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

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ABSTRACT

The Trafficking Victims Protection Act (TVPA) established for the first time the crime of trafficking in persons. This article will analyze court cases that have been decided under the TVPA. The article will show that American courts, relying upon the text of the criminal statutes of the TVPA, as well as the findings of Congress, have broadened the interpretation of the offenses recognized under the Act to expand criminal liability, whether in cases of sex trafficking or labor trafficking. The article will also address cases in which the TVPA was challenged on constitutional grounds and whether it may apply on an extraterritorial basis. This is the first study in judicial interpretation of the criminal statutes of the TVPA in the last ten years.

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INTRODUCTION

Almost ten years ago Congress passed the Trafficking Victims Protection Act (TVPA).\(^1\) This article is the first comprehensive study that examines the cases decided in accordance with the Act.\(^2\) An initial reading of court decisions suggests a significant expansion of criminal liability and a broad interpretation of the offenses that were recognized for the first time to punish those who commit the act of trafficking in persons. After discussing the categorization of the crime of trafficking in persons as a contemporary form of slavery that subjects a victim of trafficking to exploitation, the article will explore how courts define the various elements of the crime of trafficking in persons, including a commercial sex act of prostitution or pornography as a purpose of trafficking, the meaning of forced labor or services as the other purpose of trafficking, serious harm and how it was recently broadened to include nonphysical types of harm, threats of deportation as a form of abuse of the legal process and when threats of deportation amount to involuntary servitude, as well as indebtedness as the basis for the offense of peonage. Then the article will refer to several constitutional challenges that were raised by defendants trying to escape liability under the TVPA, in particular the Ex Post Facto Clause of the Constitution, the Interstate Commerce Clause, the prohibition against double jeopardy and the void-for-vagueness doctrine. The article will show that most constitutional claims failed. However, diplomatic immunity still serves as a shield from prosecution, and this required a congressional amendment to the TVPA. The TVPA was also amended to apply on an extraterritorial basis, thus changing existing presumption against extraterritoriality. The article will conclude by addressing how courts establish the relationship between domestic legislation and international law, especially the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, which the U.S. ratified. Consequently, this article is divided into six parts: Part I explores the nature of the crime of trafficking in persons and raises the question whether it should be categorized as a form of exploitation rather than as a form of slavery. Part II will examine the definitions of the elements of the crime of trafficking in persons as interpreted by the courts. Part III covers constitutional challenges that may threaten the application of the TVPA and related statutes. Part IV addresses the courts’ conclusion that the TVPA does not


override diplomatic immunity. Part V discusses when the TVPA applies on an extraterritorial basis and the potential evolution of court decisions from the traditional principle of territoriality to extraterritoriality as an international response to an international crime. Finally, Part VI calls upon courts to incorporate international law on trafficking in persons in U.S. court decisions.

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

A. From the Mann Act to the Trafficking Victims Protection Act

The TVPA of 2000 recognized for the first time trafficking in persons as a specific offense. Forced labor, trafficking with respect to peonage, slavery, involuntary servitude, forced labor, sex trafficking of children or by force, fraud, or coercion, unlawful conduct with respect to documents and attempting to commit any of these acts were all identified as crimes in the TVPA 2000.3 The Trafficking Victims Protection Reauthorization Act of 20054 identified a separate crime: trafficking in persons offenses committed by federal contractors outside the United States.5 Benefitting financially from peonage, slavery, or trafficking in persons,6 conspiring in an act of trafficking in persons,7 and fraud in foreign labor contracting8 were criminalized under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008.

Prior to the passage of the Act, cases of transportation of a person for the purpose prostitution were decided under the Mann Act,9 which was passed in 1910. The current version of the Mann

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3 New sections of 18 U.S.C. chap. 77 created by the TVPA include: § 1589 Forced labor. § 1590 Trafficking with respect to peonage, slavery, involuntary servitude, or forced labor. § 1591 Sex trafficking of children or by force, fraud, or coercion. § 1592 Unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor. § 1593 Mandatory restitution. § 1594 General provisions (specifying that attempting to violate §1581, 1583, 1584, 1589, 1590, or 1591 is punishable in the same manner as an actual violation). Id. at § 112(a).
5 Id. at § 103(a)(1) (Chapter 212A). Another section created by the TVPRA 2005 is § 3271 Trafficking in persons offenses committed by persons employed by or accompanying the Federal Government outside the United States.
7 Id. at § 222(c)(2)(b-c).
8 Id. at § 222 (e)(2).
9 "(a) Transportation With Intent To Engage in Criminal Sexual Activity.— A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 10 years or for life. (b) Travel With Intent To Engage in Illicit Sexual Conduct.— A person who travels in interstate commerce or travels into the United States, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both. (c) Engaging in Illicit Sexual Conduct in Foreign Places.— Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be
Act makes it a felony to knowingly transport any person in interstate or foreign commerce for prostitution or any sexual activity for which a person can be charged with a criminal offense.\textsuperscript{10} Although the Mann Act\textsuperscript{11} is sometimes employed to prosecute cases of trafficking in persons, the two acts are distinguishable. Unlike the TVPA, the Mann Act does not require proof of force, fraud or coercion.\textsuperscript{12} This lowers the burden of proof on the government for convicting the accused of trafficking offenses. For instance, in United States v. Daneman,\textsuperscript{13} a case decided in 2008, defendants were charged with Mann Act violations including conspiracy to transport individuals in interstate commerce to engage in prostitution\textsuperscript{14} and conspiracy to induce or persuade individuals to travel in interstate commerce to engage in prostitution.\textsuperscript{15} The government relied on undercover police officers who stated that they were offered sex in


\textsuperscript{12} However, cases in which force was used can be prosecuted under the Mann Act, as was the case with the United States v. Flavors, where the defendant was convicted of violating the Mann Act’s prohibition on transportation of an individual for prostitution. United States v. Flavors, 15 Fed. Appx. 491, 2001 U.S. App. LEXIS 16880 (2001). According to some, this requirement of force, fraud, or coercion to qualify as a “severe form of trafficking” is a serious flaw of the TVPA. She gives this example: “consider an Iraqi woman who willingly enters into prostitution to support her family and is subsequently trafficked into Syria where her pimp insists she work off the cost of the journey and living expenses before being allowed to return home. The trafficker, having neither committed a fraud, nor used force or threats of force, and having made forceful demands that do not rise to the definition of “debt bondage” is not engaged in a severe form of trafficking in persons.” Margaret Maffai, \textit{Comment: Accountability for Private Military and Security Company Employees that Engage in Sex Trafficking and Related Abuses while Under Contract with the United States Overseas} 26 Wis. Int’l L. J. 1095 (2009) at 1119.


\textsuperscript{14} 18 U.S.C. § 2421.

\textsuperscript{15} 18 U.S.C. § 2422.
exchange for money by the defendants, large amounts of sexual paraphernalia and phone calls with the taxi driver who provided women to work as prostitutes at various businesses.\textsuperscript{16}

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

B. Creating a “climate of fear” through coercive methods

In United States v. Warren,\textsuperscript{25} the court discussed the “climate of fear” that coercion may create in cases of trafficking in persons. Though proof of coercion is an additional burden required under the TVPA, it is satisfied by a broad range of behavior. The court stated that various forms of coercion may constitute a holding in involuntary servitude, and the use, or threatened use of physical force to create a climate of fear is the most grotesque example of such coercion. \textit{Warren} detailed the frightening and all-too common method by which migrant workers are lured into and kept in involuntary servitude. Often they are deceived by the promise of short term work and voluntarily enter the labor camp. Upon arriving, they are kept for a few days and later informed that they are being charged for meals and other necessities and that they may not leave until their “debt” is paid. Threats and acts of violence\textsuperscript{26} are then used to create a climate of fear that intimidates the workers and prevents them from leaving the camp. Even if the worker were to have the opportunity to escape, fear of physical harm may prevent that worker from attempting to flee.

\textsuperscript{16} Though “two of the defendants, Kim and Shim, were also tried on one count of conspiracy to provide or obtain the labor or services of a person through a scheme, plan or pattern intended to cause such person to believe that if she did not perform the labor, she or another person would suffer serious harm or physical restraint,” they were not convicted of these offenses because there was not sufficient evidence of the coercive measures charged. \textit{Daneman}, 552 F.3d at 2 (charging violation of 18 U.S.C. §1589-90).

\textsuperscript{17} United States v. Pipkins, U.S. Dist. LEXIS 81068 (2007).

\textsuperscript{18} 18 U.S.C. § 1962(d).

\textsuperscript{19} 18 U.S.C. § 2422(b).


\textsuperscript{21} 18 U.S.C. § 1951.

\textsuperscript{22} 18 U.S.C. § 1584.

\textsuperscript{23} 18 U.S.C. § 1028.

\textsuperscript{24} 18 U.S.C. § 859.


\textsuperscript{26} The House Conference Report defined the term “serious harm” as used in the TVPA as including both physical and nonphysical harms. Thus the victims of human trafficking are victims of a violent crime, whether it be physical or psychological violence. H.R. Conf. Rep. No 106-939 (2000).
However, trafficking in persons is not always identified as a crime of violence. For instance in United States v. Norris, defendants were charged and convicted of conspiracy to hold young women to a condition of peonage, to obtain forced labor and services of young women, and to traffic young women for commercial sex acts. The court rejected the appeal from the district court’s decision to impose pretrial detention on the grounds that these are “crimes of violence” as defined under section 3156 of the U.S. Code.

C. The victim of trafficking as a “vulnerable victim”

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

Whether these special vulnerabilities may give rise to the application of the vulnerable victim enhancement doctrine is a matter of debate. The vulnerable victim enhancement doctrine affirms that crimes committed against a susceptible victim warrant an enhanced penalty for the offender. In United States v. Sabhnani, the Court of Appeals found the defendants guilty of holding in peonage two Indonesian women they brought to the country illegally and subjected to forced labor. One of the maids, a 53-year old woman from Indonesia, agreed to come to the United States to work for the defendant for $200 per month. She worked as a domestic servant from February 2002 through May 2007, even though the visa obtained for her expired in May 2002. The maid was told that her salary was being paid to her daughter in Indonesia, but in reality her daughter received only $100 per month and the maid received no money herself. She was responsible for cooking, cleaning, laundry, and other chores in the defendant’s three-story

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28 18 U.S.C. § 3156(a)(4). Whether a person poses danger to the community under 18 U.S.C. § 3142 depends on four factors (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence (2) the weight of the evidence against the person; (3) the history and characteristics of the person and (4) the nature and seriousness of the danger to any person or the community that would be posed by the person’s release.
30 The court explained, “For example, a child who is told he can go home late at night in the dark through a strange area may be subject to physical coercion that results in his staying, although a competent adult plainly would not be. Similarly, it is possible that threatening an incompetent with institutionalization or an immigrant with deportation could constitute the threat of legal coercion that includes involuntary servitude, even though such a threat made to an adult citizen of normal intelligence would be too implausible to produce involuntary servitude.” Id. at 948.
home. The maid was required to sleep first on the carpet outside one of the children’s bedrooms and then on a mat on the floor in the kitchen. She was not given adequate food and was subjected to extreme physical and psychological abuse while she worked in the defendant’s home. She was often beaten with household objects such as a broom, a rolling pin, and an umbrella and on at least three occasions the defendant punished her by throwing boiling water on her. In late 2004 and early 2005 the defendant acquired another domestic servant, also an Indonesian woman who spoke no English and had received very little education. She was subjected to similar conditions, including at one point being forced to stand in one place for ten hours after she was accused of stealing two pieces of chocolate.

In applying the vulnerable victim enhancement doctrine, the Court of Appeals recognized that the TVPA included Congressional findings that most victims of trafficking are vulnerable victims; “traffickers often transport victims from their home communities to unfamiliar destinations, including foreign countries away from family and friends, religious institutions, and other sources of protection and support, leaving the victims defenseless and vulnerable.”33 The victims, who are often “unfamiliar with the laws, cultures, and languages of the countries in which they have been trafficked”34 and because they are “often subjected to coercion and intimidation including physical detention and debt bondage”35 and they hesitate to report the crimes perpetrated against them because they “often fear retribution and forcible removal to countries in which they will face retribution or other hardship.”36 However, the Court of Appeals concluded that the text of the criminal statute of the TVPA does not explicitly incorporate vulnerability into the definition of the victim, thereby allowing for variable amounts of victim vulnerability based on the situation.

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

[N]either one spoke a word of English; had never been in the United States before; were totally dependent upon the defendants for their basic human needs of food, clothing and shelter; they never received any direct payment for services … and were therefore unable to support themselves. They were in a situation where they had to accept these abusive conditions, of course because they had no alternative.37

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33 TVPA § 102(b)(5).
34 TVPA § 102(b)(20).
35 TVPA § 102(b)(20).
36 TVPA § 102(b)(20).
37 Sabhnani, 599 F.3d. at 252. Similarly, in United States v. Sung Bum Chang, the defendant participated in a trafficking smuggling ring that brought women from South Korea and required them to work to pay off trafficking smuggling debts. He was charged with a violation of forced labor under section 1589. The defendant owned a club in Texas called “Club Wa” which was frequented by Korean nationals. He recruited Korean women, requiring them to live at his house and work at his club until they repaid their debts. He held their passports and conducted video surveillance to monitor their movements. Since all of the women were in the United States illegally and spoke little or no English, the court found that these factors, including their illegal status, made them vulnerable and thus
Immigration status can also create special vulnerabilities for a victim. Under the TVPA, benefits are granted to victims of trafficking irrespective of their immigration status. In fact, an inquiry into the victim’s immigration status may undermine the objectives of the TVPA because such an inquiry might discourage victims from seeking legal action against their traffickers. Such was the rule provided in David v. Signal Int’. In this case, 500 Indian men were allegedly trafficked into the United States to work for a construction company, Signal International in the aftermath of Hurricane Katrina, using the H-2B guest-worker program. They were subjected to discrimination, forced labor, threats of deportation, overcrowded working and living conditions, unpaid wages for work and overtime, and other forms of abuse and exploitation. Plaintiffs sought a protective order against inquiring into their current immigration status after the termination of their employment with defendant. The court concluded that “[e]ven if current immigration status were relevant to plaintiffs’ race/national origin discrimination, contract and tort claims, discovery of such information would have an intimidating effect on an employee’s willingness to assert his workplace rights.”

The court explained:

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

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38 TVPRA 2003 § 107(b)(1).
40 Id. at 24.
41 Id. (quoting Liu v. Donna Karan Int’l, Inc. 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002), and Topo v. Dhir 210 F.R.D. 76, 78 (S.D.N.Y.2002) (itself quoting Flores v. Albertsons Inc. 2002 U.S. Dist. LEXIS 6171, 2002 WL 1163623, *6 (C. D. Cal. Apr. 9, 2002)); Applying this principle in light of the Fair Labor Standards Act (FLSA) the court stated that FLSA covers all workers whether undocumented or not and that “such a position not only benefits the individual workers, but advances the goals of the FLSA.” Permitting an employee to circumvent the labor laws as to undocumented aliens “permits abusive exploitation of workers, and creates an unacceptable economic incentive to hire undocumented workers by permitting employers to underpay them. To allow the immigration status of a class representative to be investigated- indeed to require a representative to enjoy legal immigration status-would seriously undermine the effectiveness of the FLSA” Id. (citations omitted); see also EEOC v. First Wireless Group, Inc., 225 F.R.D. 404 (E.D.N.Y.2004) (good cause shown for protective order where disclosure of immigration status would cause embarrassment, potential criminal charges, or deportation if status was discovered to be illegal)).
In addition to enhancing the penalty in cases of trafficking where the trafficked person is a vulnerable victim and therefore susceptible to trafficking, the courts provide the victim with a mandatory restitution to compensate the victim “to the full amount of the victim’s losses.”

D. Shifting the focus from slavery to exploitation: defining the essence of trafficking in persons

In these and other cases, trafficking in persons is commonly analyzed as a form of slavery and the broadening definition of slavery in American jurisprudence, especially under the TVPA.

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42 The court in Sabhnanani calculated restitution for the victim as follows: “The statute defines the “full amount of the victim’s losses,” in pertinent part, as “the value of the victim’s labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act (29 U.S.C. 201 et seq.)” 18 U.S.C. § 1593(b)(3). Here, the district court consulted the Fair Labor Standards Act’s (FLSA) minimum wage and overtime provisions, 29 U.S.C. §§ 206 and 207, and determined minimum wage rates for the period of Samirah’s and Enung’s labor, which it multiplied by a statutorily determined factor to calculate overtime pay. The court performed its calculations on the basis that the maids worked 24 hours per day when the Sabhnanis were at home, and eight hours per day when the Sabhnanis left the country during the summer months. The court subtracted the money that had actually been paid to the victims’ families in Indonesia. Finally, it doubled the total award pursuant to 29 U.S.C. § 216, which allows for double damages for employers who violate the FLSA’s minimum wage and overtime provisions. Based on these calculations, the district court awarded $ 620,743.82 to Samirah and $ 315,802.40 to Enung.” However, the Court of Appeals overturned the restitution award based on the Sabhnanis claim that the court failed properly to apply a statutory exemption to FLSA for payment of overtime to domestic servants who reside in their employer's household. The Court of Appeals stated: “we agree that the district court erred in awarding overtime pay, and thus we vacate the restitution award and remand for recalculation. We conclude, however, that the district court was within its discretion not to hold an evidentiary hearing and that it did not err in awarding liquidated damages.” Id. See also United States v. Fu Sheng Kuo 588 F.3d 729; 2009 U.S. App. LEXIS 26326 (2009).


44 One author argued that the Alien Torts Claims Act alone would justify such a conclusion. The Alien Torts Claims Act, or the Alien Tort Statute, states that “district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350. “This modern understanding of slavery which the U.S. government appears willing to accept, applies equally to the problem of child sex tourism as it does to sex trafficking, an act which often involves children. … [T]he purveyors
may support the conclusion that human trafficking constitutes slavery. According to this view, “[t]he terms “human trafficking” and “slavery” are interchangeable.” However, one may argue that trafficking in persons does not always constitute a form of slavery and that the definition under international law is now shifting the focus from slavery to exploitation. One must admit that the distinction between slavery and trafficking is not always clear. The general consensus is that there are instances of trafficking in which the victim is treated as property. While this may be true, slavery, under international law requires “the exercise of any or all the powers attached to the right of ownership” in accordance with the 1926 Convention on Slavery. Equally, practices similar to slavery, namely under article one of the 1956 Supplementary Convention, such as debt bondage, serfdom, forced marriage and sale of children are to be considered slavery-like conditions only if they involve “the status or condition of a person over whom any or all of the powers attaching the right of ownership are exercised.”

While this narrow definition of slavery finds some support in American jurisprudence, the requirement that trafficking must amount to slavery is not followed by American courts. In Doe v. Reddy, the court noted that “[m]any cases and international instruments make clear… that modern forms of slavery violate jus cogens norms of international law, no less than historical chattel slavery.” Thus, the court rejected the defendant’s claim that forced labor must amount

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47. Slavery Convention, 46 Stt. 2184, L.N.T.S. 253 (Sept. 25, 1926) § 1 (1).


49. 1926 Slavery Convention, art. 1 (1).

50. “In short, the decision to take action against “human trafficking,” rather than against slavery in all of its contemporary forms, has given comfort to those who prefer not to tackle the claims of the majority of enslaved persons.” James C. Hathaway, The Human Rights Quagmire of “Human Trafficking” 49 Va. J. Int’l L. 1 (2009) at 5. “The anti-trafficking campaign privileges a small subset of persons subject to contemporary forms of slavery, with consequent marginalization of the majority of the world’s slaves” Id. at 6. “To the extent that the fight against trafficking has withered drained limited nongovernmental and international aging resources away from a more holistic attack on slavery, and to the extent that governments believe that they can (and perhaps should) attack slavery via the anti-trafficking initiative rather than a more comprehensive fashion, there is a real loss to the effort to eradicate the predominant forms of slavery...” Id. at 15.


52. Id. at 33.
to “actual slavery.” In this case, eleven workers were recruited by the Reddy family to work in the real estate business. Once they arrived, they were allegedly forced to work long hours under difficult working conditions and they were sexually and physically abused by the defendant.

Trafficking in persons is commonly interpreted as a form of slavery that is prohibited under the Thirteenth Amendment. The Thirteenth Amendment was intended to apply to all cases of slavery. In United States v. Nelson, the court ruled that

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

Similarly, in United States v. Mussry, the court emphasized that “the Thirteenth Amendment and its enforcing statutes are designed to apply to a variety of circumstances and conditions... [they] apply to contemporary as well as to historic forms of involuntary servitude.”

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53 Id.
55 “Section 1: Neither slavery not involuntary servitude, except as a punishment for a crime where of the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2: Congress shall have power to enforce this article by appropriate legislation.” U.S. Const. amend. XIII.
56 But see: “to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce live undesirable results.” Kozminski, 487 U.S. at 942 (quoting Butler v. Perry, 240 U.S. 328 (1916)).
58 Id. at 25 (Citing Hodges v. United States, 203 U.S. 1 (1906)). In Buchanan v. City of Bolivar, “[p]ursuant to the Thirteenth Amendment, plaintiff’s son had a clearly established right to be free from involuntary servitude; however, a reasonable public official would not be aware that instructing a minor in the custody of a juvenile officer to wash police vehicles would constitute involuntary servitude prohibited by the Thirteenth Amendment.” Buchanan v. City of Bolivar, 99 F. 3d 1352, 1358 (6th Cir.1996). The court upheld the Kozminski test, rejecting a broad construction of “involuntary servitude.” In United States v. King, defendants repeatedly used and threatened to use physical force to make children perform labor in a case that involved cult prayers and religious orders. The court concluded that: “The Thirteenth Amendment prohibits an individual from selling himself into bondage; and it likewise prohibits a family from selling its child into bondage. The Western legal tradition prohibits contracts consenting in advance to suffer assaults and other criminal wrongs. They are void as against public policy. They do not insulate the wrongdoer from civil and criminal liability. Similarly a parent’s contract allowing a third to burn, assault, or torture his child is void. The contract does not become any more valid because the act in question is taken in the name of religion. Neither religion nor parental consent can save the Salem witch trials of children or the sale of a daughter into prostitution or the Padrone system of child labor or the House of Judah system of child beatings.” United States v. King, 840 F. 2d 1276 at 1283 (6th Cir. 1988) (citations omitted). As stated in United States v. Booker, “[t]he amendment and the legislation were intended to eradicate not merely the formal system of slavery that existed in the southern states prior to the Civil War, but all forms of compulsory, involuntary service.” Booker, 655 F.2d. The contours of slavery have shifted since the enactment of the Thirteenth Amendment. No longer is the slave always black and the master white. And, while subtler forms of coercion have replaced the blatant methods of subjugation practiced in the ante-bellum south, these new practices are no less effective than their older counterparts.” United States v. Lewis 644 F.Supp. 1391, 12400 (W. Dis. Mi., 1986).
60 Id. at 1451 (quoting in part Pollock v. Williams, 322 U.S. 4, 17-18, 64 S. ct 792, 88 L.Ed 1095 (1944).
It is to be noted that the TVPA was passed as a part of the Violence against Women Act. However, the TVPA does not emphasize trafficking as a form of violence against women.\textsuperscript{61} Similarly, courts rarely utilize the doctrine of violence against women when discussing cases of trafficking in persons. However, a few courts have recognized the connection between violence in intimate relationships and human trafficking. In United States v. Marcus,\textsuperscript{62} the court rejected the defendant’s argument that

\[ \text{the existence of a prior consensual relationship between the defendant and (the victim) in which the infliction of punishment and pain was part of their mutual sexual gratification makes it impossible to determine whether the defendant abused (the victim) to compel the performance of a commercial sex act) and that the violence inflicted could also have been for purely sexual pleasure or as a means to reinforce their previously agreed upon roles in the relationship.}\textsuperscript{63}

The court found the evidence, particularly the victim’s statements of beating and forced sex after she stated that she wanted to leave, which were photographed for the website, was sufficient to show a nexus between the defendant’s coercion and the labor element of the section 1591 conviction and the commercial sex act element of the section 1589 conviction. A prior or current intimate relationship with the victim does not release the trafficker from liability.\textsuperscript{64}

While prohibition of slavery constitutes the basis for outlawing trafficking in persons in the TVPA, and the Act makes multiple references to the concept of slavery,\textsuperscript{65} it seems to me that the prohibition of exploitation is a more appropriate and comprehensive term to explain cases of

\begin{footnotesize}


\textsuperscript{63} Id. at 309.

\textsuperscript{64} Id. at 299. Vacated because it violated the Ex Post Facto Clause, 538 F. 2d 97 (2dci 2008).

\textsuperscript{65} “A contemporary manifestation of slavery” TVPA § 102(a). “Trafficking in persons is a modern form of slavery, and it is the largest manifestation of slavery today” Id. at § 102(b)(1). “Victims are often forced through physical violence to engage in sex acts or perform slavery-like labor” Id. at § 102(b)(6). “Trafficking also involves violations of other laws, including…laws against…slavery” Id. at § 102(b)(10). “Within the context of slavery…victims are subjected to a range of violations” Id. at § 102(b)(12). “The right to be free from slavery” Id. at § 102(b)(22). “The US outlawed slavery and involuntary servitude in 1865” Id. at § 102(b)(22). “Current practices of sexual slavery and trafficking of women and children” Id. at § 102(b)(22). “International community has repeatedly condemned slavery” Id. at § 102(b)(23). “For the purpose of subjecting to involuntary servitude, peonage, debt bondage, or slavery” Id. at § 103(8)(B). “Trafficking with respect to peonage, slavery, involuntary servitude, or forced labor” Id. at § 112(a)(2). “Unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor” Id. at § 112(a)(2). “Trafficking with respect to peonage, slavery, involuntary servitude, or forced labor” Id. at § 112(a)(2)(d)(3). “Unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor” Id. at § 112(a)(2)(d)(3). “Such as kidnapping, rape, slavery, or other forced labor offenses, where severe forms of trafficking appear to have been involved” TVPRA 2003 § 107(4)(b)(E)(iv). “The US has demonstrated international leadership in combating human trafficking and slavery through the enactment of the TVPA of 2000” TVPRA 2005 § 102(1).
\end{footnotesize}
trafficking in persons. The essence of exploitation is taking advantage of a vulnerable victim and subjecting that victim to abuse, undue influence, and control.

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

[If] they cause them to provide or offer to provide labor or service by engaging in conduct that in all other circumstances could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they fail to provide or offer to provide the labor or service.\(^{66}\)

This conceptualization of trafficking as a threat to personal security is based on traditional international legal standards.\(^{67}\) But trafficking may be more appropriately defined as a threat to human security, a much broader concept.\(^{68}\) This second approach is consistent with the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children (U.N. Protocol),\(^{69}\) which defines trafficking in terms of exploitation and recognizes slavery and practices similar to slavery as only two of many forms of trafficking.\(^{70}\) Consequently a broader definition of trafficking as a form of exploitation would be comprehensive enough to include situations in which a person is subject to control or undue influence although such person is not enslaved by another.\(^{71}\) As one court explained, “the essence of a holding to involuntary


\(^{70}\) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs” Id. at § I(3)(a).

\(^{71}\) Consequently it is not enough to inquire into how a legal system responds to slavery. All instances of exploitation that may lead to trafficking should be fully addressed. For the application of this principle in Islamic law, see: Mohamed Y. Mattar, Combating Trafficking in Persons in Accordance with Islamic Law UNODC (2009), available at: http://www.unodc.org/unodc/en/human-trafficking/combating-tip-in-accordance-with-the-principles-of-islamic-law.html.
servitude is an exercise of control by one person over another so that the latter is coerced into laboring for the former.”

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

A. Defining a commercial sex act as prostitution and pornography

Section 103 of the TVPA defines sex trafficking as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act,” a commercial sex act being defined as “any sex act on account of which anything of value is given to or received by any person.” A commercial sex act typically means an act of prostitution. It must be noted, however, that the text of the TVPA does not use the term “prostitution,” although the term is used a few times in the findings of Congress. It must also be noted that there is a distinction...
between prostitution and trafficking in persons; traffickers often exploit victims for the purpose of commercial sex acts. But in the TVPA prostitution is not addressed independently from the act of trafficking itself. Prostitution remains under the TVPA, a state crime, TVPRA 2003 provided that “no funds made available to carry out this division may be used to promote, support, or advocate the legalization or practice of prostitution.”77 The TVPRA 2005 addressed for the first time a commercial sex act independently from trafficking in persons, but it did not change the fact that prostitution is still a state crime. TVPRA 2005 imposed an obligation upon the federal government to enhance state capacities to raise awareness of the dangers of prostitution and prosecute those who commit such an act. Explicitly, it provides that “the Attorney General may make grants to States and local law enforcement agencies to establish, develop, expand, or strengthen programs— … (B) to investigate and prosecute persons who engage in the purchase of commercial sex acts”78 and “(C) to educate persons charged with, or convicted of, purchasing or attempting to purchase commercial sex acts.”79

Whether a commercial sex act includes pornography was the issue in United States v. Marcus.80 In this case the court defined a “commercial sex act” under the TVPA to include not only prostitution but pornography as well. The court said:

The statutory language provides no basis for limiting the sex acts at issue to those in which payment was made for the acts themselves; rather, the use of the phrase ‘on account of which’ suggests that there merely needs to be a casual relationship between the sex act and an exchange of an item of value. If Congress has intended to limit the commercial sex acts reached by the statute to prostitution it could have easily drafted the statute accordingly.81
So, the term “commercial sex act” in 18 U.S.C. section 1591 applies to photographs of sex acts, as well as the sex acts themselves.\(^{82}\) As the nexus between the defendant’s conduct and a “commercial sex act” under the TVPA, the court further observed that

the government was required to prove three elements beyond a reasonable doubt in order for the jury to find the defendant guilty of sex trafficking in violation of 18 U.S.C. 1591, the government had to prove that: (1) the defendant engaged in a prohibited trafficking activity; (2) the defendant’s trafficking activity affects interstate commerce, and (3) the defendant knowingly used force, fraud or coercion to cause the trafficking of individual to engage in a commercial sex act.\(^{83}\)

Force, fraud and coercion are not separate elements of the offense of sex trafficking. As stated in United States v. Paris, “force, fraud, and coercion are alternate means to accomplish a single element.”\(^{84}\) The court in Marcus went on to say that it is not required to prove that obtaining a commercial sex act was the “dominant purpose”\(^{85}\) of the defendant’s use of coercion or threats. Neither such nexus would fail because of the existence of a prior consensual relationship between the defendant and the victim.\(^{86}\) Moreover, engaging in a sex act is not an element required for the establishment of the crime of sex trafficking. In Iowa v. Russell\(^{87}\) the court ruled that “neither the statute nor the instruction requires proof of sex acts by the recruited persons.”\(^{88}\) The statute requires only that a person “participated in a venture to recruit, transport, or supply provisions for the purpose of a commercial sexual activity”\(^{89}\) under the Iowa Code. In this case, the jury was instructed that “commercial sexual activity” is defined as “any sex act on behalf of which anything of value is given, promised to, or received by any person and includes, but is not

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\(^{82}\) The court rejected the defendant’s argument that the meaning of the term “commercial sex act” is ambiguous. The court stated that “while a commercial sex act is quite broadly defined in the statute, the requirement that it be a product of force, fraud or coercion precludes the potential broad sweep about which the defendant expresses concern.” \(\text{Id.}\) at 304. Defendant argued that the TVPA should not apply to “intimate, domestic relationships” and that TVPA was “intended to respond to the ‘problem of international slave trafficking’ which is ‘a far cry from acts of violence and abuse that take place in the context of an intimate personal relationship.’” \(\text{Id.}\) at 299. The defendant was found guilty of sex trafficking 1591 and forced labor. 18 U.S.C. § 1591and § 1589.

\(^{83}\) \(\text{Id.}\) at 308.


\(^{85}\) Marcus, 487 F. Supp. 2d at 313. The court rejected defendant’s claim that a conviction requires the jury to find that the “dominant purpose” of the force or coercion was to obtain the commercial sex act or labor or services and concludes there is nothing in the statute itself or the legislative history that suggest that “the reach of the statutes should be limited in this manner.” \(\text{Id.}\)

\(^{86}\) Marcus, 487 F. Supp. 2d at 309.


\(^{88}\) \(\text{Id.}\) at 8.

\(^{89}\) See Iowa Code § 710A.1(4).
limited to, prostitution and performance in strip clubs.” Thus performance in strip clubs is defined as commercial sexual activity, but stripping is not classified as a sex act.

A commercial sex act, however, should be distinguished from a non-commercial sex act, namely, marriage. Prosecution under the TVPA is possible in cases of mail order brides or marriage by catalogue in which the woman is exploited. In addition, under the TVPRA 2008 international marriage brokers can be prosecuted for profiting from sex trafficking. The potential for this kind of prosecution depends on how the court interprets the definition of a ‘commercial sex act.’ If a marriage broker assists a client in bringing a woman to the United States and is aware that the client’s purpose is to force or coerce the woman to engage in prostitution, then the broker can be prosecuted for sex trafficking. But if the broker’s client intends to use the woman as his personal prostitute, then the arrangement no longer falls under the definition of commercial sex according to the TVPA, whose definition of commercial sex focuses on a particular “‘sex act, on account of which anything of value is given to or received by any person.’”

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91 In United States v. Pendleton, the defendant, a U.S. citizen was arrested, for an offense of having sexual contact with a minor and convicted and incarcerated in Germany. United States v. Pendleton, U.S. Dist. LEXIS 10026 (2009). He was then tried in the U.S. for traveling in foreign countries to engage in illicit sexual conduct in violating the PROTECT Act. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Act of 2003 Pub. L. No. 108-21, 117 stat. 650, S. 151 (2003) [hereinafter PROTECT Act]. The court noted that “[s]ection 2423(c) is structured to address both commercial sex offenses and non-commercial sex offenses. Commercial sex offenses are criminalized under 18 U.S.C. sections 2423(c) and (f)(2). Non-commercial sex offenses are criminalized under 18 U.S.C. sections 2423(c) and (f)(1).” 18 U.S.C. 2423(c) and (f)(1).
93 “Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in any act in violation of section 1581(a), 1592, or 1595(a), knowing or in reckless disregard of the fact that the venture has engaged in such violation, shall be fined under this title or imprisoned in the same manner as a completed violation of such section” TVPRA 2008 § 222(d)(1).
94 Suzanne H. Jackson, Marriages of Convenience: International marriage Broker, “Mail-order Brides,” and Domestic Servitude 38 U. Tol. L. Rev. 895, 907 (2007). Also, the requirement of force, fraud or coercion is problematic. The “TVPA requires non-consent: the trafficked person must have been ‘induced by force, fraud, or coercion.’” Kirsten M. Lindee, Love, Honor, or Control: Domestic Violence, Trafficking, and the Question of How to Regulate the Mail-Order Bride Industry 16 Colum. J. Gender & L. 551 (2007). According to the INS report to Congress, “this attention to mail-order marriages reflects growing concern regarding the global recruitment and transportation of women in a variety of exploitative ways. The information on trafficking suggests that mail-order brides may become victims of international trafficking in women and girls … while not all mail-order brides would be considered trafficked, public policy is shifting to reflect the need to protect people from the exploitation and violence that results from all forms of trafficking.” U.S. Citizenship and Immigration Services, International Matchmaking Organizations: A Report to Congress at § I, ¶ 2, available at: http://www.uscis.gov/files/article/Mobrept_full.pdf. It is possible that IMBs may be classified as facilitators of trafficking, and also that the IMB industry may be sex traffickers per se. No cases of mail order brides have yet been prosecuted under the TVPA, however, the issue was raised in European Connection v. Gonzales, 480 F. Supp. 2d 1355; 2007 U.S. Dist. LEXIS 22823 (2007).
B. Adopting the ordinary meaning of forced labor or services

According to the TVPA, forced labor is defined as:

Whoever knowingly provides or obtains the labor or services of a person— (1) by threats of serious harm to, or physical restraint against, that person or another person; (2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or (3) by means of the abuse or threatened abuse of law or the legal process. 95

In United States v. Marcus, the terms “labor” and “services” were defined. The defendant argued that the phrase “labor or services” in the forced labor statute section 1589 should be narrowly construed to “prevent a wide range of everyday conduct from falling within the reach of the statute” 96 and “to exclude household chores performed as part of an intimate living arrangement.” 97 According to this argument the phrase “could mean only those forms of work for which a person would ordinarily be compensated.” 98 The defendant argued that the legitimate history of the TVPA shows that the statute “was only meant to proscribe conduct that compels the victim to provide labor services ‘for a business purpose.’” 99 The court disagreed, stating that

[the ordinary meaning of the term ‘labor’ is an ‘expenditure of physical or mental effort especially when fatiguing, difficult, or compulsory.’ The term ‘services’ is defined as ‘useful labor that does not produce a tangible commodity.’ These definitions yield scant support for the defendant’s contention that the usual presence of compensation for the labor of services at issue should be a requirement for conviction under the forced labor statute. 100

Again, the meaning of forced labor or services was the issue in United States v. Kaufman, 101 where the defendants maintained a home and a farm for the chronically mentally ill. Defendants asked the severely mentally ill residents to work nude and perform sexually explicitly acts while

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95 TVPA § 112(a)(2).
96 Marcus, 487 F. Supp. 2d at 300.
97 Id. at 25-26.
98 Id. at 299.
99 Id. at 301. The court, however, found “no justification for this contention, while the legislative history of the TVPA undoubtedly focuses primarily on the need to combat international sex trafficking, the Congressional purpose and findings of the TVPA make clear the intended broad scope of the legislation. The stated purpose of the TVPA is ‘to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims.’” The court went on to say “while the court observes that Congress did not expressly indicate its desire to regulate labor or services performed within the household, the legislative history provides no cause to believe that Congress intended that type of labor to be excluded from the legislation’s reach.” “Moreover, while the legislative history does not address situations where traffickers have intimate relationships with their victims, the court’s survey of the TVPA’s legislative history reveals no expressed intention to preclude criminal liability in those contexts.
100 Id. at 26-27.
appearing on video tapes. They were charged and convicted of violating section 1589 among other statutes. Defendants argued that these requested acts did not constitute “labor or services” under the involuntary servitude and forced labor statute that apply only to “work in an economic sense.” The court disagreed noting that section 1589 was created as part of the TVPA to expand Kozminski’s limited definition of coercion under section 1584. As the legislative history of the Act reveals “Section 1589 will provide federal prosecutors with tools to combat severe forms of worker exploitation that do not rise to the level of involuntary servitude as defined in Kozminski.” The court concluded that “[t]here is no indication that Congress sought to limit the scope of ‘labor or services’ in the manner suggested by the Kaufmans.” The court continued:

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

C. Expanding the concept of “serious harm”

Determining the meaning of the term “serious harm” was the issue in the United States v. Bradley. In this case the defendants lured two Jamaican workers to New Hampshire to work for the Bradley Tree Service, a tree removal company. The workers were promised wages of $15-20 per hour and lodging in Bradley’s house. Instead, they were paid $7 per hour and they were forced to stay in a camping trailer. The defendants recruited three more workers who were also badly housed and ill-treated and their passports withheld. The defendants were charged with violation of section 1589. In defining “serious harm,” the district court instructed the following:

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

Defendants argued that this definition expanded the meaning of serious harm beyond the limits contemplated by section 1589. The court disagreed. The court reasoned:

Section 1589 is a recent addition to the chapter that makes criminal acts of slavery, peonage and holding to involuntary servitude, 18 U.S.C. sections 1581-1594. Adopted in 2000 as part of a broader set of provisions—the Victims of

102 Id. at 1247.
104 Kaufman, 546 F.3d at 1261.
105 Id. at 1262.
107 Id. at 150.
Trafficking and Violence Protection Act of 2000--section 1589 was intended expressly to counter United States v. Kozminski. In *Kozminski* the Supreme Court had interpreted the pre-existing ban on ‘involuntary servitude’ in section 1584 to prohibit only conduct involving the use or threatened use of *physical* or *legal* coercion.  

The court further stated that based upon the Congress’ intent to expand the Kozminski rule “Congress made clear its intent that this statute be applied broadly in order to capture conduct that the Supreme Court had ruled beyond the reach of the statutes prohibiting involuntary servitude.”  

**D. Determining what constitutes abuse of legal process**

The term ‘abuse or threatened abuse of the law or legal process’ stated in section 1589 was defined in United States v. Peterson.  

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

The charge in this case lacked factual specificity.  

In Catalan v. Vermillion Ranch Ltd., the Court determined that the threat of deportation for violating the immigration laws of the United States constituted an abuse of the legal process. In  

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108 *Id.* at 151 (internal citations omitted). The court continued “[u]ltimately Congress adopted the House format for remedying *Kozminski* by creating a new forced labor offense. But this new nomenclature does not alter the fact that Congress thought of forced labor as a *species* of involuntary servitude. Indeed, the 2000 statute made other changes to Title 22 of the U.S. Code that make this crystal clear. It there described ‘involuntary servitude’ in the same terms used for the new ‘forced labor’ offense, calling the former: ‘a condition of servitude induced by means of…any scheme, plan, or pattern intended to cause a person to believe if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint.’ Similarly, the Act’s purposes state that ‘involuntary servitude statutes are intended to reach cases in which persons are held in a condition of servitude through nonviolent coercion’ …Thus, Congress’ evident purpose…was to treat forced labor as a form of involuntary servitude. *Id.* at 156-57 (internal citations omitted).  

109 *Id.* at 302. “Contrary to the defendant’s argument, interpreting the terms ‘labor’ and ‘services’ in light of their ordinary everyday meaning would not extend federal criminal liability to abusive domestic relationships more generally because 1589 requires a link between the physical restraint or threats of serious harm and the obtaining of labor or services. Using the defendant’s examples, if one spouse uses the means proscribed by the statute to coerce his spouse into performing domestic chores or tasks related to the operation of the bed and breakfast, a trier of fact would be able to find a violation of the forced labor statute. The court sees no reason why the existence of a domestic partnership between two individuals should preclude criminal liability if one person knowingly uses ‘threats of serious harm to, or physical restraint against, that person or another person’ to obtain labor or services.” *Id.* at 303.  


111 *Peterson*, 544 F. Supp. 2d at 1375 (quoting in part the Restatement (Second) of Torts § 682).  

112 *Id.*  

this case the four plaintiffs were threatened with deportation if they did not continue working on the ranch. The court stated that

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

Threat of deportation constitutes abuse of the legal process because the objective is to “to intimidate and coerce the workers into ‘forced labor.’” The legislative history of the TVPA indicates that section 1589 was designed to expand criminal liability in cases not covered by section 1584 (involuntary servitude).

Similarly, in United States v. Veerapol, the court concluded that “threatening… an immigrant with deportation could constitute the threat of legal coercion that induces involuntary servitude, even though such a threat made to an adult citizen of normal intelligence would be too implausible to produce involuntary servitude.” As noted in the Congressional findings, section 1589 was designed to address “the increasingly subtle methods of traffickers who place their victims in modern-day slavery, such as where traffickers threaten harm to third persons, restrain their victims without physical violence or injury, or threaten dire consequence by means other than overt violence.”

The defendants argued in Ramos v. Hoyle, that “Plaintiffs have failed to state a claim under section 1589 (3) because the threat made that Plaintiffs would lose their immigration status if

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114 Id. at 23-24.
115 Id. at 23.
116 As the House Conference Report states, “Section 1589 is intended to address the increasingly subtle methods of traffickers who place their victims in modern-day slavery, such as where traffickers threaten harm to third persons, restrain their victims without physical violence or injury, or threaten dire consequences by means other than overt violence. Section 1589 will provide federal prosecutors with tools to combat severe forms of worker exploitation that do not rise to the level of involuntary servitude as defined in Kozminski. Because provisions within section 1589 only require a showing of a threat of “serious harm”, or of a scheme, plan, or pattern intended to cause a person to believe that such harm would occur, federal prosecutors will not have to demonstrate physical harm of threats of force against victims. The term “serious harm” as used in this Act refers to a broad array of harms, including both physical and nonphysical, and section 1589’s terms and provisions are intended to be construed with respect to the individual circumstances of victims that are relevant in determining whether a particular type or certain degree of harm or coercion is sufficient to maintain or obtain a victim’s labor or services, including the age and background of the victims.” H.R. Conf. Rep. No 106-939 at 101 (2000).
118 Id. at 1132 (quoting Kozminski, 487 U.S.). However, a nexus must exist between the defendant’s conduct and “labor or services” under the forced labor statute, section 1589. As stated in Marcus, “[a] conviction of forced labor under 18 U.S.C. 1589 required the government to prove beyond reasonable doubt that (1) the defendant obtained the labor or services of another person; (2) the defendant did so by using either (a) threats of serious harm to, or physical restraint against, that person or any other person; or (b) a scheme, plan, or pattern intended to cause the person to believe that non-performance would result in serious harm to, or physical restraint against, that person or any other person; and (3) the defendant acted knowingly.” Marcus, 487 F. Supp.2d at 308.
they left Defendants’ employment was a ‘truthful statement and not an abuse of legal process.’” The truth of the statement is irrelevant however, section 1589 of the TVPA says nothing about truth or falsity. The court disagreed, citing United States v. Garcia where the court said if “workers were threatened with deportation for violation of the immigration laws such threats ‘clearly fall within the concept and definition of ‘abuse of legal process’ since the alleged objective for same was to intimidate and coerce the workers into ‘forced labor.’”

And just because the victim had an opportunity to escape does not mean that the situation was not one of coercion. As stated in United States v. Warren, it is sufficient that “defendant…placed him in such fear of physical harm that he is afraid to leave.”

Abuse, under section 1589 (3) must have a “coercive effect” on the worker. As stated in United States v. Peterson, coercion is a requirement for the application of section 1589 (3):

Section 1589 is a statute designed to prohibit obtaining another’s labor through coercive conduct. Interpreting subsection (3) not to contain a coercion requirement would be inconsistent with this interpretation. In other words, subsection (3) only fits into the overall statutory scheme if it prohibits misusing the legal process to coerce, or pressure, somebody into providing labor. It would make no sense, in the context of the statute for subsection (3) to prohibit obtaining consensual labor through a misuse of the legal process.

The court went on to say:

In Kozminski the Supreme Court narrowly interpreted the involuntary servitude statute, 18 U.S.C. section 1584, holding that the statute only prohibits compulsion of services through either physical or legal coercion. The Supreme Court expressly rejected an interpretation of the involuntary servitude statute that would have also prohibited obtaining labor through psychological coercion. To counter Kozminski’s limited definition of coercion, Congress included a broader definition of coercion in the TVPA.

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121 *Id.* at 11.
123 The relevant part reads in whole: “whoever knowingly provides or obtains the labor or services of a person (1) by threats of serious harm to, or physical restraint against, that person or another person; (2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint, or (3) by means of the abuse or threatened abuse of law or the legal process.”
125 Garcia, No. 02-CR-1105-01 at 23.
126 *Warren*, 772 F. 2d at 834.
127 *Peterson*, 544 F. Supp. 2d.
128 *Id.* at 1371.
129 *Id.* at 1372 (internal citations omitted). The court went on to say that “section 1589’s title is ‘Forced Labor,’ and it is located within Chapter 77, which is titled, ‘Peonage, Slavery, and Trafficking in Persons.’ The definition of ‘forced labor’ is ‘[w]ork exacted from a person under threat of penalty; work for which a person has not offered himself or herself voluntarily.’ While this court is fully aware that
E. When threats of deportation constitute involuntary servitude

Threats of deportation on their own do not prove involuntary servitude. In fact, according to the court in Diza v. Mendez,

[t]hreats of deportation or future unemployment do not state a claim for involuntary servitude. So long as ‘the servant knows he has a choice between continued service and freedom’ he is not working involuntarily ‘even if the master had led him to believe that the choice may entail consequences that are exceedingly bad.’\footnote{Diza v. Mendez, 1978 U.S. Dist. LEXIS 18322, 8-9 (S.D. N.Y., 1978) (quoting United States v. Shackney, 333 F.2d 475, 486 (2d cir. 1964)).}

In United States v. Shackney,\footnote{Shackney, 333 F.2d.} the defendant operated a chicken farm and hired a family from Mexico to work on it, promising them lodging and compensation. Upon arrival, however the family found the accommodations were not what they had been promised and the work conditions more arduous than they had anticipated. They were threatened with deportation if they broke the contract. The court found that while a threat of deportation may have come close to violating section 1584, it still left the family with a choice. Adopting a narrow interpretation of section 1584, the court stated “[b]ut a holding in involuntary servitude means to us action by the master causing the servant to have, or to believe he has, no way to avoid continued service or confinement.”\footnote{Id. at 486.} The court continued “[t]his seems to us a line that is intelligible and consistent with the great purpose of the 13th Amendment; to go beyond it would be inconsistent with the language and the history, both pointing to the conclusion that ‘involuntary servitude’ was considered to be something ‘akin to African slavery’ although without some of the latter’s incidents.”\footnote{Id. at 484-85 (quoting Tyler v. Heidorn, 46 Barb. 439, 458 (Albany General Term, 1866)). According to the court in Pipkins, “A conviction under section 1584 requires proof that ‘the victim (was) forced to work for the defendant by the use or threat of physical restraint or physical injury.’ If a defendant keeps a victim in involuntary servitude through such fear of physical harm that the victim is afraid to leave, regardless of any opportunity to escape, the}

The court continued:

The term involuntary servitude, in my opinion, is substantially synonymous with slavery, though it may perhaps be regarded as slightly more comprehensive, and as embracing everything under the name of servitude, though not denominated slavery, which gives to one person the control and ownership of the involuntary and compulsory services of another against his will and consent.\footnote{Id.}
Similarly, in Zavala v. Wal-Mart Stores, the immigrants who provided janitorial services at the defendant’s retail stores alleged that Wal-Mart kept them in involuntary servitude by threatening them with deportation and forcing them to work under threats of coercion. The court concluded that these allegations of involuntary servitude are insufficient, stating “plaintiffs have not alleged that they did not have any way to avoid ‘continued service or confinement.’” While the court noted that threatening an immigrant with deportation might amount to threat of legal coercion that induces involuntary servitude, it concluded that if the immigrant still knows that he has a choice between continued service and freedom, such threats are not enough to constitute in the involuntary servitude.

F. Indebtedness as the basis for the crime of peonage

In United States v. Farrell, the Farrells, who owned and operated a Comfort Inn and Suites in South Dakota, brought a number of workers from the Philippines to work as housekeepers. The workers were responsible for the cost of transportation to and from the United States in violation of their contracts. They were also told that a $1,200 petition-processing fee for their nonimmigrant worker status would be divided equally among them. The Farrells were charged with peonage in accordance with section 1581. The court explained that peonage is “compulsory service in payment of a debt” and because of its compulsory nature it resembles “involuntary servitude” and is the equivalent of the same. Consequently proof of peonage requires submission of evidence that the defendant coerced the victim to work in order to satisfy a debt.

defendant has violated 1584.” United States v. Pipkins, 378 F. 3d 1281 (2004) (quoting in part Kozinski, 487 U.S.). The court also ruled that “section 1584 requires that involuntary servitude be for ‘any term’ which suggests that the temporal duration can be slight.” Id.

136 Id. at 311.
137 See also: Chellen v. John Pickle Co., in which 52 individuals were brought from India for employment at the John Pickle Company (JPC). Once there, the managers at JPC required them to work in excess of 40 hours per week, paid them less than the minimum wage, forced them to eat and sleep on the JPC premises, restricted their movement, and held them against their will. The court concluded from their condition that they were employees, not trainees, under the Fair Labor Standards Act, (FLSA), 29 U.S.C.S. Sections 201-219. Chellen v. John Pickle Co., 344 Fed. Supp. 2d 1278, 2004 U.S. Dist. LEXIS 23185 (2004).
138 Peonage is defined as a crime under section 1581 of the U.S.C.: “Whoever holds or returns any person to a condition of peonage, or arrests any person with the intent of placing him in or returning him to a condition of peonage, shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.” 18 U.S.C. § 1581(a). In 1867, Congress passed the Anti-Ppeonage Act. The first part of the statute stated: “[t]he holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States, and all acts, laws, resolutions, orders, regulations, or usages of any Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as persons, in liquidation of any debt or obligation, or otherwise, are declared null and void.” Anti-Ppeonage Act of March 2, 1867 c. 187, 14 Stat 546.
140 Id. at 372.
141 Id. at 372 (quoting Bailey v. Alabama 219 U.S. 219, 242 (1911)).
The workers were threatened that if they attempted to run away they would be shipped back to the Philippines. The workers were also threatened to be arrested and deported if they failed to comply with the Farrells’ instructions. Sufficient evidence was presented that working and living conditions compelled the victims to serve to make the debt payments. They were socially isolated: they were not even allowed to speak to other workers. The amount of money they were allowed to send back to the Philippines was dictated to them. The coercive nature of these threats was amplified by their “special vulnerabilities” and their dependence upon the Farrell for their housing and transportation. The court concluded:

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

Explaining the principle that no person could secure the labor of another by compulsion, the court in United States v. Booker stated that

[the Thirteenth Amendment and the laws that enforce it… established the fundamental principle that no person could secure the labor of another by compulsion. The statutes protected persons similarly situated to the migrant workers of our own time. They were persons without property and without skills save those in tending the fields. With little education, little money and little hope, they easily fell prey to the tempting offers of ‘powerful and unscrupulous’ individuals who would soon assert complete control over their lives. The control might be maintained through the threat of criminal sections… or through physical force as practiced here.]

The distinction between peonage and involuntary servitude was made clear in United States v. Kang, where the court defined peonage as

a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness… Peonage is sometimes classified as voluntary or involuntary; but this implies simply a difference in the mode or origin, but none in the character of the servitude… But peonage, however created, is compulsory service, -- involuntary servitude… That which is

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142 Id. at 368-69.
143 Id. at 376.
144 Booker, 655 F.2d.
145 Booker, 655 F.2d at 566. The court further stated: “The availability of escape, as the history of slavery has shown, or even a situation where the discipline of terror is not constantly enforced, does not preclude a finding that persons are held as slaves.” Id. at 567.
contemplated by the statue is compulsory service to secure the payment of a debt.\textsuperscript{147}

In other words, “[p]eonage involves the additional element that the involuntary servitude is tied to the discharge of an indebtedness.”\textsuperscript{148}

In the absence of a debt owed to the employer, the peonage statute\textsuperscript{149} does not apply. As stated by the court in Dolla v. UniCast Co.,\textsuperscript{150}

Section 1581 makes the holding of a person in a state of peonage a criminal offense. Peonage is a ‘condition of compulsory service based upon indebtedness of the peon to its master.’ Peonage is a form of involuntary servitude, and is characterized by the involuntary performance of labor based upon indebtedness. Thus, the critical elements of a peonage claim are indebtedness and compulsion.\textsuperscript{151}

The sentence is enhanced if peonage is accompanied by sexual abuse as was the case in Yushuvayev v. United States.\textsuperscript{152} The Kangs, a married couple of South Korean origin, operated several nail salons on Long Island and a bar known as Renaissance in Queens, New York. Mr. Kang traveled in April 2003 to South Korea in order to recruit young women to work at Renaissance. The women were promised $40 per day, plus tips, and were told that they would not be required to have sexual relations with customers. Two women agreed to work for the Kangs; upon their arrival, they were forced to surrender their passports and their return airline tickets. They worked 6.5 hour shifts for six days per week for only $30 per day. They were informed that they each owed Kangs approximately $20,000 for travel-related expenses and were forced to sign promissory notes in that amount. All of their income was collected by the Kangs and credited toward their “debt.”\textsuperscript{153} In addition, they were forced to borrow money from the Kangs when they wanted to make purchases outside the bar, thereby increasing their indebtedness. They were told that they could earn more money by having sexual relations with their customers, and thus pay their debt more quickly. They refused to engage in prostitution and were sexually assaulted by Mr. Kang. The Kangs were planning to sell them to a brothel in Chinatown when one of the women escaped the Kangs’ house and contacted the police.\textsuperscript{154}

\textsuperscript{147} Id. at 6-7 (quoting in part Clyatt 197 U.S.).
\textsuperscript{148} Id. (quoting Shackney 333 F. 2d).
\textsuperscript{149} 18 U.S.C. § 1581.
\textsuperscript{151} Id.
\textsuperscript{153} Id. at 458.
\textsuperscript{154} Id. at 459.
III. CONSTITUTIONAL CHALLENGES

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

A. Application of the TVPA may not violate the Ex Post Facto Clause of the U.S. Constitution

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

One successful challenge based on the Ex Post Facto Clause of the U.S. Constitution was the issue in United States v. Marcus. The defendant was charged with violating the TVPA between January 1999 and October 2001, and thus he argued that the TVPA had been applied retroactively since it was not enacted until October 2000. The government argued that sex trafficking constituted “continuing offers” and that “even though the criminal conduct at issue began prior to enactment of the TVPA, it continued after enactment.” The court disagreed because the jury could have convicted the defendants based exclusively on pre-enactment conduct. In this case, the defendant engaged in several trafficking activities: he recruited, enticed and obtained the victim when he met her online in late 1998, then he convinced her to come from Maryland to New York in January 2000. In total, he was responsible for holding her from 1999 until 2001. Only the harboring activity, not the transporting, occurred after October 2000, the effective date of the TVPA. So the jury concluded that although the defendant did not harbor the victim, he recruited, enticed, or obtained her in 1998 or transported her in 2000 and thus could have convicted the defendant based only on pre-enactment conduct. The defendant

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155 United States v. Paulin, 329 Fed. Appx. 232 (2009). The girl was forced to work long hours doing domestic duties and was not allowed to sit and eat the meals she had prepared for the defendant’s family. She was forced to sleep on a mattress on the living room floor and to bathe outside using a bucket of cold water. The girl was not permitted to go to school or leave the house unaccompanied. If she objected to her treatment the defendant beat her or threatened to send her back to Haiti. Id. at 233-34.
156 Id. at 234.
157 “No bill of attainder or ex post facto Law shall be passed.” U.S. Const. art. 1, § 9, cl. 3.
158 United States v. Marcus, 538 F.3d 97; 2008 U.S. App. LEXIS 17222 (2008). But see: Adhikari v. Daoud & Partners, 2009 U.S. Dist. LEXIS 126195 (2009), “accordingly, the thrust of the TVPRA would be severely undermined by a holding that U.S. defendants who gained commercial advantage in this country through engaging in illegal human trafficking were free from liability, so long as the trafficking acts themselves took place outside of American borders. Therefore, the Court finds that the traditional presumption against the retroactive application of statutes would contravene the clear purpose of the TVPRA, and would inappropriately absolve those who could in fact be guilty of violating its provisions.” Id. at 16.
159 Marcus, 538 F.3d at 101.
160 Id.
argued that Congress had no power to regulate sex trafficking where the recruiting, enticing, harboring, transporting, providing or obtaining of the trafficked person was performed intrastate, thus section 1591 is unconstitutional.\textsuperscript{161}

In United States v. Jackson,\textsuperscript{162} the defendant, a U.S. citizen, was arrested in Cambodia on charges of debauchery after he had engaged in sex with three Cambodian boys. While the Cambodian charge was pending, the U.S. revoked the defendant’s passport and agreed to take jurisdiction over the case. The defendant was charged with violation of 18 U.S.C. section 2423 (c). The case was dismissed because this section was enacted in April 30, 2003 and defendant’s travel had ended by April 30, 2003. So, based on the Ex Post Facto Clause of the Constitution of the United States,\textsuperscript{163} the statute did not apply to him. The court concluded:

[The defendant] admits to committing despicable sexual acts with children… [y]et his abhorrent conduct does not give us license to ignore the elements of the criminal statutes that Congress has established… the text of section 2423 (c) only proscribes the conduct of an individual ‘who travels in foreign commerce’ after the enactment of the statute. Because Jackson’s travel had ended by April 30, 2003, he is not covered by the provision. The district court was therefore correct to dismiss the indictment.\textsuperscript{164}

B. TVPA affecting interstate and foreign commerce

Under the Commerce Clause,\textsuperscript{165} Congress has the power to regulate activities that have a substantial relation to interstate commerce. In determining whether a law regulates an activity that has a “substantial effect” on interstate commerce, the court in United States v. Paris outlined four main considerations, (a) the economic relation of the regulated activity, (b) a jurisdictional element limiting the reach of the law to a discrete set of activities that additionally have an explicit connection with or effect an interstate commerce (c) express congressional findings regarding the affects upon which interstate commerce of the activity in question, and (d) the link between the regulated activity and interstate commerce.\textsuperscript{166} The court determined:

Section 1591 satisfies each of these considerations: first commercial sex acts are economic in nature; second, section 1591 has a jurisdictional element, requiring the jury to find that the activity affected interstate commerce. Third, in enacting

\begin{footnotesize}
\begin{enumerate}
\item Section 1591 provides that “whoever knowingly (1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, or obtains by any means a person, or (2) benefits, financially or by receiving anything of values, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing that force, fraud, or coercion described in subsection (c) (2) will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provides in subsection (b).” 18 U.S.C. § 1591.
\item United States v. Jackson, 480 F.3d 1014 (9th cir. 2007).
\item U. S. Constitution art. 1, § 9 (states forbidden from enacting ex post facto laws in art. 1, §10).
\item Jackson, 480 F.3d at 1024.
\item U. S. Constitution, art. 1, § 8, cl. 3.
\item Paris, U.S. Dist. at 23.
\end{enumerate}
\end{footnotesize}
the Trafficking Victims Protection Act, Congress found that ‘Trafficking in persons substantially affects interstate and foreign commerce.’ Fourth, there is a clear nexus between (defendant’s) intrastate recruiting and obtaining of women to commit commercial sex acts, the interstate aspects of (defendant’s) business, and the interstate market for commercial sex.”167

In United States v. Simonson,168 the court wrote that “Congress has the power to regulate foreign commerce and to act to prevent the channels of commerce from being used for immoral or injurious purposes.”169 In this case, the defendant was convicted and sentenced for intent to engage in illicit conduct and attempted enticement.170 The defendant argued that Congress exceeded its power under the Commerce Clause171 by reading a statute in regards to conduct unrelated to commerce. The court disagreed, holding that Congress may regulate the use of the channels of interstate commerce.

In United States v. Martinez,172 the defendant, a U.S. citizen who traveled to Mexico to have sex with a minor, argued that section 2423 (c) violated the Commerce Clause.173 The court acknowledged:

[T]he alleged illicit sexual conduct in the instant case is not itself commercial. However, a worldwide market exists for child prostitution, an activity that is “quintessentially economic” in nature, and that falls within foreign trade and commerce. As the optimal Protocol states, there is both “significant and increasing international trafficking of children for the purpose of the sale of children, child prostitution and pornography, as well as ‘the widespread and continuing practice of sex tourism.’”174

The PROTECT Act,175 the court observes, “is primarily designed to combat human suffering and economic evils of worldwide sex tourism and child prostitution.”

167 Paris, U.S. Dist. at 23-24 (quoting in part 22 U.S.C section 7101 (b) (12)).
169 Id. at 825-26 (quoting United States v. Cummings, 281 F. 3d 1046, 1049-51 (9th cir. 2002)).
170 18 U.S.C. § 2423 (a), (b).
171 U. S. Constitution, art. 1 §8, cl. 3.
173 U. S. Constitution, art. 1 § 8 cl. 3.
176 Martinez, 599 F. Supp 2d at 807-08.
In United States v. Evans,177 the court rejected an argument that section 1591 (a) (1) of the TVPA could not constitutionally apply to his solely intrastate behavior. The court stated:

“...We have no difficulty concluding that Raich,178 Maxwell,179 and Smith180 foreclose [defendant’s] challenges to the constitutionality of section 1591 (a) (1) as applied to his activity occurring solely within Florida. Section 1591 was enacted as part of the Trafficking Victims Protection Act of 2000 (TVPA). Like the CSA and CPPA, the TVPA is part of a comprehensive regulatory scheme. The TVPA criminalizes and attempts to prevent slavery, involuntary servitude, and human trafficking for commercial gain. Congress recognized that human trafficking, particularly of women and children in the sex industry, ‘is a modern form of slavery, and it is the largest manifestation of slavery today.’ Congress found that trafficking of persons has an aggregate economic impact on interstate and foreign commerce, and we cannot say that this finding is irrational.181

The defendant was charged and convicted for enticing a minor to engage in a commercial sex act in violation of section 1591 (a) (1) and enticing a minor to engage in prostitution in violation of 18 U.S.C. section 2422 (b). The defendant operated a child prostitution ring in Miami-Dade County, Florida. The court concluded that the defendant’s enticement of the victim to commit prostitution, “even though his actions occurred solely in Florida, had that capacity when considered in the aggregate with similar conduct by others, to frustrate Congress’ broader regulation of interstate and foreign economic activity.”182 The court supported the district court’s findings that “while [the defendant’s] activities may be minor in the national and international market of trafficking children for commercial sex acts, his acts contribute to the market that Congress’ comprehensive scheme seeks to stop.”183 The court concluded that defendant’s use of hotels that served interstate travelers and distribution of condoms184 that traveled in interstate commerce “is further evidence that [the defendant’s] conduct substantially affected interstate commerce.”185 The court rejected the defendant’s argument that the term “knowingly” modifies the interstate commerce element of 18 U.S.C. section 1591 (a) and that the government was therefore required to prove that the defendant knew that his actions were in or affecting interstate foreign commerce. The court said:

We are unaware of any court that has adopted the narrow reading of section 1591 (a) urged by [the defendant]. Nor is there anything in the legislative

178 Gonzalez v. Raich, 125 S. Ct. 2195 (2005).
181 Evans, 476 F.3d at 1179.
182 Id.
183 Id.
184 The court made specific note of Pipkins, 378 F. 3d (holding that evidence that pimps furnished their prostitutes with condoms manufactured out of state... supports a finding that the activities of the enterprise affected interstate commerce).
185 Evans, 476 F.3d at 1179.
history of section 1591 suggesting that Congress intended the statute to reach only sex traffickers who knew they were acting in or affecting interstate or foreign commerce… Accordingly, we reject [defendant’s] request to construe section 1591 (a) as requiring knowledge by a defendant that his actions are in or affecting interstate commerce.\(^{186}\)

The defendant’s argument that the government did not establish section 2422 (b)’s\(^{187}\) interstate commerce element was also rejected. The defendant argued that although he admitted using both a cellular telephone and a land line telephone to entice the minor female to engage in prostitution, no evidence was presented that his intrastate calls were routed through interstate channels. The court cited several cases all of which support the ability of Congress to regulate the instrumentalities of interstate commerce\(^{188}\) and particularly activities involving the use of telephones and cellular phones, which are instrumentalities of interstate commerce\(^{189}\) even in cases involving purely intrastate calls.\(^{190}\)

### C. Applying the vagueness doctrine to trafficking in persons statutes

Challenging section 1589 on constitutional grounds was the issue in United States v. Calimlim.\(^{191}\) In this case, Irma Martinez, at the age of 19, left the Philippines to work as a domestic servant for the defendants. Upon her arrival, they confiscated her passport and told her that she had to pay the cost of her transportation. She was also told that she was in the U.S. illegally. As a live-in housekeeper, she cared for their children and household. The defendants restricted her movement: she was only allowed to go to church. She was allowed to speak with her family only four or five times over the 19 years she was serving the defendants and for the duration of her work, she was only allowed to send them about $19,000. She was constantly reminded that if she was discovered by anyone, she could be arrested and deported. The defendants argued that the forced labor statute 1589 was so vague that it failed to provide them with notice of the subject of criminalization. The court disagreed stating that: “even if the [defendants] did not know for certain that they would be convicted, the language of the statute alerted them to what was prohibited.”\(^{192}\) The court then addressed the other ground for vagueness by stating that

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\(^{186}\) *Id.* at 1180, note 2.

\(^{187}\) 18 U.S.C § 2422(b) imposes punishment on anyone who “using the mail or any facility or means of interstate or foreign commerce knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution.”


\(^{192}\) *Id.* at 711. The court continued: “They knew that they were telling Martinez that if she did not do everything they asked, they would not send money back home for her. The Calimlims also knew that not sending money back home was, for Martinez, a ‘serious harm.’ The Calimlims also warned Martinez about her precarious position under the immigration laws, conveniently omitting anything about their own vulnerability.” *Id.* at 711. The court went on to say that “the statute does not specify that the ‘serious harm’ be at the defendant’s hands. It requires that the plan be
[a] statute may also be unconstitutionally vague when an ambiguity allows for arbitrary enforcement of the law beyond what Congress intended. A statute is vague in this sense when “there is [a] lack of clarity...that would give law enforcement officials discretion to pull within the statutes activities not within Congress’ intent. With reference to section 1589, after the Supreme Court ruled that a similar statute involving involuntary servitude, 118 U.S.C. section 1584, prohibited only servitude procured by threats of physical harm, Congress enacted section 1589... The language of section 1589 covers nonviolent coercion, and that is what the indictment accused the [defendants] of doing; there was nothing arbitrary in applying the statute that way.\textsuperscript{193}

Again, sections 1589, 1584 and 1590 were challenged on constitutional grounds in United States v. Ramos-Ramos.\textsuperscript{194} The sections under which the defendant was charged\textsuperscript{195} state that “if the violation includes...aggravated sexual abuse or the attempt to commit aggravated sexual abuse...the defendant shall be fined under this title or imprisoned for any term of years or life, or both.”\textsuperscript{196} The defendant in the case argued that none of these statutes defines aggravated sexual abuse. The court noted that “[t]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement”\textsuperscript{197} The court concluded that “the absence of a definition for ‘aggravated sexual abuse’ in the human trafficking statutes does not render the human trafficking statutes or their punishment provisions void for vagueness.”\textsuperscript{198}

Similarly, in United States v. Garcia,\textsuperscript{199} the defendant claimed that section 1589 was unconstitutional because of its vagueness, claiming that

\begin{quote}
[t]he use of the terms ‘obtains,’ ‘threats of serious harm to or physical restraint’ and ‘means of the abuse or threatened abuse of law or the legal process’ in section
\end{quote}

\textsuperscript{193} \textit{Id.} at 711-12.
\textsuperscript{196} Ramos-Ramos, U.S. Dist. at 5, note 2.
\textsuperscript{197} \textit{Id.} at 15 (quoting Kolender v. Lawson 461 U.S. 352, 357, (1983)).
\textsuperscript{198} \textit{Id.} at 18. The court agreed with the government that “the sexual abuse act of 1986, 18 U.S.C sections 2241-48, which contains definitions of sexual abuse offenses, has conferred upon the term ‘aggravated sexual abuse’ a ‘commonly accepted meaning’ or an ‘established meaning’ within the context of federal criminal law sufficient to provide a criminal defendant with adequate notice.” \textit{Id.} at 17-18. The court reasoned that “[t]o the extent there is any ambiguity in the term ‘aggravated sexual abuse,’ it makes sense to look to the Federal Sexual Abuse Act for a definition of the term as it is used in another federal criminal statute. The court is satisfied that the term ‘aggravated sexual abuse’ provides a person of ordinary intelligence with reasonable notice of prohibited conduct and is sufficiently particularized in light of federal criminal statutes defining the term to insure that the provision is not enforced in an arbitrary manner.” \textit{Id.} at 18.
\textsuperscript{199} Garcia, U.S. Dist.
1589 ‘are not...anywhere defined’ and therefore, such terms as used ‘make it impossible for a lay person, let alone an attorney or judge, to determine what conduct is prohibited.’

The defendant in this case transported victims from Mexico to New York and subjected them to overcrowded working conditions, refused to allow them to leave, did not pay them, threatened them with physical violence and deportation and told them that they must work to pay off their debts. The court stated that “[t]he Constitution does not require the legislation to incorporate Webster’s Dictionary into each statute in order to insulate it from vagueness and challenges.”

The court concluded that “[t]he words used in section 1589 are common words” and “the likelihood that anyone would not understand any of those common words seems quite remote. The words and phrases cited by the defendant have a plain and unambiguous meaning.”

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

D. When do multiple trafficking crimes violate the double jeopardy clause of the Fifth Amendment?

In United States v. Maka, the defendant was charged with smuggling and harboring aliens. The defendant claimed that the human trafficking counts were multiplicitous of the involuntary servitude counts, thus, charging him with both crimes violated the double jeopardy clause of the Fifth Amendment. Similarly, the defendant claimed that the human trafficking charges were multiplicitous of the alien smuggling and harboring counts. The court disagreed, holding:

The human trafficking counts are not multiplicitous of the involuntary servitude counts, as each requires proof of a fact that the other does not. Under section 1584, the defendant had to actually hold another to involuntary servitude, something not required for a conviction under section 1590, which requires knowledge that the laborer will be used by someone for such purposes, but does not require that the recruiter or transporter be that person. Likewise, a conviction under section 1590 requires proof that defendant recruited, transported, harbored or otherwise obtained the laborer with the knowledge he or she would be used in

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200 Garcia, No. 02-CR-1105-01 at 17.
201 Id. at 19 (quoting Dennis v. Poppel, 222 F. 3d 1245, 1260 (10th cir. 2000)).
202 Id. at 19 (quoting Hill v. Colorado, 530 U.S. 703, 732 (2000)).
207 U. S. Const. amend. V.
involuntary servitude, whereas an “end-user” defendant could be convicted under section 1584 even if not involved in the acquisition or transportation process.\footnote{Maka, 237 Fed. Appx at 227.}

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

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

**E. Rejecting the unconstitutionality of the International Marriage Broker Regulation Act**

In European Connections v. Gonzales\footnote{European Connections v. Gonzales, 480 F. Supp. 2d 1355 (N. D. GA. Mar. 23, 2007).} the plaintiff argued that the International Marriage Broker Regulation Act of 2005 (IMBRA)\footnote{Passed as part of the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162 (Jan. 5, 2005).} violates the Fifth Amendment’s Equal Protection Clause\footnote{U. S. Const. Amend. V. For a discussion of this argument, see Lindee, supra note 94.} because it distinguishes between international marriage brokers and other matchmaking services. In this case, the defendant, European Connections, operated websites facilitating contact between American men and foreign women mainly from Eastern Europe and the former Soviet Union. The male clients of European Connections paid membership fees and other fees for various services but the women did not, leading to a situation of commodification of the women. Information provided by the clients was not disclosed by European Connections, including information relating to the potential dangerousness of the male clients. Male and female clients were permitted to communicate with one another via European Connections computer servers and Russian matchmaking agencies were responsible for translating these communications.

IMBRA requires international marriage brokers (IMBs) to collect information on the client and disclose it to the prospective bride.\footnote{18 U.S.C. § 833 (d) (2) (a) (ii). Required disclosure includes: (1) Temporary or permanent civil protection orders or restraining orders issued against the United States client; (2) Arrests of convictions of the United States client for, inter alia, homicide, assault, domestic violence, sexual assault, torture, trafficking, kidnapping or stalking; (3) Arrests or convictions of the United States client for engaging in prostitution, attempting to promote prostitutes or persons for the purpose of prostitution, or receiving the proceeds of prostitution; (4) Arrests or convictions of the} The law however exempts dating services and “traditional matchmaking organization[s] of a cultural or religious nature.”\footnote{Id.}
The plaintiff argued that the law violates the free speech protection of the First Amendment. The court disagreed stating:

‘Commercial speech’ entitled to First Amendment protection is limited to communications about the availability and characteristics of products, services, and communications which are intended to propose a commercial transaction… In the instant case, IMBRA does not regulate commercial speech. IMBs are not restricted from touting services. Nowhere in the IMBRA statute are there any provisions attempting to regulate the content of IMB’s commercial messages in which they tout their respective services in an attempt to induce commercial transactions. Instead IMBRA requires the IMBs merely to perform a transmittal role. This is not commercial speech.215

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

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

   Cultural and religious non-profits are not targeted by IMBRA for regulation because, like non-profits, such entities lack the same customer-centric motivations that commercial IMBs possess. Congress reasonably could assume that without the motivations to keep its male customers satisfied, traditional religious and cultural matchmaking agencies are not as likely to be complicit in developing abusive relationships. Furthermore, Congress simply had no statistical or other evidence that traditional cultural or religious marriage brokers contribute significantly to the harm Congress seeks to address- domestic abuse and human trafficking.216

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214 18 U.S.C. § 833 (e) (4) (B) (i).
215 European Connections v. Gonzales, 480 F. Supp. 2d at 1369-1370. The court distinguished between “outright bans” on commercial speech and disclosure requirements, saying that “thus, IMBRA regulates a part of a commercial transaction that does not involve any advertising or commercial claims but instead concerns the release of private information in order to protect the health and safety of foreign women.” Id. at 1371. Disclosure requirements are subject to minimal security: “[t]he state’s asserted interest here is in protecting female clients of IMBs from fraud, deception and abuse by the United States male clients who utilize IMBs to market themselves as desirable mates. This interest constitutes a legitimate governmental interest, which is advanced by the disclosure requirements.” Id. at 1371-72. Plaintiff argued that there is no link between the patronization of prostitutes and domestic abuse, and that therefore the law’s requirement to disclose relevant prostitution convictions was overly broad. The court disagreed stating: “one reason why IMBRA requires the disclosure of prostitution related offenses is that such questions are asked on the non-immigrant visa petition and such offenses are a ground of inadmissibility under the Immigration and Nationality Act. Prostitution related disclosures are also mandated under IMBRA to ascertain information which is potentially relevant to the issue of human trafficking. Id. at 1374.
216 Id. at 1378.
As to matchmaking organizations addressing domestic clients, the court said:

The distinction between those dating services whose principal business is providing international dating services as opposed to domestic service is clear. Congress sought not to regulate all dating services but to protect foreign women, who it found to be particularly vulnerable to harm from this industry, from potentially violent American men. Congress rationally sought to regulate only those businesses whose main function is to facilitate these international matches rather than painting all dating services with a broad brush.\footnote{In American Online Dating Association v. Gonzales, the court rejected a TRO and eventually dismissed claims under equal protection and freedom of speech. Id. at 1379. American Online Dating Association v. Gonzales, No. 3:06-CV-123 (S.D. Ohio May 25, 2006). \textit{See generally:} Lindee, \textit{supra} note 94.}

\section*{IV. THE TRAFFICKING VICTIMS PROTECTION ACT DOES NOT OVERRIDE DIPLOMATIC IMMUNITY}

\subsection*{A. Applying the forced labor statute to trafficking for the purpose of domestic service}

Many instances of trafficking in persons occur due to the demand for workers within the home. These domestic workers often clean the house, care for children and perform other domestic duties. These are particularly egregious cases as it is frequently the women, who are traditionally in charge of domestic affairs, commit the trafficking offenses.\footnote{See \textit{e.g.} Ramos \textit{v.} Texas, No. 13-06-00646-DR (2009), where the female defendant’s husband arranged for a housekeeper to be smuggled illegally into Texas, and then forced her to work mostly without pay and threatened her with deportation if she did not work. For the Texas law, see Texas Penal Code Ann. § 20A.02 (Vernon Supp.2008).}

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

\begin{quote}
[I]t is intended that prosecutors will be able to bring more cases in which individuals have been trafficked into domestic service, an increasingly common occurrence, not only where such victims are kept in service through overt beatings, but also where the traffickers use more subtle means designed to cause their victims to believe that serious harm will result to themselves or others if they leave.\footnote{H.R. Conf. Rep. No 106-939 at 101 (2000), 2000 SL 1479163 (Oct 5, 2000).}
\end{quote}

In \textit{United States v. Djoumessi},\footnote{\textit{United States v. Djoumessi,} 538 F. 3d 547 (2008).} the court rejected the defendant’s argument that the victim’s labor was voluntary because the conditions were better than those she would have encountered in her own country. The victim was a 14 year-old girl from Cameroon who worked as a domestic worker for defendants. She was promised education in exchange for performing housekeeping tasks for the defendants and their two young children, but was never sent to school. She was constantly beaten and sexually abused on several occasions. The court reasoned that:
[A] slave master cannot escape the clutches of section 1584 by contending that he subjected the servant to slightly less wretched conditions than she would have experienced elsewhere. Involuntary servitude is a fixed prohibition, not a relative one. It thus sweeps up all forced labor, even when the victim is freed from the bondages of one bad relationship and placed in another.\footnote{Id. at 553.}

Still, while the husband may not participate in the abuse committed by his wife towards the victim in cases of forced labor for domestic service, it is enough that he is aware of his wife’s actions and the victim’s condition to be held liable for conspiracy to commit the crimes of forced labor under article 1581 and document servitude in accordance with article 1589. This was the case in United States v Sabhnani.\footnote{Sabhnani, 599 F.3d.} In this case, the victims traveled to the U.S. from Indonesia to work as domestic servants for defendants who locked up their passports and made them work long hours under difficult working conditions. The court stated that although the husband did not personally physically abuse them or personally verbally threaten them, the trial evidence shows his specific intent to hold them in a condition of involuntary servitude by means of [his wife’s] threat and actions. This does not evidence mere knowledge by (the husband) or his mere joint occupancy of the house; rather, it evidences his knowing participation in the criminal endeavors.\footnote{Id. at 631.}

In United States v. Udeozor,\footnote{United States v. Udeozor, 515 F. 3d 260 (2008).} the court admitted evidence of defendant’s ex-husband’s rape of the victim (a 14 year-old girl) who had left her home country of Nigeria. The victim worked as a servant for the defendant and was beaten, abused and denied basic rights as a worker. The court held that to rule this evidence inadmissible outright would create problems of its own. Sexual coercion and subordination have been among the worst indicia of involuntary servitude. To reverse the trial court’s admission of such evidence here would draw us closer to an inadvisable rule of per se inadmissibility with respect to a badge and incident of servitude, which is distressingly common, not just historically, but for young women who find themselves in coercive circumstances today.\footnote{Id. at 266.}

The court concluded that the defendant “was part of a conspiracy that substituted for a promised education and compensation a regime of psychological cruelty and physical coercion that took some of the best years of a young girl’s life. For that, involuntary servitude is not too strong a term.”\footnote{Id. at 272.}
B. Diplomatic immunity as a shield against prosecution in cases of trafficking in persons

Several times, the United States has uncovered trafficked women and children performing domestic service for foreign diplomats who were protected by diplomatic immunity. When the defendant is a diplomat working in the United States, he or she may be protected by diplomatic immunity as was the case in Sabbithi v. Waleed KH N.S. Al Saleh.228

[P]laintiffs worked for the defendant and his wife in Kuwait for a period ranging from five and a half years to eight and a half months. In Kuwait, plaintiffs allegedly worked seven days a week, for long hours each day, and were paid between 35 Kuwaiti dinar (approximately $121 U.S. dollars) and 40 KD (approximately $138 U.S. dollars) per month.229

The defendants signed a contract before coming to the United States promising to pay the plaintiffs $1,314 dollars per month but they failed to comply with the provisions of the contract and instead sent wages of 70 KW (approximately $242 dollars) to 100 KD (approximately $346 dollars) per month to their families overseas. In additions, the plaintiffs’ passports were taken away from them and they were threatened with physical harm. Finally, on January 18, 2007 they escaped.230 The plaintiffs argued that “human trafficking is a profitable commercial activity that results in severe human rights violations” and that bringing plaintiffs from Kuwait to the United States to work as domestic servants constituted human trafficking and thus was a commercial activity which is an exception to diplomatic immunity. The court disagreed holding that “hiring household help is incidental to the daily life of a diplomat and therefore not commercial for the purposes of the exception to the Vienna Convention.”232 The court concluded that “the TVPA does not override diplomatic immunity. … [T]he TVPA is silent as to whether it limits the immunity of diplomats, and courts should not read a statute to modify the United States’s [sic] treaty obligations in the absence of a clear statement from Congress.”233 The court did recognize that foreclosing plaintiffs’ access to the courts may have harsh implications, including even the denial of legal or monetary relief. According to the court,

[t]he application of the doctrine of diplomatic immunity inevitably ‘deprives others of remedies for harm they have suffered’… Congress, however, is the appropriate body for plaintiffs to present their concerns that the effectiveness of

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229 Id. at 125.
230 Id.
231 Id. at 127.
232 Id.
233 Id. at 130.
enforcing fair labor practices in the United States is compromised by diplomatic immunity.\textsuperscript{234}

In Baoanan v. Baja,\textsuperscript{235} the plaintiff accused a former diplomat and his wife of luring her from the Philippines on the pretense of working as a nurse in the United States, but upon her arrival forcing her to act as a domestic servant. The court upheld the Vienna Convention on Diplomatic Relations (VCDR), which provides immunity only for “acts performed in the exercise of a diplomat’s functions as a member of the mission.”\textsuperscript{236}

\textbf{C. From Prosecution to Prevention: A significant amendment of the TVPA}

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

\begin{quote}
[T]he Secretary shall suspend, for such period as the Secretary determines necessary, the issuance of A-3 visas or G-5 visas to applicants seeking to work for officials of a diplomatic mission or an international organization, if the Secretary determines that there is credible evidence that 1 or more employees of such mission or international organization have abused or exploited 1 or more nonimmigrants holding an A-3 visa or a G-5 visa, and that the diplomatic mission or international organization tolerated such actions.\textsuperscript{237}
\end{quote}

Another significant change in the TVPRA 2008 is the introduction of section 236, which stipulates that the U.S. government will revoke the passport of an individual convicted of participating in international sex tourism.\textsuperscript{238}

\begin{itemize}
\item \textsuperscript{234} \textit{Id.}
\item \textsuperscript{235} Baoanan v. Baja, 627 F. Supp. 2d 155; 2009 U.S. Dist. Lexis 52586; 15 Wage & Hour Cas. 2d (BNA) 203 (2009). The court clarified, “There are narrow exceptions to this diplomatic immunity, which are articulated in Article 31: A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of: (a) A real action relating to private immovable property …; (b) An action relating to succession …; (c) An action relation to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.” \textit{Baoanan v. Baja}, 627 F. Supp. 2d. at 161.
\item \textsuperscript{236} \textit{Id.}
\item \textsuperscript{237} TVPRA 2008 § 203(a)(2).
\item \textsuperscript{238} Section 236 states that the U.S. Secretary of State will not issue a passport to an individual convicted of violating section 2423 of title 18, United States Code, Travel With Intent To Engage in Illicit Sexual Conduct, if the individual used a passport or passport card or otherwise crossed an international border in committing the offense. TVPRA 2008 § 236.
\end{itemize}
V. WHEN DOES THE TRAFFICKING VICTIMS PROTECTION ACT APPLY ON AN EXTRATERRITORIAL BASIS?

A. Transnationality of the crime of trafficking requires special discovery procedures

The transnational nature of many trafficking cases poses particular challenges for the plaintiffs, who must gather evidence and testimony from far-flung areas, as stated in Cruz v. Toliver:239

[C]laims of forced labor and trafficking under 18 U.S.C. 1589 and 18 U.S.C. 1590 required more time, effort and research to address than the FLSA claim… The Plaintiff’s counsel not only had to conduct discovery here in the United States, but also had to go abroad to take discovery in order to submit the claim under those statutes.240

Because of these additional burdens, the court allowed for additional attorney’s fees to be awarded. Furthermore, the prosecution of a case of trafficking in persons may require international cooperation between the country of origin and the country of destination, which may prolong the trial. In United States v. Maksimenko,241 both of the Ukrainian defendants were charged with obtaining labor and services from Ukrainian women in the U.S. through the use of threats and physical restraints in violation of 18 U.S.C. 1589. The court granted the government’s motion for continuance for five months so that it could obtain information from Ukraine. The court found that the five-month period was not excessive and did not trigger the application of the Constitutional right to a speedy trial.242 The U.S. government submitted a request to the government of Ukraine pursuant to the treaty on Mutual Legal Assistance in Criminal Matters between the U.S. and Ukraine but processing that request took a significant amount of time.

B. Early rejection of the extraterritorial application of the Trafficking Victims Protection Act

Trafficking in persons is a transnational crime that requires transnational responses, including the recognition of the crime as an extraterritorial offense. In 2000 the TVPA did not explicitly provide for the principle of extraterritoriality.243

In Nattah v. Bush,244 the plaintiff’s slavery claim was dismissed by the court, which stated: “to the extent that Plaintiff’s story relies upon the Thirteenth Amendment, that amendment does not

240 Id. at 8.
242 Maksimenko, U.S. Dist. at 9. See also: U. S. Cons. Amend. VI.
243 TVPA.
244 Nattah v. Bush, 541 F. Supp 2d at 233 (quoting Tel-Oren v. Libyan Arab Republic, 726 F. 2d 774, 809 (D.C. Cir. 1984)).
in itself create or promote right of action.” The court continued, “similarly, the plaintiff fails to provide a basis for his slavery claim under the Trafficking Victims Protection Act.” The court referred to John Roe I v. Bridgestone Corp. in which the court concluded that 18 U.S.C. 1589 did not apply extraterritorially to conditions on a Liberian rubber plantation and that the plaintiff could not maintain a civil claim pursuant to the civil cause of action created by section 1595. The court in Nattah said

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

In John Roe I v. Bridgestone Corp, the plaintiffs were workers who tapped rubber trees on the Bridgestone rubber plantation in Liberia. The plantation workers were denied basic living conditions, including food and decent accommodations, and minor workers were forced to do hazardous work with their fathers in order to meet the required quota of tapped trees. Whether the TVPA has an extraterritorial effect was one of the issues raised by the plaintiffs. The court concluded that “[t]he Thirteenth Amendment bans slavery and involuntary servitude only ‘within the United States, or any place subject to their jurisdiction.’ By its terms, that language does not appear to reach activity in other countries.” The court then stated that section 1589 of the act “does not provide a remedy for alleged violations of section 1589’s standards that occur outside the United States.” Plaintiffs argued that the TVPA, of which section 1589 is a part, “also includes an array of measures to counteract forced labor and trafficking in persons, including

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245 Id. at 234.
246 Id. The court explained that, “[f]urther, plaintiff cites several statutes in Title 18 of the United States Code [including 18 U.S.C. § 1581, 1583, 1584, 1589, 1590], that he asserts create a private right of action to enforce the 13th Amendment. Generally speaking, these statutes create criminal liability for enticement into forced labor, sale into slavery, and use or provision of forced labor; they do not create an independent means of asserting a private action. However, 18 U.S.C. 1595 expressly provides for a civil remedy for victims of violations of sections 1589, 1590 and 1591. Yet, there is no indication that section 1595 provides any remedy for alleged violations of the three statutes that occur outside the United States. The court thus finds that Nattah’s proposed extraterritorial application of these statutes is improper.” Nattah v. Bush, 541 F. Supp 2d at 234-35.
248 The Court came to a similar conclusion in Equal Employment Opportunity Commission (EEOC) v. Arabian-American Oil Co. 499 U.S. 244, 248 (1991), when it wrote “[i]t is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.” Id.
249 Nattah v. Bush, 541 F. Supp 2d at 235, note 11. Later in the case, the court addressed another tactic of the plaintiff. “Although each of these statutes applies only to territories or states of the United States, plaintiff claims that Iraq should be considered a United States territory for some or all of his period of captivity because ‘the United States invasion of Iraq in 2003 overthrew and completely replaced the Iraqi government… and treated and acted as though Iraq was a protectorate and/or colony,’ …there is simply no authority for the proposition that Iraq is the United States territory for the purposes of plaintiff’s claim.” Id. at 235 (sub-quotation is from Nattah’s complaint, citation omitted).
251 Id. at 999.
provisions for activities overseas.” The court disagreed stating that “[t]he international dimensions of the problems of trafficking and forced labor do not support a departure from the usual presumption against extraterritorial application for section 1589… Congress knows how to legislate with extraterritorial effect in this field. It has done so expressly when it has intended to do so.”

C. Statutory amendment of the Trafficking Victims Protection Act to apply on extraterritorial basis

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

The Military Extraterritorial Jurisdiction Act (MEJA) was enacted in 2000, extending criminal liability to civilians working for the U.S. abroad and criminalizing contractors “employed by or accompanying” the U.S. armed forces for offenses that under U.S. law would be considered felonies punishable by at least one year of prison. In 2004, MEJA extended its scope of

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252 Id. at 1001.
253 Id. at 1002. The court referred to the first federal anti-slavery statute passed by Congress in 1800 which provided that “whoever, being a citizen or resident of the United States, voluntarily serves on board of any vessel employed or made use of the transportation of slaves from any foreign country or place to another, shall be fined under this title or imprisoned not more than two years, or both.” 77 U.S.C. § 1586. The court concluded that section 1589, unlike section 1591 which Congress expanded based on its power to regulate interstate and foreign commerce, stems from the Thirteenth Amendment. Unlike the sex tourism statute, see e.g. United States v. Jivan 2008 U.S. Dist. LEXIS 562 (2008), where the defendant was charged with attempt to coerce a minor to commit illegal sexual activity in violation of section 2422 (b) and travel with intent to engage in illicit sexual conduct in violation of section 2423 (b). The defendant, a Canadian citizen permanently residing in Michigan, travelled to a shopping mall in Ontario, Candia to meet who he thought was a 13 year-old girl. The girl was in fact a law enforcement agent who engaged in a series of sexually explicit conversations in internet chat rooms with the defendant. The defendant argued that the statute does not apply extraterritorially. The court disagreed, holding that “[t]he statute criminalizes travel in foreign commerce for the purpose of engaging in illicit sexual conduct, as (defendant) did. The language of the statute clearly contemplates extraterritorial application, and such application does not run afoul of international law or due process or exceed Congress’s power under the Foreign Commerce Clause.” Id. at 6.

application to contractors of any federal agency “to the extent such employment related to
supporting the mission of the Department of Defense overseas.”

The original act did not provide for any extraterritorial application. The TVPRA 2003 did not
provide for extraterritorial application, but stated that:

[A]ny grant, contract, or cooperative agreement provided or entered into by a
federal department or agency under which funds are to be provided by a private
entity shall be included a condition that authorizes the department or cooperative
agreement, without penalty, if the grantee or any sub-grantee, or the contractor or
any subcontractor (i) engages in severe forms of trafficking in persons or have
procured a commercial sex act during the period of time that the grant, contract,
or cooperative agreement is in effect, or (ii) uses forced labor in the performances
if the grant, contract or cooperative agreement.

In 2005, the TVPA was amended to include an extraterritorial application in cases involving
civilian employees of the U.S. in a foreign country. Section 2371 of the act provides,

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

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

In 2008 Congress decided to apply the Act on an extraterritorial basis for all of the crimes that
are covered under the Act.

258 TVPRA 2003 § 3.
259 TVPRA 2005 § 2371.
260 The TVPRA 2005 added Criminal offenses committed by Federal contractors outside the United States as a
crime under Title 18 of the U.S. Code: “Whoever, while an extraterritorial Federal contractor, engages in conduct
outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the
conduct had been engaged in within the special maritime and territorial jurisdiction of the United States shall be
punished as provided for that offense.” 18 U.S.C. Chap. 212A § 3271(a).
261 The TVPRA 2008 specified in Section 223 Jurisdiction in Certain Trafficking Offenses that the 18 U.S.C. chap.
77 should be amended by adding “Sec. 1596. Additional jurisdiction in certain trafficking offenses: (a) In General-
In addition to any domestic or extra-territorial jurisdiction otherwise provided by law, the courts of the United States
have extra-territorial jurisdiction over any offense (or any attempt or conspiracy to commit an offense) under section
1581, 1583, 1584, 1589, 1590, or 1591 if-- (1) an alleged offender is a national of the United States or an alien
lawfully admitted for permanent residence (as those terms are defined in section 101 of the Immigration and
Nationality Act (8 U.S.C. 1101)); or (2) an alleged offender is present in the United States, irrespective of the
nationality of the alleged offender.” TVPRA 2008 § 223(a).
VI. INCORPORATING INTERNATIONAL LAW ON TRAFFICKING IN PERSONS IN U.S. COURTS

A. The TVPA as an implementation of the U.N. Protocol on Trafficking: a comparison

The U.N. Protocol which was passed in 2000 represents an international consensus that trafficking in persons should be criminalized, acts of trafficking should be prevented, and victims of trafficking should be protected. In comparison with the U.N. Protocol, the TVPA’s definition of trafficking in persons is narrow in scope in several ways, most particularly, TVPA operational provisions are limited to severe forms of trafficking. In addition, the U.N. Protocol recognizes more forms of trafficking. The focus in the TVPA is on the illegal means, while the U.N. Protocol emphasizes exploitation. In cases of trafficking in persons other than children, the TVPA requires proof of force, fraud or coercion. Consequently, these illegal means are narrowly defined under the Act. The U.N. Trafficking Protocol adopts a more expansive definition that includes, “threat, or use of force, or other means of coercion, of abduction, of fraud, of deception, of abuse of power, or of a position of vulnerability.” According to this more comprehensive definition of illegal means, force, fraud, or coercion, at least as narrowly defined as under American law, are not required. The TVPA is basically an implementation of article 5 of the U.N. Protocol which requires states to adopt specific anti-trafficking legislation making the act of trafficking an offense.

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262 U.N. Protocol, supra note 69, at Preamble.
263 “Severe forms of trafficking in persons” is defined in the TVPA as “(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery” TVPA § 103(8).
264 In Article 3 of the U.N. Protocol, it defines trafficking in persons as “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.” U.N. Protocol, supra note 69, at art. 3(a).
265 Id. at § 1(3)(a) … The Travaux Preparatoires define a position of vulnerability as “any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.”
266 The Protocol further states that consent, “expressed by a person in such vulnerable condition, is irrelevant” Id. at I(3)(b). Consequently, whether the victim performs the work or service voluntarily should not affect the outcome of the case.
267 “1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally. 2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences: (a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article; (b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this
question becomes to what extent U.S. courts refer to the U.N. Protocol or other related international legal standards when they rule on cases of trafficking. There is evidence that American courts incorporate international conventional law when deciding a domestic case.²⁶⁸ The Supremacy Clause states that “this constitution as the law of the United States and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby.”²⁶⁹

B. International legal instruments used by domestic courts in deciding cases of trafficking in persons

Incorporating international law in cases of trafficking in persons and sexual exploitation was the issue in several recent cases. In one case, the issue was whether an international convention provides a plaintiff with a cause of action. In Nattah v. Bush, the plaintiff worked as an Arabic linguist in Kuwait for L-3 Communications Titan. He claimed to have been sold as “a slave” to the U.S. military in Iraq and forced to work against his will. The plaintiff alleged violation of international law, which the court dismissed, ruling that the plaintiff cannot assess a claim under the U.N. Charter because that treaty provides no right of action against private entities.²⁷⁰ The court also dismissed the plaintiff’s claim that he had an action under the U.N. Protocol saying

²⁶⁸ In an interesting case, the Court applied an international convention that the U.S. did not ratify as a part of customary international law. The U.S. Court of Appeals held on September 8, 2005 that the “best interest of the child” could not categorically prevent the deportation of a parent according to national immigration law. Cabrera-Alvarez, a Mexican citizen, was charged with illegal entry in the United States and deemed eligible for removal after having lived and worked there illegally for 10 years. His two children would stay in the U.S. with their mother if he were removed. Under the U.S. Immigration and Nationality Act (INA), a cancellation of removal could be granted to aliens who demonstrated that removal would result in “exceptional and extremely unusual hardship” to the alien’s spouse, parent, or child. Even in the absence of ratification, it may be argued that an international convention becomes part of international customary law. Cabrera-Alvarez claimed that the immigration judge had failed to interpret the INA in a manner consistent with international law. The Court of Appeals agreed that there is a legal presumption that Congress must legislate in a manner consistent with international law.²⁶⁸ Even though the United States had not ratified the Convention on the Rights of the Child (CRC), for the purpose of the case “it could be assumed”²⁶⁸ that the Convention had attained the status of customary international law. Therefore, the standards of Articles 3 (1) and 9 (1) of the CRC were applicable. The Court explained that the “best interests of the child” principle did not only apply to U.S. cases in which children were directly affected such as in custody cases, but also when they were indirectly affected, including parents’ deportation proceedings. The Court decided, however, that the “hardship standard” of U.S. immigration law did not contravene the CRC. The best interests of the child were a primary condition when considering the removal of a parent but U.S. immigration law should not be interpreted, in light of the CRC, to mean that only a child’s best interests may be considered. The Court found that the facts of the case were “sadly common hardships that can result when an alien parent is removed” but not “exceptional and extremely unusual.”²⁶⁸

²⁶⁹ U.S. Const. art. 7, cl. 2.

²⁷⁰ Likewise, Nattah failed to establish that the Geneva Conventions provide a cause of action against a private party. “‘The Hague Conventions similarly cannot be construed to afford individuals the right to judicial enforcement’ and ‘may have never been regarded as law private parties could enforce it.’ Simply put, plaintiffs’ international law allegations have failed to state a claim upon which this court may grant itself.” Nattah v. Bush, 541 F. Supp 2d at 233 (quoting Tel-Oren v. Libyan Arab Republic, 726 F. 2d 774, 809 (D.C. Cir. 1984).
“[t]he court is aware of no authority that would permit plaintiff to assert a private right of action [...] under this protocol.”

Plaintiffs may invoke the Alien Tort Claim Act (ATCA) when claiming a violation of international law. Such was the case in Roe I v. Bridgestone Corp, where the court, relying upon Sosa v. Alvarez-Machain, concluded that:

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

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

In the United States v. Bianchi, the court stated that “the sexual abuse of children is universally condemned.” In this case, the defendant was convicted for traveling with the intent to engage in illicit sexual conduct in foreign places in violation of section 2423 (e) and using a facility in foreign commerce to entice a minor to engage in sexual activity in violation of section 2422 (b). The defendant traveled to Moldova on five occasions to engage in illicit sex with minors whom he induced into consensual sex through gifts and money. The defendant also raped them. He challenged his indictment on constitutional grounds, arguing that by enacting 18 U.S.C. section 2423 (c), Congress overstepped their powers under the Foreign Commerce Clause. The court stated that, ‘Congress’ authority under the Foreign Commerce Clause is

279 Id. at 4.
280 U.S. Const. art. 1, § 8, cl. 3.
broad,” and that section 2423 (c), “applies only to American citizens or permanent residents who travel in foreign commerce.” The defendant was charged with engaging in illicit sex acts that allegedly occurred on trips where he flew in international commercial flights to Moldova, Romania, or Cuba, then flew back to the United States. These types of illicit sex acts have been vigorously and uniformly condemned by the international community. The Optional Protocol (to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography), which has been ratified by 119 countries, including the United States, Moldova, and Cuba, requires that the sexual exploitation of children be fully covered by a signatory’s national criminal law, “whether such offenses are committed domestically or transnational.” Accordingly, because the defendant failed to make “a plain showing that Congress has exceeded its Constitutional bounds in enacting 18 U.S. C 2423 (c), his Foreign Commerce Clause challenge will be denied.” The court thus relied on the international instrument to rule on the extent of the Foreign Commerce Clause.

In United States v. Pendleton, the defendant, a U.S. citizen, was arrested, convicted, and sentenced under the German law for having sexual contact with a teenage boy. Upon his deportation back to the United States, he was charged with violation of the PROTECT Act: traveling in foreign commerce to engage in illicit sexual activity with a minor. In rejecting his double jeopardy claim, the court noted that:

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

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281 Id. at 13.
282 Id. at 15.
283 Id.
284 In a recent case, United States v. Armstrong, the defendant, who was a U.S. citizen, travelled to Mexico to engage in illicit sexual activity with a 15-year old female. The defendant was charged with violation of 18 U.S.C. section 2423(c). “Prior to the statute’s amendment, the House of Representatives noted that the ‘current law (section 2423 (b) require[d] the government to prove that the defendant travelled with intent to engage in the illegal activity.’ In contrast, the instant offer does not require such a showing. Rather, the House was equally clear that under the new section, section 2423 (c), ‘the government would only have to prove that the defendant engaged in illicit sexual conduct with a minor while in a foreign country.’ Thus, intent is not an essential conduct element under section 2423 (c)…” thus expanding minimal liability for those who commit sex crimes. Criminal liability may be found even when the travel was commenced without the intent to have sex with a minor, but where, nonetheless, the defendant engaged in illegal sexual activity during the course of a trip to another country. United States v. Armstrong, 2007 U.S. Dist LEXIS 82821 (2007), 18 U.S.C. 2423 (c) “Any United States citizen who travels in foreign commerce, and engage in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.” Id. note 29 at 2, note 2 (quoting H.R. REP. No. 108-66, at 51 (2003)).
286 18 U.S.C. § 2423(c) and (f)(1).
of United States law under the Protect Act. Germany and the United States are separate sovereigns. 287

Consequently, the court concluded that the defendant’s prosecution under the PROTECT Act of the United States was not barred by principles of international law. The court stated that:

[t]he validity of the laws of the United States do not depend on international law… A state may not exercise jurisdiction to persuade law with respect to a person or activity having connection with another state when the exercise of such jurisdiction is ‘unreasonable. 288

In United States v. Clark, 289 the defendant, a U.S. citizen was arrested in Cambodia by the Cambodian National Police for engaging in sexual contact with two Cambodian boys. Clark had lived in Cambodia for approximately five years. 290 The court found the extraterritorial application of the sex tourism statute reasonable under international law.

Although there is only a minimal link between the activity sought to be regulated by this statute and the territory of the United States, several of the other factors favor a finding of reasonableness here. There is a strong connection between the United States and its citizens (and resident aliens) who commit the illicit activity. The prohibition against sexual activity with young children is considered desirable and is widely accepted. There is very little likelihood of conflict with regulation by other states. 291

287 Pendleton, U.S. Dist. at 17.
288 Id. at 14-15.
291 Id. at 1132. The court here referred to factors considered in determining reasonableness of the application of a law on extraterritorial basis contained in the Restatement (Third) of Foreign Relations of Law of the United States, section 403 (2). The court examined the following: (a) The link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial direct, and foreseeable effect upon or in the territory. (b) The connections such as nationality residence, or economic activity, between the regulating state and the person principally responsible for the duty to be regulated, or between that state and those whom the regulation is desired to protect; (c) The character of the activity to be regulated, the importance of regulation to the regulatory state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (d) The existence of justified expectations that might be protected or hurt by the regulation; (e) The importance of the regulation to the international political, legal, or economic system; (f) The extent to which the regulation is consistent with the traditions of the international system;
In United States v. Frank, the defendant, a U.S. citizen, was indicted for violating 18 U.S.C.S. 2423 (c) on five occasions by traveling to Cambodia to engage in illicit sexual activity with various females under the age of 18. The court noted that “one of the statutes that Congress enacted to implement that Optional Protocol was section 2423 (c), part of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Act of 2003 (the “PROTECT Act”).” The defendant argued that exercising extraterritorial jurisdiction violates international law. The court disagreed. It stated:

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

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

(g) The extent to which another state may have an interest in regulating the activities, and (h) The likelihood of conflict with regulation by another state.


Frank, 486 F. Supp. 2d at 1357. “[Defendant] does not contend that the Optional Protocol was beyond the treaty power granted to the President by the Constitution. Nor could he. First, nothing in the Optional Protocol – insofar as it relates to commercial sex with minors – is prohibited by the Constitution or the Bill of Rights. Second, child sex tourism is undoubtedly a significant problem and is, by its very nature, a global concern. Not only are American citizens going abroad to have sex with child prostitutes, there is the possibility that foreigners will come to the United States for the same purpose…President Clinton therefore could personally have believed, as he said in his letter of transmittal to the Senate, that child sex tourism required an international solution like the one contained in the Optional Protocol, including extra-territorial criminal prosecution by countries of their own citizens for engaging in commercial sex with minors abroad.” “The next questions are whether, under rational basis review, Congress could enact section 2423 (c) under the Necessary and Proper Clause to implement the Optional Protocol and, if so, whether the statues -insofar as commercial sex with minors is concerned- reasonably implements the Optional Protocol… The answer to both questions is yes. First, section 2423 (c) bears a national relationship to the Optional Protocol in general, and to article 2 (b) and 3 (1) (b) -which deals with child prostitution- in particular… Second, section 2423 (c) reasonably implements the Optional Protocol. Article 3 (4) and 4 (2) required that countries take appropriate measures to establish the liability of individual for offenses such as paying a child for sex. Extra-territorial criminal liability is one of the options allowed by the Optional Protocol, and section 2423 (c) has extra-territorial application… Moreover, defining a minor as a person under that age of 18… is also congruent with the Optional Protocol.” Id. at 1357-58. For a collection of articles and case studies on child sex tourism, see generally: The Protection Project, International Child Sex Tourism: Scope of the Problem and Comparative Case Studies, The Johns Hopkins University Paul H. Nitze School of Advanced International Studies (January 2007), available at: www.protectionproject.org.

Id. at 1359. The court noted that “the Constitution gives the President the authority to enter into treaties, subject to ratification by the Senate. All Treaties made under the authority of the United States become the “supreme law of the land” and Congress has, pursuant to the necessary and proper clause, the power to enact legislation to implement treaties.” The court then said that “[i]n July of 2000, President Clinton signed the Optional Protocol to the United States Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. The Senate ratified the Optional Protocol in 2002, and it entered into force in January of 2003.
As an initial matter, section 2423 (c) does not regulate the conduct the Cambodian nationals (or, for that matter, the nationals of any countries other than the United States). In addition, as noted earlier, Cambodia ratified the Optional Protocol in May of 2002... If Cambodia does not believe that the Optional Protocol infringes on its sovereignty -and it obviously does not- it will not be offended by laws enacted by the United States to implement the Optional Protocol, which regulate the conduct of American citizens abroad.295

VII. CONCLUSION

The TVPA has evolved since 2000, creating various criminal statutes and adding new offenses to enhance prosecution in cases of trafficking. In 2005 the TVPRA added § 3271 Criminal offenses committed by Federal contractors outside the United States. And in 2008 Congress added three new statutes to the TVPA: § 1593A Benefitting financially from peonage, slavery, and trafficking in persons, § 1594 Conspiring in trafficking, and § 1351 Fraud in foreign labor contracting.

Since 2000, courts relying on the plain statutory language of the text of the TVPA, findings of Congress, the legislative history of the Acts and Congressional meetings as main tools of legal interpretation have broadly interpreted the criminal statutes of the TVPA to expand criminal liability and enhance the penalty against the offender who takes advantage of a vulnerable victim. This was confirmed by the Court of Appeals in United States v. Sabhnani (2010), when they ruled that some victims are more vulnerable than others based on their distance from home, from family, and from familiar institutions, their unfamiliarity with the language, and their fear of fear retribution and forcible removal to countries in which they face retribution.296 The Court clarified that although many victims of trafficking suffer from these circumstances, the TVPA never defines victims as inherently vulnerable, so there is potential to apply the vulnerable victim enhancement doctrine to cases of trafficking in persons. In Doe v.

295 Id. at 1359-60. In a related case, Martinez, 599 F. Supp. 2d, the defendant, a U.S. citizen, travelled to Mexico to engage in illicit sexual conduct with a minor. The defendant argued that to apply section 2423 (a)-(k) on an extraterritorial basis would violate principles of international law. The court disagreed stating that “upon review, section 2423 withstands scrutiny under several principles of international law. First, the defendant is charged as a United States citizen. Citizenship alone grants Congress the right to enact laws with extraterritorial application, this authorizing jurisdiction may also therefore be apparent under the “passive personality” principle (since the citizen is a national). Id. at 14. See: Joanna Doerfel, Regulating Unsettled Issues in Latin America Under the Treaty Powers and the Foreign Commerce Clause 39 U. Miami Int’l L. Rev. 331 (2008) (on the global problem of sex tourism, specifically in Latin America). As stated by Restatement (Third) of Foreign Relations of Law of the United States, section 402 comt. A (1987), the principles of jurisdiction include: (1) The objective territorial principle, under which jurisdiction is asserted over acts performed outside the United States that produce detrimental effect in the United States; (2) The protective principle, under which jurisdiction is asserted over forgiveness for acts committed outside the United States that may infringe on the territorial integrity, security, or political independence of the United States; (3) The nationality principle, under which jurisdiction is based on the national character of the offender; (4) The universality principle, which provides jurisdiction over extraterritorial acts for crimes so heinous as to be universally condemned; and (5) The passive personality principle, under which jurisdiction is based upon the nationality of the victim.

296 Sabhnani, 599 F.3d. at 252.
Reddy (2004) the court rejected the theory that forced labor must amount to traditional slavery in order to be prosecutable. The court in United States v. Nelson (2002) affirmed the ruling of United States v. Mussry (1984), that slavery as a crime is not limited to traditional oppression of a single race or ethnicity, but that it has the potential to affect anyone. Another broad interpretation of the TVPA’s criminal statutes occurred in United States v. Marcus (2007), when the court ruled that the definition of a commercial sex act includes both prostitution and pornography. In United States v. Bradley (2004), the court acknowledged that ‘serious harm’ incurred by the victim can be in the form of psychological harm, not just physical harm. And while coercion is still a requirement for an act to be deemed one of human trafficking, the court broadened the interpretation of coercion to include not just physical and legal coercion, but also psychological coercion, thus expanding the definition of coercion under United States v. Kozminksi. The definition of abuse or threatened abuse of the law or legal process was clearly defined to include the threat of deportation in Catalan v. Vermillion Ranch Ltd (2007) and in United States v. Veerapol (2007). This ruling was affirmed in Ramos v. Hoyle (2008) where the court, citing United States v. Garcia (2003), noted that in terms of a statement about a victim’s risk for deportation, the truthfulness or falsity was irrelevant, only that the statement was being used for the purposes of coercion.

A reading of courts’ interpretation of the TVPA suggests that they have continued to define the burden of proof so that unnecessary elements are not required to establish the crime of trafficking in persons. Many of these rulings alleviate the burden of proof on the victim and label more behaviors as trafficking. For instance, the courts in United States v. Marcus (2007) and United States v. Kaufman (2008) ruled that prosecution for labor trafficking is not dependent upon demonstration that the labor was for a “business purpose.” Another, established by the court in Marcus, is that obtaining a commercial sex act need not be the “dominant purpose” of the trafficker’s use of coercion or threats for the scenario to be considered trafficking. Thirdly, the intent to coerce someone to perform a commercial sex act is the only requirement for prosecution, not the act itself, as ruled by the court in Iowa v. Russell (2010). And a prior consensual relationship between the trafficker and the victim does not release the trafficker from liability, as substantiated by the court in Marcus. All of these interpretations tighten loopholes by making trafficking-related behavior part of the prosecutable crimes.

298 Nelson, 277 F.3d. at 25. See also: Mussry, 726 F.2d. at 1451.
299 Marcus, 487 F. Supp.2d. at 306.
300 Bradley, 390 F.3d at 150.
301 Kozminksi, 487 U.S.
303 Veerapol, 312 F.3d at 1132.
305 Marcus, 487 F. Supp.2d at 26-27.
306 Kaufman, 546 F.3d at 1261.
307 Marcus, U.S. Dist. at 313.
308 Iowa v. Russell, 2010 Iowa App. at 8.
309 Marcus, U.S. Dist. at 309.
Courts’ rulings on the TVPA and its relevant statutes have incorporated and upheld a number of Constitutional principles, in accordance with the Post Ex Facto Clause, the Commerce Clause, the void-for-vagueness legal concept, and the Double Jeopardy and Equal Protection Clauses of the Fifth Amendment. The defendants were acquitted based on the Ex Post Facto Clause in both United States v. Marcus (2008)\(^{310}\) and United States v. Jackson (2007),\(^{311}\) because the trafficking activities took place before the enactment of the TVPA. In United States v. Paulin (2009), the Court convicted the defendant because the trafficking activities continued well after the effective date of the TVPA.\(^{312}\) In both United States v. Simonson (2007)\(^{313}\) and United States v. Martinez (2009),\(^{314}\) the courts upheld that the laws created by the TVPA fall under the scope of Congress’s constitutional right to regulate the use of the channels of interstate commerce. The Commerce Clause’s role in interpreting the TVPA was expanded dramatically by the court in United States v. Evans (2007), which held that while the defendant’s trafficking activity took place entirely in one state, the nature of the crime of trafficking in persons is such that it has an aggregate economic impact on interstate and foreign commerce.\(^{315}\) A number of cases have addressed the language in the forced labor statute 1589 and the void-for-vagueness doctrine applies because of unclear language in the statute. But the courts in United States v. Calimlim (2008),\(^{316}\) United States v. Ramos-Ramos (2007)\(^{317}\) and United States v. Garcia (2003)\(^{318}\) have all ruled that the words used in section 1589 are common words and sufficiently clear. In United States v. Maka (2007), court affirmed the distinction between the charges of human trafficking and those of alien smuggling and harboring, and therefore upheld that the Double Jeopardy Clause of the Fifth Amendment did not apply to the case.\(^{319}\) And in European Connections v. Gonzales (2007), the court concluded that the International Marriage Broker Regulation Act of 2005 did not violate the Equal Protection Clause of the Fifth Amendment by making a distinction between domestic online matchmaking services and international marriage brokers.\(^{320}\)

In interpreting the criminal statutes of the TVPA, the courts have established a number of principles. The court in David v. Signal Int’l (2009) confirmed that the benefits awarded to victims are not dependent on immigrant status.\(^{321}\) The transnational aspect of cases of trafficking in persons and the necessary extension of the evidence-gathering period to prepare for such cases was acknowledged by the court in United States v. Maksimenko (2005), who ruled that such

\(^{310}\) Marcus, 538 F.3d at 101.
\(^{311}\) Jackson, 480 F.3d at 1024.
\(^{312}\) Paulin, 329 Fed. Appx. at 234.
\(^{313}\) Simonson, 244 Fed. Appx. at 825-26 (quoting Cummings, 281 F. 3d).
\(^{314}\) Martinez, 599 F. Supp 2d at 807 (quoting the Preamble to the Optional Protocol of the Convention on the Rights of the Child).
\(^{315}\) Evans, 476 F.3d at 1179.
\(^{316}\) Calimlim, 538 F.3d at 711.
\(^{317}\) Ramos-Ramos, U.S. Dist. at 18.
\(^{318}\) Garcia, No. 02-CR-1105-01 at 19 (quoting Hill v. Colorado, 530 U.S. 703, 732 (2000)).
\(^{320}\) European Connections v. Gonzales, 480 F. Supp. 2d at 1369-1370.
extensions do not violate the constitutional right to a speedy trial.\textsuperscript{322} The TVPA of 2000 did not explicitly provide for the principle for extraterritoriality, and the courts in Nattah v. Bush (2008) and John Roe I v. Bridgestone Corp. (2009) both found no Congressional intent to incorporate principles of extraterritoriality into the section 1589 ban on forced labor\textsuperscript{323}. In 2008 the TVPRA applied all of the crimes in the Act on an extraterritorial basis, thus adding an additional legislative tool to meet all cases of trafficking in persons regardless of whether the act of trafficking has occurred. One of the challenges to the scope of the TVPA is the principle of diplomatic immunity, which provided a shield against the prosecution of a trafficker in the case of Sabbithi v. Waleed KH N.S. al Saleh (2009).\textsuperscript{324} Congress’s amendment in the TVPRA 2008, namely, the limiting the issuance of A-# and G-5 visas, acts as a preventative measure against diplomats exploiting their workers from the aegis of diplomatic immunity.\textsuperscript{325}

In essence, the TVPA is an implementation of the U.N. Protocol on Trafficking. Although they rarely incorporate the Protocol, or other international legal instruments, one can infer from the judicial decisions decided in the last ten years that the principles established by U.S. courts are in harmony with international principles, whether they be the prohibition of slavery or exploitation. Utilizing international law becomes necessary in cases of trafficking in persons when the crime is transnational in nature, has such a vast global economic impact and involves a vulnerable victim from a foreign country, crying for redress and praying for justice and freedom.

\textsuperscript{322} Maksimenko, U.S. Dist. at 9.
\textsuperscript{323} John Roe I v. Bridgestone Corp., 257 F.R.D. at 998 (quoting the 13th Amendment).
\textsuperscript{324} Sabbithi v. Waleed KH N.S. Al Saleh, 605 F. Supp. 2d at 130.
\textsuperscript{325} TVPRA 2008 § 203(a)(2).