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## Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later

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# INTERPRETING JUDICIAL INTERPRETATIONS OF THE CRIMINAL STATUTES OF THE TRAFFICKING VICTIMS PROTECTION ACT: TEN YEARS LATER

MOHAMED Y. MATTAR\*

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## INTRODUCTION

Over ten years ago Congress passed the Trafficking Victims Protection Act (TVPA).<sup>1</sup> This Article is the first comprehensive study that examines

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1. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) [hereinafter TVPA]. For a discussion of the TVPA, see generally Terry Coonan, *The Trafficking Victims Protection Act: A Work in Progress*, 1 INTERCULTURAL HUM. RTS. L. REV. 99 (2006); Angela D. Giampolo, *The Trafficking Victims Protection Reauthorization Act of 2005: The Latest Weapon in the Fight Against Human Trafficking*, 16 TEMP. POL. & CIV. RTS. L. REV. 195 (2006); Sally Terry Green, *Protection for Victims of Child Sex Trafficking in the United States: Forging the Gap Between U.S. Immigration Laws and Human Trafficking Laws*, 12 U.C. DAVIS J. JUV. L. & POL'Y 309 (2008); Elizabeth Kaigh, *Whores and Other Sex Slaves: Why the Equation of Prostitution with Sex Trafficking in the William Wilberforce Reauthorization Act of 2008 Promotes Gender Discrimination*, 12 SCHOLAR 139 (2009); Rosy Kandathil, *Global Sex Trafficking and the Trafficking Victims Protection Act of 2000: Legislative Responses to the Problem of Modern Slavery*, 12 MICH. J. GENDER & L. 87 (2005); Sonia Merzon, *Extraterritorial Reach of the Trafficking Victims Protection Act*, 39 GEO. WASH. INT'L L. REV. 887 (2007).

the cases decided in accordance with the Act.<sup>2</sup> An initial reading of court decisions suggests a significant expansion of criminal liability and a broad interpretation of the offenses that were recognized for the first time to punish those who commit the act of trafficking in persons. After discussing the categorization of the crime of trafficking in persons as a contemporary form of slavery that subjects a victim of trafficking to exploitation, the Article explores how courts define the various elements of the crime of trafficking in persons, including a commercial sex act of prostitution or pornography as a purpose of trafficking, the meaning of forced labor or services as the other purpose of trafficking, serious harm and how it was recently broadened to include nonphysical types of harm, threats of deportation as a form of abuse of the legal process, and when threats of deportation amount to involuntary servitude as well as indebtedness as the basis for the offense of peonage. Then the Article will refer to several constitutional challenges that were raised by defendants trying to escape liability under the TVPA, in particular the Ex Post Facto Clause of the Constitution, the Interstate Commerce Clause, the prohibition against double jeopardy, and the void-for-vagueness doctrine. The Article will show that most constitutional claims failed. However, diplomatic immunity still serves as a shield from prosecution, and this required a congressional amendment to the TVPA. The TVPA was also amended to apply on an extraterritorial basis, thus changing existing presumption against extraterritoriality. The Article will conclude by addressing how courts establish the relationship between domestic legislation and international law, especially the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which the United States ratified.

This Article is divided into six parts. Part I explores the nature of the crime of trafficking in persons and raises the question whether it should be categorized as a form of exploitation rather than as a form of slavery. Part II will examine the definitions of the elements of the crime of trafficking in persons as interpreted by the courts. Part III covers constitutional challenges that may threaten the application of the TVPA and related statutes. Part IV addresses the courts' conclusion that the TVPA does not override diplomatic immunity. Part V discusses when the TVPA applies on an extraterritorial basis and the potential evolution of court decisions from the traditional principle of territoriality to extraterritoriality as an international response to an international crime. Finally, Part VI calls upon

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2. For articles discussing the various aspects of the TVPA, see generally Mohamed Mattar, *Trafficking in Persons: An Annotated Legal Bibliography Delineating Five Years of Development, 2005-2009*, 2 PROTECTION PROJECT J. HUM. RTS. & CIV. SOC'Y 153-209 (2009); Mohamed Mattar, *Trafficking in Persons: An Annotated Bibliography*, 96 LAW LIBR. J. 669 (2004).

courts to incorporate international law on trafficking in persons in U.S. court decisions.

I. THE NATURE OF THE CRIME OF TRAFFICKING IN PERSONS: A FORM OF SLAVERY OR EXPLOITATION

*A. From the Mann Act to the TVPA*

The TVPA of 2000 recognized for the first time trafficking in persons as a specific offense. Forced labor, trafficking with respect to peonage, slavery, involuntary servitude, forced labor, sex trafficking of children or by force, fraud, or coercion, unlawful conduct with respect to documents, and attempting to commit any of these acts were all identified as crimes in the TVPA of 2000.<sup>3</sup> The Trafficking Victims Protection Reauthorization Act of 2005 (TVPA 2005)<sup>4</sup> identified a separate crime: trafficking in persons offenses committed by federal contractors outside the United States.<sup>5</sup> Benefitting financially from peonage, slavery, or trafficking in persons,<sup>6</sup> conspiring in an act of trafficking in persons,<sup>7</sup> and fraud in foreign labor contracting<sup>8</sup> were criminalized under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPA 2008).

Prior to the passage of the TVPA, cases of transportation of a person for the purpose of prostitution were decided under the Mann Act,<sup>9</sup> which was

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3. New sections of chapter 77 of Title 18 of the United States Code created by the TVPA include: 18 U.S.C. § 1589 (forced labor) (2006); *id.* § 1590 (trafficking with respect to peonage, slavery, involuntary servitude, or forced labor); *id.* § 1591 (sex trafficking of children or by force, fraud, or coercion); *id.* § 1592 (unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor); *id.* § 1593 (mandatory restitution); *id.* § 1594 (specifying that attempting to violate 18 U.S.C. §§ 1581, 1583, 1584, 1589, 1590, or 1591 is punishable in the same manner as an actual violation).

4. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, § 103(a)(1), 119 Stat. 3558 (2005) [hereinafter TVPA 2005].

5. *See id.* § 3271 (creating a new section defining “[t]rafficking in persons offenses committed by persons employed by or accompanying the federal government outside the United States”).

6. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 222(d)(1), 122 Stat. 5044 (2008) [hereinafter TVPA 2008].

7. *See id.* § 222(c)(2)(B)-(C).

8. *See id.* § 222(e)(2).

9. *See* 18 U.S.C. § 2424 (2006) (“(a) Transportation With Intent To Engage in Criminal Sexual Activity— A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 10 years or for life. (b) Travel With Intent To Engage in Illicit Sexual Conduct.— A person who travels in interstate commerce or travels into the United States, or a

passed in 1910. The current version of the Mann Act makes it a felony to knowingly transport any person in interstate or foreign commerce for prostitution or any sexual activity for which a person can be charged with a criminal offense.<sup>10</sup> Although the Mann Act<sup>11</sup> is sometimes employed to prosecute cases of trafficking in persons, the two acts are distinguishable. Unlike the TVPA, the Mann Act does not require proof of force, fraud, or coercion.<sup>12</sup> This lowers the burden of proof on the government for convicting the accused of trafficking offenses. For instance, in *United States v. Daneman*,<sup>13</sup> a case decided in 2008, defendants were charged with

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United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both. (c) Engaging in Illicit Sexual Conduct in Foreign Places.— Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both. (d) Ancillary Offenses.— Whoever, for the purpose of commercial advantage or private financial gain, arranges, induces, procures, or facilitates the travel of a person knowing that such a person is traveling in interstate commerce or foreign commerce for the purpose of engaging in illicit sexual conduct shall be fined under this title, imprisoned not more than 30 years, or both. (e) Attempt and Conspiracy.— Whoever attempts or conspires to violate subsection (a), (b), (c), or (d) shall be punishable in the same manner as a completed violation of that subsection.”). For cases decided upon the Mann Act prior to the passage of the TVPA, see generally *Wyatt v. United States*, 362 U.S. 525 (1960); *Bell v. United States*, 349 U.S. 81 (1955); *United States v. Vang*, 128 F.3d 1065 (7th Cir. 1997); *United States v. Campbell*, 49 F.3d 1079 (5th Cir. 1995); *United States v. York*, No. 92-3800/3801, 1993 U.S. App. LEXIS 26652 (6th Cir. filed Oct. 8, 1993); *United States v. Scott*, No. 92-6435, 1993 U.S. App. LEXIS 20033 (6th Cir. July 26, 1993); *United States v. Sabatino*, 943 F.2d 94 (1st Cir. 1991); *United States v. Riley*, 684 F.2d 542 (8th Cir. 1982); *Cleveland v. United States*, 146 F.2d 730 (10th Cir. 1945).

10. 18 U.S.C. §§ 1421-24 (2006).

11. For a discussion of the Mann Act, see generally Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977 (2006); Ariel R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 *YALE L.J.* 756 (2006); Laura Elizabeth Brown, Comment, *Regulating the Marrying Kind: The Constitutionality of Federal Regulation of Polygamy Under the Mann Act*, 39 *MCGEORGE L. REV.* 267 (2008).

12. However, cases in which force was used can be prosecuted under the Mann Act, as was the case with *United States v. Flavors*, where the defendant was convicted of violating the Mann Act’s prohibition on transportation of an individual for prostitution. *United States v. Flavors*, 15 F. App’x 491 (9th Cir. 2001). According to some, this requirement of force, fraud, or coercion to qualify as a “severe form of trafficking” is a serious flaw of the TVPA. For example, “consider an Iraqi woman who willingly enters into prostitution to support her family and is subsequently trafficked into Syria where her pimp insists she work off the cost of the journey and living expenses before being allowed to return home. The trafficker, having neither committed a fraud, nor used force or threats of force, and having made forceful demands that do not rise to the definition of ‘debt bondage’ is not engaged in a severe form of trafficking in persons.” Margaret Maffai, Comment, *Accountability for Private Military and Security Company Employees that Engage in Sex Trafficking and Related Abuses While Under Contract with the United States Overseas*, 26 *WIS. INT’L L.J.* 1095, 1119 (2009).

13. No. 06 Cr. 717 (AKH), 2008 U.S. Dist. LEXIS 42725 (S.D.N.Y. May 30, 2008). For cases decided under the Mann Act, see generally *United States v. Hill*, 552

Mann Act violations including conspiracy to transport individuals in interstate commerce to engage in prostitution<sup>14</sup> and conspiracy to induce or persuade individuals to travel in interstate commerce to engage in prostitution.<sup>15</sup> The government relied on undercover police officers who stated that they were offered sex in exchange for money by the defendants, large amounts of sexual paraphernalia, and phone calls with the taxi driver who provided women to work as prostitutes at various businesses.<sup>16</sup>

Similarly, in *United States v. Pipkins*,<sup>17</sup> the defendants were charged and convicted with conspiring to participate in a juvenile prostitution enterprise affecting interstate commerce through a pattern of racketeering activity,<sup>18</sup> enticing juveniles to engage in prostitution,<sup>19</sup> using interstate facilities to carry on prostitution,<sup>20</sup> extortion in violation of the Hobbes Act,<sup>21</sup> involuntary servitude,<sup>22</sup> transfer of false identification documents,<sup>23</sup> and distribution of marijuana and cocaine to minors.<sup>24</sup> The defendants were sentenced to a total of 30 years.

### *B. Creating a "Climate of Fear" Through Coercive Methods*

In *United States v. Warren*,<sup>25</sup> the Eleventh Circuit discussed the "climate of fear" that coercion may create in cases of trafficking in persons. Though proof of coercion is an additional burden required under the TVPA, it is satisfied by a broad range of behavior. The court stated that various forms

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F.3d 686 (8th Cir. 2009); *United States v. Osley*, 302 F. App'x 896 (11th Cir. 2008); *United States v. Scott*, 529 F.3d 1290 (10th Cir. 2008).

14. *Daneman*, 2008 U.S. Dist. LEXIS 42725, at \*1; *see also* 18 U.S.C. § 2421 (2006).

15. *Daneman*, 2008 U.S. Dist. LEXIS 42725, at \*2; *see also* 18 U.S.C. § 2422.

16. *Daneman*, 2008 U.S. Dist. Lexis 42725, at \*2 (charging a violation of 18 U.S.C. §§ 1589-90 although "two of the defendants, Kim and Shim, were also tried on one count of conspiracy to provide or obtain the labor or services of a person through a scheme, plan or pattern intended to cause such person to believe that if she did not perform the labor, she or another person would suffer serious harm or physical restraint," they were not convicted of these offenses because there was not sufficient evidence of the coercive measures charged).

17. *United States v. Pipkins (Pipkins II)*, No. 1:06-CV-2629-JOF, 2007 U.S. Dist. LEXIS 81068 (N.D. Ga. Oct. 31, 2007).

18. *Id.* at \*1; *see also* 18 U.S.C. § 1962(d).

19. *Pipkins II*, 2007 U.S. Dist. LEXIS 81068, at \*1-2; *see also* § 2422(b).

20. *Pipkins II*, 2007 U.S. Dist. LEXIS 81068, at \*2; *see also* § 1952(a)(3).

21. *Pipkins II*, 2007 U.S. Dist. LEXIS 81068, at \*2; *see also* § 1951 (2006).

22. *Pipkins II*, 2007 U.S. Dist. LEXIS 81068, at \*2; *see also* § 1584 (2006).

23. *Pipkins II*, 2007 U.S. Dist. LEXIS 81068, at \*2; *see also* § 1028 (2006).

24. *Pipkins II*, 2007 U.S. Dist. LEXIS 81068, at \*2; *see also* 21 U.S.C. § 859.

25. 772 F.2d 827 (11th Cir. 1985). For earlier cases in which the court discussed the climate of fear created by coercion, *see generally* *United States v. Harris*, 701 F.2d 1095 (4th Cir. 1983); *United States v. Booker*, 655 F.2d 562 (4th Cir. 1981); *United States v. Bibbs*, 564 F.2d 1165 (5th Cir. 1977).

of coercion may constitute a holding in involuntary servitude, and the use, or threatened use of physical force to create a climate of fear is the most grotesque example of such coercion. *Warren* detailed the frightening and all-too common method by which migrant workers are lured into and kept in involuntary servitude. Often they are deceived by the promise of short term work and voluntarily enter the labor camp. Upon arriving, they are kept for a few days and later informed that they are being charged for meals and other necessities and that they may not leave until their “debt” is paid. Threats and acts of violence<sup>26</sup> are then used to create a climate of fear that intimidates the workers and prevents them from leaving the camp. Even if the worker were to have the opportunity to escape, fear of physical harm may prevent that worker from attempting to flee.

However, trafficking in persons is not always identified as a crime of violence. For instance in *United States v. Norris*,<sup>27</sup> the defendants had been charged and convicted of conspiracy to hold young women to a condition of peonage, to obtain forced labor and services of young women, and to traffic young women for commercial sex acts. The Eleventh Circuit rejected the appeal from the district court’s decision to impose pretrial detention on the grounds that these are “crimes of violence” as defined under 18 U.S.C. § 3156.<sup>28</sup>

### *C. The Victim of Trafficking as a “Vulnerable Victim”*

The standards for proving coercion may be affected by the victim’s “special vulnerabilities.” As the Supreme Court stated in *United States v. Kozminski*,<sup>29</sup> a “victim’s age or special vulnerability may be relevant in determining whether a particular type or a certain degree of physical or legal coercion is sufficient to hold that person to involuntary servitude.”<sup>30</sup>

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26. See H.R. REP. NO. 106-939 (2000) (Conf. Rep.), reprinted in 2000 U.S.C.C.A.N. 1380, 1392-93 (defining the term “serious harm,” as used in the TVPA, as including both physical and nonphysical harm, thus making the victims of human trafficking also victims of a violent crime, whether it be physical or psychological violence).

27. 188 F. App’x 822 (11th Cir. 2006).

28. *Id.* at 829-30 (“Whether a person poses danger to the community under 18 U.S.C. § 3142 depends on four factors: (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence . . . ; (2) the weight of the evidence against the person; (3) the history and characteristics of the person; and (4) the nature and seriousness of the danger to any person or the community that would be posed by the person’s release”); see also 18 U.S.C. § 3156(a)(4)(A)-(B) (2006) (defining “crime[s] of violence” to include “an offense that has an element of the offense the use, attempted use, or threatened use of physical force against the person”).

29. See 487 U.S. 931 (1988) (defining “involuntary servitude” and remanding conviction of appellee for new trial in light of the clarified definition).

30. See *id.* at 948 (illustrating that “a child who is told he can go home late at night in the dark through a strange area may be subject to physical coercion that results in his staying, although a competent adult plainly would not be. Similarly, it is possible that



Whether these special vulnerabilities may give rise to the application of the vulnerable victim enhancement doctrine<sup>31</sup> is a matter of debate. The vulnerable victim enhancement doctrine affirms that crimes committed against a susceptible victim warrant an enhanced penalty for the offender. In *United States v. Sabhnani*,<sup>32</sup> the Second Circuit found the defendants guilty of holding in peonage two Indonesian women they brought to the country illegally and subjected to forced labor. One of the maids, a 53-year-old woman from Indonesia, agreed to come to the United States to work for the defendant for \$200 per month as a domestic servant from February 2002 through May 2007, even though the visa obtained for her expired in May 2002.<sup>33</sup> The maid was told that her salary was being paid to her daughter in Indonesia, but in reality, her daughter received only \$100 per month and the maid received no money herself.<sup>34</sup> She was responsible for cooking, cleaning, laundry, and other chores in the defendant's three-story home.<sup>35</sup> The maid was required to sleep first on the carpet outside one of the children's bedrooms and then on a mat on the floor in the kitchen.<sup>36</sup> She was not given adequate food and was subjected to extreme physical and psychological abuse while she worked in the defendant's home. She was often beaten with household objects such as a broom, a rolling pin, and an umbrella, and, on at least three occasions, the defendant punished her by throwing boiling water on her.<sup>37</sup> In late 2004 and early 2005, the defendant acquired another domestic servant, also an Indonesian woman who spoke no English and had received very little education. She was subjected to similar conditions, including at one point being forced to

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threatening an incompetent with institutionalization or an immigrant with deportation could constitute the threat of legal coercion that includes involuntary servitude, even though such a threat made to an adult citizen of normal intelligence would be too implausible to produce involuntary servitude.”).

31. For a discussion of the vulnerable victim enhancement, see generally *Thirty-Eighth Annual Review of Criminal Procedure: Sentencing Guidelines*, 38 GEO. L.J. ANN. REV. CRIM. PROC. 681 (2009); Jay Dyckman, Note, *Brightening the Line: Properly Identifying a Vulnerable Victim for Purposes of Section 3A1.1 of the Federal Sentencing Guidelines*, 98 COLUM. L. REV. 1960 (1998); Raegan Joern, Note, *Mean Streets: Violence Against the Homeless and the Makings of a Hate Crime*, 6 HASTINGS RACE & POVERTY L.J. 305 (2009); Andrew Nash, Note, *Victims by Definition*, 85 WASH. U. L. REV. 1419 (2008); Jordan Blair Woods, Comment, *Taking the “Hate” Out of Hate Crimes: Applying Unfair Advantage Theory to Justify the Enhanced Punishment of Opportunistic Bias Crimes*, 56 UCLA L. REV. 489 (2008); Madeline Yanford, *Targeting the Criminally Depraved Mind: The Inherent Meaning of a “Vulnerable Victim” Under Federal Sentencing Guideline § 3A1.1*, 9 SUFFOLK J. TRIAL & APP. ADV. 103 (2004).

32. 599 F.3d 215 (2d Cir. 2010).

33. *Id.* at 225.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 226.

stand in one place for ten hours after she was accused of stealing two pieces of chocolate.<sup>38</sup>

In applying the vulnerable victim enhancement doctrine, the Second Circuit recognized that the TVPA included congressional findings that most victims of trafficking are vulnerable victims: “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.”<sup>39</sup> The victims are often “unfamiliar with the laws, cultures, and languages of the countries in which they have been trafficked because they are often subjected to coercion and intimidation including physical detention and debt bondage”<sup>40</sup> and they hesitate to report the crimes perpetrated against them because they “often fear retribution and forcible removal to countries in which they will face retribution or other hardship . . . .”<sup>41</sup> However, the court concluded that the text of the criminal statute of the TVPA does not explicitly incorporate vulnerability into the definition of the victim, thereby allowing for variable amounts of victim vulnerability based on the situation.<sup>42</sup>

The court affirmed the findings of the district court that the victims were particularly vulnerable and susceptible to the criminal conduct of the defendant. It stated:

neither one spoke a word of English; had never been in the United States before; were totally dependent upon the defendants for their basic human needs of food, clothing and shelter; they never received any direct payment for services . . . and were therefore unable to support themselves . . . . They were in a situation where they had to accept these abusive conditions, of course because they had no alternative.<sup>43</sup>

Immigration status can also create special vulnerabilities for a victim. Under the TVPA, benefits are granted to victims of trafficking irrespective of their immigration status.<sup>44</sup> In fact, an inquiry into the victim’s

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38. *Id.* at 227-28.

39. *Id.* at 253 (quoting TVPA, Pub. L. No. 106-386, § 102(b)(5), 114 Stat. 1464 (2000)).

40. *Id.* at 254 (quoting TVPA § 102(b)(20)).

41. *Id.*

42. *Id.* at 255.

43. *Id.*; see also *United States v. Sung Bum Chang*, 237 F. App’x 985 (5th Cir. 2007) (noting that the illegal status and language deficiencies of the victims allowed the vulnerable victim enhancement provisions to be applied).

44. See TVPRA 2003, Pub. L. No. 108-193, § 107(b)(1)(E), 177 Stat. 2875 (2003). In addition, a victim of trafficking should not lose such status even if the victim refuses to continue cooperating with a law enforcement official. See *United States v. Maksimenko (Maksimenko II)*, No. 05-80187, 2007 U.S. Dist. LEXIS 45615 (E.D. Mich. June 25, 2007).

immigration status may undermine the objectives of the TVPA because such an inquiry might discourage victims from seeking legal action against their traffickers as was the rule provided in *David v. Signal International, LLC*.<sup>45</sup> In this case, 500 Indian men were allegedly trafficked into the United States to work for a construction company, Signal International, in the aftermath of Hurricane Katrina, using the H-2B guest-worker program.<sup>46</sup> They were subjected to discrimination, forced labor, threats of deportation, overcrowded working and living conditions, unpaid wages for work and overtime, and other forms of abuse and exploitation.<sup>47</sup> The plaintiffs sought a protective order against inquiring into their current immigration status after the termination of their employment with the defendant. The court concluded that “[e]ven if current immigration status were relevant to plaintiffs’ race/national origin discrimination, contract and tort claims, discovery of such information would have an intimidating effect on an employee’s willingness to assert his workplace rights.”<sup>48</sup> The court explained:

This is also an action for unpaid wages and overtime for work actually performed for Signal. Courts have recognized the *in terrorem* effect of inquiring into a party’s immigration status and authorization to work in this country when irrelevant to any material claim because it presents a ‘danger of intimidation [that] would inhibit plaintiffs in pursuing their rights.’ Here, plaintiffs’ current immigration status is a collateral issue. The protective order becomes necessary as ‘it is entirely likely that any undocumented [litigant] forced to produce documents related to his or her immigration status will withdraw from the suit rather than produce such document and face . . . potential deportation.’<sup>49</sup>

In addition to enhancing the penalty in cases of trafficking where the trafficked person is a vulnerable victim and therefore susceptible to

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45. 257 F.R.D. 114 (E.D. La. 2009).

46. *Id.* at 117.

47. *Id.* at 117-19.

48. *Id.* at 122.

49. *Id.* (quoting *Liu v. Donna Karan Int’l, Inc.*, 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002) and *Topo v. Dhir*, 210 F.R.D. 76, 78 (S.D.N.Y. 2002)) (holding that FLSA covers all workers whether undocumented or not and that “such a position not only benefits the individual workers, but advances the goals of the FLSA” because allowing an employer to circumvent the labor laws as to undocumented aliens “permits abusive exploitation of workers, and creates an unacceptable economic incentive to hire undocumented workers by permitting employers to underpay them. To allow the immigration status of a class representative to be investigated - indeed to require a representative to enjoy legal immigration status - would seriously undermine the effectiveness of the FLSA”); see also *EEOC v. First Wireless Grp., Inc.*, 225 F.R.D. 404 (E.D.N.Y. 2004) (ruling that the trial court was not clearly erroneous in determining there was good cause to issue a protective order where disclosure of immigration status could cause embarrassment, potential criminal charges, or deportation).

trafficking, the courts provide the victim with a mandatory restitution to compensate the victim “to the full amount of the victim’s losses.”<sup>50</sup>

*D. Shifting the Focus from Slavery to Exploitation: Defining the Essence of Trafficking in Persons*

In these and other cases, trafficking in persons is commonly analyzed as a form of slavery<sup>51</sup> and the broadening definition of slavery in American jurisprudence, especially under the TVPA,<sup>52</sup> may support the conclusion

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50. See *United States v. Sabhnani*, 599 F.3d 215 (2d Cir. 2010) (defining victim’s losses as “the value of the victim’s labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act . . .,” overturning the lower court ruling which “consulted the Fair Labor Standards Act’s (FLSA) minimum wage and overtime provisions, 29 U.S.C. §§ 206 and 207, and determined minimum wage rates for the period of Samirah’s and Enung’s labor, which it multiplied by a statutorily determined factor to calculate overtime pay. The court performed its calculations on the basis that the maids worked 24 hours per day when the Sabhnanis were at home, and eight hours per day when the Sabhnanis left the country during the summer months. The court subtracted the money that had actually been paid to the victims’ families in Indonesia. Finally, it doubled the total award pursuant to 29 U.S.C. § 216, which allows for double damages for employers who violate the FLSA’s minimum wage and overtime provisions. Based on these calculations, the district court awarded \$620,743.82 to Samirah and \$315,802.40 to Enung. . . . We agree that the district court erred in awarding overtime pay, and thus we vacate the restitution award and remand for recalculation. We conclude, however, that the district court was within its discretion not to hold an evidentiary hearing and that it did not err in awarding liquidated damages.”); see also 18 U.S.C. § 1593(b)(3) (2006); *United States v. Fu Sheng Kuo* 588 F.3d 729 (9th Cir. 2009).

51. See Susan Tiefenbrun, *Copyright Infringement, Sex Trafficking, and Defamation in the Fictional Life of a Geisha*, 10 MICH. J. GENDER & L. 327, 365 (2004) (“Since U.S. law and international law both establish that sex trafficking is a form of slavery, consent should not be a probative issue in the requisite proof of sex trafficking because one cannot legally consent to slavery.”); Susan W. Tiefenbrun, *Sex Slavery in the United States and the Law Enacted to Stop It Here and Abroad*, 11 WM. & MARY J. WOMEN & L. 317, 318 (2005) [hereinafter Tiefenbrun, *Sex Slavery*] (arguing that sex trafficking is a modern form of slavery and violates numerous fundamental human rights). See generally Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICH. J. INT’L L. 1 (2008); Kathleen A. McKee, *Modern-Day Slavery: Framing Effective Solutions for an Age-Old Problem*, 55 CATH. U. L. REV. 141 (2005); Valerie Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 MICH. J. INT’L L. 605 (2004) (providing a link between trafficking and slavery under the Rome statute); Note, *Remedying the Injustices of Human Trafficking Through Tort Law*, 119 HARV. L. REV. 2574 (2006) (discussing restitution through criminal prosecution and readiness through civil suits under the TVPRA 2003 and specific tort claims). But see Jacqueline Bermen, *The Left, the Right, and the Prostitute: The Making of U.S. Anti-Trafficking in Persons Policy*, 14 TUL. J. INT’L & COMP. L. 269 (2006) (arguing that equating human trafficking and sexual slavery is a damaging over-simplification); Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 B.U. INT’L L.J. 207 (2007); Ryszard Piotrowicz, *The Legal Nature of Trafficking in Human Beings*, 4 INTERCULTURAL HUM. RTS. L. REV. 175 (2009).

52. See Kyle Cutts, Note, *A Modicum of Recovery: How Child Sex Tourism Constitutes Slavery Under the Alien Tort Claims Act*, 58 CASE W. RES. L.R. 277, 304 (2007) (“This modern understanding of slavery which the U.S. government appears willing to accept, applies equally to the problem of child sex tourism as it does to sex trafficking, an act which often involves children . . . [T]he purveyors of children for

that human trafficking constitutes slavery. According to this view, “[t]he terms ‘human trafficking’ and ‘slavery’ are interchangeable.”<sup>53</sup> However, one may argue that trafficking in persons does not always constitute a form of slavery and that the definition under international law is now shifting the focus from slavery to exploitation. One must admit that the distinction between slavery and trafficking is not always clear. The general consensus is that there are instances of trafficking in which the victim is treated as property. While this may be true, slavery under international law requires “the exercise of any or all the powers attached to the right of ownership”<sup>54</sup> in accordance with the 1926 Convention on Slavery.<sup>55</sup> Equally, practices similar to slavery, namely under article one of the 1956 Supplementary Convention,<sup>56</sup> such as debt bondage, serfdom, forced marriage, and sale of children are to be considered slavery-like conditions only if they involve “the status or condition of a person over whom any or all of the powers attaching the right of ownership are exercised.”<sup>57</sup>

Though this narrow definition of slavery finds some support in American jurisprudence,<sup>58</sup> the requirement that trafficking must amount to slavery is

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sex tourists tend to coerce the children through psychological, as opposed to physical, force - despite some exceptions. Under this modern approach to slavery adopted by congress, child victims are clearly kept in states of slavery by both their proprietors and their customers. These children may therefore be considered slaves under U.S. law.”); *see also* 28 U.S.C. § 1350 (2006) (“[D]istrict courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

53. *See generally* Kelly E. Hyland, *The Impact of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, 8 HUM. RTS. BRIEF 30 (2001) (“The modern concept of trafficking is a combination of traditional trafficking and slavery definitions. As such, trafficking involves both the enticement and deception elements from traditional trafficking, and the exploitation and slavery-like practices from traditional slavery and forced labor.”); George S. Yaconbian, Heather J. Clawson, & Nicole Dutch, *An Examination of Law Enforcement Responses to Human Trafficking in the United States: A Compliance Assessment of U.S. Obligations under Customary and Conventional International Law*, 15 U.C. DAVIS J. INT’L L. & POL’Y 157 (2008) (quoting U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT (2007), available at <http://www.state.gov/documents/organization/82902.pdf>).

54. *See* Slavery Convention art. 1(1), Sep. 4, 1926, 46 Stt. 2184, L.N.T.S. 253 (providing a definition of slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”); Anne T. Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway*, 49 VA. J. INT’L L. 789, 810 (2009) (discussing the definition of slavery in the context of international law).

55. Slavery Convention, *supra* note 54, at art. 1(1).

56. Supplemental Convention on the Abolition of Slavery, the Slave Trade, and Institution and Practices Similar to Slavery, § 1, Apr. 30, 1957, 266 U.N.T.S. 3 (prohibiting slavery and the slave trade in all forms).

57. Slavery Convention, *supra* note 54, at art. 1(1).

58. James C. Hathaway, *The Human Rights Quagmire of “Human Trafficking,”* 49 VA. J. INT’L L. 1, 5-6 (2009) (“In short, the decision to take action against ‘human trafficking,’ rather than against slavery in all of its contemporary forms, has given comfort to those who prefer not to tackle the claims of the majority of enslaved persons . . . . The anti-trafficking campaign privileges a small subset of persons subject to

not followed by American courts. In *Doe v. Reddy*,<sup>59</sup> a U.S. district court in California noted that “[m]any cases and international instruments make clear . . . that modern forms of slavery violate jus cogens norms of international law, no less than historical chattel slavery.”<sup>60</sup> Thus, the court rejected the defendant’s claim that forced labor must amount to “actual slavery.”<sup>61</sup> In this case, eleven workers were recruited by the Reddy family to work in the real estate business. Once they arrived, they were allegedly forced to work long hours under difficult working conditions and they were sexually and physically abused by the defendant.<sup>62</sup>

Trafficking in persons is commonly interpreted as a form of slavery that is prohibited under the Thirteenth Amendment,<sup>63</sup> which was intended to apply to all cases of slavery.<sup>64</sup> In *United States v. Nelson*,<sup>65</sup> the Second Circuit ruled that:

[T]he Thirteenth Amendment is the denunciation of a condition, and not a declaration in favor of a particular people. It reaches every race and every individual, and if in any respect it commits one race to the nation, it commits every race and every individual thereof. Slavery or involuntary servitude of the Chinese, of the Italian, of the Anglo-Saxon, are as much within its compass as slavery or involuntary servitude of the African.<sup>66</sup>

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contemporary forms of slavery, with consequent marginalization of the majority of the world’s slaves . . . . To the extent that the fight against trafficking has wither drained limited nongovernmental and international aging resources away from a more holistic attack on slavery, and to the extent that governments believe that they can (and perhaps should) attack slavery via the anti-trafficking initiative rather in a more comprehensive fashion, there is a real loss to the effort to eradicate the predominant forms of slavery . . . .”).

59. *Doe I v. Reddy*, No. C 02-05570 WHA, 2003 U.S. Dist. LEXIS 26120 (N.D. Cal. Aug. 4, 2003).

60. *Id.* at \*33.

61. *Id.*

62. *Id.* at \*36; *see also* 28 U.S.C. § 1350 (2006).

63. U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for a crime where of the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”); U.S. CONST. amend. XIII, § 2 (“Congress shall have power to enforce this article by appropriate legislation.”).

64. *But see* *United States v. Kozminski*, 487 U.S. 931, 942 (1988) (quoting *Butler v. Perry*, 240 U.S. 328, 332 (1916)) (determining that “the phrase ‘involuntary servitude’ was intended to extend ‘to cover those forms of compulsory labor akin to African slavery which, in practical operation, would tend to produce like undesirable results’”).

65. 277 F.3d 164 (2d Cir. 2002).

66. *Id.* at 176 (discussing how the Thirteenth Amendment does not specifically single out the group that it was enacted to protect); *see also* *Buchanan v. City of Bolivar*, 99 F.3d 1352, 1358 (6th Cir. 1996) (“Pursuant to the Thirteenth Amendment, plaintiff’s son had a clearly established right to be free from involuntary servitude; however, a reasonable public official would not be aware that instructing a minor in the custody of a juvenile officer to wash police vehicles would constitute involuntary

Similarly, in *United States v. Mussry*,<sup>67</sup> the Ninth Circuit emphasized that “the 13th Amendment and its enforcing statutes are designed to apply to a variety of circumstances and conditions . . . [and] to contemporary as well as to historic forms of involuntary servitude.”<sup>68</sup>

It is to be noted that the TVPA was passed as a part of the Violence against Women Act. In distinguishing between the two acts the Ninth Circuit stated, in *United States v. Todd*,<sup>69</sup> “[t]he TVPA is unlike the Violence Against Women Act . . . which sought to protect women by making gender-motivated crimes of violence actionable and was found to be beyond the power of Congress because its subject matter was not commerce . . . .”<sup>70</sup> However, the TVPA does not emphasize trafficking as a form of violence against women.<sup>71</sup> Similarly, courts rarely utilize the doctrine of violence against women when discussing cases of trafficking in persons. However, a few courts have recognized the connection between violence in intimate relationships and human trafficking. In *United States v. Marcus*,<sup>72</sup> a New York federal district court rejected the defendant’s argument that:

The existence of a prior consensual relationship between the defendant and [the victim] in which the infliction of punishment and pain was part of their mutual sexual gratification makes it impossible to determine whether the defendant abused [the victim] to compel the performance of a commercial sex act . . . [and] the violence inflicted could also have been for purely sexual pleasure or as a means to reinforce their

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servitude prohibited by the Thirteenth Amendment.”); *United States v. King*, 840 F.2d 1276, 1283 (6th Cir. 1988) (holding that parental consent to child slavery is void under the Thirteenth Amendment and for numerous public policy reasons); *United States v. Booker*, 655 F.2d 562, 564 (4th Cir. 1981) (determining that “[t]he amendment and the legislation were intended to eradicate not merely the formal system of slavery that existed in the southern states prior to the Civil War, but all forms of compulsory, involuntary service”); *United States v. Lewis*, 644 F. Supp. 1391, 1400 (W.D. Mich. 1986) (“The contours of slavery have shifted since the enactment of the Thirteenth Amendment. No longer is the slave always black and the master white. And, while subtler forms of coercion have replaced the blatant methods of subjugation practiced in the ante-bellum south, these new practices are no less effective than their older counterparts.”).

67. 726 F.2d 1448 (9th Cir. 1984).

68. *Id.* at 1451.

69. 627 F.3d. 329 (9th Cir. 2010).

70. *Id.* at 333.

71. See TVPA, Pub. L. No. 106-386, § 102(b)(23), 114 Stat. 1464 (2000) (declaring that “[t]he international community has repeatedly condemned slavery and involuntary servitude, violence against women, and other elements of trafficking”). For a discussion of the international responses to violence against women, see generally Gallagher, *supra* note 54, at 810; Mohamed Y. Mattar, *Access to International Criminal Justice for Victims of Violence Against Women Under International Family Law*, 23 EMORY INT’L L. REV. 141 (2009).

72. 487 F. Supp. 2d 289 (E.D.N.Y. 2007).

previously agreed upon roles in the relationship.<sup>73</sup>

The court found the evidence—particularly the victim’s statements of beating and forced sex after she stated that she wanted to leave, which were photographed for the website—sufficient to show a nexus between the defendant’s coercion and the labor element of the § 1591 conviction and the commercial sex act element of the § 1589 conviction. A prior or current intimate relationship with the victim does not release the trafficker from liability.<sup>74</sup>

While prohibition of slavery constitutes the basis for outlawing trafficking in persons in the TVPA, and the Act makes multiple references to the concept of slavery,<sup>75</sup> it seems that the prohibition of exploitation is a more appropriate and comprehensive term to explain cases of trafficking in persons. The essence of exploitation is taking advantage of a vulnerable victim and subjecting that victim to abuse, undue influence, and control.

Exploitation is defined narrowly by some legal systems as cases in which a person fears for his or her personal security, and more specifically as any situation where a person exploits another:

[I]f they cause them to provide or offer to provide labor or service by engaging in conduct that in all other circumstances could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they fail to provide or offer to provide the labor or service.<sup>76</sup>

This conceptualization of trafficking as a threat to personal security is based on traditional international legal standards.<sup>77</sup> But trafficking may be more appropriately defined as a threat to human security, a much broader

73. *Id.* at 309.

74. *See id.* at 299.

75. *See* TVPA § 102(a) (“A contemporary manifestation of slavery”); § 102(b)(1) (“Trafficking in persons is a modern form of slavery, and it is the largest manifestation of slavery today.”); § 102(b)(6) (“Victims are often forced through physical violence to engage in sex acts or perform slavery-like labor”); § 102(b)(10) (“Within the context of slavery . . . victims are subjected to a range of violations.”); § 102(b)(12) (“Trafficking also involves violations of other laws, including . . . laws against . . . slavery.”); § 102(b)(22) (“The U.S. outlawed slavery and involuntary servitude in 1865.”); *id.* (“Current practices of sexual slavery and trafficking of women and children . . .”); *id.* (“The right to be free from slavery . . .”); § 102(b)(23) (“International community has repeatedly condemned slavery.”); § 103(8)(B) (“For the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”); § 112(a)(2) (“Trafficking with respect to peonage, slavery, involuntary servitude, or forced labor.”); § 112(a)(2) (“Unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor.”).

76. Canadian Criminal Code, R.S.C. 1985, C-46, 279.04 (Can.).

77. *See* Universal Declaration of Human Rights, GA. Res. 217A (Art. III) at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (stating that “everyone has the right to life, liberty and security of person”); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 175 (also stating that “everyone has the right to liberty and security of person”).



concept.<sup>78</sup> This second approach is consistent with the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children (U.N. Protocol),<sup>79</sup> which defines trafficking in terms of exploitation and recognizes slavery and practices similar to slavery as only two of many forms of trafficking.<sup>80</sup> Consequently a broader definition of trafficking as a form of exploitation would be comprehensive enough to include situations in which a person is subject to control or undue influence although such person is not enslaved by another.<sup>81</sup> As one court explained, “the essence of a holding to the involuntary servitude is an exercise of control by one person over another so that the latter is coerced into laboring for the former.”<sup>82</sup>

## II. DEFINING THE ELEMENTS OF THE CRIME OF TRAFFICKING IN PERSONS

### *A. Defining a Commercial Sex Act as Prostitution and Pornography*

Section 103 of the TVPA defines sex trafficking as “the recruitment,

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78. See U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 23 (1994) (proposing that a definition of human security contain two components: “freedom from fear and freedom from want”; this definition means “first, safety from such chronic threats as hunger, disease and repression . . . and second, it means protection from sudden and hurtful disruptions in the patterns of daily life—whether in homes, in jobs or in communities”); see also Mohamed Y. Mattar, *Human Security or State Security? The Overriding Threat in Trafficking in Persons*, 1 INTERCULTURAL HUM. RTS. L. REV. 249 (2006).

79. United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children, supplementing, United Nations Convention Against Transnational Organized Crime, U.N. GAOR, 55th Sess., U.N. Doc. A/Res/55/25, Annex II (Dec. 25, 2003) [hereinafter U.N. Protocol].

80. See *id.* at art. (3)(a) (“‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”).

81. Consequently, it is not enough to inquire into how a legal system responds to slavery. All instances of exploitation that may lead to trafficking should be fully addressed. For the application of this principle in Islamic law, see generally Mohamed Y. Mattar, *COMBATING TRAFFICKING IN PERSONS IN ACCORDANCE WITH ISLAMIC LAW* (2009), available at <http://www.unodc.org/unodc/en/human-trafficking/combating-tip-in-accordance-with-the-principles-of-islamic-law.html>.

82. *Teresa T. v. Ragaglia*, 154 F. Supp. 2d 290, 305 (D. Conn. 2001) (quoting *United States v. Lewis*, 644 F. Supp. 1391, 1401 (W.D. Mich. 1986)) (discussing how the Thirteenth Amendment is inapplicable to a case where minor children were forced to witness a murder). But see *United States v. Mussry*, 726 F. 2d 1448, 1454 (9th Cir. 1984) (defining involuntary servitude as including instances “when an individual coerces another into his service by improper or wrongful conduct that is intended to cause, and does cause, the other person to believe that he or she has no alternative but to perform the labor”).

harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act,”<sup>83</sup> and the Act defines a commercial sex act as “any sex act on account of which anything of value is given to or received by any person.”<sup>84</sup> A commercial sex act typically means an act of prostitution.<sup>85</sup> It must be noted, however, that the text of the TVPA uses the term “prostitution” sparingly.<sup>86</sup> Furthermore, the Trafficking Victims Protection Reauthorization Act of 2003 (TVPRA 2003) provided that “[n]o funds made available to carry out this division . . . may be used to promote, support, or advocate the legalization or practice of prostitution.”<sup>87</sup> The

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83. TVPA, Pub. L. No. 106-386, § 103(9), 114 Stat. 1464 (2000).

84. *Id.* § 103(3).

85. See generally Marisa Silenzi Cianciarulo, *What Is Choice? Examining Sex Trafficking Legislation Through the Lenses of Rape Law and Prostitution*, 6 U. ST. THOMAS L.J. 54 (2008); Edi C. M. Kinney, *Appropriations for the Abolitionists: Undermining Effects of the U.S. Mandatory Anti-Prostitution Pledge in the Fight Against Human Trafficking and HIV/AIDS*, 21 BERKLEY J. GENDER L. & JUST. 158 (2006); Valerie S. Payne, *On the Road to Victory in America's War on Human Trafficking: Landmarks, Landmines, and the Need for Centralized Strategy*, 21 REGENT U. L. REV. 435 (2008-2009); Henry J. Shea & Pamela J. Abbate, *Human Trafficking: Global and National Responses to the Cries for Freedom*, 6 U. ST. THOMAS L.J. 1 (2008).

86. The TVPA references prostitution in only four places. See TPVA § 102(b)(2) (“Many of these persons are trafficked into the international sex trade, often by force, fraud, or coercion. The sex industry has rapidly expanded over the past several decades. It involves sexual exploitation of persons, predominantly women and girls, involving activities related to prostitution, pornography, sex tourism, and other commercial sexual services. The low status of women in many parts of the world has contributed to a burgeoning of the trafficking industry.”); *id.* § 102(b)(4) (“Traffickers also buy children from poor families and sell them into prostitution or into various types of forced or bonded labor.”); *id.* § 1513(a)(1)(A) (“Immigrant women and children are often targeted to be victims of crimes committed against them in the United States, including rape, torture, kidnapping, trafficking, incest, domestic violence, sexual assault, female genital mutilation, forced prostitution, involuntary servitude, being held hostage or being criminally restrained.”); *id.* § 1513(b)(3)(iii) (“[T]he criminal activity referred to in this clause is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.”).

87. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 7(7), 177 Stat. 2875, 2885-86 (codified as amended at 22 USC § 7110(9) (2006)) [hereinafter TVPRA 2003]. In *American Civil Liberties Union of Massachusetts v. Sebelius*, the plaintiff sued the U.S. Department of Health and Human Services (HHS) for violating the establishment clause of the U.S. Constitution when allowing the United States Conference of Catholic Bishops to impose religious restrictions on taxpayer funded services for victims of human trafficking, incorporating language in its subcontractor agreements prohibiting NGOs from using TVPA funds for “referral for abortion services or contraceptive materials.” 697 F. Supp. 2d 200, 202 (D. Mass. 2010). The Court held that “it cannot be disputed that the TVPA does not directly mandate HHS to spend taxpayer money in violation of the Establishment Clause [and] does not order HHS to include religious organizations among the service providers . . . nor does it specify the exact nature of the social services that are

TVPPRA 2005 addressed a commercial sex act independently from trafficking in persons for the first time, but it did not change the fact that prostitution is still exclusively a state crime.<sup>88</sup> TVPPRA 2005 imposed an obligation on the federal government to enhance states' capacities to raise awareness of the dangers of prostitution and states' abilities to prosecute those who commit such an act explicitly. The Act provides that "the Attorney General may make grants to States and local law enforcement agencies to establish, develop, expand, or strengthen programs—(B) to investigate and prosecute persons who engage in the purchase of commercial sex acts" and "(C) to educate persons charged with, or convicted of, purchasing or attempting to purchase commercial sex acts."<sup>89</sup>

In *United States v. Marcus (Marcus I)*,<sup>90</sup> the issue in question was whether a commercial sex act includes pornography.<sup>91</sup> In *Marcus I*, the U.S. District Court for the Eastern District of New York defined a "commercial sex act" under the TVPA to include both pornography and prostitution. The court said:

The statutory language provides no basis for limiting the sex acts at issue to those in which payment was made for the acts themselves; rather, the use of the phrase 'on account of which' suggests that there merely needs to be a casual relationship between the sex act and an exchange of an item of value. If Congress has intended to limit the commercial sex acts reached by the statute to prostitution it could have easily drafted the statute accordingly.<sup>92</sup>

Therefore, the term "commercial sex act" defined in 18 U.S.C. § 1591 applies broadly to both photographs of sex acts and the sex acts themselves.<sup>93</sup> The court further observed that:

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provided." *Id.* at 205.

88. TVPPRA 2005, Pub. L. No. 109–164, § 204, 119 Stat. 3558 (2005) (lacking any provision covering prostitution and giving a definition of related offenses that specifically leaves the term out).

89. *Id.* § 204(a)(1)(B)–(C). It must also be noted that prostitution is not considered a form of labor under the TVPA and the Act distinguishes between sex trafficking and labor trafficking, unlike other legal systems which define labor trafficking to include a commercial sex act. The Canadian law on trafficking covers both labor trafficking and sex trafficking under the single umbrella of exploitation. Canadian Criminal Code, R.S.C. 1985, C-46, 279.04 (Can.).

90. 487 F. Supp. 2d 289 (E.D.N.Y. 2007).

91. *Id.* at 306 (rejecting the defendant's claim that a depiction (pornography) was not a "commercial sex act" within the meaning of the 18 U.S.C. § 1591).

92. *Id.*

93. *See id.* (rejecting the defendant's argument that the meaning of the term "commercial sex act" is ambiguous, and stating that "while a commercial sex act is quite broadly defined in the statute, the requirement that it be a product of force, fraud or coercion precludes the potential broad sweep about which the defendant expresses concern."); *see also* 18 U.S.C. § 1591(a)(2) (2006) (providing that, under given circumstances, it is a crime to cause a person to be engaged in a commercial sex act). Defendant argued that the TVPA should not apply to "intimate, domestic relationships"

[T]he government was required to prove three elements beyond a reasonable doubt in order for the jury to find the defendant guilty of sex trafficking in violation of 18 U.S.C. 1591, the government had to prove that: (1) the defendant engaged in a prohibited trafficking activity; (2) the defendant's trafficking activity affects interstate commerce, and (3) the defendant knowingly used force, fraud or coercion to cause the trafficking of individual to engage in a commercial sex act.<sup>94</sup>

Force, fraud and coercion are not separate elements of the offense of sex trafficking. As another lower federal court stated in *United States v. Paris*,<sup>95</sup> "force, fraud, and coercion are alternate means to accomplish a single element."<sup>96</sup> In *Marcus I*, the court went on to say that, when proving the offense of sex trafficking, it is not required to show that obtaining a commercial sex act was the "dominant purpose" of the defendant's use of coercion or threats.<sup>97</sup> Similarly, existence of a prior consensual relationship between the defendant and the victim is not determinative in favor of the defendant.<sup>98</sup> Moreover, engaging in a sex act is not an element required for the establishment of the crime of sex trafficking. For example, in *Iowa v. Russell*,<sup>99</sup> the applicable state statute required only that a person "participat[ed] in a venture to recruit, harbor, transport, supply provisions, or obtain a person for [the purpose of] commercial sexual activity."<sup>100</sup> The jury was instructed that "commercial sexual activity" is defined as "any sex act on behalf of which anything of value is given, promised to, or received

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and that TVPA was "intended to respond to the 'problem of international slave trafficking' which is 'a far cry from acts of violence and abuse that take place in the context of an intimate personal relationship.'" *Marcus I*, 487 F. Supp. 2d at 299. The defendant was found guilty of sex trafficking under § 1591 and forced labor. *Id.*; see also 18 U.S.C. §§ 1591, 1589 (2006).

94. *Marcus I*, 487 F. Supp. 2d at 308.

95. Cr. No. 03:06-cr-64 (CFD), 2007 U.S. Dist. LEXIS 78418 (D. Conn. Oct. 23, 2007).

96. *Id.* at \*36; see also *United States v. Powell*, No. 04-CR-885, 2006 U.S. Dist. LEXIS 288858, at \*2 (N.D. Ill. Apr. 28, 2006) (holding that counts were not duplicative because "fraud, force, or coercion" were means of accomplishing sex trafficking, not distinct elements).

97. See *Marcus I*, 487 F. Supp. 2d at 313 (rejecting the defendant's claim that a conviction requires the jury to find that the "dominant purpose" of the force or coercion was to obtain the commercial sex act or labor or services and concluding there is nothing in the statute itself or the legislative history that suggests that "the reach of the statutes should be limited in this manner").

98. See *id.* at 309 (finding that the victim's prior consensual sexual relationship with the defendant did not preclude a finding of guilt because other circumstances could be considered).

99. No. 9-906/08-2034, 2010 Iowa App. LEXIS 145 (Iowa Ct. App. filed Mar. 10, 2010).

100. *Id.* at \*6 (ruling that the defendant erred by concentrating on only one portion of the relevant definition and holding that "neither the statute nor the instruction requires proof of sex acts by the recruited persons"); see also IOWA CODE § 710A.1 (2009).

by any person and includes, but is not limited to, prostitution and performance in strip clubs.”<sup>101</sup> Thus performance in strip clubs is defined as commercial sexual activity, but stripping is not classified as a sex act.<sup>102</sup>

A commercial sex act can be further distinguished from a non-commercial sex act by the effect marriage has on the possibility of criminal action. Prosecution under the IMBRA would be possible in cases of mail order brides or marriage by catalogue if the defendant exploited the victim.<sup>103</sup> In addition, under the TVPRA 2008 it is possible to prosecute international marriage brokers for profiting from sex trafficking.<sup>104</sup> If a marriage broker assists a client in bringing a woman to the United States and is aware that the client’s purpose is to force or coerce the woman to engage in prostitution, then the broker can be prosecuted for sex trafficking.<sup>105</sup> But if the broker’s client intends to use the woman as his personal prostitute, then the arrangement no longer falls under the definition of commercial sex according to the TVPA, whose definition of commercial sex focuses on a particular “sex act, on account of which anything of value is given to or received by any person.”<sup>106</sup>

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101. *Russell*, 2010 Iowa App. LEXIS 145, at \*6-7.

102. In *United States v. Pendleton*, the defendant, a U.S. citizen, was arrested for an offense of having sexual contact with a minor, convicted, and incarcerated in Germany. No. 08-111-GMS, 2009 U.S. Dist. LEXIS 10026 (D. Del. Feb. 11, 2009). He was then tried in the U.S. for traveling in foreign countries to engage in illicit sexual conduct violating the PROTECT Act. *Id.* See generally PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (2003). The court noted that “[s]ection 2423(c) is structured to address both commercial sex offenses and non-commercial sex offenses.” *Pendleton*, 2009 U.S. Dist. LEXIS 10026; see also 18 U.S.C. § 1591(e)(3) (2006) (defining the term “commercial sexual act” as “any sex act, on account of which anything of value is given to or received by any person”). Commercial sex offenses are criminalized under 18 U.S.C. § 2423(c), (f)(2). Non-commercial sex offenses are criminalized under 18 U.S.C. § 2423(c), (f)(1).

103. Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1653 (2007) (discussing the origins of IMBRA and the problems it is meant to rectify, including the mistreatment and murder of mail-order brides); Erin K. Pleasant, *The International Marriage Broker Regulation Act: Protecting Foreign Women or Punishing American Men*, 29 CAMPBELL L. REV. 311, 311 (2007) (outlining the requirements set by the IMBRA, including extensive disclosure requirements on the part of the potential groom); Roxanne Sims, *A Comparison of Laws in the Philippines, the U.S.A., Taiwan, and Belarus to Regulate the Mail-Order Bride Industry*, 42 AKRON L. REV. 607, 614-25 (2009) (comparing IMBRA to the laws of other countries).

104. See TVPRA 2008, Pub. L. No. 110-457, § 222, 122 Stat. 5044 (2008) (“Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by any of the means described in subsection (a), knowing or in reckless regard of the fact that the venture has engaged in the providing or obtaining of labor or services by any such means, shall be punished [by] imprisonment.”).

105. Suzanne H. Jackson, *Marriages of Convenience: International Marriage Brokers, “Mail-Order Brides,” and Domestic Servitude*, 38 U. TOL. L. REV. 895, 907 (2007).

106. *Id.* Also, the requirement of force, fraud, or coercion is problematic. The “TVPA requires non-consent: the trafficked person must have been ‘induced by force, fraud, or coercion.’” Kirsten M. Lindee, *Love, Honor, or Control: Domestic Violence*,

*B. Adopting the Ordinary Meaning of Forced Labor or Services*

According to the TVPA, forced labor is defined as:

Whoever knowingly provides or obtains the labor or services of a person— (1) by threats of serious harm to, or physical restraint against, that person or another person; (2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or (3) by means of the abuse or threatened abuse of law or the legal process.<sup>107</sup>

In *Marcus I*, the defendant argued that the phrase “labor or services” in the forced labor statute<sup>108</sup> should be narrowly construed to “prevent a wide range of everyday conduct from falling within the reach of the statute”<sup>109</sup> and “to exclude household chores performed as part of an intimate living arrangement.”<sup>110</sup> According to this argument, the phrase “labor or services” “could mean only those forms of work for which a person would ordinarily be compensated.”<sup>111</sup> The defendant also argued that the legislative history of the TVPA shows that the statute “was only meant to proscribe conduct that compels the victim to provide labor services ‘for a business purpose.’”<sup>112</sup> The court disagreed, stating that:

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*Trafficking, and the Question of How to Regulate the Mail-Order Bride Industry*, 16 COLUM. J. GENDER & L. 551, 563 (2007). According to the INS report to Congress, “[t]his attention to mail-order marriages reflects growing concern regarding the global recruitment and transportation of women in a variety of exploitative ways. The information on trafficking suggests that mail-order brides may become victims of international trafficking in women and girls . . . . While not all mail-order brides would be considered trafficked, public policy is shifting to reflect the need to protect people from the exploitation and violence that results from all forms of trafficking.” U.S. CITIZENSHIP AND IMMIGRATION SERVS., INTERNATIONAL MATCHMAKING ORGANIZATIONS: A REPORT TO CONGRESS 1 (1999). It is possible that IMBs may be classified as facilitators of trafficking, and also that the IMB industry may be sex traffickers per se. No cases of mail order brides have yet been prosecuted under the TVPA, however, the issue was raised in *European Connections & Tours, Inc. v. Gonzales*, 480 F. Supp. 2d 1355 (N.D. Ga. 2007).

107. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 112(a)(2), 114 Stat. 1464 (2000).

108. 18 U.S.C. § 1589 (2006).

109. *United States v. Marcus*, 487 F. Supp. 2d 289, 300 (E.D.N.Y. 2007).

110. *Id.*

111. *See id.* (making a lenity argument and urging the court to narrowly construe the phrase “labor or services”).

112. *Id.* at 301. The court, however, found “no justification for this contention. While the legislative history of the TVPA undoubtedly focuses primarily on the need to combat international sex trafficking, the Congressional purpose and findings of the TVPA make clear the intended broad scope of the legislation. The stated purpose of the TVPA is ‘to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims.’” *Id.* The court went on to say “[w]hile the court observes that Congress did not expressly indicate its desire to regulate labor or services performed within the household, the legislative history provides no cause to believe that Congress intended that type of labor to be excluded

The ordinary meaning of the term ‘labor’ is an ‘expenditure of physical or mental effort especially when fatiguing, difficult, or compulsory.’ The term ‘services’ is defined as ‘useful labor that does not produce a tangible commodity.’ These definitions yield scant support for the defendant’s contention that the usual presence of compensation for the labor of services at issue should be a requirement for conviction under the forced labor statute.<sup>113</sup>

The meaning of forced labor or services was again the issue in *United States v. Kaufman*.<sup>114</sup> In that case the defendants maintained a home and a farm for the chronically mentally ill and asked the severely mentally ill residents to work nude and perform sexually explicit acts while appearing on video tapes. The government charged the defendants with violating § 1589 and other statutes.<sup>115</sup> The defendants argued that the trial court erred in failing to limit the definitions of labor and services to “work in an economic sense.”<sup>116</sup> The Tenth Circuit disagreed, noting that the legislature created § 1589 as part of the TVPA to expand *Kozminski*’s limited definition of coercion under § 1584.<sup>117</sup> The court concluded that “[t]here is no indication that Congress sought to limit the scope of ‘labor or services’ in the manner suggested by the Kaufmans.”<sup>118</sup> The court continued:

In our view, if an antebellum slave was relieved of the responsibility for harvesting cotton, brought into his master’s house, directed to disrobe and then engage in the various acts performed by the Kaufman House residents on the videotapes (e.g., masturbation and genital shaving), his or her condition could still be fairly described as one of involuntary servitude and forced labor.<sup>119</sup>

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from the legislation’s reach . . . . Moreover, while the legislative history does not address situations where traffickers have intimate relationships with their victims, the court’s survey of the TVPA’s legislative history reveals no expressed intention to preclude criminal liability in those contexts.” *Id.*

113. *Id.* at 300.

114. 546 F.3d 1242, 1246 (10th Cir. 2008).

115. *See id.* (charging the defendants with violating the involuntary servitude and forced labor statutes, health care fraud, mail fraud, and obstructing a federal audit based on their activities surrounding the operation of the Kaufman House).

116. *See id.* at 1247 (appealing their convictions for forced labor and involuntary servitude).

117. *See id.* at 1261 (noting that, while the authorities cited by the defendants involved work that was economic in nature, those authorities also described slavery and involuntary servitude in a broader fashion); *see also* H.R. REP. NO. 106-939 (2000) (Conf. Rep.), *reprinted in* 2000 U.S.C.C.A.N. 1380, 1393 (explaining that “[s]ection 1589 will provide federal prosecutors with tools to combat severe forms of worker exploitation that do not rise to the level of involuntary servitude as defined in *Kozminski*.”).

118. *Kaufman*, 546 F.3d at 1261.

119. *Id.* at 1262.

### C. Expanding the Concept of “Serious Harm”

Determining the meaning of the term “serious harm” was the issue in the *United States v. Bradley*.<sup>120</sup> In this case, the defendants lured two Jamaican workers to New Hampshire to work for Bradley Tree Service, a tree removal company. The defendants promised the workers, wages of \$15-20 per hour and lodging in Bradley’s house. Instead, they were paid \$7 per hour and they were forced to stay in a camping trailer. Charges against the defendants included a violation of § 1589.<sup>121</sup> In defining “serious harm,” the district court instructed the following:

The term ‘serious harm’ includes both physical and non-physical types of harm. Therefore, a threat of serious harm includes any threats – includes threats of any consequences, whether physical or non-physical, that are sufficient under all of the surrounding circumstances to compel or coerce a reasonable person in the same situation to provide or to continue providing labor or services.<sup>122</sup>

On appeal, the defendants argued that this definition expanded the meaning of serious harm beyond the limits contemplated by § 1589.<sup>123</sup> The First Circuit disagreed, reasoning that:

Section 1589 is a recent addition to the chapter that makes criminal acts of slavery, peonage and holding to involuntary servitude, 18 U.S.C. sections 1581-1594. Adopted in 2000 as part of a broader set of provisions—the Victims of Trafficking and Violence Protection Act of 2000—section 1589 was intended expressly to counter *United States v. Kozminski*. In *Kozminski* the Supreme Court had interpreted the pre-existing ban on ‘involuntary servitude’ in section 1584 to prohibit only conduct involving the use or threatened use of *physical* or *legal* coercion.<sup>124</sup>

Additionally, in *Marcus I*, the court stated “Congress made clear its intent that this statute be applied broadly in order to capture conduct that the Supreme Court had ruled beyond the reach of the statutes prohibiting involuntary servitude.”<sup>125</sup>

### D. Determining What Constitutes Abuse of Legal Process

In *United States v. Peterson*,<sup>126</sup> a federal district court in Georgia defined

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120. 390 F.3d 145, 150 (1st Cir. 2004) (addressing the defendant’s challenge to the district court’s instruction defining serious harm).

121. *Id.* at 148-49.

122. *Id.* at 150.

123. *See id.* (challenging the jury instruction given at trial).

124. *Id.* (internal citations omitted).

125. 487 F. Supp. 2d 289, 302 (E.D.N.Y. 2007).

126. 544 F. Supp. 2d 1363 (M.D. Ga. 2008).



the § 1589 phrase “abuse or threatened abuse of the law or legal process.”<sup>127</sup> The court referred to the following:

Restatement (Second) of Torts defines the abuse of legal process as the use of a legal process, either criminal or civil ‘against another primarily to accomplish a purpose for which it is not designed.’ This broad definition demonstrates that simply using the generic terms to change the offense does not sufficiently apprise Defendant of what he must be prepared to meet.<sup>128</sup>

In *Catalan v. Vermillion Ranch Ltd.*,<sup>129</sup> a federal court in Colorado determined that the threat of deportation for violating the immigration laws of the United States constituted an abuse of the legal process.<sup>130</sup> The court stated that:

[T]he plain language of the TVPRA does not require a showing that plaintiffs (or, in a criminal case, the victims) were actually harmed physically. It is enough to state a claim for a violation of the TVPRA if it is alleged that plaintiffs were forced to work by ‘threatened abuse of law or legal process.’<sup>131</sup>

The legislative history of the TVPA indicates that Congress designed § 1589 to expand criminal liability in cases not covered by § 1584 (involuntary servitude).<sup>132</sup>

Similarly, in *United States v. Veerapol*,<sup>133</sup> the Ninth Circuit concluded that “threatening . . . an immigrant with deportation could constitute the threat of legal coercion that induces involuntary servitude, even though such a threat made to an adult citizen of normal intelligence would be too implausible to produce involuntary servitude.”<sup>134</sup> As noted in the congressional findings, § 1589 addresses “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 consequence by means other than overt violence.”<sup>135</sup>

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127. *Id.* at 1375 (finding that the terms are generic and not defined in the statute, so other sources must be considered).

128. *Id.* (quoting in part the Restatement (Second) of Torts § 682 (1965)).

129. No. 06-cv-01043-WYD-MJW, 2007 U.S. Dist. LEXIS 567 (D. Colo. Jan. 4, 2007).

130. *Id.* at \*24 (rejecting the defendant’s argument that the plaintiffs’ failure to state physical harm was detrimental to their claim).

131. *Id.* at \*23-24.

132. See H.R. REP. NO. 106-939 (2000) (Conf. Rep.), reprinted in 2000 U.S.C.A.N. 1380, 1393 (indicating that § 1589 is intended to address subtle methods of trafficking).

133. 312 F.3d 1128 (9th Cir. 2007).

134. *Id.* at 1132 (quoting *United States v. Kozminski*, 487 U.S. 931, 948 (1988)).

135. H.R. REP. NO. 106-939, at 101.

In *Ramos v. Hoyle*,<sup>136</sup> the defendants argued that “[p]laintiffs [had] failed to state a claim under § 1589 (3) because the threat made that Plaintiffs would lose their immigration status if they left Defendants’ employment was a ‘truthful statement and not an abuse of legal process.’”<sup>137</sup> The district court disagreed, citing *United States v. Garcia*<sup>138</sup> where another district court said that “threatening [workers] with serious legal consequences, i.e., deportation for having violated the immigration laws . . . ‘clearly fall[s] within the concept and definition of ‘abuse of legal process’ since the alleged objective for same was to intimidate and coerce the workers into ‘forced labor.’”<sup>139</sup>

Furthermore, an opportunity to escape does not mean that the situation was not one of coercion. It is sufficient that the “defendant . . . placed [the victim] in such fear of physical harm that he [was] afraid to leave.”<sup>140</sup>

### *E. When Threats of Deportation Constitute Involuntary Servitude*

Threats of deportation on their own do not prove involuntary servitude. In fact, according to a federal district court in New York in *Winthal v. Mendez*:

[t]hreats of deportation or future unemployment do not state a claim for involuntary servitude. So long as ‘the servant knows he has a choice between continued service and freedom’ he is not working involuntarily ‘even if the master had led him to believe that the choice may entail consequences that are exceedingly bad.’<sup>141</sup>

In *United States v. Shackney*, the defendant operated a chicken farm and hired a family from Mexico to work on it, promising them lodging and compensation. Upon arrival, however the family found the accommodations were not what the defendant promised and the work conditions more arduous than they anticipated. The defendant threatened them with deportation if they broke the contract.<sup>142</sup> The Second Circuit found that, while a threat of deportation may have come close to violating § 1584, it still left the family with a choice.<sup>143</sup> Adopting a narrow

136. No. 08-21809, 2008 U.S. Dist. LEXIS 102677 (S.D. Fla. Dec. 19, 2008).

137. *Id.* at \*10-11. *But see* 18 U.S.C. § 1589 (2006) (establishing that the truth of the statement is irrelevant).

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

139. *Id.* at \*23.

140. *See* *United States v. Warren*, 772 F. 2d 827, 834 (11th Cir. 1985) (finding that threats and acts of violence created a climate of fear sufficient to prevent workers from leaving the camp).

141. No. 76 Civ. 3161 (JMC), 1978 U.S. Dist. LEXIS 18322, at \*8-9 (S.D.N.Y. Apr. 18, 1978) (quoting *United States v. Shackney*, 333 F.2d 475, 486 (2d Cir. 1964)).

142. *United States v. Shackney*, 333 F.2d 475, 477 (2d Cir. 1964).

143. *Id.* at 486 (holding that a choice is still present, even when the consequences are exceedingly bad).

interpretation of § 1584, the court stated that “a holding in involuntary servitude means to us action by the master causing the servant to have, or to believe he has, no way to avoid continued service or confinement.”<sup>144</sup> The court continued “[t]his seems to us a line that is intelligible and consistent with the great purpose of the 13th Amendment; to go beyond it would be inconsistent with the language and the history, both pointing to the conclusion that ‘involuntary servitude’ was considered to be something ‘akin to African slavery’ although without some of the latter’s incidents.”<sup>145</sup> The court continued:

The term involuntary servitude, in my opinion, is substantially synonymous with slavery, though it may perhaps be regarded as slightly more comprehensive, and as embracing everything under the name of servitude, though not denominated slavery, which gives to one person the control and ownership of the involuntary and compulsory services of another against his will and consent.<sup>146</sup>

Similarly, in *Zavala v. Wal-Mart Stores*,<sup>147</sup> the immigrants who provided janitorial services at the defendant’s retail stores alleged that Wal-Mart kept them in involuntary servitude by threatening them with deportation and forcing them to work under threats of coercion. The New Jersey district court concluded that these allegations of involuntary servitude were insufficient, stating that “plaintiffs have not alleged that they did not have any way to avoid ‘continued service or confinement.’”<sup>148</sup>

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144. *Id.*

145. *Id.*

146. *Id.* at 484-85 (quoting *Tyler v. Heidorn*, 46 Barb. 439, 458 (Albany General Term, 1866)); see also *United States v. Pipkins (Pipkins I)*, 378 F. 3d 1281, 1297 (11th Cir. 2004) (holding that a conviction under § 1584 can be upheld based on keeping a victim in involuntary servitude through fear, regardless of opportunity to escape and duration of captivity). According to the court in *Pipkins I*, “A conviction under § 1584 requires proof that ‘the victim (was) forced to work for the defendant by the use or threat of physical restraint or physical injury.’ If a defendant keeps a victim in involuntary servitude through such fear of physical harm that the victim is afraid to leave, regardless of any opportunity to escape, the defendant has violated 1584.” *Id.* (quoting in part *Kozminski*). The court also ruled that “section 1584 requires that involuntary servitude be for ‘any term’ which suggests that the temporal duration can be slight.” *Id.*

147. 393 F. Supp. 2d 295 (D.N.J. 2005).

148. See *id.* at 311 (comparing the case to *Shackney* in that a credible threat of deportation may come close to the line, but it still leaves the employee with a credible choice).

*F. Indebtedness as the Basis for the Crime of Peonage*<sup>149</sup>

In *United States v. Farrell*,<sup>150</sup> the defendants, who owned and operated a Comfort Inn and Suites in South Dakota, brought a number of workers from the Philippines to work as housekeepers. The workers were responsible for the cost of transportation to and from the United States in violation of their contracts. They were also told that a \$1,200 petition-processing fee for their nonimmigrant worker status would be divided equally among them.<sup>151</sup> The government charged the Farrells with peonage in accordance with § 1581. The Eighth Circuit explained that peonage is “compulsory service in payment of a debt” that resembles involuntary servitude.<sup>152</sup> In this case, the workers were threatened that if they attempted to run away they would be shipped back to the Philippines. The government presented sufficient evidence that working and living conditions compelled the victims to serve to make the debt payments.<sup>153</sup> The court concluded:

Given the above, a reasonable jury could have found that the Government presented sufficient evidence to prove beyond a reasonable doubt that the Farrells’ threats of physical force and arrest compelled the workers to serve in order to satisfy their debts. The evidence establishes that the workers reasonably believed that they had no option but to continue working for the Farrells. Accordingly, the conviction for

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149. See 18 U.S.C. § 1581 (2006) (Peonage is defined as a crime under § 1581 of the United States Code: “Whoever holds or returns any person to a condition of peonage, or arrests any person with the intent of placing him in or returning him to a condition of peonage, shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.”). In 1867, Congress passed the Anti-Peonage Act. *Id.* The first part of the statute stated: “The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States, and all acts, laws, resolutions, orders, regulations, or usages of any Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as persons, in liquidation of any debt or obligation, or otherwise, are declared null and void.” Anti-Peonage Act of March 2, 1867 c. 187, 14 Stat 546.

150. 563 F.3d 364, 366 (8th Cir. 2009).

151. See *id.* at 366.

152. See *id.* at 366, 372 (concluding that, to uphold the charge, “the government must show that the defendant intentionally held a person against his will or coerced that person to work in order to satisfy a debt by (1) physical restraint or force, (2) legal coercion, or (3) threats of legal coercion or physical force.”) (citing *Bailey v. Alabama* 219 U.S. 219, 242 (1911)).

153. See *id.* at 368-69 (detailing the defendants’ treatment of workers, including rules against socialization, complete control of finances, methods of intimidation and the amplification of these factors caused by the victims special vulnerabilities and their dependence on the Farrells for housing and transportation).

peonage is affirmed.<sup>154</sup>

Explaining the principle that no person could secure the labor of another by compulsion, the Fourth Circuit in *United States v. Booker*<sup>155</sup> stated that:

The [T]hirteenth [A]mendment and the laws that enforce it . . . established the fundamental principle that no person could secure the labor of another by compulsion. The statutes protected persons similarly situated to the migrant workers of our own time. They were persons without property and without skills save those in tending the fields. With little education, little money and little hope, they easily fell prey to the tempting offers of ‘powerful and unscrupulous’ individuals who would soon assert complete control over their lives. That control might be maintained through the threat of criminal sanctions . . . or through physical force as practiced here.<sup>156</sup>

In *United States v. Kyongja Kang*,<sup>157</sup> the U.S. District Court for the Eastern District of New York clarified the distinction between peonage and involuntary servitude by defining peonage as:

[A] status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness. . . . Peonage is sometimes classified as voluntary or involuntary; but this implies simply a difference in the mode or origin, but none in the character of the servitude. . . . But peonage, however created, is compulsory service,—involuntary servitude. . . . That which is contemplated by the statute is compulsory service to secure the payment of a debt.<sup>158</sup>

In other words, “[p]eonage involves the additional element that the involuntary servitude is tied to the discharge of an indebtedness.”<sup>159</sup>

In the absence of a debt owed to the employer, the peonage statute<sup>160</sup> does not apply. As stated by a Pennsylvania district court in *Dolla v. UniCast Co.*:<sup>161</sup>

Section 1581 makes the holding of a person in a state of peonage a criminal offense. Peonage is a ‘condition of compulsory service based upon indebtedness of the peon to its master.’ Peonage is a form of involuntary servitude, and is characterized by the involuntary performance of labor based upon indebtedness. Thus, the critical

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154. *Id.* at 376.

155. 655 F.2d 562 (4th Cir. 1981).

156. *Id.* at 566 (“The availability of escape, as the history of slavery has shown, or even a situation where the discipline of terror is not constantly enforced, does not preclude a finding that persons are held as slaves.”).

157. No. 04 CR 87(ILG), 2006 WL 208882 (E.D.N.Y. Jan. 25, 2006).

158. *Id.* at \*6-7 (quoting in part *Clyatt v. United States*, 197 U.S. 215, 216 (1905)).

159. *Id.* (quoting *Clyatt*, 197 U.S. at 207).

160. 18 U.S.C. § 1581 (2006).

161. 930 F. Supp. 202 (E.D. Pa. 1996).

elements of a peonage claim are indebtedness and compulsion.<sup>162</sup>

### III. CONSTITUTIONAL CHALLENGES

The TVPA has been challenged on several constitutional grounds including the Ex Post Facto Clause, congressional overreach of powers under the Interstate Commerce Clause, the void-for-vagueness doctrine, and the Double Jeopardy Clause of the Fifth Amendment.

#### *A. Application of the TVPA may not Violate the Ex Post Facto Clause of the U.S. Constitution*

In *United States v. Paulin*,<sup>163</sup> the defendant brought a 14 year-old girl to the U.S. from Haiti and kept her in involuntary servitude for six years, from 1999 to 2005. Although the trafficking act committed by the defendant began in 1999, the Eleventh Circuit ruled that this conviction did not violate the Ex Post Facto Clause because it was clearly established that the defendant's abuse of the victim continued for a number of years after the effective date of the TVPA.

One successful challenge based on the Ex Post Facto Clause of the U.S. Constitution,<sup>164</sup> was the issue in *United States v. Marcus (Marcus II)*.<sup>165</sup> The defendant was charged with violating the TVPA between January 1999 and October 2001, and thus he argued that the TVPA had been applied retroactively since it was not enacted until October 2000. The government argued that sex trafficking constituted "continuing offers" and that "even though the criminal conduct at issue began prior to enactment of the TVPA, it continued after enactment."<sup>166</sup> The Second Circuit disagreed because the jury could have convicted the defendants based exclusively on pre-

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162. *Id.* at 204 (internal citations omitted).

163. *United States v. Paulin*, 329 F. App'x 232 (11th Cir. 2009). The girl was forced to work long hours doing domestic duties and was not allowed to sit and eat the meals she had prepared for the defendant's family. *Id.* at 233. She was forced to sleep on a mattress on the living room floor and to bathe outside using a bucket of cold water. *Id.* She was not permitted to go to school or leave the house unaccompanied. *Id.* If she objected to her treatment the defendant beat her or threatened to send her back to Haiti. *Id.* at 233-34.

164. U.S. CONST. art. 1, § 9, cl. 3 ("No bill of attainder or ex post facto Law shall be passed.").

165. 538 F.3d 97 (2d Cir. 2008). *But see* *Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674, 683 (S.D. Tex. 2009) ("Accordingly, the thrust of the TVPRA would be severely undermined by a holding that U.S. defendants who gained commercial advantage in this country through engaging in illegal human trafficking were free from liability, so long as the trafficking acts themselves took place outside of American borders. Therefore, the Court finds that the traditional presumption against the retroactive application of statutes would contravene the clear purpose of the TVPRA, and would inappropriately absolve those who could in fact be guilty of violating its provisions.").

166. *Marcus II*, 538 F.3d at 101.

enactment conduct. In this case, the defendant engaged in several trafficking activities: he recruited, enticed, and obtained the victim when he met her online in late 1998, then he convinced her to come from Maryland to New York in January 2000. In total, he was responsible for holding her from 1999 until 2001. Only the harboring activity, not the transporting, occurred after October 2000, the effective date of the TVPA. So the jury concluded that although the defendant did not harbor the victim, he recruited, enticed, or obtained her in 1998 or transported her in 2000 and thus could have convicted the defendant based only on pre-enactment conduct.<sup>167</sup> The defendant argued that Congress had no power to regulate sex trafficking where the recruiting, enticing, harboring, transporting, providing or obtaining of the trafficked person was performed intrastate, thus § 1591 is unconstitutional.<sup>168</sup>

In *United States v. Jackson*,<sup>169</sup> the defendant, a U.S. citizen, was arrested in Cambodia on charges of debauchery after he had engaged in sex with three Cambodian boys. While the Cambodian charge was pending, the United States revoked the defendant's passport and agreed to take jurisdiction over the case. The defendant was charged with violation of 18 U.S.C. § 2423(c). The case was dismissed because this section was enacted in April 30, 2003 and defendant's travel had ended by April 30, 2003. So, based on the Ex Post Facto Clause of the Constitution of the United States,<sup>170</sup> the statute did not apply to him. The Ninth Circuit concluded:

[The defendant] admits to committing despicable sexual acts with children . . . . Yet his abhorrent conduct does not give us license to ignore the elements of the criminal statutes that Congress has established . . . the text of section 2423(c) only proscribes the conduct of an individual 'who travels in foreign commerce' after the enactment of the statute. Because Jackson's travel had ended by April 30, 2003, he is not covered by the provision. The district court was therefore correct to dismiss the indictment.<sup>171</sup>

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167. *Id.*

168. See 18 U.S.C. § 1591 (2006) ("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, 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 described in subsection (c) (2) 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 provides in subsection (b).").

169. 480 F.3d 1014 (9th Cir. 2007).

170. U.S. CONST. art. 1, § 9, cl. 3.

171. *Jackson*, 480 F.3d at 1024.

*B. TVPA Affecting Interstate and Foreign Commerce*

Under the Commerce Clause,<sup>172</sup> Congress has the power to regulate activities that have a substantial relation to interstate commerce. In determining whether a law regulates an activity that has a “substantial effect” on interstate commerce, the U.S. District Court for the District of Connecticut in *United States v. Paris* outlined four main considerations: (a) the economic relation of the regulated activity; (b) a jurisdictional element limiting the reach of the law to a discrete set of activities that additionally have an explicit connection with or effect on interstate commerce; (c) express congressional findings regarding the affects upon which interstate commerce of the activity in question; and (d) the link between the regulated activity and interstate commerce.<sup>173</sup> The court determined:

Section 1591 satisfies each of these considerations: 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 (defendant’s) intrastate recruiting and obtaining of women to commit commercial sex acts, the interstate aspects of (defendant’s) business, and the interstate market for commercial sex.”<sup>174</sup>

In *United States v. Simonson*,<sup>175</sup> the Ninth Circuit wrote that “Congress has the power to regulate foreign commerce and to act to prevent the channels of commerce from being used for immoral or injurious purposes.”<sup>176</sup> In this case, the defendant was convicted and sentenced for intent to engage in illicit conduct and attempted enticement.<sup>177</sup> The defendant argued that Congress exceeded its power under the Commerce Clause<sup>178</sup> by reading a statute in regards to conduct unrelated to commerce. The court disagreed, holding that Congress may regulate the use of the channels of interstate commerce.

In *United States v. Martinez*,<sup>179</sup> the defendant, a U.S. citizen who traveled to Mexico to have sex with a minor, argued that § 2423(c) violated

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172. U.S. CONST. art. 1, § 8, cl. 3.

173. *United States v. Paris*, No. 03:06-cr-64 (CFD), 2007 U.S. Dist. LEXIS 78418, at \*23 (D. Conn. Oct. 23, 2007).

174. *Id.* at \*23-24 (quoting in part 22 U.S.C. § 7101(b)(12) (2006)).

175. 244 F. App’x 823 (9th Cir. 2007).

176. *Id.* at 825-26 (quoting *United States v. Cummings*, 281 F.3d 1046, 1049-51 (9th Cir. 2002)).

177. 18 U.S.C. § 2423(a)-(b) (2006).

178. U.S. CONST. art. 1, § 8, cl. 3.

179. 599 F. Supp. 2d 784 (W.D. Tex. 2009).



the Commerce Clause.<sup>180</sup> The Texas district court acknowledged:

[T]he alleged illicit sexual conduct in the instant case is not itself commercial. However, a worldwide market exists for child prostitution, an activity that is “quintessentially economic” in nature, and that falls within foreign trade and commerce. As the optimal Protocol states, there is both “significant and increasing international trafficking of children for the purpose of the sale of children, child prostitution and pornography, as well as ‘the widespread and continuing practice of sex tourism.’”<sup>181</sup>

The PROTECT Act,<sup>182</sup> the court observed, “is primarily designed to combat the human suffering and economic evils of worldwide sex tourism and child prostitution.”<sup>183</sup>

In *United States v. Evans*,<sup>184</sup> the Eleventh Circuit rejected an argument that § 1591(a)(1) of the TVPA could not constitutionally apply to his solely intrastate behavior. The court stated:

We have no difficulty concluding that *Raich*,<sup>185</sup> *Maxwell*,<sup>186</sup> and *Smith*<sup>187</sup> foreclose [the defendant’s] challenges to the constitutionality of section 1591(a)(1) as applied to his activity occurring solely within Florida. Section 1591 was enacted as part of the Trafficking Victims Protection Act of 2000 (TVPA). Like the CSA and CPPA, the TVPA is part of a comprehensive regulatory scheme. The TVPA criminalizes and attempts to prevent slavery, involuntary servitude, and human trafficking for commercial gain. 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 today.” Congress found that trafficking of persons has an aggregate economic impact on interstate and foreign commerce, and we cannot say that this

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180. U.S. CONST. art. 1, § 8, cl. 3.

181. *Martinez*, 599 F. Supp. 2d at 807 (quoting Optional Protocol of the Convention on the Rights of the Child on the Involvement of the Children in Armed Conflict, Feb. 12, 2002, 2173 U.N.T.S. 222, at pmb1.)

182. PROTECT Act, Pub. L. No. 108-21, § 151, 117 Stat. 650, 650 (2003) (including 18 U.S.C. § 2423(c) (2006)). For a discussion of the PROTECT Act, see generally Tracy Agyemang, *Reconceptualizing Child Sexual Exploitation as a Bias Crime Under the PROTECT Act*, 12 CARDOZO J.L. & GENDER 937 (2006); Maureen Atwell, *Combating American Child Sex Tourism in Cambodia Under the 2003 U.S. PROTECT Act*, 26 WIS. INT’L L.J. 163 (2008); Karen D. Breckenridge, *Justice Beyond Borders: A Comparison of Australian and U.S. Child-Sex Tourism Laws*, 13 PAC. RIM L. & POL’Y J. 405 (2004); Amy Fraley, *Child Sex Tourism Legislation Under the PROTECT Act: Does It Really Protect?*, 79 ST JOHN’S L. REV. 445 (2005); Stephanie L. Mariconda, *Breaking the Chains: Combating Human Trafficking at the State Level*, 29 B.C. THIRD WORLD L.J. 151 (2009).

183. *Martinez*, 599 F. Supp. 2d at 807-08.

184. 476 F.3d 1176 (11th Cir. 2007).

185. *Gonzalez v. Raich*, 545 U.S. 1 (2005).

186. *United States v. Maxwell*, 446 F.3d 1210 (11th Cir. 2006).

187. *United States v. Smith*, 459 F.3d 1276 (11th Cir. 2006).

finding is irrational.<sup>188</sup>

The defendant was charged and convicted for enticing a minor to engage in a commercial sex act in violation of § 1591(a)(1) and enticing a minor to engage in prostitution in violation of 18 U.S.C. § 2422(b). The defendant operated a child prostitution ring in Miami-Dade County, Florida. The court concluded that the defendant's enticement of the victim to commit prostitution, "even though his actions occurred solely in Florida, had that capacity when considered in the aggregate with similar conduct by others, to frustrate Congress's broader regulation of interstate and foreign economic activity."<sup>189</sup> The court supported the district court's findings that "while [the defendant's] activities may be minor in the national and international market of trafficking children for commercial sex acts, his acts contribute to the market that Congress's comprehensive scheme seeks to stop."<sup>190</sup> The court concluded that the defendant's use of hotels that served interstate travelers and distribution of condoms<sup>191</sup> that traveled in interstate commerce "is further evidence that [the defendant's] conduct substantially affected interstate commerce."<sup>192</sup> The court rejected the defendant's argument that the term "knowingly" modifies the interstate commerce element of 18 U.S.C. § 1591(a) and that the government was therefore required to prove that the defendant knew that his actions were in or affecting interstate foreign commerce. The court said:

We are unaware of any court that has adopted the narrow reading of § 1591(a) urged by [the defendant]. Nor is there anything in the legislative history of section 1591 suggesting that Congress intended the statute to reach only sex traffickers who knew they were acting in or affecting interstate or foreign commerce. . . . Accordingly, we reject [defendant's] request to construe § 1591(a) as requiring knowledge by a defendant that his actions are in or affecting interstate commerce.<sup>193</sup>

The defendant's argument that the government did not establish the commerce element under § 2422(b) was also rejected.<sup>194</sup> The defendant argued that although he admitted using both a cellular telephone and a

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188. *Evans*, 476 F.3d at 1179.

189. *Id.*

190. *Id.*

191. *Id.* at 1179-80 (taking specific note of *United States v. Pipkins*, 378 F.3d 1281, 1295 (11th Cir. 2004), which held that evidence of pimps furnishing their prostitutes with condoms that were manufactured out of state supports a finding that the activities of the enterprise affected interstate commerce).

192. *Id.* at 1179.

193. *Id.* at 1180 n.2.

194. *Id.* at 1180; *see also* 18 U.S.C. § 2422(b) (2006) (imposing punishment on anyone who "using the mail or any facility or means of interstate or foreign commerce . . . knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution . . .").

landline telephone to entice the minor female to engage in prostitution, no evidence was presented that his intrastate calls were routed through interstate channels. The court cited several cases, all of which support the ability of Congress to regulate the instrumentalities of interstate commerce<sup>195</sup> focusing particularly on activities involving the use of telephones and cellular phones, which are instrumentalities of interstate commerce<sup>196</sup> even in instances involving purely intrastate calls.<sup>197</sup> In *United States v. Todd*,<sup>198</sup> the Ninth Circuit concluded that sex trafficking was conducted by advertising across state lines and therefore affected interstate commerce.

*C. Applying the Vagueness Doctrine to Trafficking in Persons Statutes*

Challenging § 1589 on constitutional grounds was the central issue in *United States v. Calimlim*.<sup>199</sup> In this case, Irma Martinez, at the age of 19, left the Philippines to work as a domestic servant for the defendants. Upon her arrival, they confiscated her passport and told her that she had to pay the cost of her transportation. She was also told that she was in the United States illegally. As a live-in housekeeper, she cared for their children and household. The defendants restricted her movement: she was only allowed to go to church. She was allowed to speak with her family only four or five times over the 19 years she was serving the defendants and for the duration of her work, she was only allowed to send them about \$19,000. She was constantly reminded that if she was discovered, she could be arrested and deported. The defendants argued that the forced labor statute 1589 was so vague that it failed to provide them with notice of the subject of criminalization. The Seventh Circuit disagreed stating that “even if the [defendants] did not know for certain that they would be convicted, the language of the statute alerted them to what was prohibited.”<sup>200</sup> The court

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195. See *United States v. Lopez*, 514 U.S. 549 (1995).

196. See *United States v. Ballinger*, 395 F.3d 1218 (11th Cir. 2005); *United States v. Pipkins*, 378 F.3d 1281 (11th Cir. 2004).

197. See *United States v. Gilbert*, 181 F.3d 152 (1st Cir. 1999); *United States v. Weathers*, 169 F.3d 336 (6th Cir. 1999).

198. 627 F.3d 329 (9th Cir. 2010).

199. 538 F.3d 706 (7th Cir. 2008).

200. *Id.* at 711. The court continued, “They knew that they were telling Martinez that if she did not do everything they asked, they would not send money back home for her. The Calimlins also knew that not sending money back home was, for Martinez, a ‘serious harm.’ The Calimlins also warned Martinez about her precarious position under the immigration laws, conveniently omitting anything about their own vulnerability.” *Id.* The court went on to say that “the statute does not specify that the ‘serious harm’ be at the defendant’s hands. It requires that the plan be ‘intended to cause the [victim] to believe that’ that harm will befall her . . . . This subsection describes a more indirect form of threat than that covered by section 1589(1), which criminalized direct ‘threats of serious harm to [the victim] or another person.’ Taken as a whole, the statute provides ample notice that it prohibits intentionally creating the

then addressed the other ground for vagueness by stating that:

A statute may also be unconstitutionally vague when an ambiguity allows for arbitrary enforcement of the law beyond what Congress intended. A statute is vague in this sense when “there is [a] lack of clarity . . . that would give law enforcement officials discretion to pull within the statutes activities not within Congress’ intent. With reference to section 1589, after the Supreme Court ruled that a similar statute involving involuntary servitude, 18 U.S.C. § 1584, prohibited only servitude procured by threats of physical harm, Congress enacted section 1589 . . . . The language of section 1589 covers nonviolent coercion, and that is what the indictment accused the [defendants] of doing; there was nothing arbitrary in applying the statute that way.”<sup>201</sup>

Again, §§ 1589, 1584 and 1590 were challenged on constitutional grounds in *United States v. Ramos-Ramos*.<sup>202</sup> The sections under which the defendant was charged<sup>203</sup> state that “if the violation includes . . . aggravated sexual abuse or the attempt to commit aggravated sexual abuse . . . the defendant shall be fined under this title or imprisoned for any term of years or life, or both.”<sup>204</sup> The defendant in the case argued that none of these statutes defines aggravated sexual abuse. The U.S. District Court for the Western District of Michigan noted that “[t]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”<sup>205</sup> The court concluded that “the absence of a definition for ‘aggravated sexual abuse’ in the human trafficking statutes does not render the human trafficking statutes or their punishment provisions void for vagueness.”<sup>206</sup>

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belief that serious harm is possible, either at the defendant’s hands or those of others.”  
*Id.*

201. *Id.* at 711-12.

202. No. 1:07-CR-08, 2007 U.S. Dist. LEXIS 36452 (W.D. Mich. May 18, 2007).

203. 18 U.S.C. §§ 1584, 1589, 1590 (2006).

204. *Ramos-Ramos*, 2007 U.S. Dist. LEXIS 36452, at \*5 n.2.

205. *Id.* at \*5 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

206. *Id.* at \*18. The court agreed with the government that “the Sexual Abuse Act of 1986, 18 U.S.C. §§ 2241-2248, which contains definitions of sexual abuse offenses, has conferred upon the term ‘aggravated sexual abuse’ a ‘commonly accepted meaning’ or an ‘established meaning’ within the context of federal criminal law sufficient to provide a criminal defendant with adequate notice.” *Id.* at \*17-18. The court reasoned that “[t]o the extent there is any ambiguity in the term ‘aggravated sexual abuse,’ it makes sense to look to the Federal Sexual Abuse Act for a definition of the term as it is used in another federal criminal statute. The court is satisfied that the term ‘aggravated sexual abuse’ provides a person of ordinary intelligence with reasonable notice of prohibited conduct and is sufficiently particularized in light of federal criminal statutes defining the term to insure that the provision is not enforced in an arbitrary manner.” *Id.* at \*18.

Similarly, in *United States v. Garcia*,<sup>207</sup> the defendant claimed that § 1589 was unconstitutional because of its vagueness, claiming that:

The use of the terms “obtains,” “threats of serious harm to or physical restraint” and “means of the abuse or threatened abuse of law or the legal process” in section 1589 “are not . . . anywhere defined” and therefore, such terms as used “make it impossible for a lay person, let alone an attorney or judge, to determine what conduct is prohibited.”<sup>208</sup>

Here, the defendant transported victims from Mexico to New York and subjected them to overcrowded working conditions, refused to allow them to leave, did not pay them, threatened them with physical violence and deportation, and told them that they must work to pay off their debts. The court, a federal district court in New York, stated that “[t]he Constitution does not require the legislation to incorporate Webster’s Dictionary into each statute in order to insulate it from vagueness and challenges.”<sup>209</sup> The court concluded that “[t]he words used in section 1589 are common words” and “the likelihood that anyone would not understand any of those common words seems quite remote.”<sup>210</sup> The words and phrases cited by the defendant have a plain and unambiguous meaning.”

The term “commercial sex act” was challenged as void for vagueness in *United States v. Paris* “because it is broad enough to encompass even legitimate modeling or acting in a romantic movie. Section 1591 defines ‘commercial sex act’ as ‘any sex act, on account of which anything of value is given or received by any person,’ but does not define ‘any sex act.’”<sup>211</sup> The court disagreed, finding “overwhelming evidence of sexual intercourse.”<sup>212</sup>

#### *D. When do Multiple Trafficking Crimes Violate the Double Jeopardy Clause of the Fifth Amendment?*

In *United States v. Maka*,<sup>213</sup> the defendant was charged with smuggling and harboring aliens.<sup>214</sup> The defendant claimed that the human trafficking counts were multiplicitous of the involuntary servitude counts, thus, charging him with both crimes violated the double jeopardy clause of the

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

208. *Id.* at \*17.

209. *Id.* at \*19 (quoting *Dennis v. Poppel*, 222 F.3d 1245, 1260 (10th Cir. 2000)).

210. *Id.* (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000)).

211. *United States v. Paris*, No. 03:06-CR-64 (CFD), 2007 U.S. Dist. LEXIS 78418, at \*38 (D. Conn. Oct. 23, 2007).

212. *Id.* at \*40-41.

213. 237 F. App’x 225 (9th Cir. 2007).

214. *See id.* (violating 18 U.S.C. §§ 1590, 1584, 1324 (2006)).

Fifth Amendment.<sup>215</sup> Similarly, the defendant claimed that the human trafficking charges were multiplicitous of the alien smuggling and harboring counts. The Ninth Circuit disagreed, holding:

The human trafficking counts are not multiplicitous of the involuntary servitude counts, as each requires proof of a fact that the other does not. Under section 1584, the defendant had to actually hold another to involuntary servitude, something not required for a conviction under section 1590, which requires knowledge that the laborer will be used by someone for such purposes, but does not require that the recruiter or transporter be that person. Likewise, a conviction under section 1590 requires proof that defendant recruited, transported, harbored or otherwise obtained the laborer with the knowledge he or she would be used in involuntary servitude, whereas an “end-user” defendant could be convicted under section 1584 even if not involved in the acquisition or transportation process.<sup>216</sup>

Based upon this explanation, the court concluded that charging and sentencing the defendant did not violate the Fifth Amendment. The court also concluded that:

The section 1590 human trafficking charges were not multiplicitous of the alien smuggling and harboring counts. The alien smuggling and harboring statute, section 1324, does not require that the smuggling or harboring be with the intent to use the individual for “labor or services” as required by section 1590. Section 1590 does not differentiate between trafficking aliens and trafficking United States citizens, whereas section 1324 requires proof the person smuggled or harbored was an unauthorized alien. Again, because each offense requires proof of a fact the other does not, the offenses are not multiplicitous.<sup>217</sup>

#### *E. Rejecting the Unconstitutionality of the International Marriage Broker Regulation Act*

In *European Connections & Tours, Inc. v. Gonzales*,<sup>218</sup> the plaintiff argued that the International Marriage Broker Regulation Act of 2005 (IMBRA)<sup>219</sup> violates the Fifth Amendment’s equal protection provision<sup>220</sup> because it distinguishes between international marriage brokers and other matchmaking services. In this case, the defendant, European Connections,

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215. U.S. CONST. amend. V.

216. *Maka*, 237 F. App’x at 227.

217. *Id.*

218. 480 F. Supp. 2d 1355 (N.D. Ga. 2007).

219. Passed as part of the Violence against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 831, 119 Stat. 2960 (2006).

220. U.S. CONST. amend. V. For a discussion of this argument, see Lindee, *supra* note 106.

operated websites facilitating contact between American men and foreign women mainly from Eastern Europe and the former Soviet Union. The male clients of European Connections paid membership fees and other fees for various services but the women did not, leading to a situation of commodification of the women. Information provided by the clients was not disclosed by European Connections, including information relating to the potential dangerousness of the male clients. Male and female clients were permitted to communicate with one another via European Connections computer servers and Russian matchmaking agencies were responsible for translating these communications.

IMBRA requires international marriage brokers (IMBs) to collect information on the client and disclose it to the prospective bride.<sup>221</sup> The law, however, exempts dating services and “traditional matchmaking organization[s] of a cultural or religious nature.”<sup>222</sup>

The plaintiff argued that the law violates the free speech protection of the First Amendment. The court disagreed, stating:

‘Commercial speech’ entitled to First Amendment protection is limited to communications about the availability and characteristics of products, services, and communications which are intended to propose a commercial transaction . . . . In the instant case, IMBRA does not regulate commercial speech. IMBs are not restricted from touting services. Nowhere in the IMBRA statute are there any provisions attempting to regulate the content of IMB’s commercial messages in which they tout their respective services in an attempt to induce commercial transactions. Instead IMBRA requires the IMBs merely to perform a transmittal role. This is not commercial speech.<sup>223</sup>

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221. Violence Against Women and Department of Justice Reauthorization Act of 2005, § 831. Required disclosure includes: (1) Temporary or permanent civil protection orders or restraining orders issued against the United States client; (2) Arrests or convictions of the United States client for, inter alia, homicide, assault, domestic violence, sexual assault, torture, trafficking, kidnapping or stalking; (3) Arrests or convictions of the United States client for engaging in prostitution, attempting to promote prostitutes or persons for the purpose of prostitution, or receiving the proceeds of prostitution; (4) Arrests or convictions of the United States client for offenses related to controlled substances or alcohol; (5) Marital history of the United States client; (6) The ages of any of the United States client’s children who are under the age of 18; (7) All states and countries in which the United States client has resided since the client was 18 years of age. *Id.*

222. 18 U.S.C. § 833(e)(4)(B)(i) (2006).

223. *European Connections*, 480 F. Supp. 2d at 1369-70. The court distinguished between “outright bans” on commercial speech and disclosure requirements, saying that “thus, IMBRA regulates a part of a commercial transaction that does not involve any advertising or commercial claims but instead concerns the release of private information in order to protect the health and safety of foreign women.” *Id.* at 1371. Disclosure requirements are subject to minimal scrutiny: “[t]he state’s asserted interest here is in protecting female clients of IMBs from fraud, deception and abuse by the United States male clients who utilize IMBs to market themselves as desirable mates. This interest constitutes a legitimate governmental interest, which is advanced by the

The other constitutional challenge was based on equal protection. Because the law excludes organizations that do not target relationships between American men and foreign women as the principle part of its business (the IMBRA does not regulate relationships between American citizens), as well as cultural and religious organizations, European Connections argued that they were facing unconstitutional discrimination.

In upholding of the “rational basis” for the law’s classifications, the court stated that:

Cultural and religious non-profits are not targeted by IMBRA for regulation because, like non-profits, such entities lack the same customer-centric motivations that commercial IMBs possess. Congress reasonably could assume that without the motivations to keep its male customers satisfied, traditional religious and cultural matchmaking agencies are not as likely to be complicit in developing abusive relationships. Furthermore, Congress simply had no statistical or other evidence that traditional cultural or religious marriage brokers contribute significantly to the harm Congress seeks to address—domestic abuse and human trafficking.<sup>224</sup>

As to matchmaking organizations addressing domestic clients, the court said:

The distinction between those dating services whose principal business is providing international dating services as opposed to domestic service is clear, Congress sought not to regulate all dating services but to protect foreign women, who it found to be particularly vulnerable to harm from this industry, from potentially violent American men. Congress rationally sought to regulate only those businesses whose main function is to facilitate these international matches rather than painting all dating services with a broad brush.<sup>225</sup>

#### IV. THE TVPA DOES NOT OVERRIDE DIPLOMATIC IMMUNITY

##### *A. Applying the Forced Labor Statute to Trafficking for the Purpose of*

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disclosure requirements.” *Id.* at 1371-72. Plaintiff argued that there is no link between the patronization of prostitutes and domestic abuse, and that therefore the law’s requirement to disclose relevant prostitution convictions was overly broad. *Id.* at 1373. The court disagreed stating: “one reason why IMBRA requires the disclosure of prostitution related offenses is that such questions are asked on the non-immigrant petition and such offenses are a ground of inadmissibility under the Immigration and Nationality Act. Prostitution related disclosures are also mandated under IMBRA to ascertain information which is potentially relevant to the issue of human trafficking.” *Id.* at 1374 (internal citations omitted).

224. *Id.* at 1378.

225. *Id.* at 1379. In *American Online Dating Ass’n v. Gonzales*, the court rejected a TRO and eventually dismissed claims under equal protection and freedom of speech. No. 3:06-CV-123 (S.D. Ohio May 25, 2006), available at <http://www.veteransabroad.com/denied.pdf>. See generally Lindee, *supra* note 106.



*Domestic Service*

Many instances of trafficking in persons occur due to the demand for workers within the home. These domestic workers often clean the house, care for children and perform other domestic duties. These are particularly egregious cases as it is frequently the women, who are traditionally in charge of domestic affairs, commit the trafficking offenses.<sup>226</sup>

Trafficking for the purpose of domestic service was one of the offenses that Congress intended to reach by enacting § 1589. As stated in the House Conference Report:

[I]t is intended that prosecutors will be able to bring more cases in which individuals have been trafficked into domestic service, an increasingly common occurrence, not only where such victims are kept in service through overt beatings, but also where the traffickers use more subtle means designed to cause their victims to believe that serious harm will result to themselves or others if they leave.<sup>227</sup>

In *United States v. Djoumessi*,<sup>228</sup> the Sixth Circuit rejected the defendant's argument that the victim's labor was voluntary because the conditions were better than those she would have encountered in her own country. The victim was a 14 year-old girl from Cameroon who worked as a domestic worker for defendants. She was promised education in exchange for performing housekeeping tasks for the defendants and their two young children, but was never sent to school. She was constantly beaten and sexually abused on several occasions. The court reasoned that:

[A] slave master cannot escape the clutches of section 1584 by contending that he subjected the servant to slightly less wretched conditions than she would have experienced elsewhere. Involuntary servitude is a fixed prohibition, not a relative one. It thus sweeps up all forced labor, even when the victim is freed from the bondages of one bad relationship and placed in another.<sup>229</sup>

Still, while the husband may not participate in the abuse committed by his wife towards the victim in cases of forced labor for domestic service, it is enough that he is aware of his wife's actions and the victim's condition to be held liable for conspiracy to commit the crimes of forced labor under article 1581 and document servitude in accordance with article 1589. This

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226. See, e.g., *Ramos v. Texas*, No. 13-06-00646-CR, 2009 Tex. App. LEXIS 7837 (Tex. App. Oct. 8, 2009) (nothing that the female defendant's husband arranged for a housekeeper to be smuggled illegally into Texas, forced her to work mostly without pay, and threatened her with deportation if she did not work). For the Texas law, see TEXAS PENAL CODE ANN. § 20A.02 (West 2011).

227. H.R. REP. NO. 106-939, at 101 (2000) (Conf. Rep.), reprinted in 2000 U.S.C.C.A.N 1380.

228. 538 F.3d 547 (6th Cir. 2008).

229. *Id.* at 553.

was the case in *United States v. Sabhnani*.<sup>230</sup> In this case, the victims traveled to the United States from Indonesia to work as domestic servants for the defendants who locked up their passports and made them work long hours under difficult working conditions. The Second Circuit found that although he did not personally abuse the victim, the husband possessed sufficient knowledge to be liable as a secondary offender. In relation to the charge of conspiracy, the Court specifically held that:

[T]he evidence is ample that Mahender assisted his wife in bringing the maids to his home, that he did so to benefit from their labor, which he helped to direct, and that, knowing of his wife's threats and punishments, he aided her in meting them out. This evidence provides more than a sufficient basis on which to conclude that there was a "tacit understanding" between Mahender and Varsha that the maids would be held in involuntary servitude and peonage in the Sabhnanis' home.<sup>231</sup>

In *United States v. Udeozor*,<sup>232</sup> the Fourth Circuit admitted evidence of defendant's ex-husband's rape of the victim (a 14 year-old girl) who had left her home country of Nigeria. The victim worked as a servant for the defendant and was beaten, abused and denied basic rights as a worker. The court held that:

[T]o rule this evidence inadmissible outright would create problems of its own. Sexual coercion and subordination have been among the worst indicia of involuntary servitude. To reverse the trial court's admission of such evidence here would draw us closer to an inadvisable rule of per se inadmissibility with respect to a badge and incident of servitude, which is distressingly common, not just historically, but for young women who find themselves in coercive circumstances today.<sup>233</sup>

The court concluded that the defendant "was part of a conspiracy that substituted for a promised education and compensation a regime of psychological cruelty and physical coercion that took some of the best years of a young girl's life. For that, involuntary servitude is not too strong a term."<sup>234</sup>

### *B. Diplomatic Immunity as a Shield Against Prosecution in Cases of Trafficking in Persons*

Several times, the United States has uncovered trafficked women and children performing domestic service for foreign diplomats who were

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230. 599 F.3d 215 (2d Cir. 2010).

231. *Id.* at 244.

232. 515 F.3d 260 (4th Cir. 2008).

233. *Id.* at 266.

234. *Id.* at 272.

protected by diplomatic immunity.<sup>235</sup> When the defendant is a diplomat working in the United States, he or she may be protected by diplomatic immunity as was the case in *Sabbithi v. Al Saleh*.<sup>236</sup>

[P]laintiffs worked for the defendant and his wife in Kuwait for a period ranging from five and a half years to eight and a half months. In Kuwait, plaintiffs allegedly worked seven days a week, for long hours each day, and were paid between 35 Kuwaiti Dinar (KD) (approximately 121 U.S. dollars) and 40 KD (approximately 138 U.S. dollars) per month.<sup>237</sup>

The defendants signed a contract before coming to the United States promising to pay the plaintiffs \$1,314 dollars per month but they failed to comply with the provisions of the contract and instead sent wages of 70 KD (approximately 242 U.S. dollars) to 100 KD (approximately 346 U.S. dollars) per month to their families overseas. In addition, the plaintiffs' passports were taken away from them and they were threatened with physical harm. Finally, on January 18, 2007, they escaped.<sup>238</sup> The plaintiffs argued that "human trafficking is a profitable commercial activity that results in severe human rights violations"<sup>239</sup> and that bringing plaintiffs from Kuwait to the United States to work as domestic servants constituted human trafficking and thus was a commercial activity which is an exception to diplomatic immunity. The court disagreed, holding that "hiring household help is incidental to the daily life of a diplomat and therefore not commercial for the purposes of the exception to the Vienna Convention."<sup>240</sup> The court concluded that "the TVPA does not override diplomatic immunity . . . [T]he TVPA is silent as to whether it limits the immunity of diplomats, and courts should not read a statute to modify the United States's [sic] treaty obligations in the absence of a clear statement from Congress."<sup>241</sup> The court did recognize that foreclosing the plaintiffs' access to the courts may have harsh implications, including even the denial of legal or monetary relief. According to the court:

The application of the doctrine of diplomatic immunity inevitably 'deprives others of remedies for harm they have suffered.' . . . Congress, however, is the appropriate body for plaintiffs to present their concerns that the effectiveness of enforcing fair labor practices in the United

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235. See Amy Tai, Comment, *Unlocking the Doors to Justice: Protecting the Rights and Remedies of Domestic Workers in the Face of Diplomatic Immunity*, 16 AM. U. J. GENDER SOC. POL'Y & L. 175 (2007).

236. 605 F. Supp. 2d 122 (D.D.C. 2009).

237. *Id.* at 125.

238. *Id.*

239. *Id.* at 127.

240. *Id.*

241. *Id.* at 130.

States is compromised by diplomatic immunity.<sup>242</sup>

In *Baoanan v. Baja*,<sup>243</sup> the plaintiff accused a former diplomat and his wife of luring the plaintiff from the Philippines on the pretense of working as a nurse in the United States, but upon her arrival forced her to act as a domestic servant. A federal court in New York upheld the Vienna Convention on Diplomatic Relations (VCDR), which grants immunity only for “acts performed in the exercise of a diplomat’s functions as a member of the mission.”<sup>244</sup>

*C. From Prosecution to Prevention: A Significant Amendment of the TVPA*

To avoid the difficulty of prosecuting a diplomat, the TVPRA 2008 resorts to a preventative measure, namely, the limiting of the issuance of A-3 and G-5 visas. The Act provides that:

[T]he Secretary shall suspend, for such period as the Secretary determines necessary, the issuance of A-3 visas or G-5 visas to applicants seeking to work for officials of a diplomatic mission or an international organization, if the Secretary determines that there is credible evidence that 1 or more employees of such mission or international organization have abused or exploited 1 or more nonimmigrants holding an A-3 visa or a G-5 visa, and that the diplomatic mission or international organization tolerated such actions.<sup>245</sup>

Another significant change in the TVPRA 2008 is the introduction of § 236, which stipulates that the U.S. government will revoke the passport of an individual convicted of participating in international sex tourism.<sup>246</sup>

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242. *Id.*

243. 627 F. Supp. 2d 155, 161 (S.D.N.Y. 2009) (“There are narrow exceptions to this diplomatic immunity, which are articulated in Article 31: A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of: (a) A real action relating to private immovable property . . . ; (b) An action relating to succession . . . ; (c) An action relation to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.”).

244. *Id.*

245. TVPRA 2008, Pub. L. No. 110-457, § 203(a)(2), 122 Stat. 5044 (2008).

246. *Id.* § 236 (stating that the U.S. Secretary of State will not issue a passport to an individual convicted of violating 18 U.S.C. § 2423, if the individual used a passport or passport card or otherwise crossed an international border in committing the offense).

V. WHEN DOES THE TVPA APPLY ON AN EXTRATERRITORIAL BASIS?

*A. Transnationality of the Crime of Trafficking Requires Special Discovery Procedures*

The transnational nature of many trafficking cases poses particular challenges for the plaintiffs, who must gather evidence and testimony from foreign jurisdictions, as exemplified in *Cruz v. Toliver*:

[C]laims of forced labor and trafficking under 18 U.S.C. § 1589 and 18 U.S.C. § 1590 required more time, effort and research to address than the FLSA claim . . . . The Plaintiff's counsel not only had to conduct discovery here in the United States, but also had to go abroad to take discovery in order to submit the claim under those statutes.<sup>247</sup>

Because of these additional burdens, the court allowed for the award of additional attorney's fees. Furthermore, the prosecution of a case of trafficking in persons may require international cooperation between the country of origin and the country of destination, which may prolong the trial. In *United States v. Maksimenko (Maksimenko I)*,<sup>248</sup> both of the Ukrainian defendants were charged with obtaining labor and services from Ukrainian women in the U.S. through the use of threats and physical restraints in violation of 18 U.S.C. § 1589. The court granted the government's motion for continuance for five months so that it could obtain information from Ukraine. The court found that the five-month period was not excessive and did not trigger the application of the Constitutional right to a speedy trial.<sup>249</sup> The U.S. government submitted a request to the government of Ukraine pursuant to the treaty on Mutual Legal Assistance in Criminal Matters, but processing that request took a significant amount of time.

*B. Early Rejection of the Extraterritorial Application of the TVPA*

Trafficking in persons is a transnational crime that requires transnational responses, including the recognition of the crime as an extraterritorial offense. In 2000, the TVPA did not explicitly provide for the principle of extraterritoriality.

In *Nattah v. Bush*,<sup>250</sup> the D.C. District Court dismissed the plaintiff's

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247. *Cruz v. Toliver*, No. 5:04CV-231-R, 2007 U.S. Dist. LEXIS 24468, at \*8 (W.D. Ky. Mar. 30, 2007).

248. No. 05-80187, 2005 U.S. Dist. LEXIS 35087, at \*1, \*9 (E.D. Mich. June 25, 2005).

249. *United States v. Aronov*, No. 05-80187, 2007 U.S. Dist. LEXIS 45615, at \*1 (E.D. Mich. 2007); see also U.S. CONST. amend. VI (granting the right to a speedy and public trial to criminal defendants).

250. 541 F. Supp. 2d 223, 233 (D.D.C. 2008).

slavery claim. The court stated: “To the extent that Plaintiff’s story relies upon the Thirteenth Amendment, that amendment does not in itself create or promote right of action.”<sup>251</sup> The court continued, “similarly, the plaintiff fails to provide a basis for his slavery claim under the Trafficking Victims Protection Act (‘TVPA’).”<sup>252</sup> The court referred to *Roe v. Bridgestone Corp.*,<sup>253</sup> in which a lower federal court in Indiana concluded that 18 U.S.C. § 1589 did not apply extraterritorially to conditions on a Liberian rubber plantation and that the plaintiff could not maintain a civil claim pursuant to the civil cause of action created by section 1595.<sup>254</sup> The court in *Nattah* said:

The section 1589 ban on forced labor is not such an instance. That section contains no express indication of intent to create extraterritorial effect . . . [and] [t]his court finds no explicit Congressional intent to create a civil cause of action for conduct occurring wholly outside of the United States.<sup>255</sup>

In *Bridgestone*, the plaintiffs were workers who tapped rubber trees on the Bridgestone rubber plantation in Liberia. The plantation workers were denied basic living conditions, including food and decent accommodations, and minor workers were forced to do hazardous work with their fathers in order to meet the required quota of tapped trees. Whether the TVPA has an extraterritorial effect was one of the issues raised by the plaintiffs. The court concluded that “[t]he Thirteenth Amendment bans slavery and involuntary servitude only ‘within the United States, or any place subject to their jurisdiction.’ By its terms, that language does not appear to reach

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251. *Id.* at 234.

252. *See id.* at 234-35 (“Further, plaintiff cites several statutes in Title 18 of the United States Code [including 18 U.S.C. §§ 1581, 1583, 1584, 1589, 1590], that he asserts create a private right of action to enforce the 13th Amendment. Generally speaking, these statutes create criminal liability for enticement into forced labor, sale into slavery, and use or provision of forced labor; they do not create an independent means of asserting a private action. However, 18 U.S.C. § 1595 expressly provides for a civil remedy for victims of violations of §§ 1589, 1590 and 1591. Yet, there is no indication that § 1595 provides any remedy for alleged violations of the three statutes that occur outside the United States. The court thus finds that *Nattah*’s proposed extraterritorial application of these statutes is improper.”).

253. 492 F. Supp. 2d 988 (S.D. Ind. 2007).

254. *Id.* at 999-1004; *see also* *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (“It is a longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’”).

255. *Nattah*, 541 F. Supp. 2d at 235 n.11. Later in the case, the court addressed another tactic of the plaintiff: “Although each of these statutes applies only to territories or states of the United States, plaintiff claims that Iraq should be considered a United States territory for some or all of his period of captivity because ‘the United States invasion of Iraq in 2003 overthrew and completely replaced the Iraqi government . . . and treated and acted as though Iraq was a protectorate and/or colony.’ . . . There is simply no authority for the proposition that Iraq is a United States territory for the purposes of plaintiff’s claim.” *Id.* at 235 (internal citations omitted).

activity in other countries.”<sup>256</sup> The court then stated that section 1589 of the act “does not provide a remedy for alleged violations of section 1589’s standards that occur outside the United States.”<sup>257</sup> The plaintiffs argued that the TVPA, of which section 1589 is a part, “also includes an array of measures to counteract forced labor and trafficking in persons, including provisions for activities overseas.”<sup>258</sup> The court disagreed, stating that “[t]he international dimensions of the problems of trafficking and forced labor do not support a departure from the usual presumption against extraterritorial application for section 1589 . . . . Congress knows how to legislate with extraterritorial effect in this field. It has done so expressly when it has intended to do so.”<sup>259</sup>

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256. *Bridgestone*, 492 F. Supp. 2d at 998 (quoting U.S. CONST. amend XIII).

257. *Id.* at 999.

258. *Id.* at 1001.

259. *Id.* at 1002 (referring to the first federal anti-slavery statute, 18 U.S.C. § 1586, passed by Congress in 1800, which provided that “[w]hoever, being a citizen or resident of the United States, voluntarily serves on board of any vessel employed or made use of the transportation of slaves from any foreign country or place to another, shall be fined under this title or imprisoned not more than two years, or both”). The court concluded that § 1589, unlike § 1591 which Congress expanded based on its power to regulate interstate and foreign commerce, stems from the Thirteenth Amendment, unlike the sex tourism statute. *See, e.g.*, *United States v. Yakoob*, No. 07-20084, 2008 U.S. Dist. LEXIS 562, at \*6 (E.D. Mich. Jan. 4, 2008). In *Yakoob*, the defendant was charged with attempt to coerce a minor to commit illegal sexual activity in violation of § 2422(b) and travel with intent to engage in illicit sexual conduct in violation of § 2423(b)). *Id.* at \*1. The defendant, a Canadian citizen permanently residing in Michigan, traveled to a shopping mall in Ontario, Canada to meet who he thought was a thirteen year-old girl. *Id.* The girl was in fact a law enforcement agent who engaged in a series of sexually explicit conversations in internet chat rooms with the defendant. *Id.* The defendant argued that the statute does not apply extraterritorially. *Id.* at \*2. The court disagreed, holding that “[t]he statute criminalizes travel in foreign commerce for the purpose of engaging in illicit sexual conduct, as (defendant) did. The language of the statute clearly contemplates extraterritorial application, and such application does not run afoul of international law or due process or exceed Congress’s power under the Foreign Commerce Clause.” *Id.* at 6.

*C. Statutory Amendment of the TVPA to Apply on Extraterritorial Basis*<sup>260</sup>

The TVPRA 2005 came into force in 2007. After the passage of the TVPRA, the Uniform Code of Military Justice was amended in October of 2007, creating a new offense of “forcible pandering.”<sup>261</sup> The amendment was designed to respond to the issue of forced prostitution. The new offense requires: (a) that the accused compelled a certain person to engage in an act of prostitution; and (b) that the accused directed another person to said person, who then engages in an act of prostitution.

Prior to this, in 2000, the Military Extraterritorial Jurisdiction Act (MEJA)<sup>262</sup> extended criminal liability to civilians working for the United States abroad and criminalizing contractors “employed by or accompanying” the U.S. armed forces for offenses that under U.S. law would be considered felonies punishable by at least one year of prison. In 2004, MEJA extended its scope of application to contractors of any federal agency “to the extent such employment related to supporting the mission of the Department of Defense overseas.”<sup>263</sup>

The original version of MEJA did not provide for any extraterritorial application, nor did the TVPRA 2003. Instead, the TVPRA 2003 stated that:

[A]ny grant, contract, or cooperative agreement provided or entered into by a federal department or agency under which funds are to be provided by a private entity shall be included a condition that authorizes the department or cooperative agreement, without penalty, if the grantee or any sub-grantee, or the contractor or any subcontractor (i) engages in

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260. For a discussion of the relationship between international norms and domestic law, see generally Philip M. Moreman, *National Court Decisions as State Practice: A Transnational Judicial Dialogue?*, 32 N.C. J. INT’L L. & COM. REG. 259 (2006) (discussing the relationship between international norms and domestic law); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT’L L.J. 191, 192 (2003) (describing the scope of transnational litigation); Melissa A. Waters, *Justice Scalia on the Use of Foreign Law in Constitutional Interpretation: Unidirectional Monologue or Co-Constitutive Dialogue*, 12 TULSA J. COMP. & INT’L L. 149, 150-51 (2004) (pointing to the growing trend and criticism of the Supreme Court’s use of international law in its decisions and the Court’s reluctance to enter the debate during its 2003-2004 term); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 490 (2005) (arguing that domestic courts play a dual role, as both international norm internalizers and norm creators, resulting in the passive acceptance of international law into domestic law).

261. Uniform Code of Military Justice, 10 U.S.C. § 801 (2006). See generally Margaret Maffai, *Accountability for Private Military and Security Company Employees that Engage in Sex Trafficking and Related Abuses While Under Contract with the United States Overseas*, 26 WIS. INT’L L.J. 1095, 1109 (2009) (listing the requirements for classifying an act as “forcible pandering” and analyzing the problems in the statutory language).

262. 18 U.S.C. § 3261 (2006).

263. 18 U.S.C. § 3267 (2006).



severe forms of trafficking in persons or have procured a commercial sex act during the period of time that the grant, contract, or cooperative agreement is in effect, or (ii) uses forced labor in the performances if the grant, contract or cooperative agreement.<sup>264</sup>

However, in 2005, the TVPA was amended to include an extraterritorial application in cases involving civilian employees of the United States in a foreign country. Section 2371 of the act provides:

Whoever, while employed by or accompanying the federal government outside the United States, engages in conduct outside the United States, that would constitute any offense under this title if the conduct has been engaged in within the United States or within the special maritime and territorial jurisdiction of the United States should be punished as provided for that offense.<sup>265</sup>

Consequently, TVPRA 2005 expanded U.S. criminal jurisdiction for offenses committed by U.S. government personnel and contractors in a foreign country in cases in which they are involved in trafficking in persons activities.<sup>266</sup>

Finally, in 2008, Congress decided to apply the Act on an extraterritorial basis for all of the crimes that are covered under the Act.<sup>267</sup>

## VI. INCORPORATING INTERNATIONAL LAW ON TRAFFICKING IN PERSONS INTO U.S. COURTS

### *A. The TVPA as an Implementation of the U.N. Protocol on Trafficking: A Comparison*

The U.N. Protocol, which was passed in 2000, represents an international consensus that trafficking in persons should be criminalized,

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264. TVPRA 2003, Pub. L. No. 108-193, § 3, 177 Stat. 2875 (2003).

265. TVPRA 2005, Pub. L. No. 109-164, § 2371, 119 Stat. 3558 (2005).

266. *See id.* (including criminal offenses committed by federal contractors outside the United States as a crime under § 3271 of Title 18 of the United States Code, which states that “[w]hoever, while an extraterritorial Federal contractor, engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States shall be punished as provided for that offense.”).

267. *See id.* § 223(a) (specifying in Section 223, titled Jurisdiction in Certain Trafficking Offenses, that chapter 77 of Title of the United States Code should be amended by adding “Sec. 1596. Additional jurisdiction in certain trafficking offenses: (a) In General—In addition to any domestic or extra-territorial jurisdiction otherwise provided by law, the courts of the United States have extra-territorial jurisdiction over any offense (or any attempt or conspiracy to commit an offense) under section 1581, 1583, 1584, 1589, 1590, or 1591 if—(1) an alleged offender is a national of the United States or an alien lawfully admitted for permanent residence (as those terms are defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)); or (2) an alleged offender is present in the United States, irrespective of the nationality of the alleged offender.”).

acts of trafficking should be prevented, and victims of trafficking should be protected.<sup>268</sup> The United States ratified the U.N. Protocol on November 3, 2005. In comparison with the U.N. Protocol, the TVPA's definition of trafficking in persons is narrow in scope in several ways. In particular, the TVPA's operational provisions are limited to severe forms of trafficking.<sup>269</sup> In addition, the U.N. Protocol recognizes more forms of trafficking.<sup>270</sup> The focus in the TVPA is on the illegal means, while the U.N. Protocol emphasizes the exploitation of workers. In cases of trafficking in persons other than children, the TVPA requires proof of force, fraud, or coercion. Consequently, these "illegal means" are narrowly defined under the Act. The U.N. Trafficking Protocol adopts a more expansive definition that includes "threat, or use of force, or other means of coercion, of abduction, of fraud, of deception, of abuse of power, or of a position of vulnerability."<sup>271</sup> According to this more comprehensive definition of "illegal means," the use of force, fraud, or coercion is not required.<sup>272</sup> It should be noted, however, that the UN Protocol and the TVPA adopt substantially similar standards for the elimination of human trafficking.<sup>273</sup>

The TVPA is essentially an implementation of article 5 of the U.N.

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268. U.N. Protocol, *supra* note 79, at 31.

269. TVPA, Pub. L. No. 106-386, § 103(8), 114 Stat. 1464 (2000) (defining "[s]evere forms of trafficking in persons" as "(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.").

270. U.N. Protocol, *supra* note 79, at art. 3(a) (defining trafficking in persons as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs").

271. *Id.* (defining a position of vulnerability as "any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved").

272. *Id.* at art. (3)(b) (stating that consent, "expressed by a person in such vulnerable condition, is irrelevant" and thus when the victim performs the work or service voluntarily it should not affect the outcome of the case).

273. See U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT, 2011 16 (2011) ("The Trafficking in Persons Report monitors countries' anti-trafficking standards set forth in the U.S. Trafficking Victims Protection Act of 2000 . . . not the . . . Palermo Protocol, which supplements the UN Convention Against Transnational Organized Crime. The standards in the TVPA, however, are largely consistent with the framework for addressing trafficking set forth in the Palermo Protocol, both in form and in content. Both define trafficking in persons as a set of acts, means, and purposes. Both emphasize the use of force, fraud, or coercion to obtain the services of another person. And both acknowledge that movement is not required, framing the crime around the extreme exploitation that characterizes this form of abuse.").

Protocol which requires states to adopt specific anti-trafficking legislation making the act of trafficking an offense.<sup>274</sup> The question becomes to what extent U.S. courts refer to the U.N. Protocol or other related international legal standards when they rule on cases of trafficking. There is evidence that American courts incorporate international conventional law when deciding a domestic case.<sup>275</sup> The Supremacy Clause states that “this constitution as the law of the United States and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby.”<sup>276</sup>

*B. International Legal Instruments Used by Domestic Courts in Deciding Cases of Trafficking in Persons*

Incorporating international law in cases of trafficking in persons and sexual exploitation was the issue in several recent cases. In one case, the issue was whether an international convention provides a plaintiff with a cause of action. In *Nattah*, the plaintiff worked as an Arabic linguist in Kuwait for L-3 Communications Titan. He claimed to have been sold as “a slave” to the U.S. military in Iraq and forced to work against his will. The plaintiff alleged that this violated international law, which the court dismissed, ruling that the plaintiff cannot assert a claim under the U.N. Charter because that treaty provides no right of action against private entities.<sup>277</sup> The court also dismissed the plaintiff’s claim that he had an action under the U.N. Protocol, saying “[t]he court is aware of no authority that would permit plaintiff to assert a private right of action . . . under this

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274. U.N. Protocol, *supra* note 79, at art. 5(1) (“Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally. 2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences: (a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article; (b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and (c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.”).

275. *See generally* Cabrera-Alvarez v. Gonzales, 423 F.3d 1006 (9th Cir. 2005) (agreeing that there is a legal presumption that Congress must legislate in a manner consistent with international law, and that standards in the Convention on the Rights of the Child (CRC) were applicable).

276. U.S. CONST. art. 7, cl. 2.

277. *Nattah v. Bush*, 541 F. Supp. 2d 223, 233 (9th Cir. 1976) (failing to establish that the Geneva Conventions provide a cause of action against a private party, and explaining that “‘The Hague Conventions similarly cannot be construed to afford individuals the right to judicial enforcement’ and ‘may have never been regarded as law private parties could enforce.’ Simply put, plaintiff’s international law allegations have failed to state a claim upon which this Court may grant relief.”) (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 809 (D.C. Cir. 1984)).

protocol.”<sup>278</sup>

Plaintiffs may, however, invoke the Alien Tort Claims Act (ATCA)<sup>279</sup> when claiming a violation of international law. Such was the case in *Roe v. Bridgestone Corp.*, where the federal district court, relying upon *Sosa v. Alvarez-Machain*,<sup>280</sup> concluded that:

[T]here is a broad international consensus that at least some extreme practices called ‘forced labor’ violate universal and binding international norms. But the adult plaintiffs in this case allege labor practices that lie somewhere on a continuum that ranges from those clear violations of international law (slavery or labor forced at the point of soldiers’ bayonets) to more ambiguous situations involving poor working conditions and meager or exploitative wages.<sup>281</sup>

In this case, the adult and child plaintiffs, who worked on a rubber plantation in Liberia, sued their employers and affiliated companies in Liberia, Japan, and the United States. They claimed that the working conditions violated the ATCA,<sup>282</sup> the Thirteenth Amendment, and forced labor laws.<sup>283</sup> The court followed the standard adopted by the Supreme Court in *Sosa*, where the plaintiff must show a violation of an international norm that is “specific, universal, and obligatory.”<sup>284</sup>

In *United States v. Bianchi*,<sup>285</sup> a federal court in Pennsylvania declared

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278. *Id.* at 235.

279. For a discussion of the Alien Tort Claims Act, see generally M. Anderson Berry, *Whether Foreigner or Alien: A New Look at the Original Language of the Alien Tort Statute*, 27 BERKELEY J. INT’L L. 316, 317 (2009) (discussing the uncharted territory of defining the term “alien” in the ATS as the drafters intended); Chad G. Marzen, *The Furundzija Judgment and Its Continued Vitality in International Law*, 43 CREIGHTON L. REV. 505, 505 (2010) (outlining the implications of the *Furundzija* holding on the United States’ treatment of ATS cases); Erin Stapp, *Third-Party Liability for Violations of the Law of Nations: Apply International Law, the Law of the Situs, or Domestic Standards?*, 49 SANTA CLARA L. REV. 495, 495 (2009) (revealing that the ATS could become very useful in increasing corporations’ accountability for their role in human rights violations); Vassilis P. Tzevelekos, *In Search of Alternative Solutions: Can the State of Origin Be Held Internationally Responsible for Investors’ Human Rights Abuses That Are Not Attributable to It?*, 35 BROOKLYN J. INT’L L. 155, 159 (2010) (presenting the argument that a home state is still internationally responsible for an investor’s violation of human rights); Martha Lovejoy, Note, *From Aiding Pirates to Aiding Human Rights Abusers: Translating the Eighteenth-Century Paradigm of the Law of Nations for the Alien Tort Statute*, 12 YALE HUM. RTS. & DEV. L.J. 241, 244-47 (2009) (plotting the history of the ATS in the United States and the cases that shaped its effect).

280. 542 U.S. 692, 732-33 (2004) (illustrating that the ATS only enforces a narrow set of specific norms of international law).

281. *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1010 (S.D. Ind. 2007).

282. 28 U.S.C. § 1350 (2006).

283. 18 U.S.C. §§ 1589-90 (2006).

284. *Bridgestone Corp.*, 492 F. Supp. 2d at 991 (quoting *Sosa*, 542 U.S. at 732).

285. No. 06-19, 2007 U.S. Dist. LEXIS 37103 (E.D. Pa. May 22, 2007).

that “the sexual abuse of children is universally condemned.”<sup>286</sup> In this case, the defendant was convicted for traveling with the intent to engage in illicit sexual conduct in foreign places in violation of section 2423(e) and using a facility in foreign commerce to entice a minor to engage in sexual activity in violation of section 2422(b). The defendant traveled to Moldova on five occasions to engage in illicit sex with minors whom he induced into consensual sex through gifts and money. The defendant also raped them. He challenged his indictment on constitutional grounds, arguing that by enacting 18 U.S.C. § 2423(c), Congress overstepped their powers under the Foreign Commerce Clause.<sup>287</sup> The court stated that, “Congress’s authority under the Foreign Commerce Clause is broad,”<sup>288</sup> and that section 2423(c), “applies only to American citizens or permanent residents who travel in foreign commerce.”<sup>289</sup> The defendant was charged with engaging in illicit sex acts that allegedly occurred on trips where he flew in international commercial flights to Moldova, Romania, or Cuba, then flew back to the United States. The international community has vigorously and uniformly condemned these types of illicit sex acts. The Optional Protocol (to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography)—which has been ratified by 119 countries, including the United States, Moldova, and Cuba—requires that the sexual exploitation of children be fully covered by a signatory’s national criminal law, “whether such offenses are committed domestically or transnational.” Accordingly, because the defendant failed to make “a plain showing that Congress has exceeded its Constitutional bounds in enacting 18 U.S.C. § 2423(c), his Foreign Commerce Clause challenge will be denied.”<sup>290</sup> The court thus relied on the international instrument to rule on the extent of the Foreign Commerce Clause.<sup>291</sup>

In *United States v. Pendleton*,<sup>292</sup> the defendant, a U.S. citizen, was arrested, convicted, and sentenced under German law for having sexual contact with a teenage boy. Upon his deportation back to the United States,

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286. *Id.* at \*4.

287. U.S. CONST. art. 1, § 8, cl. 3.

288. *Bianchi*, 2007 U.S. Dist. LEXIS 37103, at \*13.

289. *Id.* at \*15.

290. *Id.*

291. See *United States v. Armstrong*, No. EP-07-CR-2276-DB, 2007 U.S. Dist. LEXIS 82821, at \*7 (W.D. Tex. Oct. 26, 2007) (holding that criminal liability may be found even when the defendant’s travel was commenced without the intent to have sex with a minor, but where, nonetheless, the defendant engaged in illegal sexual activity during the course of a trip to another country); see also *id.* at \*1 n.2 (“Any United States citizen . . . who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.”) (quoting 18 U.S.C. § 2423(c) (2006)).

292. No. 08-111-GMS, 2009 WL 330965 (D. Del. Feb. 11, 2009).

he was charged with a violation of the PROTECT Act: traveling in foreign commerce to engage in illicit sexual activity with a minor.<sup>293</sup> In rejecting his double jeopardy claim, the Delaware District Court noted that:

[T]he defendant's argument that this prosecution is unreasonable as a matter of international law because he was previously prosecuted in Germany is . . . unpersuasive. The fact that Germany has an interest in regulating, and does regulate the behavior of adults toward children within its territorial limits, in no way diminishes the interest the United States has in regulating that same behavior when it involves one of its citizens. In this case [defendant]'s previous prosecution, conviction, and term of imprisonment in Germany for a German sexual offense does not, in any way, diminish or bar prosecution or enforcement of United States law under the Protect Act. Germany and the United States are separate sovereigns.<sup>294</sup>

Consequently, the court concluded that the defendant's prosecution under the PROTECT Act of the United States was not barred by principles of international law. The court stated that, "[t]he validity of the laws of the United States do not depend on international law . . . . A state may not exercise jurisdiction to persuade law with respect to a person or activity having connection with another state when the exercise of such jurisdiction is 'unreasonable.'"<sup>295</sup>

In *United States v. Clark*,<sup>296</sup> the defendant, a U.S. citizen, was arrested in Cambodia by the Cambodian National Police for engaging in sexual contact with two Cambodian boys. Clark had lived in Cambodia for approximately five years.<sup>297</sup> A federal court in Washington State found the

293. 18 U.S.C. § 2423(c), (f)(1) (2006).

294. *Pendleton*, 2009 WL 330965, at \*6.

295. *Id.* at \*5.

296. 315 F. Supp. 2d 1127 (W.D. Wash. 2004).

297. *Id.* at 1129 (depicting the defendant's activities within the five year period in Cambodia). See generally Recent Case, *Constitutional Law-Foreign Commerce Clause-Ninth Circuit Holds that Congress Can Regulate Sex Crimes Committed by U.S. Citizens Abroad*-*United States v. Clark*, 435 F.3d 1100 (9th Cir. 2006), 119 HARV. L. REV. 2612, 2619 (2006) (concluding that *United States v. Clark* is just the beginning of a predictably increasing slate of legislation and litigation reflecting the growing globalization of political, economic, and health institutions); Daniel Bolia, *Policing Americans Abroad: The Protect Act, the Case Against Michael Lewis Clark, and the Use of the Foreign Commerce Clause in an Increasingly Flat World*, 48 S. TEX. L. REV. 797, 801 (2007) (highlighting that the defendant in *Clark* was the first person to be prosecuted under the extraterritorial provisions of the PROTECT Act); Amy Messigian, *Love's Labour's Lost: Michael Lewis Clark's Constitutional Challenge of 18 U.S.C. 2423(C)*, 43 AM. CRIM. L. REV. 1241, 1242 (2006) (introducing the purpose of the paper, which is to analyze the arguments in *Clark* and the implications of the Ninth Circuit's ruling); Julie Buffington, Note, *Taking the Ball and Running with It: U.S. v. Clark and Congress's Unlimited Power Under the Foreign Commerce Clause*, 75 U. CIN. L. REV. 841, 841 (2006) (presenting the *Clark* case as an opportunity for courts to find that the illicit sex acts statute fell within Congress's Foreign Commerce Clause powers); Jeff Christensen, Comment, *Congressional Power to Regulate*

extraterritorial application of the sex tourism statute reasonable under international law:

Although there is only a minimal link between the activity sought to be regulated by this statute and the territory of the United States, several of the other factors favor a finding of reasonableness here. There is a strong connection between the United States and its citizens (and resident aliens) who commit the illicit activity. The prohibition against sexual activity with young children is considered desirable and is widely accepted. There is very little likelihood of conflict with regulation by other states.<sup>298</sup>

In *United States v. Frank*,<sup>299</sup> the defendant, a U.S. citizen, was indicted for violating 18 U.S.C. § 2423(c) on five occasions by traveling to Cambodia to engage in illicit sexual activity with various females under the age of 18. The court noted that “one of the statutes that Congress enacted to implement that Optional Protocol was section 2423(c), part of [the PROTECT Act].”<sup>300</sup> The defendant argued that exercising extraterritorial

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*Noncommercial Activity Overseas: Interstate Commerce Clause Precedent Indicates Constitutional Limitations on Foreign Commerce Clause Authority*, 81 WASH. L. REV. 621, 622 (2006) (arguing that the criminalization of noncommercial sexual abuse of minors in foreign countries is not within the scope of the Foreign Commerce Clause).

298. *Clark*, 315 F. Supp. 2d at 1132 (referring to factors considered in determining reasonableness of the application of a law on extraterritorial basis contained in the Restatement (Third) of Foreign Relations of Law of the United States, section 403(2): “(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial direct, and foreseeable effect upon or in the territory; (b) the connections such as nationality residence, or economic activity, between the regulating state and the person principally responsible for the duty to be regulated, or between that state and those whom the regulation is desired to protect; (c) the character of the activity to be regulated, the importance of regulation to the regulatory state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international political, legal, or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system; (g) the extent to which another state may have an interest in regulating the activities; and (h) the likelihood of conflict with regulation by another state.”).

299. 486 F. Supp. 2d 1353 (S.D. Fla. 2007), *aff’d* 599 F.3d 1221 (11th Cir. 2010).

300. *Id.* at 1357-58 (“[Defendant] does not contend that the Optional Protocol was beyond the treaty power granted to the President by the Constitution. Nor could he. First, nothing in the Optional Protocol—insofar as it relates to commercial sex with minors—is prohibited by the Constitution or the Bill of Rights. Second, child sex tourism is undoubtedly a significant problem and is, by its very nature, a global concern. Not only are American citizens going abroad to have sex with child prostitutes, there is the possibility that foreigners will come to the United States for the same purpose . . . . President Clinton therefore could personally have believed, as he said in his letter of transmittal to the Senate, that child sex tourism required an international solution like the one contained in the Optional Protocol, including extraterritorial criminal prosecution by countries of their own citizens for engaging in commercial sex with minors abroad . . . . The next questions are whether, under rational basis review, Congress could enact § 2423(c) under the Necessary and Proper Clause to implement the Optional Protocol and, if so, whether the statutes—insofar as commercial sex with minors is concerned—reasonably implements the Optional Protocol . . . . The

jurisdiction violates international law. The court disagreed. It stated:

Congress has the power to control (and punish) the conduct of American citizens abroad . . . . International law, moreover, generally allows a country to exert extra-territorial jurisdiction over its own citizens, as long as the exercise of such jurisdiction is not unreasonable . . . . Finally, “public international law is controlling only where there is no treaty and no controlling executive or legislative act or judicial decision.” . . . Here there is a treaty—the Optional Protocol—ratified by both the United States and Cambodia.<sup>301</sup>

In addition, the court stated that the U.S. statute did not infringe on the sovereignty of Cambodia. It continued:

As an initial matter, section 2423(c) does not regulate the conduct of the Cambodian nationals (or, for that matter, the nationals of any countries other than the United States). In addition, as noted earlier, Cambodia ratified the Optional Protocol in May of 2002 . . . . If Cambodia does not believe that the Optional Protocol infringes on its sovereignty—and it obviously does not—it will not be offended by laws enacted by the United States to implement the Optional Protocol, which regulate the conduct of American citizens abroad.<sup>302</sup>

### CONCLUSION

The TVPA has evolved since 2000, creating various criminal statutes and adding new offenses to enhance prosecution in cases of trafficking. In 2005, the TVPRA added section 3271 criminal offenses committed by Federal contractors outside the United States. Then, in 2008, Congress

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answer to both questions is yes. First, § 2423(c) bears a national relationship to the Optional Protocol in general, and to article 2(b) and 3(1)(b)—which deals with child prostitution- in particular . . . . Second, § 2423(c) reasonably implements the Optional Protocol. Article 3(4) and 4(2) required that countries take appropriate measures to establish the liability of individual for offenses such as paying a child for sex. Extra-territorial criminal liability is one of the options allowed by the Optional Protocol, and § 2423(c) has extra-territorial application . . . . Moreover, defining a minor as a person under that age of 18 . . . is also congruent with the Optional Protocol.”). *See generally* INTERNATIONAL CHILD SEX TOURISM: SCOPE OF THE PROBLEM AND COMPARATIVE CASE STUDIES (2007), *available at* [http://www.protectionproject.org/wp-content/uploads/2010/09/JHU\\_Report.pdf](http://www.protectionproject.org/wp-content/uploads/2010/09/JHU_Report.pdf) (presenting a collection of articles and case studies on child sex tourism).

301. *Frank*, 486 F. Supp. 2d at 1359 (“[T]he Constitution gives the President the authority to enter into treaties, subject to ratification by the Senate. All Treaties made under the authority of the United States become the ‘supreme law of the land’ and Congress has, pursuant to the necessary and proper clause, the power to enact legislation to implement treaties.”).

302. *Id.* at 1359-60; *see also* *United States v. Martinez*, 599 F. Supp. 2d 784, 800 (W.D. Tex. 2009) (describing that citizenship alone gives Congress the right to enact laws with extraterritorial application, an authorizing jurisdiction that may also therefore be apparent under the “passive personality” principle). *See generally* Joanna Doerfel, Comment, *Regulating Unsettled Issues in Latin America Under the Treaty Powers and the Foreign Commerce Clause*, 39 U. MIAMI INTER-AM. L. REV. 331 (2008) (describing the global problem of sex tourism, specifically in Latin America).



added three new statutes to the TVPA: section 1593A (benefitting financially from peonage, slavery, and trafficking in persons); section 1594 (conspiring in trafficking); and section 1351 (fraud in foreign labor contracting). Courts acknowledge that neither section 1584 nor section 1590 of the TVPA specify a statute of limitations and by analogy to section 1595 provided for a ten-year statute of limitations.<sup>303</sup> If a sex trafficking case involves a child, the statute of limitations is abolished altogether.<sup>304</sup>

Since 2000, courts relying on the plain statutory language of the text of the TVPA, findings of Congress, the legislative history of the Acts and congressional meetings as main tools of legal interpretation, have broadly interpreted the criminal statutes of the TVPA to expand criminal liability and enhance the penalty against the offender who takes advantage of a vulnerable victim. Courts rule that some victims are more vulnerable than others based on several criteria, including their distance from home, family, and familiar institutions, their unfamiliarity with the language, and their fear of retribution and forcible removal to countries in which they face retribution.<sup>305</sup> Although many victims of trafficking suffer from these circumstances, the TVPA never characterizes victims as inherently vulnerable, so there is potential to apply the vulnerable victim enhancement doctrine to cases of trafficking in persons.

Courts also reject the theory that forced labor must amount to traditional slavery in order to be prosecutable.<sup>306</sup> The general consensus is that the crime of slavery is not limited to traditional oppression of a single race or ethnicity, but that it has the potential to affect anyone.<sup>307</sup> Another broad interpretation of the TVPA's criminal statutes is defining a commercial sex

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303. *See Hernandez v. Attisha*, No. 09-CV-2257 IEG (WMC), 2010 U.S. Dist. LEXIS 20235 (S.D. Cal. Mar. 5, 2010).

304. PROTECT Act, Pub. L. No. 108-21, § 202, 117 Stat. 650 (2003) ("No Statute of Limitations for Child Abduction and Sex Crimes . . . . No Statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse, or kidnapping, of a child under the age of 18 years shall preclude such prosecution during the life of the child.").

305. *See United States v. Sabhnani*, 599 F.3d 215, 252 (2d Cir. 2010) (revealing a variety of factors that made the victims in this case vulnerable, such as the defendants' confiscation of the victims' travel documents, the fact that the victims could not speak English, and the fact that the victims were entirely dependent on the defendants for their survival).

306. *See Doe v. Reddy*, No. C 02-05570 WHA, 2003 U.S. Dist. LEXIS 26120, at \*33 (N.D. Cal. Aug. 4, 2003) (contending that modern forms of slavery, such as labor procured through threats of serious harm, are sufficient for establishing a violation of human rights).

307. *See United States v. Nelson*, 277 F.3d 164, 176 (2d Cir. 2001) (emphasizing that the Thirteenth Amendment of the Constitution was meant to reach every race and every individual); *see also United States v. Mussry*, 726 F.2d 1448, 1451 (9th Cir. 1984) (clarifying that the Thirteenth Amendment is not limited to a classic form of slavery but also encompasses contemporary forms of involuntary servitude).

act to include both prostitution and pornography.<sup>308</sup> While courts still require the existence of coercion in order to classify an act as a form of human trafficking, courts broaden the interpretation of coercion to include not just physical and legal coercion, but also psychological coercion, thus expanding the definition of coercion under *United States v. Kozminksi*.<sup>309</sup> The courts clearly define abuse or threatened abuse of the law or legal process to include the threat of deportation.<sup>310</sup>

A reading of courts' interpretation of the TVPA suggests that they define the burden of proof so that unnecessary elements are not required to establish the crime of trafficking in persons. For example, prosecution for labor trafficking is not dependent upon demonstration that the labor was for a "business purpose."<sup>311</sup> Additionally, obtaining a commercial sex act need not be the "dominant purpose" of the trafficker's use of coercion or threats for the scenario to be considered trafficking.<sup>312</sup> The intent to coerce someone to perform a commercial sex act is the only requirement for prosecution, not the act itself,<sup>313</sup> and a prior consensual relationship between the trafficker and the victim does not release the trafficker from liability.<sup>314</sup> Most constitutional challenges to the TVPA, the International Marriage Broker Regulation Act of 2005, and the PROTECT Act have failed. In 2008, the TVPA was amended to apply to all of the crimes on an extraterritorial basis, thus adding a legislative tool to prosecute all cases of trafficking in persons regardless of where the act of trafficking has occurred.

In essence, the TVPA is an implementation of the U.N. Protocol on Trafficking. Although U.S. courts rarely incorporate the Protocol, or other international legal instruments, one can infer from the judicial decisions decided in the last ten years that the principles that U.S. courts established are in harmony with international principles, whether they be the prohibition of slavery or exploitation. Utilizing international law becomes

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308. *See United States v. Marcus*, 487 F. Supp. 2d 289, 306 (E.D.N.Y. 2007) (concluding that Congress would have written the statute to limit the commercial sex acts to prostitution if it had intended to do so, but it did not).

309. 487 U.S. 931 (1988).

310. *See Catalan v. Vermillion Ranch Ltd.*, No. 06-cv-01043-WYD-MJW, 2007 U.S. Dist. LEXIS 567, at \*23-24 (D. Colo. Jan. 4, 2007) (expanding the scope of threats from physical to verbal threats of abusing the legal process); *see also United States v. Veerapol*, 312 F.3d 1128, 1132 (9th Cir. 2007) (including threats of legal deportation as legal coercion used to induce involuntary servitude).

311. *United States v. Kaufman*, 546 F.3d 1242 (10th Cir. 2008).

312. *Marcus*, 487 F. Supp. 2d at 313 (pointing out that the Second Circuit has never limited the purpose of the defendant's conduct to the prohibited conduct).

313. *Iowa v. Russell*, No. 9-906/08-2034, 2010 Iowa App. LEXIS 145, at \*8 (Iowa Ct. App. filed Mar. 10, 2010).

314. *Marcus*, 487 F. Supp. 2d at 309.

necessary in cases of trafficking in persons when the crime is transnational in nature, has a vast global economic impact, and involves a vulnerable victim from a foreign country crying for redress and praying for justice and freedom.