

HUMAN TRAFFICKING PROSECUTIONS IN THE UNITED STATES

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I. HUMAN TRAFFICKING LEGAL OVERVIEW

A. Introduction

Over the past 15 years, “trafficking in persons” and “human trafficking” have been used as umbrella terms for activities involved when someone obtains or holds a person in compelled service. According to the United States Department of State, the United States government considers trafficking in persons to include all of the criminal conduct involved in forced labor and sex trafficking, essentially the conduct involved in reducing or holding someone in compelled service. Under the Trafficking Victims Protection Act as amended (TVPA) and consistent with the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol), individuals may be trafficking victims regardless of whether they once consented, participated in a crime as a direct result of being trafficked, were transported into the exploitative situation, or were simply born into a state of servitude. Despite a term that seems to connote movement, at the heart of the phenomenon of trafficking in persons are the many forms of enslavement, not the activities involved in international transportation.

B. Sex Trafficking of Minors and Adult Victims, 18 U.S.C. § 1591

When an adult is coerced, forced, or deceived into prostitution — or maintained in prostitution through coercion — that person is a victim of trafficking. All of those involved in recruiting, transporting, harboring, receiving, or obtaining the person for that purpose have committed a trafficking crime. Sex trafficking can also occur within debt bondage, as women and girls are forced to continue in prostitution through the use of unlawful “debt” purportedly incurred through their transportation, recruitment, or even their crude “sale,” which exploiters insist they must pay off before they can be free.

It is critical to understand that a person’s initial consent to participate in prostitution is not legally determinative; if an individual is thereafter held in service through psychological manipulation or physical force, that person is a trafficking victim and should receive the benefits outlined in the United Nations’ Palermo Protocol and applicable laws.

With respect to children, according to the State Department and UNICEF, as many as two million children are subjected to prostitution in the global commercial sex trade. International covenants and protocols obligate criminalization of the commercial sexual exploitation of children. The use of children in the commercial sex trade is prohibited under both U.S. law and the Palermo Protocol as well as by legislation in countries around the world. There can be no exceptions and no cultural or socioeconomic rationalizations preventing the rescue of children from sexual servitude. Sex trafficking has devastating consequences for minors, including long-lasting physical and psychological trauma, disease (including HIV/AIDS), drug addiction, unintended pregnancy, malnutrition, social ostracism, and death.

Title 18, United States Code, Section 1591, criminalizes sex trafficking involving minors and adult victims. To prove a defendant guilty of this offense, the government must prove beyond a reasonable doubt that:

1. The defendant knowingly recruited, enticed, harbored, transported or obtained the victim, whom the Defendant knew would be caused to engage in a commercial sex act;

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2. The defendant knew, or acted in reckless disregard of the fact, that the victim was under 18 years of age OR, the defendant knew that force, fraud or coercion would be used to cause the victim (of any age) to engage in a commercial sex act; and
3. That the offense occurred in, or affected, interstate commerce.

The government must prove that the defendant knew that the person recruited, enticed, harbored, transported or obtained would be caused to engage in a commercial sex act. While it is not necessary for the defendant to be the one to cause the person to engage in a commercial sex act, the government must prove beyond a reasonable doubt that the defendant knew that the person would be caused to engage in such an act.

Where the defendant had a reasonable opportunity to observe a minor, the government may not have to prove the defendant's actual knowledge of the victim's age. Further, if evidence exists that the defendant knew that the victim was under 18 years of age, the government is not required to prove that the defendant acted with force, fraud or coercion. Additionally, the victim's consent is not a defense.

“Coercion” means threats of serious harm to or physical restraint against any person; or any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person. Therefore, if evidence exists that the victim was threatened or made to suffer certain consequences in connection with prostituting for the defendant, either as punishment or to create a climate of fear that overcame her will and compelled her service, that may be sufficient to establish the “force, fraud, or coercion” element of this charge. Similarly, the fact that a person may have had an opportunity to escape is irrelevant if the defendant or anyone acting in concert with him, using force, fraud or coercion, made the victim reasonably believe she could not leave. A victim who reasonably believes she cannot leave is under no affirmative duty to try to escape.

The term “commercial sex act” means any sex act, on account of which anything of value is given to or received by any person. It is not necessary that the government prove that the defendant, or even the victim, gave or received the thing of value, but the government must prove beyond a reasonable doubt that something of value was given to or received by somebody, on account of the sex act. Money need not be involved in order to prove that value was given or received on account of the sex act. However, the government must prove that something of value was involved.

With regard to the third element, that the offense occurred in, or affected, interstate commerce, the term “interstate commerce” means trade, transactions, transportation or communication between any point in a state and any place outside that state or between two points within a state through a place outside the state. The phrase “in interstate commerce” applies only to activities that cross state lines. The phrase “affecting interstate commerce” applies to activities that demonstrate a connection or link to such commerce. It is not necessary for the government to prove that the defendant knew or intended that his conduct would affect commerce; it is only necessary that the natural consequences of his conduct affected commerce in some way.

Some examples of trade, transactions or communications that occur in, or affect, interstate commerce include use of cellular telephones by defendants to commit or during the course of sex trafficking crimes; use of hotels, during or to facilitate sex trafficking crimes, that are involved in interstate commerce – i.e., the hotel used by the defendants is part of a chain headquartered in another state; the hotel provides or used goods that are purchased from outside the state; or use of condoms or related aids or materials to commit the sex trafficking offense that were manufactured outside the state.

If the victim had not attained the age of 18 years, the offense carries a mandatory minimum of 10 years, up to a maximum of life imprisonment. However, if the victim was under age 14 years, the mandatory minimum sentence increases to 15 years. If the defendant does use force, fraud or coercion to cause the victim to engage in a commercial sex act, the offense carries a mandatory minimum of 15 years imprisonment, up to a maximum of life imprisonment.

C. Transportation of Minors for Prostitution, 18 U.S.C. § 2423(a)

Title 18, United States Code, Section 2423(a) provides in pertinent part, that whoever knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, with the

intent that the individual engage in any sexual activity for which any person can be charged with a criminal offense, shall be guilty of an offense against the United States. To convict a defendant of this offense, the government must prove beyond a reasonable doubt that:

1. The defendant knowingly transported a victim in interstate commerce;
2. The victim was under 18 years of age when the transportation took place; and
3. The defendant intended that the victim engage in sexual activity for which any person can be charged with a criminal offense.

“Interstate commerce” means commerce or travel between one state and another. A person is transported in interstate commerce whenever she is moved or carried from one state into another.

As a matter of law (Title 18, United States Code, Section 3283), no statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse of a child under the age of 18 years shall preclude such prosecution during the life of the child, or for ten years after the offense, whichever is longer.

With respect to the second element of the offense, that the person was under the age of 18 years when the transportation took place, the government is not required to prove that the defendant had knowledge of the victim's minority. In other words, knowledge that the victim is under 18 years of age is not part of the proof required for conviction of an offense under 18 U.S.C. § 2423 (a).

With respect to the third element of the offense, that the Defendant intended that the person engage in sexual activity for which any person can be charged with a criminal offense, crimes against children under many state laws, such as the offenses of child molestation or enticing a child for indecent purposes, qualify as such “sexual activity for which any person can be charged with a criminal offense.”

The government does not have to prove that any criminal sexual activity actually occurred. It is sufficient for the government to establish that the defendant transported the minor in interstate commerce for the purpose of, or with the intent to, engage in criminal sexual activity.

If the victim had not attained the age of 18 years, the offense carries a mandatory minimum of 10 years, up to a maximum of life imprisonment.

D. Interstate Transportation for Purposes of Prostitution, 18 U.S.C. §§ 2421 and 2422

1. Title 18, United States Code, Section 2421

Title 18, United States Code, Section 2421, makes it a Federal crime for anyone to knowingly transport anyone in interstate commerce with intent that the person engage in prostitution. The statute carries a maximum sentence of 10 years.

2. Title 18, United States Code, Section 2422

Title 18, United States Code, Section 2422, makes it a Federal crime for anyone to knowingly persuade, induce, entice or coerce anyone to travel in interstate commerce with intent that the person engage in prostitution. The statute carries a maximum sentence of 20 years. However, if the victim had not attained the age of 18 years, the offense carries a mandatory minimum of 10 years, up to a maximum of life imprisonment.

3. Details of the Laws

It is no defense to the charges of transporting a minor or an adult in interstate commerce for prostitution, that the prostitution which may have been intended by the defendant was not accomplished. Consequently, the government need not prove that anyone, in fact, engaged in any prostitution. The offense is complete so long as the government proves, beyond a reasonable doubt, that the minor or adult was knowingly transported across state lines by the defendant and that the defendant intended at the time of the travel or transportation that the minor or adult would engage in prostitution. Whether the individual or minor mentioned therein consented to being transported or to traveling in interstate commerce for the purpose of prostitution, or otherwise voluntarily participated, is irrelevant, as the consent or voluntary participation of

the individuals or minors is not a defense to the charge.

To sustain its burden of proof the government must prove beyond a reasonable doubt that it was part of the defendant's conscious purpose to cause the victim to engage in prostitution. It need not have been his only purpose or motivation. A person may have several different purposes or motives for such actions and each may prompt, in varying degrees, the act. The government must prove beyond a reasonable doubt, however, that one of the dominant purposes of the defendant's acts was to cause the victim to engage in prostitution.

E. Transporting, Harboring, and Smuggling Aliens for Prostitution and Related Offenses, 8 U.S.C. §§ 1324 and 1328

1. Title 8, United States Code, Section 1324(a)(1)(A)(ii)

Title 8, United States Code, Section 1324(a)(1)(A)(ii) makes it a Federal crime for anyone to, knowing and in reckless disregard of the fact that a certain alien has come to, entered and remained in the United States in violation of law, transport and move, or attempt to transport and move, that alien within the United States by means of transportation and otherwise in furtherance of such violation of law, and all for the purpose of commercial advantage or private financial gain. To prove the defendant guilty of this offense beyond a reasonable doubt the government must prove that:

- a. The defendant, knowing or in reckless disregard that an alien has come to the United States, entered the United States, or remained in the United States in violation of the law;
- b. Transported, moved, or attempted to transport or move, within the United States by means of transportation or otherwise in furtherance of the alien's unlawful coming to the United States, entering the United States, or remaining in the United States; and
- c. For the purpose of commercial advantage or private financial gain.

2. Title 8, United States Code, Section 1324(a)(1)(A)(iii)

Title 8, United States Code, Section 1324(a)(1)(A)(iii), makes it a Federal crime for anyone to, knowing and in reckless disregard of the fact that an alien has come to, entered and remained in the United States in violation of law, conceal, harbor and shield from detection, or attempt to conceal, harbor, and shield from detection, such alien in buildings and other place or by means of transportation, for the purpose of commercial advantage or private financial gain. To prove the defendant guilty of this offense beyond a reasonable doubt the government must prove that:

- a. The defendant, knowing or in reckless disregard that an alien has come to the United States, entered the United States, or remained in the United States in violation of the law;
- b. Concealed, harbored or shielded from detection, or attempted to conceal, harbor or shield from detection, in any place, including any building or any means of transportation; and
- c. For the purpose of commercial advantage or private financial gain.

3. Title 8, United States Code, Section 1324(a)(1)(A)(iv)

Title 8, United States Code, Section 1324(a)(1)(A)(iv), makes it a Federal crime for anyone to encourage or induce an alien to come to, enter or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry or residence is or will be in violation of law, and all for the purpose of commercial advantage or private financial gain.

4. Title 8, United States Code, Section 1324(a)(1)(A)(v)(I)

Title 8, United States Code, Section 1324(a)(1)(A)(v)(I), makes it a Federal crime for anyone to conspire to harbor an illegal alien. To prove the defendant guilty of this offense beyond a reasonable doubt the government must prove that:

- a. That the alien entered or remained in the United States in violation of law;
- b. That the defendant knowingly agreed with at least one other person to (A) encourage or induce the alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence was in violation of the law; or (B) knowing or in reckless disregard of the fact that the alien came to, entered, or remained in the United States in violation of

law, harbor, conceal, or shield from detection, or attempt to conceal, harbor, or shield from detection, the alien in any place, including any building or any means of transportation, and all for the purpose of private financial gain; and

- c. That the defendant, knowing the unlawful purpose of the plan, willfully joined in it.

“Reckless disregard” means to be aware of, but consciously and carelessly ignore, facts and circumstances clearly indicating that the person was an alien whose coming to, entering or residing in the United States would be in violation of law.

5. Punishment

Title 8, United States Code, Sections 1324(a)(1)(A)(ii), (iii), (iv) and (v)(I) carry a maximum sentence of 10 years, if the evidence proves that a defendant acted for the purpose of commercial advantage or private financial gain. However, if these offenses were committed without proof that the defendant acted for commercial advantage or private financial gain, the maximum sentence for any such violation is 5 years.

6. Title 8, United States Code, Section 1328

Title 8, United States Code, Section 1328, makes it a Federal crime for anyone to knowingly import into the United States, or to keep, maintain, control, support, employ, hold or harbor in the United States, or attempt to do so, an alien for the purpose of prostitution or for any other immoral purpose. This statute carries a maximum sentence of 10 years.

F. Forced Labor, 18 U.S.C. § 1589

Also known as involuntary servitude, forced labor may result when unscrupulous employers exploit workers made more vulnerable by high rates of unemployment, poverty, crime, discrimination, corruption, political conflict, or even cultural acceptance of the practice. Immigrants are particularly vulnerable, but individuals also may be forced into labor in their own countries. Female victims of forced or bonded labor, especially women and girls in domestic servitude, are often sexually exploited as well.

Title 18, United States Code, Section 1589(a) makes it a Federal crime for anyone to knowingly and unlawfully provide or obtain, or to attempt to do so, the labor or services of a person by threats of harm to a victim or another person. To prove the defendant guilty of this offense beyond a reasonable doubt the government must prove that:

1. The defendant provided or obtained the labor or services of a person; or financially benefitted by receiving anything of value, from participation in a venture which has engaged in providing or obtaining the labor or services of a person;
2. The defendant or venture did so by any one or by any combination of the following means:
 - a. by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;
 - b. by means of serious harm or threats of serious harm or threats of serious harm to that person or another person;
 - c. by means of the abuse or threatened abuse of the legal process; or
 - d. by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; and
 - e. The defendant acted knowingly or with reckless disregard.

The term “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.

“Serious harm” means any harm, whether physical or nonphysical, including psychological, financial or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue

performing labor or services in order to avoid incurring the harm.

Title 18, United States Code, Section 1589 carries a maximum sentence of 20 years. However, if death results from the commission of the offense, or if the violation includes kidnaping, an attempt to kidnap, aggravated sexual abuse, an attempt to commit aggravated sexual abuse, or an attempt to kill, the maximum sentence is any term of years or life imprisonment.

G. Involuntary Servitude, 18 U.S.C. § 1584

The behavior criminalized by Title 18, United States Code, Section 1584 should, necessarily, include Section 1589 (discussed above), which criminalizes, among other things, compulsion of labor through threats of "serious harm."

A unique form of forced labor is the involuntary servitude of domestic workers, whose workplace is informal, connected to their off-duty living quarters, and not often shared with other workers. Such an environment, which often socially isolates domestic workers, is conducive to nonconsensual exploitation since authorities cannot inspect private property as easily as formal workplaces. Investigators and service providers report many cases of untreated illnesses and, tragically, widespread sexual abuse, which in some cases may be symptoms of a situation of involuntary servitude. Ongoing international efforts seek to ensure not only that administrative remedies are enforced but also that criminal penalties are enacted against those who hold others in involuntary domestic servitude.

To obtain a conviction for violating § 1584, the government must prove the following elements:

1. The defendant must have held the victim(s) to involuntary servitude through restraint, force, threats of force, or legal coercion;
2. Such holding must have been for a term, that is, any period of time; and
3. The defendant must have acted knowingly and willfully.

It is no defense to a § 1584 charge that the victims initially voluntarily consented to work for the defendants, or signed a contract to do so, if consent was later withdrawn. It is also no defense that the victims were paid some amount for their work. Finally, defendants may not argue that the victims failed to take advantage of an opportunity to escape from the defendant; or the defendants were acting consistently with sincerely held religious or cultural beliefs.

The statute carries a maximum sentence of 20 years. However, if death results from the commission of the offense, or if the violation includes kidnaping, an attempt to kidnap, aggravated sexual abuse, an attempt to commit aggravated sexual abuse, or an attempt to kill, the maximum sentence is any term of years or life imprisonment.

H. Peonage (Debt Bondage), 18 U.S.C. § 1581(a)

One form of coercion is the use of a bond, or debt. Often referred to as "bonded labor" or "debt bondage," the practice has long been prohibited under U.S. law by its Spanish name, peonage, and the Palermo Protocol calls for its criminalization as a form of trafficking in persons. Workers around the world fall victim to debt bondage when traffickers or recruiters unlawfully exploit an initial debt the worker assumed as part of the terms of employment. Workers may also inherit intergenerational debt in more traditional systems of bonded labor.

To obtain a conviction for violating § 1581(a), the government must prove each of the elements of Involuntary Servitude, listed above at I.G. In addition, however, the government must also prove that the victims' involuntary servitude was tied to the discharge of a debt.

The statute carries a maximum sentence of 20 years. However, if death results from the commission of the offense, or if the violation includes kidnaping, an attempt to kidnap, aggravated sexual abuse, an attempt to commit aggravated sexual abuse, or an attempt to kill, the maximum sentence is any term of years or life imprisonment.

I. Trafficking into Servitude, 18 U.S.C. § 1590

The lack of a trafficking statute per se was seen by the United States Congress as a gap in the federal criminal laws, which penalized transportation for immoral purposes under the Mann Act (18 U.S.C. § 2421) and immigration offenses under the transportation statute (8 U.S.C. § 1324), but not transportation for forced labor. Section 1590 fills this gap by providing a means of prosecuting — as principals rather than aiders/abettors — those who recruit, harbor, transport, or broker persons for labor under conditions which violate any of the offenses set forth in 18 U.S.C. §§ 1581-1594 (also known as Chapter 77 offenses). Such an addition may provide a vehicle for extraterritorial jurisdiction over recruiters and facilitators overseas.

To obtain a conviction for violating § 1590, the government must prove the following elements (As noted above, the TVPA's criminal provisions have not been tested in court, so the elements of the offenses can at this point only be set forth in reliance on the plain language of the respective Sections):

1. The defendant did recruit, harbor, transport, provide, or obtain a person for labor or services,
2. Such labor or services were to be obtained or maintained in violation of any provision of Title 18, Chapter 77, and
3. The defendant acted knowingly.

The statute carries a maximum sentence of 20 years. However, if death results from the commission of the offense, or if the violation includes kidnaping, an attempt to kidnap, aggravated sexual abuse, an attempt to commit aggravated sexual abuse, or an attempt to kill, the maximum sentence is any term of years or life imprisonment.

J. Recent Legal Developments

1. New Crimes of Obstructing Human Trafficking Enforcement

New provisions criminalize, and severely penalize, the obstruction or attempted obstruction of enforcement of any of the major human trafficking statutes, including Involuntary Servitude, Forced Labor, Trafficking, Sex Trafficking and Document Servitude. The new obstruction violations are punishable to the same extent as the underlying criminal offense.

2. New Fraud in Labor Contracting Crime

A new crime, codified at Title 18, United States Code, Section 1351, prohibits fraud in foreign labor contracting. This provision imposes criminal liability on those who knowingly, and with intent to defraud, recruit workers from outside the United States for employment within the United States by means of materially false or fraudulent representations. The statute provides for a maximum term of 5 years imprisonment.

3. New Conspiracy Statute

A new trafficking-specific conspiracy statute, Title 18, United States Code, Section 1594, prohibits conspiring to commit the major trafficking offenses, including Peonage, Forced Labor, Sex Trafficking, etc. In contrast to the general conspiracy statute, with a maximum penalty of 5 years, the penalty for violating this provision is equal to the penalty for the underlying substantive offense, except that there is no minimum mandatory penalty for conspiring to commit Sex Trafficking. This statute therefore enhances the penalty for conspiring to commit trafficking crimes.

II. FORFEITURE, RESTITUTION & VICTIM-WITNESS ASSISTANCE

A. Criminal Forfeiture

Criminal forfeiture is part of the sentence imposed on a defendant convicted of any offense for which forfeiture is authorized. Title 18, United States Code, Sections 1594, 2428, 1324(b), and other Federal statutes, require a defendant to forfeit to the United States any proceeds obtained, directly or indirectly, from and any property used to facilitate offenses involving crimes against children, sex trafficking, Mann Act and forced labor violations.

B. Victim Restitution

Title 18, United States Code, Section 3663A, mandates that restitution be ordered for victims of crimes of violence. Pursuant to that statute, a court shall order restitution to victims of these offenses, and sometimes

persons other than the victims, for reimbursement for expenses related to the crime of violence, including: (1) medical and mental health services and devices relating to physical, psychiatric and psychological care related to any bodily injury; (2) lost income; (3) funeral and related expenses in the case of an injury that results in the death of a victim; and (4) necessary child care, transportation and other expenses incurred during participation in the investigation or prosecution.

C. Emergency Victim-Witness Assistance

The Federal Crime Victim Assistance Fund (FCVAF) program is derived from the Victims of Crime Act (VOCA) funds, and is designed to assist Federal crime victims with services of an immediate nature. These services include, but are not limited to, transportation costs for victims to participate in judicial proceedings, emergency shelter, temporary housing, crisis intervention and other services necessary to effectively respond to emergency needs of Federal crime victims.

D. Emergency Witness Assistance Program (EWAP)

EWAP provides the United States Attorneys' offices with the flexibility to address a critical need: assistance to witnesses on an emergency basis to ensure their well-being and that witnesses will be available for trial, other court proceedings or activities on an ongoing case. The program also addresses a witness's or prospective witness's physical, mental or emotional reservations about participating in a specific matter before or after he or she has agreed to cooperate with, testify, or be available for the government.

AUTHORITIES & SUPPLEMENTAL RESOURCES

1. United States Department of State, "What is Modern Slavery,"
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