

## HUMAN TRAFFICKING AND RICO: A NEW PROSECUTORIAL HAMMER IN THE WAR ON MODERN DAY SLAVERY

*Kendal Nicole Smith\**

### INTRODUCTION

Season two of the critically acclaimed HBO show “The Wire” opens with the Baltimore Port Police’s discovery of the bodies of thirteen Russian young women stuffed inside a shipping container.<sup>1</sup> Later episodes reveal that the women were smuggled into the United States by a criminal organization that intended to force the women to work as prostitutes in brothels owned by the organization.<sup>2</sup> Throughout the season, law enforcement on the show discovered that in addition to sex trafficking, the criminal enterprise was also involved in narcotics distribution, money laundering, extortion, wire fraud, and murder.<sup>3</sup>

Unfortunately, “The Wire” story arc has become an increasingly common reality in the United States. Human trafficking is an international problem occurring in U.S. cities where criminal organizations like those portrayed in the show are forcing people to work as sex slaves or bonded laborers.<sup>4</sup> For example, Mara Salvatrucha 13 (“MS-13”), one of the most violent street gangs operating within U.S. borders, is heavily involved in human trafficking.<sup>5</sup> With over 10,000 members across the country, MS-13’s largest concentrations are in cities with significant immigrant populations where the gang preys upon these vulnerable members of society through extortion and intimidation.<sup>6</sup>

---

\* George Mason University School of Law, Juris Doctor Candidate, May 2011; Notes Editor, *GEORGE MASON LAW REVIEW*, 2010-2011; Truett Theological Seminary, M.T.S., May 2008; University of North Texas, B.A. Philosophy, *cum laude*, May 2005. I would like to thank Elizabeth Bahr and Rosanne Rust for their time and insights, my family for their continuing support, and Blaire Pilkington for her inspiring dedication to the fight against human trafficking.

<sup>1</sup> *The Wire: Ebb Tide* (HBO television broadcast June 2, 2003).

<sup>2</sup> *The Wire: Backwash* (HBO television broadcast July 13, 2003); *The Wire: Duck and Cover* (HBO television broadcast July 27, 2003).

<sup>3</sup> *The Wire: All Prologue* (HBO television broadcast July 6, 2003).

<sup>4</sup> U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT 7-8* (2009) [hereinafter *TIP REPORT 2009*], available at <http://www.state.gov/documents/organization/123357.pdf>.

<sup>5</sup> David McLemore, *Marked Men: Authorities Target Vicious Gang in Texas, Across U.S.*, *DAL. MORNING NEWS*, Oct. 29, 2006, at 1A.

<sup>6</sup> *Id.*

The Department of Justice reports that between 14,500 and 17,500 people are trafficked across United States borders each year.<sup>7</sup> Surpassed only by drug-dealing, human trafficking is tied with the illegal arms industry as the second most lucrative criminal enterprise in the world.<sup>8</sup> Trafficked victims in the United States are exploited for commercial sex or are forced to work under threat of deportation and other coercive tactics and manipulation.<sup>9</sup> These victims come to America seeking economic opportunity, but instead encounter oppression and abuse.<sup>10</sup>

The United States has declared that human trafficking is a fundamental human rights violation<sup>11</sup> and has designed legislation purposely geared toward its eradication. First enacted in 2000, the Trafficking Victims Protection Act (“TVPA”)<sup>12</sup> has made great strides in fighting this war on modern-day slavery. However, as illustrated by the criminal organization in “The Wire,” human-trafficking rings have come to resemble other forms of organized criminal enterprises, often involving multiple perpetrators and complex webs of illegal activities.<sup>13</sup> The MS-13 gang, for example, in addition to human trafficking, is involved in narcotics transportation, robbery, extortion, kidnapping, and human smuggling.<sup>14</sup> This is primarily a result of globalization and the ease of international travel, which enable traffickers

---

<sup>7</sup> U.S. DEP’T OF JUSTICE, ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS 5 (2004) [hereinafter ASSESSMENT], available at [http://www.justice.gov/archive/ag/annualreports/tr2004/us\\_assessment\\_2004.pdf](http://www.justice.gov/archive/ag/annualreports/tr2004/us_assessment_2004.pdf). The report acknowledges that because of the “underground” nature of the crime, it is difficult to make a precise determination of the number of victims. *Id.*

<sup>8</sup> *Fact Sheet: Human Trafficking*, ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP’T OF HEALTH & HUMAN SERVS., [http://www.acf.hhs.gov/trafficking/about/fact\\_human.html](http://www.acf.hhs.gov/trafficking/about/fact_human.html) (last updated Aug. 10, 2010).

<sup>9</sup> TIP REPORT 2009, *supra* note 4.

<sup>10</sup> See, e.g., Grace Kahng, *Sex Slaves, Human Trafficking . . . In America?*, MSNBC.COM (Dec. 3, 2007, 2:53 PM), <http://today.msnbc.msn.com/id/22083762>. The following is an all-too-common account of human trafficking:

In spring of 2004, Katya (not her real name), like thousands of other foreign exchange university students, was looking forward to the summer job placement that she and a friend had received in Virginia Beach, Va. When she and her friend Lena arrived at Dulles Airport after a long flight from Ukraine, they were relieved to be met by fellow countrymen who spoke Russian. . . . “When we got to the hotel in Detroit, everything changed,” says Katya. “They closed the door and sat us down on the couch, took our passports and papers and said, ‘You owe us big money for bringing you here.’ They gave us strip clothes and told us that we were going to be working at a strip club called Cheetahs.” Shocked and scared, the two women were subjected to physical, mental and sexual abuse over the next year as they were forced to work 12-hour shifts stripping for local Detroit men’s clubs. According to immigration customs agent Angus Lowe, the men controlled the women through intimidation with guns and threats to hurt family members back home.

*Id.*

<sup>11</sup> Memorandum on Steps to Combat Violence Against Women and Trafficking in Women and Girls, 1 PUB. PAPERS 412, 412 (Mar. 11, 1998).

<sup>12</sup> Trafficking Victims Protection Act of 2000, 22 U.S.C. §§ 7101-12 (2006).

<sup>13</sup> See *Developments in the Law: Jobs and Borders*, 118 HARV. L. REV. 2171, 2186 (2005).

<sup>14</sup> McLemore, *supra* note 5.

such as MS-13 to expand their illegal operations and grow into multi-faceted organizations.<sup>15</sup> Though Congress has repeatedly amended the TVPA to address this issue,<sup>16</sup> additional means are necessary to supplement these efforts. The parallels between the human-trafficking problem and other forms of organized crime suggest that prosecutors should utilize the Racketeer Influenced and Corrupt Organizations Act (“RICO”),<sup>17</sup> intended specifically to eliminate organized crime,<sup>18</sup> in conjunction with the TVPA to more successfully eradicate these human-trafficking enterprises.

RICO allows prosecutors to charge a perpetrator with a separate offense if he engages in a pattern of racketeering activity consisting of at least two specified illegal acts within a particular time period.<sup>19</sup> RICO violators may receive prison sentences that exceed those allowed for the underlying offenses and may also be forced to forfeit any assets gained through the racketeering activity.<sup>20</sup> Victims of RICO crimes may also bring civil suits against the perpetrators to receive financial restitution.<sup>21</sup> These options make RICO highly effective in dismantling complex criminal organizations such as the MS-13 gang.<sup>22</sup>

Though prosecutors have been able to use RICO to charge human-trafficking enterprises since 2003,<sup>23</sup> the first RICO human-trafficking indictment was not filed until May 6, 2009.<sup>24</sup> In that case, a federal grand jury indicted multiple defendants in the Western District of Missouri on RICO charges related to forced-labor trafficking.<sup>25</sup> The indictment alleged

---

<sup>15</sup> See *Developments in the Law: Jobs and Borders*, *supra* note 13. MS-13 membership extends throughout Mexico and Central America. By obtaining control of rail lines, the gang operates a smuggling route from Central America through Southern Mexico. Though members are often deported, they return to the United States through this smuggling route. McLemore, *supra* note 5.

<sup>16</sup> See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, tits. I-III, 122 Stat. 5044, 5044-87 (codified in scattered sections of 6, 8, 18, 22, 28, and 42 U.S.C.); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (codified in scattered sections of 18 and 22 U.S.C.); Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (codified in scattered sections of 8, 18 and 22 U.S.C.).

<sup>17</sup> Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (2006).

<sup>18</sup> Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922-23.

<sup>19</sup> 18 U.S.C. §§ 1961-68.

<sup>20</sup> *Id.* § 1963.

<sup>21</sup> *Id.* §§ 1963-64.

<sup>22</sup> See *United States v. Juvenile Male*, 554 F.3d 456, 461 (4th Cir. 2009) (convicting a MS-13 member of conspiracy to violate RICO); *United States v. Vasquez*, 258 F.R.D. 68, 70 (E.D.N.Y. 2009) (convicting two MS-13 members of assault with a deadly weapon in aid of racketeering activity).

<sup>23</sup> 18 U.S.C. § 1961.

<sup>24</sup> Bill Draper, *Missouri RICO Charges a First for Human Trafficking Case*, COLUMBIA MISSOURIAN, Aug. 17, 2009, <http://www.columbiamissourian.com/stories/2009/08/17/missouri-rico-charges-first-human-trafficking-case>.

<sup>25</sup> Press Release, Office of the United States Att’y, W. Dist. of Mo., RICO Indictment, Human Trafficking Rescue Project: Eight Uzbekistan Nationals Among 12 Charged with Racketeering, Human Trafficking, Immigration Violations (May 27, 2009) [hereinafter RICO Press Release], *available at*

that the defendants formed a criminal enterprise that lured hundreds of foreign nationals into the United States with promises of visas and employment.<sup>26</sup> The foreign nationals were charged exorbitant amounts for these services and were then forced to work for the criminal enterprise to pay off their debts.<sup>27</sup> Those who attempted to seek alternative employment or to return to their home countries were threatened with the cancellation of their immigration statuses.<sup>28</sup>

The injustice suffered by these foreign nationals and the similar wrongs being perpetrated against thousands of other victims in the United States demonstrates the need for a comprehensive statute to prosecute trafficking enterprises. Fortunately, RICO has effectively punished various types of analogous organized criminal behavior<sup>29</sup> and, thus, is likely to succeed in prosecuting human-trafficking cases.

Although RICO provides the ability to curtail human-trafficking enterprises, legal scholarship has not comprehensively addressed the use of the Act in this capacity. For that reason, this Comment explores the use of RICO as a means of prosecuting human trafficking in the United States. Part I defines human trafficking and surveys its scope within the United States as it exists today by explaining the differences between trafficking and smuggling and by emphasizing the international nature of the problem. Part II examines the development of current trafficking legislation, culminating in the TVPA and its subsequent amendments. An evaluation of the TVPA's legislative history and its primary objectives of prevention, protection, and prosecution indicate that additional tools are necessary to facilitate trafficking prosecutions. This Comment posits that RICO provides the solution to the problem by acting as a beneficial prosecutorial supplement. Thus, Part III examines the history and statutory construction of RICO, as well as the courts' interpretation of the Act, and discusses RICO's usefulness in prosecuting other criminal enterprises. Part IV then assesses the recent Giant Labor human-trafficking indictment charged under RICO and its implications for future cases. Finally, Part V argues that RICO provides the best framework for prioritizing the safety and vulnerability of victims that is crucial in human-trafficking cases, while also offering valuable advantages for human-trafficking prosecutions such as stricter penalties, a broader conspiracy provision, and greater prosecutorial discretion.

---

<http://www.justice.gov/usao/mow/news2009/giantlabor.ind.htm>. A superseding indictment was filed on January 7, 2010, charging eleven defendants with one-hundred-forty-three criminal counts. Indictment at 1-6, *United States v. Askarkhodjaev*, No. 09-00143-01/11-CR-W-ODS (W.D. Mo. Jan. 7, 2010) [hereinafter *Indictment*].

<sup>26</sup> *Indictment*, *supra* note 25, at 21.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *See infra* Part IV.B.

## I. THE SCOPE OF HUMAN TRAFFICKING

This Part defines the problem of human trafficking and examines its most common forms, which include sex trafficking and forced labor. It then distinguishes between two often-confused concepts: human trafficking, which involves coercion, and smuggling, which involves the illegal crossing of a border. Finally, this Part notes the potential ways people become trafficking victims and explores the international nature of the human-trafficking problem.

### A. *Human Trafficking Defined*

Trafficking is a phenomenon that affects victims all over the world.<sup>30</sup> Known as the “dark side” of globalization, it is facilitated by the ease of technological innovation and international travel.<sup>31</sup> While the majority of victims are exploited within their own countries, between 600,000 and 800,000 people are trafficked across international borders each year.<sup>32</sup> These victims are often lured away from their homes with promises of a better life and superior work in a foreign country.<sup>33</sup> Yet, when they arrive, they are subjected to forced labor or sexual exploitation through involuntary servitude or debt bondage.<sup>34</sup> Traffickers confiscate victims’ passports and other documentation and then threaten legal repercussions if their demands are not met, thus further limiting any means of escape.<sup>35</sup>

Human trafficking has developed into a multi-billion dollar industry<sup>36</sup> that is continuing to grow at an alarming rate.<sup>37</sup> The International Labour Organization estimates that there are at least 12.3 million trafficked victims worldwide at any given time.<sup>38</sup> Trafficking exists where “force, fraud, or

---

<sup>30</sup> TIP REPORT 2009, *supra* note 4.

<sup>31</sup> Tony Addison, *Human Trafficking—The Dark Side of Globalization*, BROOKS WORLD POVERTY INST., (Jan. 29, 2008, 6:32 PM), <http://povertyblog.wordpress.com/2008/01/29/human-trafficking-is-the-dark-side-of-globalization>.

<sup>32</sup> *Fact Sheet: Human Trafficking*, *supra* note 8.

<sup>33</sup> TIP REPORT 2009, *supra* note 4, at 8.

<sup>34</sup> *Id.* at 7.

<sup>35</sup> *Id.* at 11.

<sup>36</sup> Micheline R. Millar, *Global Solution Needed to Eradicate Human Trafficking, Says Expert*, ASIAN DEV. BANK (July 9, 2007), <http://www.adb.org/media/Articles/2007/12016-asian-human-trafficking>.

<sup>37</sup> *Fact Sheet: Human Trafficking*, *supra* note 8.

<sup>38</sup> INT’L LABOUR ORG., EXECUTIVE SUMMARY, FORCED LABOR: COERCION AND EXPLOITATION IN THE PRIVATE ECONOMY 3 (Beate Andrees & Patrick Belser eds., 2009), available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_112966.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_112966.pdf).

coercion [is used] to exploit a person for profit.”<sup>39</sup> The two most common forms of trafficking are forced labor and sexual exploitation.<sup>40</sup>

Forced labor leads to the greatest number of trafficking victims and includes involuntary servitude and debt bondage.<sup>41</sup> People exploited as involuntary servants are often forced to work in domestic households where, because private property is more difficult for authorities to inspect than public spaces, their plight can remain undiscovered for years.<sup>42</sup> Many traffickers also coerce victims into forced labor through debt bondage. This occurs when a trafficker forces a victim to work until she pays her debt.<sup>43</sup> The trafficker, however, often prevents the victim from being able to pay off his debt by maintaining control of his housing and charging exorbitant rents, while forcing him to work for nothing or for minimal wages.<sup>44</sup>

Sex trafficking affects 1.39 million victims each year.<sup>45</sup> These people, the majority of whom are women and children, are often forced to perform commercial sex acts as a result of physical or psychological coercion.<sup>46</sup> In addition to causing severe emotional trauma, sexual exploitation poses serious public health risks because “the inhumane living conditions that victims are forced to endure often . . . spread to fellow workers, customers, and neighbors.”<sup>47</sup>

Many trafficking victims are smuggled into the United States.<sup>48</sup> Trafficking and smuggling are easily and often-confused concepts, though they are distinct: “Human smuggling is the facilitation, transportation, attempted transportation or illegal entry of a person(s) across an international border, in violation of one or more countries [sic] laws, either

---

<sup>39</sup> TIP REPORT 2009, *supra* note 4, at 7.

<sup>40</sup> *See id.*

<sup>41</sup> *Id.* at 7-8.

<sup>42</sup> *Id.* at 18; *see* United States v. Kaufman, 546 F.3d 1242, 1246 (10th Cir. 2008) (noting that patients at a privately owned mental health care facility were sexually abused and forced to perform manual labor for over fifteen years); Martinez v. Calimlim, 651 F. Supp. 2d 852, 856 (E.D. Wis. 2009) (noting that a woman was held as an involuntary domestic servant for nineteen years).

<sup>43</sup> TIP REPORT 2009, *supra* note 4, at 17.

<sup>44</sup> Courts have held that whether or not a person receives compensation for his labor is not indicative of his status as a trafficking victim. Rather, the issue turns on whether or not he has been coerced. *See* David v. Signal Int’l, LLC, No. 08-1220, 2009 WL 5215326, at \*1 (E.D. La. Dec. 28, 2009) (noting that 500 Indian men were allowed to bring a civil claim under the TVPA after being coerced into working at defendant’s construction site for substandard wages following Hurricane Katrina); United States v. Phan, 628 F. Supp. 2d 562, 565-68 (M.D. Pa. 2009) (describing involuntary servitude charges that were brought against a nail salon owner who forced a woman to work for eight years under threat of deportation and paid her only in tips).

<sup>45</sup> TIP REPORT 2009, *supra* note 4, at 8.

<sup>46</sup> *Id.*

<sup>47</sup> *Developments in the Law: Jobs and Borders*, *supra* note 13.

<sup>48</sup> HUMAN SMUGGLING & TRAFFICKING CTR., FACT SHEET: DISTINCTIONS BETWEEN HUMAN SMUGGLING AND HUMAN TRAFFICKING 2-3 (2006) [hereinafter SMUGGLING FACT SHEET], available at <http://www.state.gov/documents/organization/90541.pdf>.

clandestinely or through deception, such as the use of fraudulent documents.”<sup>49</sup> Foreigners will often pay smugglers exorbitant amounts for passage into the United States.<sup>50</sup> Trafficking, however, does not require the illegal crossing of a border, but involves the specific targeting of individuals as victims of criminal exploitation.<sup>51</sup> While both criminal activities are profit-driven, “[a]lien smuggling is an enterprise that produces short-term profits resulting from one-time fees paid by or on behalf of migrants smuggled.”<sup>52</sup> Thus, in the case of smuggling, the connection between the smuggler and the person being smuggled ends when the destination country is reached and the foreigner is released. Trafficking, on the other hand, can continue indefinitely.<sup>53</sup>

Despite their distinctions, smuggling and human trafficking frequently overlap, with smuggled aliens regularly becoming trafficking victims. “Smugglers often conspire with traffickers essentially to enslave migrants once they arrive in the United States.”<sup>54</sup> This usually occurs in the form of debt bondage.<sup>55</sup> Lacking proper documentation and fearing law enforcement, these individuals are prime targets for trafficking crimes, as they are especially unlikely to challenge their traffickers’ authority.<sup>56</sup> By preying on the increased vulnerability of a smuggled migrant, “[t]rafficking enterprises rely on forced labor or commercial sexual exploitation of the victim to produce profits over the long-term and the short-term.”<sup>57</sup>

---

<sup>49</sup> *Id.* at 2.

<sup>50</sup> See *Alien Smuggling/Human Trafficking: Sending a Meaningful Message of Deterrence: Hearing Before the Subcomm. on Crime, Corrections and Victims’ Rights of the S. Comm. on the Judiciary*, 108th Cong. 84 (2003) [hereinafter *Trafficking Hearing*] (statement of John Malcolm, Deputy Assistant Att’y Gen., Criminal Division, Department of Justice) (noting that one Chinese migrant paid \$15,000 to be transported to Guatemala and then smuggled into the United States).

<sup>51</sup> SMUGGLING FACT SHEET, *supra* note 48, at 3.

<sup>52</sup> *Trafficking Hearing*, *supra* note 50, at 60 (statement of Charles H. DeMore, Interim Assistant Director of Investigations, Bureau of Immigration and Customs Enforcement, Department of Homeland Security).

<sup>53</sup> See *id.* However, there have been instances in the United States where smugglers have abandoned migrants in locked containers or in treacherous weather with no food or water. For example, in May 2003, seventeen undocumented aliens were found dead in a tractor-trailer in Victoria, Texas, and in March 2000, four undocumented aliens died of hypothermia after being abandoned in the San Diego mountains. In 2002, 133 smuggling-related deaths were recorded in the Arizona desert as a result of migrants being abandoned in the heat. *Id.* at 60-61.

<sup>54</sup> *Id.* at 79 (Statement of John Malcolm, Deputy Assistant Att’y Gen., Criminal Division, Department of Justice).

<sup>55</sup> SMUGGLING FACT SHEET, *supra* note 48, at 2.

<sup>56</sup> TIP REPORT 2009, *supra* note 4, at 28.

<sup>57</sup> *Trafficking Hearing*, *supra* note 50, at 60 (statement of Charles H. DeMore, Interim Assistant Director of Investigations, Bureau of Immigration and Customs Enforcement, Department of Homeland Security).

## B. *Reasons for Human Trafficking*

Trafficking in persons is an increasingly lucrative business in the United States for several reasons. First, the United States is a destination country for trafficked individuals.<sup>58</sup> People all over the world want to come to the United States for better opportunities, making it easy for traffickers to lure potential victims.<sup>59</sup> The majority of victims trafficked to the United States come from East Asia and the Pacific, followed by Latin America and Eurasia.<sup>60</sup> Aliens, however, are not the only trafficking victims within the United States. American teenagers and young children are often victimized even in American suburbs.<sup>61</sup> In a CBS television special addressing the issue, a reporter noted that “trafficked children are often lured by false promises of education, a new skill or a good job; other children are kidnapped outright, taken from their home villages or towns and then bought and sold as commodities.”<sup>62</sup> Traffickers prey upon these vulnerable individuals because they are easy to coerce and exploit.<sup>63</sup>

Second, relative to other criminal networks, human trafficking is a low-risk enterprise.<sup>64</sup> This is because human trafficking generally “operate[s] in the netherworld of illegal aliens.”<sup>65</sup> Traffickers can easily manipulate foreigners who are terrified of being deported, are unfamiliar with American laws, and seldom speak English.<sup>66</sup> For these same reasons, victims are also much less likely to testify against their traffickers; this

---

<sup>58</sup> ASSESSMENT, *supra* note 7.

<sup>59</sup> *See id.*

<sup>60</sup> *Id.* at 10. Between 5,000 and 7,000 victims are trafficked from East Asia and the Pacific, with 3,500 to 5,500 coming from both Latin American and Eurasia. *Id.*

<sup>61</sup> Tracy Smith, *Slavery in the Suburbs*, CBSNews.com, Sept. 12, 2007, <http://www.cbsnews.com/stories/2007/09/12/eveningnews/main3254966.shtml>. Shauna, a seventeen year-old girl in Pensacola, Florida, was kidnapped and repeatedly raped and beaten for several days by a trafficker posing as a girl’s father at a sleepover. *Id.*

<sup>62</sup> *Trafficking Hearing*, *supra* note 50, at 62 (statement of Charles H. DeMore, Interim Assistant Director of Investigations, Bureau of Immigration and Customs Enforcement, Department of Homeland Security).

<sup>63</sup> TIP REPORT 2009, *supra* note 4, at 8.

<sup>64</sup> *Trafficking Hearing*, *supra* note 50, at 79 (statement of John Malcolm, Deputy Assistant Att’y General, Criminal Division, Department of Justice) (stating that traffickers often “disappear into ethnic communities and, once so ensconced, turn to further exploiting members of those ethnic communities”); *see also International Trafficking in Women and Children: Prosecution, Testimonies, and Prevention: Hearing Before the Subcomm. on Near E. & S. Asian Affairs of the S. Comm. on Foreign Relations*, 105th Cong. 84 (2000) [hereinafter *Trafficking in Women and Children Hearing*] (statement of William R. Yeomans, Chief of Staff, Civil Rights Division, Department of Justice) (“[F]or a long time now, trafficking in human beings has been a fairly low risk, high-profit activity. We need to change that. We need to make people who are engaging in trafficking pay.”).

<sup>65</sup> *Trafficking Hearing*, *supra* note 50, at 79 (statement of John Malcolm, Deputy Assistant Att’y General, Criminal Division, Department of Justice).

<sup>66</sup> *See id.*

reduces the deterrence value of potential prosecutions.<sup>67</sup> Dealing with human victims also increases the costs of investigation and prosecution.<sup>68</sup> “These cases often involve large numbers of victims, language barriers, multiple investigating agencies, international investigations and, frequently, victims who have suffered severe physical and psychological trauma.”<sup>69</sup> As a result of these difficulties, trafficking operations often continue unchallenged, or traffickers walk away with little or no jail time after their organizations are dismantled.<sup>70</sup>

Third, in contrast to commodities utilized in many other types of criminal enterprises, human beings are reusable resources.<sup>71</sup> A woman can be exploited for sex repeatedly. Likewise, a migrant worker can be forced into labor as a child and work for twenty or thirty years. The International Labour Organization estimates that the opportunity costs in terms of lost wages to victims of forced labor is upwards of \$20 billion, while traffickers are annually earning profits of over \$30 billion exploiting their victims.<sup>72</sup>

Although trafficking networks now generate significant revenue, it is only within the past twenty years that trafficking has reached a level of sophistication enabling such massive profits.<sup>73</sup> In a hearing before the Senate Subcommittee on Crime, Corrections and Victims’ Rights, Charles DeMore, the Assistant Director of Investigations for the Bureau of Immigration and Customs Enforcement, argued that “[t]he fall of communism, coupled with the deteriorating third world economies, has fueled the dramatic rise of this sinister form of commerce.”<sup>74</sup> DeMore additionally noted that international criminal enterprises “have also capitalized on weak economies, corruption, and improved international infrastructure in order to facilitate the smuggling and trafficking of some 700,000 to 2,000,000 people globally each year.”<sup>75</sup> Human trafficking has hence evolved into an

---

<sup>67</sup> See *id.* at 81. Additionally, because human trafficking is international in nature and often involves smuggling, cooperation with foreign law enforcement agencies is frequently necessary, though law enforcement capabilities in most source countries are virtually non-existent. *Id.* at 82.

<sup>68</sup> See *id.* at 81.

<sup>69</sup> *Id.* at 89.

<sup>70</sup> See *id.* at 89-90. Even when law enforcement is successful in making arrests, the barriers to prosecution result in minimal sentences, and traffickers are soon free to resume their illegal activities. *Id.* at 89.

<sup>71</sup> Kelly E. Hyland, *Protecting Human Victims of Trafficking: An American Framework*, 16 BERKELEY WOMEN’S L.J. 29, 38 (2001).

<sup>72</sup> INT’L LABOUR OFFICE, REPORT OF THE DIRECTOR-GENERAL, THE COST OF COERCION 1-2 (2009), available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_106230.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_106230.pdf).

<sup>73</sup> *Trafficking Hearing*, *supra* note 50, at 79 (statement of John Malcolm, Deputy Assistant Att’y General, Criminal Division, Department of Justice).

<sup>74</sup> *Id.* at 63 (statement of Charles H. DeMore, Interim Assistant Director of Investigations, Bureau of Immigration and Customs Enforcement, Department of Homeland Security).

<sup>75</sup> *Id.*

organized international criminal activity that flourishes in the United States where demand is high and the risk of prosecution is comparatively low.

## II. TRAFFICKING LEGISLATION

Because human trafficking is such a problem in the United States, Congress enacted legislation to facilitate prosecutions for these crimes. This Part examines the history of human-trafficking legislation in the United States, beginning with the involuntary servitude and slavery statutes. After noting the inherent problems these statutes have in dealing with modern slavery, this Part evaluates the TVPA, the United States' first legislation targeted specifically at human trafficking, and its subsequent amendments.

### A. *Involuntary Servitude and Slavery Statutes*

Human trafficking is an international problem that victimizes thousands within U.S. borders and jeopardizes fundamental human rights.<sup>76</sup> It is essential that the United States respond with full force to quell instances of human exploitation and to assist victims of trafficking crimes. Before 2000, however, no comprehensive legislation directed at modern day trafficking existed.<sup>77</sup> Traffickers were prosecuted, if at all, under the involuntary servitude and slavery statutes, which included prohibitions against peonage,<sup>78</sup> enticement into slavery, and involuntary servitude.<sup>79</sup>

Obtaining prosecutions through these statutes, however, became problematic after the Supreme Court's ruling in *United States v. Kozminski*.<sup>80</sup> The case concerned two mentally challenged men forced to work on a couple's farm and to live in their barn for many years.<sup>81</sup> Although the couple did not physically abuse the two men, they psychologically coerced them into believing they had no choice but to remain on the farm and work.<sup>82</sup> Because no evidence of physical abuse existed, the Court found that a conviction under the involuntary servitude statutes could not stand.<sup>83</sup> Thus, *Kozminski* limited the definition of "coercion" found in the

---

<sup>76</sup> See *supra* Part I.

<sup>77</sup> Mark J. Kappelhoff, *Federal Prosecutions of Human Trafficking Cases: Striking a Blow Against Modern Day Slavery*, 6 U. ST. THOMAS. L. J. 9, 12 (2008).

<sup>78</sup> The Supreme Court has defined peonage as a "condition of compulsory service, based upon the indebtedness of the peon to the master." *United States v. Reynolds*, 235 U.S. 133, 144 (1914) (quoting *Clyatt v. United States*, 197 U.S. 207, 215 (1905)) (internal quotation marks omitted).

<sup>79</sup> 18 U.S.C. §§ 1581, 1583-84 (2006).

<sup>80</sup> 487 U.S. 931 (1988).

<sup>81</sup> *Id.* at 934-35.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 952.

involuntary servitude statutes to include only the use or threatened use of physical injury or manipulation of legal process.<sup>84</sup>

While human trafficking shares similarities to the slave trade in several respects, the *Kozminski* holding demonstrated that problems existed with applying eighteenth-century legislation to a modern day problem.<sup>85</sup> Namely, a large number of trafficking victims never face physical violence.<sup>86</sup> Rather, they are verbally terrorized or threatened with legal consequences.<sup>87</sup> As a result, under the involuntary servitude and slavery statutes, numerous traffickers who controlled their victims through psychological or less obvious forms of coercion repeatedly escaped federal prosecution.<sup>88</sup> In a congressional hearing on trafficked victims in 2000, John Yeomans, Department of Justice Civil Rights Division Chief of Staff, said the following:

One of the biggest enforcement hurdles that we face is the requirement of Federal law that we show that the defendant used actual force, threat of force or illegal coercion to enslave the victim. As a result, federal law enforcement cannot reach those who use more subtle, but no less heinous, forms of coercion that wrongfully hold victims in bondage.<sup>89</sup>

Responding to this human-trafficking problem and recognizing that new legislation was needed to combat the growing crisis, Congress passed the TVPA in October 2000.<sup>90</sup>

#### B. *The Trafficking Victims Protection Act of 2000*

The purposes of the TVPA “are 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.”<sup>91</sup> The TVPA addresses the trafficking issue with the “Three P’s” of prevention, protection, and prosecution.<sup>92</sup> President

---

<sup>84</sup> *Id.*

<sup>85</sup> See *Trafficking in Women and Children Hearing*, *supra* note 64, at 80 (statement of William R. Yeomans, Chief of Staff, Civil Rights Division, Department of Justice).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Kappelhoff, *supra* note 77, at 13.

<sup>89</sup> *Trafficking in Women and Children Hearing*, *supra* note 64 at 80 (statement of William R. Yeomans, Chief of Staff, Civil Rights Division, Department of Justice).

<sup>90</sup> Trafficking Victims Protection Act of 2000, 22 U.S.C. §§ 7101-12 (2006).

<sup>91</sup> *Id.* § 7101.

<sup>92</sup> See *Trafficking of Women and Children in the International Sex Trade: Hearing Before the Subcomm. on Int’l Operations and Human Rights of the H. Comm. on Int’l Relations*, 106th Cong. 90 (1999) [hereinafter *Hearing on International Sex Trade*] (statement of Dr. Laura J. Lederer, Director of the Protection Project, Harvard University) (“The best [trafficking] legislation would cover what we call ‘The Three P’s’—prevention of trafficking, prosecution of traffickers, and protection (social services and other programs) for trafficking victims.”).

Clinton first introduced this model in a 1998 memorandum in which he denounced trafficking as a “fundamental human rights violation.”<sup>93</sup> The memorandum used the “Three-P” strategy as a means of suppressing trafficking violations against women and girls.<sup>94</sup> Since their utilization in the TVPA, the “Three P’s” have been applied government-wide in the fight against human trafficking.<sup>95</sup> In addition, the TVPA establishes the “Three P’s” as the criteria by which the United States government judges the anti-trafficking efforts of foreign governments.<sup>96</sup>

### 1. Prevention

The TVPA sets forth a variety of initiatives to combat the aims of human traffickers. These programs are primarily focused on helping potential victims and encouraging economic solutions that would make individuals less attractive to traffickers.<sup>97</sup> Initiatives listed in the TVPA include micro-credit lending programs, business development training, elementary and secondary school programs, specialized programs for women and girls, and grants to nongovernmental organizations for programs to advance the causes of women in their countries.<sup>98</sup> The Act further calls for programs to increase public awareness about the dangers of trafficking and for border interdiction programs that train border guards and other officials to identify traffickers and set up shelters to meet the needs of rescued victims.<sup>99</sup>

The TVPA also recommends international sanctions if the United States determines that a foreign government is not doing its part to eliminate human trafficking within its borders.<sup>100</sup> International compliance with United States anti-trafficking standards is also based on the “Three P’s.”<sup>101</sup> The Secretary of State issues a yearly report to Congress outlining those countries who abide by the standards of the TVPA, those who are making significant efforts to do so, and those who are not.<sup>102</sup> The countries that fail

---

<sup>93</sup> Memorandum on Steps to Combat Violence Against Women and Trafficking in Women and Girls, 34 WEEKLY COMP. PRES. DOC. 412, 412 (Mar. 11, 1998).

<sup>94</sup> *Id.* at 413.

<sup>95</sup> Valerie S. Payne, Note, *On the Road to Victory in America’s War on Human Trafficking: Landmarks, Landmines, and the Need for Centralized Strategy*, 21 REGENT U. L. REV. 435, 437 (2009).

<sup>96</sup> 22 U.S.C. § 7106.

<sup>97</sup> *Id.* § 7104.

<sup>98</sup> *Id.* § 7104(a).

<sup>99</sup> *Id.* § 7104(b)-(c).

<sup>100</sup> *Id.* § 7107.

<sup>101</sup> *Id.* § 7106.

<sup>102</sup> 22 U.S.C. § 7101(b). At the release of the 2009 Trafficking in Persons Report, Secretary Hillary Clinton stated: “The Obama Administration views the fight against human trafficking, both at home and abroad, as a critical part of our foreign policy agenda. The United States currently funds 140 anti-trafficking programs in nearly 70 countries, as well as 42 domestic task forces to address the challenge here.” Hillary Rodham Clinton, Sec’y of State, U.S. Dep’t of State, Remarks at Release of the Ninth

to make significant efforts to abide by the standards no longer qualify for “nonhumanitarian, nontrade-related foreign assistance” from the United States.<sup>103</sup>

## 2. Protection

Under the TVPA, victims of “severe forms of trafficking” in the United States can receive certain benefits and services.<sup>104</sup> Severe forms of trafficking are defined as:

- (A) [S]ex 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.<sup>105</sup>

“[T]o the extent practicable,” these victims are afforded certain safeguards while in the custody of the U.S. Government, including access to appropriate facilities and medical care, protection from recapture and threats of reprisal against their families, and the security of their personal information.<sup>106</sup> Victims are also provided access to translation services and information about their rights and federally funded anti-trafficking programs.<sup>107</sup> If a victim is an alien and determined to be a victim of severe trafficking, law enforcement can permit her “continued presence” in the United States and take measures to protect her and her family.<sup>108</sup> This is contingent, however, on the victim’s status as a potential witness to trafficking crimes.<sup>109</sup> An alien may also apply for a special visa granted to trafficked victims (“T-visa”) and receive temporary non-immigrant status if she is under the age of eighteen or agrees to provide assistance in the

---

Annual Trafficking in Persons Report Alongside Leaders in Congress (June 16, 2009), *available at* <http://www.state.gov/secretary/rm/2009a/06/124872.htm>. In addition to the State Department’s TIP Report on worldwide trafficking, the Department of Justice issued a report in 2009 outlining specific incidences of human trafficking within the United States, noting that within a twenty-one month period, more than 1,200 occurrences of human trafficking were reported. *See* TRACEY KYCKELHAHN, ALLEN J. BECK & THOMAS H. COHEN, U.S. DEP’T OF JUSTICE, CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS, 2007-08 (2009), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/cshti08.pdf>.

<sup>103</sup> 22 U.S.C. § 7107(a). The TVPA reserves the right to waive the sanction if the President determines it to be in the national interest. *Id.* § 7107(d)(4).

<sup>104</sup> *Id.* § 7105.

<sup>105</sup> *Id.* § 7102(8).

<sup>106</sup> *Id.* § 7105(c)(1).

<sup>107</sup> *Id.* § 7105(c)(2).

<sup>108</sup> *Id.* § 7105(c)(3).

<sup>109</sup> 22 U.S.C. § 7105(c)(3).

prosecution of severe forms of trafficking within the United States.<sup>110</sup> This gives victims legal status and allows them to receive career counseling and lawful employment, though only a limited number of T-visas may be approved each year.<sup>111</sup> Victims can apply for permanent residency if they have been present in the United States for at least three years, have assisted with prosecutions or would suffer extreme hardship if removed, and have demonstrated “good moral character.”<sup>112</sup>

In 2003, Congress amended the TVPA to give victims a private right of action to sue their traffickers in federal court for damages and attorney’s fees.<sup>113</sup> A 2005 amendment then permitted the forfeiture of a trafficker’s assets.<sup>114</sup> These changes have proven especially effective in enabling victims to strike back at their perpetrators and reclaim a semblance of personal dignity while providing for needs such as medical care and housing.<sup>115</sup> Restitution is also effective in preventing a victim’s reentry into a trafficked life.<sup>116</sup> In addition, these amendments act as deterrent threats against traffickers who fear the loss of their financial enterprises.<sup>117</sup>

### 3. Prosecution

Former Chief Counsel for the Human Smuggling and Trafficking Center of the Department of Justice Cynthia Shepherd Torg argues that “effective prosecution is the linchpin to eradicating human trafficking. Prosecution, combined with the imposition of significant penalties, not only provides protection by eliminating the perpetrator’s immediate ability to exploit the victim, but also serves to deter future criminal acts.”<sup>118</sup>

For this reason, the TVPA introduced several new prosecutorial tools to aid in the war on human slavery in the United States.<sup>119</sup> For example,

---

<sup>110</sup> *Id.* § 7105(b).

<sup>111</sup> 8 U.S.C. § 1184(n)(2).

<sup>112</sup> *Id.* § 1255(i)(1)(B).

<sup>113</sup> Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(4), 117 Stat. 2875, 2877-78 (codified at 18 U.S.C. § 1595).

<sup>114</sup> Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, § 103(d), 119 Stat. 3558, 3563 (codified at 18 U.S.C. § 2428).

<sup>115</sup> TIP REPORT 2009, *supra* note 4, at 18.

<sup>116</sup> *Id.*

<sup>117</sup> Terry Coonan, *The Trafficking Victims Protections Act: A Work in Progress*, 1 INTERCULTURAL HUM. RTS. L. REV. 99, 108 n.26 (2006).

<sup>118</sup> Cynthia Shepherd Torg, *Human Trafficking Enforcement in the United States*, 14 TUL. J. INT’L. & COMP. L. 503, 503-04. (2006).

<sup>119</sup> However, international prosecution efforts are seriously lacking:

Although a majority of the world’s countries now have criminal legislation prohibiting all forms of trafficking in persons, this year’s Trafficking in Persons Report, along with a recent United Nations survey, found that many countries have not brought any cases under their trafficking statutes, and few labor-trafficking cases are being prosecuted.

§ 1589 of the Forced Labor statute makes it illegal to obtain a person's services through force, threats of harm to that person or a third person, or abuse of the legal process or threats of such abuse.<sup>120</sup> Under this definition, a trafficker can now be prosecuted for threatening to harm a victim for her refusal to cooperate, regardless of whether physical abuse has occurred.<sup>121</sup> Prosecutors can also bring charges if a victim's family was threatened, or if a victim was threatened with deportation.<sup>122</sup> Thus, the Forced Labor statute effectively deals with *Kozminski's* narrow holding by outlawing the more common coercive techniques employed by traffickers.<sup>123</sup>

The TVPA also enacted § 1591, prohibiting the use of force, threats, or coercion to cause a person to engage in a commercial sex act.<sup>124</sup> The statute further prohibits the sex trafficking of children under the age of eighteen, regardless of whether or not coercion is present.<sup>125</sup> The reach of the statute extends to anyone who "benefits, financially or by receiving anything of value, from participation in a venture which has engaged in [a commercial sex act]."<sup>126</sup> While the statute is limited to commercial sex acts, this clause implies that anyone who knowingly profits from a sex trafficking enterprise can be prosecuted under § 1591.<sup>127</sup>

The Act created a third statute making it unlawful to confiscate or destroy a person's passport or other immigration or identification documents in furtherance of any trafficking crime.<sup>128</sup> This criminalizes one of the most popular practices used by traffickers in coercing their victims.<sup>129</sup> Notably, § 1592 allows for prosecution of traffickers who take possession of fraudulent documents.<sup>130</sup> Hence, "it is a trafficker's coercive actions rather than the authenticity of a victim's documentation that is the focus of the law."<sup>131</sup>

---

[Luis] CdeBaca, himself a federal prosecutor who has worked many trafficking cases, noted that the U.N. Office on Drugs and Crime recently released its own report on global human trafficking and found that two out of every five countries have yet to achieve a single conviction of a human trafficker. "Prosecutions can be a blunt tool, but they do matter" in deterring traffickers, he said.

Jane Morse, *Fighting Human Trafficking a Critical Part of U.S. Foreign Policy*, AMERICA.GOV (June 16, 2009), <http://www.america.gov/st/democracyhr-english/2009/June/20090616141405ajesrom0.4048426.html>.

<sup>120</sup> 18 U.S.C. § 1589 (2006 & Supp. II 2008).

<sup>121</sup> *Id.*

<sup>122</sup> *See id.*

<sup>123</sup> Coonan, *supra* note 117, at 104.

<sup>124</sup> 18 U.S.C. § 1591(a).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* § 1591(a)(2).

<sup>127</sup> Coonan, *supra* note 117, at 105 ("This arguably includes anyone along the trafficking continuum who knowingly profits from the venture—recruiters, smugglers, transporters, madams, advertisers, bouncers, and enforcers alike.").

<sup>128</sup> 18 U.S.C. § 1592.

<sup>129</sup> Coonan, *supra* note 117, at 106.

<sup>130</sup> *Id.* at 106-07.

<sup>131</sup> *Id.* at 107.

The TVPA also introduced § 1594, making any attempt to violate a human-trafficking statute punishable to the same extent as the completed crime.<sup>132</sup> The statute enables prosecutors to prove only the trafficker's intent, regardless of the victim's state of mind.<sup>133</sup> This becomes especially relevant in light of the sex trafficking statute, which allows for prosecution only when the act has been completed.<sup>134</sup>

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("2008 TVPRA") instituted several more prosecutorial reforms.<sup>135</sup> The 2008 TVPRA added a conspiracy provision, which is an effective tool in trafficking cases because the majority of trafficking crimes involve collusion between two or more people.<sup>136</sup> It also introduced a "reckless disregard" alternative to the culpability standard of the sex trafficking statute, which was previously limited to those who "knowingly" used force or coercion.<sup>137</sup> Section 1593A makes it punishable to knowingly benefit financially from trafficking crimes,<sup>138</sup> and several statutes were amended to criminalize the obstruction of trafficking investigations.<sup>139</sup> These amendments put additional weapons in a prosecutor's arsenal for building a case against human traffickers.

The TVPA enacted all of these statutes and subsequent amendments to give prosecutors every opportunity to indict human traffickers. As Representative Chris Smith explained in a congressional hearing discussing an early form of the Act: "We give the President all the tools that we hope will be necessary to stop this unspeakable exploitation of women and children, not just some of the tools, and then it is up to the President to decide which tools he wants to use in each case."<sup>140</sup> Prosecutors should therefore take advantage of all the legislative tools that Congress has provided in order to wage this war on human slavery.

---

<sup>132</sup> 18 U.S.C. § 1594.

<sup>133</sup> Coonan, *supra* note 117, at 108.

<sup>134</sup> *Id.* at 107.

<sup>135</sup> See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, tits. I-III, 122 Stat. 5044, 5045-87 (codified in scattered sections of 6, 8, 18, 22, 28 and 42 U.S.C.). William Wilberforce, one of the most influential abolitionists, spent fifty years advocating in Parliament for the emancipation of slaves in Britain. See William Wilberforce, *Horrors of the British Slave-Trade*, in 5 MODERN ELOQUENCE: POLITICAL ORATORY 2120, 2125 (Thomas B. Reed et al. eds., 1903) ("[S]o enormous, so dreadful, so irremediable did [the slave trade's] wickedness appear, that my own mind was completely made up for the abolition. . . . Let the consequences be what they would, I from this time determined that I would never rest till I had effected its abolition."); *Biography of William Wilberforce*, BIOGRAPHY ONLINE, <http://www.biographyonline.net/politicians/uk/william-wilberforce.html> (last visited Feb. 10, 2011).

<sup>136</sup> Torg, *supra* note 118, at 511. *But see* discussion *infra* Part V.B.

<sup>137</sup> 18 U.S.C. § 1589(b).

<sup>138</sup> *Id.* § 1593A.

<sup>139</sup> See, e.g., *id.* § 1583(a)(3).

<sup>140</sup> *Hearing on International Sex Trade*, *supra* note 92, at 3 (statement of Rep. Christopher H. Smith).

However, maintaining a victim-centered approach is critical when prosecuting a human-trafficking case. The loudest critics of the TVPA claim that it emphasizes prosecution to the detriment of the two other victim-centered “P’s” of protection and prevention.<sup>141</sup> Because victims are not issued protection or T-visas unless they are classified as witnesses and agree to assist in trafficking investigations and prosecutions, it appears that the TVPA gives a preference to prosecution over other victim considerations. Additionally, the TVPA only affords benefits to victims of “severe forms of trafficking,”<sup>142</sup> leading one to question whether this distinction should be made at all.<sup>143</sup> Terry Coonan, Executive Director of the Center for the Advancement of Human Rights, argues that “[a]t the most fundamental level, the ultimate challenge that remains for the U.S. in fighting human trafficking is to better embrace a human rights paradigm, rather than one premised upon law enforcement needs or immigration control.”<sup>144</sup>

This distinguishes human-trafficking enterprises from similar trafficking rings, such as narcotics or arms dealing, because the commodities trafficked are human victims who have been coerced and abused. As Senator Paul David Wellstone said: “I cannot emphasize enough that this trafficking is a human rights problem and it requires a human rights solution. And all too often . . . what happens is that the victims are the ones that are hounded and the traffickers go free. We have to change that.”<sup>145</sup> The victim’s well-being must remain the top priority. At the same time, trafficking cannot be eradicated without successful prosecution.<sup>146</sup> Thousands more will continue to be victimized in the United States each year if prosecutors do not find a way to effectively dismantle trafficking enterprises. A delicate balance must therefore be achieved between protecting and restoring trafficked victims while punishing and deterring their abusers. Yet obtaining justice for victims is often impossible because singular TVPA prosecutions do not cripple an entire trafficking enterprise, which often employs a myriad of individuals engaged in illegal activity that is not covered by the TVPA, but that still furthers the illicit goals of the organization.<sup>147</sup>

Hence, while the TVPA has laid an excellent foundation and allowed prosecutors to make great strides in imprisoning individual traffickers,<sup>148</sup>

---

<sup>141</sup> See Coonan, *supra* note 117, at 129; *Developments in the Law: Jobs and Borders*, *supra* note 13, at 2195-96.

<sup>142</sup> See discussion *supra* Part II.B.2.

<sup>143</sup> Coonan, *supra* note 117, at 130.

<sup>144</sup> *Id.* at 129.

<sup>145</sup> *Trafficking in Women and Children Hearing*, *supra* note 64, at 73 (statement of S. Paul David Wellstone).

<sup>146</sup> Torg, *supra* note 118.

<sup>147</sup> See *infra* Part V.B.

<sup>148</sup> *Facts About the Department of Justice’s Anti-Trafficking Efforts*, DEP’T OF JUSTICE, 1 (July 2008), <http://www.justice.gov/olp/pdf/myths-and-facts.pdf> (“From Fiscal Years 2001 to 2007, DOJ’s Civil Rights Division and U.S. Attorneys’ Offices around the country prosecuted 156 trafficking

additional legislation must be utilized to combat the sophisticated trafficking rings that continue to grow in number within the United States.<sup>149</sup> One solution is for prosecutors to use RICO because human trafficking has become a form of organized crime. For the past thirty years, RICO has been successful in combating various forms of organized crime.<sup>150</sup> Because of its unique structure and emphasis on dismantling criminal enterprises, RICO is ready-made legislation for attacking human traffickers. In fact, Congress already recognized RICO's potential effectiveness for human-trafficking prosecutions when it amended the Act in 2003 to include human trafficking among the various predicate acts for which a perpetrator could be prosecuted under the statute.<sup>151</sup> Yet it was not until May 2009 that charges were first brought under RICO in a human-trafficking case.<sup>152</sup> This Comment argues that RICO is a valuable tool for prosecutors that should be utilized alongside the TVPA to dismantle human-trafficking enterprises.

### III. THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

This Part examines the legislative history of RICO and denotes organized crime as the impetus behind its enactment. It then expounds upon RICO's statutory construction and its interpretation by the courts.

#### A. *Legislative History*

Congress enacted RICO in 1970 to "seek the eradication of organized crime."<sup>153</sup> Originally formed in response to the increasing problem of organized crime's penetration into lawful business operations,<sup>154</sup> "[a]s finally enacted, RICO authorized the imposition of enhanced criminal penalties and new civil sanctions to provide new legal remedies for all types of organized criminal behavior."<sup>155</sup> This novel combination of criminal and civil penalties was the end result of an opinion by the President's

---

cases—securing 342 convictions and rescuing more than 1400 victims. This represents an almost seven-fold increase in prosecutions compared to the previous seven years. These prosecutions have led to sentences as long as life in prison and to millions of dollars in restitution to victims.”).

<sup>149</sup> See Torg, *supra* note 118, at 519-20 (“To end the trade, prosecutors and law enforcement need to remain alert to the issue and continue to be aggressive and innovative with all of the existing legal tools.”).

<sup>150</sup> See *infra* Part IV.B.

<sup>151</sup> 18 U.S.C. § 1961(1) (2006).

<sup>152</sup> RICO Press Release, *supra* note 25.

<sup>153</sup> Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923.

<sup>154</sup> G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1014 (1980).

<sup>155</sup> *Id.* at 1013.

Commission on Law Enforcement and Administration of Justice reporting that antitrust remedies would be effective in dealing with the growing problem of the Mafia.<sup>156</sup> Lower burdens of proof and the possibility of discovery further added to the appeal of civil remedies.<sup>157</sup> Congress, however, decided that a separate statute was also necessary to meet the problem's criminal enforcement, and it therefore adopted a two-tiered approach; one tier provided civil penalties, and the other criminal.<sup>158</sup>

Congress passed RICO as part of the Organized Crime Control Act ("OCCA") introduced by Senator John L. McClellan as Senate Bill 30 in 1969.<sup>159</sup> OCCA called for sweeping reforms in many areas including grand juries,<sup>160</sup> immunity,<sup>161</sup> contempt,<sup>162</sup> false statements,<sup>163</sup> depositions,<sup>164</sup> and sentencing.<sup>165</sup> Although not originally part of the Act, Congress eventually incorporated RICO into OCCA after substantial congressional debate over its content and witness recommendations concerning its particular provisions.<sup>166</sup> President Nixon signed the bill into law in October 1970.<sup>167</sup>

## B. *Structure*

RICO classifies certain illegal behaviors as racketeering activities and makes it unlawful for a person to engage in a pattern of such activity.<sup>168</sup> Section 1961 lists over thirty crimes that qualify as acts of racketeering activity able to form the basis of a RICO action.<sup>169</sup> These predicate acts<sup>170</sup> include everything from murder, kidnapping, and the sale of biological weapons, to wire and mail fraud, counterfeiting, and copyright infringement.<sup>171</sup>

---

<sup>156</sup> PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 208 (1967) ("Law enforcement is not the only weapon that governments have to control organized crime. Regulatory activity can have a great effect. . . . Government at various levels has not explored the regulatory devices available to thwart the activities of criminal groups, especially in the area of infiltration of legitimate business.").

<sup>157</sup> *Id.*

<sup>158</sup> Blakey & Gettings, *supra* note 154.

<sup>159</sup> 115 CONG. REC. 769 (1969) (statement of Sen. John McClellan).

<sup>160</sup> *Id.* at 39,906 (statement of Sen. John McClellan).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 39,906-07.

<sup>165</sup> 115 CONG. REC. 39,907 (1969) (statement of Sen. John McClellan).

<sup>166</sup> *See id.* at 6,925, 9,512.

<sup>167</sup> 116 CONG. REC. 37,264 (1970).

<sup>168</sup> 18 U.S.C. §§ 1961-62 (2006).

<sup>169</sup> *Id.* § 1961(1).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

A “pattern of racketeering activity” is defined in § 1961 as “requir[ing] at least two acts of racketeering activity” occurring within a ten-year period.<sup>172</sup> However, in *H.J. Inc. v. Northwestern Bell Telephone Co.*,<sup>173</sup> the Supreme Court established two additional criteria for proving a pattern of racketeering activity under RICO.<sup>174</sup> The Court held that “a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity.”<sup>175</sup> The Court distinguished between closed and open-ended continuity, the former indicating “a closed period of repeated conduct,” and the latter referring to “past conduct that by its nature projects into the future with a threat of repetition.”<sup>176</sup> A mob boss engaging in acts of wire fraud, money laundering, and murder over an extended period of time is an example of closed continuity, while the same mob boss threatening to harm a shop owner if she does not pay him a monthly fee constitutes open-ended continuity, as the threat continues indefinitely into the future. Both closed and open-ended continuity are sufficient to establish the threat of continued criminal activity required by *Northwestern Bell*.<sup>177</sup>

The substantial RICO prohibitions are set forth in 18 U.S.C. § 1962(a)-(d). Section 1962(a) makes it unlawful to invest in an enterprise using income derived from a pattern of racketeering activity,<sup>178</sup> and § 1962(b) makes it unlawful to acquire or maintain an interest in an enterprise through a pattern of racketeering activity.<sup>179</sup> Section 1962(c) is the broadest RICO provision, making it unlawful to operate or manage an enterprise that conducts its affairs, even indirectly, through a pattern of racketeering activity.<sup>180</sup> Section 1962(d) prohibits any person from conspiring to violate provisions (a)-(c) of § 1962.<sup>181</sup>

Under RICO, an enterprise “includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”<sup>182</sup> In the past three decades, courts have shed further light on the meaning of “enterprise” as outlined by RICO.<sup>183</sup> An enterprise can refer either to a wholly legitimate

---

<sup>172</sup> *Id.* § 1961(5) (internal quotation marks omitted).

<sup>173</sup> 492 U.S. 229 (1989).

<sup>174</sup> *Id.* at 239.

<sup>175</sup> *Id.* (emphasis omitted).

<sup>176</sup> *Id.* at 241.

<sup>177</sup> *Id.*

<sup>178</sup> 18 U.S.C. § 1962(a) (2006).

<sup>179</sup> *Id.* § 1962(b).

<sup>180</sup> *Id.* § 1962(c).

<sup>181</sup> *Id.* § 1962(d).

<sup>182</sup> *Id.* § 1961(4).

<sup>183</sup> See *Boyle v. United States*, 129 S. Ct. 2237, 2245 (2009); *United States v. Turkette*, 452 U.S. 576, 580-82 (1981).

enterprise or to a criminal enterprise.<sup>184</sup> Association-in-fact enterprises are the most common types of enterprises in RICO actions.<sup>185</sup> In *Boyle v. United States*,<sup>186</sup> the Supreme Court held that “an association-in-fact enterprise is simply a continuing unit that functions with a common purpose.”<sup>187</sup> This decision resolved a split among the circuits, several of which had held that an association-in-fact enterprise had to have a separate or ascertainable structure distinct from the pattern of racketeering activity.<sup>188</sup> *Boyle* overruled this notion, though the Court still held that the government must prove the *existence* of an enterprise separately from the pattern of racketeering activity, whether or not it had an ascertainable chain of command or other hierarchical structure.<sup>189</sup>

A § 1962(c) RICO claim also requires that a defendant “conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs.”<sup>190</sup> In *Reves v. Ernst & Young*,<sup>191</sup> the Court held that “[a]n enterprise is ‘operated’ not just by upper management but also by lower rung participants . . . who are under the direction of upper management.”<sup>192</sup> This includes those who “‘associat[e] with’ the enterprise” by exerting some measure of control over its affairs.<sup>193</sup> Prosecutors are thus able to charge any mid- or low-level operators or employees who carry out the business of the enterprise. However, the *Reves* “operation or management” test generally does not extend liability to professionals performing duties at the behest of the enterprise.<sup>194</sup>

Enterprises also do not have to be large in number. For example, in *United States v. Johnson*,<sup>195</sup> prosecutors used RICO to charge three defendants who committed multiple acts of arson, additional acts of bank

---

<sup>184</sup> *Turkette*, 452 U.S. at 580-81.

<sup>185</sup> Jeffrey E. Grell, *RICO in a Nutshell*, RICOACT.COM, <http://www.ricoact.com/ricoact/nutshell.asp#enterprise> (last visited Feb. 26, 2011).

<sup>186</sup> 129 S. Ct. 2237 (2009).

<sup>187</sup> *Id.* at 2245.

<sup>188</sup> See *Odom v. Microsoft Corp.*, 486 F.3d 541, 550 (9th Cir. 2007) (citing *United States v. Rogers*, 89 F.3d 1326, 1337-38 (7th Cir. 1996); *Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 644 (7th Cir. 1995)).

<sup>189</sup> *Boyle*, 129 S. Ct. at 2247.

<sup>190</sup> 18 U.S.C. § 1962(c) (2006).

<sup>191</sup> 507 U.S. 170 (1993).

<sup>192</sup> *Id.* at 184.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 186 (holding that the defendant’s accounting services were insufficient under the “operation or management” test to signify RICO liability (internal quotation marks omitted)); see also *Dahlgren v. First Nat’l Bank of Holdrege*, 533 F.3d 681, 690 (8th Cir. 2008) (“A bank’s financial assistance and professional services may assist a customer engaging in racketeering activities, but that alone does not satisfy the stringent ‘operation and management’ test of *Reves*.”); *Azzielli v. Cohen Law Offices*, 21 F.3d 512, 521-22 (2d Cir. 1994) (holding that acting as an attorney for the enterprise did not amount to operation or management).

<sup>195</sup> 440 F.3d 832 (6th Cir. 2006).

fraud, wire fraud, witness tampering, and one murder.<sup>196</sup> Though one defendant challenged the existence of an “enterprise” as defined in the statute, the court dismissed this objection, noting that the three men met frequently to discuss their crimes and that each had different roles within the enterprise.<sup>197</sup>

A person convicted of a criminal RICO violation may receive a prison sentence of up to twenty years.<sup>198</sup> Moreover, a violator may be fined or forced to forfeit property acquired through racketeering activities.<sup>199</sup> Therefore, the punishment for a RICO violation is oftentimes greater than that of the underlying offenses.<sup>200</sup>

Section 1964(c) further allows a “person injured in his business or property by reason of a violation of section 1962” to bring a civil suit and recover treble damages as well as court costs and attorney’s fees.<sup>201</sup> Known as “civil RICO,” this section is responsible for the majority of RICO actions brought each year.<sup>202</sup>

To best accomplish the purpose of combating organized crime, RICO specifies that the Act should be “liberally construed to effectuate its remedial purposes.”<sup>203</sup> Because RICO authorizes the imposition of different criminal or civil remedies on conduct already deemed criminal, when performed in a specific fashion, the doctrines of strict construction and leniency have already been applied in the construction of the underlying racketeering activity.<sup>204</sup> Moreover, supporters of the bill envisioned its expansion under this clause. Senator Roman Hruska spoke of its ability to evolve to fit future needs: “The bill is innovative . . . . Hopefully, experts on organized crime will be able to conceive of additional applications of the law. The potential is great.”<sup>205</sup> Likewise, Senator John McClellan claimed: “The ability of our chancery courts to formulate a remedy to fit the wrong is one of the great benefits of our system of justice.”<sup>206</sup>

---

<sup>196</sup> *Id.* at 836.

<sup>197</sup> *Id.* at 835-36.

<sup>198</sup> The sentence can exceed twenty years if the underlying racketeering activity includes a more excessive penalty. *See* 18 U.S.C. § 1963(a) (2006).

<sup>199</sup> *Id.*

<sup>200</sup> Blakey & Gettings, *supra* note 154, at 1033.

<sup>201</sup> 18 U.S.C. § 1964(c).

<sup>202</sup> Grell, *supra* note 185.

<sup>203</sup> Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (codified in a note following 18 U.S.C. § 1961) (internal quotation marks omitted).

<sup>204</sup> Blakey & Gettings, *supra* note 154, at 1032.

<sup>205</sup> 115 CONG. REC. 6,993-94 (1969) (statement of Sen. Roman Hruska).

<sup>206</sup> 115 CONG. REC. 9,567 (1969) (statement of Sen. John McClellan).

#### IV. RICO APPLIED TO HUMAN TRAFFICKING

The first indictment alleging human trafficking as a foundation for a criminal RICO charge was filed on May 6, 2009.<sup>207</sup> A superseding indictment followed on January 6, 2010.<sup>208</sup> Charges of forced labor, aggravated identity theft, money laundering, visa fraud, mail fraud, wire fraud, and extortion all formed the basis of the pattern of racketeering activity alleged in the indictment.<sup>209</sup> This Part first discusses the indictment and its implications for similar cases. It then examines several other successful RICO prosecutions in analogous criminal contexts and argues that the parallel criminal structures indicate that RICO would also be successful in human-trafficking prosecutions.

##### A. *The First Human Trafficking RICO Indictment*

Eleven defendants were charged in the one-hundred-forty-three-count “Giant Labor” indictment.<sup>210</sup> Defendant Abrorkhodja Askarkhodjaev owned and operated a company named Giant Labor Solutions that obtained fraudulent labor-leasing contracts with clients in hotels, resorts, casinos, and construction businesses in fourteen different states.<sup>211</sup> The indictment listed thirteen different companies associated with or controlled by what it terms “the Enterprise,” as defined in RICO.<sup>212</sup> The workforces for these companies were predominately comprised of illegal aliens.<sup>213</sup> The Enterprise charged hundreds of illegal aliens \$3,000 to \$5,000 to transport them into the United States, procure them visas, and provide them with employment.<sup>214</sup> Immigrants within the United States whose visas were about to expire were also targeted and charged up to \$3,000 to extend their visa authorizations.<sup>215</sup> Many immigrants and their families took out loans and amassed debt in order to pay these fees.<sup>216</sup> The visas, however, were fraudulently obtained and extended.<sup>217</sup>

The Enterprise then forced these people to work in specific locations.<sup>218</sup> It maintained control over the workers by threatening to cancel

---

<sup>207</sup> RICO Press Release, *supra* note 25.

<sup>208</sup> Indictment, *supra* note 25, at 1-6, 126.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 6.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 7-10.

<sup>213</sup> *Id.* at 7.

<sup>214</sup> Indictment, *supra* note 25, at 20.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 20-21.

<sup>217</sup> *Id.* at 21.

<sup>218</sup> *Id.*

their immigration statuses if they did not cooperate, thereby preventing them from finding legal employment.<sup>219</sup> Some workers were also told that their families would be charged \$5,000 if they attempted to return to their home countries illegally.<sup>220</sup> Workers had to pay a fee between \$1,000 and \$2,500 to work somewhere other than as assigned by the Enterprise.<sup>221</sup> Otherwise, workers could only work elsewhere if the job did not interfere with their Enterprise employment.<sup>222</sup>

The Enterprise accrued profits by retaining portions of the workers' paychecks, not paying them for all the hours they worked, and not paying them for earned overtime.<sup>223</sup> The indictment specified that some workers received only \$3.50 for cleaning hotel rooms.<sup>224</sup> The Enterprise also charged the workers various fees, such as transportation fees for driving them to appointed work locations, uniform fees, fees for petitions to extend their visas—whether or not they were actually extended—and other unexplained fees.<sup>225</sup> As a result, workers often received paychecks with negative earnings.<sup>226</sup> This ensured that workers did not earn enough money to repay the debt owed to the Enterprise or to pay for a plane ticket home.<sup>227</sup>

The indictment also stated that the Enterprise forced workers to reside in apartments it controlled, where they were charged excessive rents.<sup>228</sup> Between three and eight workers were assigned to one apartment, with each being charged \$250 to \$350 per month.<sup>229</sup> Gender distinctions were seldom made and furniture was sparse, with workers sleeping on mattresses, air mattresses, or on the floor.<sup>230</sup> The Enterprise also blocked some workers from receiving their mail; it maintained keys to the workers' mailboxes and their apartments in order to maintain control over both.<sup>231</sup> Workers who wished to seek alternative residency were threatened with the cancellation of their immigration statuses.<sup>232</sup>

Giant Labor marks the first time RICO has been used to charge a human-trafficking case.<sup>233</sup> Though Congress amended RICO in 2003 to add human-trafficking crimes as predicate offenses for the purpose of

---

<sup>219</sup> *Id.*

<sup>220</sup> Indictment, *supra* note 25, at 21.

<sup>221</sup> *Id.* at 22.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> Indictment, *supra* note 25, at 23.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> Indictment, *supra* note 25, at 23.

<sup>233</sup> RICO Press Release, *supra* note 25.

establishing racketeering activity, it has taken prosecutors six years to utilize this valuable tool.<sup>234</sup> As Giant Labor illustrates, human trafficking is rarely a stand-alone crime. Instead, it often involves other illegal activities such as money laundering, extortion, and fraud.<sup>235</sup> Nine of the eleven defendants charged in the Giant Labor indictment pleaded guilty to various charges in addition to forced labor trafficking, including racketeering conspiracy, fraud in foreign labor contracting, misprision of a felony, identity theft, and tax evasion.<sup>236</sup> Defendant Askarkhodjaev, the head of the Enterprise, admitted to “commit[ing] forced labor trafficking, visa fraud, fraud in foreign labor contracting, transportation of illegal aliens, extortion, interstate travel in aid of racketeering, money laundering, and mail and wire fraud, as part of a pattern of racketeering.”<sup>237</sup> Thus, the Giant Labor Enterprise was effectively dismantled, proving that it is just the sort of organized criminal operation that RICO was designed to combat.<sup>238</sup>

#### B. *Analogous RICO Prosecutions*

RICO has proved successful in prosecuting analogous criminal enterprises, such as narcotics, weapons, and prostitution rings.<sup>239</sup> For example, in *United States v. DiDomenico*,<sup>240</sup> prosecutors charged twenty members of the Chicago Outfit, or the “mob,” with RICO violations that included money laundering, extortion, prostitution, gambling, bribery, and murder as predicate acts.<sup>241</sup> Each defendant, including the head of the organization at that time, was convicted, with many of them receiving sentences equivalent to life.<sup>242</sup>

In *United States v. Antico*,<sup>243</sup> the defendant was convicted for RICO violations predicated on nine counts of extortion in violation of the Hobbs Act and eight counts of mail and wire fraud.<sup>244</sup> The defendant used his

---

<sup>234</sup> 18 U.S.C. § 1961(1) (2006).

<sup>235</sup> *Developments in the Law: Jobs and Borders*, *supra* note 13.

<sup>236</sup> See Bill Draper, *Man Pleads Guilty in Human Trafficking Case*, BOSTON GLOBE, Oct. 20, 2010, [http://www.boston.com/news/local/massachusetts/articles/2010/10/20/man\\_pleads\\_guilty\\_in\\_human\\_trafficking\\_case](http://www.boston.com/news/local/massachusetts/articles/2010/10/20/man_pleads_guilty_in_human_trafficking_case); Press Release, U.S. Dep’t of Justice, Uzbek Man Pleads Guilty to Racketeering (Aug. 19, 2010), available at <http://www.justice.gov/usao/mow/news2010/abdoollayev.ple.htm>.

<sup>237</sup> Plea Agreement at 2, *United States v. Askarkhodjaev*, No. 09-00143-01-CR-W-ODS (W.D. Mo. Oct. 20, 2010).

<sup>238</sup> See *supra* Part III.B.

<sup>239</sup> See *United States v. Fowler*, 535 F.3d 408, 411 (2008) (noting that the defendant was one of thirteen members of the Outlaw Motorcycle Club indicted for RICO charges related to drug-trafficking and firearms offenses); see also *supra* note 22.

<sup>240</sup> 78 F.3d 294 (7th Cir. 1996).

<sup>241</sup> *Id.* at 297-98.

<sup>242</sup> *Id.* at 298.

<sup>243</sup> 275 F.3d 245 (3d Cir. 2001).

<sup>244</sup> *Id.* at 248.

position at the Office of Licenses and Inspections to extort money from business owners attempting to obtain licenses and avoid inspections of topless dance clubs and brothels.<sup>245</sup> The court found that Antico was the head of an enterprise containing three other actors who helped to facilitate his criminal schemes.<sup>246</sup>

Further, in *United States v. Pipkins*,<sup>247</sup> the defendants were two of fifteen pimps convicted of conspiracy to violate RICO predicated on prostitution, enticing juveniles to engage in prostitution, extortion, transfer of false identification documents, and distribution of narcotics to minors.<sup>248</sup> The criminal enterprise set up by these pimps was analogous to a human-trafficking ring. Many of the prostitutes were minors whom the defendants had solicited with promises of a luxurious lifestyle.<sup>249</sup> After becoming prostitutes, however, the women could not keep any of their earnings, were forced to have sex with the pimps and each other, and were threatened, beaten, and locked in the trunks of cars if they did not comply.<sup>250</sup> The pimps also housed and clothed the women, keeping them entirely dependent on the pimps for survival.<sup>251</sup> Prosecutors successfully used RICO to dismantle this prostitution ring.<sup>252</sup> Unfortunately, at the time of this indictment, RICO had not yet been amended to include the TVPA sex-trafficking statute as a predicate act.<sup>253</sup> Otherwise, prosecutors could have utilized the statute as part of the RICO prosecution because the women were psychologically and physically abused.<sup>254</sup> The defendants certainly could have been prosecuted for the sexual exploitation of minors, which does not require coercion.<sup>255</sup>

These cases illustrate the success of RICO in prosecuting organized crime. As trafficking operations in the United States become increasingly sophisticated and extensive, the advantages of RICO as an effective prosecutorial tool become more evident.

## V. THE ADVANTAGES OF RICO IN HUMAN-TRAFFICKING PROSECUTIONS

As evidenced by Giant Labor, the international nature and ever-present demand for labor and commercial sex ensure that human traffickers often operate in expansive enterprises that involve complex criminal networks.

---

<sup>245</sup> *Id.* at 249.

<sup>246</sup> *Id.* at 268-69.

<sup>247</sup> 378 F.3d 1281 (11th Cir. 2004), *vacated*, 544 U.S. 902 (2005).

<sup>248</sup> *Id.* at 1287.

<sup>249</sup> *Id.* at 1285.

<sup>250</sup> *Id.* at 1285-86.

<sup>251</sup> *Id.* at 1285.

<sup>252</sup> *Id.* at 1287.

<sup>253</sup> *See* 18 U.S.C. § 1961 (2000).

<sup>254</sup> *See id.* § 1591(a).

<sup>255</sup> *See id.*

“Trafficking is . . . lucrative because it often occurs in conjunction with other forms of organized crime and criminal activities such as document fraud, money laundering, and migrant smuggling.”<sup>256</sup> Although trafficking is a profitable venture, prosecutors have in RICO a statute specifically enacted to fight organized crime.<sup>257</sup> As a result of its liberal construction clause imposed by Congress, RICO has successfully expanded to prosecute large criminal syndicates involved in narcotics, arms dealing, gambling, and prostitution.<sup>258</sup> The Act’s legislative intent thus makes RICO an ideal statute for human-trafficking prosecutions.<sup>259</sup>

Accordingly, this Part analyzes the advantages of using RICO to prosecute human-trafficking cases. It begins by examining the harsher penalties that traffickers face under a RICO charge and the statute’s broader conspiracy provision. It then concludes that RICO offers prosecutors a great degree of discretion in charging human trafficking cases.

#### A. *Harsher Penalties*

A criminal RICO violation allows for a twenty-year prison sentence, or more if the underlying offense has a greater penalty.<sup>260</sup> Because a defendant can be charged both with a RICO violation and with conspiracy to violate RICO, the potential for a forty-year sentence exists.<sup>261</sup> Additionally, a defendant can receive consecutive sentences for a RICO violation and a predicate offense; or participants in an enterprise can be convicted of racketeering conspiracy without being convicted of an underlying predicate offense.<sup>262</sup>

Because RICO prohibits racketeering activity that must be continuous, it also enables a prosecutor to bring charges based on predicate acts that might not otherwise be charged because the statute of limitations has run or

---

<sup>256</sup> *Developments in the Law: Jobs and Borders*, *supra* note 13.

<sup>257</sup> *See supra* notes 153-55 and accompanying text.

<sup>258</sup> *See supra* Part IV.B.

<sup>259</sup> *See* 115 CONG. REC. 6,993-94 (1969) (statement of Sen. Roman Hruska).

<sup>260</sup> *See* 18 U.S.C. § 1963(a) (2006). The Organized Crime and Racketeering Section will approve a RICO count seeking a sentence beyond twenty years if:

(1) the count charges against the defendant a racketeering act for which the penalty includes life imprisonment; (2) the racketeering act charges the necessary facts to trigger the life imprisonment penalty, tracking that portion of the statute that sets forth the factors supporting a penalty of life imprisonment; and (3) the racketeering act cites the appropriate statute or statutes the racketeering act violates.

ORGANIZED CRIME AND RACKETEERING SECTION, U.S. DEP’T OF JUSTICE, CRIMINAL RICO: 18 U.S.C. §§ 1961-1968, A MANUAL FOR FEDERAL PROSECUTORS 159 (Frank J. Marine ed., 5th rev. ed. 2009) [hereinafter RICO PROSECUTOR’S MANUAL], available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/rico.pdf](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/rico.pdf).

<sup>261</sup> RICO PROSECUTOR’S MANUAL, *supra* note 260.

<sup>262</sup> *Id.* at 177; *see infra* Part V.B.

the act was the subject of a prior state or federal prosecution.<sup>263</sup> For example, a trafficker who is part of an enterprise but is prosecuted and convicted under the TVPA, and who subsequently commits additional racketeering acts within ten years, could be indicted on RICO charges that include the TVPA conviction as an underlying predicate offense. The same is true if the trafficker was never prosecuted for the underlying offense, which has consequently become time-barred, as long as RICO charges are brought within five years of the commission of at least one predicate act.<sup>264</sup>

An additional lure for prosecutors is § 1963(a), which requires asset forfeiture of any interest or property gained as a result of a RICO violation.<sup>265</sup> Congress included the criminal forfeiture provision in RICO to “break the economic power of organized crime as well as to punish and deter offenders.”<sup>266</sup> The provision mandates the forfeiture of a defendant’s entire interest in the enterprise, possibly including the enterprise itself, regardless of whether some parts are engaged in legitimate business.<sup>267</sup> Section 1963(a)(2)(D) specifies forfeiture of “property or contractual right[s] of any kind affording a source of influence over” the enterprise.<sup>268</sup> In addition to voting rights or management contracts, courts have construed this subsection to include buildings, vehicles, and other instrumentalities used in the racketeering activity.<sup>269</sup> Section 1963(a)(3) requires a defendant

---

<sup>263</sup> See, e.g., *United States v. Wong*, 40 F.3d 1347, 1367 (2d Cir. 1994) (“Because the limitations period is measured from the point at which the crime is complete, a defendant may be liable under substantive RICO for predicate acts the separate prosecution of which would be barred by the applicable statute of limitations.” (citations omitted)); *United States v. Castellano*, 610 F. Supp. 1359, 1413-27 (S.D.N.Y. 1985) (upholding thirty-six racketeering acts that were either the subject of prior state or federal prosecutions or the subject of a favorable federal ruling).

<sup>264</sup> While sex-trafficking and child offenses have no statute of limitations, charges for other trafficking crimes must be brought within ten years. See CHARLES DOYLE, CONG. RESEARCH SERV., RL 31253 STATUTES OF LIMITATIONS IN FEDERAL CRIMINAL CASES: AN OVERVIEW app. 19-22 (2007).

<sup>265</sup> 18 U.S.C. § 1963(a); see Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 920, 924 (1987) (“In some cases, the impetus for the use of RICO in criminal enterprise cases appears to be, as in the white collar and labor cases, its extreme, mandatory and procedurally simple financial penalties.”).

<sup>266</sup> Blakey & Gettings, *supra* note 154, at 1036.

<sup>267</sup> See, e.g., *United States v. Segal*, 495 F.3d 826, 838 (7th Cir. 2007) (finding that a defendant who owned the entire enterprise was properly required to forfeit the full enterprise, despite the jury’s finding that only 60 percent of his interests were “tainted” by racketeering activity); *United States v. Najjar*, 300 F.3d 466, 485-86 (4th Cir. 2002) (upholding order subjecting all of corporation’s assets to forfeiture); *United States v. Busher*, 817 F.2d 1409, 1413 (9th Cir. 1987) (“[F]orfeiture is not limited to those assets of a RICO enterprise that are tainted by use in connection with racketeering activity, but rather extends to the convicted person’s entire interest in the enterprise.”); see also RICO PROSECUTOR’S MANUAL, *supra* note 260, at 189-92.

<sup>268</sup> 18 U.S.C. § 1963(a)(2)(D).

<sup>269</sup> See, e.g., *United States v. West*, 877 F.2d 281, 292 (4th Cir. 1989) (holding that two houses used to store and sell drugs satisfies the requirements of subsection D); *United States v. Zielie*, 734 F.2d 1447, 1458-59 (11th Cir. 1984) (same); *United States v. Rudaj*, No. 04 CR. 1110(DLC), 2006 WL

to forfeit all proceeds acquired from a RICO violation, as determined by the court, even if the defendant no longer possesses the funds or uses other funds to meet the forfeiture order.<sup>270</sup>

As the Eleventh Circuit explained in *United States v. Ginsburg*:<sup>271</sup> “Since RICO forfeiture is a sanction against the individual defendant rather than a judgment against the property itself, ‘it follows the defendant as a part of the penalty and thus it does not require that the government trace it, even though the forfeiture is not due until after conviction.’”<sup>272</sup> This prevents the government from having to align forfeited assets with specific criminal activity and ensures that the forfeiture provision covers the entire enterprise.<sup>273</sup> Consequently, although the 2008 TVPA amendments added forfeiture clauses to several trafficking crimes,<sup>274</sup> the RICO provision is more expansive because all assets and proceeds derived from the enterprise, legitimate or not, are forfeited.<sup>275</sup> If trafficking is conducted in conjunction with other crimes, a RICO conviction and subsequent forfeiture will cripple the entire economic infrastructure of the organization, while singular prosecutions under the TVPA or other statutes might not.

Given the egregious nature of trafficking crimes and that perpetrators have engaged in a pattern of trafficking activity that by definition must have been continuous, longer prison sentences and financial repercussions are justified. The consequences of a RICO conviction also deter traffickers because in addition to lengthier incarcerations, the criminal forfeiture provision can irreparably damage the economic infrastructure of a trafficking enterprise.

#### B. *A More Comprehensive Conspiracy Provision*

Section 1962(d) of RICO provides: “It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.”<sup>276</sup> According to the Supreme Court in *Salinas v. United States*,<sup>277</sup> this provision is broader than the general conspiracy stipulation

---

1876664, at \*3-4 (S.D.N.Y. July 5, 2006) (holding that the forfeiture of property used as a meeting place to conduct racketeering activity is proper under subsection D).

<sup>270</sup> 18 U.S.C. § 1963(a)(3).

<sup>271</sup> 773 F.2d 798 (7th Cir. 1985).

<sup>272</sup> *Id.* at 801 (quoting *United States v. Conner*, 752 F.2d 566, 576 (11th Cir. 1985)).

<sup>273</sup> See RICO PROSECUTOR’S MANUAL, *supra* note 260, at 196.

<sup>274</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, tits. I-III, 122 Stat. 5044, 5045-87 (codified in scattered sections of 6, 8, 18, 22, 28 and 42 U.S.C.); see *supra* Part II.B.3.

<sup>275</sup> See RICO PROSECUTOR’S MANUAL, *supra* note 260, at 196.

<sup>276</sup> 18 U.S.C. § 1962(d) (2006).

<sup>277</sup> 522 U.S. 52 (1997).

applicable to federal crimes.<sup>278</sup> In *Salinas*, the defendant argued that his RICO conspiracy conviction should be overturned because he had neither committed nor agreed to commit two predicate acts, but was acquitted of the underlying racketeering activity of accepting bribes.<sup>279</sup> In rejecting this argument, the Court held that unlike the general conspiracy statute, the RICO conspiracy provision does *not* require an overt “act to effect the object of the conspiracy” on the part of at least one of the conspirators.<sup>280</sup> All that was necessary was an agreement effectuating a common purpose, whether or not the conspirator agreed to the commission of all parts of the offense.<sup>281</sup> Thus, in sustaining a RICO conspiracy charge:

It makes no difference that the substantive offense under § 1962(c) requires two or more predicate acts. The interplay between subsections (c) and (d) does not permit us to excuse from the reach of the conspiracy provision an actor who does not himself commit or agree to commit the two or more predicate acts requisite to the underlying offense.<sup>282</sup>

For example, in *United States v. Deitz*,<sup>283</sup> the Sixth Circuit affirmed the defendant’s conviction after he and thirty-seven co-defendants were indicted for RICO conspiracy charges related to drug trafficking and firearms offenses.<sup>284</sup> The defendants were all members of the Outlaw Motorcycle Club, an international organization additionally involved in murder, assault, extortion, money laundering, prostitution, robbery, fraud, explosives, arson, and kidnapping.<sup>285</sup> Deitz claimed on appeal that there was not enough evidence to support the RICO conspiracy conviction.<sup>286</sup> The court, however, held that “[o]nce a conspiracy is shown beyond a reasonable doubt, a defendant’s connection to the conspiracy, ‘need only be slight, and the government is only required to prove that the defendant was a party to the general conspiratorial agreement.’”<sup>287</sup>

This has valuable implications for human-trafficking prosecutions because, as previously discussed, the majority of trafficking crimes involve conspiracies.<sup>288</sup> A broader conspiracy provision that does not require the conspirator to agree to commit the underlying predicate acts, but requires only that he share a common purpose with his co-conspirators, enables prosecution of the entire trafficking enterprise. This can include smugglers,

---

<sup>278</sup> *Id.* at 63.

<sup>279</sup> *Id.* at 62-63.

<sup>280</sup> *Id.* (quoting 18 U.S.C. § 371 (1994)) (internal quotation marks omitted).

<sup>281</sup> *Id.* at 63-64.

<sup>282</sup> *Id.* at 65.

<sup>283</sup> 577 F.3d 672 (6th Cir. 2009).

<sup>284</sup> *Id.* at 676.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* at 677.

<sup>287</sup> *Id.* (quoting *United States v. Avery*, 128 F.3d 966, 971 (6th Cir. 1997)).

<sup>288</sup> See Torg, *supra* note 118, at 511.

madams, accountants, bouncers, customers, fraudulent document providers, financiers, and a myriad of other people who are knowingly involved in some part of a trafficking operation. As *Salinas* illustrates, a person need not be convicted of the underlying offenses to be found guilty of a RICO conspiracy.<sup>289</sup> Therefore, under the conspiracy provision, RICO has the potential to reach perpetrators who are not directly involved in forcing or coercing victims and are thus not prosecutable under the applicable trafficking statutes, and who also may not be prosecutable under the stricter requirements of the general conspiracy statute.

In *Giant Labor*, for example, several of the defendants who pleaded guilty to racketeering conspiracy under § 1962(d) were not directly involved in human trafficking. Defendant Ilkham Fazilov admitted to “utilizing illegal aliens to fraudulently fulfill labor leasing contracts,” executing fraudulent documents, and concealing illegal funds.<sup>290</sup> Likewise, defendant Jakhongir Kakhkharov admitted to “mail fraud, money laundering, inducing aliens to illegally enter the United States, and harboring illegal aliens.”<sup>291</sup> Though neither of these confessions would amount to a conviction under the forced labor statute, or under the general conspiracy provision without additional proof of agreement to commit all parts of the underlying offense, *Salinas* ensures that these types of criminal actions, crucial to the operation of a trafficking enterprise, do not go unpunished under RICO.

### C. *Prosecutorial Discretion*

RICO offers prosecutors a great deal of discretion in charging, trying, and sentencing a case. For example, an indictment does not have to specify the type of enterprise that forms the basis of a racketeering charge.<sup>292</sup> Rather, “[t]he precise description of the enterprise alleged in the indictment will rarely be relevant to determinative legal questions in a RICO prosecution, because the amorphous nature of the statute gives prosecutors remarkable flexibility in drafting indictments.”<sup>293</sup> This flexibility continues to trial

---

<sup>289</sup> *Salinas v. United States*, 522 U.S. 52, 63 (1997).

<sup>290</sup> Plea Agreement at 2, *United States v. Fazilov*, No. 09-00143-5-CR-W-ODS (W.D. Mo. Aug. 16, 2010).

<sup>291</sup> Plea Agreement at 2, *United States v. Kakhkharov*, No. 09-00143-10-CR-W-ODS (W.D. Mo. Mar. 17, 2010).

<sup>292</sup> *United States v. Stratton*, 649 F.2d 1066, 1075 (5th Cir. 1981) (“Moreover, there is no merit to appellants’ suggestion that the prosecution must specify whether the enterprise is either a ‘legal entity’ or ‘a group of individuals associated in fact although not a legal entity.’” (quoting 18 U.S.C. § 1961(4) (West Supp. 1981))); *see also* RICO PROSECUTOR’S MANUAL, *supra* note 260, at 79 (“The Government need not specify in a RICO indictment whether the enterprise charged is a ‘legal entity’ or a ‘group of individuals associated in fact,’ provided that the indictment is otherwise sufficient.”).

<sup>293</sup> Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 732 (1987).

because the enterprise theory alleged in the indictment and the one relied on in the courtroom do not have to be the same.<sup>294</sup>

Additionally, RICO allows prosecutors to join multiple crimes that would traditionally be impermissible. Federal Rule of Criminal Procedure 8(a) permits joinder of offenses only if they “are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.”<sup>295</sup> Moreover, defendants cannot be joined unless they “are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses.”<sup>296</sup> Hence, a defendant who commits money laundering cannot be joined with a defendant charged with sex trafficking, unless the Government can prove that the crimes are part of the same series of acts. Rule 14 also prohibits joinder of offenses in a single indictment that might prejudice a defendant.<sup>297</sup> Consequently, serious crimes like murder and rape are often severed from other violations.<sup>298</sup>

RICO’s unique structure, however, enables joinder of these types of offenses, as well as others that would not be allowed under Rule 8.<sup>299</sup> Because the goal of a RICO prosecution is to prove the existence of an enterprise and a pattern of racketeering activity, not any individual crime, “RICO’s enterprise concept . . . unites what might otherwise be diverse offenses committed by the same defendant or defendants and makes joinder possible.”<sup>300</sup> This gives a prosecutor wide latitude in determining which defendants and predicate acts to join in an indictment, enabling the prosecution of sophisticated trafficking operations such as MS-13 that are involved in various violent activities.<sup>301</sup>

Finally, because forfeiture is mandatory under § 1963(a), RICO also assigns prosecutors a substantial amount of sentencing control normally reserved to a judge or jury.<sup>302</sup> This further increases a prosecutor’s bargain-

<sup>294</sup> *Stratton*, 649 F.2d at 1075; *see also Lynch, supra* note 293, at 732.

<sup>295</sup> FED. R. CRIM. P. 8(a).

<sup>296</sup> FED. R. CRIM. P. 8(b).

<sup>297</sup> FED. R. CRIM. P. 14.

<sup>298</sup> *See Lynch, supra* note 265, at 927 (“This motivation for use of RICO is especially strong where the offenses sought to be joined are very serious and prejudicial, and thus particularly likely to be severed in the exercise of the trial judge’s discretion.”).

<sup>299</sup> *See Julie Gunnigle, “Birds of a Feather” RICO: Trying Partners in Crime Together*, 34 SYRACUSE J. INT’L L. & COM. 41, 67-68 (2006) (stating that RICO would likely allow evidence of murder and an illegal sport-booking action, for example, to be joined if they are sufficiently related to the enterprise’s business).

<sup>300</sup> *Id.* at 65-66; *see also Lynch, supra* note 265, at 931 (“RICO has enabled prosecutors to link together a wide range of different offenses committed by numerous different individuals, linked together by common aims, overlapping patterns of complicity in different crimes and general awareness that others committed to the same goals were engaged in similar illegal acts, in ways that would be impossible under traditional rules of joinder, jurisdiction and venue.”).

<sup>301</sup> McLemore, *supra* note 5.

<sup>302</sup> *Lynch, supra* note 293, at 721.

ing power in plea negotiations. Fear of a RICO charge and the financial repercussions accompanied by it can produce more cooperative defendants and induce pleas to lesser charges.<sup>303</sup> While the Justice Department prohibits the outright use of a RICO charge to solicit a guilty plea to a lesser charge,<sup>304</sup> “[i]t would of course be naive to conclude from this that RICO does not constitute a significant prosecution weapon in plea bargaining.”<sup>305</sup>

This degree of discretion has become necessary in human-trafficking prosecutions, where defendants are no longer engaging in singular illegal activity, but are increasingly demonstrating a devotion to organized crime.<sup>306</sup> Professor Gerald Lynch says it best: “Respect for law is hardly fostered when the legal system myopically focuses on isolated, perhaps minor, offenses of individuals whose entire lives make plain their complete commitment to a career of organized lawbreaking.”<sup>307</sup>

## CONCLUSION

It is shocking that human slavery exists in the United States today. Humans are being bought, sold, and forced to labor for someone else’s commercial gain. The eradication of these fundamental human rights violations must be a central concern among government officials. While the TVPA takes a great leap in accomplishing this goal, it does not jump far enough. Human trafficking has become the second largest criminal industry in the world. Trafficking rings have evolved into complex criminal enterprises involving various illegal activities. The TVPA does not provide sufficient prosecutorial tools to eradicate these organizations.

Prosecutors must take advantage of every available weapon in this fight. RICO offers prosecutors a ready-made statute intended to combat organized crime and provides harsher penalties that serve as a greater deterrent to traffickers. It also contains a broader conspiracy provision and gives prosecutors wide-ranging discretion, securing convictions in cases that otherwise could not be prosecuted. Hopefully, Giant Labor will prove to be the first of many successful RICO human-trafficking cases, setting a new precedent for prosecutors as they wage war against modern day slavery.

---

<sup>303</sup> *Id.* at 725-26.

<sup>304</sup> U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-110.320 (1997) (“Inclusion of a RICO count in an indictment solely or even primarily to create a bargaining tool for later plea negotiations on lesser counts is not appropriate and would violate the Principles of Federal Prosecution.”), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/110mcrm.htm#9-110.320](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/110mcrm.htm#9-110.320).

<sup>305</sup> Lynch, *supra* note 293, at 726 n.268.

<sup>306</sup> See *Developments in the Law: Jobs and Borders*, *supra* note 13 (stating that human trafficking is now the third-largest international criminal enterprise).

<sup>307</sup> Lynch, *supra* note 265, at 960.