short term. It may be useful, therefore, to afford potential victims access to counselors who have expertise in gang-related crimes who can provide trauma-informed counseling services. Eventually a victim's misplaced loyalty to the gang can be overcome, but it often is a slow process.

[4] *See* United States v. Toliver, 387 F. App'x 406, 408-09 (4th Cir. 2010) (noting that women could be "sexed" into a gang by having sex with five different members of this particular gang); *see also* United States v. Hornbuckle, Nos. 12–10541, 12–10615, 2015 WL 1783073, at *1 (9th Cir. Apr. 21, 2015) (noting that the victims provided all of the prostitution proceeds to the sex traffickers).

C. Using Narcotics to Control Victims

Many sex traffickers, both individual and enterprise-based, use addictive drugs to compel, coerce, manipulate, and control their victims, whether to induce them or to numb their sensibilities to make them more compliant.[5]

Individual and enterprise-based traffickers alike readily use narcotics to induce obedience and erode victims' resistance.[6] It is particularly important in organized crime cases, therefore, to pay attention to the ways criminal organizations are using narcotics with victims.

Prosecutors should not hesitate to charge sex trafficking by coercion when traffickers withhold drugs (or threaten to withhold drugs) to induce drug-dependent and addicted victims to submit to prostitution because they fear the physical and mental pain caused by drug withdrawal.[7]

Because drug withdrawal is such a painful process, the threat of withdrawal is sufficient to induce most persons with addictions to submit to commercial sex acts.[8] Depending on the drug and the extent of a victim's drug dependence, the pain form withdrawal can last for 72 hours or longer.[9] Thus, the mere threat of causing drug-dependent victims to undergo withdrawal is highly coercive.

Including narcotics-related counts in the indictment also can strengthen trafficking prosecutions by holding traffickers and their associates accountable for additional criminal conduct. Furthermore, the sex traffickers' drug distribution to victims (and others) may be more readily provable than counts that rely on victim testimony. Because Attorney General Sessions has again authorized prosecutors to use the full panoply of statutory mandatory minimums in narcotics cases, these charges may also entail substantial penalties for traffickers who use narcotics to control victims.

D. Implicit Threats of Violence

Many criminal organizations have such a reputation for violence that victims remain intimidated and compliant, so there is no need for the traffickers to utter explicit threats of violence. The very

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[5] *See, e.g.,* United States v. Kizer, 517 F. App'x 415, 416 (6th Cir. 2013) ("Kizer enticed an 18-year-old crack addict identified as A. W. into a world of prostitution with promises to feed her drug habit. She prostituted herself . . . and gave Kizer all of the proceeds. He, in turn, gave her crack."); United States v. Royal, 442 F. App'x 794, 796–97 (4th Cir. 2011) (noting that the sex trafficker provided drugs to victims in order to take further advantage of them); United States v. Amedeo, 370 F.3d 1305, 1317 (11th Cir. 2004) (describing how a teenage victim's drug addiction rendered him "unusually vulnerable" to a defendant who supplied him with cocaine); United States v. Altman, 901 F.2d 1161 (2d Cir. 1990) (noting that the defendant drugged his victims, which made them physically and mentally vulnerable).

[6] *See, e.g.,* United States v. Mack, 808 F.3d 1074, 1078 (6th Cir. 2015) (noting that the trafficker would addict victims to drugs and would intentionally make them endure painful withdrawal to control them); United States v. Flanders, 752 F.3d 1317, 1326 (11th Cir. 2014) (noting that the defendants drugged women before having sex with them); United States v. Amaya, 519 F. App'x 784, 785 (4th Cir. 2013) (noting that MS-13 gang leader provided drugs to sex trafficking victims).

[7] *See* United States v. Bonner, No. 1:14-CR-425 (E.D.Va. 2015) (noting that the defendant punished victims by forcing them to undergo drug withdrawal and that one victim died of a fentanyl overdose); United States v. Mack, 298 F.R.D. 349, 350 (N.D. Ohio 2014) (noting that the defendant "controlled [the victims'] access to drugs to force them to continue to prostitute themselves in order to avoid painful withdrawal symptoms").

[8] *See* United States v. Fields, 625 F. App'x 949, 952 (11th Cir. 2015) (noting that the victims' "withdrawal sickness was so severe that it caused the victims to want to die"); Pretty on Top v. City of Hardin, 182 Mont. 311 (1979) ("The process of detoxification is a painful physical and mental process.") (Shea, J., dissenting); Thomas R. Kosten & Tony P. George, *The Neurobiology of Opioid Dependence: Implications for Treatment*, 1 SCIENCE & PRAC. PERSP. 13, 15–16 (2002) (noting that withdrawal symptoms can include, anxiety, muscle cramps, diarrhea, pain, agitation, and malaise).

[9] Michael Farrell, *Opiate Withdrawal*, 89 ADDICTION 1471 (1994).

existence of these organizations is perceived as a threat to the lives of anyone who would oppose them. Prosecutors should keep this in mind when they are searching for the "force" or "threats of force" that caused a victim to submit. There may not be any explicit threats.

These organizations instill fear without overt threats. Their reputations for violence are tacit threats.[10] Prosecutors, therefore, may need to make use of gang experts to testify about the threatening nature and violent reputations of gangs, such that no specific threats of violence were necessary.

Victims themselves often can testify that they understood the gang's very existence to be a threat to them.[11] Many victims, however, may not even realize that they were perpetually operating under this pervasive fear. They become so numbed to the fear that they hardly remember a time when they were not apprehensive.[12] This is one of many challenges that gang and enterprise-based trafficking prosecutions entail.

E. Community Outreach and School Resource Officers

In attempting to identify potential trafficking victims and networks, engaging in community outreach may help to identify possible gang members and potential victims who are at risk. In particular, many schools have police officers assigned to them.

These officers often have the pulse of the school and are aware of the gang members and students who could be victimized. They also have relationships with school counselors and administrators who can sometimes identify likely victims and gang members through excessive absences or changes in behavior, among other things.

As an example of information school resource officers may possess, some gangs hold "skip parties" in which they encourage potential victims to skip school and hang out with gang members. This is often a first step toward recruiting victims, and school resource officers may hear rumors of such parties and those who attended. Later, once they have been recruited, victims often will be absent from school because traffickers keep them busy with commercial sex acts.

School resource officers are sometimes aware that something is amiss with victims. They also are typically able to get information about students that could be helpful in investigations, such as who a victim's associates are, unexplained absences, and changes in behavior that are indicative of trafficking.

Thus, in identifying possible traffickers or victims, and in investigating and prosecuting gang sex trafficking cases, school resource officers can be extremely helpful. In short, school resource officers can be a great resource for trafficking investigations.

III. Investigating Organized Sex Trafficking

A. Debriefing Sex Trafficking Victims

In virtually all types of human trafficking cases, agents and prosecutors face challenges in securing the cooperation of vulnerable, traumatized victims, who often distrust authorities and fear retaliation from their traffickers and the traffickers' associates. These concerns can be particularly

[10] *See* United States v. Mulder, 273 F.3d 91, 103 (2d Cir. 2001) (noting that a reputation for violence "frequently conveys a tacit threat of violence")
[11] *See* United States v. Coppola, 671 F.3d 220, 242 (2d Cir. 2012) (noting, in a traditional organized crime case, that "a jury may reasonably consider . . . reputation in assessing whether" conduct was "induced by the exploitation of existing fear without an explicit or implicit threat").
[12] *See, e.g.,* United States v. Amaya, 519 F. App'x 784, 785 (4th Cir. 2013) (noting that "Amaya served as the 'muscle' in the conspiracy, using force and intimidation to ensure that the victims complied with the rules of the organization and carrying weapons").

pronounced in organized and gang-based trafficking contexts, where victims are often well aware of gang members' reputation for extreme violence and of the extensive reach of the organization through the perpetrators' many criminal associates. The number one rule of debriefing sex trafficking victims and survivors, particularly those that have fallen prey to organized sex traffickers, is to be patient. Trafficking victims often do not self-identify as victims, and the psychological trauma of being trafficked, which often includes threats, beatings, and living in perpetual fear, is extraordinarily difficult to overcome.

Stabilize victims before you attempt to debrief them. Often the victims' most basic needs—such as food, clothing, and shelter—were met by their traffickers. Until the victims' basic needs are satisfied—including personal security and security for family members—it is unlikely that a victim will be fully engaged in interviews, much less prepared to contemplate testifying.

In debriefing victims of trafficking, be sensitive to language. For example, if the victim refers to prostitution as "working" or "dating," clarify what they mean, but seek to mirror the language they use to avoid imputing terminology or implications they are not prepared to communicate themselves. It is never appropriate to call a sex trafficking victim a "prostitute." Speak in terms of conduct they were expected to perform, rather than affixing a label implying that they are identified by their engagement in that conduct.

In addition, some victims are offended by the term "victim," as that potentially implies pity and lack of control over their lives. Early in the recovery process, many victims deny their victimization and utterly reject being labeled a "victim." Interviewers should avoid these labels and, instead, ask the victim to describe their experience without using conclusory terms.

As in all cases, it is imperative that law enforcement keep victims informed about the process to the extent that the information you provide will not inadvertently interfere with their testimony. All victims have specified rights under the Crime Victims' Rights Act,[13] including the right to confer with the prosecution and timely notice. They also have a right to privacy and dignity, which may provide you with a basis to keep the victims' identities confidential, as discussed below.

As in all sex trafficking cases, building trust with victims is essential. Showing victims that you will protect their rights, facilitate their access to assistance, and keep them informed will help to stabilize them and build the confidence they need to be effective witnesses. This will help victims become empowered to testify, as they are often essential witnesses whose testimony is a cornerstone of your case.

Throughout the investigation, law enforcement should make every effort to corroborate victims' statements. For example, if they say that they stayed in particular hotels, subpoena the hotel records; if they previously were arrested, track down all of the arrest paperwork. Invaluable corroboration also can be found in advertisements on "escort" websites, social media, travel records, phone records and cell phone downloads, and the testimony of other witnesses, including cooperators and insiders.

B. Cooperators

As in other organized crime investigations, cooperators are often essential to prosecutors' efforts to dismantle an organized sex trafficking group. By utilizing their structure to maximize sex trafficking profits, criminal organizations and gangs unwittingly create a large number of witnesses who potentially could testify against other members of the venture.

Because fellow members of the organization are insiders, the information they possess is invaluable in implicating numerous criminal associates. Accordingly, in organized crime and gang cases, there are a large number of potential witnesses for the prosecution, and success often depends on utilizing

[13] 18 U.S.C. § 3771 (2015).

effective strategies to secure their cooperation and developing their testimony as to the operations of the trafficking enterprise.

The "rules" of most criminal organizations, however, preclude members from testifying against their colleagues.[14] Indeed, most criminal organizations forbid any cooperation with the police, even if such assistance is directed against rival criminal organizations. The penalty for breaking this "no assistance to the police" rule typically is death, although enforcement of this rule varies from organization to organization.

Because most organized criminals swear an oath of loyalty to the criminal organization or gang, many members will not testify against their comrades until they have been separated from the organization for a substantial period of time or are facing life imprisonment. Even then, a substantial number of gang members will not cooperate.

In short, it takes time for a criminal's loyalty to their organization to "wear off," and sometimes it never does. However, as with any corporate body, internal divisions and internecine rivalries erupt, and these can be exploited to encourage members to disregard their oath of allegiance.

In seeking cooperation, prosecutors should be patient, although sometimes that is not possible. Prosecutors also should not be shy about reminding defendants about the harm their criminal organization inflicted on innocent victims. Even some hardened gang members have a sliver of a conscience, and some can be motivated by pity for the victims.

Self-centeredness and an instinct for self-preservation remains the norm, however. Therefore, reminding organized criminals of the mandatory minimum terms of imprisonment they are facing is often the most effective means of gaining cooperation.

Prosecutors should be aware that many members of criminal organizations will be difficult to "flip," but it is not impossible to do so. Keep in mind that most cooperators likely will ask for protection for themselves and their families because they have violated the code of silence. Prosecutors should consult early with Office of Enforcement Operations (OEO) about the Department of Justice (DOJ) Witness Security Program, as sometimes witness protection is not a viable option for gang members, especially those who are unlawfully present in the United States.

C. Initial Consent Does Not Preclude Subsequent Coercion

As noted above, some sex trafficking victims initially "consent" to being prostituted, whether out of misplaced loyalty to an organization or a desire to be part of the family structure. In time, however, most victims will desire to stop being prostituted.

When this occurs, gangs usually increase their use of fraud, threats, and coercion to keep victims submitting to commercial sex acts. When victims are minors, a sex trafficking crime may be complete if a defendant conspires to, attempts to, or causes an underage individual to engage in commercial sex acts, regardless of whether the victims initially consented. With respect to adult victims, however, keep in

[14] *See* United States v. Pugliese, 860 F.2d 25, 28 (2d Cir. 1988) (noting a "criminal group's attitude toward 'rats' or government informants and its willingness to use violence to prevent individuals from testifying").

mind that their initial consent does not preclude a prosecution for subsequent periods when they were coerced into commercial sex acts.[15]

D. Remuneration for Victims

Like other sex traffickers, criminal organizations that engage in trafficking sometimes allow victims to keep a portion of the sex trafficking proceeds, sometimes up to 50percent.[16] Rather than generosity, this is simply a matter of sound economics for these syndicates. Although this practice slightly diminishes the organization's profits, it gives victims a false sense of freedom and dignity.

It also may lead victims to believe that they are full partners in the endeavor. Thus, a few dollars goes a long way toward placating victims, which increases the duration that an organization can exploit a victim. It also allows the organization to point to these payments as "evidence" that they never coerced the victims. Furthermore, well-run ventures can recoup some of these lost profits by selling narcotics to the victims at inflated prices, which victims then have to purchase with their "share" of the sex trafficking proceeds.

Do not be fooled, however, by the fact that victims were permitted to retain some of the proceeds. Beneath the surface, the relationship is still a coercive one, and once freed of the organization's tentacles, victims often concede that they felt compelled to stay and be prostituted. Once victims have an opportunity to explain the coercive nature of the relationships, juries can see that allowing the victims to retain some of the money did not negate the compulsion, but rather was a key part of the coercion.

The United States Code includes multiple options for charging gang and enterprise-based trafficking crimes. The sex trafficking statute itself criminalizes benefitting from knowing "participation in a venture" that engages in sex trafficking, 18 U.S.C. §1591,[17] and the trafficking statutes include a trafficking-specific conspiracy with a higher statutory maximum than the general conspiracy statute.[18] These multiple charging options are discussed below.

E. Utilize Evidence from Jail Calls, Visits, and Mail

Recordings of a defendant's telephone calls (to the extent possible), recordings of in-person visits, and mail (while the defendant is incarcerated), frequently yield valuable evidence. This is particularly true in organized crime and gang cases.

Because the criminal organizations often will seek to convey orders and admonitions to its incarcerated members, jail communications can provide significant evidence to be used at trial. Efforts to intimidate witnesses may also be conveyed through intermediaries, from incarcerated gang members to victims and witnesses on the outside. The vigilant monitoring of this activity should continue from initial arrest through trial.

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[15] *See* United States v. Valenzuela, 495 F. App'x 817, 820 (9th Cir. 2012) ("Even if some of the victims consented initially, Appellants violated § 1591 by continuing to harbor and maintain them once Appellants realized that force, fraud, or coercion (or threats thereof) would have to be used to cause the girls to engage in a commercial sex act."); United States v. Mack, No. 1:13-CR-278, 2014 WL 356502, at *5 (N.D. Ohio Jan. 31, 2014) ("The fact that the victims may have initially agreed to engage in commercial sex acts does not preclude a subsequent charge of sex trafficking based on later non-consensual acts.").

[16] *See* United States v. Jackson, 865 F.3d 946 (7th Cir. 2017) (noting that the fifteen-year-old victim and the trafficker "split the proceeds evenly between them").

[17] 18 U.S.C. § 1591 (2015).

[18] 18 U.S.C. § 1594 (2015).

F. Fully Debriefing Organized Crime Defendants

Although the internal rules of many criminal organizations prohibit members from "snitching," pragmatic defendants have been known to break this rule to reduce their exposure to lengthy sentences.

Often, however, organized criminals who may be interested in cooperating are unaware that prosecutors are interested in investigating sex trafficking crimes, and when debriefed in gang-related investigations, may initially focus on providing information about firearms, narcotics, carjackings, and acts of violence.

If asked, however, they may provide extensive information on the organization's prostitution and sex trafficking activities. Human trafficking agents and prosecutors should collaborate with organized crime and violent crime agents and prosecutors to include prostitution- and trafficking-related inquiries in debriefs of gang members. Unless agents and prosecutors specifically ask for such information, however, many cooperating defendants will not know the importance of this information and will fail to volunteer it. Fully debriefing of organized crime defendants, therefore, is a great way to corroborate other evidence in your case, or to uncover new sex trafficking cases.

IV. Charging and Prosecuting Organized Trafficking Cases

A. Be Vigilant for Obstruction of Justice

Members of criminal organizations often display disdain for law enforcement and the criminal justice process, and utilize violence to achieve their objectives. When confronted with investigation and prosecution, therefore, their first response is often to threaten victims, witnesses, and their families.

At trial, prosecutors must be especially vigilant for witness tampering. Organized criminals have been known to accost witnesses in the hallways of courthouses or on their way to their cars. Consequently, prosecutors should work with case agents to arrange secure transportation for witnesses to and from the courthouse and courtroom. Prosecutors are also well advised to let the Marshals Service know that an organized crime case is going to trial so that they can increase the presence of deputy marshals.

When obstruction occurs, remember that the sex trafficking statute has its own obstruction provision: section 1591(d).[19] That provision states: "Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be fined under this title, imprisoned for a term not to exceed 20 years, or both."[20]

Section 1591(d) is an excellent tool to use when organization members seek to intimidate victims or witnesses. Under this provision, a trafficker's associates who engage in obstruction become criminally liable under the trafficking statute, even if they were not involved in the trafficking itself.

Keep in mind that § 1591(d) can be used any time there is an investigation of alleged trafficking, even if you cannot ultimately prove trafficking. For example, you may be investigating a prostitution operation, but are ultimately unable to establish the requisite force, fraud, or coercion to charge a violation of § 1591(a). If a gang member obstructs such an investigation, he can be charged with violating § 1591(d) because your investigation was predicated on § 1591(a), even if you are unable to establish all of the elements of the sex trafficking offense.[21]

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[19] 18 U.S.C. § 1591(d) (2015).
[20] *Id.*
[21] *Id.*

Another advantage to using § 1591(d) is that the mens rea element is merely "knowingly," as opposed to "corruptly."[22] Thus, it may be easier to establish a violation of § 1591(d) than a violation of § 1512, because § 1512(a)—which prohibits tampering with victims, witnesses, and informants—has a more stringent *mens rea* standard. However, due to its higher applicable statutory maximum of thirty years of imprisonment,[23] prosecutors may want to charge a violation of § 1512(a) when the obstructive conduct warrants a sentence above the twenty-year maximum penalty under § 1591(d).[24]

B. Look for a Child Exploitation Enterprise

Many sex trafficking enterprises exploit both adults and minor victims. Organizations that engage in the trafficking of minor victims may qualify as "child exploitation enterprises" (CEE) under federal law.[25] Prosecutors, therefore, should consider charging these ventures with operating a CEE. The CEE statute imposes a mandatory minimum sentence of 20 years of imprisonment and a maximum of life imprisonment, even higher than the 10-year and 15-year mandatory minimum penalties applicable to sex trafficking of minors and sex trafficking by force, fraud, or coercion or of victims under age 14, respectively.[26]

To establish the CEE offense, the prosecution has to establish only that the defendant committed three predicate offenses (such as three instances of sex trafficking of a child) with more than one victim, in concert with three or more people.[27]Most organizations that engage in sex trafficking of minors easily will meet this threshold, thereby making this charge a highly effective option in many instances.

C. Establishing a Conspiracy/Child Exploitation Enterprise through Evidence of Affiliation with the Criminal Organization

Showing that defendants are members of a criminal organization goes a long way toward implicating them in a child exploitation enterprise, a Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO) enterprise,[28] or a sex trafficking venture. Because common membership in a criminal organization shows that co-conspirators already have affinity and loyalty, their ties to the organization are highly relevant to establishing that their relationship is also a criminal one.

"Evidence of gang affiliation is relevant where it demonstrates the relationship between people and that relationship is an issue in the case, such as in a conspiracy case."[29] Evidence of affiliation with a criminal organization "is admissible in cases in which it is relevant to demonstrate the existence of a joint venture or conspiracy and a relationship among its members."[30] "Specific and circumscribed evidence of gang association may be necessary . . . to show 'the nature and extent of [the defendants'] association, which in turn bears on whether they conspired.'"[31]

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[22] *See* United States v. Farah, 766 F.3d 599, 614 (6th Cir. 2014).
[23] 18 U.S.C. § 1591(d) (2015); 18 U.S.C. § 1512 (2012).
[24] 18 U.S.C. § 1512 (2012); 18 U.S.C. § 1591(d) (2015).
[25] 18 U.S.C. § 2252A(g) (2012).
[26] 18 U.S.C. § 1591(b) (2015).
[27] United States v. DeFoggi, 839 F.3d 701, 710 (8th Cir. 2016); United States v. Grovo, 826 F.3d 1207, 1215 (9th Cir. 2016); United States v. Barcus, No. 1:13-CR-95 (E.D. Va. Mar. 11, 2013).
[28] 18 U.S.C § 1961 (2016).
[29] United States v. Ford, 761 F.3d 641, 648 (6th Cir. 2014).
[30] United States v. Westbrook, 125 F.3d 996, 1007 (7th Cir. 1997); *see* United States v. Thomas, 86 F.3d 647, 652 (7th Cir. 1996) (affirming district court's ruling allowing gang evidence because that evidence "helped demonstrate the existence of the conspiracy and the connections between members of the conspiracy").
[31] United States v. Johnson, 28 F.3d 1487, 1497 (8th Cir. 1994) (citation omitted); *see* United States v. Brown, 200 F.3d 700, 708 (10th Cir. 1999) (allowing gang-affiliation evidence as evidence of conspiracy).

"[G]ang membership can be key to establishing criminal intent or agreement to conspire."[32] Membership in a criminal organization also may be used to establish motive, especially in cases where sex trafficking members are motivated by a need to pay their organizational dues with the trafficking proceeds.[33] Additionally, evidence of the organization's existence and nature is useful to explain that a victim or witness initially lied to the police because of fear of retaliation by the organization.[34]

D. Consider Using RICO

RICO provides another tool that prosecutors can use to prosecute and dismantle organizations that engage in human trafficking. In enacting RICO, Congress sought to provide prosecutors with tools to combat "organized crime and its economic roots."[35]

Because of its scope, RICO allows prosecutors to present evidence of the full range of an organization's criminal activities, including activities in violation of state law and crimes not personally committed by each defendant. It thus allows juries to see the breadth of the organization's criminal activities. Not surprisingly, "RICO has proven to be a powerful weapon in the government's efforts against organized crime."[36]

The RICO statute includes both a substantive provision and a conspiracy provision. RICO's substantive provision makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."[37]

"The term 'enterprise' is defined as including 'any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.'"[38] Thus, the definition of "enterprise" is broad enough to encompass organized criminal syndicates and gangs, even those that lack a fixed structure.

Through use of RICO, therefore, prosecutors can more effectively hold criminal organizations accountable for their full spectrum of criminal activity, including state crimes such as prostitution.[39]

It "is a well-known phenomena that the higher-ups in criminal enterprises attempt to insulate themselves from detection and exposure by having their unlawful schemes carried out by others."[40] RICO allows for the prosecution of members of an enterprise who profit from sex trafficking without directly

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[32] United States v. Sargent, 98 F.3d 325, 328 (7th Cir. 1996); United States v. Robinson, 978 F.2d 1554, 1564 (10th Cir. 1992) ("[A]ssociational evidence may be directly relevant on the issues of formation, agreement and purpose of a conspiracy.").
[33] United States v. Montgomery, 390 F.3d 1013, 1018 (7th Cir. 2004); United States v. Harrell, 737 F.2d 971, 978 (11th Cir. 1984) (holding that evidence about a criminal association may be admissible to establish the existence, motives, and object of the conspiracy and means through which it was conducted).
[34] United States ex rel. Garcia v. Lane, 698 F.2d 900 (7th Cir. 1983); *see* United States v. Santiago, 46 F.3d 885, 890 (9th Cir. 1995) (recognizing that organization-related testimony relating to the witnesses' fear of retaliation was admissible on the issue of credibility irrespective of whether the defendant was a member).
[35] Russello v. United States, 464 U.S. 16, 26 (1983).
[36] United States v. Marino, 277 F.3d 11, 18 (1st Cir. 2002).
[37] 18 U.S.C. § 1962(c) (2012).
[38] United States v. Turkette, 452 U.S. 576, 580 (1981) (quoting 18 U.S.C. § 1961(4) (2016)).
[39] *See* 18 U.S.C. § 1961(1) (2016) (defining "racketeering activity" to include section 18 U.S.C. § 1952(b) (2014), which includes "prostitution offenses in violation of the laws of the State in which they are committed," and sections 18 U.S.C. §§ 2421–2423 (2015), which each proscribe interstate travel, enticement or coercion to engage in the commission of illegal sex acts, which include state law crimes).
[40] United States v. Bernal-Obeso, 989 F.2d 331, 335 (9th Cir. 1993).

participating in the trafficking. Indeed, one of the purposes of RICO was to reach those who ultimately profit from racketeering but who are sufficiently savvy to keep their distance from overt criminal activity.

Through a RICO prosecution, "evidence of numerous criminal acts by a variety of persons" may be relevant to prove the enterprise and pattern elements of racketeering.[41]

Thus, even though a defendant "may reasonably claim no direct participation" in the acts of others, evidence of those acts may be relevant to prove (1) the "existence and nature" of the racketeering enterprise, and (2) a pattern of racketeering activity by the defendant "by providing the requisite relationship and continuity of illegal activities."[42]

In determining whether to pursue a RICO case, prosecutors should consider whether RICO's expanded concepts of venue, relevance and admissibility of additional enterprise-related evidence, and extended multi-jurisdictional and extraterritorial reach will strengthen their case.

For example, in *United States v. Rendon-Reyes*, which involved an eight-defendant conspiracy to engage in transnational sex trafficking of multiple Mexican women and girls, charging the defendants with operating a RICO enterprise enabled the prosecution to include multiple substantive predicate acts of sex trafficking involving numerous victims that were committed by varying members of the same organization in multiple venues, and to charge additional predicate acts involving related violations of money laundering, immigration, and prostitution-related statutes.[43]

In addition, RICO may permit the inclusion of acts of importation for prostitution, trafficking, or other related crimes that would be otherwise barred by an applicable statute of limitations, as long as the acts are sufficiently related to other violations so as to constitute a "pattern" within the meaning of § 1961(5).[44]

In numerous cases, RICO charges have afforded prosecutors a valuable mechanism for charging ongoing criminal conduct involving violations of the Trafficking Victims Protection Act,[45] as well as various other statutes.[46] Due to its power and reach, RICO is an important tool to utilize as appropriate in a range of organized crime or gang-based trafficking cases.

E. Use the Venture Provision in 18 U.S.C. § 1591(a)(2)

Remember that § 1591 itself contains a powerful tool to reach gangs and organizations that pursue sex trafficking. Section 1591(a)(2) covers members of "ventures" who benefit financially or receive anything of value from their knowing participation in a sex trafficking venture. "Ventures" are "any group of two or more individuals associated in fact, whether or not a legal entity."[47]

Section 1591(a)(2) allows prosecutors to pursue even those members of organizations and gangs who do not personally participate directly in coercing or exploiting the victim for commercial sex, but

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[41] United States v. DiNome, 954 F.2d 839, 843 (2d Cir. 1992).
[42] *Id.* at 843.
[43] *See* United States v. Rendon-Reyes, Cr. No. 15-348 (E.D.N.Y. Dec. 16, 2015), ECF No.16 (superseding indictment).
[44] 18 U.S.C. § 1961(5) (2016) (defining a RICO "pattern" as requiring at least two acts of racketeering activity, "the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity").
[45] 18 U.S.C. § 1591 (2012).
[46] *See, e.g.,* United States v. Rivera, No. 13-CR-149(KAM), 2015 WL 7455504 (E.D.N.Y. Nov. 23, 2015) (denying defendant's Rule 29 motion after conviction of RICO, sex trafficking and various other offenses in a gang-controlled sex trafficking case); *see also* United States v. Pipkins, 378 F.3d 1281 (11th Cir. 2004) (RICO case charging numerous pimps).
[47] 18 U.S.C. § 1591(e)(5) (2012).

who derive a monetary benefit from knowingly participating in some aspect of the venture, with the requisite *mens rea* regarding the venture's use of coercion or exploitation of minors.[48]

The statute may also be utilized to reach the conduct of members of criminal organizations who are granted access to victims for sexual "favors."[49] Notably, these members may also face the ten-year and fifteen-year mandatory minimum sentences that direct participants face, provided that the requisite *mens rea* can be established.

F. Juvenile Defendants

Many gang members initially join a gang between the ages of 11 and 15 and become involved in gang-related criminal activity before age 18. Federal law "provides for the adult prosecution of a juvenile when the government shows that such treatment is in the 'interest of justice,'" as defined by six statutory factors set forth in § 5032.[50]

But prosecuting juvenile gang members federally entails procedural challenges that could unnecessarily delay the prosecution of adult co-defendants.[51] Indeed, prosecutors should carefully consider whether it is worthwhile to pursue federal prosecution of juvenile traffickers, especially when this will substantially delay the prosecution of adult co-defendants or result in multiple trials.

Youthful gang members, however, frequently perform a number of tasks for their gang's sex trafficking operations, including recruiting young victims (whom they might know from school or their neighborhoods) and posing as the boyfriends of victims to deflect suspicion.

Because these youths often are an integral part of the gang's sex trafficking operation, they possess extraordinary knowledge about the trafficking and are well positioned to cooperate and testify against adult defendants. They would have little incentive to cooperate, however, absent a risk of criminal prosecution. To secure their cooperation, it is important to work with local juvenile prosecutors whose ability to prosecute these offenders may encourage them to cooperate against their fellow gang members despite the gangs' "no snitching" policies.

G. Protect Victims Using Protective Orders and Federal Rule Evidence 412

In order to protect victim-witnesses from undue embarrassment, prosecutors should consider seeking a protective order that allows them to testify by first name, nickname, or some other identifier, such as their initials.

In the case of minor victims, 18 U.S.C. § 3509 provides for specific procedures that should be followed to ensure that the victims' names do not become publicly known, as well as options for the presentation of minor witness testimony, including closed circuit television and video-taped depositions, as well as the sealing of all documents that disclose victims' names and the courtroom during testimony.[52] For adult victims, you should consider filing a similar motion to protect victim identity information.

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[48] See United States v. Afyare, 632 F. App'x 272, 283–84 (6th Cir. 2016) (discussing the elements of the offense); United States v. Flanders, 752 F.3d 1317, 1331 (11th Cir. 2014) (same).
[49] *See* United States v. Cook, 782 F.3d 983, 988 (8th Cir. 2015) (holding that sex acts are things of value for purposes of section 1591).
[50] 18 U.S.C. § 5032 (2012); United States v. Nelson, 90 F.3d 636, 640 (2d Cir. 1996).
[51] *See* Juvenile Justice and Delinquency Prevention Act 1974, 18 U.S.C. §§ 5031–5042 (2012).
[52] 18 U.S.C. § 3509(d)(3) (2012) (providing for the entry of protective orders); 18 U.S.C. § 3509(e) (2012) (permitting the court to close the courtroom).

In addition, depending upon the facts, there may be grounds to limit embarrassing cross-examination of witnesses regarding their prior sexual histories under Federal Rule of Evidence 412.[53] Often, sex traffickers' trial defenses are based, in part, on the idea that they did not coerce a victim into prostitution because of the victim's prior history of engaging in prostitution. As many courts have observed, however, the fact that a victim previously was prostituted by someone other than the defendant is not relevant to the defendant's guilt.[54]

H. Cooperators with Egregious Criminal History

Prosecutors are sometimes discouraged from using members of criminal organizations as cooperators in their prosecutions, frequently because many members have participated in violent crimes, such as brutal assaults, rapes, or even murders. As experienced organized crime prosecutors know, juries do not disbelieve violent members simply because they were violent. Indeed, sometimes hearing from an insider the unvarnished truth about the violence of an organization may significantly benefit the prosecution's case.

Although prosecutors must make a witness-by-witness assessment, sometimes a cooperator's forthright testimony acknowledging his responsibility for participating in violent criminal acts conveys a compelling sense of credibility. This frequently causes juries to credit the cooperator's first-hand account of the criminal activity.

The fact that witnesses have substantial "baggage," therefore, should not necessarily preclude calling them as witnesses in gang-based or enterprise-based sex trafficking prosecutions when their demeanor and acceptance of responsibility are indicative of credibility. In such circumstances, juries have demonstrated an ability to comprehend that only fellow criminals will have inside knowledge of such conduct, and juries have demonstrated an ability to credit such testimony, particularly when it is corroborative of victim testimony and other evidence.

I. Remember the Co-Conspirator Exception to the Hearsay Rule

The co-conspirator exception to the hearsay rule can be extremely powerful in organized crime trafficking cases. For example, victims often will overhear statements that co-conspirators make to each other; such statements are admissible if made in furtherance of the conspiracy, even if the conspiracy is not charged, or even if the cooperator did not personally participate in the sex trafficking activity.[55]

This rule allows prosecutors to admit a broad range of statements that are highly probative of the operations of the trafficking venture and other associated criminal activity because a wide variety of statements have been recognized as statements in furtherance of conspiracies.[56]

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[53] *See* FED. R. EVID. 412 (prohibiting the introduction of evidence "offered to prove that a victim engaged in other sexual behavior" in cases involving alleged sexual misconduct).

[54] *See*, *e.g.*, United States v. Roy, 781 F.3d 416, 420 (8th Cir. 2015) (holding that the exclusion of victim's sexual history did not violate defendant's constitutional rights, because "[t]he victim's participation in prostitution either before or after the time period in the indictment has no relevance to whether [the defendant] beat her, threatened her, and took the money she made from prostitution in order to cause her to engage in commercial sex"); United States v. Rivera, No. 13-CR-149(KAM), 2015 WL 1886967 (E.D.N.Y. Apr. 24, 2015) (collecting cases).

[55] *See* FED. R. EVID. 801(d)(2)(E).

[56] *See* United States v. Tracy, 12 F.3d 1186, 1196 (2d Cir. 1993) (noting that statements "in furtherance" of conspiracy include those "designed to promote or facilitate achievement of the goals of the ongoing conspiracy" by "seeking to induce a coconspirator's assistance . . . informing coconspirators as to the progress or status of the conspiracy . . . or . . . prompting the listener—who need not be a coconspirator—to respond in a way that promotes or facilitates the carrying out of a criminal activity").

"One of the objectives that members of a criminal organization share as co-conspirators is the transmission of information regarding the organization's membership."[57] Accordingly, witnesses can relate co-conspirators' statements about the organization's hierarchy, including "silent partners" who remain above the fray.

Furthermore, co-conspirator statements are admissible against other members of the conspiracy, even if the defendant was otherwise unaware of them. "As long as it is shown that a party, having joined a conspiracy, is aware of the conspiracy's features and general aims, statements pertaining to the details of plans to further the conspiracy can be admitted against the party even if the party does not have specific knowledge of the acts spoken of."[58]

In sex trafficking cases, such statements could include: (1) statements recounting the violence used on victims; (2) boasts about how much money has been generated by a particular victim or the enterprise in general; (3) statements about the locations where the organization earned substantial profits; (4) discussions overheard between a conspirator and a victim regarding the plans for, or need to, go to "work," and whether the victim is earning enough money; or (5) statements about trafficking other victims in the past.[59]

J. Tattoo Removal for Victims and Cooperators

Many sex traffickers, both individual and enterprise-based, tattoo their victims, and some criminal organizations are notorious for painting their signs or names on victims' bodies. Having a trafficker's name or sign etched upon their bodies is particularly degrading to victims and communicates to victims that they are property of the gangs. Other times victims will request to be tattooed if that ritual is part of a gang initiation. Some victims derive a sense of belonging from these tattoos or hope to gain favor from the traffickers through this display of loyalty.

Those who have escaped the clutches of gangs, however, often will want these painful reminders erased, especially those victims who are attempting to put their lives back together.

As part of our victim-centered approach to prosecuting these cases, law enforcement victim-witness coordinators can assist trafficking victims in contacting non-governmental organizations that remove trafficking victims' tattoos for free. When victims seek to do so before trial, photographs of the tattoos can serve as significant evidence to show the gang's control of victims, so ensure that photographs are taken such that the evidentiary value of any tattoos is retained while the victim gains independence by severing this symbolic tie to the trafficker.

V. Conclusion

Criminal associations are responsible for a significant portion of the violent crime that occurs in the United States. Increasingly, that includes sex trafficking. Investigating and prosecuting human trafficking perpetrated by criminal organizations involves unique issues and challenges, regardless of whether the perpetrators conspire through loosely affiliated family-based networks or highly structured and sophisticated criminal enterprises.

Criminal organizations and violent gangs are adept at intimidating and controlling victims through their well-known reputations for violence and their broad reach through extensive associations.

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[57] United States v. Russo, 302 F.3d 37, 47 (2d Cir. 2002).
[58] United States v. Angiulo, 847 F.2d 956, 969 (1st Cir. 1988).
[59] *See* United States v. Haldeman, 559 F.2d 31, 110–11 (D.C. Cir. 1976) (holding that narrations of past events were in furtherance of conspiracy when co-conspirators were required to make "regular strategic decisions on how best to proceed").

"Gangs fill the daily lives of many of our poorest and most vulnerable citizens with a terror . . . often relegating them to the status of prisoners in their own homes."[60] Many sex trafficking victims also have become prisoners of these gangs and criminal organizations. Federal investigation and prosecution of these organizations are sometimes the only hope for setting these victims free. Federal law provides prosecutors and investigators with effective tools for combatting criminal associations that generate revenue by sex trafficking.

Despite the challenges these cases entail, numerous federal prosecutions have successfully convicted defendants of human trafficking and related crimes perpetrated through criminal enterprises. They did so by utilizing the threat detection, victim stabilization, investigation, and prosecution strategies discussed in this article.

Federal prosecutors are encouraged to continue pursuing these cases to disrupt, dismantle, and deter these criminal organizations and seek justice on behalf of vulnerable victims of human trafficking. For an in-depth discussion of organized and gang-controlled sex trafficking and the mechanism used by sex traffickers generally, please see the article written by two of the authors, *Gang Controlled Sex-Trafficking.*[61]

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[60] City of Chicago v. Morales, 527 U.S. 41, 99 (1999) (Thomas, J., dissenting).
[61] Michael J. Frank & G. Zachary Terwilliger, *Gang-Controlled Sex Trafficking,* 3 VA. J. CRIM. L. 342 (2015).

Criminal Conduct of Victims: Policy Considerations

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I. Introduction

One of the recurring challenges for investigators and prosecutors in human trafficking cases arises when encountering trafficking victims who have also committed criminal acts. As federal agents and prosecutors already know, the arrest and prosecution of trafficking victims is of great concern to survivors, anti-trafficking organizations, and law enforcement alike. Fear of arrest and prosecution can compound victims' distrust of authorities and impede their willingness to cooperate with law enforcement in bringing traffickers to justice.

While authorities are committed to protecting victims and aim to avoid prosecuting them for violations committed as a direct result of their victimization, it can be difficult to implement this approach. United States law states that victims of human trafficking should not be "inappropriately" penalized for acts committed "as a direct result of being trafficked," but does not offer further guidance.[1] When exactly, then, is penalization appropriate? Is some criminal conduct so severe that it cannot be excused? And what does the term "direct" mean? How close must the cause-and-effect between victimization and the victim's criminal conduct be to meet this standard? This article seeks to provide an analytical framework for prosecutors who are confronted with these questions. The article discusses challenges in balancing the need to hold perpetrators accountable with the need to protect victims from inappropriate arrest and prosecution for their own criminal conduct. The article examines the exercise of prosecutorial discretion in these complicated circumstances and surveys a range of policy proposals addressing the issue, but does not purport to endorse any of those proposals or otherwise offer definitive recommendations.

This article first describes types of cases in which trafficking victims are implicated in criminal conduct. Section III discusses some complexities of this issue, including the effect of trauma symptoms, ambiguities in establishing evidence of intent, and implications where the individual is expected to cooperate with law enforcement. Section IV surveys a range of policy approaches under federal, state, and international law. The article concludes with a framework for analyzing these issues when presented with charging decisions.

[1] 22 U.S.C. § 7101(b)(19) (2012) (emphasis added).

II. When Human Trafficking Victims Engage in Criminal Conduct

Victims of human trafficking may, themselves, violate state or federal laws through actions that relate in some way to their own victimization. Most sex trafficking victims will, for example, have engaged in prostitution-related offenses. Because traffickers control many sex trafficking victims via a narcotics dependency, many victims suffering from addiction will also have committed drug-related crimes. Sex trafficking victims may also engage in more serious offenses intertwined with their own victimization, including recruitment of other victims into a trafficking enterprise. Labor trafficking victims are likewise often implicated in either immigration or visa fraud violations related to their victimization. Prosecutors should carefully consider the circumstances underlying any crime committed by a trafficking victim prior to bringing charges against such victim in order to ensure that the victim is not "inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked …."[2]

This consideration, of course, assumes that investigators and prosecutors are aware that the individual they are evaluating has been victimized, which requires an initial screening of all potential subjects for indicators of victimization. This screening can be extremely difficult because trafficking victims do not usually self-identify as such due to the effect of complex trauma, explained in more detail in Section III, fear or distrust of law enforcement, lack of information about their rights, and (perceived or actual) ongoing threats from their traffickers.

When evaluating crimes committed by any trafficking victim, it may be helpful for prosecutors to initially divide those crimes into three categories: offenses wholly unrelated to the underlying trafficking offenses (i.e., which were not committed "as a direct result of being trafficked"); relatively minor or non-violent offenses—such as prostitution or working without documentation—that are directly caused by or otherwise inseparable from the trafficking offense and for which penalizing the victim would be "inappropriate"; and violent crimes or other significant offenses victimizing third parties that were directly caused by or otherwise inseparable from the trafficking offense.

Section 7101's non-prosecution policy would not apply to a victim who engaged in the first category of offenses, as those crimes were not caused—either directly or indirectly—by victimization. An example might be a sex trafficking victim having committed credit card fraud against a customer that was in no way directed by, or for the benefit of, her trafficker.[3] Prosecutors should, however, carefully consider whether an offense that may seem facially unrelated to human trafficking may have been coerced or directed by a trafficker in ways that are not immediately apparent.

In the second category, victims should rarely, if ever, be charged with non-violent, victimless offenses that are entirely a product of the trafficking, such as prostitution offenses committed at the trafficker's direction. Prosecuting such offenses serves no deterrent purpose and only amplifies the severe harm suffered from the initial victimization. This type of prosecution will only further alienate the victim, increasing her risk of re-victimization.[4] Similarly, it would not serve the interest of justice to prosecute a labor trafficking victim for an immigration-related offense that the trafficker facilitated in furtherance of the coerced labor scheme.

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[2] 22 U.S.C. § 7101(b)(19) (2012).

[3] Individuals of all genders may perpetrate or be victims of all forms of human trafficking. In some cases throughout this article, more limited gender pronouns are used simply to aid readability.

[4] *See generally* SUZANNAH PHILLIPS, ET AL., CLEARING THE SLATE: SEEKING EFFECTIVE REMEDIED FOR CRIMINALIZED TRAFFICKING VICTIMS, CITY UNIV. OF N.Y. SCHOOL OF LAW WOMEN'S HUMAN RIGHTS CLINIC (2014); *see generally* *Nat'l Survivor Network Members Survey: Impact of Criminal Arrest & Detention on Survivors of Human Trafficking*, NATIONAL SURVIVOR NETWORK (2016).

The third type of offenses involve harms inflicted on others through conduct that is related to the underlying victimization. These are especially challenging to evaluate because protection of the victim potentially conflicts with protection of third parties harmed by the victim's conduct. We will focus our attention on this third category of offenses, which require a nuanced, fact-specific analysis. Two typical examples are provided for less experienced readers here to offer context for the subsequent discussion. The facts of each case are composite and are not drawn from one specific case.

Consider the hypothetical case of Victor, a twenty-eight-year-old Guatemalan national who speaks no English and never completed primary school. He borrowed $2,000 from a recruiter, Carlos, for assistance to obtain a guest worker visa to work for a beef slaughtering company in the United States. Once Victor arrived, Carlos' associate, Ramon, assumed control over Victor, housing him in an overcrowded, substandard room in an isolated area, confiscating most of his pay, and inflating his debt with exorbitant charges for meager food, lodging, and rides to work each day. Despite being paid far less than promised and required to work seven days a week, Victor managed to send home about $150 per month, which prevented his family, who live in a poor rural village, from going hungry. The remainder of Victor's wages went to Carlos and Ramon.

When Victor's visa expired, he wanted to return home, but Ramon told Victor that he was still in debt and was required to continue working it off. Ramon threatened to report Victor's now-undocumented status to authorities unless he kept working, and threatened him with possible arrest and deportation, leaving his family without support. Ramon also said that, to work off the debt more quickly, Victor should help Ramon distribute heroin. Victor feared that Ramon would have him arrested for being undocumented, leaving his family destitute, if he did not comply. Victor reluctantly began selling heroin, including to teenagers, and Ramon allowed him to keep a very small percentage of the proceeds to supplement his earnings at the slaughterhouse. After several weeks, Victor was apprehended in a drug sting in possession of a significant quantity of heroin, bundled for distribution. Prosecutors had to decide whether to prosecute Victor for this serious federal narcotics distribution crime. Although Victor was under some degree of coercion, he also knew that heroin was extremely harmful to the drug-addicted minors who purchased it from him. Couldn't Victor have made a better choice?

Let's also examine a common hypothetical case example in the sex trafficking context. James is a pimp who recruited Sandy, age twenty-three, to engage in commercial sex. At first, he romanced her and claimed that they would share the profits, working hard together for a short time and then living off the proceeds in style. After plying Sandy with alcohol, James convinced her to have sex with a friend of his in exchange for money. Sandy, eager to please James, met about ten customers for commercial sex over the next few weeks, but then encountered men who were physically abusive toward her.

After three weeks, Sandy was exhausted and emotionally scarred, and she told James that she wanted to stop engaging in commercial sex. James began to threaten her with violence unless she continued, while also telling her it was all for her own good and for their future together. On at least two occasions, he beat Sandy badly enough to leave bruises when she tried to get out of particular "dates." She started to feel numb and depressed, but deep down she was holding on to the fantasy of the future life promised by James. She was arrested once and sensed that the male and female officers treated her with disdain for engaging in prostitution. Despite her terrible situation, Sandy did not consider confiding in those officers, because admitting that she had engaged in commercial sex for weeks would have placed her in further legal jeopardy. And besides, she was reluctant to call law enforcement attention to James; while he sometimes beat her, Sandy knew that he loved her, she had nobody else to turn to, and if James learned that she betrayed him, the abuse would only grow more severe. James posted Sandy's bail and then told her to recruit other girls to engage in commercial sex for him, or he would increase her "quota" and make her serve twice as many "dates" each day to pay all their bills. Sandy knew that James would beat her if she did not accede to his demands, and she hoped that he would treat her more like a true girlfriend if other girls supplemented their income.

Sandy recruited Trish, age sixteen, who recently ran away from home, by promising Trish a place to live, a chance to party, and a way to make good money by modeling for pictures. Sandy photographed Trish in provocative poses and used those photos to advertise Trish for sex. Sandy drove Trish to meet customers, including a customer who violently beat Trish for refusing to perform certain sex acts. Trish, having nowhere else to go, continued engaging in commercial sex and also obtained a fake ID at Sandy's direction. Because Trish's relatively minor criminal offenses are entirely a product of her victimization, they should not be charged by either state or federal prosecutors. Sandy's offenses, on the other hand, appear to fall within the third, most challenging category of offenses, requiring a more careful analysis, which is discussed in Section V below.

III. The Role of Trauma, Intent, and Causation

This section examines the effects of human trafficking on its victims' conduct—both their conduct while still in the trafficking situation, and their potential responses when encountering law enforcement. As we will see, both are relevant to how law enforcement perceive potential victims' criminal culpability.

Victims of human trafficking often blame themselves rather than their traffickers for abuse they have suffered, and they may even defend the trafficker's behavior and resist testifying against the trafficker.[5] The victims may display belligerence, coldness, evasiveness, or nonchalance. When victims act that way, even experienced law enforcement officials may be more likely to think of the victims as criminals or as being disrespectful of law enforcement. In truth, the victims may display those attitudes as a result of psychological and neurobiological processes. Therefore, in the interests of effective crime detection and punishment, prosecutors and agents should be trained to recognize this behavior, guard against preconceived responses to it, and be aware of various alternative "meanings" of this behavior. These behaviors may be the result of fear or trauma and, in some cases, of the victim's "traumatic bonding" or "trauma-coerced attachment" to the trafficker.

To start with, it will be helpful to understand alternative interpretations of untrustworthiness, which is one of the primary characteristics that prevents law enforcement from recognizing human trafficking victims. For example, victims may provide statements that are incoherent, internally inconsistent, or evolving over time. As a result, those victims may be viewed as deceptive, dishonest, or unreliable by those who are unaware of the effects of trauma on the brain. A traumatic incident, such as a sexual assault, releases a deluge of hormones in the body while it is being experienced. These hormones play some positive roles in reducing physical and psychological pain experienced in the moment, and activating the body for a fight, flight, or freeze response—all of which are possible responses in different situations, supporting the most fundamental need to preserve the physical body in the face of an attack that the brain may perceive as threatening to life. Unfortunately, these hormones wreak havoc on the brain structures and alter the way information is normally processed and stored.[6] While accurate information about the experience is present in the brain, it is not stored where it is supposed to be stored, and it is difficult for victims to retrieve later in an organized way, especially when they are under renewed stress. These effects may be particularly acute among sufferers of Post-Traumatic Stress Disorder, which is not uncommon among trafficking victims.[7]

Therefore, a victim's first encounter with law enforcement is critical. A trauma-informed interviewer will build rapport and give the potential victim time to think and explain, whereas an

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[5] *See* HEATHER J. CLAWSON ET AL, TREATING THE HIDDEN WOUNDS: TRAUMA TREATMENT & MENTAL HEALTH RECOVERY FOR VICTIMS OF HUMAN TRAFFICKING, ISSUE BRIEF, U.S. DEP'T. OF HEALTH & HUMAN SERVICES, OFFICE OF THE ASSISTANT SEC'Y. OF PLANNING & EVALUATION (2008).

[6] *See* Rebecca Campbell, Transcript "The Neurobiology of Sexual Assault," NIJ.GOV (Dec. 3, 2012).

[7] *See, e.g.*, Dr Siân Oram et al, *Characteristics of trafficked adults and children with severe mental illness: a historical cohort study*, THE LANCET PSYCHIATRY (2015).

untrained interviewer, who approaches the victim like a potential criminal subject, will likely provoke fear, distrust, and anxiety over an implicit or explicit threat of prosecution. Handled improperly, the interaction could be another traumatic incident that prevents the victim from explaining past victimization in a coherent manner and could cause the victim to view law enforcement as a threat to his or her safety or well-being. While all potential victims may not actually have been truly victimized, approaching potential victims with a trauma-informed approach may be critical to the long-term success of the case, including unraveling all pertinent facts and the full scope of the relationship between perpetrators and victims. The most sympathetic questioner must also keep in mind that the victim's fear may also be provoked by legitimate threats of trafficker retaliation against the victim or the victim's loved ones.

So, if effective criminal detection is compromised by the relatively simple problem of misinterpreting victims' incoherent or resistant statements, what about situations where victims not only lie, but also have actually engaged in offense conduct? How is a law enforcement officer or a prosecutor to interpret that behavior, and how are they to exercise their discretion in the interest of justice?

There is a growing body of research about the effects of trauma that is sustained over time, such as in human trafficking,[8] domestic violence, intimate partner violence, and the use of children by armed groups. Over time, these victims lose not only a sense of control over their "self," but also lose a sense of "self" altogether. The abuser's logic becomes their logic. The abuser's decisions and directions take over, and they lose capacity for independent decision-making. Their perception of reality is altered. They may believe that the abuser treats them well even in the face of facts clearly demonstrating that the abuser has regularly threatened them with physical and other harm and invaded their bodily integrity. Scientists do not yet fully understand how this process, known as traumatic bonding or trauma-coerced attachment, plays out inside the brain. However, its presence has been regularly observed as a normal human response to sustained abuse and control over time.

When deciding when to prosecute trafficking victims for crimes induced by their perpetrators, the potential impact of traumatic bonding is relevant to criminal intent. Prosecutors must consider whether it is in the interest of justice to prosecute a person for conduct that was a normal human response to abusive control over time, rather than an independently developed desire or intent to do harm. Regardless of whether we decide to prosecute, we must understand that the victim will not necessarily change her view of the abuser overnight, nor immediately ally herself with law enforcement. It may take months or years, if it happens at all.

IV. Policy Framework

Federal statutes do not resolve the "victim-perpetrator dilemma," but recognize the principle that victims should not be inappropriately prosecuted for conduct that would otherwise be criminally punishable. In the Trafficking Victims Protection Act (TVPA) of 2000, Congress stated that:

> Victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documentation, or working without documentation.[9]

Similarly, the minimum standards by which foreign governments are assessed in a TVPA-mandated annual report reiterate the expectation that governments should "ensure[ ] that victims

[8] See, e.g., Elizabeth K. Hopper, *Polyvictimization and Developmental Trauma Adaptations in Sex Trafficked Youth*, J. OF CHILD & ADOLESCENT TRAUMA (2016).
[9] 22 U.S.C. § 7101(b)(19) (2012).

are not inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts as a direct result of being trafficked."[10]

At the state level, some states prohibit prosecution of certain categories of offenses committed by sex trafficking victims, and other states have created expungement and/or vacatur provisions to provide a mechanism for relieving all trafficking victims from prior convictions. For example, under Washington state law, those convicted of prostitution-related offenses arising out of their human trafficking victimization may seek to have their conviction records vacated. To obtain vacatur, applicants must not have any pending criminal charges against them, any other criminal charges on their records, or any other vacated prostitution convictions.[11] Kansas, by contrast, provides no immunity from prosecution and no vacatur remedy for human trafficking victims generally, but does provide an alternative to criminal prosecution for minor victims of sex trafficking, grounded in a research-based assessment tool.[12]

Prosecutors should also keep in mind that Congress and state legislatures have been keenly focused on the enactment of vacatur and expungement laws for human trafficking victims.[13] When evaluating whether to charge a human trafficking victim, prosecutors should be sure to consider the most current version of any such applicable laws. A list of state vacatur, expungement, and immunity statutes is available at https://www.americanbar.org/groups/domestic_violence/survivor-reentry-project.html (last accessed October 18, 2017)[14]. Federal law enforcement, working with state and local partners on task forces or joint trafficking investigations, should consult applicable state law to understand the extent of, and limitations on, victims' potential criminal exposure.

Intergovernmental institutions and international instruments, under which the United States has legal commitments, contain similar language to United States law. For example, the United Nations Office of the High Commissioner for Human Rights has recommended that: "[t]rafficked persons shall not be detained, charged or prosecuted for … their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons."[15]

V. A Framework for Analyzing Criminal Accountability and Serving the Interest of Justice

In some circumstances, prosecutors must consider potentially charging victims, despite their victimization, if their conduct is sufficiently harmful to others and insufficiently connected to coercion. Prosecutors represent the government and, by extension, society. While the victim-perpetrator may be the member of society that has the biggest stake in a case at hand, law enforcement must balance the interests of this victim against the interests of other victims, of potential future crime victims, and of the community in being safe from harmful conduct. The victim-perpetrator's testimony may be critical to these outcomes and, in some instances, he or she can credibly testify only by accepting some degree of responsibility where there is some criminal intent in his or her own conduct. Ultimately, prosecutors must first determine whether sufficient intent existed to establish criminal liability, and then they must carefully balance the interest of justice in exercising their discretion.

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[10] 22 U.S.C. § 7106(b)(2) (2012).
[11] *See* R.C.W.A. § 9.96.060.
[12] *See* K.S.A. § 38-2287.
[13] *See, e.g.*, S. 104, 115th Cong. (2017); *see, e.g.*, H.R. 459, 115th Cong. (2017).
[14] *See also,* UNIF. ACT ON PREVENTION OF & REMEDIES FOR HUMAN TRAFFICKING § 17 (NAT'L CONFERENCE OF COMM'R ON UNIF. STATE LAWS 2013), http://www.uniformlaws.org/shared/docs/Prevention%20of%20and%20Remedies%20for%20Human%20Trafficking/2013AM_UPRHT_As%20approved.pdf
[15] OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, RECOMMENDED PRINCIPLES AND GUIDELINES ON HUMAN RIGHTS AND HUMAN TRAFFICKING, U.N. DOC. E/2002/68/ADD.1 at 1 (May 20, 2002). For reference to other international instruments on this topic, *see also* U.S. STATE DEP'T, PROTECTING VICTIMS FROM WRONGFUL PROSECUTION AND FURTHER VICTIMIZATION, CIVILIAN SECURITY, DEMOCRACY, & HUMAN RIGHTS (June 2016).

Of course, not all crimes committed by trafficking victims are the result of trauma, force, or coercion. As noted above, immigration-related crimes or violations may precede the onset of coercion and abusive control. Sex trafficking victims may initially consent to engage in commercial sex, in violation of state laws, and may have committed drug-related crimes before the abuse and control began. In such cases, prosecutors must weigh the severity of offenses and consider whether prosecuting victims may inadvertently play into the defendants' hands by reinforcing defendants' prior warnings to victims that law enforcement will never help them or be on their side.

Section II divided victims' offense conduct into three categories. This section focuses on the difficult cases in the third category: violent crimes or other significant offenses victimizing third parties that were directly caused by or otherwise are inseparable from the trafficking offense. Deciding whether the interest of justice favors holding an individual accountable for severe criminal conduct arising from her own victimization requires a nuanced, case-by-case, fact-specific analysis involving consideration of the totality of the trafficking victim's actions, intent and personal circumstances, as well as the impact of her conduct on others. For example, it may be appropriate to charge adult sex trafficking victims who willingly assist the leader of a prostitution enterprise in recruiting other sex trafficking victims, particularly when those additional victims include minors, persons with developmental disabilities, or other especially vulnerable individuals. In some cases, adult trafficking victims may engage in other culpable conduct, including, inter alia, knowingly advertising or transporting trafficking victims to be exploited for forced labor or compelled commercial sex, providing narcotics to trafficking victims, and directly coercing other victims to engage in illegal acts. Under circumstances such as these, if criminal intent is present, the interests of the victim-perpetrator must be balanced with the interests of the others they have victimized.

Evaluating the victim-perpetrator's culpability can be extremely difficult, and prosecutors need to balance multiple factors, including the Principles of Federal Prosecution set out in § 9-27 of the U.S. Attorney's Manual.[16] Additional considerations include:

- Degree of harm to third parties: If a third party has been victimized and particularly, if that person has been severely harmed, that harm may weigh in favor of bringing criminal charges against a victim-perpetrator. If a victim-perpetrator's conduct harmed a minor or other especially vulnerable individual, that tips the scales even further in favor of prosecution. If appropriate, prosecutors should confer with the third-party victims to consider their views on any prosecution of the victim-perpetrator.

- Age and capacity of the trafficking victim at the time of her offense: The age and capacity of a perpetrator-victim when first trafficked, exploited or abused, and when engaging in criminal conduct toward others may also be relevant to assessing whether the interest of justice warrants charges.

- Nature and extent of compulsion: Prosecutors should examine the totality of the circumstances to understand the extent to which a victim's will may have been overborne in causing her to engage in criminal acts. Was she physically or psychologically abused repeatedly? Was she or her family threatened with severe harm or death? Did the trafficker exert control over significant aspects of her life, including restricting freedom of movement, withholding earnings, or preventing her from communicating with others?

Prosecutors should also weigh any other factor that bears on culpability, including, for example, a victim's disability or drug addiction, history of prior physical or sexual abuse, degree of cooperation with law enforcement, acknowledgement of responsibility for aspects of her conduct, and duration of victimization. In so doing, prosecutors must bear in mind that trauma responses often make first

[16] U.S. DEP'T. OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-27 (2017).

impressions deceptive, and these factors—especially cooperation and acknowledgement of responsibility—often can only be assessed gradually over time, after efforts to stabilize and build rapport with initially reluctant potential victims. See full discussion of these issues in Section III supra.

The paradigmatic victim-perpetrator dilemma arises in the case of so-called "bottoms" or "bottom girls" in the parlance of commercial sex enterprises, as illustrated by the hypothetical case of Sandy described above.[17] The "bottom" often continues engaging in commercial sex for the sex trafficker's profit and often continues to endure abuse and violent threats herself. Yet, her conduct may be similarly abusive when she recruits and trains other victims, sometimes minors, or punishes them violently for infractions of the pimp's rules for his "stable" of victims. Has the "bottom" crossed over from victim territory to become a sex trafficker? Some victim advocates have argued that a victim in such situations never has the requisite criminal intent to be considered a perpetrator. Three possibilities exist: either she is (1) purely a victim and lacks criminal intent for the otherwise criminal conduct she has engaged in; (2) she is not subject to any force or coercion and is purely a perpetrator; or (3) she is both a victim of the trafficker's conduct and has criminal responsibility for her own violent or coercive conduct. In Sandy's case, careful interviewing of both Sandy and of those victimized by her conduct would be necessary in order to make a judgment in the case.

In cases in which criminal charges are deemed appropriate despite some degree of victimization, prosecutors should, of course, consider all charging and sentencing options and seek a resolution that balances the interest in criminal accountability with the interest in protecting victims. Charging and sentencing decisions should seek to account for psychological and physical harm suffered by trafficking victims, as well as to facilitate cooperation with law enforcement to protect others from harm. In some instances, state charges may be the most appropriate resolution, for example, where ambiguities in the evidence of criminal intent render potential federal charges with differing elements less readily provable. State criminal diversion programs may, under appropriate circumstances, strike a balance that enables a victim-perpetrator to acknowledge responsibility for her misconduct while emerging with a clean criminal record after complying with a probationary period. Whenever ultimately bringing federal charges, prosecutors should carefully consider appropriate sentencing recommendations to balance evidence of culpability with evidence of victimization.

As discussed throughout this article, human trafficking victims often suffer extreme trauma that may contribute in varying degrees to their involvement in offenses victimizing others. In some instances, a history of prior psychological, sexual, or physical abuse may have contributed to making the victim vulnerable to trafficking in the first instance, as well as complicating the analysis of whether her involvement in perpetrating criminal acts resulted from the trafficking-related trauma or previously existing trauma. In other criminal contexts, previous trauma and victimization may be considered mitigating factors, but typically would not foreclose federal prosecution in itself, as is the case when a child pornography perpetrator has previously been sexually abused. Despite their own history of trauma, trafficking victims, likewise, are not necessarily exempted from liability for severe harm inflicted on others when they reasonably could have avoided inflicting such harm, considering their own background and circumstances. At the same time, when assessing criminal liability, it is important for prosecutors to consider that in some cases, trafficking victims are uniquely situated due to ongoing coercion that may have directly contributed in varying degrees to criminal conduct perpetrated by those victims.

VI. Conclusion

Determining a human trafficking victim's potential criminal culpability presents unique and daunting challenges. There are no easy answers in balancing the complex considerations that must be

[17] Use of gender pronouns in this paragraph implies the "bottom" is a female because that is typically the case. However, similar power dynamics arise in other sex and labor trafficking situations. Men may simultaneously be victims and perpetrators as well.

weighed in these circumstances. Agents and prosecutors who have not been trained in trauma-informed approaches to potential victims may overlook indicators of victimization, placing victims at risk of being inappropriately charged as perpetrators without adequate consideration of the victimization they have experienced. However, even experienced agents and prosecutors who are alert to trauma responses and are deeply committed to pursuing justice on behalf of vulnerable victims may reach differing conclusions in analyzing and balancing the multiple complex considerations relevant to assessing a victim-perpetrator's criminal liability.

As our understanding of trafficking victims, trauma, and trauma-informed anti-trafficking strategies continues to evolve, we must continue to develop more nuanced understanding of the dynamics affecting individuals who are both victimized by their traffickers and implicated in the victimization of others, which, in turn, will allow us to assess legislative proposals that seek to limit the criminal exposure of those whose offenses are a direct product of victimization. This article offers no easy solution to the dilemma of whether and when it is appropriate to charge victim-perpetrators, and it makes no concrete policy proposals. Rather, the article shares relevant considerations that may better inform decisions in human trafficking investigations and prosecutions. In particular, prosecutors should endeavor to understand the role of trauma and coercion in trafficking victims' criminal conduct, as well as their subsequent interactions with the criminal justice system; and should carefully consider the full context and surrounding circumstances in evaluating how to pursue the interest of justice when encountering individuals who are both victims and perpetrators.

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Combatting Trafficking of Native Americans and Alaska Natives

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I. Introduction

Like carnival barkers in an Internet sideshow, they tout their product: young women who will provide companionship. For a price.[1]

The issue of human trafficking, specifically sex trafficking, in Indian country has received increasing attention the past couple of years. Multiple jurisdictions in tribal communities may have the legal authority to investigate and prosecute crimes of human trafficking. Many of the media reports and congressional inquiries have focused on the federal government's role in uncovering and prosecuting these offenses. However, state prosecutors and tribal prosecutors also may have the ability to charge and try these cases. The issue is nuanced, and a balanced discussion of the issue must involve the following: the location of the offense; the Indian or non-Indian status of the pimp, if known; and, if the victim is an adult, whether there was force, fraud, or coercion exerted to induce the commercial sex act. To date, there has been little research done on the topic of sex trafficking occurring in Indian country. But, some of what does exist fails to adequately distinguish between the commercial sexual exploitation of American Indian/Alaska Natives in Indian country, as defined in 18 U.S.C. §1151, and the commercial sexual exploitation of American Indian/Alaska Natives (AI/ANs) off-reservation.

To date, the two most frequently cited reports on the trafficking of Native women are *Shattered Hearts: The Commercial Sexual Exploitation of American Indian Women and Children in Minnesota* (*Shattered Hearts*)[2] and *Garden of Truth: the Prostitution and Trafficking of Native Women in Minnesota* (Garden of Truth).[3] *Shattered Hearts* is focused on data collected in Minnesota during the client intake process at several service provider programs, and it reports that trafficking of Native American girls is common. While *Shattered Hearts* is a thorough and well-written report, the reader must be aware that its analysis is based on Minnesota's trafficking statutes and not federal law. The authors of *Garden of Truth* interviewed 105 Native women involved in prostitution and asked about family history, sexual and physical violence throughout their lifetimes, homelessness, symptoms of post-traumatic stress disorder and dissociation, and use of available services such as domestic violence shelters, homeless shelters, rape crisis centers, and substance abuse treatment. The survey results document a shocking level of abuse

[1] Amy Dalrymple & Katherine Lymn, Sex for Sale in the Bakken: N.D. Trafficking on the Rise, BILLINGS GAZETTE (Jan. 4, 2015).
[2] MINN. INDIAN WOMEN'S RES. CTR., SHATTERED HEARTS: THE COMMERCIAL SEXUAL EXPLOITATION OF AMERICAN INDIAN WOMEN AND GIRLS IN MINNESOTA (2009).
[3] MELISSA FARLEY ET AL., GARDEN OF TRUTH: THE PROSTITUTION AND TRAFFICKING OF NATIVE WOMEN IN MINNESOTA (2011).

perpetrated on these victims and an extensive list of recommendations necessary to provide desperately needed assistance. Again, this document is poignant and well researched, but it does not address the federal human trafficking statute.

One area in Indian country where there is increasing research and analysis (with a focus on the federal government's response) is the proliferation of violence, drug abuse, and sex crimes, including human trafficking, in the Bakken Oil patch.[4] The United States Attorney's Offices (USAOs) and the Federal Bureau of Investigation (FBI) are very engaged in increasing law enforcement resources in the oil patch and actively investigating and prosecuting crime occurring in the Bakken. Some of these efforts are documented more fully in the case example portion of this article.

Sex trafficking of American Indians and Alaska Natives is a real and significant problem. Unfortunately, lore and urban myth about what sex trafficking in Indian country looks like has possibly done a grave disservice to Native trafficking victims residing in tribal communities or urban areas by diverting attention from looking for genuine cases of trafficking to chasing shadows. For example, many of the discussions the last couple of years regarding human trafficking in Indian country inevitably include stories about Native women being taken, held, and sexually abused in the cargo storage compartments of international ships visiting the Duluth port. In fact, since the terrorist attacks of September 11, 2001, the Duluth port has increased security because of its designation as an international point of entry. Credentials and identification are required to get on the docks and to the boats. Civilians are not permitted access to the docks or boats.[5] So, while there may have been a time when prostitution and human trafficking were commonplace at the Duluth port, security efforts implemented nearly sixteen years ago have significantly curtailed the problem.

This article seeks to clarify the record by doing the following: outlining federal jurisdiction for commercial sex trafficking offenses in Indian country, providing examples of cases originating in tribal communities or where AI/ANs were victimized, reviewing current studies and data on victimization rates of AI/ANs, offering an example of how to develop a comprehensive community response to the issue of human trafficking in Indian country, and detailing the Department's commitment to investigating and prosecuting this heinous crime.

II. Trafficking Victim Vulnerabilities

"He made me feel special. He found me when I was broken. He built me up. Broke me back down. And built me back up again to where I thought he was my everything." (Heather, Alaska Sex Trafficking Survivor)[6]

Pimps select their prey, typically adolescents, to victimize with a few specific criteria in mind. They target individuals they believe will be unable to escape, unwilling or too afraid to cooperate with law enforcement, and likely to be simply overlooked, forgotten, or ignored by society. To be marginalized is to be vulnerable—every minute of every day and at every turn. This truth is magnified in tribal communities where resources are scarce and help may be hours away.

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[4] *See* Amy Dalrymple & Katherine Lynn, *Sex for Sale in the Bakken: Trafficking in ND Is on the Rise*, DAILY REPUBLIC (Jan. 5, 2015).

[5] Rhianon Fletcher, *Secrets of the Ports Human Trafficking in Duluth, Minnesota*, DULUTH J. UNDERGRADUATE RES., 2015, at 103–05.

[6] Written testimony of Diana Bline submitted at the Fourth Hearing of the Advisory Committee of the Attorney General's Task Force on American Indian/Alaska Native Children Exposed to Violence, Anchorage, Alaska 2014. *See generally* ATT'Y GEN.'S ADVISORY COMM. ON AM. INDIAN & ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE, ENDING VIOLENCE SO CHILDREN CAN THRIVE (2014).

While it is often believed that "prostitution is an adult occupation," "80 percent of women engaged in prostitution started before their eighteenth birthday," with "the average [starting age being] between twelve and fourteen years old."[7] There were "1,400 youth arrested for prostitution in the United States in 2003," and of that group, unfortunately, "14 percent were age fourteen or younger.[[8]] Of the Department of Justice's confirmed human trafficking cases from 2008 to 2010, 64 percent consist of allegations of sexual exploitation of a child."[9] While adults are also victims in domestic sex trafficking cases, the adults who are sex trafficked are often "initially trafficked either while juveniles or very shortly thereafter."[10] Juveniles are found to be easier targets for pimps based on their lack of "perspective, experience, and emotional maturity" that hinders their ability to see through lies and schemes told to them by traffickers.[11] Therefore, "[t]he younger the victim, the more susceptible they are to the manipulations . . . of domestic sex traffickers."[12]

Beyond the factor of age, "70 percent of domestic sex trafficking victims were [victims of prior child sexual abuse, with the abuse occurring] between the ages of three and fourteen."[13] These previous child sexual abuse victims frequently suffer from the symptoms of "deep-seated shame, humiliation, and lack of self-worth. They also are often left 'feeling defective and defeated,' . . . [and] blame themselves for being sexually victimized."[14] Victims then have low self-esteem and a high need for love, increasing their vulnerability, and, in turn, making them view themselves as "dirty" or a "pervert."[15]

Because of this prior sexual abuse, many sex trafficking victims come from dysfunctional families whose abuse stems further to include "physical abuse, verbal abuse, neglect, and family abandonment."[16] Most victims lack a healthy, "loving relationship with their father or another adult male" and crave what the victim understands to be a family environment, even though they lack the understanding of what a functional family environment could be.[17] Sex traffickers often prey on this family void; however, it should be noted "that 25 percent of child sex trafficking victims were . . . trafficked by family members."[18]

Another factor to note is the financial instability victims may face. This might be through "inadequate education," "limited employment opportunities," or "a poverty-stricken background" in which the victims find themselves unable to support themselves, a situation which, in turn, increases their vulnerability to the traffickers.[19]

Because of experiences like a history of abuse and lack of financial stability, victims might be runaways, "abuse drugs to self-medicate," and "have a history of psychological problems."[20] If the victim is a runaway, the victim is more likely to engage in what is known as "survival sex" to obtain "subsistence needs" such as "shelter, food, drugs, or money."[21] If the victims are engaging in survival sex,

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[7] Stephen C. Parker & Jonathan T. Skrmetti, *Pimps Down: A Prosecutorial Perspective on Domestic Sex Trafficking*, 43 U. MEM. L. REV. 1013, 1020 (2013).
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.* at 1021.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at 1022.
[19] *Id.*
[20] *Id.*
[21] *Id.*

"it is not uncommon for [these victims to participate in] commercial sex acts prior to their exploitation," which, in turn, increases their vulnerability to "exploitation and enslavement [by the] traffickers."[22]

III. Victimization Rates in American Indian and Alaska Native Populations

> *American Indian and Alaska Native (AI/AN) children suffer exposure to violence at rates higher than any other race in the United States. The immediate and long term effects of this exposure to violence includes increased rates of altered neurological development, poor physical and mental health, poor school performance, substance abuse, and overrepresentation in the juvenile justice system. This chronic exposure to violence often leads to toxic stress reactions and severe trauma, which is compounded by historical trauma. Sadly, AI/AN children experience posttraumatic stress disorder at the same rate as veterans returning from Iraq and Afghanistan and triple the rate of the general population.[] With the convergence of exceptionally high crime rates, jurisdictional limitations, vastly under-resourced programs, and poverty, service providers and policy makers should assume that all AI/AN children have been exposed to violence.*[23]

The issues of domestic violence, sexual assault, and child abuse are significant ones, and they have deservedly received greater attention by the public, criminal justice and social service systems, and the medical community during the past two decades. Research and anecdotal evidence show that individuals who are abused at home by family members, friends, or intimate partners are more likely to be vulnerable to other forms of victimization. For example, if an adolescent's father or uncle molests her at home, she is more likely to become a runaway or to self-medicate with drugs and alcohol. These factors put her at increased risk for falling prey to a sex trafficker. We know that AI/ANs experience much higher rates of victimization than do the rest of the population. Recent studies suggest that American Indian women are 2.5 times more likely than the national average to experience certain violent crimes, such as nonfatal strangulation.[24] Therefore, it is important for criminal justice and social service personnel responding to crime in tribal communities to be knowledgeable of the types and frequency of abuse perpetrated on the First Americans. In addition, all must be mindful of the painful experiences Native Americans have suffered at the hands of the federal and state governments: forced removal from their ancestral homelands, boarding school, slavery, and sexual abuse.[25]

The Department of Justice's research component is the National Institute of Justice (NIJ). Throughout the past decade, NIJ has dedicated many resources to researching and evaluating the rate and types of violence perpetrated against AI/ANs. Results from an NIJ-funded study, researched and written by Andre Rosay, Ph.D., Director of the Justice Center at the University of Alaska–Anchorage, was released in 2016; the study shows that AI/AN women and men suffer violence at alarmingly high rates.

The study looked at the prevalence of psychological aggression and physical violence by intimate partners, stalking, and sexual violence among AI/AN women and men. It also examined the perpetrators' race and the impact of the violence.

> The [NIJ] study used a nationally representative sample from the National Intimate Partner and Sexual Violence Survey (NISVS),[] with a total of 2,473 adult women and 1,505 adult men who identified themselves as AI/AN, either alone or in combination with another

[22] *Id.*
[23] ATT'Y GEN.'S ADVISORY COMM. ON AM. INDIAN & ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE, *supra* note 6, at 2 (citation omitted).
[24] United States v. Lamott, 831 F.3d 1153, 1154 (2016).
[25] B. Greer, *Hiding Behind Tribal Sovereignty: Rooting Out Human Trafficking in Indian Country*, 16 J. GENDER, RACE AND JUST. 453, 455–59 (2013).

racial group. Most women (83 percent) and most men (79 percent) were affiliated or enrolled with a tribe or village. More than half of women and men (54 percent for each group) had lived within reservation boundaries or in an Alaska Native village in the past year.

The results, which show high rates of violence against both women and men, provide the most thorough assessment on the extent of violence against [AI/AN] women and men to date.[26]

In short, more than four in five AI/AN women and men have experienced violence in their lifetime, and more than one in three experienced violence in the past year, according to this NIJ-funded study. NIJ published a Journal article written by Dr. Rosay, which provides an excellent summary of the longer Research Report. The information printed below is taken from the NIJ Journal article document:

Violence Against Women

Results show that more than four in five [AIAN] women (84.3 percent) have experienced violence in their lifetime. This includes 56.1 percent who have experienced sexual violence, 55.5 percent who have experienced physical violence by an intimate partner, 48.8 percent who have experienced stalking, and 66.4 percent who have experienced psychological aggression by an intimate partner. Overall, more than 1.5 million [AIAN] women have experienced violence in their lifetime.

The study also found that more than one in three [AIAN] women (39.8 percent) have experienced violence in the past year. This includes 14.4 percent who have experienced sexual violence, 8.6 percent who have experienced physical violence by an intimate partner, 11.6 percent who have experienced stalking, and 25.5 percent who have experienced psychological aggression by an intimate partner. Overall, more than 730,000 [AIAN] women have experienced violence in the past year.

Violence Against Men

[AIAN] men also have high victimization rates. More than four in five [AIAN] men (81.6 percent) have experienced violence in their lifetime. This includes 27.5 percent who have experienced sexual violence, 43.2 percent who have experienced physical violence by an intimate partner, 18.6 percent who have experienced stalking, and 73 percent who have experienced psychological aggression by an intimate partner. Overall, more than 1.4 million [AIAN] men have experienced violence in their lifetime.

More than one in three [AIAN] men (34.6 percent) have experienced violence in the past year. This includes 9.9 percent who have experienced sexual violence, 5.6 percent who have experienced physical violence by an intimate partner, 3.8 percent who have experienced stalking, and 27.3 percent who have experienced psychological aggression by an intimate partner. Overall, more than 595,000 AIAN men have experienced violence in the past year.

[AIAN] men are 1.3 times as likely as non-Hispanic white-only men to have experienced violence in their lifetime. In particular, [AIAN] men are 1.4 times as likely to have experienced physical violence by an intimate partner and 1.4 times as likely to have experienced psychological aggression by an intimate partner in their lifetime. The other estimates are not significantly different across racial and ethnic groups.

. . . .

[26] Andre V. Rosay, *Violence Against American Indian and Alaska Native Women and Men*, Nat'L INST. JUST. J., June 2016.

How Does the Violence Affect Victims?

The study also briefly examined how physical violence by intimate partners, stalking, and sexual violence affects [AIAN] victims. Among the victims:

- 66.5 percent of women and 26.0 percent of men expressed concern for their safety.
- 41.3 percent of women and 20.3 percent of men were physically injured.
- 49.0 percent of women and 19.9 percent of men needed services.
- 40.5 percent of women and 9.7 percent of men missed days of work or school.

[AIAN] female victims were 1.5 times as likely as non-Hispanic white-only female victims to be physically injured, 1.8 times as likely to need services, and 1.9 times as likely to have missed days of work or school. Other differences across racial and ethnic groups were not statistically significant.

[AIAN] female victims were 1.5 times as likely as non-Hispanic white-only female victims to be physically injured, 1.8 times as likely to need services, and 1.9 times as likely to have missed days of work or school. Other differences across racial and ethnic groups were not statistically significant.

Victims identified a variety of needed services. [AIAN] female victims most commonly needed medical care (38 percent of victims) and were 2.3 times as likely as non-Hispanic white-only victims to need this type of care. They also needed legal services (16 percent), housing services (11 percent), and advocacy services (9 percent). Medical care and legal services were the most commonly reported needs for male victims as well.

Unfortunately, not all victims were able to access services. More than one in three [AIAN] female victims (38 percent) and more than one in six [AIAN] male victims (17 percent) were unable to get the services that they needed. [AIAN] women were 2.5 times as likely as non-Hispanic white-only women to lack access to needed services.[27]

As seen through the statistics listed above, AI/ANs suffer from a heightened victimization and are often unable to receive services that could help them.

Regarding the issue of child abuse, the most recent statistics come from *Child Maltreatment 2015*, the 26th edition of the annual Child Maltreatment report series, which provides data through the National Child Abuse and Neglect Data System (NCANDS). The report states that "the national estimate of children who received a child protective services investigation response or an alternative response [was] . . . 3,358,000 . . . ."[28] Of these cases, the number and rate of reported victims in 2015 was 683,000.[29] Approximately, "[t]hree-quarters (75.3 percent) of the victims were neglected, 17.2 percent were physically abused, and 8.4 percent were sexually abused."[30] "For [the entirety of] 2015, a nationally estimated 1,670 children died of abuse and neglect at a rate of 2.25 per 100,000 children in the national population."[31] All of these 2015 national statistics were based upon receiving data from "the 50 states, the District of Columbia and the Commonwealth of Puerto Rico."[32]

Looking specifically into Indian country, data on child sexual abuse is limited. Through the National Indian Child Welfare Association, it is reported that of the 405,000 American Indian children

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[27] *Id.* (tables omitted). For full survey information, visit: https://www.cdc.gov/violenceprevention/nisvs/index.html.
[28] DEP'T OF HEALTH & HUMAN SERVS. CHILD MALTREATMENT 2015 (2017).
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*

living the United States today, 28,000 or (7 percent) are at risk for abuse or neglect each year.[33] Of these cases in which there is abuse, 95 percent are substance abuse related.[34]

IV. Federal Criminal Jurisdiction in Indian Country

Currently, there are 567 federally recognized tribes in the United States.[35] According to the Bureau of Indian Affairs, "[a]pproximately 56.2 million acres are held in trust by the United States for various Indian tribes and individuals."[36] In addition, the Bureau states the following:

> There are approximately 326 Indian land areas in the U.S. administered as federal Indian reservations (i.e., reservations, pueblos, rancherias, missions, villages, communities, etc.). The largest [such land area] is the 16 million-acre Navajo Nation Reservation located in Arizona, New Mexico, and Utah. The smallest is a 1.32-acre parcel in California where the Pit River Tribe's cemetery is located. Many of the smaller reservations are less than 1,000 acres.[37]

Approximately, 5.2 million people in the United States identify as Native American, "either alone or in combination with one or more other races," per the 2010 Census.[38] And of this group, 2.9 million, or 0.9 percent of the total U.S. population, identify as only Native American.[39] In 2010, more than 1.1 million Native Americans resided on tribal land.[40]

The two main federal statutes governing federal criminal jurisdiction in Indian country are 18 U.S.C. § 1152[41] and § 1153.[42] Section 1153, known as the Major Crimes Act, gives the federal government jurisdiction to prosecute certain enumerated offenses, such as murder, manslaughter, rape, aggravated assault, and child sexual abuse, when they are committed by Indians in Indian country.[43] Section 1152, known as the General Crimes Act, gives the federal government exclusive jurisdiction to prosecute all crimes committed by non-Indians against Indian victims in Indian country.[44] Section 1152 also grants the federal government jurisdiction to prosecute minor crimes by Indians against non-Indians, although that jurisdiction is shared with tribes and provides that the federal government may not prosecute an Indian who has been punished by the local tribe.[45]

To protect tribal self-government, Section 1152 specifically excludes minor crimes involving Indians, when the crimes fall under exclusive tribal jurisdiction.[46] The federal government also has jurisdiction to prosecute federal crimes of general application, such as drug and financial crimes, when they occur in Indian country, unless a specific treaty or statutory provision provides otherwise.[47] On a

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[33] Child Abuse and Neglect, NAT'L INDIAN CHILD WELFARE ASS'N (last visited Jul. 5, 2017).
[34] *Id.*
[35] Frequently Asked Questions, U.S. DEP'T INTERIOR, BUREAU INDIAN AFF. (last visited Sept. 15, 2017).
[36] *Id.*
[37] *Id.*
[38] TINA NORRIS, ET AL., U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, at 1 (2012).
[39] *Id.* at 3.
[40] *Id.* at 13.
[41] 18 U.S.C. § 1152 (2012).
[42] *Id.* § 1153 (2012 & Supp. III 2015).
[43] *Id.* § 1153(a).
[44] *Id.* § 1152.
[45] *Id.*
[46] *Id.*
[47] *Id.*

limited number of reservations, the federal criminal responsibilities under Sections 1152 and 1153 have been ceded to the States under "Public Law 280" or other federal laws.

The United States Constitution, treaties, federal statutes, executive orders, and court decisions establish and define the unique legal and political relationship that exists between the United States and Indian tribes. The FBI and the USAOs are two of many federal law enforcement agencies with responsibility for investigating and prosecuting crimes that occur in Indian country. FBI jurisdiction for the investigation of federal violations in Indian country is statutorily derived from 28 U.S.C. § 533, pursuant to which the FBI was given investigative authority by the Attorney General.[48] In addition to the FBI, the Department of the Interior's Bureau of Indian Affairs (BIA) plays a significant role in enforcing federal law, including the investigation and presentation for prosecution of cases involving violations of 18 U.S.C. §§ 1152 and 1153.

V. Application of the Federal Human Trafficking Statute to Crimes Arising in Indian Country

It must be emphasized that the General Crimes Act and Major Crimes Act deal only with the application of federal enclave law to Indians, and have no bearing on federal laws of general applicability that make actions criminal wherever committed, regardless of the status of the defendant or the location of the crime.[49] Despite the explicit holdings in three circuits that jurisdiction exists over violation of statutes of general applicability, one court of appeals has held that such statutes do not automatically apply to offenses in Indian country involving only Indians, unless there is an independent federal interest to be protected.[50] The *Markiewicz* court went on to hold that each of the statutes charged in the case, 18 U.S.C. § 1163 (theft of tribal funds), 18 U.S.C. § 844(i) (arson of property in interstate commerce), 18 U.S.C. § 1513 (witness tampering), 18 U.S.C. § 402 (contempt), 18 U.S.C. § 1621 (perjury), and 18 U.S.C. § 2101 (riot), reflected such an independent federal interest or that its violation had not occurred in Indian country.[51] *Markiewicz* was explicitly rejected by the Ninth Circuit in *United States v. Begay*, which held that 18 U.S.C. § 371 (conspiracy) applied in Indian country even though it is not a crime enumerated in 18 U.S.C. § 1153.[52]

The federal "human trafficking" statute is found at 18 U.S.C. § 1591, and the official title in the federal code is "[s]ex trafficking of children or by force, fraud, or coercion."[53] The penalty and elements for the offense are the following:

> (a) Whoever knowingly--
>
> (1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or
>
> (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),

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[48] 28 U.S.C. § 533 (2012).
[49] *See* United States v. Young, 936 F.2d 1050, 1055 (9th Cir. 1991) (assault on federal officer and firearms), *overruled on other grounds by* United States v. Vela, 624 F.3d 1148 (9th Cir. 2010); United States v. Blue, 722 F.2d 383, 384–85 (8th Cir. 1983) (narcotics); United States v. Smith, 562 F.2d 453, 458 (7th Cir. 1977), (assault on federal officer), *abrogated by* United States v. Brisk, 171 F.3d 514, 521 n.5 (7th Cir. 1999).
[50] *See* United States v. Markiewicz, 978 F.2d 786, 800 (2d Cir. 1992).
[51] *See id*. at 817.
[52] United States v. Begay, 42 F.3d 486, 499–500 (9th Cir. 2012); *see also* United States v. Yannott, 42 F.3d 999, 1004 (6th Cir. 1994) (discussing 18 U.S.C. § 922).
[53] 18 U.S.C. § 1591 (2012 & Supp. III 2015).

> knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).
>
> (b) The punishment for an offense under subsection (a) is--
>
> (1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or
>
> (2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.[54]

Section 1591 is a crime of general applicability. If the government can prove that the crime was committed "in or affecting interstate or foreign commerce," there is no need to consider other bases of jurisdiction, like the General Crimes Act, for crimes occurring in Indian country. Also, 18 U.S.C. § 1591 prohibits interstate or foreign commerce in regard to sex trafficking. When defining interstate or foreign commerce, the United States Supreme Court has interpreted Congress's power to regulate activities that involve and affect commerce through the Commerce Clause.[55] Pursuant to the Commerce Clause, Congress has the power to regulate activities that have a substantial effect on interstate commerce.[56] The government need only meet a de minimis standard of commerce to fall under the Commerce Clause.[57]

The courts have created a four-factor test to determine whether a law regulates an activity that has substantial effect on interstate commerce.[58] The four factors are the following:

> (1) whether the regulated activity is economic in nature; (2) whether the statute contains an 'express jurisdictional element' linking its scope in some way to interstate commerce; (3) whether Congress made express findings regarding the effects of the regulated activity on interstate commerce; and (4) attenuation of the link between the regulated activity and interstate commerce.[59]

Numerous courts have ruled § 1591 constitutional following application of the four factor test. The *Campbell* court said the following:

> First, commercial sex acts are economic in nature. Second, section 1591 has a jurisdictional element, requiring the jury to find that the activity affected interstate commerce. Third, in enacting the [Trafficking Victims Protection Act, . . .], Congress found that "Trafficking in persons substantially affects interstate and foreign commerce." Fourth[, . . .] there is a clear nexus between [the defendant's] intrastate recruiting and obtaining of women to

[54] *Id*. § 1591(a)–(b).
[55] United States v. Campbell, 111 F. Supp. 3d 340, 343 (W.D.N.Y. 2015).
[56] *Id.*
[57] *Id.*
[58] United States v. Lopez, 514 U.S. 549, 558–59 (1995).
[59] United States v. Guzman, 591 F.3d 83, 89 (2d Cir. 2010) (quoting United States v. Morrison, 529 U.S. 598, 611–12 (2000)).

> commit commercial sex acts, the interstate aspects of [the defendant's] business, and the interstate market for commercial sex.

Accordingly, the Court in *Paris* ruled that Congress had the power to regulate the defendant's intrastate recruiting and obtaining women to perform commercial sex acts.[60]

A critical question for using § 1591 in Indian country is what activity falls within the definition of interstate commerce. Must the pimp, john, or victim travel across state lines or in and out of Indian country? Or does purely intra-jurisdiction activity meet the legal definition? The case of *United States v. Evans* addressed the issue of whether solely "intrastate" commercial sexual activity could satisfy the interstate-commerce element of §1591(a)(1).[61] In *Evans*, a fourteen-year-old girl (Jane Doe) worked in Miami-Dade County as a prostitute for the defendant.[62] "[Defendant] arranged 'dates' for Jane Doe at local hotels."[63] Jane Doe gave all money earned to the defendant.[64] Evans communicated with the victim using a cell phone.[65] "[The defendant] supplied Jane Doe with condoms to use on the dates." Lifestyle was the most commonly used brand of condom; this brand is produced overseas and imported into Georgia for sale and delivery throughout the United States.[66] Jane Doe was ultimately hospitalized for eleven days and diagnosed with AIDS.[67] After her release from the hospital, Evans contacted Jane Doe via landline telephone and asked her to work for him again. Jane Doe worked for the defendant until she was hospitalized again to be treated for AIDS.[68]

The Evans court found that § 1591(a)(1) was constitutional as applied to defendant's purely intrastate activities.[69] The court said that § 1591 "was enacted as part of the Trafficking Victims Protection Act of 2000 [(TVPA)]"; this act "criminalizes and attempts to prevent slavery, involuntary servitude, and human trafficking, . . . particularly of women and children in the sex industry."[70] Importantly, the court highlighted that "Congress found that trafficking of persons has an aggregate economic impact on interstate and foreign commerce."[71] The court stated that Congress's conclusions in this regard were not irrational.[72] Therefore, the *Evans* court concluded that defendant's enticement of a fourteen-year-old female to commit intrastate prostitution "had the capacity when considered in the aggregate with similar conduct by others, to frustrate Congress's broader regulation of interstate and foreign economic activity."[73] In short, defendant's "use of hotels that served interstate travelers and distribution of condoms that traveled in interstate commerce are further evidence that Evans's conduct substantially affected interstate commerce."[74] This case is often cited to support a broad definition of interstate commerce.

Evans was also charged with a count of 18 U.S.C. § 2422(b), which criminalizes the actions of anyone who, by "using the mail or any facility or means of interstate or foreign commerce, . . . persuades,

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[60] *See* United States v. Campbell, 111 F. Supp. 3d 340, 345 (W.D.N.Y. 2015) (quoting United States v. Paris, No. 03:06–cr–64 (CFD), 2007 WL 3124724, at *8 (D. Conn. 2007)).
[61] United States v. Evans, 476 F.3d 1176 (2007).
[62] *Id*. at 1177.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id*. at 1177–78.
[68] *Id.*
[69] *Id*. at 1180–81.
[70] *Id*. at 1179.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*

induces, entices, or coerces any individual who has not attained the age of 18 years to engage in prostitution . . . ."[75] Defendant admitted to contacting the victim via cellular telephone and landline.[76] But on appeal, he argued that the government failed to prove that his intrastate calls were routed through interstate channels.[77] The court disagreed and held that "telephones and cellular telephones are instrumentalities of interstate commerce."[78] This finding, too, may prove important to the prosecutor analyzing whether or not § 1591 is a viable charge for sex trafficking in Indian country.

A review of case law demonstrates that many activities undertaken to promote or support commercial sexual exploitation will meet the standard of "affecting interstate commerce." Moreover, the prosecutor is permitted to argue that even "intrastate," "intra-reservation," and "intra-SMTJ" activities have an aggregate economic impact on interstate and foreign commerce. In fact, these authors were unable to find case law articulating an activity undertaken to further acts of commercial sexual exploitation that were found *not* to impact interstate commerce. Thus, human trafficking violations occurring in Indian country or within the special maritime and territorial jurisdiction should always be chargeable as § 1591 offenses crimes. If, however, commerce is inexplicably not implicated, the prosecutor must look to the General Crimes Act (18 U.S.C. § 1152) to determine if jurisdiction exists to charge the case in federal court. The General Crimes Act limits federal jurisdiction for a violation of § 1591 to either a non-Indian perpetrator and an Indian victim or an Indian perpetrator and a non-Indian victim when the tribe has not already punished the offender for the same offense.[79] In these very specific situations, the United States could prosecute the offender under § 1591 by relying on the incorporation of SMTJ jurisdiction through the General Crimes Act by proving that the crime occurred in Indian country; by doing so, the prosecutor would eliminate the need to prove an interstate nexus.[80]

It is also important to note that, depending on the facts of the case, the county prosecutor or state attorney general's office may have jurisdiction to prosecute cases of human trafficking in Indian country. Furthermore, some tribes may have human trafficking codes and the ability to prosecute Indian offenders in tribal court. Or, even if the tribe does not have a specific human trafficking code, it may have jurisdiction to prosecute co-occurring crimes.

VI. Indian Country Human Trafficking Case Examples

Human trafficking and, specifically, commercial sexual exploitation of children and adults happens everywhere, including Indian country and Alaska Native villages. The crimes may not be on the scale of offenses committed in big cities. Nevertheless, the harm done to victims and the community is just as damaging. Because residents of small towns and tribal communities may be oblivious to the signs of trafficking, cases may be overlooked. An example of a trafficking case that could easily stay off law enforcement's radar is United States v. Jackie Little Dog (a/k/a Audrey Jacqueline Little Dog, a/k/a Audrey Jacqueline Bobtail Bear). On June 5, 2012, Little Dog, age 52, was sentenced to 30 months in custody with credit for time served, two years of supervised release, and a $100 assessment to the Victim Assistance Fund.

[75] *Id*. at 1180; 18 U.S.C. § 2422(b) (2012).
[76] Evans, 476 F.3d at 1180.
[77] *Id.*
[78] *Id*. at 1180–81.
[79] 18 U.S.C. § 1152 (2012).
[80] *See* 18 U.S.C. § 1591(a)(1) (2012 & Supp. III 2015).

"Little Dog was indicted for Sex Trafficking of a Child by a federal grand jury on May 3, 2011. A superseding indictment charging her with Sex Trafficking of a Child and Child Abuse was filed [in September] 2011."[81] The defendant pled guilty to a single count of child abuse on March 14, 2012.

> Little Dog admitted that she repeatedly brought an individual who was younger than 18 from his/her home in Little Eagle to a residence in McLaughlin where she knew [the minor] would be exposed to a variety of physical dangers, including [consuming alcohol] and being expected to engage in sexual encounters with various adult men.[82]

The defendant had met a group of immigrant construction workers at the casino. None of the men spoke English. Little Dog began visiting the men's rental house and partying with them. She also began taking a group of minor females and young women with her to the house. The defendant took the minor victim with her numerous times to the house. The victim had sex with one of the men and received $50.00 payment. She used the money to purchase gas for the defendant's car and to feed each of them breakfast. The victim told the defendant where she got the money. The defendant continued to take the minor female to the house, and the victim continued to have sex with the men for various amounts of payment. She received as much as $50.00 and as little as an 18-pack of beer. The case was prosecuted by AUSA Kevin Koliner, District of South Dakota.

The rural nature and geographic size and scope can make it difficult to detect trafficking cases occurring in the City of Anchorage and in "the bush" Alaska. In Anchorage, there are some reoccurring themes in trafficking cases: (1) cases are primarily Internet based; (2) traffickers directly recruit the victims; (3) drugs are typically involved; (4) victims are promised a better life and the chance to earn large sums of money; and (5) pimps isolate victims and remove them from their families.[83] Cases originating in rural Alaska, or "the bush," also have certain characteristics: (1) victims are lured to Anchorage by family members or boyfriends (referred to as "Tundra Pimping"); (2) something other than money, like drugs, may be exchanged for sex; and (3) the victim typically has a history of prior victimization.[84] The average age of becoming a trafficking victim is fifteen to seventeen. Alaska Native youth are particularly vulnerable to traffickers because they may be unfamiliar with Anchorage, have little to no support system outside of their village, and may be unaware of resources or assistance available to them in Anchorage.[85] Covenant House Alaska, a youth shelter in Anchorage, reports that "1 in 3 youth will be approached by a trafficker in Anchorage within forty-eight to seventy-two hours of becoming homeless."[86]

Fortunately, in 2012, the FBI in Alaska developed a robust "Innocence Lost" task force to tackle the problem of sex trafficking in Alaska. In 2003, the FBI created the Innocence Lost National Initiative in conjunction with the Department of Justice Child Exploitation and Obscenity Section and the National Center for Missing & Exploited Children. The initiative's goal is to address the growing problem of domestic sex trafficking of children in the United States.[87] In addition to developing and working cases, FBI agents in Alaska, along with their task force partners, do a tremendous amount of training and outreach, even in remote Alaska Native villages. Sharing information with other criminal justice, social

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[81] Press Release, U.S. Dep't of Justice, U.S. Attorney's Office, Dist. of S.D., Little Eagle Woman Sentenced for Child Abuse (June 6, 2012).
[82] *See id.*
[83] Written testimony of Diana Bline submitted at the Fourth Hearing of the Advisory Committee of the Attorney General's Task Force on American Indian/Alaska Native Children Exposed to Violence, Anchorage, Alaska 2014.
[84] *Id*.
[85] *Id*.
[86] *Id.*
[87] *See* What We Investigate, FBI (last visited Sept. 15, 2017).

service, medical personnel, and community members has paid real dividends by saving victims and getting pimps off the street. One such case example is *United States v. Randall Scott Hines*.[88]

Hines was a charter fishing boat captain in Homer, Alaska. Hines admitted to engaging in sexual relationships with a series of teenage girls in Homer, Alaska. He also admitted to frequently supplying these same girls with methamphetamine and, at times, with oxycodone, "often in conjunction with having sex with them. Four of the six teenage girls with whom Hines had a sex and drug relationship were under the age of sixteen . . . ."[89] In part, the crimes were discovered when an astute health care professional, who had been trained by the FBI on how to identify trafficking victims, noted that a group of young women and adolescents had the same sexually transmitted infection. Hines was ultimately convicted of "one consolidated count of distributing drugs to underage individuals and one count of possession of child pornography" because he had "a sexually explicit video clip of him engaged in sex[ual] conduct with one of the minor victims."[90] He was sentenced to ten years' imprisonment to be followed by ten years' supervised release. As part of the case, his charter boat was seized by authorities. Hines agreed to sell the boat and use the proceeds to fund a $160,000 trust fund to help the victims obtain drug treatment and counseling. The case was prosecuted by AUSA Kim Sayers-Fay, District of Alaska.[91]

An example of a trafficking case occurring in Indian country is *United States v. Dustin Morsette*. Morsette received a 45-year prison term following a jury trial and his conviction on charges of sex trafficking, sexual abuse, drug trafficking, and witness tampering.[92]

> In or about September 2009, Morsette and another person conspired to distribute marijuana in and around the Fort Berthold Indian Reservation [in North Dakota]. As part of this conspiracy, Morsette began to recruit minors and young adults to be part of a gang he described as the Black Disciples. According to testimony at trial, Morsette used physical force and coercion to cause an adult female he had recruited for the gang to engage in commercial sex acts on the Fort Berthold Indian Reservation and in Williston and Minot. After his arrest in July 2010, Morsette attempted to influence this adult female's testimony in this case and to prevent communication of information about the sexual abuse and prostitution activity to law enforcement.
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> Also according to trial testimony, gang members were required to distribute marijuana for Morsette and/or engage in sexual acts with Morsette. Morsette used force and threats to coerce individuals he recruited for the gang into engaging in the sexual acts with him. Morsette also engaged in a sexual act with a minor who was physically incapable of consenting to the act due to her consumption of alcoholic beverages and drugs. Morsette utilized several minors whom he had recruited for the gang to distribute or assist with the distribution of marijuana in the New Town area.[93]

At the time of his sentencing, the United States Attorney for the District of North Dakota said the following:

> "Defendant Morsette is a predator who targeted and exploited young girls and women of the Fort Berthold Reservation. He sexually abused multiple young girls[;] he engaged

[88] *See* Press Release, Fed. Bureau of Investigation, U.S. Attorney's Office, Dist. of Alaska, Homer Man Indicted by Federal Grand Jury for Drug Trafficking and Obstructing Justice (Aug. 18, 2011).
[89] Press Release, U.S. Dep't of Justice, U.S. Attorney's Office, Dist. of Alaska, Homer Resident Sentenced to Ten years for Distributing Drugs to Teenage Girls and Possessing Child Pornography (Feb. 11, 2013).
[90] *Id.*
[91] *See id.*
[92] *See* Press Release, Fed. Bureau of Investigation, U.S. Attorney's Office, Dist. of N.D., New Town Man Sentenced to 45 Years (Aug. 13, 2012).
[93] *Id.*

minor children to sell drugs for him, and he used physical force and coercion to force an additional young woman to perform sex acts for money in Minot and Williston. The stiff sentence imposed by the court today is a just punishment for defendant Morsette's crimes. The climate of fear he created for young girls and women on the Fort Berthold Reservation is no more."[94] The case was prosecuted by AUSA Rick Volk, District of North Dakota.[95]

From the above listed case examples, it is clear that commercial sex trafficking cases in Indian country or rural Alaska look different from big city cases. In addition, as evidenced by the cases outlined above, cases originally charged as a violation of § 1591 may ultimately be resolved by plea to another criminal offense, like sexual abuse or child abuse. Defendants who plead guilty to a crime other than trafficking typically receive stiff penalties on par with sentences meted out for trafficking convictions. However, plea agreements allow for resolution of a case without the necessity of putting the victim through trial. Particularly, for victims in Indian country, a public trial and the exposure that it entails can be devastating to a young victim who may be struggling physically, mentally, and emotionally with the after effects of being trafficked.

In March 2017, the United States Government Accountability Office (GAO) released a report titled "Human Trafficking: Action Needed to Identify the Number of Native American Victims Receiving Federally-Funded Services."[96] The GAO looked at the data of four agencies with the authority to investigate or prosecute human trafficking in Indian country: the FBI, Bureau of Indian Affairs (BIA), Immigration and Customs Enforcement Homeland Security Investigations (ICE HSI), and the U.S. Attorneys' Offices (USAO). The USAOs, FBI, and BIA not only report case statistics, but also track whether or not the crime occurred in Indian country.[97] The GAO report states that for the fiscal years 2013 through 2016, "there were 14 federal investigations and 2 federal prosecutions of human trafficking in Indian country."[98] During fiscal years 2013-2015, GAO reports "there were over 6,100 federal human trafficking investigations and approximately 1,000 federal human trafficking prosecutions . . . ."[99] Importantly, GAO noted that "state or tribal law enforcement may have jurisdiction to investigate crimes in Indian country; therefore, these figures likely do not represent the total number of human trafficking-related cases in Indian country."[100] GAO also recognized that crimes like human trafficking may be underreported; therefore, prosecution data may not reflect the full extent of the trafficking problem.[101]

VII. Department of Justice's Commitment to Fighting Violent Crime and Working Together with American Indians and Alaska Natives

Improving public safety and the fair administration of justice in tribal communities is a top priority for the Department of Justice. On February 28, 2017, U.S. Attorney General Sessions announced the formation of the U.S. Department of Justice Task Force on Crime Reduction and Public Safety. The Task Force was formed pursuant to the President's Executive Order on a Task Force on Crime Reduction and Public Safety, and is chaired by the Deputy Attorney General, Rod Rosenstein. Task Force members

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[94] *Id.*
[95] *Id.*
[96] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-325, HUMAN TRAFFICKING: ACTION NEEDED TO IDENTIFY THE NUMBER OF NATIVE AMERICAN VICTIMS RECEIVING FEDERALLY-FUNDED SERVICES (2017).
[97] *Id*. at 17.
[98] *Id.*
[99] *Id*.
[100] *Id.*
[101] *Id.*

include the Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the Administrator of the Drug Enforcement Administration (DEA), the Director of the FBI, and the Director of the U.S. Marshals Service (USMS).

Attorney General Sessions said the following:

> "On my first day in office, I called in the heads of the four major law enforcement agencies to discuss this plan. Violent crime is on the rise, and we must always remember that crimes are committed against real people. The creation of this task force is a critical step toward confronting this crisis vigorously, effectively and immediately."[102]

"The task force is central to the Attorney General's commitment to combatting illegal immigration and violent crime, such as drug trafficking, gang violence and gun crimes, and to restoring public safety to all of the nation's communities."[103]

> The task force is charged with developing strategies to reduce crime; identifying deficiencies in existing laws and policies that have made them less effective in reducing crime and proposing new legislation and policies to improve public safety and reduce crime; evaluating the availability and adequacy of crime-related data and identifying measures to improve it; and conducting any other relevant studies. In conducting its work, the task force will consult with federal, state, tribal and local law enforcement, law enforcement organizations and victims' and community advocacy organizations, among others, to learn about successful local efforts and how they can best be supported at the federal level.[104]

Violent crime in Indian country and human trafficking are certainly two of the important public safety issues addressed by the task force. In April 2017, the Executive Office for United States Attorneys (EOUSA) organized the Violent Crime in Indian Country Subcommittee. EOUSA's Native American Issues Coordinator chairs this Subcommittee, which is part of the larger Task Force on Crime Reduction and Public Safety.

The Department recognizes the United States' unique legal relationship with federally recognized Indian tribes. The United States Constitution, treaties, federal statutes, executive orders, and court decisions establish and define the unique legal and political relationship that exists between the United States and Indian tribes. In December 2014, the Attorney General issued guidelines stating principles for working with federally recognized Indian tribes. These guidelines apply to all Department personnel working in Indian country. The overarching principles as directed by the Attorney General are the following:

- "The Department of Justice honors and strives to act in accordance with the general trust relationship between the United States and tribes."
- "The Department of Justice is committed to furthering the government-to-government relationship with each tribe, which forms the heart of its federal Indian policy."
- "The Department of Justice respects and supports tribes' authority to exercise their inherent sovereign powers, including powers over both their citizens and their territory."
- "The Department of Justice promotes and pursues the objectives of the United Nations Declaration on the Rights of Indigenous Peoples."

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[102] Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Attorney General Announces Crime Reduction and Public Safety Task Force (Feb. 28, 2017).
[103] *Id.*
[104] *Id.*

- "The Department of Justice is committed to tribal self-determination, tribal autonomy, tribal nation-building, and the long-term goal of maximizing tribal control over governmental institutions in tribal communities, because tribal problems generally are best addressed by tribal solutions, including solutions informed by tribal traditions and custom."[105]

The Attorney General's guidelines for working with federally recognized tribes also addresses Department efforts concerning law enforcement and the administration of justice in tribal communities, priorities for USAOs and the FBI:

- "The Department of Justice is committed to helping protect all Native Americans from violence, takes seriously its role in enforcing federal criminal laws that apply in Indian Country, and recognizes that, absent the Department's action, some serious crimes might go unaddressed."
- "The Department of Justice prioritizes helping protect Native American women and children from violence and exposure to violence, and works with tribes to hold perpetrators accountable, to protect victims, and to reduce the incidence of domestic violence, sexual assault, and child abuse and neglect in tribal communities."[106]

VIII. Department of Justice Indian Country Training Resources

In July 2010, EOUSA launched the National Indian Country Training Initiative (NICTI) to ensure that Department prosecutors, as well as state and tribal criminal justice personnel, receive the training and support needed to address the particular challenges relevant to Indian country prosecutions. The Department's National Indian Country Training Coordinator (Coordinator) leads this training effort, which is based at the National Advocacy Center (NAC) in Columbia, SC. Since its inception, the NICTI has delivered dozens of training opportunities at the NAC or in the field, including well over 100 lectures for other federal agencies, tribes, and tribal organizations held around the country. The NICTI has reached all United States Attorneys' Offices with Indian country responsibility and over 300 tribal, federal, and state agencies. In addition to live training, the NICTI issues written publications and serves as faculty for other federal agency trainings, webinars, tribally hosted conferences, and technical assistance providers serving Indian country. Importantly, the Department's Office of Legal Education covers the costs of travel and lodging for tribal attendees at classes sponsored by the NICTI. This allows many tribal criminal justice and social service professional to receive cutting-edge training from national experts at no cost to the student or tribe.

In February 2015, the NICTI, together with the FBI, held the first-ever Human Trafficking in Indian Country Seminar at the NAC. The seminar was for federal and tribal criminal justice professionals working in Indian Country. The seminar enhanced participants' understanding of legal definitions, elements of federal offenses, and current issues and challenges of human trafficking enforcement. The training also included in-depth discussions of effective strategies for identifying, investigating, and prosecuting human trafficking cases, including prosecutors' roles in the following: planning successful enforcement operations; strategies for developing victim testimony; pretrial litigation strategies; effective trial presentation in human trafficking prosecutions; and sentencing issues. The seminar focused primarily on sex trafficking. A second residential Human Trafficking in Indian Country Seminar was held in early 2017. This training, too, was held at the NAC.

In addition to training at the NAC, the National Indian Country Training Coordinator has lectured on the topic of human trafficking in Indian country at several national conferences, including sessions hosted by the BIA, the USAOs for the Districts of Kansas, Nebraska, and Northern Iowa, a community

[105] Attorney General Guidelines Stating Principles for Working with Federally Recognized Indian Tribes, 79 Fed. Reg. 73,905, 73, 905 (proposed Dec. 3, 2014).
[106] *Id.*

forum organized by the USAO for the Western District of Michigan, and the American Indian Justice Conference hosted by the Bureau of Justice Assistance.

The NICTI has also worked with the Office for Victims of Crime, the Office on Violence Against Women, and a video production company, Video/Action, to put together a series of five training videos focused on violence committed against Alaska Natives. One of the videos in the series concerns the issue of sex trafficking. The video highlights several cases where Alaska Natives were targeted by traffickers. Many of these crimes occurred when young Alaska Natives travel from the bush to more urban areas, like Anchorage. The video training series was released in October 2016. The target audience for the training videos is tribal, state, and federal leadership and criminal justice and social service professionals who deal with cases of domestic violence, sexual assault, and sex trafficking committed against Alaska Natives.[107]

IX. Collaboration Is Key

Working in Indian country is complex because multiple jurisdictions and a myriad of criminal justice and social services personnel may have an active role to play in a single case. This is certainly the situation when a trafficking allegation is reported. Cases must be thoroughly investigated, victims needs identified and met, justice done, and offenders held accountable. Thus, the federal, state, and tribal governments must be coordinated and collaborative, and maintain good lines of communication. Concerning human trafficking in Indian country, there are few examples where all stakeholders in a state, including the tribes, have come together to explore the issue and to develop recommendations. However, one example is the state of Oregon.

In 2010, the Willamette University College of Law's International Human Rights Clinic (Clinic) released a report that measured how well state and federal officials in Oregon were doing to prevent human trafficking, to prosecute traffickers, and to protect trafficking victims. Their final report is titled "Modern Slavery in Our Midst: A Human Rights Report on Ending Human Trafficking in Oregon."[108] Following release of this report, it was brought to the Clinic's attention that Native Americans, nationally and in Oregon, are vulnerable to traffickers. Consequently, a second human rights legal fact-finding investigation was initiated. A report titled "Human Trafficking & Native Peoples in Oregon: A Human Rights Report" (Report) was published in May 2014.[109]

The Report outlined a number of areas where its authors believed that more could be learned or accomplished to deal with criminal justice and victim services issues concerning human trafficking in Indian country: (1) "statistical data and focus on natives in human trafficking"; (2) "knowledge of human trafficking involving Native Americans"; (3) granular information about the location of offenses, identifying characteristics of traffickers and victims, and mechanisms used to facilitate offenses; (4) the impact of foster care placements; (5) the impact of generational trauma and oppression; (6) the causes and effects of underreporting; (7) the "causes and effects of under-enforcement"; (8) the impact of jurisdictional complexities; (9) the impact of state law; (10) training needs; and (11) lack of available resources to fund service provider programs.[110] Accordingly, to address these concerns, a list of recommendations is included in the Report.[111]

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[107] To access this video, visit: https://www.ovc.gov/library/healing-journey.html.
[108] Int'l Human Rights Clinic at Willamette University College of Law, Modern Slavery in Our Midst: A Human Rights Report on Ending Human Trafficking in Oregon (2010).
[109] Int'l Human Rights Clinic at Willamette University College of Law, Human Trafficking & Native Peoples in Oregon: A Human Rights Report (2014).
[110] *Id*. at 41–58.
[111] *Id*. at 58–62.

The Report provides an excellent template for other states or federal judicial districts seeking to undertake a similar examination of trafficking responses in their jurisdictions. The Report also includes the interview questions used to gather the information forming the basis of the recommendations.[112]

USAOs are engaged in an unprecedented level of collaboration with tribal law enforcement, consulting regularly with them on crime-fighting strategies in each district, joining in federal-tribal task forces, sharing case and grant information, training investigators, and cross-deputizing tribal police and prosecutors to enforce federal law and to allow those deputized individuals to bring cases directly to federal court. Across the country, USAOs and the NICTI have trained over 1,000 tribal and local police officers, enabling those officers to receive their Special Law Enforcement Commissions (SLECs). SLEC holders are cross-deputized to enforce federal laws on Indian land—an important "force multiplier" for tribal communities where federal law enforcement resources may be thin or remotely located. United States Attorneys around the country are also designating tribal prosecutors as Special Assistant United States Attorneys, enabling them to bring cases directly to federal court.

Indian country prosecutions, particularly violent crime prosecutions, are an important part of the Department's mission, and the Department continually works to improve efforts in this area. These cases are a specific district priority for the forty-nine federal judicial districts with Indian country responsibility.

All USAOs with Indian country responsibility have at least one Tribal Liaison to serve as the primary point of contact with tribes in the district. Tribal Liaisons are an important component of the USAOs' efforts in Indian country. The Tribal Liaison program was first established in 1995 and codified with the passage of the Tribal Law and Order Act in 2010.[113] Tribal Liaisons play a critical and multi-faceted role. In addition to their duties as prosecutors, Tribal Liaisons generally fulfill a number of other functions. For example, they often coordinate and train law enforcement agents investigating violent crime and sexual abuse cases in Indian country. They also train BIA criminal investigators and tribal police presenting cases in federal court.

Tribal Liaisons often serve in a role similar to a local district attorney or community prosecutor in a non-Indian-country jurisdiction and are accessible to the community in a way not generally required of other Assistant United States Attorneys (AUSAs). Tribal Liaisons are assigned specific functions dictated by the nature of the district. They serve as the primary point of contact between the USAO and the Indian tribes located in the district. Tribal Liaisons typically have personal relationships with tribal governments, including tribal law enforcement officers, tribal leaders, tribal courts, tribal prosecutors, and social service agency staff.

Tribal Liaisons also know and work well with state and local law enforcement officials from jurisdictions adjacent to Indian country. These relationships enhance information sharing and assist the coordination of criminal prosecutions, whether federal, state, or tribal. It is important to note that while the Tribal Liaisons are collectively the most experienced prosecutors of crimes in Indian country, they are not the only AUSAs doing these prosecutions. The volume of cases from Indian country requires these prosecutions in most USAOs to be distributed among numerous AUSAs.

Indian country and violent crime, including human trafficking, remain priorities for the Department of Justice. Working together in partnership with our state and tribal counterparts, the

[112] *Id*. at B-1–B-2.
[113] Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261.

Department of Justice has the ability to increase prevention efforts, improve the success of trafficking investigations and prosecutions—and most importantly—reduce the victimization and suffering of AI/AN trafficking victims.

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Forced Labor in Supply Chains: Addressing Challenges

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I. Introduction

Forced labor throughout the world is connected to the United States through commercial supply chains that cross our borders and end in grocery and clothing stores, high-tech corridors, car sale lots, and elsewhere. While federal law allows prosecution of human trafficking committed overseas, the forced labor statute also targets United States actors profiting from a *venture* engaged in trafficking conduct overseas, provided that the actors know of, or recklessly disregard, the criminal activity.

Efforts to prosecute individuals profiting from imported goods that are tainted by forced labor are at a nascent stage and will need to overcome several challenges. Proving knowledge or reckless disregard by an individual or company may be difficult when force or coercion is not exerted by the individual or company's employees, but by its direct and indirect business partners, in some cases within multi-tiered product supply chains. Important evidence and witnesses may be located overseas. Forced labor may be tied to one shipment of a product, but not another, raising questions as to whether a tainted shipment taints the whole product stream and, if not, whether the defendant must be proven to have specific knowledge of the taint of that specific shipment. The same questions might apply to whether a tainted component infects an entire product. Finally, the contours of a "venture," while apparently expansive, are not fully defined by statute 18 U.S.C. § 1589.[1]

Nonetheless, it is plain that businesses and corporate officials who know about abuses, and do nothing to resolve them, can be found criminally responsible. Protecting U.S. markets from goods that are cheaply produced due to forced labor is a high priority of the U.S. government. Enforcement also protects and promotes values of freedom in the U.S. and around the world.

Sections II and III of this article will review the set of criminal, customs, and corporate disclosure laws, along with government procurement efforts, that aim to prevent and punish forced labor connected to supply chains. Section IV will present the status of the Department of Justice (DOJ) coordination with law enforcement partners to address these crimes and discuss strategies to develop evidence, which prosecutors throughout the United States may be able to further develop.

Prosecutors considering these cases are encouraged to be in touch early with DOJ's Human Trafficking Prosecution Unit (HTPU), which has developed expertise and relevant interagency partnerships that could be helpful during investigation and prosecution.

[1] 18 U.S.C. § 1589 (2012).

II. Criminal Statutes

A. 18 U.S.C. § 1589(b) and 18 U.S.C. § 1593A

The federal crime of forced labor in § 1589(b) punishes a person who "knowingly benefits, financially or by receiving anything of value, from participation in a venture . . . knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services" by prohibited means.[2] The prohibited means are:

(1) "force, threats of force, physical restraint, or threats of physical restraint to that person or another person;"

(2) "serious harm or threats of serious harm to that person or another person;"

(3) "abuse or threatened abuse of law or legal process; or"

(4) "any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, the person or another person would suffer serious harm or physical restraint."[3]

The term "venture" is defined in § 1591 (sex trafficking) as "any group of two or more individuals associated in fact, whether or not a legal entity."[4] Both §§ 1589 and 1591 appear in Chapter 77, but there is no explicit authority extending the definition from § 1591 to § 1589.

Persons that benefit financially from the trade in particular goods are liable if they know those goods were produced with forced labor. A more difficult case arises when the person benefiting from such trade, while lacking definite knowledge, was aware that taint was a risk, but took only limited steps to remedy the risk. What degree of risk and what failure to address that risk would constitute forced labor under a reckless disregard theory? These questions will be answered as cases are brought to the courts. The evidence must show that:

(1) Some individual(s) provided or obtained labor or services through the prohibited means;
(2) The defendant and said individual(s) participated in a common group of persons that were "associated in fact," that is, a venture;
(3) The defendant knowingly benefitted, financially or by receiving anything of value, from participating in the venture; and
(4) The defendant recklessly disregarded the fact that labor or services were obtained through the prohibited means.

18 U.S.C. § 1593A is very similar to 18 U.S.C. § 1589(b) in criminalizing anyone who knowingly benefits from participation in a venture that has engaged in peonage[5] or in the crime of unlawful conduct with respect to documents,[6] knowing or in reckless disregard that the venture has engaged in such a violation.

B. Other Criminal Statutes

An individual or company that directly engages in providing or obtaining labor or services through the prohibited means can be prosecuted under § 1589(a), without reference to financial benefit or

[2] *Id.* § 1589(b).
[3] *Id.* § 1589(a)(1)–(4).
[4] *Id.* § 1591 (2012 & Supp. III 2015).
[5] *Id.* § 1589 (2012).
[6] *Id.* § 1592.

to participation in a venture.[7] Further, 18 U.S.C. § 1596 provides for jurisdiction over violations of § 1589(a) even if the criminal conduct occurred overseas, provided that the alleged offender is physically present in the United States or is a U.S. citizen or permanent resident.[8] Presumably, this provision will rarely apply to cases of forced labor in imported goods because it would require that the importer directly exert force or coercion on the victims.

In addition, 18 U.S.C. § 1761 criminalizes the importation of goods manufactured, produced, or mined in whole or in part by convicts or prisoners.[9] Convict labor may in some cases constitute forced labor. Title 18, chapter 27 describes criminal customs offenses that may be committed by importers of goods produced with forced labor. For example, § 542 criminalizes entry of goods by means of false statements.[10]

III. Customs and Disclosure Laws and Their Relevance to Criminal Cases

A. Customs Measures

First enacted as part of the Tariff Act of 1930, also known as the Smoot-Hawley Act, U.S. law has long prohibited the importation of goods produced "wholly or in part . . . by convict labor or/and forced labor or/and indentured labor."[11] However, a "consumptive demand exception" for goods not produced domestically in the United States prevented effective enforcement of this prohibition for nearly a century.[12] That "loophole" was closed through the Trade Facilitation and Trade Enforcement Act of 2015.[13] Since then, U.S. Customs and Border Protection (CBP) has initiated at least four customs enforcement actions in the form of Withhold Release Orders (WROs), which withhold release of the goods into the United States. The current Administration's 2017 Trade Agenda named enforcement of this prohibition as a "key objective."[14]

Customs enforcement actions may in some circumstances provide a potential avenue for proving elements of forced labor criminal violations. While withholding goods at a port of entry requires no evidence of knowledge or reckless disregard on the part of an importer, CBP must publish the fact that goods were withheld pursuant to § 1307,[15] a fact which provides the importer notice of the WRO against its products. If the importer continues to benefit financially from a suspect trade relationship, documentation connected to WROs may be relevant evidence of knowledge or reckless disregard.

B. Transparency Measures

Similarly, transparency regimes may provide critical documentary evidence of knowledge or reckless disregard or, on the other hand, of legal compliance. The California Transparency in Supply Chains Act of 2010 is a California state law that requires any business with over $100 million in global revenue to post information on its website regarding steps it is taking, if any, to address the risk of human

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[7] *Id.* § 1589(a).
[8] *Id.* § 1596.
[9] *Id.* § 1761.
[10] *Id.* § 542.
[11] Tariff Act of 1930, ch. 497, § 307, 46 Stat. 689 (1930) (current version at 19 U.S.C. § 1307 (2012 & Supp. III 2015).
[12] China Diesel Imps., Inc. v. United States, 870 F. Supp. 347, 350 (Ct. Int'l Trade 1994).
[13] 19 U.S.C. § 4301 (2012 & Supp. III 2015).
[14] *Id.* § 2171(c)(1)(A) (2012); OFFICE OF U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF THE PRESIDENT OF THE U.S., 2017 TRADE POLICY AGENDA AND 2016 ANNUAL REPORT (2017).
[15] 19 C.F.R. § 12.42 (2017).

trafficking within its supply chain.[16] The California law in itself is a pure transparency measure. That is, it does not require any particular anti-trafficking measures on the part of a company. Compliance does not confer immunity, nor does lack of compliance imply reckless disregard. Nevertheless, compliance status may be a relevant fact. A complying public statement that a company has not taken any steps to address risks of trafficking in its supply chain may be evidence of reckless disregard. It is important to remember that the analysis of knowledge or reckless disregard is based on all the facts of a specific case.

The U.S. Congress has considered federal bills modeled on the California law, though such legislation has not been enacted as of this writing. The United Kingdom (UK) Modern Slavery Law, which applies to many American companies doing business in the UK, contains a similar transparency measure.[17] Corporate disclosures, or lack thereof, under the UK law may also provide pertinent evidence of knowledge or reckless disregard of forced labor or, on the other hand, of efforts to eliminate such risks.

C. Government Procurement Measures

The Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) released a final rule in January 29, 2015, to implement title XVII of the National Defense Authorization Act for Fiscal Year 2013 and Executive Order 13627, *Strengthening Protections Against Trafficking in Persons in Federal Contracts*.[18] The final rule prohibits contractors and subcontractors from engaging in trafficking in persons, procuring commercial sex, or using forced labor in performance of the contract.[19] A prospective federal contractor must certify that it implements a compliance plan to prevent, monitor, and detect human trafficking. The prospective contractor must also certify that it has conducted due diligence to confirm that its agents, subcontractors, and their agents do not engage in prohibited activity and that, in cases where prohibited activity occurred, the contractor implemented appropriate remedies and referrals. The rule outlines a number of prohibited recruitment and employment practices related to human trafficking vulnerability and specifies minimum requirements for the compliance plan.

While the Federal Acquisition Regulations applies only to federal contractors and subcontractors, the minimum requirements for compliance may constitute persuasive evidence of what level of action or inaction constitutes reckless disregard for purposes of the criminal forced labor statute.

D. Due Diligence

While the limits of "reckless disregard" have yet to be determined in the complex supply chain context, most defendants will attempt to argue that they have engaged in *due diligence* to eliminate forced labor from their supply chain. Attempts to develop due diligence norms have proliferated along with the field of business and human rights, which has grown by leaps and bounds in recent years. The field brings together a diverse range of professionals, including business procurement managers, marketing executives, government officials, international lawyers within intergovernmental institutions, community members affected by corporate activity, and human rights activists. These groups have painstakingly negotiated numerous industry-specific human rights due diligence standards. While many are voluntary, they may provide persuasive evidence of reasonable—and reckless—industry behavior.

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[16] CAL. REV. & TAX. CODE § 19547.5 (West, Westlaw through Ch. 685 of 2017 Reg. Sess.); CAL. CIV. CODE § 1714.43 (West, Westlaw through Ch. 685 of 2017 Reg. Sess.).
[17] U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, UNITED KINGDOM 2016 HUMAN RIGHTS REPORT (2017).
[18] Federal Acquisition Regulation; Ending Trafficking in Persons, 80 Fed. Reg. 4967-01 (Jan. 29, 2015) (codified at 48 C.F.R. pts. 1, 2, 9, 12, 22, 42, 52).
[19] 48 C.F.R. § 22.1703 (2017).

The *United Nations Guiding Principles on Business and Human Rights (UNGPs)*, endorsed by the UN Human Rights Council in June 2011, are the most widely accepted set of guidelines for companies and national governments.[20] The *OECD Guidelines for Multinational Enterprises* include well-recognized recommendations from member countries to multinational corporations.[21] The *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, while specific to minerals in conflict zones, provide a description of due diligence that may be more broadly useful.[22] The U.S. government released a National Action Plan on Responsible Business Conduct in December 2016.[23] A plethora of useful information about industry activities and norms is available from the Business and Human Rights Resource Centre,[24] and from the International Corporate Accountability Roundtable.[25] There is not a single authority that describes the parameters of due diligence. However, contrasting the conduct of a defendant with the norms put forth by industry, governments, and other stakeholders can support arguments that inaction is reckless when articulated norms would require action.

Effective due diligence by a corporation is likely to include risk assessment and risk management. As mandated by the Trafficking Victims Protection Reauthorization Act of 2005,[26] the U.S. Department of Labor (DOL) has provided two tools to assist companies in assessing and managing risk:

- As the name implies, the *List of Goods Produced by Child Labor or Forced Labor* identifies raw materials and manufactured goods and their source countries wherever there is sufficient evidence of forced labor (or child labor).[27] The list assists companies, as well as compliance and enforcement agencies, to identify high-risk areas within supply chains.
- DOL's Toolkit for Responsible Businesses describes "steps to a social compliance system," which may be relevant to establishing reasonable, or reckless, business conduct (adoption of these steps does not confer immunity; the analysis of knowledge or reckless disregard is based on all the facts of a specific case).[28]

IV. DOJ Coordination and Enforcement

Several federal agencies have authority to enforce criminal forced labor statutes. Investigative agencies include Homeland Security Investigations (HSI) of U.S. Immigration and Customs Enforcement (ICE), the Federal Bureau of Investigation (FBI), and the U.S. Department of State Diplomatic Security Service (DS), and all play a significant role in investigating allegations of forced labor and related violations in different contexts, including allegations of forced labor within overseas supply chains. HSI's specialized Forced Labor Program, located at HSI headquarters, leads targeted efforts to detect and investigate such allegations. As described above, CBP may also investigate and collect relevant evidence

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[20] UNITED NATIONS, OFFICE OF THE HIGH COMM'R, UNITED NATIONS HUMAN RIGHTS, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (2011).
[21] Organisation for Econ. Co-operation & Dev., OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011).
[22] ORGANISATION FOR ECON. CO-OPERATION & DEV., OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS OF MINERALS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS (3d ed. 2016).
[23] U.S. DEP'T. OF STATE, RESPONSIBLE BUSINESS CONDUCT: FIRST NATIONAL ACTION PLAN FOR THE UNITED STATES OF AMERICA (2016).
[24] BUS. & HUM. RTS. RESOURCE CENTRE (last visited Sept. 22, 2017).
[25] INT'L. CORP. ACCOUNTABILITY ROUNDTABLE (last visited Sept. 22, 2017).
[26] Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat 3558 (codified as amended in scattered sections of 18 U.S.C., 22 U.S.C., and 42 U.S.C.).
[27] U.S. Dep't. of Labor, Bureau of Int'l Labor Affairs, *List of Goods Produced by Child Labor or Forced Labor*, U.S. DEP'T. OF LAB. (last visited Sept. 22, 2017).
[28] *See* U.S. Dep't. of Labor, Bureau of Int'l Labor Affairs, *Comply Chain*, U.S. DEP'T OF LAB. (last visited Sept. 22, 2017).

in connection with its customs enforcement role. HTPU, as DOJ's national subject matter experts in forced labor, guides development of investigations into allegations of forced labor in overseas supply chains for potential prosecution in partnership with U.S. Attorneys' Offices.

Given the range of agencies involved, interagency coordination is necessary to streamline the development of these potentially complex investigations across multiple investigative agencies. Two informal working groups have convened to focus on coordinating specific aspects of these enforcement efforts. In addition, the Senior Policy Operating Group (SPOG), a TVPA-mandated interagency coordination body, has formed a standing Committee on Procurement and Supply Chains, and the National Security Council's Transnational Organized Crime Directorate has initiated an interagency dialogue to enhance the government-wide response to labor trafficking in supply chains.

V. Conclusion

The corporate sector is improving the sophistication of good-faith efforts to rid its supply chains of forced labor and other serious human rights abuses. While voluntary standards have proliferated, the creation and implementation of workable "hard law" frameworks for governments to hold corporations accountable are in their formative stages. Until now, individuals and corporations have mostly escaped criminal accountability for knowingly profiting from forced labor within their supply chains, abetted by complex global supply chains that make investigation and prosecution very challenging. This article makes the case that criminal accountability is possible, but that interagency collaboration will be critical for success. Prosecutors interested in bringing such cases are encouraged to contact HTPU at DOJ to benefit from existing interagency coordination and expertise.

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Prosecuting Sex Trafficking Cases Using a Drug-Based Theory of Coercion

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I. Introduction

In November 2013, a federal jury in the Middle District of Florida found Andrew Blane Fields guilty of five counts of sex trafficking by force, fraud, and coercion, and three narcotics counts.[1] At trial, the prosecutors presented evidence that Fields distributed controlled substances to the sex trafficking victims as a part of his scheme to manipulate and control their drug supply in order to coerce them to commit commercial sex acts for his profit.[2] The prosecution's theory of nonviolent drug-based coercion under 18 U.S.C. § 1591 presented a case of first impression for the court, and on appeal, the U.S. Court of Appeals for the Eleventh Circuit upheld the defendant's convictions and his 405-month sentence, finding that the trial court's "explanation regarding victims with special vulnerabilities was a direct application of the statutory definition of 'serious harm' to the facts of the case."[3] This article explains why such a theory of coercion was successful at this and similar trials. The article also includes practical tools for building better victim identification through education, improving investigative strategies, and prevailing on appeal in cases involving drug-based coercion.

II. Overview: Intersection of the Opioid Epidemic and Sex Trafficking

In 2016, the Drug Enforcement Administration (DEA) confirmed what many in the law enforcement community already knew: "Over the past 10 years, the drug landscape in the United States has shifted, with the tripartite opioid threat (controlled prescription drugs, fentanyl, and heroin) having risen to epidemic levels, impacting significant portions of the United States."[4] While it is common knowledge that many drug users ingest drugs to "numb the pain," opioids are, in fact, some of the most

[1] Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Convicted Sex Trafficker Sentenced to More Than 30 Years in Prison (Jan. 29, 2014).
[2] *Id.*
[3] United States v. Fields, 625 F. App'x 949, 952 (11th Cir. 2015).
[4] DRUG ENF'T ADMIN., U.S. DEP'T OF JUSTICE, 2016 NATIONAL DRUG THREAT ASSESSMENT SUMMARY at v (2016).

effective analgesics in existence.[5] Opioids are also extraordinarily addictive. When the pills run out, users often move from prescription medicines to heroin in order to support their habit and avoid painful withdrawal symptoms—which range from psychological to physical symptoms, including severe anxiety, muscle and bone pain, insomnia, sweating, abdominal cramping, diarrhea, nausea, and vomiting.[6] Studies have also shown that the extended abuse of opioids can result in long-term neurological effects, causing a loss of the brain's white matter, which "may affect decision-making, behavior control, and responses to stressful situations."[7]

These well-known addictive qualities of opioids, as well as the long-term neurological consequences of their use, make them a near perfect tool for traffickers who control or have access to a drug supply to compel opioid addicts into performing commercial sex acts for the traffickers' financial benefit. In one study, at least 84 percent of sex trafficking survivors reported substance abuse during their victimization, and nearly 25 percent of sex trafficking survivors used heroin.[8] In 2014, over 15 percent of victims who contacted the Polaris Project through its trafficking hotline and textline disclosed that their traffickers utilized "induced substance abuse" as a method of control.[9] One emergency room physician and human trafficking expert succinctly summarized the vicious cycle in which the addict-victim becomes trapped as follows:

> The physical craving the body develops for opioids is profound and unrelenting. Add extreme brainwashing, psychological manipulation, and physical trauma and you end up with someone who is trapped in a cycle. The power of addiction combined with the coercion of a trafficker can be a lethal combination. We have seen a number of these patients die from overdose, suicide, and infections.[10]

The growing intersection between sex trafficking and substance abuse can present itself in various iterations. A case might involve a young woman with no prior drug exposure whose "boyfriend" introduces her to a drug with the intent that she become dependent—both on the drug and on him to supply it—and then manipulates her into a situation where she cannot pay off her drug "debt" without engaging in commercial sex. In another scenario, the trafficker may exploit a victim who already struggles with a substance dependency by telling her that any attempt to alert the authorities or stop working for him will result in her going to jail, where she will go through a horrible withdrawal. Another common situation occurs when a person develops a drug dependency as a coping mechanism for the trauma stemming from her involvement in the commercial sex trade; often, the trafficker fosters that dependency by providing her drugs to keep her compliant and in his employ. While each of these scenarios might involve violations of Section 1591,[11] none of them will reach a courtroom if law enforcement and other practitioners are not equipped to recognize the signs, both of sex trafficking and of drug-based coercion.

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[5] *See, e.g.,* Jonathan S. Miller, *Increasing Access to Naloxone: Overcoming Societal Challenges to Reduce Opioid Overdose Fatalities*, 26 ALB. L.J. SCI. & TECH. 77, 82 (2016).
[6] *See, e.g., Opiate and Opioid Withdrawal*, MEDLINEPLUS (last updated Sept. 5, 2017).
[7] *Heroin*, NIH: NAT'L INST. ON DRUG ABUSE (last updated July 2017).
[8] Laura J. Lederer & Christopher A. Wetzel, *The Health Consequences of Sex Trafficking and Their Implications for Identifying Victims in Healthcare Facilities*, 23 ANNALS HEALTH L. 61, 82 (2014); Hanni Stoklosa et al., *Human Trafficking, Mental Illness, and Addiction: Avoiding Diagnostic Overshadowing*, 19 AMA J. ETHICS 23, 26 (2017).
[9] POLARIS, SEX TRAFFICKING IN THE U.S.: A CLOSER LOOK AT U.S. CITIZEN VICTIMS 6 (2015).
[10] Katherine Chon, *Human Trafficking and Opioid Abuse*, ADMIN. FOR CHILD. & FAMILIES: THE FAMILY ROOM BLOG (May 17, 2016), https://wayback.archive-it.org/8654/20170322021028/https://www.acf.hhs.gov/blog/2016/05/human-trafficking-and-opioid-abuse (discussing an interview with Dr. Hanni Stoklosa)
[11] 18 U.S.C. § 1591 (2012 & Supp. III 2015).

III. Identifying Victims of Drug-Related Coercion

A. Engaging Local Law Enforcement

Perhaps the most challenging obstacle in building a successful drug-related sex trafficking prosecution is identifying victims who, at first glance, appear solely as addicts whose substance abuse camouflages the crime of sex trafficking under a layer of illegal drug possession and other related criminal activity.

Imagine, for example, the heroin user in a local motel room. The motel manager calls the police because of complaints of suspected drug use from occupants in neighboring rooms, and police respond to encounter an eighteen-year-old female on heroin in the room, which happens to be located in a high-prostitution area of town, with a male hurriedly exiting upon their arrival. The responding officers are likely patrol officers or members of the local department's vice squad, and their ability to identify the heroin user as a potential victim of human trafficking depends in large part on whether they have been trained on indicia of human trafficking, including the use of drug-based coercion. To close any gaps in victim identification, it is imperative to proactively reach out to local law enforcement in your district to educate them on these issues.

Specialized task forces are another valuable tool to ensure that federal and local law enforcement work together to identify and prosecute human trafficking predicated on drug-based coercion. Since 2004, the Bureau of Justice Assistance for the DOJ, in conjunction with the Office for Victims of Crime, has funded over forty Anti-Human Trafficking Task Forces, making funds available for investigative agencies and nonprofit service providers to better collaborate, investigate, assist victims, provide trafficking-specific training, and trade intelligence regarding human trafficking within their task force region and across the country. These task forces produce a significantly increased number of successful human trafficking prosecutions when compared to jurisdictions that have not benefited from this type of collaboration.[12]

B. Educating the Public through an Emphasis on Medical Providers

In addition to law enforcement, medical professionals and substance abuse counselors are particularly valuable resources when it comes to identifying victims of drug-coerced trafficking because they are among the individuals most likely to come into contact with the victims. At least one study suggests that approximately 88 percent of sex trafficking victims have come in contact with a healthcare provider during their victimization, and more than half of those who sought medical attention first encountered treatment in the emergency room.[13] Similarly, one practitioner reported that over 50 percent of the trafficking victims she has encountered in her emergency room were "hooked on heroin."[14] It stands to reason that many of these victims have also come into contact with substance abuse counselors while they were being trafficked. Without adequate training for these professionals, the addict might go unnoticed as a sex trafficking victim and instead only be treated as another individual suffering from the opioid epidemic. Such a concern has been expressed by medical professionals who, after attending a

[12] *See, e.g.* DUREN BANKS & TRACY KYCKELHAHN, U.S. DEP'T OF JUSTICE, NCJ 233732, CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS, 2008–2010, at 1 (2011).
[13] Lederer & Wetzel, *supra* note 8, at 77.
[14] Dr. Hanni Stoklosa, Anti-Trafficking Policy Developments Impacting Health Care Providers, Remarks to the Health and Human Services Task Force to Prevent and End Human Trafficking (Mar. 29, 2016).

human trafficking training, reported that they had previously encountered drug addicts who they labeled "difficult" but, in retrospect, may have been sex trafficking victims.[15]

Thus, it is vital that federal law enforcement officials do their part to help train medical professionals and substance abuse counselors concerning indicia of human trafficking. In these trainings, federal prosecutors and agents are particularly helpful in allaying medical professionals' fears about violating the Health Insurance Portability and Accountability Act (HIPPA). These fears arise because not all medical professionals are aware of the law enforcement and related exceptions to HIPPA that allow them to divulge protected health information to law enforcement concerning a victim or an ongoing threat to the safety of an individual.[16]

When attempting to better identify potential victims, it is also important to remember that concerned citizens are valuable resources in the fight against human trafficking. Parents, teachers, hotel operators, taxi drivers, and truckers are all examples of individuals who may witness the indicia of human trafficking activity without realizing it. Human trafficking campaigns sponsored by governmental and non-governmental agencies have helped educate the public concerning human trafficking, and federal prosecutors and agents can assist in these efforts by organizing trainings and outreach activities specific to their districts.

IV. Recent Human Trafficking Prosecutions Involving Drug-Based Coercion

Given the rise of the opioid epidemic and the acute vulnerabilities of opioid addicts, it is no surprise that there has been an increase in the number of human trafficking investigations and prosecutions involving drug-coerced victims. To provide context for how a drug-based theory of coercion has been implemented in practice, we provide a brief summary of two successful prosecutions; we then offer some practice tips for prosecuting these types of cases.

A. Manipulating Addiction to Pain Pills: *United States v. Fields*

United States v. Fields[17] represented a joint prosecution by attorneys from the United States Attorney's Office for the Middle District of Florida and from the Human Trafficking Prosecution Unit (HTPU). There, a jury found Andrew Fields guilty of five counts of sex trafficking for his role in a sex trafficking scheme that relied on manipulating the victims' addiction to pain pills; the jury also found three narcotics counts arising from his distribution of controlled substances. The district court sentenced Fields to thirty-three years and nine months' imprisonment, and the Eleventh Circuit subsequently upheld the conviction and sentence.[18]

The Fields investigation began in April 2011, when a Clearwater/Tampa human trafficking task force responded to a tip that a minor was being advertised for prostitution on Backpage.com. When members of the task force responded to the advertisement and confronted the potential victim, they realized that, although she was nineteen years old, she was being trafficked against her will. The victim showed the responding officers a piece of paper that had columns for "owed" and "paid." She explained that these were computations for her "debt to the defendant" for prescription pills he had provided to her and that she had to pay off the debt by going to prostitution calls. She told the officers that she did not

[15] Maureen McKinney, *Hospitals Train Staff to Spot Victims of Human Trafficking*, MODERN HEALTHCARE MAG. (June 20, 2015).
[16] *See* 45 C.F.R. §164.512(f)(3), (j)(1) (2016).
[17] United States v. Fields, No. 8:13–cr–198–T–24TGW, 2013 WL 11318863 (M.D. Fla. Dec. 10, 2013).
[18] United States v. Fields, 625 F. App'x 949, 951 (11th Cir. 2015).

want to engage in prostitution but that she "was afraid of the withdrawal sickness, because the defendant would withhold the prescription pills from her if she did not do as he said."

The victim subsequently explained that she met Fields when he reached out to her and offered to provide her "protection" for when she provided escort services. The victim stated that while she had been a recreational drug user prior to meeting Fields, he provided her prescription pain pills, including Oxycodone, and showed her how to crush and inject the pills for a quicker high. The victim soon became addicted to the prescription opioids and other controlled substances Fields gave to her. Fields then informed her that she would have to prostitute for him until she worked off the drug debt that she owed him—thus creating an unending cycle of exploitation and drug addiction for the victim and a continuous profit for Fields. The victim further explained to law enforcement that Fields would physically force-feed drugs down her throat at times. At other times, he would threaten to stop the flow of drugs, which would induce violent physical withdrawal symptoms, including diarrhea, nausea, vomiting, stomach cramps, headaches, and hot and cold sweats.

The Fields investigation continued to reveal additional victims who met Fields in different ways but whose victimization and exploitation shared the common thread of coercion to commit commercial sex acts fueled by a drug addiction manipulated by Fields. One victim testified at trial that Fields would mention the debt owed every single day, and often traded sex with the victims for pills (but not to reduce their debt). The investigation ultimately revealed that, over the course of the timeframe in question, Fields filled a total of 11,865 prescriptions for pain pills, including 4,200 dosage units of Oxycodone.

The government successfully argued to the jury that Fields's creation, exacerbation, and manipulation of his victims' opioid addictions satisfied the second element of the sex trafficking statute, which requires that the defendant acted while knowing "that means of force, threats of force, fraud, [or] coercion" would be used to cause a victim to commit a commercial sex act.[19] With respect to the drug withholding and manipulation, the government focused on "coercion," which is statutorily defined as "threats of serious harm to or physical restraint against any person" or "any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person."[20] "Serious harm" is defined as "any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity [to] avoid incurring that harm."[21]

The district and circuit courts agreed with the government's arguments and upheld the jury's verdict. The district court, in denying a defense pretrial motion, explained that the question as to "whether the threat of withdrawal sickness can constitute 'coercion' to satisfy the second element" was one of first impression in the Middle District of Florida.[22] Recounting that the victims feared the extreme symptoms of opiate withdrawal the most, the court agreed that the defendant's manipulation of the victims' addiction constituted "serious harm" under the statute, finding the "threat of withdrawal sickness constitutes 'psychological' harm that is 'sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.'"[23] In upholding

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[19] *See* 18 U.S.C. § 1591(a)(2).
[20] *Id.* § 1591(e)(2).
[21] *Id.* § 1591(e)(4).
[22] United States v. Fields, No. 8:13–cr–198–T–30TGW, 2013 WL 5278499, at *1–2 (M.D. Fla. Sept. 18, 2013) (denying Defendant's Amended Second Motion in Limine to Limit Evidence on Sex Trafficking Counts to Force, Threats of Force, Fraud or Coercion).
[23] *Id.* at *1.

the district's court's denial of a motion for acquittal, the Eleventh Circuit noted that Fields "coerced the victims to engage in commercial sex acts by withholding pills from them and thereby causing them to experience withdrawal sickness if they did not engage in prostitution."[24]

B. Manipulating Addiction to Heroin: *United States v. Mack* and *United Sates v. Groce*

In two recent jury trials, the prosecutors successfully argued that manipulating and withholding heroin from victims qualifies as a means of coercion that satisfies the second element of 18 U.S.C. § 1591.

In *United States v. Mack*,[25] a case prosecuted by the United States Attorney's Office for the Northern District of Ohio, the defendant, Jeremy Mack, was convicted of four counts of sex trafficking as well as one count of conspiracy to commit sex trafficking, two counts of distribution of a controlled substance, and two counts of witness tampering. The district court sentenced the defendant to life imprisonment for each count of sex trafficking, five years for the conspiracy count, and twenty years each for the narcotics and witness tampering counts. The Sixth Circuit upheld the defendant's conviction and sentence, and the Supreme Court denied certiorari.[26]

In *Mack*, three of the four sex trafficking victims testified and outlined the defendant's scheme for manipulating their drug supply in order to compel them into prostituting themselves on his behalf. Two adult victims testified that they were heroin addicts prior to meeting Mack and that Mack was initially their drug dealer. One victim explained that when she ran out of money, Mack told her she could have sex with him in exchange for heroin. The victim complied, thinking that this would make the drugs free, but Mack later told her that the drugs were not free and the only way she could repay her debt was to prostitute herself on his behalf. The victim explained that, due to her severe addiction, she could never pay her debt and was in a "never-ending cycle." The second adult victim stated that she eventually had a drug debt owed to Mack that he said she could repay by prostituting herself. Despite not wanting to engage in prostitution, the victim felt compelled because she needed the heroin. On certain occasions, the victim would become ill because the defendant refused to give her heroin until she went on dates. The third victim detailed a similar scheme regarding a cocaine addiction that the defendant manipulated. However, because that victim was a minor, the government was not required to prove force or coercion.[27]

On appeal, the defendant argued that the victims had pre-existing drug addictions and that they entered into the prostitution arrangement voluntarily because it "was a convenient way to pay for the drugs they wanted." The Sixth Circuit found, to the contrary, that the defendant did coerce the victims into prostitution by initially supplying them with drugs on the pretense that the drugs were free and then cutting off the supply of free drugs and demanding payment. As a result, the victims felt compelled to prostitute themselves or risk withdrawal symptoms, which they described in detail.[28]

In *United States v. Groce*,[29] a joint prosecution by attorneys from the United States Attorney's Office for the Western District of Wisconsin and HTPU, the defendant, Monta Groce, was found guilty of three counts of sex trafficking, two counts related to interstate transportation for purposes of prostitution, one count of maintaining a place for the distribution of narcotics, one count of brandishing a firearm in relation to a drug trafficking crime, and one count related to witness retaliation.[30] The district court

[24] United States v. Fields, 625 F. App'x 949, 952 (11th Cir. 2015).
[25] United States v. Mack, 298 F.R.D. 349, 350 (N.D. Ohio 2014).
[26] United States v. Mack, 808 F.3d 1074, 1085 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 1231 (2016).
[27] *Id.* at 1078–79, 1081.
[28] *Id.* at 1080–82. The Sixth Circuit also upheld the convictions on the basis that the defendant used force or the threat of force to cause his victims to engage in prostitution. *Id.* at 1082–83.
[29] United States v. Groce, No: 3:15–cr–78, (W.D. Wisc. July 15, 2016).
[30] The defendant was acquitted on one count of attempted sex trafficking.

sentenced the defendant to twenty-five years' imprisonment, but the convictions and sentence are currently being appealed.

Three victims testified for the government in the *Groce* trial. Similar to the victims in *Mack*, all of the victims outlined the defendant's scheme to withhold heroin from the victims unless they performed acts of prostitution on his behalf. In the case of two of the victims, they lived with the defendant in a house at which he also sold drugs. At first, Groce was the victims' heroin dealer, but he then coerced them into going on prostitution calls for his benefit when they did not have enough money to pay him for the heroin. The defendant "charged" the victims more for the heroin than they made for a sex act, and thus he claimed that the victims were constantly in debt to him. The victims knew that if they did not go on the prostitution calls, the defendant would stop providing them with heroin and they would go into withdrawal. The victims explained the severe effects of withdrawal and stated that they felt as if they had no choice but to go on the calls to prevent withdrawal. One of the victims helped the other escape, at which point the defendant claimed that the victim who remained with the defendant "owed" him for the lost proceeds from the victim who escaped.

The third victim testified that she routinely prostituted herself voluntarily but that on one occasion she misplaced the defendant's prepaid debit card and the defendant ordered her to go on a call to repay him. Despite her unwillingness to go on that call, the victim completed the call because the defendant was her source of heroin, and she feared that he would withhold heroin from her, causing her to experience withdrawal symptoms.

Although the central tool of coercion was the defendant's control of the heroin supply, he also "punished" the victims in different ways, including hitting them and isolating them when they disobeyed his orders or withheld money from him. Groce also routinely carried and brandished a gun, which added to the victims' climate of fear.

V. Lessons Learned and Practice Tips

A. Working with Local Law Enforcement to Identify and Investigate Cases

Given that local law enforcement will often be the first to encounter victims of drug-based coercion, federal partners should invest proactively in relationships with these invaluable partners and engage them throughout an investigation of a trafficking scheme based on such coercion. In *Fields*, a collaborative task force was responsible for first identifying the case, and local law enforcement partners continued to work the case to its completion. Similarly, in *Groce*, local police were the first to investigate the defendant as a potential trafficker and drug dealer, and though the FBI became the lead investigative agency on the case, local police continued to assist throughout the prosecution. Local agencies were particularly helpful in *Groce* because much of the trafficking scheme occurred in a small community in Wisconsin where police officers knew many of the victims and witnesses from previous encounters. Additionally, in *Groce*, prior traffic stops were helpful to tie specific Mann Act violations to a specific date because the stops happened to occur when the victims were being driven out of a state for a scheduled prostitution call.[31]

B. Utilizing a Victim Witness Coordinator

In all human trafficking investigations and prosecutions, a victim witness coordinator provides vital support to ensure that the victims' needs, expectations, and concerns are continually met throughout the investigation and prosecution. This is especially true in cases involving victims who are currently using or recovering from substance abuse addictions. The victim witness coordinator will be essential to

[31] *See* 18 U.S.C. §§ 2421–2422 (2012 & Supp. III 2015) (criminalizing transportation across state lines for the purpose of prostitution).

support the prosecution team by ensuring that the victims' needs are met during the investigation, trial preparation, and the trial itself. For example, victims may need to travel for trial and may need access to methadone treatments, both of which victim witness coordinators can help facilitate.

C. Charging Decisions: Considering Other Drug Crimes

Prosecutors who are pursuing human trafficking charges are encouraged to consider other potentially relevant statutes related to human trafficking, including transportation across state lines for the purpose of prostitution[32] and interstate travel in aid of racketeering enterprises.[33] In a trafficking prosecution based on drug-related coercion, there are even more corollary charges to consider, such as narcotics violations that can be charged and will be useful to ensure that the defendant is held accountable for the entire scope of his criminal conduct. For example, in both *Fields* and *Mack*, the defendants were convicted of multiple counts of distribution of a controlled substance in violation of 21 U.S.C. § 841(a)(1),[34] and in *Groce*, the defendant was convicted of maintaining a drug place for the distribution of narcotics in violation of 21 U.S.C. § 856(a)(1).[35]

D. Convey Drug-Based Coercion Theory Early and Often

Prosecutors should anticipate that judges may have less familiarity with the relevant human trafficking statutes compared to other more frequently charged crimes. As a result, we encourage prosecutors to educate the court on the elements of the statute and the specific evidence supporting those elements as early as possible through pleadings and a trial brief. This is especially true in a prosecution focusing on drug-based coercion.

E. Use of an Expert on Addictive Properties of Drugs

We recommend considering whether expert testimony from a doctor or a substance abuse counselor would be beneficial to educate the judge and jury concerning the addictive properties of certain drugs. This testimony is particularly helpful to provide an unbiased, scientific analysis of the psychological harm and physical pain that accompanies withdrawal symptoms for drugs such as opioids. If the judge and jury understand the extent of the symptoms, which include nausea, sweating, muscle spasms, and cravings for the drugs, they will also likely understand the supreme effectiveness of manipulating addiction as a means of coercion in sex trafficking cases. In *Fields*, the prosecution called a pharmacology professor to serve as an expert and testify concerning different classes of drugs, physical dependence, and withdrawal symptoms. Similarly, in *Groce*, the government used a licensed clinical social worker, who had extensive experience as a substance abuse counselor, as an expert on general characteristics of heroin, the addictive nature of heroin, and withdrawal symptoms for heroin addicts. It should be noted, however, that while expert testimony can provide a neutral explanation as to addictive properties of drugs and withdrawal symptoms, some of the most compelling testimony concerning those issues typically comes from the victims themselves because the victims can best explain to the judge and jury firsthand how they felt while experiencing withdrawal symptoms.

F. Victim Vulnerability

The vulnerability of drug addicts to coercion based on manipulation of their drug supply is at the center of any trafficking prosecution based on this theory. In essence, the trafficker is preying on that vulnerability, the victims' addiction to drugs, to compel the victims to perform acts of commercial sex for

[32] *See id.*
[33] *See* 18 U.S.C. § 1952 (2012 & Supp. III 2015).
[34] 21 U.S.C. § 841(a)(1) (2012).
[35] 21 U.S.C. § 856(a)(1) (2012).

the trafficker's financial benefit. The definition of "serious harm" under Section 1591 takes such vulnerabilities into account by reference to "a reasonable person of the same background and in the same circumstances";[36] the Supreme Court has also held that vulnerabilities are relevant to determining whether coercion was sufficient to compel a victim.[37] As a result, we recommend that prosecutors highlight this vulnerability and legal principle by seeking both an appropriate "vulnerability" jury instruction and sentencing enhancement.

In *Fields*, the district court instructed the jury that when they were determining whether the defendant coerced the victims to engage in commercial sex acts, they "may consider the victim's special vulnerabilities" and "whether the victim was vulnerable in some way such that the actions of the defendant, even if not sufficient to compel another person to engage in commercial sex acts, would have been enough to compel a reasonable person of the same background and in the same circumstances."[38] The Eleventh Circuit upheld the defendant's conviction, finding that the court's instructions did not misstate the law or mislead the jury, and stating that the court's "explanation regarding victims with special vulnerabilities was a direct application of the statutory definition of 'serious harm' to the facts of the case."[39] Additionally, just as prior and subsequent prostitution by victims ordinarily does not bar prosecution, and often evidence of such should be excluded at trial under Federal Rule of Evidence 412,[40] prior and subsequent drug use by victims should not bar employing a theory of drug-based coercion. In *Fields*, *Mack*, and *Groce*, several of the victims abused drugs before meeting the defendants, and as the Sixth Circuit explained in upholding the convictions in *Mack*, the victims' "pre-existing drug addiction [did] not make *Mack*'s actions any less coercive."[41] In fact, a pre-existing drug addiction should not necessarily be perceived as a weakness in a case because the exploitation of that addiction by a trafficker can be among the most compelling aspects of the drug-related coercion theory of prosecution. As articulated by the district court in *Fields*, the "[d]efendant cannot defeat his prosecution through [pointing to] the very traits of his victims that he sought to exploit, because those traits comprised the victims' 'backgrounds' and 'circumstances' in evaluating the seriousness of [the d]efendant's threatened harm."[42]

Finally, we recommend arguing for a vulnerable victim enhancement pursuant to United States Sentencing Guideline Section 3A1.1(b)(1). This section allows the court to increase a sentence by two levels "if the defendant knew or should have known that a victim of the offense was a vulnerable victim," meaning, in this context, that the victim is "particularly susceptible to the criminal conduct."[43] The district court granted such an enhancement for the victims in *Groce*,[44] and although that case is currently on appeal, the Seventh Circuit has upheld the applicability of the enhancement in another Wisconsin case, *United States v. Guidry*, in which the defendant was sentenced to twenty-five years' imprisonment after pleading guilty to Mann Act and drug violations.[45] In upholding the applicability of the enhancement in *Guidry*, the Court of Appeals explained that the defendant controlled the victim by "[using] his knowledge that [the victim] was addicted to heroin and suffered painful withdrawal symptoms if she did

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[36] 18 U.S.C. § 1591(e)(4) (2012).
[37] United States v. Kozminski, 487 U.S. 931, 952 (1988).
[38] *See* Transcript of Proceedings (Jury Trial – Volume 7) at 79–80, United States v. Fields, 625 F. App'x 949, 952 (M.D. Fla. 2013) (No. 14–10441).
[39] United States v. Fields, 625 F. App'x 949, 952 (M.D. Fla. 2013).
[40] FED. R. EVID. 412; *see, e.g.,* United States v. Mack, 808 F.3d 1074, 1084 (6th Cir. 2015) (upholding district court's decision to exclude evidence of victims' prior history of prostitution).
[41] *Id.* at 1082.
[42] United States v. Fields, No. 8:13–cr–198–T–24TGW, 2013 WL 11318863, at *3 (M.D. Fla. Dec. 11, 2013) (denying Defendant's Renewed Motion for Judgement of Acquittal).
[43] U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 cmt. n.2 (U.S. SENTENCING COMM'N 2004).
[44] United States v. Groce, No: 3:15–cr–78, (W.D. Wisc.) Transcript of Sentencing Held October 21, 2016, Document #149, *at* 8, filed October 26, 2016.
[45] U.S. v. Guidry, 817 F.3d 997, 1001, 1009 (7th Cir. 2016).

not receive it"; the Court also stated that the defendant "preyed on [the victim's] addiction in order to force her to engage in sexual acts."[46] Moreover, although the district court denied the application of such an enhancement in *Fields*, the Eleventh Circuit, perhaps mistaking the district court's ruling, stated that the application of the enhancement would not be an error because the "victims' drug addictions rendered them particularly susceptible to Field's selling and dispensing of controlled substances."[47] Other circuits have reached similar conclusions.[48]

VI. Conclusion

Drug-related coercion is as effective as actual force when it comes to compelling victims to prostitute,[49] and the success of the above cases demonstrates that convictions are obtainable. Such prosecutions, however, require additional considerations and resources to ensure that all potential victims are identified and that their needs are adequately met throughout the investigation. As a result, prosecutors should be prepared to work hand-in-hand with their local law enforcement counterparts and victim witness specialists to achieve similar successes in vindicating the rights of drug-addicted victims being trafficked by individuals who prey on their addictions. Prosecutors are encouraged to contact HTPU at (202) 616-4588 or by email at HTPU@usdoj.gov at the onset of investigations involving drug-based coercion to discuss current trends, investigative and prosecution strategies, and legal issues and developing case law.

ABOUT THE AUTHORS

❑ **Lindsey Roberson** joined the Department of Justice's Human Trafficking Prosecution Unit as a trial attorney in January of 2017. Prior to her current position, Ms. Roberson served as a prosecutor for the Fifth Judicial District of North Carolina, where she focused on special victim cases, including human trafficking, and drafted North Carolina's Safe Harbor Act for Victims of Sex Trafficking legislation. She has previously written on the topic of drug addiction and human trafficking, and has served as an Adjunct Professor at the University of North Carolina at Wilmington, where she taught courses on human trafficking and provided lectures on criminal law. Ms. Roberson began her legal career as a law clerk for the Honorable James C. Fox in the Eastern District of North Carolina.

❑ **Shan Patel** joined the Criminal Section of the Department of Justice's Civil Rights Division through the Attorney General's Honors Program in 2007. As an attorney in the Criminal Section, he has prosecuted a wide variety of civil rights cases, including human trafficking violations, law enforcement misconduct cases, and hate crimes. In 2015, Mr. Patel joined the Human Trafficking Prosecution Unit, and has tried cases related to both labor and sex trafficking, including *United States v. Groce*, which is discussed in this article.

[46] *Id.* at 1009.
[47] United States v. Fields, 625 F. App'x 949, 953 (M.D. Fla. 2013).
[48] *See* United States v. Royal, 442 F. App'x 794, 798 (4th Cir. 2011) (finding that the vulnerable victim enhancement was applicable where the defendant "took advantage of each victim's drug dependence vulnerability" during a sex trafficking conspiracy); United States v. Amedeo, 370 F.3d 1305, 1317–18 (11th Cir. 2004) (finding victim "vulnerable" due to drug addiction in distribution of cocaine to a minor prosecution); United States v. Evans, 272 F.3d 1069, 1091 (8th Cir. 2001) (affirming district court's finding of vulnerability in Mann Act prosecution where defendant provided drugs and alcohol to victim who was addicted to those substances).
[49] *See, e.g.,* United States v. Kozminski, 487 U.S. 931, 955–56 (1988) (Brennan, J., concurring) (noting that "drug addiction . . . can eliminate the will to resist as readily as the fear of a physical blow").

Note from the Editor . . .

This issue on Human Trafficking is the last in a five issue series of Attorney General priority issues—Violent Crime I, Civil Immigration, Criminal Immigration, Violent Crime II, and now, Human Trafficking. We are indebted to Gretchen Shappert (EOUSA), Andrew Goldsmith (ODAG), and Steve Cook (ODAG) for their leadership on these issues. We would also like to thank Karen Stauss, Senior Policy Counsel, Human Trafficking Prosecution Unit, Civil Rights Division, for serving as editor, writer, and, most importantly, mentor on this issue.

Here at the Publications Unit, we are excited about the upcoming issues of the Bulletin. Over the next year, look for Bulletins on emerging issues in your practice, bankruptcy, training, appellate issues, and a revitalized Project Safe Neighborhood, among others. Our continuing goal is to serve you, the practicing attorney in the United States Attorney community and Department family. If you have suggestions as to how we can meet that goal or if you have ideas for Bulletins or if you are interested in writing for us, please contact me at tate.chambers@usdoj.gov.

Thank you for your continued readership.

K. Tate Chambers