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### Human Trafficking: Understanding the Law and Deconstructing Myths

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## HUMAN TRAFFICKING: UNDERSTANDING THE LAW AND DECONSTRUCTING MYTHS<sup>1</sup>

JOHN COTTON RICHMOND\*

### I. INTRODUCTION

World leaders from across the political and religious spectrum are speaking out to condemn human trafficking.

- Pope Francis has called human trafficking a “plague on the body of contemporary humanity.”<sup>2</sup>
- United Nations Secretary-General Ban Ki-moon stated, “Modern day slavery and trafficking are serious violations of human dignity and rights.”<sup>3</sup>
- Dr. Abbas Shuman, representing the Grand Imam of Al-Azhar, stated, “Islam considers emancipation of slaves as one of the greatest acts of worship . . . we must work together to “push countries to enact laws and legislations that deter the deprivation of freedoms.”<sup>4</sup>
- United States President Barack Obama championed, “Our fight against human trafficking is one of the great human rights causes of our time, and the United States will continue to lead it . . . .”<sup>5</sup>

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1. Some portions of this article originally appeared in *Perspectives on Missing Persons Cases* textbook, published by Carolina Academic Press in 2015. John Cotton Richmond, *Missing Human Trafficking Cases*, in PERSPECTIVES ON MISSING PERSONS CASES (Mary Graw Leary et al. eds., 2015).

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2. Pope Francis: ‘Human Trafficking Is a Plague on Humanity,’ VATICAN RADIO (Apr. 18, 2015), [http://en.radiovaticana.va/news/2015/04/18/\\_\\_\\_pope\\_francis\\_%E2%80%98human\\_trafficking\\_is\\_a\\_plague\\_on\\_humanity%E2%80%99/1137856](http://en.radiovaticana.va/news/2015/04/18/___pope_francis_%E2%80%98human_trafficking_is_a_plague_on_humanity%E2%80%99/1137856) [<http://perma.cc/2QSY-ZDF8>].

3. David V. Barrett, *World Faith Leaders Join Pope to Sign Human Trafficking Declaration*, CATH. HERALD (Dec. 2, 2014), <http://www.catholicherald.co.uk/news/2014/12/02/faith-leaders-join-pope-at-vatican-to-sign-human-trafficking-declaration/> [<http://perma.cc/HLC9-3SVS>].

4. *Id.*

5. President Barak Obama, Remarks by the President to the Clinton Global Initiative (Sept. 25, 2012), <http://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-clinton-global-initiative> [<http://perma.cc/7FL9-MW6Y>].

- The Grand Ayatollah Mohammad Taqi al-Modarresi called for “[t]he formation of a permanent body recognized internationally (akin to UNICEF) to uproot the evil of slavery on a cultural level, and see criminals prosecuted and punished for forced labor and slavery.”<sup>6</sup>

Similar statements have been made by United States President George W. Bush<sup>7</sup> and the Archbishop of Canterbury.<sup>8</sup>

While a grand consensus exists about the need to root out systemic human trafficking from our modern world, the reality of bringing justice to traffickers and their victims is clouded by troublesome myths and practical challenges. From brick kilns<sup>9</sup> to brothels<sup>10</sup> and fishing boats<sup>11</sup> to factory workers,<sup>12</sup> numerous articles have been written highlighting victims’ accounts of exploitation and governments’ collective failures to deal with modern-day slavery. This article seeks to deconstruct several common myths surrounding human trafficking, and provide a general outline of the international and domestic legal framework. While it is not intended as an exhaustive treatment of human trafficking law or policy, it endeavors to provide the reader an introduction to the difficulties of prosecuting traffickers, protecting human trafficking victims, and preventing the surge of modern-day slavery from seeping into yet another generation.<sup>13</sup>

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6. Grand Ayatollah Mohammad Taqi al-Modarresi, Address at the Ceremony for the Signing of the Joint Declaration of Religious Leaders Against Slavery (Dec. 2, 2014), <http://globalfreedomnetwork.org/modarresi2014/> [<http://perma.cc/VGF9-FJGL>].

7. Gina Pace, *Bush Signs Anti-Human Trafficking Bill*, CBS NEWS (Jan. 10, 2006), <http://www.cbsnews.com/news/bush-signs-anti-human-trafficking-bill/> [<http://perma.cc/7XG3-QZ4N>]. At the signing of the 2006 reauthorization of the Trafficking Victims Protection Act, President George W. Bush called human trafficking an “unspeakable evil” and stated that “[w]e’ll continue to call on other nations to take action against trafficking within their own borders.” *Id.*

8. Barrett, *supra* note 3. “Archbishop of Canterbury Justin Welby said: ‘No human body can in any circumstances be an object to be enslaved.’ He continued: ‘We gather to affirm a deep shared commitment for the liberation of those humiliated, abused and enslaved.’” *Id.*

9. Mallika Kapur, *More Than 500 Slaves Rescued from Brick Kilns*, CNN FREEDOM PROJECT (June 29, 2011), <http://thecnnfreedomproject.blogs.cnn.com/2011/06/29/more-than-500-slaves-rescued-from-brick-kilns/> [<http://perma.cc/PG49-7EVV>].

10. Premankur Biswas, *Citizen Hope: A Kid With a Camera*, INDIAN EXPRESS (Aug. 9, 2015), <http://indianexpress.com/article/india/india-others/citizen-hope-a-kid-with-a-camera/> [<http://perma.cc/2WJW-8H25>].

11. Ian Urbina, ‘Sea Slaves’: *The Human Misery That Feeds Pets and Livestock*, N.Y. TIMES (July 27, 2015), [http://www.nytimes.com/2015/07/27/world/outlaw-ocean-thailand-fishing-sea-slaves-pets.html?\\_r=1](http://www.nytimes.com/2015/07/27/world/outlaw-ocean-thailand-fishing-sea-slaves-pets.html?_r=1) [<http://perma.cc/YK5M-Q626>].

12. Dan Viederman, *Supply Chains and Forced Labour After Rana Plaza*, GUARDIAN (Apr. 24, 2014), <http://www.theguardian.com/global-development-professionals-network/2013/may/30/rana-plaza-bangladesh-forced-labour-supply-chains> [<http://perma.cc/VY5N-QBVK>].

13. Prosecution, protection, and prevention are often referred to as the “3P” paradigm approach to human trafficking cases. U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT*

## II. LEGAL AND HISTORIC LANDSCAPE

For most of human history, the buying and selling of people has been a culturally accepted, religiously endorsed,<sup>14</sup> and legally protected practice.<sup>15</sup> No continent, culture, or community can lay an exclusive claim to the persistent menace of slavery.

From the founding of Jamestown, Virginia in 1607<sup>16</sup> to the British army's surrender twenty miles away in Yorktown, Virginia in 1781,<sup>17</sup> the trans-Atlantic slave trade was in full swing.<sup>18</sup> The debate over slavery is even enshrined in the United States Constitution. Although the term "slavery" does not appear in America's founding document, the Constitution contains three references to slavery: the Three-Fifths Compromise,<sup>19</sup> the Fugitive Slave Clause,<sup>20</sup> and the Slave Trade Clause.<sup>21</sup> The Slave Trade Clause provided that slaves could continue to be imported into the country, and it prohibited Congress from passing any law infringing the slave trade for twenty years,

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11 (July 2015), <http://www.state.gov/documents/organization/245365.pdf> [<http://perma.cc/32YV-PMBN>].

14. Pope Nicholas V granted the King of Portugal the right to enslave pagans and unbelievers in "perpetual servitude." *Dum Diversas (English Translation)*, UNAM SANCTUM CATHOLICAM (Feb. 5, 2011), <http://unamsanctamcatholicam.blogspot.de/2011/02/dum-diversas-english-translation.html> [<http://perma.cc/E3YF-FQPU>].

15. Slavery was referenced in the Code of Hammurabi Code of Laws. L.W. King trans., *The Code of Hammurabi*, YALE LAW SCH., <http://avalon.law.yale.edu/ancient/hamcode.asp> [<http://perma.cc/UN2M-VPVA>].

16. Lisa Rein, *Mystery of Va.'s First Slaves Is Unlocked 400 Years Later*, WASH. POST (Sept. 3, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/02/AR2006090201097.html> [<http://perma.cc/BJR6-ASBM>].

17. Robert O. Bigleow, *Blacks at Yorktown*, DAILY PRESS (Feb. 23, 1997), [http://articles.dailypress.com/1997-02-23/news/9702210167\\_1\\_armies-yorktown-blacks](http://articles.dailypress.com/1997-02-23/news/9702210167_1_armies-yorktown-blacks) [<http://perma.cc/WF7D-8KAW>].

18. DAVID BRION DAVIS, *INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD* 82, 240, 324 (2006) (explaining that the trans-Atlantic slave trade began in 1400 and ended in 1888 when Brazil abolished the slave trade).

19. U.S. CONST. art. I, § 2. "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons." *Id.*

20. U.S. CONST. art. IV, § 2. "No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due." *Id.*

21. U.S. CONST. art. I, § 9. "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person." *Id.*

until 1808.<sup>22</sup> Under the leadership of President Thomas Jefferson,<sup>23</sup> Congress enacted the Slave Trade Act of 1807<sup>24</sup> that took effect on January 1, 1808.<sup>25</sup> Although the Slave Trade Act ended the importation of new slaves, it offered no benefits to those slaves already in the United States.<sup>26</sup> It was not until America's Civil War ended and the states ratified the Thirteenth Amendment in 1865 that slavery was legally abolished.<sup>27</sup>

In the decades that followed, the Slave Trade Act was amended,<sup>28</sup> re-codified,<sup>29</sup> and consolidated with another statute<sup>30</sup> in 1948 to form the modern Involuntary Servitude statute that prohibits requiring someone to work by

22. *Id.*

23. Thomas Jefferson, Sixth Annual Presidential Message to Congress, Washington D.C., December 2, 1806, *reprinted in A NECESSARY EVIL?: SLAVERY AND THE DEBATE OVER THE CONSTITUTION* 256 (John P. Kaminski ed., 1995). In his annual message to Congress in 1806, President Thomas Jefferson wrote:

I congratulate you, fellow-citizens, on the approach of the period at which you may interpose your authority constitutionally, to withdraw the citizens of the United States from all further participation in those violations of human rights which have been so long continued on the unoffending inhabitants of Africa, and which the morality, the reputation, and the best interests of our country, have long been eager to proscribe.

*Id.*

24. Slave Trade Act of 1807, ch. 22, 2 Stat. 426, 426–30 (1807).

25. The Slave Trade Act was amended in 1818, stating that “it shall not be lawful to import or bring, in any manner whatsoever, into the United States, or territories thereof, from any foreign kingdom, place, or country, any negro, mulatto, or person of colour, as a slave, or to be held to service or labour . . . .” Slave Trade Act, ch. 90, 3 Stat. 450, 450–51 (1818).

26. *See United States v. Ship Garonne*, 36 U.S. 73, 74, 77 (1837) (holding that the Slave Trade Act “cannot properly be applied to persons of colour who are domiciled in the United States, and who are brought back to their place of residence, after a temporary absence,” in a case involving a slave who went to France for several years with her owner and then returned to Louisiana on the Ship Fortune).

27. U.S. CONST. amend. XIII, §§ 1–2. The Thirteenth Amendment to the United States Constitution, passed December 6, 1865, states as follows: Section 1. “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” Section 2. “Congress shall have power to enforce this article by appropriate legislation.” *Id.*

28. *See* 18 U.S.C. § 423 (1940) (removing the racial element so that it protected all people regardless of race from slavery).

29. Act of March 4, 1909, ch. 321, 35 Stat. 1088 (1909). For a thorough discussion of the recodification process, *see* John M. Cook, *Involuntary Servitude: Modern Conditions Addressed in United States v. Mussry*, 34 CATH. U. L. REV. 153, 160–62 (1984).

30. 18 U.S.C. § 1584 (2012). In 1948, the Slave Trade Act (formerly found at 18 U.S.C. § 423) and the Padrone Statute (originally passed in 1878 to protect Italian boys from involuntary servitude (Act of June 23, 1874, ch. 464, 18 Stat. 251 (1874), formerly found at 18 U.S.C. § 446)) were merged into the current Involuntary Servitude statute as part of general revisions to the federal criminal code. The current Involuntary Servitude statute is found at 18 U.S.C. § 1584. *See* 18 U.S.C. § 423 (1940); 18 U.S.C. § 251 (1874); 18 U.S.C. § 1584 (2012).

force, threats of force, physical restraint, or abuse of law.<sup>31</sup> That same year, the international community gathered to pass the Universal Declaration of Human Rights, which called upon all nations to abolish slavery.<sup>32</sup> In 1981, Mauritania became the last nation to enact a law criminalizing slavery,<sup>33</sup> and now many states in the United States have developed their own human trafficking laws.<sup>34</sup>

A. *America's Comprehensive Human Trafficking Law*

Amidst this patchwork of laws, the Trafficking Victims Protection Act (TVPA), which took effect on October 28, 2000, has emerged as the primary law in the United States regarding human trafficking.<sup>35</sup> One leading international expert noted that “[w]hile a number of governments were debating and passing trafficking legislation throughout the 1990s, it was the United States that had the greatest single impact on the evolution of an international consensus on the definition of trafficking.”<sup>36</sup> For jurisdictional reasons, the TVPA criminalized sex trafficking and forced labor in two separate portions of the criminal statute.<sup>37</sup> Both the forced labor statute and the sex trafficking statute deal with engaging in “prohibited activities” through

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31. 18 U.S.C. § 1584(a) (2012). The section states:

Whoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held, 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.

*Id.*

32. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

33. John D. Sutter, *Slavery's Last Stronghold*, CNN FREEDOM PROJECT (Mar. 17, 2012), <http://thecnnfreedomproject.blogs.cnn.com/2012/03/17/slaverys-last-stronghold/> [<http://perma.cc/5PHG-TCBL>].

34. See POLARIS, 2014 STATE RATINGS ON HUMAN TRAFFICKING LAWS (2014), <http://polarisproject.org/sites/default/files/2014-State-Ratings.pdf> [<http://perma.cc/SY7U-VGJM>] (providing an overview and ranking of states' human trafficking statutes); see *Protected Innocence Challenge*, SHARED HOPE INT'L, <http://sharedhope.org/what-we-do/bring-justice/re-portcards/> [<http://perma.cc/XZ4K-ENWR>] (last visited Aug. 15, 2015).

35. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000). There have been five major reauthorizations and amendments to the TVPA since it became law: December 19, 2003, January 10, 2006, December 23, 2008, March 7, 2013, and May 29, 2015. See 117 Stat. 2875 (2003); 119 Stat. 3558 (2005); 122 Stat. 5044 (2008); 127 Stat. 54 (2013); 129 Stat. 227 (2015).

36. ANNE T. GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* 22 (2010).

37. The jurisdictional basis for the Section 1589 forced labor statute is the Thirteenth Amendment of the Constitution that abolished slavery. See U.S. CONST. amend. XIII. However, the jurisdictional basis for the Section 1591 sex trafficking statute is the Constitution's interstate commerce clause. See U.S. CONST. art. I, § 8, cl. 3.

“prohibited means” to achieve an “economic end.”<sup>38</sup> Under the TVPA, a working definition of “human trafficking” is coercing a person to work or engage in a commercial sex act.

*B. Trafficking People for Labor or Services*

The vast majority of human trafficking victims around the world are forced labor victims.<sup>39</sup> To convict someone of the “forced labor” human trafficking offense under the TVPA, the government must prove that the defendant knowingly engaged in a “prohibited activity” by one or more of the “prohibited means” to achieve an “economic end.” “Prohibited activities” in the forced labor statute are “provid[ing] or obtain[ing] the labor or services of a person.”<sup>40</sup> The “prohibited means” include: (1) “force, threats of force, physical restraint, or threats of physical restraint to that person or another person”; (2) “serious harm or threats of serious harm to that person or another person”; (3) “the abuse or threatened abuse of the law or legal process”; and (4) a “scheme, plan, or pattern intended to cause the person to believe that . . . [they] or another person would suffer serious harm” if the person did not perform the labor or service.<sup>41</sup> The “economic end” is the labor or services of the victim.<sup>42</sup>

The broad language of the four “prohibited means” in the TVPA’s forced labor statute is intended to cover a wide variety of different methods used to coerce a victim. “Serious harm” includes nonphysical harm, such as psychological, financial, and reputational harm.<sup>43</sup> The standard for the trafficker’s conduct is that it must be sufficiently serious that a reasonable person of the same background and circumstances would be coerced. Thus, it is both an objective and subjective standard. The question becomes what combination of coercive methods would make a reasonable person with the same background, physical or mental condition, education, language skills, cultural experience, socioeconomic status, age, and immigration status work for the trafficker. Information about the victim’s specific vulnerabilities and the trafficker’s coercive scheme become essential evidence for a jury to consider.

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38. See 18 U.S.C. §§ 1589, 1591 (2015).

39. Int’l Labour Office, *ILO Global Estimate of Forced Labour: Results and Methodology*, INT’L LABOUR ORG. 13 (2012), [http://www.ilo.org/wcmsp5/groups/public/—ed\\_norm/—declaration/documents/publication/wcms\\_182004.pdf](http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—declaration/documents/publication/wcms_182004.pdf) [<http://perma.cc/3XWH-67R9>]. The International Labour Organization estimates that sixty-eight percent of victims are labor trafficking victims, twenty-two percent are sex trafficking victims, and ten percent are exploited by state actors for labor. *Id.*

40. 18 U.S.C. § 1589(a) (2012).

41. *Id.*

42. *Id.*

43. *Id.* § 1589(c)(2).

The economic end involved in forced labor is the victim's "labor or services," which is essentially the victim's work. It is important to note that the forced labor statute makes no distinction between legal and illegal work. Working in a restaurant or a nail salon is not itself an illegal act. In contrast, the work involved in selling narcotics or extorting others, by definition, involves illegal acts. Regardless of whether the work involves legal or illegal acts, the trafficker commits the crime of forced labor when the trafficker coerces a person to perform that work. The maximum penalty for forced labor under both theories of prosecution is twenty years in prison. If an aggravating factor is present, the maximum penalty increases to life in prison.<sup>44</sup>

### C. Sex Trafficking: Legal Overview

The TVPA criminalizes sex trafficking using a construction similar to the forced labor statute. The ten "prohibited activities" are to "knowingly recruit[], entice[], harbor[], transport[], provide[], obtain[], advertise, maintain[], patronize[], or solicit[] [a person] by any means."<sup>45</sup> The familiar phrase, "by force, fraud, or coercion," comprises the "prohibited means" for sex trafficking. The sex trafficking statute has two different intent requirements. The first requires one to knowingly engage in the "prohibited activities," and the second requires one to know, or recklessly disregard, the "prohibited means."<sup>46</sup> For all practical purposes, the "prohibited means" in the sex trafficking statute are the same as those for the forced labor statute because "coercion" is defined with a cross-reference to the forced labor statute.<sup>47</sup> Therefore, the concepts of "serious harm" and "scheme, plan, and pattern," as well as the need to consider a victim's specific vulnerabilities, are applicable in the sex trafficking context.

Unlike the forced labor statute, which is not limited to any one industry, the "economic end" in the sex trafficking statute is always a "commercial sex act." The TVPA defines a "commercial sex act" broadly as "any sex act, on account of which anything of value is given to or received by any person."<sup>48</sup> Another key difference between the TVPA's forced labor and sex trafficking

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44. *Id.* § 1590(a). The aggravating factors include kidnapping, an attempt to kidnap, aggregated sexual abuse, or an attempt to kill. *Id.*

45. 18 U.S.C. § 1591 (2015).

46. The intent requirement for the "prohibited means" was reduced from knowingly to knowing or in reckless disregard in the 2008 amendments to the TVPA. It is worth noting that when "advertising" was added to the "prohibited activities" portion of the sex trafficking statute in the 2015 TVPA amendments, the advertising theory was excluded from the lower second intent requirement. Therefore, if a case proceeds under an advertising theory, the government must prove that the defendant "knew" about the "prohibited means," and it cannot rely on the reckless disregard option. *Id.* § 1591(a).

47. *Id.* § 1591.

48. *Id.* § 1591(e)(3).



statutes is the impact of the victim's age. The forced labor statute is silent with respect to the age of the victim, while the sex trafficking statute makes a critical distinction.<sup>49</sup> If the trafficker knows or recklessly disregards the fact that the victim is a minor, there is no requirement for the prosecution to prove the "prohibited means" of force, fraud, or coercion. The rationale is that someone under eighteen-years-old is legally incapable of consenting to a commercial sex act and, therefore, must have been coerced. Phrased another way, if knowledge or reckless disregard of age can be proven, no evidence of coercion is necessary.

The TVPA also treats sex trafficking differently from forced labor in the arena of sentencing. All sex trafficking convictions are subject to a maximum sentence of life in prison, whereas the forced labor statute requires the court to find aggravating factors to achieve a life sentence.<sup>50</sup> A conviction for sex trafficking also requires a mandatory minimum sentence of either ten or fifteen years, while the forced labor statute imposes no mandatory minimum sentence at all.<sup>51</sup>

#### D. *Benefiter Theory: Expanded Criminal Liability*

Both the forced labor and sex trafficking statutes provide for an alternate theory of criminal liability. This theory extends culpability beyond traffickers who personally engage in the "prohibited activities" listed in the forced labor<sup>52</sup> and sex trafficking<sup>53</sup> statutes, to individuals who "benefit[], financially or by receiving anything of value, from participation in a venture which has engaged"<sup>54</sup> in the "prohibited activities." Therefore, a "benefiter" can be convicted of a human trafficking crime even though they never recruited, transported, groomed, or coerced the victim. Although the original sex trafficking statute of the TVPA in 2000<sup>55</sup> included the benefiter theory, it was not included in the forced labor statute until 2008.<sup>56</sup>

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49. *See id.* §§ 1589, 1591(b).

50. *See id.* §§ 1589(d), 1591(b).

51. *Compare* 18 U.S.C. § 1589(d) ("Whoever violates this section shall be fined under this title, imprisoned for not more than 20 years or both[]," *with id.* § 1591(b)(1) (If the sex trafficking victim is thirteen years old or younger or the crime was proved by force, fraud, and coercion that mandatory minimum sentence is fifteen years in prison), *and id.* § 1591(b)(2) (If sex trafficking victim had reached fourteen years of age but not eighteen years of age, and the jury did not find coercion, the mandatory minimum sentence is ten years in prison).

52. *Id.* § 1589(a) ("provides or obtains the labor or services of a person . . .").

53. *Id.* § 1591(a)(1) ("recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person.").

54. *Id.* § 1591(a)(2).

55. 18 U.S.C. § 1591 (2000).

56. *See* 18 U.S.C. § 1589(b) (2008).

Although the benefiter theory provides an alternative to proving the “prohibited activities” element, it has no impact on the “prohibited means” and “economic end” elements. For a benefiter to be held criminally liable for forced labor or sex trafficking, the benefiter must know or recklessly disregard<sup>57</sup> the fact that the labor or services, or commercial sex act were compelled through “prohibited means.”

The terms “benefiting” and “venture” found in the statutes are broadly defined. “Benefiting” is not limited to financial compensation. The statutes direct that a benefit can be “financially or by receiving anything of value.”<sup>58</sup> Likewise, the term “venture” is defined by the statute to be far less than what is required to establish a conspiracy. “[V]enture” means any group of two or more individuals associated in fact, whether or not a legal entity.”<sup>59</sup> In the only successful human trafficking conviction in the United States, relying solely on the benefiter theory, a New Orleans hotel owner was indicted for sex trafficking where he benefited by charging pimps an inflated room rate and maintained their consistent businesses.<sup>60</sup> Although the hotel owner never personally engaged in the “prohibited activities” or personally participated in the “prohibited means,” he was held criminally liable for sex trafficking.<sup>61</sup> In providing a factual basis for his sex trafficking plea,<sup>62</sup> the hotel owner admitted that he knew or recklessly disregarded the fact that the pimps used force, fraud, or coercion to compel the victims to engage in commercial sex acts at his hotel.

The benefiter theory seeks to hold accountable those who knowingly, or through reckless disregard, profit from forced labor. This provision could be used to prosecute a landlord of a sweatshop or a company sourcing its products through a supply chain using forced labor. The critical component of culpability under the benefiter theory is proving that the person or entity that benefited knew or recklessly disregarded the coercion.

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57. The “reckless disregard” language was added in the 2008 amendments to 18 U.S.C. §§ 1589 and 1591. *See id.* §§ 1589(b), 1591(a).

58. 18 U.S.C. § 1589(b) (2012).

59. *Id.* § 1591(e)(5).

60. Factual Basis at 1–2, *United States v. Patel*, No. 2:13-cr-00286 (E.D. La. July 1, 2015), ECF No. 227.

61. *See id.*

62. *Id.* Although originally indicted on October 3, 2014 for sex trafficking pursuant to 18 U.S.C. § 1591, using only the benefiter theory, the defendant entered a guilty plea on July 1, 2015 under 18 U.S.C. § 1593(a), which criminalizes benefiting from sex trafficking where a trafficker uses a victim’s identity documents in the coercive scheme. Press Release, U.S. Dep’t of Justice, Louisiana Motel Owner Pleads Guilty in Sex Trafficking Case (July 1, 2015), <http://www.justice.gov/opa/pr/louisiana-motel-owner-pleads-guilty-sex-trafficking-case> [<http://perma.cc/5DLR-EYBC>].

*E. Comparing the Palermo Protocol and the TVPA*

In addition to the TVPA, there is a second commonly referenced source for the definition of human trafficking. The United Nations met in Palermo, Italy and established a protocol (“Palermo Protocol”) to address trafficking in persons, and called upon all its member states to enact human trafficking laws that protect victims, prosecute perpetrators, and prevent future incidents of trafficking.<sup>63</sup> Although the TVPA became law in the United States two months before the Palermo Protocol passed,<sup>64</sup> the TVPA largely conforms to the basic concepts contained in the Palermo Protocol.<sup>65</sup> The United States ultimately ratified the Palermo Protocol in 2005.

Like the TVPA, the Palermo Protocol’s definition of human trafficking can be broken down into three categories: “action,” “means,” and “purpose.”<sup>66</sup> It is worth noting that the Palermo Protocol’s “purpose” is broader in scope than the TVPA’s “economic end.” Under the Palermo Protocol, “actions” include: recruitment, transportation, transfer, harboring, and receipt of a person. “Means” include: threats, force, coercion, abduction, fraud, deception, abuse of power, and payments.<sup>67</sup> For the “purpose,” the Palermo Protocol uses the term “exploitation,” which it defines as forced labor, slavery, prostitution, sexual servitude, and the removal of organs.<sup>68</sup> Where “prohibited acts,” “prohibited means,” and the “exploitive purpose” are all present, a perpetrator has committed a human trafficking offense. The United Nations also called upon member states to create national laws criminalizing such behavior and to provide services to the victims of human trafficking.<sup>69</sup>

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63. The United Nations Convention Against Transnational Organized Crime, and the Protocol to Prevent, Suppress and Punish Trafficking in Persons were adopted pursuant to General Assembly resolution 55/25 of 15 November 2000. The United States ratified the Palermo Protocol in 2005. U.N. Office on Drugs & Crime, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, in UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERETO* 41, 42 (2004) (referring to Article 3(a)).

64. The TVPA took effect on October 28, 2000, and the initial round of state parties met in Palermo to sign the Protocol on December 12, 2000. *See id.*

65. ANTHONY M. DE STEFANO, *THE WAR ON HUMAN TRAFFICKING: U.S. POLICY ASSESSED* 45 (2007).

66. GALLAGHER, *supra* note 36, at 29.

67. U.N. Office on Drugs & Crime, *supra* note 63; *see also* ALISON SISKIN & LIANA S. WYLER, CONG. RESEARCH SERV., *TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 2* (Feb. 19, 2013), <http://www.fas.org/sgp/crs/row/RL34317.pdf> [<http://perma.cc/5V KR-AUBC>].

68. U.N. Office on Drugs & Crime, *supra* note 63.

69. *Id.* at 43. Article 5(1) provides: “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.” *Id.*

There are several notable distinctions between the TVPA and the Palermo Protocol. For instance, the Palermo Protocol and the TVPA differ in their treatment of minor victims. While the TVPA eliminates the requirement to prove the “prohibited means” of force, fraud, or coercion in a sex trafficking case involving a minor victim, it is silent as to the age of a victim in the forced labor statute; the prohibited means must be proven even if the forced labor victim is under the age of eighteen. The Palermo Protocol eliminates the requirement to prove the “prohibited means” in both sex and labor trafficking cases involving a minor victim.<sup>70</sup> This distinction has led some to criticize the TVPA for suggesting that one type of human trafficking is more severe than others.<sup>71</sup> Additionally, the TVPA does not use the term “exploitation” and contains a narrower construction of the prohibited economic ends. For instance, the removal of organs and non-commercial sexual servitude do not fall under the TVPA’s construction of human trafficking; instead, those offenses are criminalized in other portions of state and federal law.

Additionally, the Palermo Protocol states that initial “consent” on the part of the victim is “irrelevant.”<sup>72</sup> Although there is no similar statutory provision in the TVPA, case law in the United States has recognized the same principle.<sup>73</sup> In a case that preceded the Palermo Protocol and the TVPA by sixteen years, some United States Circuit Courts of Appeals have held:

In considering whether service or labor was performed by someone [involuntarily], it makes no difference that the person may have initially agreed, voluntarily, to render the service or perform the work. If a person willingly begins work, but later desires to withdraw and is then forced to remain and perform work against his will [by the use or threatened use of coercion], his service becomes involuntary.<sup>74</sup>

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70. *Id.* (referring to Article 3(c)).

71. GLOB. ALL. AGAINST TRAFFIC IN WOMEN, COLLATERAL DAMAGE: THE IMPACT OF ANTI-TRAFFICKING MEASURES ON HUMAN RIGHTS IN THE WORLD 232 (2007), [http://www.iom.int/jahia/webdav/shared/shared/mainsite/microsites/IDM/workshops/ensuring\\_protection\\_070909/collateral\\_damage\\_gaatw\\_2007.pdf](http://www.iom.int/jahia/webdav/shared/shared/mainsite/microsites/IDM/workshops/ensuring_protection_070909/collateral_damage_gaatw_2007.pdf) [<http://perma.cc/3VZD-M8P2>].

72. U.N. Office on Drugs & Crime, *supra* note 63, at 43. Article 3(b) provides: “The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.” *Id.*

73. *United States v. Dann*, 652 F.3d 1160, 1164 (9th Cir. 2011) (victim applied for visa multiple times and met with consultant to learn how to lie to immigration officials in order to work for defendant); *United States v. Farrell*, 563 F.3d 364, 370 (8th Cir. 2009) (after working for the defendants and returning to the Philippines, workers wrote letters to justify why they deserved to return to United States to work for defendants).

74. *Involuntary Servitude & Peonage*, LECTRIC L. LIBR., <http://www.lectlaw.com/def/i071.htm> [<http://perma.cc/C42U-FV5Q>] (last visited Oct. 4, 2015); *see* ELEVENTH CIRCUIT, PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) § 49 (2010); *United States v. Mussry*, 726 F.2d 1448, 1454 n.6 (9th Cir. 1984) (“Even though a person may come to a job voluntarily,

Thus, both United States law and the Palermo Protocol reject the argument that initial consent is a defense to a human trafficking charge. These differences should not distract from the grand consensus that the TVPA and Palermo Protocol create a broad definition of human trafficking that focuses on coercion of people for illicit profit.

*F. Practical Effects of the TVPA and Palermo Protocol*

1. Expanded Terminology

In perhaps their biggest contributions, both the United Nations' Palermo Protocol and the United States' TVPA consolidated a variety of related offenses and terms under the banner of "trafficking in persons" or "human trafficking."<sup>75</sup> Terms with overlapping definitions like slavery, forced labor, involuntary servitude, debt bondage, and peonage are now effectively criminalized under a single human trafficking legal framework. Each of the underlying offenses merely criminalized one type or aspect of what is now commonly referred to as "human trafficking." "Human trafficking" and "trafficking in persons" have become umbrella terms for this category of criminal activity.

2. Victim-Centered Approach

Both the TVPA and the Palermo Protocol emphasize the rights of human trafficking victims in their approach to combating criminal activity. This "victim-centered" or "rights-based"<sup>76</sup> approach to combating human trafficking seeks to ensure that victims get care, confidentiality, the opportunity for civil suits,<sup>77</sup> and consistent communication during the legal process.<sup>78</sup> Practically, it means emphasis is placed on corroborating victim testimony, seeking

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subsequent coerced service constitutes involuntary servitude."); *United States v. Bibbs*, 564 F.2d 1165, 1167 (5th Cir. 1977) (affirming conviction where victims initially agreed to work for defendants).

75. *TRAFFICKING IN PERSONS REPORT 2015*, *supra* note 13, at 7.

76. JOY NGOZI EZEILO, U.N. HUMAN RIGHTS COUNCIL, *REPORT OF THE SPECIAL RAPPORTEUR ON TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN 5* (2012) (explaining the rights-based approach as one that "identifies rights-holders and their entitlements (for example, trafficked persons, individuals at risk of being trafficked, or individuals accused or convicted of trafficking-related offences), and the corresponding duty-bearers (usually States) and their obligations. This approach strengthens the capacity of rights-holders to secure their rights and of duty-bearers to meet their obligations. Core principles and standards derived from international human rights law should guide all aspects of the response at all stages.").

77. For an example of a civil suit, *see* Jury Verdict Form, *David v. Signal International, LLC*, No. 2:08-cv-01220 (E.D. La. Feb. 18, 2015), ECF No. 2272-3.

78. *See* *TRAFFICKING IN PERSONS REPORT 2015*, *supra* note 13, at 26.

mandatory restitution<sup>79</sup> for victims, not prosecuting them for unlawful conduct that resulted from being trafficking,<sup>80</sup> and assisting with any immigration issues that might arise. The cornerstone of a victim-centered approach provides consistent protections to victims as it seeks to stop traffickers from exploiting more people.

### III. DECONSTRUCTING MYTHS ABOUT HUMAN TRAFFICKING

It has been more than fifteen years since the legal landmarks of the TVPA and Palermo Protocol. The important hurdles of international agreements and the passage of robust domestic human trafficking laws have been cleared. The challenge now is to deliver those rights and protections to the people they were intended to benefit. Yet several troubling myths inhibit the delivery of justice in human trafficking.

#### A. *Myth: Slavery Is a Historical Footnote and Not a Modern-Day Struggle*

Victims of human trafficking cannot be rescued if they cannot be identified, and identification is unlikely if it is assumed that slavery does not exist at this time in history. For many people, the idea of human trafficking conjures images of the trans-Atlantic slave trade or other historic injustices. It can seem like an ancient crisis not a modern-day problem.

Once exposed to the notion of modern-day slavery, many reasonable minds ask, “If human trafficking exists today, what is the scope of the problem?” Researchers have worked hard to answer that question, but they have found determining the scope of human trafficking crimes very difficult to estimate for a variety of reasons.<sup>81</sup> First, the very nature of the crime creates underreporting problems. Traffickers often hide their criminal enterprises, and victims are frequently fearful of law enforcement because of the trafficker’s persistent

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79. 18 U.S.C. § 1593 (2012); *United States v. Sabhnani*, 599 F.3d 215, 224–25 (2d Cir. 2010) (affirming a restitution award to domestic servants following a forced labor conviction); *United States v. Sanderson*, Nos. 11-2488-cr(L), 11-2608-cr(CON), 12-321-cr(CON), 2013 WL 1150491, at \*1 (2d Cir. 2013) (affirming a \$25,608.80 restitution award for future psychological and psychiatric treatment in a sex trafficking of a minor case); *United States v. Fu Sheng Kou*, 620 F.3d 1158, 1162, 1167 (9th Cir. 2010) (affirming a restitution award to sex trafficking victims based on the price of each commercial sex act times the average estimated number of commercial sex acts performed).

80. 22 U.S.C. § 7101(b)(19) (2006) (“Victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documentation, or working without documentation.”).

81. For a detailed discussion of data collection challenges, see Amy Farrell & Jack McDevitt, *Enhancing the Collection and Standardization of Human Trafficking Data: Examples from Data Collection Efforts in the United States*, in HUMAN TRAFFICKING: NEW DIRECTIONS FOR RESEARCH 17 (2008).

warnings about untrustworthy police officers. Often, human trafficking victims are uniquely afraid to speak with law enforcement because they have engaged in illegal acts, or they are not legally in the United States.<sup>82</sup> Also, incomplete data collection systems make it difficult to learn the number of human trafficking cases in which law enforcement has been engaged.<sup>83</sup> When cases are discovered, authorities may resolve the case by using non-human trafficking statutes for a variety of reasons. For instance, authorities may prosecute someone for domestic violence, alien harboring, distribution of narcotics, solicitation, trespassing, or assault, when the true underlying crime is human trafficking. Therefore, a review of human trafficking prosecutions will likely not capture cases that were charged or resolved by a plea to a non-human trafficking offense. Information management problems, the variety of criminal justice systems and anti-trafficking laws, the reality that human trafficking is a hidden crime, and the difficulty of victims seeking out law enforcement make developing an accurate estimate a thorny endeavor. Yet the appetite for estimates regarding the scope of the human trafficking problem is large. This is particularly true when funding decisions are being made.

### 1. Estimates of Human Trafficking Victims

There are several major global estimates of the number of human trafficking victims. Since 1999, organizations and researchers have placed the global number of human trafficking victims at 20.9 million,<sup>84</sup> 27 million,<sup>85</sup> 28.4 million,<sup>86</sup> and 35.8 million.<sup>87</sup> The largest estimate of 35.8 million has received significant criticism for its methodology<sup>88</sup> and has been given “four

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82. Maureen Q. McGough, *Ending Modern-Day Slavery: Using Research to Inform U.S. Anti-Human Trafficking Efforts*, NAT'L INST. OF JUST. (Feb. 27, 2013), <http://www.nij.gov/journals/271/pages/anti-human-trafficking.aspx> [<http://perma.cc/HA62-X7BW>].

83. *Id.*

84. Int'l Labour Office, *supra* note 39.

85. U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT 7* (June 2013); U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT 7* (June 2012). Researcher Kevin Bales with Free the Slaves developed the twenty-seven million global victim estimate in 1999. KEVIN BALES, *DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY* 8 (1999).

86. SIDDHARTH KARA, *SEX TRAFFICKING: INSIDE THE BUSINESS OF MODERN SLAVERY* 221 (2009).

87. WALK FREE FOUND., *THE GLOBAL SLAVERY INDEX 5* (2014). The prior year in 2013, the Global Slavery Index estimated 29.8 million human trafficking victims in the world. WALK FREE FOUND., *THE GLOBAL SLAVERY INDEX 1* (2013).

88. Anne Gallagher, *The Global Slavery Index Is Based on Flawed Data—Why Does No One Say So?*, *GUARDIAN* (Nov. 28, 2014), <http://www.theguardian.com/global-development/poverty-matters/2014/nov/28/global-slavery-index-walk-free-human-trafficking-anne-gallagher> [<http://perma.cc/3SQA-WY39>].

Pinocchios” by the Washington Post Fact Checker.<sup>89</sup> However, even considering the more conservative 20.9 million estimate for global victims by the International Labour Organization (ILO),<sup>90</sup> there are more human trafficking victims today than the approximately 9.5 million<sup>91</sup> people trafficked during all 488 years<sup>92</sup> of the trans-Atlantic slave trade.<sup>93</sup>

Although most of the global human trafficking victim estimates have been broadly accepted, other estimates used by the United States government have been largely criticized and discarded. For instance, for many years the United States State Department cited an estimate that traffickers annually transported 600,000 to 800,000 victims across international borders.<sup>94</sup> In 2006, a leading United States agency, the Government Accountability Office (GAO), flatly called the number “unsupported or unproven by valid research methods and data.”<sup>95</sup> Despite a chorus of criticism, the United States State Department

89. Glenn Kessler, *Why You Should Be Wary of Statistics on ‘Modern Slavery’ and ‘Trafficking,’* WASH. POST (Apr. 24, 2015), <http://www.washingtonpost.com/news/fact-checker/wp/2015/04/24/why-you-should-be-wary-of-statistics-on-modern-slavery-and-trafficking/> [http://perma.cc/CYC5-MDDR].

90. Int’l Labour Office, *supra* note 39, at 13. Prior to the 2012 ILO estimate of 20.9 million victims, the ILO estimated in 2005 that there were 12.3 million human trafficking victims in the world and that 2.4 million of them were forced laborers who traffickers actually moved across borders. *Id.* at 17.

91. 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, 213 (2007) (citing JAMES A. RAWLEY ET AL., THE TRANSATLANTIC SLAVE TRADE 16 (revised ed. 2005), which “report[ed], analyz[ed] and present[ed] in table format the analyses conducted in 1968 by historian Philip D. Curtin and in 2001 by historian David Eltis, who estimated, respectively, that 9,556,000 and 9,599,000 Africans were transshipped across the Atlantic during the trans-Atlantic slave trade.”).

92. DAVIS, *supra* note 18, at 323–27, 238; see Andrew Cockburn, *21st Century Slaves*, NAT’L GEOGRAPHIC, Sept. 2003, at 9; Karen E. Bravo, *The Role of the Transatlantic Slave Trade in Contemporary Anti-Human Trafficking Discourse*, 9 SEATTLE J. FOR SOC. JUST. 555, 561, 564–66 (2011) (explaining that the trans-Atlantic slave trade began in 1400 and ended in 1888 when Brazil abolished the slave trade).

93. Bravo, *supra* note 91. Concerns have been expressed that the comparison between the trans-Atlantic slave trade and modern slavery diminishes the horror of historic slavery and fails to consider the increase in the global population. See *id.* at 555, 561–66.

94. Bruce Kutnick, Patrick Belser & Gergana Danailova-Trainor, *Methodologies for Global and National Estimation of Human Trafficking Victims: Current and Future Approaches* iii, 2 (Int’l Labour Office, Working Paper No. 29, 2007). This estimate was generated from a review of data from 2000 and 2001 by Mercyhurst University and the Federal Research Division at the Library of Congress. See *id.*

95. ANTHONY M. DE STEFANO, THE WAR ON HUMAN TRAFFICKING: U.S. POLICY ASSESSED 112 (2007); U.S. GOV’T ACCOUNTABILITY OFFICE, HUMAN TRAFFICKING: BETTER DATA, STRATEGY, AND REPORTING NEEDED TO ENHANCE U.S. ANTITRAFFICKING EFFORTS ABROAD (July 2006); Letter from Ann Jordan et al., to Ambassador John Miller, Dir., U.S. Dep’t of State Office to Monitor and Combat Trafficking in Persons (Apr. 21, 2005), <http://www.nswp.org/sites/nswp.org/files/USSTATE-LETTER.pdf> [http://perma.cc/SSD8-66TP].



continued to cite variations of this estimate through 2008.<sup>96</sup> Since then, it has abandoned this number in its annual “Trafficking in Persons Report” (TIP Report).<sup>97</sup>

The estimate of the number of human trafficking victims that traffickers annually transport into the United States suffered a similar fate. When the TVPA was passed, many cited a figure that traffickers moved 45,000 to 50,000 women and children into the United States each year.<sup>98</sup> This figure appeared in the United States State Department TIP reports until 2002, when it was discredited.<sup>99</sup> The State Department then lowered the estimate to 18,000 to 20,000 victims in 2003,<sup>100</sup> and 14,500 to 17,500 in 2004.<sup>101</sup> Continued criticism of the methodology from a variety of sources caused these estimates to be abandoned, and United States government agencies have resisted estimating the number of human trafficking victims being transported into the United States since 2005.<sup>102</sup>

Another category of frequently cited estimates is the number of children in the United States who traffickers are exploiting through prostitution. In 2001, researchers at the University of Pennsylvania’s School of Social Work found that a “high estimate” of children “at risk” for commercial sexual exploitation was 325,575 and that a “low estimate” was 244,181.<sup>103</sup> The researchers were careful to explain that their estimate was limited to children “at risk” of exploitation and not an estimate of actual victims.<sup>104</sup> Activist groups have

96. U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT 7* (June 2008).

97. *See* *TRAFFICKING IN PERSONS REPORT 2015*, *supra* note 13.

98. AMY O’NEILL RICHARD, *CTR. FOR THE STUDY OF INTELLIGENCE, INTERNATIONAL TRAFFICKING IN WOMEN TO THE UNITED STATES: A CONTEMPORARY MANIFESTATION OF SLAVERY AND ORGANIZED CRIME 3* (Nov. 1999); Press Release, Office of the Press Sec’y, Fact Sheet: International Crime Threat Assessment (Dec. 18, 2000), <http://clinton6.nara.gov/2000/12/2000-12-18-fact-sheet-on-international-crime-threat-assessment.html> [http://perma.cc/M7ZV-8NYP].

99. DESTEFANO, *supra* note 95, at 32.

100. U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT 7* (June 2003).

101. U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT 23* (June 2004).

102. In 2006, the Attorney General indicated that the 14,500 to 17,500 estimate “may be overstated.” U.S. DEP’T OF JUSTICE, *ATTORNEY GENERAL’S ANNUAL REPORT TO CONGRESS ON U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS: FISCAL YEAR 2005 3* (June 2006). *See* Amy Farrell, Jack McDevitt & Stephanie Fahy, *Where Are All the Victims? Understanding the Determinants of Official Identification of Human Trafficking Incidents*, 9 *CRIMINOLOGY & PUB. POL’Y* 201, 204 (2010) (noting that the “estimates of the problem are unreasonable . . .”).

103. RICHARD J. ESTES & NEIL ALAN WEINER, *UNIV. OF PA. SCH. OF SOC. WORK, THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA AND MEXICO 144* (2001).

104. *Id.* at 143. Similar estimates have circulated for years. A 1993 *Time Magazine* article stated, “Estimates of the number of U.S. prostitutes under age 18 range from 90,000 to 300,000.”

frequently rounded this “at risk” estimate to 300,000<sup>105</sup> children in the United States who are exploited in prostitution.<sup>106</sup> Some have been careful to include the researcher’s caveats and “at risk” language,<sup>107</sup> others have used the numbers as the actual number of annual sex trafficking victims.<sup>108</sup> The frequent misuse of this statistic regarding commercially and sexually exploited minors<sup>109</sup> caused the Crimes Against Children Research Center at the University of New Hampshire to publish a scathing “factsheet” in 2008, stating:

There have been many attempts to estimate the number of juvenile prostitutes within the United States. These estimates range from 1,400 to 2.4 million, although most fall between 300,000 and 600,000. BUT PLEASE DO NOT CITE THESE NUMBERS.<sup>110</sup>

Shared Hope International received a government grant in 2006 to create an estimate of the number of domestic minor sex trafficking victims. The study focused on ten locations in the United States where approximately 5841 sex trafficking victims were identified.<sup>111</sup> Of the identified victims, 5122 were

Michael S. Serrill, *Prostitution: Defiling the Children*, TIME (June 21, 1993), <http://content.time.com/time/subscriber/printout/0,8816,978725,00.html> [<http://perma.cc/U4D8-Q7DR>].

105. Serrill, *supra* note 104.

106. See *Child Sex Trafficking in America: A Guide for Parents and Guardians*, NAT’L CTR. FOR MISSING & EXPLOITED CHILD. (2010), [http://www.missingkids.com/en\\_US/documents/Fact\\_Sheet\\_Parents\\_Guardians.pdf](http://www.missingkids.com/en_US/documents/Fact_Sheet_Parents_Guardians.pdf) [<http://perma.cc/G6GT-K7BF>].

107. Along with NCMEC, Ending Child Slavery at the Source (ECPAT) is an example of a nonprofit using the “at risk” language. *Statistics*, ECPAT-USA: ENDING CHILD SLAVERY AT THE SOURCE, <http://www.ecpatusa.org/statistics> [<http://perma.cc/QH2N-FKDU>] (last visited Aug. 15, 2015).

108. See Elizabeth Kiem, *Child Sexual Exploitation in the USA: Not Just a Problem for Developing Nations*, UNICEF, [http://www.unicef.org/protection/usa\\_46464.html](http://www.unicef.org/protection/usa_46464.html) [<http://perma.cc/SX7H-QT5M>] (last updated Nov. 20, 2008) (“*But at least 300,000 children and adolescents are prostituted every year in the United States, according to a 2001 University of Pennsylvania study.*”).

109. Glenn Kessler, *The Bogus Claim That 300,000 U.S. Children Are ‘At Risk’ of Sexual Exploitation*, WASH. POST (May 28, 2015), <http://www.washingtonpost.com/blogs/fact-checker/wp/2015/05/28/the-bogus-claim-that-300000-u-s-children-are-at-risk-of-sexual-exploitation/> [<http://perma.cc/6B66-4958>] (explaining that the frequent misuse of this number by public and private sector actors caused the Washington Post Fact Checker to give the 300,000 estimate “four Pinocchios”). *Id.*

110. Michelle Stransky & David Finkelhor, *How Many Juveniles Are Involved in Prostitution in the U.S.?*, CRIMES AGAINST CHILD. RES. CTR. (2008), [http://www.unh.edu/ccrc/prostitution/Juvenile\\_Prostitution\\_factsheet.pdf](http://www.unh.edu/ccrc/prostitution/Juvenile_Prostitution_factsheet.pdf) [<http://perma.cc/B5YA-E9FV>].

111. LINDA A. SMITH, SAMANTHA HEALY VARDAMAN & MELISSA A. SNOW, SHARED HOPE INT’L, THE NATIONAL REPORT ON DOMESTIC MINOR SEX TRAFFICKING: AMERICA’S PROSTITUTED CHILDREN 11 (May 2009) (cautioning that “[d]ue to a lack of formal tracking protocols between agencies, some DMST victims may be duplicated within a city and some may have not been included in this count. These numbers were obtained through an interview process in addition to official government records when available.”).

from Las Vegas over a thirteen-year period dating back to 1994 (six years prior to the passage of the TVPA). The study concluded that:

[A]n accurate count of the number of victims of domestic minor sex trafficking was not available — the lack of tracking, the common misidentification, the frequent plea agreements or declined prosecutions, and the stove-piped communications among and within law enforcement, juvenile justice, and service providers prevented the capture of the complete picture.<sup>112</sup>

The President of the National Center for Missing and Exploited Children reached that same conclusion. Suggesting that there are 100,000 children who are victims of sex trafficking in the United States each year, he stated, “We don’t know with certainty how many victims there really are. We have a vast amount of anecdotal information, but estimating the size of this problem empirically is impossible at this time.”<sup>113</sup> Thus, there is no credible estimate for the number of domestic minor victims in the United States, only an estimate of those at risk of being trafficked.

In light of the estimate’s troubled history, the President’s Interagency Task Force to Monitor and Combat Trafficking in Persons put forth ten strategic objectives to guide United States government efforts.<sup>114</sup> One of the strategic objectives is “[s]pur innovation and improve capacity to combat modern slavery through data collection and research.”<sup>115</sup> The need for better data collection was also highlighted in the “Federal Strategic Action Plan on Services for Victims of Human Trafficking in the United States.” It directed federal agencies to “invest in strategic research requirements, such as the prevalence of human trafficking in the United States and the needs of victims.”<sup>116</sup>

The confusion about statistics, the difficulty of data collection, and the exaggeration or misuse of estimates can cast doubts of the prevalence of the human trafficking crimes today. It is worth noting that even the harshest critics do not suggest that human trafficking does not exist or even that it is not a significant problem. Instead, they merely seek greater academic rigor in the creation and use of estimates. The generally accepted methodology and frequent use of the global estimates should give support to the need for a robust response to modern-day slavery, while the field seeks better metrics.

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112. *Id.*

113. Ernie Allen, President & CEO, Nat’l Ctr. for Missing & Exploited Children, Testimony Before the Institute of Medicine Committee on Commercial Sexual Exploitation and Sex Trafficking of Minors in the United States of the National Academies (Jan. 4, 2012).

114. *See* PRESIDENT’S INTERAGENCY TASK FORCE, PROGRESS IN COMBATING TRAFFICKING IN PERSONS: THE U.S. GOVERNMENT RESPONSE TO MODERN SLAVERY 5 (Apr. 2014).

115. *Id.* at 22.

116. PRESIDENT’S INTERAGENCY TASK FORCE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, FEDERAL STRATEGIC ACTION PLAN ON SERVICES FOR VICTIMS OF HUMAN TRAFFICKING IN THE UNITED STATES 2013–2017 19 (2013).

## 2. Number of Actual Victims Identified and Cases Prosecuted

For the same reasons that researchers have struggled with developing estimates of the number of human trafficking victims who are transported across borders or are present in certain countries, it is difficult to know the number of actual victims assisted by law enforcement and NGOs each year. Although there is not a published number of all identified victims in the United States, there are several sources of data that can provide some basis to know the number of identified victims. In a 2012 report to Congress about activities during fiscal year 2012, the United States Department of Health and Human Services noted that it issued 469 certification and eligibility letters to adult and minor victims during the reporting year.<sup>117</sup> The report is careful not to conflate certification and eligibility letters with victim identification because the letters only apply to victims who sought federal benefits. Identified victims who did not seek federal benefits are not counted in this number.<sup>118</sup> The same report notes that 762 victims received case management services from federally supported groups in ninety-six cities throughout the United States.<sup>119</sup> This number does not include human trafficking victims served in other cities or from non-federally supported service providers.

Researchers also look to the number of human trafficking prosecutions. The number of prosecutions is much smaller than the number of identified victims because not every case is prosecutable for a variety of reasons, including available evidence, witness credibility, statute of limitations, and the general effectiveness of the public justice system in the country where the prosecution could be brought. For the fiscal year ending September 2012, the Department of Justice reported that it charged 128 forced labor and sex trafficking cases involving 200 defendants.<sup>120</sup> The number of victims in each case can vary widely. These numbers do not capture the cases resolved on other charges or prosecuted by state or local entities. The unfortunate reality is that reliable information about the number of actual human trafficking victims identified and cases prosecuted does not exist.

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117. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS: FISCAL YEAR 2012 15 (2012). That number was down from 564 in Fiscal Year 2011, and from 541 in Fiscal Year 2010. *Id.*

118. *Id.* at 14 n.6.

119. *Id.* at 17. For Fiscal Year 2011, 729 victims received case management services from federally supported groups in 135 cities. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS FISCAL YEAR 2011 35 (2011).

120. ATTORNEY GENERAL'S ANNUAL REPORT 2012, *supra* note 117, at 47–48.

### 3. The Discrepancy Dilemma

The gap between the global estimates and the fractured data regarding actual victims identified and cases prosecuted has generated a variety of reactions. Some point out the discrepancy and argue it is evidence that more resources and action are required. In 2013, the United States Department of State took this position stating:

[B]ased on the information governments have provided, only around 40,000 victims have been identified in the last year. In contrast, social scientists estimate that as many as 27 million men, women, and children are trafficking victims at any given time. This shows that a mere fraction of the more than 26 million men, women, and children who are estimated to suffer in modern slavery have been recognized by governments as such and are eligible to receive the protection and support they are owed.<sup>121</sup>

The current estimate by the Department of State in its 2015 TIP Report is that there were 44,462 human trafficking victims identified and 4443 human trafficking convictions around the world in 2014.<sup>122</sup> Others argue that the discrepancy between global estimates and actual victims identified proves that the estimates are exaggerated or inflated.<sup>123</sup> These critics are concerned that “the misinformation has succeeded in diverting resources away from other victims.”<sup>124</sup> Importantly, neither side in the dilemma concludes that human trafficking does not exist. The debate is essentially about whether the problem is important and large or important and enormous.

A few facts are clear. Each year since the passage of the TVPA, the number of human trafficking cases prosecuted has increased.<sup>125</sup> In addition, the Department of Homeland Security also has issued its highest number in fiscal year 2012, 674 people received a T-visa, allowing human trafficking victims without legal status to remain in the United States.<sup>126</sup> Regardless of the estimate of total victims worldwide, more actual cases are being identified and

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121. TRAFFICKING IN PERSONS REPORT 2013, *supra* note 85, at 7; U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 13 (2010). The State Department framed a similar argument using the number of prosecutions instead of identified victims in 2010: “Yet the numbers of prosecutions each year are dismally low in comparison to the scope of the problem . . . . For those laws to have any meaning, however, they must be enforced. As long as there are only around 4,000 trafficking convictions worldwide each year, a message is sent that the injustice suffered by victims is not a national or international priority.” *Id.*

122. TRAFFICKING IN PERSONS REPORT 2015, *supra* note 13, at 48.

123. Ann Jordan, *Fact or Fiction: What Do We Really Know About Human Trafficking?*, AM. U. CTR. FOR HUM. RTS. & HUMANITARIAN L., May 2011, at 4–5.

124. Nick Davies, *Prostitution and Trafficking—The Anatomy of a Moral Panic*, GUARDIAN (Oct. 19, 2009), <http://www.guardian.co.uk/uk/2009/oct/20/trafficking-numbers-women-exaggerated> [<http://perma.cc/4B6Y-H3YG>].

125. ATTORNEY GENERAL’S ANNUAL REPORT 2012, *supra* note 117, at 47.

126. *Id.* at 37–38.

prosecuted each year. Faced with the “dubious” nature of the estimates, one expert noted, “[A]lmost every expert on human trafficking and smuggling, whether practitioner or scholar, agrees that the problem is significant and increasing as both demand and supply for people are rising.”<sup>127</sup> While there can always be critiques of researchers’ methodologies, there is agreement that human trafficking is a significant modern problem. In 2012, referring to “the millions” trapped by traffickers, President Barack Obama said:

[A]nd so our message today, to them, is -- to the millions around the world -- we see you. We hear you. We insist on your dignity. And we share your belief that if just given the chance, you will forge a life equal to your talents and worthy of your dreams. . . . Our fight against human trafficking is one of the great human rights causes of our time, and the United States will continue to lead it . . . .<sup>128</sup>

Even if the number of victims cannot be definitively known, the individuals being exploited require the intervention of law enforcement and the support of civil society. To identify human trafficking cases effectively so that victims can find rescue and restoration, the myth that slavery is a historical footnote and not a modern-day struggle must be deconstructed, even while data collection improves and researchers seek methodologies to generate reliable estimates.

#### *B. Myth: Movement, Borders, and Aliens*

Another problematic myth is that human trafficking cases require movement, borders, and aliens. Many of the most popularized examples of human trafficking involve people being moved across international borders to be exploited in a foreign land. The term “trafficking” itself creates confusion. It generates images of road congestion not a horrible human rights abuse. There is no requirement in the Palermo Protocol or the TVPA that a person be moved across borders for a human trafficking case to exist. Successful prosecutions have been affirmed on appeal in the United States where the trafficker and the victim were both citizens of the United States, and never crossed state or international borders.<sup>129</sup>

The terms “human trafficking” and “human smuggling” are often confused or used interchangeably when they actually criminalize very different conduct. Human smuggling always involves illegally moving people across borders.<sup>130</sup> For the purpose of the smuggling offense, it is not relevant whether or not the

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127. LOUISE SHELLEY, HUMAN TRAFFICKING: A GLOBAL PERSPECTIVE 4 (2010).

128. Obama, *supra* note 5.

129. *United States v. Evans*, 476 F.3d 1176, 1177 (11th Cir. 2007) (affirming the conviction in a sex trafficking of a minor case involving a defendant and victim who were both United States citizens and never left the state of Florida).

130. 8 U.S.C. § 1324 (2012).

person smuggled wanted to be moved across the border. Likewise, the purpose for illegally crossing the border is not relevant to a human smuggling offense. Often, individuals pay significant amounts to smugglers to help them cross a border because they desire to be transported into the country.

In contrast, human trafficking by definition is always involuntary because it occurs by prohibited coercive means. Human trafficking is a crime against an individual's rights, where human smuggling is a crime against the integrity of a border. Another difference is that human trafficking is always for the purpose of obtaining someone's labor services or causing them to engage in a commercial sex act. The crime of human smuggling does not seek to answer the question "why" the person is moved. Simply put, human smuggling is a crime of movement, and human trafficking is a crime of coercion.

A variation of the transportation myth is that a foreign national must be involved in the case. If a law enforcement officer or concerned citizen assumes that human trafficking only exists if someone from another country is the victim or perpetrator, many cases will not be identified. Just as there is nothing in the law that requires a border crossing, there is nothing in the law regarding the citizenship of those involved in the crime. Both the trafficker and the victim can be citizens of the United States.<sup>131</sup> The idea that movement, borders, and aliens are required for a human trafficking case is a myth that inhibits case identification.

### C. *Myth: Chains, Bars, and Beatings*

A constant image in the anti-trafficking "awareness-raising" posters is that of chains, bars, and beatings. These images depict human trafficking victims trapped in a cycle of violence with no opportunity or ability to escape. There is a good reason why many assume that chains, bars, and beatings are essential elements of a human trafficking case. The law required such things for most of American history. Yet today the law has shifted to avoid the requirement that a human trafficking victim must be physically restrained or trapped. Understanding the evolution of human trafficking law is the most effective way of deconstructing this myth.

Human trafficking law remained static for years until two Michigan dairy farmers inadvertently set in motion the modern anti-trafficking movement. Ike and Margarethe Kozminski were convicted of involuntary servitude for compelling two adult, mentally disabled men to work on their farm.<sup>132</sup> The evidence at trial revealed that the Kozminskis used physical force and restraints to compel the men's labor, but also that the Kozminskis used more subtle forms of coercion. They used threats of institutionalization, isolation

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131. *Evans*, 476 F.3d at 1177.

132. *United States v. Kozminski*, 487 U.S. 931, 934 (1988).

from relatives, and denial of pay to force the victims to work.<sup>133</sup> The victims' vulnerabilities and their living conditions in a trailer with no heat or indoor toilet were highlighted during the case. Hearing all the evidence, the jury convicted the Kozminskis.

When their appeal reached the Supreme Court, their convictions were reversed because the Involuntary Servitude statute only prohibits compelling labor by force, threats of force, physical restraint, or legal coercion.<sup>134</sup> The prosecution mingled this evidence with other more subtle forms of coercion so that the Court could not determine if the jury's verdict was based only on what the law prohibits. This 1988 decision ignited a movement to modernize the law and eliminate the requirement that chains, bars, and beatings are required for successful human trafficking cases. These efforts culminated in the passage of the TVPA.<sup>135</sup>

Congress passed the TVPA in direct response to the Supreme Court's decision in *Kozminski*.<sup>136</sup> It specifically expands the traditional coercive means of force, threats of force, physical restraint, and abuse of law by including other factors that can create a climate of fear. Victims can be coerced by being placed in fear of serious harm, or by a scheme, plan, or pattern to make the victims think serious harm, may befall them. Congress painted with broad strokes in the TVPA, defining "serious harm" as:

[A]ny harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.<sup>137</sup>

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133. *Id.* at 935–36.

134. *Id.* at 948.

135. 18 U.S.C. §§ 1581–1596 (2012) (covering the Trafficking Victims Protection Act's criminal components, specifically Chapter 77 of the Criminal Code at 18 U.S.C. §§ 1581–1596).

136. *See* *United States v. Dann*, 652 F.3d 1160, 1169 (9th Cir. 2011) (citing legislative history that suggests "Congress passed [the TVPA] to correct what they viewed as the Supreme Court's mistaken holding in *United States v. Kozminski*."); *see also* *United States v. Bradley*, 390 F.3d 145, 150 (1st Cir. 2004) (stating "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. §§ 1581–1594 (2000). Adopted in 2000 as part of a broader set of provisions—the Victims of Trafficking and Violence Protection Act of 2000, 114 Stat. 1464—section 1589 was intended expressly to counter *United States v. Kozminski*, 487 U.S. 931, 108 S.Ct. 2751, 101 L.Ed.2d 788 (1988). *See* H.R. Conf. Rep. No. 106-939, at 100-01 (2000). 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*.").

137. 18 U.S.C. § 1589(c)(2) (added to the TVPA on December 23, 2008 by amendment). *See* *Dann*, 652 F.3d at 1169–73 (discussing a detailed analysis of "serious harm").



Although it is now clear under the law that chains, bars, and beatings are not required for a human trafficking case, when it comes to case identification, many still operate with a pre-TVPA understanding of the law.

A variation of the chains, bars, and beatings myth is often expressed as the victims had “opportunity to escape.” This is often stated as “there was no gun to his head, and there were no locks on the door.” Fortunately, the law is clear on this matter, and there are numerous examples from labor and sex trafficking cases that expose this myth. For example, when Timothy Bradley forced adult, Jamaican men to work at his New Hampshire tree removal service, the trial court addressed this very issue.<sup>138</sup> The court held that “[t]he fact that [the victims] may have had an opportunity to flee is not determinative of the question of forced labor if either or both of the defendants placed [the victims] in such fear or circumstances that he did not reasonably believe he could leave.”<sup>139</sup> When Joseph and Evelyn Djoumessi settled outside Detroit, Michigan and forced a fourteen-year-old girl from Cameroon to provide childcare, did not allow her to attend school, and inflicted severe physical abuse, the court rejected their argument that she was voluntarily there and could have escaped.<sup>140</sup>

The same holds true for sex trafficking cases. In a pimp-directed sex trafficking case, the defendant who called himself “Sir Charles” argued that his victim was free to leave and had the opportunity to escape. The court rejected his argument by citing the various beatings and punishments she endured when she broke the “rules of the game.”<sup>141</sup> Courts, therefore, should instruct the jury that the prosecution does not need to prove physical restraint—such as the use of chains, barbed wire, or locked doors—in order for the jury to find the defendant guilty of human trafficking. The fact that victims may have had an

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138. *Bradley*, 390 F.3d at 148.

139. *Id.* at 153 (interpreting the Section 1594 Involuntary Servitude statute not the more expansive Section 1589 forced labor statute); *see also* *United States v. Farrell*, 563 F.3d 364, 375 (8th Cir. 2009) (finding in a Section 1581 peonage case that “[e]ven assuming that there were points at which the workers could have escaped the Farrells’ control, a rational jury could have concluded that the workers’ employment ‘was involuntary for at least *some* portion of [their] stay. And that involuntary portion would suffice to sustain the conviction.’” (quoting *United States v. Djoumessi*, 538 F.3d 547, 552–53 (6th Cir. 2008))).

140. *Djoumessi*, 538 F.3d at 553 (rejecting even under the heightened Section 1584 standard defendant’s argument that the victim “necessarily remained voluntarily at his home because he never physically restrained her . . . and she never attempted to escape” and stating that “opportunities for escape mean nothing if [Defendant] gave [the victim] reasons to fear leaving the house,” such as imprisonment or deportation).

141. *United States v. Pipkins*, 378 F.3d 1281, 1295, 1297 (11th Cir. 2004) (stating “[i]f 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.”), *opinion reinstated*, 412 F.3d 1251 (11th Cir. 2005).

opportunity to leave is irrelevant if the defendant placed the victims in such fear or circumstances that they did not reasonably believe they could leave.

Generally, traffickers will only use the amount of force, fraud, and coercion necessary to compel their victims. The use of coercion is a resource and time intensive endeavor. If threats to harm family members in a victim's country of origin and manipulated debts are sufficient to compel the victim's labor, the trafficker does not need to invest in elaborate surveillance systems or pay for guards. Subtle forms of coercion can also be more powerful. A chain-cutter can free a victim held by mere chains. A key can open a locked door and allow a detained victim to walk free. Yet, if a trafficker renders a victim fearful of what will happen to the victim's family or traps the victim with some other form of nonviolent coercion, the victim can become so helpless that even the dream of escape begins to die. Therefore, it is essential for both case identification and successful prosecution that those working with human trafficking victims recognize that subtle forms of coercion are sufficient, and that chains and beatings are not required to intervene on behalf of a victim.

*D. Myth: Human Trafficking Is Primarily Sex Trafficking*

The term "human trafficking" almost always conjures ideas of forced prostitution or some sort of commercial sexual exploitation. Yet some leading global estimates indicate that the vast majority of human trafficking victims in the world are labor trafficking victims. The ILO's 2012 "Global Estimate of Forced Labour" suggests that sixty-eight percent of human trafficking victims around the world are forced laborers in the private economy, twenty-two percent of victims are in commercial sexual exploitation, and the remaining ten percent of victims suffer from government imposed forms of labor.<sup>142</sup> That means that seventy-eight percent of human trafficking victims are not sex trafficking victims.

Yet a study conducted by the Urban Institute and Northeastern University found that eighty-five percent of state and federal human trafficking cases were sex trafficking cases, and only eleven percent were forced labor cases.<sup>143</sup> Likewise, the Bureau of Justice Statistics at the United States Department of Justice reported that eighty-two percent of human trafficking cases opened by a select number of federally funded local law enforcement agencies between January 2008 and June 2010 were sex trafficking cases.<sup>144</sup> A similar pattern

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142. Int'l Labour Office, *supra* note 39.

143. AMY FARRELL ET AL., IDENTIFYING CHALLENGES TO IMPROVE THE INVESTIGATION AND PROSECUTION OF STATE AND LOCAL HUMAN TRAFFICKING CASES 17, 36 (Apr. 2012) (reviewing 140 closed human trafficking cases that may have classified as non-human trafficking offenses, and stakeholder interviews).

144. DUREN BANKS & TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS, 2008–2010 1 (2011).

can be seen on the international level. The International Organization for Migration provides direct services to human trafficking victims. Although, it was measuring victims and not the number of cases, it found that eighty-one percent of the actual victims it served were exploited in the commercial sex industry.<sup>145</sup>

On the federal level, the numbers seem to be different. In a recent Attorney General's report to Congress, he noted that there were an equal number of charges and convictions for labor trafficking and sex trafficking of adult victims.<sup>146</sup> When sex trafficking of minor cases are included in the total number of cases, however, eighty-three percent of the federally charged cases were sex trafficking.<sup>147</sup> Thus, there appears to be a paradox between the estimated scope of force labor cases and forced labor victims identified.

Although some suggest that the problem has been exaggerated by the "rescue industry" and earnest cultural crusaders,<sup>148</sup> there may be a practical reason for the gap between estimate and identification. Identifying labor trafficking cases is more difficult. Forced labor victims rarely have direct contact with the end consumers, or their products or services. The customer eating the meal, for example, may not have any contact with the workers in the back of the restaurant. The patron of the hotel normally has little direct contact with the person who cleans the hotel room or washes the linens. The purchaser of a garment often never meets the tailor or seamstress who labored to create the product. The detached nature of the relationship between the laborer and the ultimate customer in forced labor cases is a barrier to case identification.

The same is not true for sex trafficking. Those seeking to sell commercial sex acts must advertise the services or create physical locations for customers to approach. These points of contact between the customer and a victim create opportunities for law enforcement to intervene. Additionally, it is important to note that in most jurisdictions the commercial sex act itself is a violation of law. The labor or services at the heart of most forced labor cases is not itself an illegal act. Most local police departments have vice squads dedicated to identifying crimes related to commercial sex, some of which may qualify as sex trafficking. There is no counterpart to the vice squad in the forced labor arena.

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145. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 95, at 12; *see also* INT'L ORG. FOR MIGRATION, DATA AND RESEARCH ON HUMAN TRAFFICKING: A GLOBAL SURVEY (2005).

146. ATTORNEY GENERAL'S ANNUAL REPORT 2011, *supra* note 119, at 64–65.

147. *See id.* (noting that 125 cases of forced labor, sex trafficking of adults, and sex trafficking of minors were charged in Fiscal Year 2011; only twenty-one of them were primarily forced labor cases).

148. Laura Agustín, *The Soft Side of Imperialism*, COUNTER PUNCH (Jan. 25, 2012), <http://www.counterpunch.org/2012/01/25/the-soft-side-of-imperialism/> [<http://perma.cc/2G7C-3C4R>]; Ronald Weitzer, *The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade*, 35 POL. & SOC'Y 447 (2007).

Although both forced labor and sex trafficking cases involve coercion and profit for the trafficker, forced labor cases are often much more difficult to identify. Consider the *Botsvynyuk* forced labor case in Philadelphia.<sup>149</sup> Five brothers operated a cleaning crew comprised of eastern European men and women who worked in retail stores and office buildings at night while the employees and customers were not present.<sup>150</sup> The brothers used physical force, threats of force, sexual assault, and debt bondage to force the victims to work.<sup>151</sup> One of the defendants even threatened to place a victim's nine-year-old daughter into prostitution if he did not continue to work.<sup>152</sup> The brothers were tried, convicted, and the lead defendant was sentenced to life in prison.<sup>153</sup>

Operating a cleaning service is not an illegal act that would by itself spark a law enforcement investigation. Unlike sex trafficking, where the goal of a customer is to have direct interaction with a sex trafficking victim, forced labor victims in factories, agricultural fields, or cleaning crews may never interact with the ultimate customer of their products or services. In the *Botsvynyuk* case, it was not until a few of the victims escaped, and authorities in their country of origin contacted law enforcement in the United States that an investigation commenced.<sup>154</sup> This case illustrates why forced labor cases can be more difficult to identify than sex trafficking cases.

Another reason forced labor cases are difficult to identify is that when they come to the attention of the authorities, they can be misclassified as incidents of workplace violence, domestic violence, employment discrimination, or some other violation of criminal or civil law. It would be a mistake to expect that law enforcement can identify forced labor cases as easily as sex trafficking cases. As a result, the fact that more sex trafficking cases are identified does not justify the conclusion that most human trafficking victims are engaged in commercial sex.<sup>155</sup> It certainly does not justify the myth that human trafficking cases are primarily sex trafficking cases. To identify forced labor cases,

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149. *United States v. Botsvynyuk*, No. 10-159-1, 2012 WL 2885928, at \*1, \*2 (E.D. Pa. July 16, 2012).

150. *Id.* at \*2.

151. *Id.* at \*2, \*3.

152. *Id.* at \*7.

153. Criminal Docket, *United States v. Bostvynyuk*, No. 2:10-cr-00159 (E.D. Pa. 2010).

154. Maryclaire Dale, *Five Brothers Charged in Human Smuggling Case*, ASSOCIATED PRESS (June 30, 2010), <http://abclocal.go.com/story?section=news/crime&id=7529105> [<http://perma.cc/HPD2-AX5M>].

155. *New ILO Global Estimate of Forced Labour: 20.9 Million Victims*, INT'L LABOUR ORG. (June 1, 2012), [http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_182109/lang—en/index.htm](http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_182109/lang-en/index.htm) [<http://perma.cc/79NP-T6WF>]. It is important not to conflate the number of cases and the number of victims. There can be multiple victims in a single human trafficking case. Robert Moossy, *Sex Trafficking: Identifying Cases and Victims*, NAT'L INST. OF JUST. (Mar. 9, 2009), <http://www.nij.gov/journals/262/pages/sex-trafficking.aspx> [<http://perma.cc/6A7U-TUMB>].

communities must be aware that the problem exists so that it can be detected and prosecuted.

*E. Myth: All Traffickers Use the Same Business Model*

When one reads a sensational report about a human trafficking case or views an investigative report about how traffickers operate, it can inadvertently create an archetype against which other cases are judged. If a dissimilar case presents itself, it is possible that the case will not be identified as human trafficking. Exposure to one type of human trafficking case should not lead to the strained conclusion that all other cases will be the same. It is, therefore, important to expose the myth that there is a prototypical human trafficking case. In fact, there are a wide variety of human trafficking business models. It is important that communities not limit their abilities to identify a diverse range of cases.

The common thread that runs through every type of human trafficking case is money. At its core, human trafficking is an economically motivated crime. It involves someone exploiting his or her power to generate and illicit economic gain by violating a victim's human rights. In this, human trafficking differs from other violent crimes or civil rights abuses that are often not economically motivated. Understanding the wide variety of human trafficking enterprises and following the money will likely lead to victim identification and helpful evidence. There are several recurring business models for sex and labor trafficking cases.

1. Sex Trafficking

Sex trafficking enterprises present unique business models because, by the nature of the commercial sex act, the exploited victims must come into direct contact with the customer. That direct contact provides numerous case identification opportunities. Perhaps the best-known sex trafficking business model is "pimp-directed" sex trafficking. In these cases, the pimp directs the victim's actions and takes all the victim's earnings. In recent years, the pimp-directed model has been glamorized in movies like "Hustle and Flow,"<sup>156</sup> and songs like the Academy Award-winning "It's Hard out Here for a Pimp."<sup>157</sup> Several books have been written about pimp culture that offer guidance to

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156. HUSTLE & FLOW (Paramount Pictures 2005).

157. "It's Hard out Here for a Pimp," by Three 6 Mafia, won the Oscar for "Best Original Song" on March 5, 2006 at the 78th Academy Award ceremony. *The 78th Academy Awards 2006*, OSCARS, <http://www.oscars.org/oscars/ceremonies/2006> [<http://perma.cc/C63V-BQNH>] (last visited Aug. 12, 2015).

would-be pimps and that explain how to maximize profits.<sup>158</sup> The pimp-directed sex trafficking model is the most often discovered by law enforcement because of the work of vice squads and the public nature of solicitation. The victims generally perform “out calls,” which means they travel to the customer’s home or hotel room instead of the customer coming to an establishment run by the trafficker.

Datquinn Sawyer provides an example of a pimp-controlled sex trafficking operation.<sup>159</sup> He coerced adult and minor females to engage in commercial sex acts.<sup>160</sup> Both he and his victims were United States citizens, and they did not leave the Chicago metro area to commit the crime.<sup>161</sup> Sawyer provided his victims with new names and new identities before beating them into compliance.<sup>162</sup> The victims had to engage in commercial sex acts with men they met over the Internet or while “walking the track” in an area known for prostitution.<sup>163</sup> Sawyer controlled his victims through a rigid set of rules that required their obedience at all times.<sup>164</sup> After being convicted of sex trafficking of minors and sex trafficking of adults by force, fraud, or coercion, Sawyer received a fifty-year prison sentence.<sup>165</sup>

Far too often, instead of a pimp, it is a victim’s family member who operates as the trafficker. It can be a mother, aunt, or male serving in that role. In “family-directed” sex trafficking, the trafficker exploits the very people she is supposed to protect. This can occur with children of any age. For example, Tessa Vanvlerah sold her five-month-old infant daughter to be raped by a university professor she met on the Internet in exchange for money.<sup>166</sup> The professor traveled from California to St. Louis on multiple occasions to engage

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158. See, e.g., ALFRED “BILBO” GHOLSON, *THE PIMP’S BIBLE: THE SWEET SCIENCE OF SIN* 47 (2009); PIMPIN’ KEN, *PIMPOLOGY: THE 48 LAWS OF THE GAME* 72, 77 (2007); ICEBERG SLIM, *PIMP: THE STORY OF MY LIFE* 146 (1987).

159. Press Release, U.S. Attorney’s Office for the N. Dist. of Ill., *Chicago Man Convicted of Sex Trafficking Minors* (Nov. 21, 2011), <http://www.fbi.gov/chicago/press-releases/2011/chicago-man-convicted-of-sex-trafficking-minors> [<http://perma.cc/NA53-5JAD>]. Sawyer was convicted on November 21, 2011 and sentenced on April 5, 2012. Jury Verdict, *United States v. Sawyer*, No. 1:10-cr-00744 (N.D. Ill. Nov. 21, 2011), ECF No. 100; Judgment, *Sawyer*, No. 1:10-cr-00744 (N.D. Ill. Apr. 5, 2012), ECF No. 121.

160. *Sawyer v. United States*, No. 14 C7665, 2015 WL 2147969, at \*1 (N.D. Ill. May 6, 2015).

161. Press Release, FBI Chicago, *Three Chicago Men Charged in Child Prostitution Probe* (Sept. 9, 2010), <http://www.fbi.gov/chicago/press-releases/2010/cg090910a.htm> [<http://perma.cc/262F-XTRL>].

162. See Press Release, U.S. Attorney’s Office for the N. Dist. of Ill., *supra* note 159.

163. *Id.*

164. *Id.*

165. *United States v. Sawyer*, 733 F.3d 228, 229 (7th Cir. 2013).

166. Transcript of Plea and Sentencing Proceedings at 6–8, *State v. Vanvlerah*, No. 10SL-CR02241 (St. Louis Cty. Cir. Ct. Apr. 30, 2012).

in sex acts with the infant. Vanvlerah remained in the room for some of the sex acts and collected the money.<sup>167</sup> Both Vanvlerah and the professor were prosecuted and convicted.<sup>168</sup> The professor received thirty-seven-and-a-half years in prison pursuant to a plea agreement, and Vanvlerah, the baby's mother, is serving two consecutive life sentences.<sup>169</sup>

Family-directed sex trafficking can also involve payments to third parties. Linda O'Connor was convicted of sex trafficking in New York for sexually abusing her ten-year-old daughter and trading sex with her daughter to a customer who agreed to pay O'Connor's landlord the rent payment.<sup>170</sup> Debra Palmer was convicted of sex trafficking in Missouri for training her twelve-year-old daughter to be a dominatrix and then selling her services to people over the Internet seeking to have sex with the child.<sup>171</sup> Because of the family relationships, family-directed sex trafficking cases can be difficult to identify.

There are also "establishment-based" sex trafficking operations. The most familiar is the traditional brothel. However, many massage parlors, nail salons, bars, restaurants, and other businesses operate as "fronts" for the commercial sexual activity that goes on within the establishment.<sup>172</sup> In terms of case identification, any establishment-based sex trafficking operation offers benefits and exhibits weaknesses. Establishments offer law enforcement fixed locations to conduct surveillance, and the "front" aspect of the business can allow entry into the facility. However, the establishments can be cloaked by the legitimate labor or services they provide, making it more difficult to detect the coercive scheme used to compel the victims.

"Gang-directed" sex trafficking presents an entirely different business model because of the organized nature of the gang structure. Rances Ulices Amaya was one of the leaders of the MS-13 El Salvadoran gang in the Washington, D.C. metro area.<sup>173</sup> He went by the name "Murder" and often brandished his machete as he used the gang's reputation for violence to coerce

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167. *Id.*

168. Criminal Docket, *United States v. Kyle*, No. 3:10-cr-00245-CRB (N.D. Cal. Mar. 12, 2012), ECF No. 66; Circuit Court Docket Sheet, *Vanvlerah*, No. 10SL-CR02241 (St. Louis Cty. Cir. Ct. Apr. 30, 2012).

169. *See* Plea Agreement, *Kyle*, No. 3:10-cr-00245 (N.D. Cal. Mar. 14, 2012), ECF No. 69.

170. *United States v. O'Connor*, 650 F.3d 839, 844–45 (2d Cir. 2011).

171. *United States v. Palmer*, 643 F.3d 1060, 1062 (8th Cir. 2011); *see also* *United States v. Adams*, 789 F.3d 903, 905 (8th Cir. 2015) (convicting a mother under Section 1591(a) sex trafficking for allowing a paraplegic veteran to engage in oral sex with her sixteen-year-old daughter in exchange for two morphine pills).

172. GRAEME R. NEWMAN, U.S. DEP'T OF JUSTICE, *THE EXPLOITATION OF TRAFFICKED WOMEN* 9, 24, 26, 34 (Feb. 2006).

173. Press Release, U.S. Attorney's Office for the E. Dist. of Va., *Leader of MS-13 Gang Sentenced to 50 Years in Prison for Sex Trafficking Multiple Teens* (June 1, 2012), <http://www.fbi.gov/washingtondc/press-releases/2012/leader-of-ms-13-gang-sentenced-to-50-years-in-prison-for-sex-trafficking-multiple-teens> [<http://perma.cc/2KC6-FSMD>].

young women to engage in commercial sex acts.<sup>174</sup> He focused on girls in middle school, high school, and at homeless shelters.<sup>175</sup> He required that they service an average of ten customers a day and as many gang members as Amaya would allow.<sup>176</sup> Leveraging the power and organization of the gang, Amaya advertised to potential customers who also feared the gang's power.<sup>177</sup> Rape, threats, drugs, alcohol, and the gang's reputation were all essential elements of Amaya's coercive scheme.<sup>178</sup> Gang members recognized that drugs could only be sold once, but they could repeatedly sell women.<sup>179</sup> Amaya and several of his fellow gang members were convicted of sex trafficking.<sup>180</sup> A federal judge in Virginia sentenced Amaya to fifty years in prison.<sup>181</sup>

Although there are many variations of these basic sex trafficking business models, all of them are dependent on communication systems and money. Case identification can often arise from the sex trafficker's marketing activity: business cards, telephone calls, text messages, social media, bulletin boards, magazines, and Internet sites. It is important to understand that traffickers will shift their business models over time to avoid detection. Therefore, victim advocates and investigators must always be looking for new variations on the trafficker's coercive schemes.

## 2. Forced Labor Business Models

The business models in forced labor cases contain fewer patterns. Forced labor can occur in any industry or region. Identified cases have ranged from garment factories to agricultural fields. Massage parlors,<sup>182</sup> bars,<sup>183</sup> hotels,<sup>184</sup>

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174. Position of the United States with Respect to Sentencing at 1, 7, *United States v. Amaya*, No. 1:11-cr-00556 (E.D. Va. June 1, 2012), ECF No. 48.

175. *Id.* at 6.

176. *Id.* at 6, 8.

177. *Id.* at 7.

178. *Id.* at 6–8.

179. *E.g.*, K. Elysse Stolpe, *MS-13 and Domestic Juvenile Sex Trafficking: Causes, Correlates, and Solutions*, 21 VA. J. OF SOC. POL'Y & L. 341, 348 (2014).

180. Press Release, U.S. Attorney's Office for the E. Dist. of Va., *supra* note 173.

181. *Id.*

182. *United States v. Campbell*, 770 F.3d 556, 559 (7th Cir. 2014).

183. *United States v. Chang*, 237 F. App'x 985, 985 (5th Cir. 2007) (convicting defendant of forced labor for exploiting Korean women who worked in his night club. Defendant was sentenced to ten years in prison).

184. Press Release, U.S. Dep't of Justice, *Uzbek Man Sentenced for Role in Multi-National Racketeering and Forced Labor Enterprise* (May 9, 2011), <http://www.justice.gov/opa/pr/uzbek-man-sentenced-role-multi-national-racketeering-and-forced-labor-enterprise> [<http://perma.cc/8K V2-JRXX>]. In a RICO prosecution, where forced labor was a component of the enterprise, the defendant pled guilty to forcing dozens of foreign nationals to work in hotels and the hospitality



hair-braiding stands, dairy farms,<sup>185</sup> and tree-cutting operations<sup>186</sup> have all been the basis for labor trafficking cases. House cleaners and childcare providers who work as domestic servants present an even more challenging set of factors for investigators. They are often isolated inside the home and have no co-workers. In any industry, the crime of forced labor often hides behind the benign nature of the product or service that the customer receives. Thus, identifying forced labor cases often requires aggressive investigative efforts.

There are some common indicators among forced labor cases. Identifying how the workers enter and leave the facility can provide some insight. When all the employees arrive and leave work together in a van or series of cars, a trafficking indicator has presented itself. Also, where many co-workers live together in a dwelling owned or rented by the trafficker, suspicions should rise. As with all human trafficking cases, isolation, debts, control of identity documents, and threats to others should raise concerns. The critical question in any forced labor case is, “If you want to go work somewhere else, can you?” Free workers have the opportunity to move between employers; forced laborers do not.

### 3. Combating the Demand in the Business Model

Successful businesses have customers. In addition to prosecuting those who create and enforce the coercive scheme, human trafficking can be combated by prosecuting the customers who demand the labor or the commercial sex act. The essential question turns on what the customer is demanding. In the forced labor context, the customer may demand the lowest priced item but is not demanding that that item be made by forced laborers. In sex trafficking cases, there may be demand for a “commercial sex act” but not necessarily from a victim who is coerced. Minor sex trafficking cases, however, present a different form of demand because the customer is often seeking to have sex with someone who is underage.

The TVPA allows for the prosecution of customers who patronize human trafficking enterprises under the “obtain” prohibited activity in the sex trafficking statute.<sup>187</sup> In 2015, the sex trafficking statute was amended to include “patronizes” and “solicits” to the prohibited activities to increase the prosecution of customers.<sup>188</sup> The government must be able to prove that the

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industry across fourteen states. *Id.* He was sentenced to twelve years in prison and ordered to pay \$172,000 in victim restitution. *Id.*

185. *United States v. Kozminski*, 487 U.S. 931, 934 (1988).

186. *United States v. Bradley*, 390 F.3d 145, 148 (1st Cir. 2004).

187. *United States v. Jungers*, 702 F.3d 1066, 1069 (8th Cir. 2013) (successfully prosecuting a customer seeking commercial sex with a minor); *United States v. Cook*, 782 F.3d 983 (8th Cir. 2015) (successfully prosecuting a customer seeking to have non-consensual commercial sex with a tortured victim).

188. *See* 18 U.S.C. § 1591 (2015).

customer knew or recklessly disregarded the fact that the person was coerced or a minor. If the customer does not have any idea about the coercion or the fact that a minor is engaging in the commercial sex act, there cannot be effective prosecution of the customer. However, when undercover agents engage in sting operations where customers learn about the coercion or are demanding a minor victim, prosecutions have been successful.

In sex trafficking cases involving minors, there is an alternative to proving a trafficker or customer's knowledge of the victim's age.<sup>189</sup> If there is evidence that the trafficker or customer had a "reasonable opportunity to observe" the minor victim, he or she can be held criminally liable.<sup>190</sup> Combating demand can be an effective tool in the fight against human trafficking. Therefore, when gathering information about the trafficker's business model, it is also important to gather information about the customers.

#### 4. The Use of Debt in the Business Model

Both sex and labor trafficking investigations warrant significant emphasis on how the money flowed through the operation. Following the movement of money via wire transfers, bank deposits, and unusual movement of cash can also be indicators. Debts have historically presented an effective method of coercion. In addition to traffickers loaning large sums to victims who are unable to repay the loans due to usurious interest rates, traffickers are developing alternate debt schemes. Some of these schemes relieve the trafficker of the capital burden required to initially loan money to a victim. Instead, the trafficker can create a circumstance where the trafficker owing money to the victim creates a coercive tether that prevents the victim from leaving. This can occur through formally holding wages for an initial period of time to create a deposit in case the victim runs away, gets sick, or refuses to work. Under the promise that they will receive the wages held by the trafficker on deposit if the victim leaves on good terms with the trafficker, the victim remains while the trafficker is enriched. The same effect can occur in less formal settings. A trafficker might pay the promised wage some of the time and make excuses for why he or she cannot make payment at other times. After a few months, the victim is owed a significant amount of back wages from the trafficker and can feel that if she leaves, she will never get repaid. Both debts a victim owes and compensation owed to a victim can be powerful components in a trafficker's coercive scheme. Too often, lists of trafficking indicators only ask if the potential victim owes others money.

When encountering a possible human trafficking victim, it is important not to have a limited view of the business models a trafficker might employ.

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189. *United States v. Robinson*, 702 F.3d 22, 31–32 (2d Cir. 2012).

190. 18 U.S.C. § 1591(c).

Marketing efforts, cash flow patterns, wire transfers, and the use of debts can all be indicators of human trafficking within a trafficker's business model.

*F. Myth: The Perfect Victim*

When people think of a typical human trafficking victim, they often imagine a kind and demure girl who has never been in trouble with the law before. Yet, because traffickers prey on individuals with vulnerabilities and who often lack resources that could protect them, human trafficking victims often have pre-existing problems. These problems may include immigration problems, the use of alcohol and drugs, a prior criminal record, and multiple inconsistent statements from lies the victim has told the authorities in the past. Whether these problems are self-inflicted or caused by others, they do not disqualify the victim from assistance, and they should not prevent the authorities from investigating the case.

1. Immigration Issues

Victim stabilization is essential in the human trafficking investigation. Part of a "victim-centered approach" is to ensure rescued victims are warm, safe, fed, and healthy.<sup>191</sup> Often before investigative interviews can be effective, a victim needs a culturally appropriate meal and a good night's sleep. Providing victims with their basic physical needs, including addressing any medical issues, begins the process of recovery and restoration.

One important aspect of stabilization for victims who are not legally in the country is for them to obtain legal status to be present in the United States.<sup>192</sup> Some of these undocumented victims agreed to be smuggled into the United States or voluntarily overstayed their legal visas. Others were brought into the country against their will. Regardless of how the victims found their way to the United States, they need to remain in the country so investigators can uncover the truth about what occurred. Without some sort of temporary immigration relief, the victims could be placed in removal proceedings and deported.

There are two primary pathways to obtaining immigration status for human trafficking victims. Law enforcement officers can grant a victim a temporary status called "continued presence" that provides legal status while the authorities investigate and possibly prosecute the defendant.<sup>193</sup> This is an important benefit for law enforcement because it needs access to the victim for

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191. TEX. HUMAN TRAFFICKING PREVENTION TASK FORCE, INTRODUCTION TO HUMAN TRAFFICKING: A GUIDE FOR CRIMINAL JUSTICE PROFESSIONALS 16 (Sept. 2013).

192. Office of Trafficking in Persons, *Labor Trafficking Fact Sheet*, ADMIN. FOR CHILD. & FAMS. (Aug. 6, 2012), [http://www.acf.hhs.gov/sites/default/files/orr/fact\\_sheet\\_labor\\_trafficking\\_english.pdf](http://www.acf.hhs.gov/sites/default/files/orr/fact_sheet_labor_trafficking_english.pdf) [<http://perma.cc/ENU7-R4AQ>].

193. 22 U.S.C. § 7105(c) (2012). The details of continued presence are contained in 28 C.F.R. § 1100.35 (2014).

interviews and trial. Continued presence status also allows a victim to work legally in the United States. Continued presence is initiated by law enforcement for the benefit of the criminal case.

The TVPA also created an opportunity for human trafficking victims to self-petition for a T-visa.<sup>194</sup> The T-visa is initiated by the victim for the benefit of the victim. Further, it lasts for five years, includes work authorization, and can lead to a victim becoming a citizen. In their T-visa application, victims can seek a statement of support from law enforcement but cooperation with an investigation is not required. Some government services and benefits, however, do require cooperation with law enforcement.<sup>195</sup>

It is important to note that neither continued presence status nor the T-visa requires a successful criminal prosecution. If the government determines that the investigation cannot result in prosecution, immigration relief is still available. Stabilization is an essential aspect of the victim-centered approach. Bifurcating victims' services and benefits from the numerous factors that affect prosecutorial decisions means more victims find assistance. Victims who are not called to testify at trial, not mentioned in an indictment, or not interviewed by the authorities, can still find access to certain services under the TVPA.

## 2. Intoxicants: Incentives, Tethers, and Anesthesia

When a victim is located, it is not uncommon to find that the victim is currently using alcohol and drugs or is addicted to some sort of intoxicant. Instead of assuming no one will believe the victim because the victim has used the illegal substance, investigators should determine if the intoxicants are actually substantive evidence of the trafficker's coercive scheme.

There are three primary ways that traffickers use alcohol and drugs as part of a coercive scheme to exercise control over victims. First, traffickers can use alcohol and drugs as an incentive—providing the drug to a victim for engaging in some act. They can also withhold the intoxicant as punishment for violating a rule or refusing to engage in some act. Don Arthur Webster used the incentive approach in his sex trafficking enterprise that exploited minors and adults in Alaska.<sup>196</sup> In addition to violence, threats, and isolation, Webster also provided cocaine to his victims and withheld it from them when they refused to engage in commercial sex acts. Webster was convicted and sentenced to thirty

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194. 8 U.S.C. § 1101 (2012); 8 C.F.R. § 214.11 (2014).

195. See 22 U.S.C. § 7105. For adults to receive a “certification letter” from the United States Department of Health and Human Services, cooperation with law enforcement is required. *Id.* Minor victims are not required to cooperate with law enforcement to obtain an “eligibility letter.” *Id.*

196. *United States v. Webster*, Nos. 08-30311, 09-30182, 2011 WL 8478276, at \*1 (9th Cir. Nov. 28, 2011).

years in federal prison.<sup>197</sup> Traffickers can also use intoxicants as a tether—where the trafficker becomes the exclusive supplier of drugs to a victim. Once the chemical tether is in place, the victim can move freely through the community because the trafficker knows the victim will return when the victim needs another dose. Using the tether strategy, traffickers can exploit a victim's pre-existing addiction or actively work to make a victim dependent on the drug they supply. Andrew Fields employed this strategy. Fields controlled the supply of a powerful prescription drug that he used to compel women to engage in commercial sex acts.<sup>198</sup>

A third insidious use of intoxicants occurs when traffickers use alcohol or drugs as anesthesia—where the trafficker attempts to impair a victim's faculties through the use of drugs so that the victim is unaware or only partially aware of what is happening. Antonio Rivera used alcohol as part of his coercive scheme in a large labor and sex trafficking operation in two Long Island, New York bars.<sup>199</sup> Rivera required waitresses to drink large amounts of alcohol and then sell access to their bodies to customers.<sup>200</sup> Often, the victims did not recall what happened to them or were unable to fend off customers' sexual advances. Rivera was convicted and sentenced to sixty years in federal prison.<sup>201</sup> When identifying human trafficking cases, it is incorrect to assume that victims' usage of illegal drugs or their addictions disqualify them from assistance.

### 3. Prior Prostitution

In sex trafficking cases, it is far too common that investigations stall when a potential victim's history of voluntary prostitution is revealed. The same erroneous analysis is not applied to forced labor cases. It is not assumed that because someone voluntarily worked on a farm, picking tomatoes last year that they cannot be coerced to work on a different farm this year. Yet too many cases are quickly discarded because victims have engaged in prior sexualized employment.

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197. *Id.*

198. *United States v. Fields*, No. 8:13-cr-198-T-30TGW, 2013 WL 5278499, at \*1 (M.D. Fla. Sept. 18, 2013), *aff'd*, No. 14-10441, 2015 WL 5157060 (11th Cir. Sept. 3, 2015).

199. *United States v. Rivera*, 799 F.3d 180, 183 (2d Cir. 2015); Press Release, U.S. Attorney's Office for the E. Dist. of N.Y., Former Long Island Bar Owner Sentenced to 60 Years in Prison for Sex Trafficking, Forced Labor, and Immigration Crimes on Long Island (June 12, 2013), <http://www.fbi.gov/newyork/press-releases/2013/former-long-island-bar-owner-sentenced-to-60-years-in-prison-for-sex-trafficking-forced-labor-and-immigration-crimes-on-long-island> [<http://perma.cc/LE48-4R29>].

200. Press Release, U.S. Attorney's Office for the E. Dist. of N.Y., *supra* note 199.

201. *Id.*

Justin Cephus made this argument during his trial for operating a violent sex trafficking enterprise in Indiana.<sup>202</sup> There was evidence that Cephus beat his victims with his fists and broomsticks. There was also evidence that he whipped them with extension cords when they refused to have sex with customers. Cephus' attempt to discredit the victims because they had worked as prostitutes before Cephus recruited them into his coercive scheme was foreclosed by the court. He was not allowed to ask the victims about their prior prostitution during the trial. On appeal, the court reasoned, "[E]ven if [the victim] knew going in, from her prior experience, that Cephus probably would beat her, it was still a crime for him to do so. And finally the fact that she'd been a prostitute before does not suggest that he didn't beat and threaten her – that was his *modus operandi*."<sup>203</sup> Cephus was sentenced to life in prison for sex trafficking of adults by force, fraud, and coercion.

If victims' prior mistakes, including some criminal acts, are irrelevant at trial, they should be irrelevant during the case identification stage. The fact that a victim may have engaged in commercial sex acts in the past does not mean that the victim consents to being trafficked in the future. Self-inflicted problems and messy lives are attractive to traffickers when they are recruiting their victims; these conditions should not also be barriers to the rescue and restoration of victims.

#### 4. Self-Identification and Evolving Statements

"He said he was not a victim" and "she said she loves him" are two emblematic statements that prevent the identification of human trafficking cases.<sup>204</sup> In initial interviews, victims rarely self-identify as a human trafficking victim for a variety of reasons. Victims may share partial truths or speak lies because they fear law enforcement, are ashamed of their exploitation, or lack an understanding about what has happened to them. Some believe that nothing can be done, and they do not want to anger their trafficker, so they elect to remain silent about the coercion. Still others are following the instructions the trafficker gave them about what to say if they are ever questioned.

These initial false statements create significant problems for investigators and prosecutors. Prosecutors are often taught that people who give inconsistent

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202. *United States v. Cephus*, 684 F.3d 703, 708 (7th Cir. 2012).

203. *Id.*; *see also* *United States v. Roy*, 781 F.3d 416, 421–22 (8th Cir. 2015) (holding that prior and subsequent sexual history of victims is barred by Federal Rules Evidence Rule 403 and is irrelevant); *Rivera*, 799 F.3d at 185.

204. Heather J. Clawson & Nicole Dutch, *Identifying Victims of Human Trafficking: Inherent Challenges and Promising Strategies from the Field*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Jan. 20, 2008), <http://aspe.hhs.gov/hsp/07/HumanTrafficking/IdentVict/ib.htm> [<http://perma.cc/K4AC-CTWC>].

statements will be poor witnesses at trial. For example, those types of witnesses can be easily impeached on cross-examination and compromise the entire case. A victim's evolving statements or progressive revelations can scuttle case identification. Once authorities learn that a victim has told "two different stories," they might prosecute the victim for an underlying crime or avoid bringing a criminal case at all.

It is important to understand that human trafficking cases are often full of prior inconsistent statements that should not prevent a successful prosecution. Once a victim is stabilized and authorities have earned the victim's trust, more accurate information is revealed. When time permits, it is helpful not to ask victims direct questions about the ultimate issue of their victimization during the first interview. Delaying such questions may minimize the number or type of inconsistent statements. The initial statements can often become substantive evidence of the coercive scheme. Victims can testify about why they were not honest with the police at first, and explain to the jury that it was because the trafficker told them to lie or that they were scared of the police. Regardless of a victim's willingness to tell the truth or self-identify, when evidence exists that a person is a trafficking victim, authorities must be mobilized to assist.

*G. Myth: Only Professionals Can Combat Human Trafficking*

Human trafficking cases are often "hidden in plain sight."<sup>205</sup> It frequently takes an observant and interested individual to bring a human trafficking case to the attention of law enforcement or service providers. Yet particular law enforcement qualifications or academic expertise are not required to do so. A variety of differently situated individuals have brought to light successful human trafficking cases.

A custodian, gardener, and mother teamed up to identify a forced labor case in California.<sup>206</sup> The victim was an adult female domestic servant from Peru who spoke only Spanish. For two years, she labored in Mabelle Dann's apartment all day, cleaning the home, making the meals, and walking the twin children to and from school.<sup>207</sup> Dann kept the servant's passport and attempted to isolate her from others in the community. It was at the school that the servant met the school custodian, a gardener, and a mother who was there to pick up her children.<sup>208</sup> In brief conversations, she told them that she would get in trouble for talking to them, and that Dann mistreated her.<sup>209</sup> This unlikely trio decided to help. One day, they had a car waiting for the victim when she

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205. STEPHANIE HEPBURN & RITA J. SIMON, HUMAN TRAFFICKING AROUND THE WORLD: HIDDEN IN PLAIN SIGHT 7–9 (2013).

206. *United States v. Dann*, 652 F.3d 1160, 1166 (9th Cir. 2011).

207. *Id.* at 1164–65.

208. *Id.* at 1166.

209. *Id.*

dropped the twins off at school.<sup>210</sup> The car took the victim to a safe house, and the mother called Dann to let her know she would need to pick up the twins that day.<sup>211</sup> When Dann reached the school, she found an envelope with the victim's key to Dann's home and a letter requesting that Dann return her passport.<sup>212</sup> After reading the letter, Dann became "hysterical" and accused the victim of theft.<sup>213</sup> A few days later, Dann emailed her sister and said the victim "escaped, got away, left."<sup>214</sup> But at least she was here for two years.<sup>215</sup> Dann was convicted of forced labor, sentenced to five years in prison, and ordered to pay the victim \$123,740.34 in restitution.<sup>216</sup> The gardener, custodian, and mother were not trained human trafficking advocates; they were merely individuals who noticed a problem and acted.

In a sex trafficking case, a victim's cousin identified the case.<sup>217</sup> The Blue House Lounge was a karaoke bar in Guam with private rooms where women from Chuuk, Micronesia were forced to engage in commercial sex acts.<sup>218</sup> Song Ja Cha, who ran the operation, had recruited and began grooming a new victim to work in the bar.<sup>219</sup> The victim had been told she would be a waitress, but when she saw the nature of the business, she refused to work there.<sup>220</sup> Cha expelled the victim from the establishment but kept the victim's passport.<sup>221</sup> The victim stated that Cha kept her passport; and, if she refused to have sex with a customer, Cha would refuse to feed her.<sup>222</sup> The cousin contacted the authorities, and law enforcement found four victims.<sup>223</sup> Cha was convicted of sex trafficking, sentenced to life in prison, and ordered to pay \$200,000 in restitution to the victims.<sup>224</sup> The expelled victim's cousin had no specialized training in human trafficking case identification.

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210. *Id.*

211. *Dann*, 652 F.3d at 1166.

212. *Id.*

213. *Id.*

214. *Id.* at 1167.

215. *Id.*

216. *Dann*, 652 F.3d at 1167–68.

217. Brief for Appellant, *United States v. Cha*, 597 F.3d 995 (9th Cir. 2010) (No. 09-10147), 2009 WL 3223710, at \*5.

218. *Id.* at \*4, \*6, \*7.

219. *Id.* at \*7.

220. *Id.*

221. *United States v. Cha*, 597 F.3d 995, 997 (9th Cir. 2010).

222. *Id.* at 998.

223. Brief for Appellant, *Cha*, *supra* note 2017, at \*5.

224. See Press Release, U.S. Dep't of Justice, Guam Bar Owner Sentenced to Life for Sex Trafficking and Related Crimes (Sept. 20, 2012), <http://www.justice.gov/opa/pr/guam-bar-owner-sentenced-life-prison-sex-trafficking-and-related-crimes> [<http://perma.cc/W7TH-YE39>]. The federal jury convicted Cha on February 17, 2011 after an eight-day trial, and she was sentenced on September 20, 2012. *Id.*



It is often said that human trafficking victims do not self-identify. Many of them do not know their rights or understand the nature of the crimes committed against them. Although they may not articulate that they are a “human trafficking victim,” they may report other crimes to the police. For instance, a labor and sex trafficking case began in Chicago when a victim ran to a local police station to report the physical abuse she suffered. The investigating officer began to look beyond the domestic violence facts presented and collaborated with other law enforcement agencies that received similar tips. They uncovered an elaborate and brutal human trafficking case that resulted in a life sentence for that defendant.<sup>225</sup>

Other victims have arrived at hospitals to receive medical care for injuries sustained while being trafficked. Under pressure to fulfill a large order, Kil Soo Lee, the owner of a garment factory in American Samoa began to choke one of his victims.<sup>226</sup> Other victims came to her rescue, and guards beat them with plastic pipes.<sup>227</sup> Consequently, one victim lost her eye during the beating.<sup>228</sup> When receiving medical treatment for the injury, authorities began to investigate and learned of the coercion used to force more than 200 victims to work.<sup>229</sup> After a four-month jury trial, Lee was convicted and sentenced to forty years in prison.<sup>230</sup>

Of course, concerned citizens do not *always* identify cases. There are times when the traffickers themselves contact law enforcement. Robert Farrell and his wife, Angelita, forced adult Filipino women to work as housekeepers in their South Dakota hotel.<sup>231</sup> They frequently threatened to contact immigration and have the women deported if they did not continue to work. The Farrells did not pay the women as promised and piled significant debts upon them.<sup>232</sup> Ultimately, the victims were required to work at local fast food restaurants after they cleaned the hotel rooms.<sup>233</sup> The income for working at the restaurants also went to the Farrells. One of the victims lied to the Farrells by telling them her mother was dying in the Philippines.<sup>234</sup> She promised to return to South Dakota if they would let her visit her mother.<sup>235</sup> Once in the

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225. See Judgment at 1, 3, *United States v. Campbell*, 770 F.3d 556 (7th Cir. 2014) (No. 10-cr-00026). The federal jury convicted Campbell on January 30, 2012, and Judge Robert Gettleman sentenced Campbell to life in prison on November 26, 2012. *Id.*

226. *United States v. Lee*, 472 F.3d 638, 640 (9th Cir. 2006).

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* at 641.

231. *United States v. Farrell*, 563 F.3d 364, 367–70, 372, 376 (8th Cir. 2009).

232. *Id.* at 368.

233. *Id.*

234. *Id.* at 371.

235. See *id.*

Philippines, she contacted the United States Embassy and reported the Farrells.<sup>236</sup> Meanwhile, in the United States, Robert Farrell was dealing with several victims who were refusing to work.<sup>237</sup> He attempted to make good on his threat of deportation by contacting federal immigration agents and the local police.<sup>238</sup> Following the investigation, the victims were not deported, and the Farrells were tried and convicted on human trafficking charges.<sup>239</sup> Robert Farrell was sentenced to fifty months in prison, and Angelita Farrell received a three-year sentence.<sup>240</sup>

The myth that only law enforcement officers or experts can identify human trafficking victims is belied by the facts. Concerned citizens, neighbors, first responders, educators, medical professionals, custodians, gardeners, parents, the unemployed, and even victims themselves are all qualified to report possible human trafficking crimes. Although no particular training is required to report a case, it is important that law enforcement and those likely to come into contact with human trafficking victims receive training to understand the basic human trafficking indicators. Everyone can participate in the essential work of case identification.

#### IV. CONCLUSION

Whether defined as slavery, forced labor, involuntary servitude, or forced prostitution, “human trafficking” exists in the modern world. The key to identifying human trafficking victims is to have a clear understanding of what human trafficking is and the variety of business models that traffickers employ. The common myths about human trafficking cases and victims prevent individuals from identifying victims in need of help. These myths must be deconstructed through education and the effective awareness that successful prosecutions can generate. At its core, human trafficking is coercing a person to work, or to engage in labor or a commercial sex act—and it must be stopped.

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236. *Farrell*, 563 F.3d at 371.

237. *Id.*

238. *Id.*

239. *Id.* at 366.

240. *United States v. Farrell*, No. 3:07-cr-30019 (D. S.D. Mar. 15, 2007).

