

2015

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Recommended Citation

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The Human Trafficking Challenge: Prosecutorial Hurdles in Criminal Human Trafficking
Litigation

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December 27, 2014

This paper is submitted to Professor Bernard Freamon in partial satisfaction of the requirements of Slavery, Human Trafficking and the Law. This paper is submitted in satisfaction of the Seton Hall Law School's Advanced Writing Requirement.

This paper is approved not approved for AWR certification.

INTRODUCTION

Samirah was lured into the United States under the guise of an opportunity to be paid as a domestic worker. Once in the country, she was not paid, forced to work extremely long hours, eat from garbage and provided with only a space on the floor to sleep. In addition to these degrading conditions, Samirah was also physically abused: scalding water poured on her arms, cut and scarred on her face and body.¹ Unlike Samirah, Lynda was not lured into the United States, but was taken from her neighborhood in Yonkers, New York to Rhode Island to be a sex slave.² Lynda was continuously drugged to be “loose” for paying customers. Any defiance subjected her to punishment, which included being locked in a room or watching her captors tie and beat other women to remind her of the consequences of her disobedience.³

Stories such as these occur too often in the United States and around the world. Domestically, victims are trafficked in every state in the United States.⁴ Globally over 40,000 victims of human trafficking were identified in 2013, however, there are approximately 20 million victims who remain unidentified and are still under the control of a trafficker.⁵ Human trafficking victims generate \$9.5 billion per year in profits for their traffickers.⁶

Human trafficking includes forced labor, commercial sex trade of minors and adults, domestic servitude and child soldiering.⁷ Forced labor usually involves the victim performing physical labor by working in factories, nail salons, and the construction or farming industry.

¹ *United States v. Sabhanani*, 599 F.3d 215 (2nd Cir. 2010).

² Amanda Milkovits, *Fighting for Her Soul: A Sex-Trafficking Victim's Story*, PROVIDENCE JOURNAL (November 15, 2014), <http://www.providencejournal.com/news/police-fire/20141115-fighting-for-her-soul-a-sex-trafficking-victim-s-story.ece>.

³ *Id.*

⁴ *Domestic Human Trafficking- An Internal Issue*, HUMAN SMUGGLING AND TRAFFICKING CENTER 1, (December 2008), <http://www.state.gov/documents/organization/113612.pdf>.

⁵ *Trafficking in Persons Report*, UNITED STATES DEPARTMENT OF STATE 4(June 2014), <http://www.state.gov/documents/organization/226844.pdf>

⁶ *Sex Trafficking Statistics*, THE COVERING HOUSE (2014), <http://thecoveringhouse.org/act/resources-2/sex-trafficking-statistics-source-documentation/>

⁷ *Definition and Types*, YWCA SILICON VALLEY, <http://www.worsethanyouthink.org/about-human-trafficking/definitions-and-types/> (last visited Dec. 1, 2014).

These victims are often threatened with physical harm, exposure of their illegal status to the authorities, debt bondage⁸ and withholding of wages.⁹ Sex trafficking may include prostitution, escort services, strip clubs, brothels and pornography.¹⁰ The victims are often lured by the trafficker's promises of a better life, then controlled by violence and abuse. On the other hand, domestic servitude involves the victim performing household tasks such as cooking, housekeeping or child care for long hours with little if any pay.¹¹ Lastly, child soldiers are children used as guards, servants, messengers or spies for paramilitary organizations and rebel groups.¹² Regardless of the type of trafficking, victims are often subject to similar conditions, long work hours and some form of abuse.¹³

Citizens of the United States visualize trafficking as a crime that is far removed from the United States and its citizens, while, as illustrated by Samirah and Lynda's stories, it is present in our backyard. Both immigrants and citizens can be susceptible to the numerous methods of trafficking.¹⁴ Traffickers focus on exploiting the desperate, the easily manipulated and the young.¹⁵ There are certain risk factors which contribute to some individuals increased vulnerability.¹⁶ Previous victims of trauma, runaways and homeless individuals are susceptible because some are desperate and have beliefs of shame or unworthiness, which enhance their risk of becoming a trafficking victim.¹⁷ There is no single profile of a trafficking victim. Victims

⁸ Debt bondage occurs when the victim is further exploited by the trafficker based upon a debt owed. The victim is forced to work and the debt is inflated so that the victim cannot pay and must continue to work. *Id.*

⁹ *Types of Human Trafficking*, NATIONAL CRIME AGENCY, <http://www.nationalcrimeagency.gov.uk/crime-threats/human-trafficking/types-of-human-trafficking> (last visited Dec. 1, 2014).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Human Smuggling and Trafficking Center, *supra* at 1.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *The Victims*, NATIONAL HUMAN TRAFFICKING RESOURCE CENTER, <http://www.traffickingresourcecenter.org/what-human-trafficking/human-trafficking/victims> (last visited Dec. 1, 2014).

¹⁷ *Id.*

can be adults, minors, men or women.¹⁸ He or she can be from a variety of socio-economic backgrounds, levels of education and come from a rural, suburban or urban community.¹⁹ Additionally, as the initial encounters with the trafficker may involve progressive grooming,²⁰ it may be difficult for a victim to identify and avoid the trafficking situation.²¹ For example, the process may begin with the victim receiving a legitimate job from the trafficker, such as in a massage parlor.²² The trafficker may then become the victim's friend and eventually boyfriend.²³ Once the relationship is established, the trafficker begins to abuse and isolate the victim from her family and friends.²⁴ The sometimes progressive nature of human trafficking exposes how trafficking can truly affect anyone, because the preliminary stages and signs are not always obvious. This wide demographic of trafficking victims and methods for luring proves that any person can be susceptible to trafficking. Trafficking knows no boundaries.

As astonishing as it is that these horrendous crimes can victimize so many people, it is even more appalling that once these crimes are discovered they are often not successfully prosecuted or face numerous obstacles which hamper the execution of complete justice. The Trafficking Victims Protection Act (TVPA) was implemented to criminalize and prevent trafficking.²⁵ Prior to the TVPA, prosecutors used other means²⁶ to prosecute human traffickers,

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ The grooming process is also present in other forms of human trafficking, not only sex trafficking. In the forced labor context, usually foreign nationals are promised well-paying jobs, good working conditions and other benefits that are never fulfilled. Human Smuggling and Trafficking Center, *supra* at 6.

²¹ Human Smuggling and Trafficking Center, *supra* at 1.

²² Marion Brooks, *The World of Human Trafficking: One Woman's Story*, NBC CHICAGO (Feb 22, 2013), <http://www.nbcchicago.com/investigations/human-trafficking-alex-campbell-192415731.html>.

²³ *Id.*

²⁴ *Id.*

²⁵ Trafficking in persons as defined by the TVPA is (a) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (b) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery. *See* 22 U.S.C.A. § 7102 (West). This definition of slavery refers to modern day slavery as opposed to the classic

but now the TVPA can be used as a comprehensive method.²⁷ Even though the TVPA has provided a mechanism to prosecute traffickers, there are still numerous challenges which impede trafficking convictions. The national attention and resources allocated to combat human trafficking has substantially increased, yet the conviction rates have not increased proportionately.²⁸

The successful conviction of traffickers is crucial to end human trafficking.²⁹ In the criminal justice system, successful convictions and imprisonment are effective deterrents to future crimes.³⁰ “Prosecution deters further trafficking, incapacitates current traffickers and removes the powerful financial incentive to traffic through both asset and forfeiture and mandatory restitution.”³¹ Therefore, prosecutors who can secure convictions are essential to ensure that the TVPA is the powerful deterrent that it was intended to be.³² If prosecutors fail to obtain convictions, it will send a message to traffickers that their actions will not be punished and show victims that their suffering will not be vindicated. If prosecutors are aware of the potential challenges, they can be better equipped to tackle issues as they arise, which may lead to the necessary convictions to deter and reduce human trafficking.

chattel slavery. Chattel slavery was the ownership of one person by another, which subjected the slave to sale or transfer and this treatment was enforced by the law. 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, 261 (2007).

²⁶ Prosecutors often brought other charges such as compelling prostitution, aggravated promotion of prostitution. Brooke Grona-Robb, *Prosecuting Human Traffickers*, TEXAS DISTRICT & COUNTY ATTORNEY'S ASSOCIATION, <http://www.tdcaa.com/print/7370> (last visited Nov. 2, 2014). A survey of federal and state prosecutors revealed that traffickers were most commonly charged with compelling or promoting prostitution or with the transport of persons for the purpose of prostitution. NORTHWESTERN UNIVERSITY INSTITUTE ON RACE AND JUSTICE, IDENTIFYING CHALLENGES TO IMPROVE THE INVESTIGATION AND PROSECUTION OF STATE AND LOCAL HUMAN TRAFFICKING CASES EXECUTIVE SUMMARY (2012).

²⁷ Prosecutors have recognized that that the TVPA raises awareness to the problem of trafficking, facilitates social services and restitution to victims, punishes conduct that was not previously considered trafficking (prostitution of minors) and provides stricter penalties for offenders. ICF INTERNATIONAL, PROSECUTING HUMAN TRAFFICKING CASES: LESSONS LEARNED AND PROMISING PRACTICES 16 (2008).

²⁸ Northwestern University Institute on Race and Justice, *supra* at 1 (2012).

²⁹ Eileen Overbaugh, Comment, *Human Trafficking: The Need for Federal Prosecution of Accused Traffickers*, 39 SETON HALL L. REV. 635, 642 (2009).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

The TVPA provides a good starting point for prosecutors in human trafficking cases. However, a lack of knowledge of the potential pitfalls can eradicate the benefits of the TVPA. It is crucial that prosecutors understand the benefits that the TVPA grants and the issues presented in satisfying the requirements of the TVPA to obtain a conviction. The TVPA is an effective tool for prosecutors to utilize in human trafficking cases, but it is important for prosecutors to recognize and effectively utilize the evidence and victims to secure convictions through the TVPA.

This paper will discuss the prosecutorial tools that can be used to combat the challenges of prosecuting a human trafficker. It will serve as a guide to the major issues that prosecutors face when they pursue a human trafficking case. It will consider both legal and non-legal issues and offer suggestions for steps to minimize the roadblocks that may arise. Part I will briefly explain the various statutes that are available to prosecutors to combat human trafficking. Part II will address the trial and evidentiary challenges presented in such prosecutions. Part III will consider the pre-trial challenges of a typical case. Part IV will discuss punishment and sentencing issues implicated in trafficking cases.

I. STATUTES CRIMINALIZING HUMAN TRAFFICKING

The TVPA is the first statute to recognize and prosecute the numerous forms of human trafficking. The TVPA punishes forced labor, trafficking with respect to peonage, involuntary service, sex trafficking of children or by force, fraud or coercion and unlawful conduct with respect to documents.³³ The TVPA's purpose is to be a guide for those investigating and prosecuting trafficking cases, so that law enforcement and others can identify, protect and

³³ Mohamed Y. Mattar, *Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later*, 19 AM. U.J. GENDER SOC. POL'Y & L. 1247, 1250 (2011).

provide services to victims.³⁴ This section will briefly review the various statues that can be used to prosecute traffickers. The next section will then focus on the two most commonly invoked provisions to combat trafficking: 18 U.S.C. §§1589 and 1591.

18 U.S.C. §1594³⁵ is the general provisions section of the TVPA. It provides for punishment for any attempts to violate or conspire with another to violate §§ 1581, 1583, 1589, 1590 and 1592. The key portion of this section provides that the court may impose forfeiture of the trafficker's property, real or personal, that has been derived from the proceeds of the violation, as well as any interest in property, real or personal, that was used to commit or facilitate the commission of the crime.

18 U.S.C. §1590 addresses trafficking with respect to peonage, slavery, involuntary servitude or forced labor. It provides for a fine or imprisonment when the trafficking results in death or involves kidnapping, sexual abuse or an attempt to kill.³⁶

18 U.S.C. §1584 punishes the sale of a person into involuntary servitude. Any person who knowingly and willfully holds a person or sells them into involuntary servitude, shall be fined or imprisoned for up to 20 years. However, if the crime involves death, kidnapping, aggravated sexual abuse or an attempt to kill, the violator may be subject to a fine, life in prison or both. Subsection b provides that a person who obstructs the enforcement of this section will be subject to penalties.³⁷

18 U.S.C. §1592 penalizes unlawful conduct with respect to documents in furtherance of trafficking. If a person knowingly destroys, conceals, removes, confiscates or possess a passport or other immigration document of another person. The punishment for a violation of this section

³⁴ Press Release, United States Department of Justice, *Department of Justice and State Issue Human Trafficking Regulation and Guidelines for Prosecutors and Investigators* (July 18, 2001).

³⁵ 18 U.S.C. §1594.

³⁶ 18 U.S.C. §1590.

³⁷ 18 U.S.C. §1584.

is a fine of up to five years in prison or both and any obstruction or interference with its enforcement is punishable by fine.³⁸

II. TRIAL AND EVIDENTIARY CHALLENGES

Once a trafficking case successfully passes the indictment phase, the prosecutor must seek a conviction against the trafficker by presenting evidence to establish the trafficker's guilt beyond a reasonable doubt. Securing convictions under §§1589 and 1591 presents challenges, such as proving that the threat, harm or fraud utilized by the defendant in the trafficking scheme is punishable under the TVPA. This section will discuss the legal standards and type of evidence that is necessary for a court to determine that the proof set forth for each element is sufficient to satisfy the burden of proof.

A. 18 U.S.C. §1589

18 U.S.C. §1589 criminalizes forced labor human trafficking. §1589(a) provides that a person is guilty of forced labor if he knowingly obtains the labor or services of another by (1) force threat of force or physical harm, (2) serious harm or threats of serious harm, (3) abuse or threatened abuse of law or legal process or (4) any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, he/she would suffer serious harm or physical restraint.³⁹ §1589(b) requires that the person benefit financially or by receiving anything of value from participating in the venture.⁴⁰ The prosecution must offer sufficient evidence for each element to successfully prove the claim.

³⁸ 18 U.S.C. §1592.

³⁹ 18 U.S.C. §1589.

⁴⁰ *Id.*

One of the frequently contested elements is the requirement of serious harm or threat. Serious harm refers to a broad range of harms both physical and non-physical⁴¹ and may include psychological coercion.^{42 43} A threat is a statement that would lead a reasonable person to believe that the intended audience would receive it as a threat.⁴⁴ The threat must be considered under the reasonable person standard and be sufficiently serious to compel a person to remain⁴⁵ and believe that an attempt to leave would result in harm.⁴⁶ The threat is not required to be directly from the defendants, but can be at the hands of others so long as the threat is “intended to cause the victim to believe that harm would befall her.”⁴⁷ Congress acknowledged that the methods of harm used by modern day traffickers may be increasingly subtle, therefore §1589 is purposely defined broadly.⁴⁸ In enacting §1589, Congress explained that serious harm occurs when, “traffickers threaten harm to third persons, restrain their victims without physical violence or injury, or threaten dire consequences by means other than overt violence . . .”⁴⁹ *United States v. Nnaji*, provides an illustration of the broad definition of serious harm. The court upheld the trafficking conviction and found the evidence to be sufficient to demonstrate that the defendants took advantage of the victim and coerced her into performing work. In *Nnaji*, the trafficker’s threats of falsely accusing the victim of wrongdoing, so that she would be deported and her children taken from her, taken together were sufficiently serious to compel the victim to stay and

⁴¹ *United States v. Afolabi*, 508 Fed Appx 111, 117 (3d Cir 2013) (citing H.R. CONF. REP. 106-939 at 101 (2000)).

⁴² *United States v. Nnaji*, 447 Fed. Appx 558, 559 (5th Cir. 2011). It should be noted that Congress sought to overrule the decision of *United States v. Kozminski*, 487 U.S. 931 (1988), which held that the statute did not apply to psychological coercion. *United States v. Sou*, No. CRIM. 09-00345 SOM, 2011 WL 3207265, at *1 (D. Haw. July 26, 2011).

⁴⁴ *United States v. Calimlim*, 538 F.3d 706 (7th Cir. 2008).

⁴⁵ 18 U.S.C. §1589 (c)(2).

⁴⁶ *United States v. Dann*, 652 F.3d 1160, 1170 (9th Cir. 2011).

⁴⁷ *Calimlim*, 538 F.3d at 711.

⁴⁸ *Dann*, 652 F.3d at 1169 (citing H.R.Rep. NO. 106-939 at 101, 2000 U.S.C.C.A.N. 1380, 1392-93 (2000) (Conf. Rep)).

⁴⁹ *United States v. Sou*, No. CRIM. 09-00345 SOM, 2011 WL 3207265, at *5 (D. Haw. July 26, 2011) (citing Victims of Trafficking & Violence Protection Act of 2000, Conference Report, H.R. Conf. Rep. No. 106-939, at 100-01, 2000 WL 1479163, at *91-*92 (Oct. 5, 2000)).

would therefore satisfy the serious harm requirement.⁵⁰ The threat took advantage of the victim and coerced her into performing work.⁵¹ Similarly, in *United States v. Sou*, the court denied the dismissal of an indictment because the defendant's threats of loss of family property and substantial debt, which would leave the individual homeless and destitute, created fear of serious economic harm which satisfied the requirements of the statute.⁵² Of course, instances of physical abuse would also constitute serious harm.⁵³

In addition to the use of serious harm or threat of serious harm, the case law indicates that traffickers commonly utilize abuse or threatened abuse of law or legal process to force their victims into compliance.⁵⁴ "Abuse or threatened abuse of law or legal process means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action"⁵⁵ In *United States v. Calimlim*, the defendant threatened the victim with deportation and frequent "warnings" that she was violating the law and in the country illegally, were sufficient an abuse of the law or legal process.⁵⁶ Additionally, threats of legal action against the victim and allowing the victim's visa to expire are sufficient to constitute an abuse of legal process.⁵⁷ Threatening the victim with serious legal consequences is clearly an abuse of legal process.⁵⁸ Even if the content of the threat

⁵⁰ *Nnaji*, 447 Fed. Appx at 559.

⁵¹ *Id.*

⁵² *Sou*, 2011 WL 3207265, at *1.

⁵³ See *United States v. Sabhanani*, 599 F.3d 215 (2nd Cir. 2010).

⁵⁴ *Calimlim*, 538 F.3d 708, 710 (7th Cir. 2008); *United States v. Rivera*, No. 09-CR-619 SJF, 2012 WL 2339318, at *5 (E.D.N.Y. June 19, 2012).

⁵⁵ *Rivera*, 2012 WL 2339318, at *6.

⁵⁶ *Calimlim*, 538 F.3d at 710.

⁵⁷ *Nunag-Tanedo v. E. Baton Rouge Parish Sch. Bd.*, 790 F. Supp. 2d 1134, 1144 (C.D. Cal. 2011).

⁵⁸ *United States v. Garcia*, No. 02-CR-110S-01, 2003 WL 22956917, at *4.

is valid that does not validate the defendant's actions or prohibit the threats from being an abuse of power.⁵⁹

Under §1589, subsection b requires that the defendant benefit financially or by receiving anything of value from participating in the venture.⁶⁰ The statute does not require that the person participated in any portion of the financial management of the business, only that they benefitted financially.⁶¹ In *United States v. Rivera*, the defendants were accused of violating both sex trafficking and forced labor statutes for forcing numerous women to work in bars and engage in commercial sex.⁶² One of the defendants argued that the prosecutors had not satisfied their burden of proving that he engaged in forced labor because there was no evidence that he had hired any of the victims, forced them to continue working at the bars, withhold wages or threaten them.⁶³ The court disregarded the defendant's contention reasoning that that the statute only requires that he knowingly benefitted from his participation in the operation.⁶⁴ Further the court determined that there was ample evidence that the defendant knew of, or recklessly disregarded the threats of deportation threats made to the victims.⁶⁵

A reading of §1589 and review of the case law demonstrates that §1589 is a sufficient tool for prosecutors to utilize in forced labor cases. First, the statute offers three methods that would implicate a trafficker's behavior under the statute. The methods are broad and accounts for different forms of manipulation commonly utilized by traffickers. For example, prosecuting traffickers where physical coercion, not physical harm is used evidences Congress' understanding that the human trafficking problem is not limited to only physical abuse and can

⁵⁹ See *Calimlim*, 538 F.3d at 710.

⁶⁰ 18 U.S.C. §1589.

⁶¹ *Rivera*, 2012 WL 2339318, at *5.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

occur in numerous forms. Additionally, as courts utilize the reasonable person standard in determining whether the government has satisfied these requirements, there does not seem to be an unusual burden placed upon the government to establish the defendant's guilt. Therefore, if prosecutors are able to work with the victim and investigators to obtain the evidence necessary, then they should be able to effectively prosecute forced labor cases.

B. 18 U.S.C. §1591

The TVPA punishes sex trafficking under 18 U.S.C. §1591 as the trafficking of minors⁶⁶ as well as trafficking that is effected by force, fraud or coercion. This section will focus on sex trafficking effected by force, fraud or coercion, which is addressed in §1591(b)(1). According to the majority of the case law, the most disputed elements are the definitions and evidentiary requirements for (1) knowing (2) affecting interstate or foreign commerce, (3) force, fraud or coercion.⁶⁷

The knowledge prong requires that the defendant must be aware of an established modus operandi⁶⁸ that his actions will cause a person to engage in prostitution in the future.⁶⁹ The requirement is satisfied if it is determined that “if things go as planned, force, fraud or coercion will be employed to cause the victim to engage in a commercial sex transaction.”⁷⁰ Additionally, the knowledge requirement only applies to acts of force, fraud and coercion that occurred after

⁶⁶ 18 USC 1591(b)(2) punishes trafficking “where the person recruited, enticed, harbored, transported, provided, or obtained had attained the age of 14 years but had not attained the age of 18 years at the time of such offense.

⁶⁷ See *United States v. Zitalpopoca-Hernandez*, 495 Fed. Appx. 833 (9th Cir. 2012); *United States v. Sawyer*, 733 F.3d 228 (7th Cir. 2013).

⁶⁸ A method of operating or a manner of procedure; esp. a pattern of criminal behavior so distinctive that investigators attribute it to the work of the same person. MODUS OPERANDI, BLACK'S LAW DICTIONARY (9th ed. 2009).

⁶⁹ *Zitalpopoca-Hernandez*, 495 Fed. Appx. at 835.

⁷⁰ *Id.*

the dates alleged in the indictment.⁷¹In *United States v. Zitalalpopca-Hernandez*, the court reversed the conviction under §1591 because the government did not present evidence that the defendant coerced the victim into the United States.⁷² There was evidence that a third party, not the defendant coerced the victim into the United States.⁷³ The court’s unwillingness to attribute another’s conduct to the defendant, despite his participation in the general trafficking of the victim, demonstrates that the court will strictly focus on the defendant’s conduct to consider whether the defendant actually committed each particular element of the offense. There is no room for the prosecutors to provide general evidence that an action was taken against the victim and should be attributed to the defendant unless there is specific proof. In reversing the conviction, the relied upon the lack of evidence that the victims were assaulted or coerced while in the United States.⁷⁴ On the converse, in *United States v. Todd*, the court concluded that the defendant had sufficient knowledge that his actions would cause his victims to engage in commercial sex because he had established a pattern with numerous victims.⁷⁵ Therefore, the defendant knew that his actions would cause the victim to engage in prostitution.⁷⁶ The defendant had an established practice and rules to control the victims, which had been successful with prior victims in the past.⁷⁷ “Just as a mother who has had one child in school and prepared his lunch knows that she will prepare the school lunch for her second child, just as a judge knows that his law clerks will use Westlaw, so Jerome Todd knew that he would use coercion to cause his sex workers to make money for him.”⁷⁸ What the statute requires is that the defendant know in the sense of being aware of an established modus operandi that he will in the future cause a

⁷¹ *Id.*

⁷² *Id.* at 836.

⁷³ *Id.*

⁷⁴ *Id.* at 835.

⁷⁵ *Id.*

⁷⁶ *Todd*, 627 F.3d at 334.

⁷⁷ *Id.*

⁷⁸ *Id.*

person to engage in prostitution.”⁷⁹ As the government must prove the knowledge requirement beyond a reasonable doubt, it is imperative that a prosecutor ensure that she acquires evidence to establish that the defendant knew that his conduct would result in the victim engaging in commercial sex.⁸⁰

Interstate commerce is another important aspect of the statute which is often disputed. Congress has the authority to regulate sex trafficking because it has a substantial effect on interstate commerce.⁸¹ Sex trafficking has an economic impact on interstate and foreign commerce because of the methods used to transport victims and the payment exchanged for them.⁸² A number of circuit court of appeals have concluded that there is no *mens rea* required for the interstate and foreign commerce requirements in criminal statutes.⁸³ The scienter requirement appears in the introductory paragraph to provide the *mens rea* for subsections (a)(1) and (a)(2), but it does not apply to interstate commerce.⁸⁴ The legislative history indicates that Congress intended for the statute to be applied broadly and not solely limited to those “surely trifling number of sex traffickers who know, for example, that using a hotel room or out-of-state condoms affects interstate commerce as that term is understood in constitutional law.”⁸⁵ Requiring that a trafficker knowingly engage in interstate commerce while trafficking victims would substantially reduce the amount of traffickers subject to prosecution, thereby controverting the purpose of the statute.⁸⁶ To satisfy the evidentiary requirements that the defendant has effected interstate or foreign commerce, the prosecutor must only establish that the

⁷⁹ *Id.*

⁸⁰ Todd, 627 F.3d at 334.

⁸¹ *Rivera*, 2012 WL 2339318 *13 (citing Todd, 627 F.3d at 334.)

⁸² *Id.*

⁸³ *Sawyer*, 733 F.3d at 230 (7th Cir.2013); *United States v. Phea*, 755 F.3d 255, 265 (5th Cir. 2014); *United States v. Evans*, 476 F.3d 1176, 1180 n. 2 (11th Cir.2007).

⁸⁴ *Sawyer*, 733 F.3d at 230; *See Phea*, 755 F.3d at 265.

⁸⁵ *Sawyer*, 733 F.3d at 230.

⁸⁶ *Id.*

trafficking resulted in a *de minimus* effect on interstate commerce.⁸⁷ Evidence of cell phone calls, payments accepted via credit card, use of hotels frequented by out of state guests and use of condoms manufactured out of state are all sufficient evidence to satisfy the interstate commerce requirements of §1591.⁸⁸ A *de minimis* effect on interstate commerce has been proven where the advertising occurred across state lines,⁸⁹ the defendant used hotels that served interstate travelers and where women were used to engage in commercial sex act regardless of whether the commercial sex act occurred interstate or intrastate.⁹⁰ Even if there is some indication that the trafficker's activities are local, there may still be a sufficient effect on interstate commerce because "the Trafficking Victims Protection Act 'is part of a comprehensive regulatory scheme that criminalizes and attempts to prevent slavery, involuntary servitude, and human trafficking for commercial gain.'" ⁹¹ As demonstrated by the case law, there are a variety of activities which sufficiently establish an effect on interstate commerce for a prosecutor to use as a basis to secure a sex trafficking conviction.

Force, fraud and coercion is another required element for a sex trafficking under the TVPA, however, defendants may argue that there is insufficient evidence to prove this elements.⁹² Fraud is not defined in §1591, but in its ordinary meaning, it is "an instance or an act of trickery or deceit especially when involving misrepresentation."⁹³ Generally, false promises do not constitute fraud, therefore, where the victims are induced by promises of

⁸⁷ *Rivera*, 2012 WL 2339318, at *13.

⁸⁸ *United States v. Paris*, No. CR 03:06-CR-64, 2007 WL 3124724, *7 (D. Conn. Oct. 24, 2007).

⁸⁹ *Rivera*, 2012 WL 2339318 *13 (citing *Todd*, 627 F.3d at 333).

⁹⁰ *Paris*, 2007 WL 3124724, at *8

⁹¹ *United States v. Chappell*, No. CRIM09-139, 2010 WL 1131474, at *7 (D. Minn. Jan. 12, 2010) report and recommendation adopted, No. CRIM09-139 JNE/JJK, 2010 WL 1131473 (D. Minn. Mar. 22, 2010) (holding that there was a sufficient effect on interstate commerce although the defendant's conduct was local because his activities "contribute to the market that Congress's comprehensive scheme seeks to stop.") (citing *United States v. Evans*, 476 F.3d 1176, 1179 (11th Cir.2007).

⁹² *United States v. Townsend*, 521 F. App'x 904, 906 (11th Cir. 2013); *United States v. Chang Da Liu*, 538 F.3d 1078, 1085 (9th Cir. 2008).

⁹³ *United States v. Smith*, 719 F.3d 1120, 1125 (9th Cir. 2013) (citing *See Webster's Third New International Dictionary* 887, 904 (2002).

compensation and good treatment, the fraud requirement is not satisfied.⁹⁴ However, in *United States v. Chang Da Liu*, the court concluded that the evidence that the defendant designed a scheme to deceive the women and induce women them to travel to the Commonwealth of Northern Mariana Islands, then defraud them of money was sufficient to constitute fraud, force and coercion.⁹⁵ Here, the false promises coupled with the deceit and coercion to engage in prostitution was sufficient to prove sex trafficking.

Like fraud, force is not defined in §1591. Force is defined as compelling by physical means⁹⁶ or when power or violence is used on a person or thing.⁹⁷ In the pimp-prostitute framework of sex trafficking, the pimp may argue that the victim's actions were voluntary as she was not constantly subject to defendant's force and had opportunities to leave.⁹⁸ This argument is not sufficient to discredit the prosecutor's evidence of force. In *United States v. Townsend*, after leaving the pimp, the victim returned to him because of fear that the pimp would find her and beat and rape her as he had done in the past.⁹⁹ The victim's testimony confirmed that the beatings, rapes and threats made her engage in prostitution.¹⁰⁰ Additionally, even if the victim voluntarily engaged in commercial sex acts at first, if force was used to compel her to continue engaging in sex acts, then the evidence would be sufficient.¹⁰¹ The climate of fear created by the defendant is at the core of the force requirement.¹⁰² The threats and previous acts of physical

⁹⁴ *Paris*, 2007 WL 3124724, at *14.

⁹⁵ *United States v. Chang Da Liu*, 538 F.3d 1078, 1085 (9th Cir. 2008).

⁹⁶ BLACK'S LAW DICTIONARY (9th ed. 2009).

⁹⁷ Force Definition, MERRIAM-WEBSTER ONLINE, <http://www.merriam-webster.com/dictionary/force>.

⁹⁸ *United States v. Townsend*, 521 F. App'x 904, 906 (11th Cir. 2013)

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *United States v. Warren; Mattar, supra* at 3.

violence serve to intimidate the victims, so that even if she was presented with an opportunity to escape, fear of retaliation would silence any plan to do so.¹⁰³

Under the statute, there are three actions which can constitute coercion: (1) threats of serious harm, (2) any scheme, plan or pattern which causes a person to believe that the failure to perform would result in harm to them and (3) the abuse or threat of the abuse of the law of legal process.¹⁰⁴ Threats to use a legitimate legal process to cause a person to engage in commercial sex acts are sufficient to constitute coercion.¹⁰⁵ Specifically, threats to have illegal aliens deported are legal coercion because the trafficker's objective is to coerce or intimidate the victim into forced labor.¹⁰⁶ In *Paris*, the court reasoned that it was not unlawful for the defendant to threaten to report his victims to law enforcement, but it was illegal for him to condition his refrain from doing so on her continuing to engage in commercial sex acts.¹⁰⁷ In proving force, fraud or coercion, the testimony of the victims that the defendant used fraud as well as written documents, advertisements which was proof that they were recruited based upon fraud.¹⁰⁸

To ensure that the prosecutor has sufficient evidence to prove the elements of sex trafficking beyond a reasonable doubt, it is not only important to understand the legal requirements of the statute, but also to ensure that the investigator has obtained all of the facts regarding these elements from the victims. It is crucial to obtain as many details as possible and the investigator should be meticulous in their record keeping to ensure that all of the information is properly documented for use in the prosecution.

¹⁰³ Mattar, *supra* at 4.

¹⁰⁴ 18 U.S.C. 1591 (e).

¹⁰⁵ *Kozminski*, 487 U.S. 9 (1988).

¹⁰⁶ *Rivera*, 2012 WL 2339318 *5.

¹⁰⁷ *Paris*, 2007 WL 3124724 *14.

¹⁰⁸ *Chang Da Liu*, 1085.

III. PRE-TRIAL CHALLENGES

In a human trafficking case, a prosecutor must be intimately involved to assure that the case has all of the evidence necessary to obtain a conviction. Unless there is sufficient resources, a prosecutor will need to be significantly involved in the case from the investigational phase to ensure that all of the necessary evidence is obtained, while creating an environment for victim cooperation.¹⁰⁹ If the prosecuting jurisdiction does not have the resources to train law enforcement or provide services for the victim, the prosecutor must be closely involved to obtain all the necessary evidence and arrange the services for the victim's recovery.¹¹⁰ A recent survey of prosecutors across the United States revealed that the factors that contribute to a successful trafficking case are patience, rapport and a positive relationship with the victims, trained investigators and services available to assist victims.¹¹¹ On the other hand, the greatest challenges are ineffective communication with the victim, lack of resources and knowledge of trafficking issues and the victim's voluntary return to the trafficker.¹¹²

This section of the paper will address the challenges that arise at the inception of a human trafficking case before any trial issues arise. A criminal prosecution cannot proceed unless sufficient evidence is obtained to prove the charge against the defendant. Part A will discuss the challenges of working with a trafficking victim, while Part B will discuss the evidentiary challenges and types of evidence that will lead to convictions.

A. Victims

¹⁰⁹ See ICF INTERNATIONAL, *supra* at 19 (2008).

¹¹⁰ See *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 20-21.

There is no consistent profile of who a trafficking victim is, what they look like or where they come from.¹¹³ Trafficking victims can range from the girl next door in a small American town to the man trafficked into the United States from a foreign country.¹¹⁴ Although the victims are diverse, traffickers are the same.¹¹⁵ Traffickers use the promise of jobs, education and marriage to target their victims.¹¹⁶ Once under their control, traffickers use physical and psychological abuse, threats of violence and deportation and torture methods, such as starvation, to force the victim into compliance.¹¹⁷ Due to the conditions that the victims endure, once the trafficking regime is finally uncovered by law enforcement or they escape their traffickers, they are usually fragile.¹¹⁸ Working with trafficking victims can be emotionally draining, time consuming and require significant prosecutorial resources, which the prosecutor should be prepared to handle.¹¹⁹

The victim is important to the trafficking case because they are a source of information that is necessary for investigation and evidence. Prosecutors have reported that the lack of victim cooperation is the biggest challenge in a trafficking case.¹²⁰ Some of the victim-related challenges are language and culture barriers, the victim's lack of trust for authority, the victim's fear and safety concerns and their general reluctance and unwillingness to cooperate with authority.¹²¹

¹¹³ *The Victims*, NATIONAL HUMAN TRAFFICKING RESOURCE CENTER, <http://www.polarisproject.org/human-trafficking/overview/the-victims> (last visited Nov. 2, 2014).

¹¹⁴ Overbaugh, *supra* at 637.

¹¹⁵ Overbaugh, *supra* at 637.

¹¹⁶ Overbaugh, *supra* at 637.

¹¹⁷ *Human Trafficking*, NATIONAL HUMAN TRAFFICKING RESOURCE CENTER, <http://www.polarisproject.org/human-trafficking/overview/the-victims> (last visited Nov. 2, 2014).

¹¹⁸ See NATIONAL HUMAN TRAFFICKING RESOURCE CENTER, *supra*.

¹¹⁹ ICF INTERNATIONAL, *supra* at 20.

¹²⁰ NORTHWESTERN UNIVERSITY INSTITUTE ON RACE AND JUSTICE, *supra* at 8.

¹²¹ ICF INTERNATIONAL, *supra* at 20.

Victim cooperation during the investigation and prosecution depends upon the services available to assist the victim to adjust to their post-trafficking life.¹²² There are state and federally funded programs¹²³ that provide services to victims to help them become self-sufficient.¹²⁴ Victims often need health and mental health services, jobs training, education and housing, which are important to a victim's success.¹²⁵ Once they are on the road to stability, they will be a more credible and consistent witness for the prosecution.¹²⁶ The vital need for services presents an issue because resources may be limited in some states.¹²⁷

Another victim related issue, which can impede a trafficking prosecution is a victim's complete denial that he/she was a victim of their trafficker. This often arises when a victim is forced into prostitution by a pimp.¹²⁸ In a trial against two Pennsylvanian traffickers,¹²⁹ a pregnant prostitute testified on behalf of her pimps proclaiming, "I make my own choices. I am not a dumb person. I know what I'm doing."¹³⁰ In support of their lifestyle, she further stated, "the whole point to our family was just to become better."¹³¹ These types of trafficking "victims" pose a serious threat to a prosecutor's ability to secure a trafficking conviction. Not

¹²² *Id.*

¹²³ In passing the TVPA, Congress wanted to ensure that the international and domestic victims had access to assistance in the United States. Trafficking victims are eligible for federal and state funded to the same extent as refugees. Some of the services include medical assistance, refugee cash and social services. *Case Management and the Victim of Human Trafficking*, US DEPARTMENT OF HEALTH AND HUMAN SERVICES 1, <http://aspe.hhs.gov/hsp/07/humantrafficking/casemgmt/ib.pdf>.

¹²⁴ *Id.* at 5.

¹²⁵ NORTHWESTERN UNIVERSITY INSTITUTE ON RACE AND JUSTICE, *supra* at 12.

¹²⁶ US DEPARTMENT OF HEALTH AND HUMAN SERVICES, *supra* at 5.

¹²⁷ The availability of resources may be limited because of limitations in funding. The Officer of Refugee Resettlement Anti-Trafficking Services Subcontracts is one method of funding, which is primarily based upon a reimbursement system which limits smaller agencies that do not have the funds to pay for the victims services upfront. *Id.*

¹²⁸ Russ Buettner, *Prostitute Testifies in Defense of Pimps at Sex Trafficking Trial*, N.Y. Times, May 28, 2013, available at http://www.nytimes.com/2013/05/29/nyregion/prostitutes-testify-in-defense-of-pimps-at-sex-trafficking-trial.html?_r=0.

¹²⁹ Vincent St. George Sr. and Vincent St. George Jr. are a father and son who established a prostitution ring in Allentown, Pennsylvania. Both men were charged with promoting prostitution, sex trafficking and money laundering. The men plead guilty to promoting prostitution, but were found not guilty on the sex trafficking charges. *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

only must the prosecutor establish that the defendant is a trafficker who has violated the law, but she must also prove that there is actually a victim.¹³² A victims' consent to participate in prostitution is not determinative to a prosecution if they are held in the service through psychological manipulation or physical force.¹³³

In the St. George case, the prosecutor attempted to discredit the testimony of the prostitutes by explaining to the jury that "While these women were not chained up, they did not have real options."¹³⁴ In cases like this, the prosecutor has the additional burden of proving that the prostitutes are victims and are not acting under their free will as they claim.¹³⁵ It would likely be much more difficult for a jury to convict a trafficker if neither the jury or the purported victim believes that there is no real victim. How can his actions be that bad or be a crime if these women don't seem to mind? The jury may conclude that the case is just the result of an overzealous prosecutor. Although prosecutors face numerous challenges when working with human trafficking victims, the right preparation and planning can eradicate some of the issues so that victims are able to participate in the investigation, prosecution and conviction of their trafficker. For example, addressing the victim's needs, by providing translators, emergency shelter and housing, allows the victim to better assist in the prosecution.

B. Evidence

The critical types of evidence necessary for the presentation of a human trafficking prosecution are more easily ascertainable if the prosecutor has the necessary resources.¹³⁶ One of

¹³² *Id.*

¹³³ UNITED STATES DEPARTMENT OF STATE, *supra* at 29.

¹³⁴ Buettner, *supra*.

¹³⁵ Buettner, *supra*.

¹³⁶ Jennifer Gentile Long & Teresa Garvey, *Creative Strategies in Prosecuting Human Trafficking Cases Using Forfeiture by Wrongdoing and Other Evidence-Based Techniques*, Strategies: The Prosecutors' Newsletter on Violence Against Women (AEquitas, Washington, D.C.) November 2012, at 3.

the most important pieces of evidence in a human trafficking case is the victim's statement.¹³⁷ A victim's statement is the most persuasive evidence for a prosecutor to utilize during her case in chief.¹³⁸ As discussed previously, the victim may be traumatized and fragile, which may make it difficult to obtain a statement.¹³⁹ The victim's statement may take numerous sessions to obtain, but because it is important to be patient and believe the victim's story until the investigation shows otherwise.¹⁴⁰

The statement not only provides new information, but can be used to corroborate evidence.¹⁴¹ Corroboration is essential to a prosecution because a jury may not consider a victim to be credible witness.¹⁴² The corroboration between the evidence presented and the victim's statement creates a link that solidifies the evidence in the eyes of the jury and discredits claims of fabrication.¹⁴³ It is ideal if the evidence is gathered by an experienced or well-trained officer that is familiar with the common indicators of human trafficking.¹⁴⁴ Familiarity with the applicable law will lead the investigator to obtain evidence that is required to prove the elements of the offense.¹⁴⁵ Evidence may include phone, motel, jail, medical or computer records, photos, DNA, client and financial ledgers, website and craigslist's postings, clothing and prior encounters with law enforcement.¹⁴⁶ Investigators must be sure to document and photograph any physical evidence, interview witnesses, conduct surveillance, trace any relevant financial evidence and monitor the defendant from jail, including phone calls and written correspondence.¹⁴⁷

¹³⁷ NORTHWESTERN UNIVERSITY INSTITUTE ON RACE AND JUSTICE, *supra* at 7.

¹³⁸ Moosy, *supra*.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Grona-Robb, *supra*.

¹⁴³ *Id.*

¹⁴⁴ Gentile, *supra* at 3.

¹⁴⁵ Gentile, *supra* at 3.

¹⁴⁶ Gentile, *supra* at 3; ICF INTERNATIONAL, *supra* at 26.

¹⁴⁷ Gentile, *supra* at 3.

C. Solutions to Challenges involving Victims and Evidence

The successful collaboration of law enforcement, prosecutors and victim services workers are indispensable to both the victim and the prosecutor's case. Although significant resources are required for victim services, the government must be prepared to protect the victims, provide the resources for them to recover and re-enter society to permanently escape their life as a trafficking victim.¹⁴⁸ If the respective organizations are prepared to work together to ensure the victim's rehabilitation and success, it will have a positively impact the prosecution of the trafficker. Working together to recognize and understand the common circumstances of the victims and traffickers will allow for the prosecutors to avidly pursue traffickers with the assistance of the victim.¹⁴⁹

The importance of working together becomes evident when the appropriate evidence is obtained because the evidence allows prosecutors to counter the defendant's challenges to the sufficiency of the evidence.¹⁵⁰ Securing pertinent evidence during the investigation phase is crucial so that prosecutors can prepare appropriately.¹⁵¹ If the investigators and prosecutors have a working relationship, the investigators will know what evidence is necessary to prosecute the traffickers and will have a heightened awareness to procure the evidence during the investigation.

Lastly and most importantly, there must be a commitment to prosecute all trafficking cases regardless of the minor challenges that may arise. If law enforcement and investigators believe that a prosecutor is selective and will only prosecute cases, which are almost guaranteed

¹⁴⁸ Grona-Robb, *supra*.

¹⁴⁹ Gentile, *supra* at 3.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

to result in a conviction such as those involving multiple victims or minors, the investigators or officers may be discouraged and lack motivation when investigating trafficking cases that do not meet those requirements.¹⁵² A pledge to prosecute human trafficking, and not dismiss when challenges arise, demonstrates a commitment to truly end all human trafficking and not only the likely successful cases. An uncompromising stand against traffickers and dedication to prosecute them will send the chilling message to traffickers that their crimes will not be prosecuted and justice will be served.

When prosecuting human trafficking case, preparation is half the battle. A prosecutor's ability to anticipate the challenges of obtaining evidence and working with fragile victims, will aid in the successful prosecution of traffickers. Even if a prosecutor is not able to overcome every obstacle in its case, a knowledge and understanding of the potential issues provides an advantage that may lead to an increase in the trafficking cases.

IV. SENTENCING

A conviction of a trafficker does not end the war against human trafficking. A central part of the war against trafficking is the sentencing of the convicted offender. A trafficking conviction makes demonstrates that our society is taking a stand against human trafficking. However, prosecutors must also strive to obtain a severe punishment against the offender to prove society's commitment to the end human trafficking. Mild punishments and prison sentences will not be effective in deterring human trafficking. Alex Campbell, a trafficker in Illinois was convicted of sex trafficking, forced labor, harboring illegal aliens and confiscating passports.¹⁵³ He was sentenced to life in prison and ordered to pay \$124,000 in restitution to the

¹⁵² NORTHWESTERN UNIVERSITY INSTITUTE ON RACE AND JUSTICE, *supra* at 7.

¹⁵³ Press Release, Department of Justice: Office of Public Affairs, *Former Chicago Massage Parlor Operator Sentenced to Life in Prison for Human Trafficking of Four Women* (November 26, 2012) available at

victims.¹⁵⁴ In response to the victory, the Immigration and Customs Enforcement Agent in charge of the investigation commented, “The sentence handed down today sends a clear message to those who think they can callously prey upon vulnerable women to turn a profit.”¹⁵⁵ An understanding of the considerations involved in sentencing can guide a prosecutor to include evidence relevant to sentencing during his case in chief so that the sentenced imposed can have a deterrent effect of other traffickers.

After a successful trial, all that remains is for the judge to determine the punishment, usually a term of imprisonment. The sentence is guided by the United States Sentencing Guidelines (U.S.S.G.) and the trafficking statutes: 18 USC §§ 1589 (d), 1590, 1591, 1594, which contain various instructions on the appropriate range of punishment for purposes of sentencing. This section will briefly discuss the various sentences that can be imposed upon human traffickers based upon U.S.S.G. and the trafficking statutes and how the convicted may challenge their sentence.

A. Sentencing Guidelines

Sentencing guidelines are established by the United States Sentencing Commission and are based upon research and evaluation of the best policies and practices for the federal criminal system.¹⁵⁶ Although courts must consult and take the guidelines into account, they are not bound by the Guidelines.¹⁵⁷ However, the Supreme Court has indicated that the guidelines are a method of securing national consistency and should be the initial benchmark in making

<http://www.justice.gov/opa/pr/former-chicago-massage-parlor-operator-sentenced-life-prison-human-trafficking-four-women>.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ FSG Ch. ONE, Pt. A, Subpt. 1.

¹⁵⁷ *United States v. Booker*, 543 U.S. 220, 264 (2005).

sentencing determinations¹⁵⁸ The Guidelines establish 43 levels of offenses¹⁵⁹ based upon the severity of the crime.¹⁶⁰ It also establishes a criminal history category of the offender ranging from one to six, with six being the most extensive criminal history. Both categories are used to determine the prison sentence for the defendant. U.S.S.G. manual contains a table which provides a range of months in federal prison for each pairing of offense level and criminal history category. The levels can be adjusted based upon characteristics of the crime of the defendant such as victim's related adjustments, multiple count adjustments and acceptance of responsibility adjustments.¹⁶¹ Some of the factors considered in sentencing are the nature of the offense, seriousness of the crime, need for sentence imposed, and kind of sentences available and the range of sentences for the offense.¹⁶²

U.S.S.G. §3A1.1 is the vulnerable victim enhancement, which is important to trafficking cases. It is used to deter criminals from targeting susceptible individuals by increasing the punishment for targeting the victims because of a vulnerability.¹⁶³ The vulnerable victim enhancement is commonly used by prosecutors as an attempt to increase the sentence of the trafficker.¹⁶⁴ The enhancement is important to trafficking cases because it is applicable to many trafficking victims. It has been recognized that the vulnerability of the victim is not automatic.¹⁶⁵ Under §3A1.1, a court may increase the defendant's sentence by two levels if the victim is "unusually vulnerable due to age, physical or mental condition or otherwise particularly

¹⁵⁸ *Gall v. United States*, 552 U.S. 38, 49, (2007); *An Overview of the Federal Sentencing Guidelines*, UNITED STATES SENTENCING COMMISSION, http://www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf (last visited: Nov. 2, 2014).

¹⁵⁹ Forced labor is classified as a level 22 offense, while sex trafficking is a level 34 offense.

¹⁶⁰ UNITED STATES SENTENCING COMMISSION, *supra* at 1.

¹⁶¹ UNITED STATES SENTENCING COMMISSION, *supra* at 2.

¹⁶² 18 U.S.C. §3553(a); *United States v. Jimenez-Calderon*, 183 Fed. Appx. 274, 277 (2006).

¹⁶³ *Calimlim*, 538 F.3d at 717.

¹⁶⁴ *Id.*

¹⁶⁵ *Mattar*, *supra* at 4.

susceptible to the defendant's crime."¹⁶⁶ For example, if a defendant has a category 1 criminal history and level 22 offense (forced labor), the prison term would range from 41-51 months. However, if there was a 2 level increase because of a vulnerable victim enhancement, the new range would be 51-63 months. For the vulnerable victim enhancement to apply, the following factors must be satisfied: (1) the victim was particularly susceptible or vulnerable to the criminal conduct; (2) the defendant knew or should have known of this susceptibility or vulnerability; and (3) this vulnerability or susceptibility facilitated the defendant's crime in some manner; that is, there was 'a nexus between the victim's vulnerability and the crime's ultimate success.'¹⁶⁷ In *United States v. Jimenez-Calderon*, a sex trafficking case, the court determined that the vulnerable victim sentencing enhancement should apply because the defendants targeted the victims because they were vulnerable.¹⁶⁸ The victim's status as young, uneducated, naïve and from extremely impoverished families satisfied the vulnerability requirement.¹⁶⁹ There was an undeniable nexus between the victim's vulnerability and ultimate success of the crime because the victims were lured to the United States based upon the promise of marriage and a better life and the defendants maintained the ruse until the prostitution ring was discovered by law enforcement.¹⁷⁰ Where the defendant exploits the victim's dependence on drugs, homelessness or lack of family support or contact, the vulnerable victim enhancement should apply.¹⁷¹ The victim's status as an illegal alien can also trigger the vulnerable victim enhancement.¹⁷²

¹⁶⁶ *What constitutes unusually "vulnerable" victim under Sentencing Guideline § 3A1.1 permitting increase in offense level*, 114 A.L.R. Fed. 355 (Originally published in 1993).

¹⁶⁷ *U.S. v. Jimenez-Calderon*, 183 Fed. Appx. 274, 279 (3d Cir. 2006) (citing *United States v. Iannone*, 184 F.3d 214, 220 (3d Cir. 1999)).

¹⁶⁸ *Jimenez-Calderon*, 183 Fed. Appx. at 279.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 280.

¹⁷¹ *United States v. Royal*, 442 Fed. Appx 794, 798 (4th Cir 2011).

¹⁷² *Calimlim*, 538 F.3d at 711.

The vulnerable victim enhancement is commonly used by prosecutors in an attempt to increase the sentence of traffickers convicted in cases under §§1589, 1591 and 1590¹⁷³. Other sentencing enhancements are identified in §2G1.1, 2G1.3(b), 2H4.1(b)(3) and 3B1.1. §2G1.1 provides for a four level enhancement when the crime involved Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor. §2G1.3(b)(3) involves a conspiracy to commit sex trafficking, it enhances the offense by two levels. 2H4.1(b)(3) enhances an offense by three levels when it involves peonage, involuntary servitude, slave trade and child soldiers.¹⁷⁴ Lastly, §3B1.1 can be used to enhance an offense by four levels if the defendant was organizer or leader of the activity.¹⁷⁵

B. Sentencing under the Trafficking Statutes

Aside from the U.S.S.G., the trafficking statutes also provide guidance (required) for the sentencing of convicted traffickers. 18 U.S.C. §1589 criminalizes forced labor and §1590 prohibits peonage, slavery and involuntary servitude. Both §§1589(d) and 1590 provides that punishment for the respective crimes shall be a fine and sentence to imprisonment for not more than 20 years or both. However if the crime involves kidnapping, sexual abuse or attempt to murder, then the sentence can be any term of imprisonment, including a life term.¹⁷⁶

Under §1591(b)(1) the punishment for sex trafficking is a sentence of fifteen years to life if the offense was effected by fraud, force or coercion, while 1591(b)(2) provides that when there was no fraud, force or coercion, but the victim was fourteen to seventeen years old,

¹⁷³ See *Calimlim*, 538 F.3d 708; *Jimenez-Calderon*, 183 Fed. Appx. 274.

¹⁷⁴ See *Dann*, 652 F.3d 1160, 1170.

¹⁷⁵ See *Jimenez-Calderon*, 183 Fed. Appx. 274; *Royal*, 442 Fed. Appx 794.

¹⁷⁶ 18 U.S.C. §1589.

imprisonment is for ten years to life.¹⁷⁷ In *Todd*, the defendant argued that there is a whole in the statute because it does not provide for punishment for acts not described in (a) or (b).¹⁷⁸ An important principle of criminal sentencing was reaffirmed in *United States v. Booker*, which concludes that in applying Sentencing Guidelines, a person may not be subject to imprisonment unless a jury has made a factual finding.¹⁷⁹

VI. CONCLUSION

The TVPA is an effective prosecutorial tool for forced labor and sex trafficking cases. If utilized effectively, the TVPA will serve its purpose of deterring traffickers and reducing human trafficking in our society. To successfully prosecute a human trafficking case, the prosecutor must be prepared to handle the challenges of preparing a prosecution for trial and acquiring the evidence for a conviction. First, even before an indictment is pursued or a trial occurs, the prosecutor must work with the victim, who is often traumatized and reluctant, and law enforcement to ensure that he has all of the evidence necessary to secure a conviction. This may include working closely with the investigators and ensuring the victim has resources to be re-introduced into society. Second, at trial the prosecutor must have evidence that adequately proves each element of the offense and be prepared to combat the defendant's claims of insufficiency. Finally, even though a guilty verdict is announced, the prosecutor's job is not over because the defendant must be sentenced. Unless the trafficker is sentenced to a significant term of imprisonment, then the TVPA will not serve its purpose. Throughout the trial, the prosecutor should highlight some of the considerations that weigh into the sentencing determination, such as

¹⁷⁷ *Todd*, 627 F.3d 329 (9th Cir. 2010).

¹⁷⁸ *Id.*

¹⁷⁹ *Booker*, 543 U.S. at 756.

the vulnerable victim enhancement. Prosecutors must overcome the numerous obstacles to obtain convictions and strive towards ending human trafficking. Armed with the right tools and resources, prosecutors can erode the power of traffickers and recapture the power for the victims.