



# HUMAN TRAFFICKING

A HANDBOOK FOR LOUISIANA'S PROSECUTORS AND VICTIM ASSISTANCE COORDINATORS

*The opinions, findings, and conclusions or recommendations expressed in this book, manual, handbook, film, video, plan, publication, program, and/or exhibition are those of the author(s) and do not necessarily reflect the views of the Department of Justice or the LCLE.  
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# Introduction

According to the United Nations, human trafficking can take many forms – from the compulsion of labor in legitimate businesses to the commercial sex trafficking of both adults and minors, and from child labor to forced marriages.

Despite the prevalence of human trafficking, many in the criminal justice system do not fully understand the dynamics of trafficking, who is trafficking the victims, the methods employed by the traffickers, and, ultimately, how to investigate and successfully prosecute such crimes.

One possibility is that traffickers lurk in the shadows, choosing victims who are unlikely to tell anyone or unlikely to be believed. It could be, too, a belief that human trafficking exists only in developing countries or is limited in scope to teenage girls who are kidnapped in foreign lands and kept shackled in cages as portrayed in the well-known movie “Taken.”

Of course, the reality of human trafficking is that it is a local problem as much as it is an international one. To be sure, labor trafficking exists here in Louisiana. You can find trafficked people working in industries such as agriculture, hospitality, health care, and manufacturing, and even in individual homes. Equally so, commercial sex trafficking of minors and undocumented immigrants is common in the illegal sex trade, whether on the street corner, online, or in a seemingly legitimate massage parlor.

In 2000, the United States entered the ranks of progressive nations to pass a federal trafficking protection statute, and states were encouraged to follow suit. In 2005, Louisiana joined that effort in passing separate laws to make trafficking a crime.

Even with renewed attention and legislative efforts, trafficking investigations and prosecutions remain rare. The goal of this handbook is to help bend that curve toward increasingly more effective investigations and prosecutions and to begin the process of improving the entire community’s response to human trafficking.

The first step toward that goal is understanding the laws against trafficking. This is only one step of many. It won’t take long for the reader to realize that just as trafficking can involve an intricate web of criminality, the response to it requires the same level of collaboration: Forming our own seamless web by partnering with local, state, and federal authorities, community trafficking victim advocacy service providers, and many others to create a response that is truly responsive to the needs of trafficking victims.

This handbook is written primarily for prosecutors, victim assistance coordinators, law enforcement and community-based service providers. It can be a valuable resource for the experienced prosecutor or investigator looking for a deeper understanding trafficking statutes, or who is looking for new ideas to improve the response to trafficking. However, it is not intended to be a compendium of all trafficking knowledge, nor is it a legal treatise or article on a narrow point of law. Rather, this handbook is a resource that one can turn to find information “on the fly,” like when one needs to know if Louisiana’s trafficking law has an element of asportation (which it does not). It is also a resource to learn how to improve trafficking investigations and to understand the impact that trafficking has on the victim.

The handbook is divided into eight easy-to-read chapters. At the outset, history of human trafficking laws and the elements of both federal and state law are discussed. The chapters then focus on trafficking investigation and prosecution and provides guidance for handling some of the most pressing issues surrounding both. Finally, the handbook shifts to the trafficking survivor, wherein the rights of the victims of crime are explored. It is the hope of the Louisiana District Attorneys Association that this handbook will be considered both useful and informative, whatever your role and level of knowledge. For all readers, this can be starting point to begin what can be a daunting yet worthwhile challenge.



# Chapter 1

## The History of Human Trafficking

*And by virtue of the power, and for the purpose aforesaid, I do order and declare that all persons held as slaves within said designated States, and parts of States, are, and henceforward shall be free; and that the Executive government of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of said persons.* *The Emancipation Proclamation*

It is widely believed that with these incredibly stirring words President Abraham Lincoln freed those who were enslaved and ended the institution of slavery in the United States. The truth, however, is much more complicated: The Emancipation Proclamation (which by device was a Presidential Proclamation and Executive Order) only served to change the legal status under federal law of over 3.5 million persons subjugated in the Confederate<sup>1</sup> states from being “enslaved” to “free.” The great statesman Frederick Douglass recognized the Proclamation as being the “first step on the part of the nation in its departure from the thralldom of the ages.”<sup>2</sup>

### Section A: The 13th Amendment to the Constitution

#### 1. The Substance of the Amendment

As the first of three Reconstruction Amendments adopted following the American Civil War,<sup>3</sup> the 13th Amendment was the formal legal instrument which abolished slavery and involuntary servitude in the United States, except as punishment for a crime of which one had been convicted.<sup>4</sup>

The words, which changed a portion of Article IV, Section 2, are simple enough:

##### **Section 1**

***Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.***

##### **Section 2**

***Congress shall have power to enforce this article by appropriate legislation.***

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<sup>1</sup> The Emancipation Proclamation was directed to all areas that were then in open rebellion or had seceded from the Union (i.e., those eleven Confederate-controlled states).

<sup>2</sup> John Hope Franklin, *An Act of Justice*, Prologue Magazine, Summer 1993, Vol. 25, No. 2.

<sup>3</sup> The 13th, 14th and 15th Amendments to the U.S. Constitution are collectively known as the “Reconstruction Amendments,” which were adopted between 1865 and 1870.

<sup>4</sup> Presently, the Constitutions of 31 states provide for this exception to slavery and involuntary servitude; conversely, 26 states make no mention of slavery or involuntary servitude; In 2018, Colorado became the first state to repeal the exceptions clause from its state's constitution. In 2020, referendums to repeal similar exceptions clauses in both Utah and Nebraska were approved by 81% and 68% of voters, respectively.

The meaning and implication of those simple words are still hotly debated. How much power was ceded to Congress in Section 2 to create laws to eliminate the badges and incidents of slavery is an issue to this day. However, it is universally accepted that the 13th Amendment ended chattel slavery in America.

The amendment also bans “involuntary servitude” – a restriction which covers a broad range of forced labor arrangements through physical threats, violence, or coercion. One such arrangement practiced at the time of the ratification of the 13th amendment was “peonage,” or debt servitude. One who was held in “peonage” was required to provide labor to pay off debt, trapping them in a vicious cycle where the debt continued to grow despite the labor of the debtor.

## 2. The Importance of Section 2

Section 2 of the 13<sup>th</sup> Amendment was unique at the time as it was the first to include the broad grant of authority to Congress to pass legislation necessary for the enforcement of the amendment. One of the earliest examples of legislation growing out of Section 2 was the federal statute against peonage passed in 1867.<sup>5</sup> Since then, Congress has invoked the powers granted in Section 2 to pass significant civil rights legislation including the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009.<sup>6</sup>

## 3. Early statutes under Section 2

Once the 13th Amendment was enacted, Congress did not hesitate to pass legislation necessary to enforce its provisions. For example, Congress passed the Civil Rights Act of 1866 which defined citizenship and invalidated the Black Codes that had flourished to keep freed slaves in a state of *de facto* slavery.<sup>7</sup>

During the early and mid-20th century, Congress passed a flurry of laws for the enforcement of the 13th Amendment’s abolition of slavery. Those included the prohibitions of using vessels for the slave trade, peonage, kidnapping with the intent to sell the victim into slavery, and enticing, persuading, or inducing another to board a vessel or go to another place with the intent to hold that other in involuntary servitude or as a slave. These statutes remain today, codified at 18 U.S.C. §§1582, 1581, and 1583.

That surge of legislation also included 18 U.S.C. §1584, which makes it a crime to “knowingly and willfully” hold another in “involuntary servitude” – language which was most certainly borrowed from the 13th Amendment. Nonetheless, this legislation proved to be ineffective against modern-day human trafficking when the U.S. Supreme Court, in *United States v. Kozminski*,<sup>8</sup> narrowly interpreted the meaning of “involuntary servitude” in the context the 13th Amendment. This seminal case, which arose from the unlikely setting of a small agrarian community in Chelsea, Michigan led to the enactment of the modern human trafficking statutes in force today.

## 4. *United States v. Kozminski*

For much of the early 20th Century, the area of rolling hills around Chelsea was dotted with small family farms and homesteads. By the early 1980’s, this bucolic way of life was starting to transition; Chelsea’s proximity to Ann Arbor and Detroit made it an attractive place for city dwellers seeking a slower pace of life. With the increasingly large numbers of city workers moving into Chelsea and commuted to

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<sup>5</sup>This federal statute was codified as the “Anti-Peonage Act of 1867.” At the time, peons were the poor Hispanic or detribalized Native Americans (known as “*genizaros*”) who were taken into villages as indentured servants or general laborers in the New Mexico Territory and elsewhere in the United States. It was specifically enacted to prohibit any the holding of any person “to service or labor under the peonage system” and to assist in enforcing the 13th Amendment.

<sup>6</sup>Signed into law on October 28, 2009 by President Barack Obama, the “Shepard Byrd Act” was a rider to the National Defense Authorization Act of 2010 and expanded the Civil Rights Act of 1968. It was the first statute allowing federal criminal prosecution of hate crimes motivated by the victims actual or perceived sexual orientation or gender identity. The Act further makes it a federal crime to willfully cause or attempt to cause bodily injury using a dangerous weapon. It also covers crimes committed because of the actual or perceived religion, national origin, sexual orientation, gender, gender identity, or disability if any person if the crime affected interstate or foreign commerce or within maritime or territorial jurisdiction.

<sup>7</sup>In the first two years after the Civil War, white-dominated Southern legislatures passed “Black Codes” modeled after the earlier slave codes, as a larger pattern of the majority to maintain political dominance and suppress the freedmen, newly emancipated African-Americans.

<sup>8</sup>487 U.S. 931, 108 S.Ct. 2751, 101 L.Ed.2d 788 (1988).

their jobs, the demand for real estate increased. In turn, the raised property values made it increasingly more difficult for the family-run farms to sustain their small operations.

Notably, Ike Kozminski, an immigrant from Poland, owned two small dairy farms near Chelsea and worked them with his wife Margarethe and adult son John. Even before the problems caused by the shifting population, Kozminski's success as a dairy farmer was limited. A local official of the Michigan Livestock Exchange told the *New York Times*, "[T]he cattle he brought in here to sell were sickly and thin and he had trouble selling his milk as Grade A."<sup>9</sup>

One evening in 1967, the Kozminskis and their young son, Michael, found Robert Fulmer walking along the road near the farm where he was working at the time and offered him a ride. Fulmer, who was well-known in the community, was a simple man with developmental disabilities and an IQ of 67. After talking with the Kozminskis, Fulmer agreed to provide farm labor in exchange for food and lodging.

In 1972, Mr. Kozminski encountered Louis Molitoris who had recently been discharged from a mental institution and was unemployed and homeless. Kozminski knew Molitoris from previous encounters and offered him food, lodging and cigarettes in exchange for labor. Like Fulmer, Molitoris suffered from developmental disabilities and had an IQ of 60.

For more than a decade, the two men became fixtures in the community, in the way that farm workers often do in small towns. The two men were friendly and were known for driving pickup trucks and farm equipment up and down the road fronting the farm. Mr. Kozminski told anyone who asked that he was their legal guardian.

But theirs was a wholly iniquitous relationship. The two men toiled 17 hard hours a day, seven days a week. Although the men were initially paid \$15.00 per week, this arrangement eventually morphed into a "labor-without-pay" deal solely benefiting the Kozminskis. Neighbors not only describe Fulmer and Molitoris as being mistreated, but as scared to leave. In fact, the two lived in a squalid trailer without the necessities of heat, running water, or toilet facilities. By 1993, they were fed so poorly that both were suffering from malnutrition. They were denied the most basic medical care, to such an extent that Fulmer was even denied emergency medical treatment when his thumb was severed in a farming accident. Moreover, a former employee of the family revealed that Mr. Kozminski told him to beat or kick the men, if necessary, to make them work.

Ultimately, this mistreatment came to the attention of authorities, and the Kozminskis were arrested in October 1983. They were charged with conspiring to interfere with Fulmer's and Molitoris' 13th Amendment right to be free from "involuntary servitude, contrary to 18 U.S.C. §241, and with holding the two men in involuntary servitude by compelling their labor and preventing them from leaving the farm, in violation of 18 U.S.C. §1584.

At trial, neighbors and witnesses described two developmentally disabled men who were psychologically coerced and controlled by the Kozminskis but who were not physically restrained. Testimony and other evidence demonstrated that the Kozminskis preyed upon the men's disability and dependency, utilizing psychological control through threats of violence, threats of returning one of the men to a state institution, and other means of compulsion. The Kozminskis were found guilty, and appeals followed.<sup>10</sup> The sole issue on appeal was whether involuntary servitude as used in the statutes included servitude through "general psychological coercion."

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<sup>9</sup> John Holusha, *Neighbors say Two 'Slaves' Were Friendly but Helpless*, October 31, 1983. Archived at <https://www.nytimes.com/1983/10/31/us/neighbors-say-two-slaves-were-friendly-but-helpless.html>.

<sup>10</sup> *United States v. Kozminski*, 821 F.2d 1186 (6th Cir. 1987), *reversed and remanded*.

## 5. Defining Involuntary Servitude

In delivering the unanimous opinion, Justice Sandra Day O'Connor stated that precedent had established that the type of involuntary servitude prohibited by the 13th Amendment is limited to that which is enforced by the use or threatened use of physical or legal coercion. The Court held "that for purposes of criminal prosecution under §241 or §1584, the term 'involuntary servitude' necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process."<sup>11</sup>

The Court reasoned that the language, legislative history, and statutory progenitors of §1584 indicate that its reach should be limited. *In specie*, that is the understanding of the 13th Amendment's "involuntary servitude" phrase that prevailed at the time of §1584's enactment and, since Congress clearly borrowed that phrase in enacting §1584, the phrase should have the same meaning in both places absent any contrary indications. Therefore, it is reasoned that "Section 1584's history does not support the Court of Appeals' conclusion that immigrants, children or mental incompetents are entitled to any special protection."<sup>12</sup>

The majority opinion relied upon the obvious borrowing of the phrase "involuntary servitude" from the 13th Amendment to say that Congress must have meant the term to mean what it was understood to mean at the time §241 and §1584 were enacted. The Supreme Court reasoned that these two statutes had been derived from two precursor statutes (*i.e.*, the Slave Trade statute of 1818, as amended in 1909, and the Padrone statute of 1874) and that the legislative history and interpretation of those two precursor statutes informed the interpretation of §241 and §1584.

The *Kozminski* Court explained that "[T]he Slave Trade statute originally made it a crime to hold, sell, or otherwise dispose of any . . . negro, mulatto, or person of colour brought [into the United States] as a slave, or to be held to service or labour."<sup>13</sup> The Supreme Court found that cases under the Slave Trade statute established that the reach of involuntary servitude was limited to "cases involving the compulsion of services by the use or threatened use of physical or legal coercion."<sup>14</sup>

The Supreme Court found that the Padrone statute was likewise limited to services compelled by the use or threatened use of physical or legal coercion. The term "*padrone*," the Italian word for "owner," was used in 1874 to identify men who brought boys from Italy to the United States to work as street musicians and beggars. The Padrone statute sought to punish this practice by providing that anyone who "inveigled or forcibly kidnapped" another, intending to keep them in involuntary servitude is guilty of a felony.<sup>15</sup> While the term "inveigled" suggests that the statute reached those who were brought to this country by means other than through the use or threatened use of physical force, once in the country, the *padrone* must have held the victim in a state of involuntary servitude through some use of force or threatened force to have committed a crime.

Reading the Slave Trade and Padrone Act in concert and reviewing the specific legislative history of §1584, the Court found nothing suggesting that the words "involuntary servitude," as understood at the time, meant anything other than compulsion of labor or services through the use or threatened use of physical coercion. "Congress chose to use the language of the Thirteenth Amendment in §1584, and this was the scope of that constitutional provision at the time §1584 was enacted."<sup>16</sup>

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<sup>11</sup> 487 U.S. at 949-52, 108 S.Ct. 2751.

<sup>12</sup> 487 U.S. at 944-948 (emphasis added).

<sup>13</sup> *Id.* at 946.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 947.

<sup>16</sup> *Id.* at 948.

## Section B: Human Trafficking Statutes

### 1. Federal Human Trafficking Law

Not surprisingly, the holding in *Kozminski* created a vacuum into which a broad range of coercive conduct tumbled, and the need for Congress to act was apparent. International attention was sharply focused on the problem of involuntary servitude, slavery, and international trafficking of children and women – often for purposes of sexual exploitation. In contrast, the United States was falling behind other countries in combating international trafficking due to its failure to embrace broader definitions of “involuntary servitude.” Ultimately compelled by circumstances, Congress passed the Trafficking Victims Protection Act of 2000 (“TVPA”). The TVPA was reauthorized in 2008 and 2013, and re-codified as the Justice for Victims of Trafficking Act (“JVTA”) of 2015. Federal law soon filled the void left by *Kozminski* by expanding the definition of involuntary servitude beyond those who knowingly provide or obtain the labor and services of another through physical force or threats of force, to those who abuse law or legal process, engage in document servitude, or use other means of fraud or coercion to accomplish those ends.

The Congressional findings made before the passage of the TVPA focused largely on international trafficking and the need for a comprehensive statutory scheme to address trafficking across international borders. However, it is clear from the language of the federal statutes that the offense does not require any movement across borders – recognizing that victims are most assuredly trafficked within national borders.

### 2. State Human Trafficking Statutes

While the federal statutes were an important first step in addressing this issue, it quickly became apparent that similarly comprehensive state laws were needed to open a second front in the battle against human trafficking. States began to propose and pass their own laws empowering local law enforcement and prosecutors to combat human trafficking and to ensure that victims have ready access to services from multiple providers.<sup>17</sup> To create a more comprehensive response, states also amended victims’ right statutes and crime victims’ compensation and reparation legislation. The passage of state human trafficking laws became a force multiplier, encouraging cooperation between local, state, and federal actors to fully implement both state and federal law for the protection of trafficking victims.

In 2005, Louisiana joined the effort with the passage of its human trafficking law.<sup>18</sup> Like its federal analogue, Louisiana’s statute is written broadly to cover the many ways in which the trafficker coerces and compels the labor of another, including but not limited to, threats of, or acts of, physical violence. Also like the federal law, Louisiana’s statute recognizes the unique harm caused by sex trafficking, especially trafficking in minors, by increasing the potential penalties for those found guilty.

## Section C: Trafficking as Modern-Day Slavery

Upon hearing the term “human trafficking,” images of organized crime groups or foreign nation-states that kidnap, smuggle and force women and children into prostitution may be conjured. Though conceivable and likely enough, the essence of trafficking is not the *movement* but rather the *bondage* of the victim. Smuggling people across a national border is violation of the integrity of the border, and border integrity is solely a federal concern. States cannot set immigration policy nor enforce border security. Human traffickers may violate immigration and customs laws in the course of their criminal enterprise, but such movement is not an element of either state or federal trafficking offenses.

Human trafficking laws focus upon the restriction placed upon *will* of the victim, not upon the victim’s *movement* from one place to another. Many trafficking cases will be built without any evidence

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<sup>17</sup> *Human Trafficking Task Force e-Guide*, Office for Victims of Crime: Training and Technical Assistance Center, <https://www.ovcttac.gov/taskforceguide/eguide/>.

<sup>18</sup> Act 2005, No. 187, codified as La. R.S. 14:46.2.

of asportation at all, let alone transportation across state or national borders. Involuntary servitude, debt bondage, document bondage, and labor of any kind that is forced through fraud, force, or coercion, enslaves a victim who is never moved from one place to another as surely as one who is taken across national borders and forced into commercial sexual activity.



# Chapter 2

## Federal Human Trafficking Laws

*Enslave the liberty of but one human being and the liberties of the world are put in peril.* William Lloyd Garrison

Federal human trafficking statutes were first enacted in the post-Civil War era in response to the abolition of slavery. These statutes are commonly referred to as Involuntary Servitude and Slavery Crimes and can be found in their modern form at 18 U.S.C. §§1581-1588.<sup>19</sup> Human trafficking statutes attacking the practices that make up modern day slavery — the TVPA, the Trafficking Victims Protection Reauthorization Acts (“TVPRA”) of 2008 and 2013, and JVTA — are found at 18 U.S.C. §§1589-95.<sup>20</sup>

### Section A: The Federal Trafficking Statutes

The federal statutes combat the incidents and badges of modern-day slavery. To that end, the statutes are generally crafted to criminalize sex trafficking of adults, sex trafficking of children, and forced labor other than sex trafficking.

Recognizing that bondage by force is but one of the trafficker’s tools, the federal law includes trafficking by means of fraud, coercion, debt bondage, and document bondage. In addition, the federal statutes reach those who profit from trafficking by receiving anything of value from the trafficking, and those who in any way obstruct or attempt to obstruct enforcement of the law.

#### 1. 18 U.S.C. §1591 – Sex Trafficking

Sex trafficking as provided under federal law falls into two main categories: (1) sex trafficking of adults, and (2) sex trafficking of children. The central distinction, however, does not lie in the obvious (*i.e.*, the “age” of the victim). Rather, sex trafficking of adults requires a specific element of force, fraud, or coercion (*or reckless disregard that such force, fraud, or coercion existed*); on the other hand, sex trafficking of children does not require such an element, thus recognizing that in federal law children under the age of 18, are unable to voluntarily consent to sexual acts.

18 U.S.C. §1591 states the elements of sex trafficking as:

- (a) ***Whoever knowingly***
  - (1) ***in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or***
  - (2) ***benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing, or, except where the act***

<sup>19</sup> Among the sections included are: Peonage; Vessels for Slave Trade; Enticement into Slavery; Sale into Involuntary Servitude; and other slave trade related statutes.

<sup>20</sup> These statutes address forced labor, trafficking, sex trafficking of children, document fraud/destruction/misconduct connected to trafficking, mandatory restitution, benefitting financially from trafficking.

***constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).***

- (b) The punishment for an offense under subsection (a) is —***
- (1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or***
  - (2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.***
- (c) In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, patronized, or solicited, the Government need not prove that the defendant knew, or was in reckless disregard the fact, that the person had not attained the age of 18 years.***
- (d) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be fined under this title, imprisoned for a term not to exceed 20 years, or both.***

An additional distinction in the sex trafficking statute is the prohibition against advertising and the extent of knowledge offenders must have. Offenders must at the very least act in reckless disregard of the fact that force, fraud, or coercion was used to make a person commit a commercial sex act, or that a person is under 18 years of age when being forced to engage in a commercial sex act. That is, unless the charged offense is advertising, in which case the offender must have actual knowledge of the fact. The “reckless disregard” provision was omitted to ensure that third party advertisers, such as internet sites, actually know that sex trafficking is involved in posts on their sites.

The federal sex trafficking statutes, like most other federal crimes, requires that there be some nexus to interstate commerce. The courts have found that such a nexus need only be *de minimis* and, importantly, the nexus need not be transportation across state or national borders. Consequently, a sufficient nexus usually exists in most instances, and can be proven by something as simple as the use of condoms, which were manufactured out-of-state or with items that moved through interstate commerce. A common means of proving a nexus is the utilization of the internet in some way to advance the trafficking enterprise.

## 2. Definitions in the Statute

Although many of the terms used in the federal sex trafficking statute have a plain meaning in common speech, those same words have distinct meanings as used in the context of §1591.

**(e) In this section:**

- (1) The term “abuse or threatened abuse of law or legal process” means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.**
- (2) The term “coercion” means —**
  - (A) threats of serious harm to or physical restraint against any person;**
  - (B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or**
  - (C) the abuse or threatened abuse of law or the legal process.**
- (3) The term “commercial sex act” means any sex act, on account of which anything of value is given to or received by any person.**
- (4) The term “serious harm” means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.**
- (5) The term “venture” means any group of two or more individuals associated in fact, whether or not a legal entity.**

## 3. 18 U.S.C. §1589 – Labor Trafficking

The language in the forced labor statute describing the prohibited means of coercion in obtaining a person’s labor is nearly identical to the description in the sex trafficking statute. But there are a few notable distinctions.

Firstly, §1589 does not include the element of fraud. Therefore, fraud alone is insufficient to establish a violation. Secondly, §1589 contains no jurisdictional element requiring a nexus to interstate commerce. Thirdly, there is no distinction between adult and minor victims, providing the same proof for all victims. Fourthly, there is a ten-year statute of limitations where no such limitation exists for sex trafficking. Fifthly, there are no mandatory minimum sentences for forced labor as there are with sex trafficking statutes.

18 U.S.C. §1589 provides:

- (a) Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following mean —**
  - (1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;**

- (2) *by means of serious harm or threats of serious harm to that person or another person;*
  - (3) *by means of the abuse or threatened abuse of law or legal process; or*
  - (4) *by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint, shall be punished as provided under subsection (d).*
- (b) *Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by any of the means described in subsection (a), knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means, shall be punished as provided in subsection (d).*
- (c) *In this section:*
- (1) *The term “abuse or threatened abuse of law or legal process” means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.*
  - (2) *The term “serious harm” means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or service in order to avoid incurring that harm.*
- (d) *Whoever violates this section shall be fined under this title, imprisoned not more than 20 years, or both. If death results from a violation of this section, or if the violation includes kidnaping, an attempt to kidnap, aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title, imprisoned for any term of years or life, or both.*

In short, §1589 prohibits the obtaining of labor or services by any of three means: by threats of serious harm to or physical restraint of any person; by means of a scheme, plan, or pattern intended to cause the person to believe that they or another would suffer serious harm or physical restraint if they did not perform such services; or by means of the abuse or threatened abuse of law or legal process.

#### **4. Other Modern Federal Human Trafficking Statutes**

There are several ancillary statutes in addition to the two principal statutes discussed above: (a) 18 U.S.C. §1592, which prohibits withholding of identification documents in connection with a trafficking offense (sometimes referred to document slavery); (b) 18 U.S.C. §1590, which prohibits trafficking a person into servitude; (c) 18 U.S.C. §1593A, which makes benefiting financially or receiving anything of value related to a venture engaged in a violation of trafficking a criminal offense; and, (d) 18 U.S.C. §1594, which makes an attempted violation of human trafficking statutes punishable to the same extent as a completed violation.<sup>21</sup>

<sup>21</sup> §1594 also criminalizes conspiracies of certain trafficking activity. This latter provision also provides for mandatory restitution to any trafficking survivor.

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

As previously noted, these older statutes were enacted to enforce the abolition of slavery after the Civil War and appear today simply as vestiges of that era. Nonetheless, they have been reauthorized several times and are still in force today. A general awareness of these statutes can be helpful in the rare instance where there is some impediment to a prosecution under the more recent statute.

### **18 U.S.C. §1581 – Peonage**

- (a) *Whoever holds or returns any person to a condition of peonage, or arrests any person with the intent of placing him in or returning him to a condition of peonage, shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.***
- (b) *Whoever obstructs, or attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be liable to the penalties prescribed in subsection (a).***

### **18 U.S.C. §1582 - Vessels for Slave Trade**

***Whoever, whether as master, factor, or owner, builds, fits out, loads, or otherwise prepares or sends away any vessel, in any port of place with the United States, or causes such vessel, to sail from any such port or place, for the purpose of procuring any person from any foreign kingdom or country to be transported and help, sold, or otherwise disposed of as a slave, or held to service or labor, shall be fined under this title or imprisoned not more than seven years, or both.***

### **18 U.S.C. §1583 – Enticement into Slavery**

***Whoever —***

- (1) *kidnaps or carries away any other person, with the intent that such other person be sold into involuntary servitude, or held as a slave;***
  - (2) *entices, persuades, or induces any other person to go on board any vessel or to any other place with the intent that he or she may be made or held as a slave, or sent out of the country to be so made or held; or***
  - (3) *obstructs, or attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be fined under this title, imprisoned not more than 20 years, or both.***
- (b) *Whoever violates this section shall be fined under this title, imprisoned for any term of years or for life, or both if —***
- (1) *the violation results in the death of the victim; or***
  - (2) *the violation includes kidnapping, an attempt to kidnap, aggravated sexual abuse, an attempt to commit aggravated sexual abuse, or an attempt to kill.***

## **18 U.S.C. §1584 – Sale into involuntary Servitude**

- (a) *Whoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held, shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.***
- (b) *Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be subject to the penalties described in subsection (a).***

### **b. Other Statutes**

Additional statutes related to slavery (some with versions passed before the Civil War) still exist and can conceivably and legitimately be used to prosecute offenders today. Although rarely seen today, they include being a crew member of a slave vessel;<sup>22</sup> volunteering to serve on a slave vessel;<sup>23</sup> possessing slaves aboard a vessel;<sup>24</sup> and the transportation of slaves from or within the United States.<sup>25</sup>

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<sup>22</sup> 18 U.S.C. §1585.

<sup>23</sup> 18 U.S.C. §1586.

<sup>24</sup> 18 U.S.C. §1587.

<sup>25</sup> 18 U.S.C. §1588.

# Chapter 3

## Louisiana's Trafficking Statutes

*Raising awareness is key.* John Bel Edwards

Originally passed in 2005, Louisiana has enacted two distinct offenses: (1) La. R.S. 14:46.2, relative to human trafficking in general; and (2) La. R.S. 14:46.3, relative to human trafficking of children for sexual purposes. The basic elements of both are the same, with some distinct changes and sentencing enhancements related to those offenses which target and victimize children.

There are relatively few Louisiana appellate cases interpreting the human trafficking statutes. However, Louisiana's statutes largely track the federal law, so federal decisions are helpful where the language of the statutes is sufficiently similar.<sup>26</sup> When evaluating a case for state prosecution, it is important to understand federal laws to decide when referral for federal prosecution is appropriate. The type of case that might be best suited for federal action includes one where the criminal activity occurs in multiple jurisdictions or crosses state boundaries. Cases may be better suited to the resources of the federal system when the trafficking involves established gangs or large-scale criminal organizations that operate nationally or internationally. If an FBI agent or AUSA is not already on a Multidisciplinary Human Trafficking Task Force of which that law enforcement is a member, the United States Attorney's Office along with the Federal Bureau of Investigations will need to be contacted directly.<sup>27</sup>

### Section A: Human Trafficking Codified: La. R.S. 14:46.2 and 14:46.3

Louisiana R.S. 14:46.2, styled "Human Trafficking," provides:

**A. It shall be unlawful:**

- (1) (a) For any person to knowingly recruit, harbor, transport, provide, solicit, receive, isolate, entice, obtain, or maintain the use of another person through fraud, force, or coercion to provide services or labor.**

**(b) For any person to knowingly recruit, harbor, transport, provide, solicit, sell, purchase, receive, isolate, entice, obtain, or maintain the use of a person under the age of twenty-one years for the purpose of engaging in commercial sexual activity regardless of whether the person was recruited, harbored, transported, provided, solicited, sold, purchased, received, isolated, enticed, obtained, or maintained through fraud force, or coercion. It shall not be a defense to prosecution for a violation of the provisions of this Subparagraph that the person did not know the age of the victim or that the victim consented to the prohibited activity.**
- (2) For any person to knowingly benefit from activity prohibited by the provisions of this Section.**

<sup>26</sup> See, e.g., King v. Phelps Dunbar LPP, 743 So.2d 181 (La. 1999).

<sup>27</sup> For more on building and sustaining a Multidisciplinary Human Trafficking Task Force, visit the Office of Victims of Crime Training and Technical Assistance Center's *Human Trafficking Task Force e-Guide*, at [www.ovcttac.gov/taskforceguide/eguide](http://www.ovcttac.gov/taskforceguide/eguide).

- (3) ***For any person to knowingly facilitate any of the activities prohibited by the provisions of this Section by any means, including but not limited to helping, aiding, abetting, or conspiring, regardless of whether a thing of value has been promised to or received by the person.***

Similarly, Louisiana R.S. 14:46.3, relative to the Trafficking of Children for Sexual Purposes, provides:

**A. It shall be unlawful:**

- (1) ***For any person to knowingly recruit, harbor, transport, provide, sell, purchase, receive, isolate, entice, obtain, or maintain the use of a person under the age of eighteen years for the purpose of engaging in commercial sexual activity.***
- (2) ***For any person to knowingly benefit from activity prohibited by the provisions of this Section.***
- (3) ***For any parent, legal guardian, or person having custody of a person under the age of eighteen years to knowingly permit or consent to such minor entering into any activity prohibited by the provisions of this Section.***
- (4) ***For any person to knowingly facilitate any of the activities prohibited by the provisions of this Section by any means, including but not limited to helping, aiding, abetting, or conspiring, regardless of whether a thing of value has been promised to or received by the person.***
- (5) ***For any person to knowingly advertise any of the activities prohibited by this Section.***
- (6) ***For any person to knowingly sell or offer to sell travel services that include or facilitate any of the activities prohibited by this Section.***

## **Section B. Labor and Sex Trafficking**

### **1. Elements of Trafficking under La. R.S. 14:46(A)(1)(a)**

La. R.S. 14:46.2(A)(1)(a) makes it unlawful to knowingly recruit, harbor, transport, provide, solicit, receive, isolate, entice, obtain, or maintain the use of another person through fraud, force, or coercion to provide services or labor. This section of Louisiana's statute criminalizes forced labor and services. Of note is the fact that it is not limited to any one particular form of service or labor; rather, it encompasses anything from household chores to forced sex acts (including non-commercial sex acts) of any person, through fraud, force, or coercion.

Like the federal law upon which it is based, the substance of this offense is the securing of another's services or labor through fraud, force, or coercion. The statute criminalizes not only those who ultimately secure the services or labor of the victim, but including those who recruit, harbor, transport, provide, solicit, isolate, or entice. These elements are identical to the TVPA with the addition of the word "isolate." The broad reach of the statute is intentional, reflecting a recognition that most trafficking is an organized venture involving multiple individuals.



**a. The Conduct Element: “Recruit, harbor, transport, provide, solicit, receive, isolate, entice, obtain, or maintain the use of another person”**

La. R.S. 14:46.2(A)(1)(a) provides a long list of prohibited acts but does not actually provide definitions for any of the listed terms. As such, the determination of what conduct rises to the level of “recruitment” (for example) would be a question for the trier of fact.

The meaning of most of the prohibited acts, such as “recruit” or “transport,” is self-evident, allowing fact finders to apply a common understanding of the term in its deliberation. However, the meaning of the term “harbor” is less obvious and merits special mention here.

The dictionary defines the verb “harbor” as to give shelter to or offer refuge to another person. But the statute requires more than giving shelter to a victim. To be found guilty, a person must *knowingly* give shelter to the trafficked victim. Some level of knowledge about the victim’s status is necessary (the knowledge requirement is discussed below). For example, in *Ricchio v. McLean*,<sup>28</sup> a federal civil case under the TVPA, the owners of a hotel where the plaintiff was held for the purpose of prostitution were found to be harboring or sheltering the plaintiff/victim.

As alleged, plaintiff/victim Lisa Ricchio was enticed by Clark McClean in June 2011 to drive from Maine to the Shangri-La Hotel in Massachusetts. Once there, she was taken captive and held against her will. Over the course of several days, McClean physically and sexually abused Ricchio, repeatedly raping her, starving and drugging her, and leaving her visibly haggard and bruised. He disclosed to her that he was grooming her for service as a prostitute subject to his control. The hotel owner’s knowledge went beyond simply knowing the victim *was in the room* rented by McLean; It extended to knowing what *was happening in the room*. The First Circuit Court specifically found that McClean’s association with the hotel owner was a “venture” in which the hotel owner knowingly benefited by continuing to rent the motel room.<sup>29</sup>

**b. The Means Element: “Fraud, force, or coercion”**

La. R.S. 14:46.2(A)(1)(a) requires that the prohibited act be committed through “fraud, force, or coercion.” “Fraud, force, or coercion” is defined in 14:46.2(C)(3) as including, but not limited to, the following:

- (a) *Causing or threatening to cause serious bodily injury.***
- (b) *Physically restraining or threatening to physically restrain another person. Abduction or threatened abduction of an individual.***
- (c) *The use of a plan, pattern, or statement with intent to cause an individual to believe that failure to perform an act will result in the use of force against, abduction of, serious harm to, or physical restraint of an individual.***
- (d) *The abuse or threatened abuse of law or legal process.***
- (e) *The actual or threatened destruction, concealment, removal, confiscation, or possession of any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person.***

<sup>28</sup> 853 F.3d 553 (1st Cir. 2017). The Hon. David H. Souter, Associate Justice (Ret.) of the U.S. Supreme Court, sat by designation and authored the Circuit Court opinion.

<sup>29</sup> *Id.* at 556. In fact, the appellate record revealed that McClean had prior commercial dealings with the hotel owners, which the parties wished to reinstate for profit. McClean and the hotel owner enthusiastically expressed this intent by exchanging “high-fives” in the parking lot of the hotel about “getting this going again.” Additionally, McClean’s abusive and coercive treatment of Ricchio as a sex slave was apparent to the hotel owner who ignored her pleas for help in escaping and showed indifference to her obvious physical deterioration.

- (f) **Controlling or threatening to control an individual's access to a controlled dangerous substance as set forth in R.S. 40:961 et seq.**
- (g) **Causing or threatening to cause serious bodily injury.**
- (h) **The use of an individual's physical or mental impairment, where such impairment has substantial adverse effects on the individual's cognitive or volitional functions.**
- (i) **The use of debt bondage or civil or criminal fraud.**
- (j) **Extortion as defined in R.S. 14:66.**

The ten examples of fraud, force, and coercion listed above are expressly illustrative and not limiting. In other words, the legislature intentionally meant for the words “fraud, force, and coercion” to cover a broad range of conduct that can compel another do something. As a result, when considering a case for prosecution, the analysis should be fact-driven and not limited the examples listed.

In one of the few reported cases in Louisiana, the First Circuit of Appeal upheld the jury's finding that the defendant used “fraud, force, or coercion” where several victims testified of their fear of the defendant and their belief that he would beat them if they broke any of his rules.<sup>30</sup> In *United States v. Rivera*,<sup>31</sup> the U.S. Court of Appeals held that, while the standard when considering the presence of coercive behavior of the defendant is what is “objectively reasonable” under the circumstances, a victim's subjective belief due to her particular and unique vulnerabilities can be considered by the jury.<sup>32</sup> Similarly, the U.S. Court of Appeals in *United States v. Campbell*<sup>33</sup> that “[T]estimony regarding a victim's vulnerabilities, including a ‘troubled past,’ may be relevant in considering coercion if it ‘help[s] explain why a victim continued to succumb to the defendant's persuasion.”<sup>34</sup>

The use of fraud is often found in the context of labor trafficking cases. In *United States v. Churuk*,<sup>35</sup> the U.S. Third Circuit of Appeal found that the victims of labor trafficking were recruited through fraud by false promises of good paying jobs and a better life in the United States.

The non-exclusive list of conduct contained in the Louisiana's definition of “fraud, force or coercion” leaves open the possibility that any conduct which threatens *nonphysical* harm can satisfy the definition. The federal statute includes language that prohibits a trafficker from making a threat of “serious harm” – language which is not included in La. R.S. 14:46.2. Nevertheless, two federal cases interpreting this language may be useful in further defining “fraud, force, or coercion” as intended in the Louisiana statute.

In *United States v. Dann*,<sup>36</sup> the U.S. Ninth Circuit Court of Appeal held that threats of serious harm could include threats of *nonphysical* harm such as psychological, financial, or reputational harm. Similarly, in *United States v. Ranieri*,<sup>37</sup> the U.S. District Court for the Eastern District of New York held that the reputational harm that would come from releasing sexually explicit photographs and videos meant that the “threatening to release” that material constituted threats of “serious harm” under the statute. The court reasoned that the release of such material could ruin a victim's career, finances, or personal relationships. Even though La. R.S. 14:46.2(C)(3) does not specifically include threats of such nonphysical harm, *Dann* and *Ranier* serve to illustrate those threats of nonphysical harm (*i.e.*, reputational or financial injury) could be deemed the type of coercion proscribed by statute.

<sup>30</sup> 265 So.3d 799 (La. App. 1st Cir. 2018). Defendant Carlos Lampley was charged by Grand Jury via Bill of Indictment with one count of La. R.S. 14:46.3, relative to Trafficking Children for Sexual Purposes and with three counts of La. R.S. 14:46.2, relative to Human Trafficking.

<sup>31</sup> 799 F.3d 180 (2d Cir. 2015).

<sup>32</sup> *Id.* at 180-187.

<sup>33</sup> 764 F.3d 880 (8th Cir. 2014).

<sup>34</sup> *Id.* at 892.

<sup>35</sup> 797 F.App'x 680 (3d Cir. 2020).

<sup>36</sup> 652 F.3d 1160 (9th Cir. 2011).

<sup>37</sup> 384 F. Supp. 3d 282 (E.D.N.Y. 2019).

While the meaning of most of the examples of “fraud, force, or coercion” found in La. R.S. 14: 46.2(C) (3) are obvious or self-explanatory, the meaning of “debt bondage” may not be so self-evident. Debt bondage is defined in La. R.S. 14:46.2(C)(2) as follows:

**(2) “Debt bondage” means inducing an individual to provide any of the following:**

- (a) Commercial sexual activity in payment toward or satisfaction of a real or purported debt.**
- (b) Labor or services in payment toward or satisfaction of a real or purported debt if either of the following occur:**
  - (i) The reasonable value of the labor or services provided is not applied toward the liquidation of the debt.**
  - (ii) The length of the labor or services is not limited and the nature of the labor or services is not defined.**

The modern practice of debt bondage is described by the International Centre for Migration Policy Development as a practice where “victims are required to repay the exaggerated costs allegedly incurred for bringing a person into a destination country. Exorbitant and cumulative interest rates are often attached which are then supplemented by the requirement to pay vastly inflated prices for accommodation and transportation costs, all of which adds to an ever-mounting debt bond that becomes effectively impossible to pay off.”<sup>38</sup>

The facts in *United States v. Morris*<sup>39</sup> provide a clear illustration of how debt bondage can be used as coercion in the context of a human trafficking organization. In *Morris*, the sex trafficking victim, a foreign national, testified that she would have come to the United States sooner had she realized how much money could be made as a sex worker. The defendant claimed that his conviction of sex trafficking should be reversed for insufficient evidence, citing the victim’s testimony as a clear indication that she had not been coerced into sex trafficking. In her testimony, the victim acknowledged that, had she known earlier the lucrative nature of sex work in the United States, she would have traveled to this country and voluntarily engaged in sex work. The District Court disagreed with this characterization of the victim’s testimony, noting other evidence that: (1) the victim was brought to the United States pursuant to a \$60,000 debt owed to a trafficker in Thailand, (2) one-half of her earnings from engaging in commercial sex was applied to her debt, and (3) she did not have the ability to stop engaging in commercial sex until she satisfied her debt.

**c. The Purpose Element: “Labor or services”**

“Labor or services” is defined in La. R.S. 14:46.2(C)(4) as “activity having an economic value.” This definition has been broadly interpreted and includes just about anything, licit or illicit, that one might pay for, including sex acts.<sup>40</sup> Additionally, housecleaning, yardwork, and even performing errands constitute labor or services.<sup>41</sup> However, courts are reluctant to apply this definition of labor or services in the context of parents or guardians who force their children to perform household duties or other chores, even if the conduct rises to the level of abuse.<sup>42</sup>

<sup>38</sup> *Anti-Trafficking Training Material for Judges and Prosecutors Handbook*, International Centre for Migration Policy Development, (2006).

<sup>39</sup> 2019 WL 719202 (D. Minn., Feb. 20, 2019).

<sup>40</sup> See *United States v. Marcus*, 487 F. Supp. 2d 289 (E.D.N.Y. 2007).

<sup>41</sup> See *United States v. Callahan*, 801 F. 3d 606 (6th Cir. 2014).

<sup>42</sup> See *United States v. Toviave*, 761 F.3d (6th Cir. 2014).

#### d. The Knowledge Element: “Knowingly”

La. R.S. 14:46.2 requires that a defendant act “knowingly”—that is, that an offender knowingly engages in the prohibited act and that he understands that the proscribed act is for the purpose of human trafficking.<sup>43</sup>

## 2. Other Conduct Prohibited by La. R.S. 14:46.2

### a. Benefitting from Human Trafficking

La. R.S. 14:46.2(A)(2) prohibits a person from *knowingly benefiting* from human trafficking. Although what constitutes a “benefit” is not specifically defined within the statute itself, it is easy to conclude that one who receives any forced labor undoubtedly benefits from that trafficking offense. This is also true of anyone who directly receives cash or its equivalent as a direct consequence of a trafficking activity, such as a trafficker/pimp who collects financial proceeds derived from the commercial sex acts of the trafficking victim/prostitute.

Similarly, 18 U.S.C. §1589 provides that one who “knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in providing or obtaining forced labor is guilty of trafficking. Moreover, Subsection (b) of the statute further requires that the participation must be with actual knowledge of the nature of the venture or done in reckless disregard of that fact.

In *United States v. Rivera*,<sup>44</sup> the U.S. District Court held that an increase in status or stature among a group is a thing of value. The court held that when determining whether something is a benefit, the term “anything of value” encompasses more than just monetary gain and ruled that the “ordination as a prophet,” an increase in status among members of defendant’s church (status that unfortunately carried with it the expectation of sexual activity), qualified as a benefit under the statute.

The U.S. Eighth Circuit in *United States v. Jungers*<sup>45</sup> held that value is subjective and that, when determining whether something is a benefit, the focus should be on what value the defendant subjectively attached to the thing received. In *Noble v. Weinstein*<sup>46</sup> and *United States v. Cook*,<sup>47</sup> both courts held that the federal statute regarding a thing of value (*i.e.*, a “benefit”) should be interpreted broadly and read liberally.

La. R.S. 14.2(A)(2) defines “anything of value” and sets out how the term should be construed:

***“Anything of value” must be given the broadest possible construction, including any conceivable thing of value, movable or immovable, corporeal or incorporeal, public or private, and including transportation, telephone and telegraph services, or any other service available for hire. It must be construed in the broad popular sense of the phrase, not necessarily as synonymous with the traditional legal term “property.” In all cases involving shoplifting, the term “value” is the actual retail priced of the property at the time of the offense.***<sup>48</sup>

It is worth noting that Louisiana’s statute does not include the phrase “participation in a venture” as is seen in the federal statute. This would suggest that “to participate,” one need only *knowingly receive* a benefit from the trafficking offense. Thus, a spouse or romantic partner of a trafficker (a) who lives in a home that is purchased and furnished by the trafficker, and (b) who accepts other financial

<sup>43</sup> State v. Sims, 195 So.3d 441 (2016) (interpreting knowledge element in La. R.S.14:46.3(A)(1)).

<sup>44</sup> 2012 WL 6589526 (M.D. Fla. Dec. 18, 2012) *aff’d.*, 551 Fed.App’x. 531 (11th Cir. 2014).

<sup>45</sup> 702 F.3d 1066 (8th Cir. 2013).

<sup>46</sup> 335 F. Supp.3d 504, 521 (S.D.N.Y. 2018).

<sup>47</sup> 782 F.3d 983 (8th Cir. 2015).

<sup>48</sup> This definition of “anything of value” bolsters the argument that the term “benefit” (as used in La. R.S. 14:46.2) should be broadly construed.

support from him, is in violation of the trafficking statute provided he or she is aware that the funds used to provide this support are derived from a trafficking activity. However, caution is advised before proceeding with such a prosecution. Human traffickers are most certainly capable of manipulation and subtle abuse and disproportionately target individuals who have been exposed to or experienced prior physical and emotional abuse. Thus, the prosecution of a person who merely “knowingly benefits” in some manner, *with nothing more*, may not be appropriate. Of course, any such analysis should be fact based, and all decisions to prosecute should be grounded in common sense and compassion.

## **b. Facilitating Human Trafficking**

La. R.S. 14:46.2(A)(3) makes it unlawful to knowingly facilitate a human trafficking offense. Within the text of 14:46.2(A)(3), there is a non-exhaustive list of means by which a person can “facilitate” a human trafficking offense, to wit:

***(3) For any person to knowingly facilitate any of the activities prohibited by the provisions of this section by any means, including but not limited to helping, aiding, abetting, or conspiring, regardless of whether a thing of value has been promised to or received by the person.***

Because there are no Louisiana appellate cases interpreting the meaning of “facilitate” and because “facilitate” does not appear in the federal statute, it is unclear what conduct specifically is proscribed by this statute. One must look to the generally accepted meaning of “aiding and abetting” and “conspiracy,” coupled with the added provision in 14:46.2(A)(3) that a person need not receive or be promised a thing of value. In doing so, it can be reasonably concluded that “facilitate” means something less than full participation in a human trafficking enterprise to include conduct of those on the periphery of a human trafficking organization. At the very least, aiders and abettors or conspirators can be charged as a facilitator under this provision.

## **c. Undercover Operations**

La. R.S. 14:46.2(D) provides that it shall not be a defense that the victim is a law enforcement officer acting within his official duties. This provision provides for undercover operations or so-called “stings.”

## **d. Affirmative Defenses**

La. R.S. 14:46.2(F) provides an affirmative defense to any victim of commercial and non-commercial trafficking for conduct that was a direct result of being trafficked. The affirmative defense applies to the following crimes: prostitution, prostitution by massage, sexual massage, crime against nature, and solicitation for crime against nature.

## **e. Commercial Sex Trafficking of Children and Young Adults**

La. R.S. 14:46.2(A)(1)(b) and 14:46.3(A)(1) prohibit the commercial sex trafficking of underage persons, with the age threshold of the former set at under 21 years of age and, of the latter, at under 18 years of age.<sup>49</sup>

Commercial child sex trafficking is prohibited by both 14:46.2 and 14:46.3, even when there is no fraud, force, or coercion. Generally, child commercial sex trafficking, under both statutes, is distinguished from other forms of human trafficking in four principal respects: (1) age threshold; (2) prohibited acts must be committed for the purpose of a victim engaging in commercial sexual activity; (3) no fraud, force, or coercion is required; and (4) congruent with the lack of fraud, force, or coercion element, the victim’s consent is deemed to be irrelevant.

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<sup>49</sup> For ease of discussion, commercial sex trafficking of persons under 21 years of age and 18 years of age will both be referenced as “child commercial sex trafficking.”

**i. Trafficking under La. R.S. 14:46.2(A)(1)(b)**

La. R.S. 14:46.2(A)(1)(b) prohibits the commercial sex trafficking of persons under 21 years of age regardless of whether the commercial sex trafficking was conducted using use of fraud, force, or coercion.

***For any person to knowingly recruit, harbor, transport, provide, solicit, sell, purchase, receive, isolate, entice, obtain, or maintain the use of a person under the age of twenty-one years for the purpose of engaging in commercial sexual activity regardless of whether the person was recruited, harbored, transported, provided, solicited, sold, purchased, received, isolated, enticed, obtained, or maintained through fraud, force, or coercion. It shall not be a defense to prosecution for a violation of the provisions of this Subparagraph that the person did not know the age of the victim or that the victim consented to the prohibited activity.***<sup>50</sup>

“Commercial Sexual Activity” is defined in 14:46.2(C)(1) as, “any sexual act performed or conducted when anything of value has been given, promised, or received by any person.” The statute clearly includes the conduct of customers of commercial sexual activity as well as the conduct of a seller.<sup>51</sup>

Also included is a provision that lack of knowledge of the victim’s age, or the consent of the victim is not a defense.<sup>52</sup> The Louisiana Supreme Court in *State v. Sims*<sup>53</sup> upheld the constitutionality of a similar provision in La. R.S. 14:46.3(C)(2) holding that the defendant’s knowledge of the victim’s age irrelevant. The Sims Court stated that “14:46.3, like other laws enacted to protect children, is intended to criminalize the knowing sex trafficking of juveniles, regardless of the defendant’s knowledge of the victim’s minority status . . .”<sup>54</sup>

As with labor trafficking, anyone who knowingly facilitates or benefits from commercial child sex trafficking may be prosecuted under the provisions of La. R.S. 14:46.2.<sup>55</sup>

**ii. Trafficking under La. R.S. 14:46.3**

La. R.S. 14:46.3(A)(1), styled “Trafficking of children for sexual purposes” states:

***It shall be unlawful:***

***(1) For any person to knowingly recruit, harbor, transport, provide, sell, purchase, receive, isolate, entice, obtain, or maintain the use of a person under the age of eighteen years for the purpose of engaging in commercial sexual activity.***<sup>56</sup>

<sup>50</sup>“Sell” and “Purchase” are specifically included as prohibited human trafficking activity. While not defined within the statute, one potential interpretation is that this could be understood to specifically include conduct where children are literally sold, *in toto*.

<sup>51</sup> See *United States v. Cook*, *supra*; See also *United States v. Jungers*, *supra*.

<sup>52</sup> La. R.S. 14:46.2(A)(1)(b) states in pertinent part: “It shall not be a defense to prosecution for a violation of the provisions of this Subparagraph that the person did not know the age of the victim or that the victim consented to the prohibited activity.”

<sup>53</sup> 195 So.3d 441 (La. 2016).

<sup>54</sup> *Id.* at 448.

<sup>55</sup> See La. R.S. 14:46.2(A)(3) & (4).

<sup>56</sup> The substance of La. R.S. 14:46.3(A)(1) is corresponding to that of La. R.S. 14:46.2(A)(1)(b). However, the the threshold age of the former is lowered from 21 years to 18 years of age.

The Louisiana legislature further broadened the list of proscribed conduct by including the following:

- (2) For any person to knowingly benefit from activity prohibited by the provisions of this Section.**
- (3) For any parent, legal guardian, or person having custody of a person under the age of eighteen years to knowingly permit or consent to such minor entering into any activity prohibited by the provisions of this Section.**
- (4) For any person to knowingly facilitate any of the activities prohibited by the provisions of this Section by any means, including but not limited to helping, aiding, abetting, or conspiring, regardless of whether a thing of value has been promised to or received by the person.**
- (5) For any person to knowingly advertise any of the activities prohibited by this Section.**
- (6) For any person to knowingly sell or offer to sell travel services that include or facilitate any of the activities prohibited by this Section.**

Also, La. R.S. 14:46.3(E) broadens the affirmative defense to victims of human trafficking to all crimes committed as a direct result of being trafficked.<sup>57</sup> All other provisions of La. R.S. 14:46.3(A)(1) are identical to La. R.S. 14:46.3(A)(1)(b).<sup>58</sup>

The provisions prohibiting the knowing advertisement and sale or offer to sell travel services do not appear significant in that such conduct likely falls under the provision prohibiting the knowing facilitation of human trafficking activity found in La. R.S. 14:46.3(A)(4) and La. R.S. 14:46.2(A)(3), discussed above. However, the provision prohibiting the knowing consent or permission of a parent or guardian is significant and merits discussion.

La. R.S. 14:46.3(A)(3) provides that it is unlawful:

- (3) For any parent, legal guardian, or person having custody of a person under the age of eighteen years to knowingly permit or consent to such minor entering into any activity prohibited by the provisions of this Section.**

Under this provision, a parent's or guardian's knowing consent to the commercial sex trafficking of their child, *without any participation in the human trafficking organization*, is a criminal offense in and of itself. This criminalization of parental consent is unique, and there is no similar prohibition in La. R.S. 14:46.2 or the federal statutes. Because there are no reported cases precisely addressing this provision, its impact is not yet known.

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<sup>57</sup> Section E provides that "[N]o victim of trafficking as provided by the provisions of this Section shall be prosecuted for unlawful acts committed as a direct result of being trafficked. Any child determined to be a victim pursuant to the provisions of this Subsection shall be eligible for specialized services for sexually exploited children."

<sup>58</sup> The list of prohibited acts in La. R.S. 14:46.3(A)(1) omits the term "solicit." This omission appears to be a drafting error and is likely of no consequence.

**iii. Sentencing for Human Trafficking Offenses**

**a. Penalties under La. R.S. 14:46.2(B)**

The general penalty imposed in La. R.S. 14:46.2 is imprisonment for not more than 10 years and a fine not to exceed \$10,000. Under the following circumstances, this penalty is enhanced to: (1) imprisonment of not more than 20 years or a fine of not more than \$10,000, when the offense includes commercial sexual activity; (2) imprisonment of not less than 15 years or more than 50 years or a fine of up to \$50,000, when the offense involves commercial sexual activity and the victim is under 21 years of age; or (3) imprisonment of not less than 5 years or more than 25 years or a fine of \$25,000, where the victim is under 18 years of age.

**b. Penalties under La. R.S. 14:46.3(D)**

The general penalty imposed in La. R.S. 14:46.3 is imprisonment of not less than 15 years or more than 50 years and a fine of not more than \$50,000. If a parent or guardian is charged under La. R.S. 14:46.3(A)(3), at least five years of the penalty must be served without the benefit of probation, parole, or suspension of sentence and, where the victim is under the age of 14, at least 10 years without the benefit of probation, parole, or suspension of sentence. Under the following circumstances, the general penalty is enhanced to: (1) imprisonment of not less than 25 years or more than 50 years and a fine of \$75,000 where the victim is under the age of 14 years; and (2) not less than 50 years or for life or a fine \$100,000, where the defendant was previously convicted of a sex offense (as defined in La. R.S. 15:541) when the victim of the prior sex offense was under the age of 18 years.



# Chapter 4

## A Brief Introduction to the Neurobiology of Trauma

*Traumatized people chronically feel unsafe inside their bodies: The past is alive in the form of gnawing interior discomfort. Their bodies are constantly bombarded by visceral warning signs, and, in an attempt to control these processes, they often become expert at ignoring their gut feelings and in numbing awareness of what is played out inside. They learn to hide from their selves.* Bessel A. van der Kolk

For some time now, the “helping professions,” including community-based victim advocates, have focused on trauma-informed care as a best practice. The application of the principles of trauma-informed care in the criminal justice system’s response to victims of crime is a relatively recent development. The concept of a “trauma-informed, victim involved response” to victimization is only just now moving from the realm of promising practice to that of best practice. There are many resources for law enforcement and prosecutors that cover in detail the impact of trauma on survivors.<sup>59</sup> While the lion’s share of experience with the trauma-informed response is in the realm of sexual assault, the trauma-informed response, including a trauma-informed interview of survivors, is no less a promising practice in the realm of human trafficking victimization.

There have been incredible advances in the fields of medicine and neuroscience over the last decades — not least because of the advent of the functional MRI, or fMRI, which allows scientists to literally see the brain function in real time. Coupled with the imperative of studying and understanding the origins of conditions like post-traumatic stress disorder and how best to treat it, we have learned just how pervasive the experience of trauma is, and its role in guiding and understanding the survivor’s behavior.

It is important to keep in the forefront the reality that every victim is unique, as is their response to the trauma of victimization. What neurobiology does for us is establish that some of the seemingly most troubling things a victim does are brain-based, ordinary responses to an extraordinary experience. For example, not leaving a trafficker when it seems that there are many opportunities to do so, may well be the brain’s natural reaction to maximize the chance of surviving the traumatic event.

### Section A: A Working Definition of Trauma

When one hears the word “trauma,” it is natural to think of something like a broken bone, something that can be seen externally or in an X-ray. While that can be one definition of trauma, it is the certainly the narrowest.

When we talk about the neurobiology of trauma, we are talking about a broader definition that encompasses the event itself and its physical and psychological effect. The two are inextricably linked: How the whole event is experienced as both a physical and psychological attack and how the body and brain reacts to the experience

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<sup>59</sup> See Resource List, *supra*.

is what “trauma” means in this context. Thus, the American Psychiatric Association defines a “traumatic event” as “exposure to actual or threatened death, serious injury, or sexual violence.”<sup>60</sup>

## Section B: The Impact of Trauma – Acting to Survive

A victim of commercial sex trafficking, by definition, has experienced a traumatic event. But a victim of forced labor trafficking is no less a survivor of trauma, experiencing the same biological reaction to trauma as the sex trafficking victim. Victims of both may do something, or not do something, that can be misunderstood by investigators and prosecutors as evidence of untruthfulness. Victims are judged against a belief – albeit an entirely mistaken one – that “real” victims should react or present in a certain way. That misunderstanding often leads to doubts about the victim’s account and early negative judgments about the report. Poignantly, that disbelief and skepticism is communicated to the victim in myriad ways. This impacts how and even whether a victim will continue to participate in the investigation and any subsequent prosecution. The truly ground-breaking change that can come from understanding the neurobiology of trauma (even just a little) is a profound shift from a culture of disbelief to one of involving the victim and understanding his or her experience.

The irrefutable human biological imperative is survival. The human body has evolved extraordinary methods to maximize the chance of survival, ways which are deployed in fractions of seconds without conscious thought. This response, called the defense cascade response, drives the human body’s action or inaction in the face of the perception of a threat.<sup>61</sup> The body’s response to fear is incredibly complex, involving nearly every organ and system in the body, including the heart and other muscles, the nervous system (both autonomic and voluntary) the adrenal glands, and the gut.

In general, and at the risk of oversimplification, the brain works in tandem with the rest of the body when a threat is perceived. The amygdala, a structure deep in the brain, is responsible for detecting a threat. When it interprets sensory input as a threat, it instantaneously sends out neurotransmitters that activate another part of the brain called the hypothalamus. The hypothalamus in turn sends out neurotransmitters to the pituitary gland, causing it to flood the body with hormones that prepare the body to take action to survive.

This all happens in tiny fractions of seconds and without conscious effort or thought. The primary hormones flooding the system are catecholamines (a kind of natural adrenaline), corticosteroids (useful for providing energy to the muscles), natural opioids (that have a pain-numbing effect as well as creating a general feeling of well-being), and oxytocin (another hormone responsible for creating feelings of bonding, affection, and well-being).

Remembering that an individual’s response to a traumatic event will be unique: the general response follows a pattern. The first response is often to freeze and be watchful of the threat. The body is preparing for possible action, not wanting to do anything that might provoke attack. The goal is to escape the threat and live another day. One way to reach that goal is by running away. But if flight is perceived as impractical or impossible, the response may be to fight. This is the “fight-or-flight” response familiar to all high school biology students.

When fleeing or fighting is impossible, or perceived to be impossible, a last-ditch effort by the body to survive is to enter a state of tonic immobility. As the name implies, tonic immobility is the inability to move by consciously activating one’s muscles. It is described by trauma survivors as just that, a feeling that they cannot move even if they want to. It is sometimes described as a cold, numb feeling. Tonic immobility is sometimes accompanied by uncontrollable shaking. Importantly, many survivors will have a vivid recall of some details, while other details are remembered poorly or not at all.

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<sup>60</sup> *Diagnostic and Statistical Manual of Mental Disorders (5th ed.)*, American Psychiatric Association, Washington, D.C. (2013).

<sup>61</sup> Kozlowska, K. et al., *Fear and the Defense Cascade: Clinical Implications and Management*, (2015). <https://www.harvardreviewofpsychiatry.org>.

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## *Evelyn Yang, Wife of Andrew Yang, Says She Was Assaulted by Her Gynecologist*

In an interview with CNN, Ms. Yang said the doctor, Robert Hadden, sexually assaulted her in 2012, when she was seven months pregnant.



Evelyn Yang, the wife of the Democratic presidential candidate Andrew Yang, says she was sexually assaulted by her gynecologist in 2012, while pregnant with her first child. Gary He/EPA, via Shutterstock

By Michael Levenson

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The experience of Evelyn Yang, former presidential candidate Andrew Yang's wife, illustrates this well. In an interview with the New York Times, she revealed publicly that she was sexually assaulted by her doctor. Like many of us, she did not entertain the possibility that she would not fight back when attacked. She said that when her doctor abused her, she knew in the moment that "it was wrong," that she "was being assaulted," and that, prior to her assault she had imagined herself as a person who would, "throw a chair . . . and run out yelling bloody murder." However, that is not what happened. Yang explained "I just kind of froze, like a deer in headlights. Just frozen."<sup>62</sup> Not surprisingly, trauma is compounded when we do not act like we thought we would, and our inaction is not understood as our brain and body doing what is necessary to survive. Consequently, researchers have shown that experiencing tonic immobility during victimization is often associated with an increase of self-blame, decreased access to support, and a decrease in reporting to police.

Describing the body's response as a cascade suggests that one thing follows another: a victim will first freeze; then flee and/or fight; and when all other options are exhausted, enter a state of tonic immobility. This is not necessarily the case. While it is useful to understand what the body does in general, any individual's response can be markedly different. Not every traumatic experience ends in tonic immobility, nor does every survivor first freeze. Any individual's reaction to an event is also affected by the proximity of the threat, the perception of how dangerous the threat is, even how the person survived a similar threat confronted in the past. Past threats often inform current actions as victims learn by experience how to survive.

Finally, when the body and brain are overloaded and ultimately overwhelmed by the sensory experience of trauma, a victim may dissociate from the event. Dissociation disconnects a person from the overwhelming experience of trauma. The victim psychologically escapes from the present experience of trauma, protecting themselves from the full impact of the traumatic event.

When describing their experience of dissociation, survivors may feel as though the event is happening to someone else, feeling numb, feeling little or no pain, or having an out-of-body experience. The phenomenon of dissociation can also affect one's memory of the traumatic event and alter a victim's sense of time.

The neurobiology of trauma can explain many of what have been called non-intuitive reactions to victimization. However, this does not provide a checklist where several behaviors must be seen before a victim is to be believed, or the absence of any of the reactions described means the event did not happen, or it was not a traumatic experience. Furthermore, an understanding of the neurobiology of trauma cannot take the place of a full, thorough, and objective investigation. What it does is provide a scientific explanation of reactions that we may see, preventing investigators from misinterpreting victim behavior and making early judgments about a case or victim that can stall or even stop a thorough investigation.

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<sup>62</sup> Michael Levenson, *Evelyn Yang, Wife of Andrew Yang, Says She Was Assaulted by Her Gynecologist*, January 6, 2020, archived at <https://www.nytimes.com/2020/01/16/us/andrew-evelyn-yang-dr-robert-hadden.html>.

## Section C: The Impact of Trauma – The Details Remembered

The biological reaction to a traumatic event has an impact upon how decisions are made during the event, and upon how memories are encoded and retrieved. Like the physical/behavioral reaction to trauma, the manifestations of the changes to memory and cognition have been misinterpreted by many inside and outside the criminal justice system.

The brain is exquisitely sensitive to the neurotransmitters and hormones that flood the system during a traumatic event. Some brain functions are heightened while others are diminished. We previously discussed the heightened role of the amygdala during a traumatic event. It is interesting that while the amygdala (the area of the brain associated with cognition) is most active, the pre-frontal cortex is less active.

The pre-frontal cortex is the executive function part of the brain, playing a primary role in data-driven processing, directing our attention, regulating emotions and impulses, and encoding and retrieving memory during ordinary times. When experiencing a traumatic event, when split-second decisions can make the difference between survival or death, the data-driven, “if-this-then-that” decision making function is suppressed. This can lead to decisions that, when evaluated after the traumatic event, seem illogical, irrational, or somehow wrong. We should take care when judging decisions made during a traumatic event. Judgements made from the comfort of our offices or living rooms are essentially applying a calm, relaxed mind, one not experiencing trauma, to the actions of a body and brain experiencing trauma, awash in the hormones and neurotransmitters that alter neurobiology; a comparison akin to the proverbial comparison of “apples to oranges.” The victim’s ability to engage in that data-driven decision making is impaired or even absent when surviving the trauma is the primary concern.

Along with the suppression of the executive decision-making process, how and what memory is encoded and easily retrieved is affected when the pre-frontal cortex is awash in stress chemicals. Not surprisingly, the more attention paid to something, the greater likelihood that it will be remembered. Operating under normal circumstance, the pre-frontal cortex directs attention to the core details of an experience, and those core details are likely to be committed to memory. However, the pre-frontal cortex function of separating core details from peripheral ones is altered by the experience of trauma.

The result is that those core details deemed necessary for survival are more strongly encoded into memory and are the details most easily and accurately retrieved over time. Memory of the event becomes fragmented and incomplete as peripheral details (peripheral at the time) may be missing or poorly encoded into memory. The traumatic memory is not likely to be organized in a contextual, chronological narrative.

Therein lies the problem, as the typical presentation in court is the chronological narrative of events, a narrative retelling that the victim may not be capable of providing. In a real sense the criminal justice system considers as core details the who-what-where-when-and-how of the event. When experiencing a traumatic event, the victim may have considered other details as core to survival, and what or when peripheral.

Ms. Yang, the victim who described her assault by her doctor to the New York Times, described focusing on a core detail, a spot on the wall, to survive the assault. She said “I remember trying to fix my eyes on a spot on the wall and just trying to avoid seeing his face as he was assaulting me. Just waiting for it to be over.” Imagine asking her how long the assault lasted. She may give a range of time, or say something like, “It seemed like forever.” The duration of event was not a core detail and encoded poorly if at all.<sup>63</sup>

Now, imagine asking her what color the wall was. She may well be able to describe the spot on the wall down to its color and shape. This is because sensory details are often more strongly encoded and retrieved by trauma survivors. Investigators may consider these peripheral, but they are the kind of detail that is remembered, and interviewers should spend more time developing what the victim considered core to the experience.

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

Understanding the biological and psychological effects of trauma is essential to successfully investigating and prosecuting human trafficking offenses. This is especially true when interviewing the victim, especially for the first time. Using what has become known as the “trauma-informed interview,” a law enforcement officer can conduct a victim interview in a manner that is productive and compassionate. The following chapter discusses other helpful investigative techniques in human trafficking cases.

## **Section D: The Trauma-Informed Interview**

Like most criminal actors, traffickers are quite adept at finding victims who are vulnerable and at exploiting their vulnerabilities. Victims can be vulnerable because they are runaways, homeless, young, have a developmental or cognitive disability, or because they abuse substances. A desire to escape poverty makes one vulnerable to labor trafficking. The means of exploitation often include violence or threat of violence to the victim or family members. It is hardly surprising that victims would experience their trafficking as a traumatic event(s).

Of course, each victim is unique in their reaction to victimization. In some cases, investigators and prosecutors will be confronted with trafficking victims who behave like co-conspirators or are coerced into committing other criminal acts. Those who work with such victims should always be aware of the possibility that the victim is acting on their experience of trauma, seeming to join in the criminal activity as a means of staying relatively safe from the trafficker’s violence.

Working with trafficking victims, as with most victims of violent crimes, means that at some point the victim will be asked to talk about the trafficking. The act of talking about a traumatic event can itself trigger the body’s defense mechanisms, and, victims can literally re-experience the trauma as they say what happened to them. Anyone who interviews trafficking victims should be prepared to see and deal with the reality of reliving the trauma.

### **1. Restoring Control**

Like most victims of crime, trafficking victims have experienced a loss of control over their lives. Many of the decisions about their lives, mundane and extraordinary, are forced upon the victim. A hallmark of the victim involved trauma-informed response is restoring the victim’s agency and autonomy by giving back the ability to make meaningful decisions about their lives. It also helps law enforcement in understanding and accepting a victim’s decisions that appear to be contrary to the victim’s best interest and honoring those decisions whenever possible.

### **2. The First In-Depth Interview**

There are many resources that describe the trauma-informed interview process. This Chapter is intended as an overview of the in-depth interview, and not a detailed instruction manual. Keeping that in mind, the general course of the victim interview should not follow the traditional, “tell me everything that happened from beginning to end” format. Because the victim’s memory is likely to be fragmented, and providing a chronological, contextually rich narrative of events is probably an impossible task, the victim should be given permission to tell what happened in a way she is able, allowing her to begin wherever she is comfortable. This is far preferable than the “what happened next” interview.

Once the victim has finished that first narrative, it is appropriate to go back and explore additional facts. Remember that sensory memories are likely to be encoded strongly. Ask questions to draw out those memories, tying them to concrete events the victim told you about. For example, ask, “When the man came up to you at the bus station, do you remember how the bus station smelled?”

Smell is not something most would consider a core detail, but it is a sensory experience that may be strongly encoded. In addition, like other sensory experiences it is often tied to, or associated with other memories about what happened. Remembering the smell can lead the victim back to the event, and to other memories about the event.

This kind of interview requires a different form of follow up questions. Don't fall back on "what happened next." Rather, invite the victim to share anything more they can remember about the traumatic event as they move through the process of disclosure. Again, tie the follow-up to a concrete event that the victim remembers. For example, using the language of invitation one might ask, "tell me more about when you were at the hotel." Asking the victim to help you in your understanding can be an effective follow up, too. A good example of a good follow-up questioning is, "Help me understand more about feeling scared."

### **3. What Not to Say**

One of the goals of this kind of response is minimizing the secondary trauma that victims often experience when involved in the criminal justice system. One of things that can enhance rather than diminish the chance of increasing the feeling of traumatization is appearing to judge the victim negatively because of what they did or did not do, or by suggesting that the victim shares the blame for her victimization.

Avoiding words or question that convey judgment is a key component of a successful interview. This can be difficult because we regularly use language of judgment or blame, or at least language that is understood that way in this context.

One of the words that is heard as judgment in this context is the word "why." "Why did you get in the car?" "Why didn't you run away?" These are perfectly fine questions in many conversations but are often understood by victims as conveying negative judgments. Asking "why" presumes a victim knows the answer, even though the action or inaction may be an unconscious brain-based reaction to trauma. Also, asking why a victim did or did not do something in this context, suggests to the victim that the interviewer is starting to disbelieve her account because the interviewer thinks that a "true" victim would have done something different.

Sometimes knowing the "why" is necessary to the investigation. At trial, defense counsel is almost certain to ask about conduct that is considered non-intuitive. This can be countered by asking for an explanation or reason without using the actual word "why." For example, using the language of invitation, a victim can be asked to explain or expand on what they remember about the conduct in question.

# Chapter 5

## Investigations

*Human trafficking is a crime against humanity. We must unite our efforts to free victims and stop this crime that's become ever more aggressive, that threatens not just individuals, but the foundational values of society.* Pope Francis I

The dynamics of human trafficking investigations are unique and complex. As discussed in the previous chapter, victims of human trafficking experience a trauma that invokes reactions that can be unexpected and often misunderstood. This is partially why traditional investigative techniques are unlikely to generate sufficient evidence necessary for appropriate arrest and charging decisions. In fact, human trafficking investigations that are not informed and driven by knowledge of the impact of trauma on survivors may unintentionally cause its own trauma for survivors. To compound the problem, human traffickers often prey upon those who are marginalized or vulnerable in other ways. Consequently, human trafficking investigations require a different approach and mindset than the typical criminal investigation. This different mindset starts with a *proactive* rather than *reactive* investigation by law enforcement officers who are well-versed in the trauma-informed, victim involved response and experienced in working collaboratively with appropriate non-law enforcement organizations. These concepts, which are generally applied at different stages of an investigation, are fully discussed below.

### **Section A: Investigations Before Subjects or Victims are Known — *Reactive v. Proactive* Investigations**

Traditionally, most criminal investigations are handled reactively. That is, crimes are investigated after the offense is reported by a victim or witness to the law enforcement agency. In turn, the officer or detective contacts this individual, and the investigation proceeds. For example, once the crime scene is secured, the area is searched for evidence. Photographs are taken, physical evidence is gathered, and fingerprints or DNA samples are collected and preserved. Additionally, all potential witnesses and victims are identified and interviewed. In most cases, the victim will be – and will continue to be – a cooperative in the investigation and any subsequent court proceedings. Typically, the complexity of the investigation is directly proportional to the severity of the crime. By and large, the standard law enforcement pattern is “to react” to a call for service then proceed to investigate reported crime.

Traffickers strategically choose and exploit their victims who are vulnerable because they have mental illness, substance use disorders, their age and naivete, and their isolation from family or community. Moreover, those same victims are targeted and exploited because they are often unfamiliar with our customs. This is particularly true if these victims cannot speak or understand English. Depending upon their native country, such trafficking victims may be very reluctant to report any crime against them: Either because the trafficker has already threatened to harm family left back in their country of origin, or because police corruption is endemic in their homeland resulting in mistrust of law enforcement.

To exert control over these vulnerable victims, traffickers employ these and many other coercive tactics of psychological and physical abuse. Therefore, victims are sometimes reluctant to trust law enforcement and are unlikely to reach out and seek police assistance. In fact, they are much more apt to *avoid* law enforcement or others who could provide any meaningful assistance. For these reasons, it is important that law enforcement

utilize effective proactive techniques to ferret out human trafficking offenses. Only with effective proactive investigative techniques will there be a lasting effect in the reduction of this serious crime.

## **1. Targeted Outreach**

An effective proactive technique, known as “targeted outreach,” is to develop an ongoing relationship with groups and organizations that have high probabilities of encountering victims of human trafficking. Examples are organizations that provide services to vulnerable members of the community such as the homeless, troubled teens, or those with mental illness. Other examples are emergency room personnel and first responders such as fireman, paramedics, and patrolmen. Even churches and other religious organizations can be helpful in this regard. An essential aspect of a targeted outreach approach is to provide training to allow these organizations the ability to recognize telltale signs of trafficking.

## **2. Data and Intelligence Gathering**

Data and intelligence gathering from key sources is another important proactive technique. This method gathers and analyzes data and intelligence from various sources to uncover important indicators of potential human trafficking offenses that are otherwise not readily apparent. Below are specific examples of data and intelligence that can be analyzed for indications of potential human trafficking activity.

### **a. 911 and Non-Emergency Service Calls**

911 calls or non-emergency “service calls” can provide valuable police intelligence when gathered and analyzed in creative ways. For example, unusually high numbers of complaints involving a specific hotel could indicate potential sex trafficking activity. Hotels or motels are often venues where commercial sex acts occur and can generate disturbances that are reported to the police, such as a pimp and “john” arguing over payment for sex, or a pimp physically abusing a sex trafficking victim. It is important to pay attention to the *volume* of calls in addition to the nature of calls, as these calls are often recorded simply as a “disturbance,” a physical fight, or other non-specific, generalized description.

### **b. Police Incident Reports**

Police incident reports are another significant source of intelligence. This is true even where the call for service appears to be unrelated to human trafficking. Police reports on “check welfare,” or “suspicious person/circumstances” often include facts that raise concern when analyzed through the lens of someone familiar with typical trafficking activity. For instance, an incident report concerning an unusually large number of foreign-born individuals living in a single residence could indicate potential labor trafficking. Similarly, an incident concerning underage prostitution, or even the loitering of underage girls in an area known for prostitution, could indicate sex trafficking. Reports of other first responders such as the fire department and EMT are also important in this regard.

### **c. Debriefings from Other Investigations**

Debriefings of cooperating witnesses from other investigations can also provide indications of potential human trafficking operations. This is especially true in drug investigations. Often sex trafficking involves illegal drug use and information disclosed by cooperators in these investigations could evidence human trafficking activity.

### **d. Coroner’s Drug Overdose Reports**

Sex trafficking victims sometimes have substance use disorders. A careful analysis of the circumstances surrounding overdose deaths could be indicative of a human trafficking operation. For



example, the drug overdose deaths of multiple, seemingly unrelated females involving the same male could be indicative of a pimp and his sex trafficking victims.

#### **e. Social Media**

Social media is another great source of data to utilize in a proactive investigation. Often sex traffickers use social media to advertise and recruit new victims. In addition, photographs posted on social media may reflect obvious human trafficking activity.

#### **f. Civil or Administrative Court Dockets and other Public Records**

An analysis of civil complaints or administrative actions against employers or labor contractors may provide red flags indicative of human trafficking. Pending cases or administrative orders regarding unpaid employment or sales tax liabilities and wage and hour complaints can be a rich source of intelligence about trafficking at an ostensibly legitimate business.

With a bit of creative thinking, there are endless possible sources of useful data. These proactive techniques require a bit more work and ingenuity on the frontend but go a long way toward successfully uncovering human trafficking offenses that otherwise would remain undetected.

## **Section B. Investigations After Subjects or Victims are Known: Continuing the Proactive Investigation**

Once an investigation has revealed the existence of a particular trafficking offense, along with the identity of a trafficker and his victims, the investigation is far from over. There is nearly always considerable evidence available to the experienced investigator. Human trafficking cases can be challenging to prove in court, and it is important to uncover as much admissible evidence as possible to establish the offense and corroborate the testimony of victims who may be seen as unreliable.

Furthermore, there are almost always multiple offenders, many of whom are not readily apparent. Rarely are human trafficking offenses committed by a lone offender, and the universe of those who aid, facilitate, use, and profit from human trafficking is expansive. For instance, in a sex trafficking case, there could be a hotel owner or employee who knowingly permits hotel rooms to be rented for trafficking purposes. Such an individual may do this overtly with an express *quid pro quo* agreement with a pimp or the victim, or it could be a much more subtle arrangement. Only with a thorough, proactive investigation would such an offender be discovered.

Below are a few additional methods and techniques to uncover important evidence and additional offenders in a human trafficking case once an offense has been discovered. Depending upon the circumstance, these types of evidence may be sought and recovered prior, during, or after an arrest.

### **1. Social media**

Social media is a great way to learn more about a suspect and identify additional offenders. Many offenders post detailed and surprisingly revealing information that can provide invaluable insights into a trafficking operation. This evidence can include photographs, messaging, posts, and geotags. Not only does this information provide important direct evidence of the offense and identify additional offenders, but it can also provide important evidence to help corroborate the victims' statements.

### **2. Surveillance**

Covert surveillance of certain locations is another way to obtain important evidence in human trafficking cases. For instance, where a massage parlor is discovered to be a place of human sex trafficking, surveillance could reveal that nearly all customers are men during the late evening and overnight hours.

This type of clientele and hours of operations are clearly inconsistent with a legitimate spa or massage operation and could provide important corroborative evidence of sex trafficking.

### **3. Cell Phone Provider Records, Numbers Called and Location Data**

Cell phone records from cellular service providers (excluding the content of text messages) often provide important information to drive the investigation forward. These records do not reveal the content of the messages on the phone; rather, they provide call data (time, duration of call, number called, number of calls received) and cell site location information, or CSLI. CSLI is a continuous record of the cell towers a cell phone connects to send and receive information. Smartphones connect to the wireless network several times a minute when on, without the owner or possessor doing anything on the phone. In short, the cell service provider always has a record of a phone's location and call duration when it was in use.

The information is kept as a business record and is analyzed by the company to help measure demand for cell service, and thus the potential need for more cell towers, in a specific geographic area. According to the *Amicus* brief of the Electronic Frontier Foundation filed in *Carpenter v. United States*, due to the proliferation of cell towers and antennas, the ability to locate a specific device has increased to a level of accuracy that can approach that of GPS. This can be vital information in trafficking investigations.

The general rule is that defendants have no protected privacy interest in the business records kept by a third party.<sup>64</sup> However, the United States Supreme Court recently ruled otherwise, holding that the subscriber has a reasonable expectation of privacy in CSLI. Accordingly, law enforcement must get a search warrant to gather CSLI from cellular service providers.<sup>65</sup>

Like social media, this evidence can help identify the trafficker's associates and help to corroborate the victim's statement. Similarly, cell phone records of the victim will serve the same purpose. However, this area of the law is in flux as courts scramble to gauge the appropriate scope of Fourth Amendment protection to this technology. You are encouraged to check the law before attempting to get CSLI and other data from providers.

### **4. Cell Phone Content**

If a suspect's cell phone is seized during his arrest or during a search of his automobile or home, there is often probable cause to search the contents of the phone. Of course, such a search would require a search warrant. Searching the contents of a cell phone should never be overlooked as a suspect's phone almost always provides an abundance of evidence, including text messages, contact lists, and photographs. A suspect's text messages can be especially useful considering that such text messages, if relevant at trial, are not considered hearsay.

Issues will arise with the investigator's ability to unlock phones that are encrypted and/or password protected. Again, please check the status of the law on forcing a person to unlock a phone or provide a password.

### **5. Interception of Communications**

When a suspect has been identified, intercepting his communications can be an invaluable investigative tool. Louisiana law specifically identifies human trafficking of a victim under 21 years of age for the purpose of engaging in commercial sexual activity under La. R.S. 14:46.2(A)(1)(b), and child sex trafficking under 14:46.3 as offenses in which intercepting wire, electronic, and oral communications can be permitted.<sup>66</sup>

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<sup>64</sup> *United States v. Miller*, 425 U.S. 435(1976).

<sup>65</sup> *Carpenter v. United States*, 584 U.S. \_\_\_, 188 S.Ct. 2206, 201 L.Ed.2d 507 (2018).

<sup>66</sup> See La. R.S. 15:1308.

Important definitions, limitations on the disclosure of intercepted communications, and procedural requirements for seeking an order authorizing interception of such communications are found at La. R.S. 15:1302 *et seq.* In general, law enforcement must work closely with the Office of the Louisiana Attorney General and local District Attorney to seek an order authorizing an intercept.

## **6. Search Warrants**

As with a suspect's phone, there is often probable cause to search a suspect's car, home, or business. This valuable law enforcement tool should not be overlooked as well.

## **7. Bank Records**

Personal and business bank records of traffickers are another potential source of valuable evidence. Human trafficking is a highly lucrative endeavor and bank records often provide an opportunity for prosecutors to "follow the money." More importantly, financial records are important in establishing a viable related financial investigation.

## **8. Records of Car Rental Agencies, Airlines & Transportation Lines**

Traffickers often transport victims to various locations in furtherance of the trafficking operation. If there is any indication of such travel, records of car rental agencies, as well as airlines, bus and rail lines, and hotels can provide important corroborative evidence.

## **9. Jail Calls & Recordings**

After a suspect is arrested, it is a prudent prosecutor who endeavors to listen to jail calls. Inmates are often surprisingly talkative during these calls, and the content can be incredibly revealing and useful.

Traffickers share many characteristics with the domestic batterer in the manner they gain and maintain coercive control over their victim. The trafficker's efforts at keeping control of a victim do not stop if the trafficker is in jail; they may even increase in the form of repeated calls. It can be time consuming to monitor jail calls, but it is important to take the time to listen to the trafficker's calls. The calls will sometimes produce a bonus by yielding powerful evidence of witness intimidation or even give rise to further criminal charges.

It is also important to consider reviewing the jail calls of any of incarcerated trafficking victims. Often in sex trafficking cases, when victims are arrested for prostitution or other offenses related to the trafficking operation, the trafficker is the first person they call. These conversations are no less important than those of the incarcerated trafficker himself. However, be aware that secretly listening to the calls may turn a reluctant-but-participating witness into a hostile and combative one. Exercise prudence as it may be more advantageous to forego this technique and concentrate on building a results-based relationship with the victim, with the help of a community-based service provider.

## **10. Potential Co-Conspirators or Other Offenders Related to the Trafficking Operation**

As noted above, rarely does a trafficker operate alone. Once other culpable individuals are identified, the possibility must be explored that they may wish to cooperate in exchange for lenient treatment.

## **11. Business Owners & Residents Near the Trafficking Site**

Business owners, nearby residents and even mail carriers often observe suspicious activity that clearly indicate trafficking activity and could provide important corroborative evidence at trial.

## **12. Security Recordings**

Security cameras located anywhere near the location of the trafficking activity could contain valuable corroborative evidence. This rather less obvious source of evidence should not be overlooked.

## **13. Family Members of the Victims**

Family members of the victims, if available and cooperative, could provide important information to provide background evidence that establishes a narrative of how the victim came to be victimized and explains the mindset of the victim.

## **14. Other Criminal Investigations**

Finally, if there are any known active criminal investigations involving the trafficking suspect, it is important to reach out to those investigators. That investigation may have uncovered relevant information to the trafficking offense that was not recognized as consequential at the time of that unrelated investigation.

# **Section C: Interacting with Victims of Human Trafficking**

Once an investigation has successfully uncovered a trafficking offense, suspects have been identified, and significant evidence has been uncovered, it is time to move to the next step.

Arguably, this is the most difficult stage of the investigation because it involves a direct interaction with the victims. The two most important goals at this stage are to: (1) properly interact with vulnerable and traumatized victims, and (2) gather as much corroborative evidence as possible. To this end, law enforcement should build the trauma-informed, victim involved response previously discussed. This response is necessarily collaborative, with robust partnerships with those in the community who respond to human trafficking.

### **1. Trauma-Informed, Victim Involved Response**

As discussed in detail elsewhere in this handbook, trafficking victims can be severely affected by the trauma of victimization. This can be attributed in part to what is usually a prolonged exposure to intense physical and psychological coercion upon individuals who were already psychologically vulnerable and helpless. A trauma-informed, victim involved response recognizes this and allows law enforcement to adjust their approach to how and when they interact with the victim.

### **2. The Necessity of Collaboration**

The trauma-informed, victim involved response acknowledges the reality that victims of human trafficking require services outside the ability of law enforcement or prosecutors to provide. Not unlike domestic violence victims, the consequence of arresting the trafficker can put incredible pressure on victims, financial and otherwise. Often, trafficking victims rely on the trafficker for everything, including housing, transportation, and other day-to-day needs. In addition, victims may need help getting medical care. Depending on the circumstances, victims may need assistance negotiating through the application for various government assistance or require help petitioning the court for additional protection through a civil or criminal order of protection.

Meeting these needs — which is elemental to keeping the victim safe and more likely to continue to participate in the court system — is best done by collaborative partners. Community-based advocates that provide services to human trafficking victims are invaluable collaborative partners in the response. Community-based advocates can find housing, medical care, and mental health counseling, and any additional assistance to ensure that the victim is safe and on the road to recovery. Meeting these needs goes a long way toward establishing an important level of trust between the victim and law enforcement.

Collaboration is also necessary to meet the cultural and language needs of some trafficking victims. This goes beyond finding an interpreter. Many community-based service and advocacy organizations exist to serve the needs of these immigrant communities. Partnering with these community organizations helps law enforcement learn about the victim's culture.

The community-based advocate's role should not be confused with that of a law enforcement victim assistance program. There is a significant distinction between the two. Victim assistance provided by law enforcement is generally tied to the criminal case and usually ends once the prosecution has ended. The community-based advocate's involvement is not dependent upon the pendency of the criminal case and continues until the needs of the victim are met, even if the court proceedings wrap up. A more important distinction is that communications between the victim and some community-based service providers are confidential and cannot be disclosed. This is an extremely important distinction that allows the victim to speak freely with advocates confident that what they say will not be disclosed.

For these reasons and more, a multidisciplinary team ("MDT") to respond to human trafficking is essential. Beyond the need to support and involve victims in the response, the nature of this crime lends itself to the MDT approach. Trafficking offenses are often cross-jurisdictional, putting a premium on communication and coordination of effort. They often include multiple different offenses, some of which, like tax related offenses, have separate administrative agencies and investigative forces that should be included on the team.

Finally, the MDT approach has proven its worth in other areas such as responding to child abuse and neglect, and domestic violence offenses. In fact, La. R.S. 14:46.3(F) requires that the MDT approach be used with child victims of human sex trafficking to the extent it is practical.<sup>67</sup>

### **3. Addressing Criminal Activity Committed by a Victim**

One of the most difficult and thorny situations to face law enforcement in human trafficking investigations is where a victim is also the perpetrator of criminal activity. This forces law enforcement officers to face a dilemma: Should an individual be treated as a victim only? As a defendant? Or as both? Resolving this dilemma is especially challenging when weighing the trauma to the victim versus the victim's need to survive.

Unfortunately, there is no hard and fast rule or one-size-fits-all solution, and each situation must be resolved on its own particular facts and circumstances. To be sure, there are never any easy answers. However, there are certain guidelines that can provide a workable framework toward achieving a reasonable and equitable resolution.

To that end, it is helpful to separate criminal conduct into three distinct categories: (1) crimes wholly unrelated to the human trafficking offense; (2) crimes directly related to the human trafficking offense but present no compelling interest in prosecution; and (3) crimes directly related to the human trafficking offense and present a compelling interest in prosecution.

### **4. Crimes unrelated to the Human Trafficking Offense**

Often, criminal activity of a victim is clearly unrelated to the human trafficking offense, such as crimes committed before the individual became a victim of the human trafficking enterprise. In most instances, these crimes can be handled as any other similar case, with less regard to the human trafficking investigation. However, careful consideration should be given to the victim's mental state and the severity of the criminal activity before proceeding in the normal course. For instance, it may not be wise to arrest a victim on a warrant for unpaid traffic fines or a minor shoplifting offense on the evening she is rescued from a human trafficker. Common sense and compassion should rule the day, keeping in mind that human

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<sup>67</sup> For more on establishing a human trafficking task force, read the Office for Victims of Crime "Human Trafficking Task Force e-Guide." [www.ovcttac.gov/taskforceguide/eguide/](http://www.ovcttac.gov/taskforceguide/eguide/).

trafficking cases are not the norm. Remember, there are no intractable rules, and discretion should be exercised where possible. Of course, any consideration given to a victim in this regard should be carefully documented as any favorable treatment toward a victim must ultimately be disclosed to defense counsel.

## 5. Crimes related to the Human Trafficking Offense that present No Compelling Interest in Prosecution.

Often traffickers will force their victims to commit crimes as part of the trafficking offenses. The most obvious example is when a sex trafficker forces an individual to commit acts of prostitution. Another example is drug possession offenses where the trafficker uses the victim's drug addiction to gain psychological control over the victim. Because this type of criminal activity does not present a compelling interest in prosecution, the statute provides victims an affirmative defense to many of the crimes a victim commits at the order of the trafficker. Those offenses are listed in *Figure 1*.

Special attention should be paid to the victim's age. A victim under 18-years-old who is trafficked for the purpose of engaging in commercial sexual activity has complete immunity from prosecution for crimes committed "as a direct result of being trafficked."<sup>68</sup> The child victim is eligible for specialized service for exploited children, and law enforcement and prosecutors are directed to adopt a MDT approach to working with child victims of commercial sex trafficking.<sup>69</sup>

What crimes are a "direct result" of being trafficked is left undefined. Since the very purpose of the trafficking enterprise prosecuted under La. R.S. 14:46.3 is commercial sexual activity, prostitution and related crimes that are listed in *Figure 1* are a direct result the trafficking offense. But what about when the prostituted child is coerced and forced to rob a "john?" Is that a direct result of being trafficked?

**FIGURE 1:**

<b>Offenses to Which the Trafficking Victims have an Affirmative Defense.**</b>	<b>(a) R.S. 14:82 (Prostitution).</b>
	<b>(b) R.S. 14:83.3 (Prostitution by massage).</b>
	<b>(c) R.S. 14:83.4 (Massage; sexual conduct prohibited).</b>
	<b>(d) R.S. 14:89 (Crime against nature).</b>
	<b>(e) R.S. 14:89.2 (Crime against nature by solicitation). La. R.S. § 14:46.2(F)(1)</b>

**\*\*A victim who wishes to assert these defenses must give the state notice 45 days in advance of trial, or earlier if the court orders.**

<sup>68</sup> La. R.S. 14:46.3(E).

<sup>69</sup> La. R.S. 14:46.3(E) and (F).

Here, again, the age of the victim should weigh heavily in the decision. Even if the robbery is not considered a direct result of the trafficking, there will rarely be a compelling interest in prosecuting a child victim under these circumstances.

Perhaps a harder case to decide is when the child victim commits a crime without being coerced or forced to do so by the trafficker. It is not unusual for victims of any age to commit theft or other offenses that are related to the trafficking – related at least because the crime was done while the victim is being trafficked – but not a direct result of it.

Understanding how the child victim was vulnerable is a necessary predicate to deciding whether to prosecute. It should be difficult to find compelling reasons to prosecute a child whose family life was unstable or dangerous, who has experienced multiple traumatic events, and who has been repeatedly sexually assaulted. This is especially true for most property-related offenses.

## **6. Crimes related to the Human Trafficking Offense that present a Compelling Interest in Prosecution.**

The most difficult category involves those crimes which are violent, involve victims, or are otherwise serious enough to create a significant interest in prosecution. Examples include situations where traffickers persuade a victim to engage in credit card fraud, robberies, or distribute large quantities of controlled substances.

The most common crime in this regard is when a trafficking victim actively recruits and manipulates new trafficking victims. Sometimes a victim of a sex trafficking organization will be promoted to a high-ranking position, often called a “Bottom.” The Bottom will then recruit new victims utilizing the very same techniques of coercion and violence that were used on her when she was first victimized. How to resolve these situations can be extraordinarily difficult, and an appropriate resolution can only be achieved on a case-by-case basis. Again, common sense and compassion must rule the day. In many instances, the criminal activity is simply too severe to justify lenient treatment. Other times, leniency is justified. Such decisions can often be reached after consultation with the victims of the crimes at issue. Often, these victims feel compassion and support lenient treatment.

In most instances, a reasonable resolution will be reached if the issue is approached with the appropriate deliberation using common sense and compassion.

## ***The Potentially Devastating Consequences of Prosecuting a Child Victim***

At the age of 15, Alexis Smith was charged and convicted of murder.

Everyone knew that she wasn't even in the room when the victim was shot and killed, but prosecutors alleged that she set the victim up, and urged she be **tried and sentenced as an adult**.

**The victim was her trafficker**, a 36-year-old man who Alexis called "Dad." He was her pimp, and she relied on him for everything.

Taken to Cincinnati by a drug dealer she couldn't pay, she was forced to become a stripper. Her trafficker was at first kind. Even though he found her a job at another strip club, he protected her from customers.

He eventually prostituted her, but not before he repeatedly beat and raped her. Alexis spiraled down into abusing drugs to separate herself from the pain of her life.

The police and prosecutors knew this when they decide to charge her. **At sentencing the judge said she had been "working" for the trafficker's "escort business."**

Like Louisiana, Ohio has a law protecting child trafficking victims, mandating a pause in any prosecution for crimes related to the trafficking to allow time to provide special services to child victims. **The law was not implemented in Alexis's case.**

Ohio governor Mike DeWine granted her release from prison after serving seven years.

***(The state of Ohio vs. a sex-trafficked teenager: The criminal justice system mishandled 15-year-old Alexis Martin's case. Now she's living with the consequences. by Jessica Contrera, Washington Post Digital, June 1, 2021)***



# Chapter 6

## Trial Issues in Human Trafficking

*Effective public policy to address human trafficking cannot only address offender accountability and increase prosecution, but must also address root causes of the issue as well as enhance safety, services, and dignity for victims. It must also provide education and awareness to those who can stop this crime in its tracks.* Sara Gideon

While all criminal trials are challenging, human trafficking trials offer unique challenges. Jurors are often unaware of the typical circumstances leading to the victimization of human trafficking offenses and how trauma affects the behavior of victims. For these reasons, it is important for a prosecutor to take care to carefully educate the jury during the course of the trial about these and other issues. Below are some suggestions on how to manage this. This handbook is not meant to be a strict, instructional “how-to” for human trafficking trials, rather it should be used as a guide for how to approach this very challenging process.

### Section A: Voir Dire

There is little statutory guidance for voir dire in Louisiana. Article 786 of the Louisiana Code of Criminal Procedure provides that the “scope of the examination shall be within the discretion of the court.” However, most state courts allow wide latitude to attorneys in their voir dire questions to potential jurors. Therefore, voir dire can provide the first opportunity to educate the jury to learn what the jurors know or think they know about human trafficking. In the process of selecting a fair and impartial panel, you also have the opportunity to educate jury and judge alike about the misconceptions held about human trafficking and trafficking victims.

While every case should be addressed on its own facts, there are several areas common to most human trafficking cases that should be addressed during voir dire. First, many human trafficking cases involve the discussion of sensitive and potentially embarrassing subject matter. This is especially true for sex trafficking cases. It may be helpful to ask potential jurors if they have any trouble hearing a frank discussion of sexual behavior. Even if a potential juror says they have no problem with such testimony, it is prudent to ask if they understand that a victim could have trouble testifying about those things.

One important question would include asking how they (as jurors) would expect a victim to testify in an open court filled with strangers about their last sexual encounter, down to the last intimate detail. Most would agree that this would be extraordinarily uncomfortable and would not willing do so. This begins the process of teaching jurors to understand how difficult it can be for a victim to testify and engender empathy during her testimony.

Other topics to address should include attitudes toward sex workers or prostitution in general, attitudes toward illegal immigrants, victims who may have committed crimes, and co-participants in the criminal offense, who may be testifying in exchange for lenient treatment.

Trafficking cases share many similarities to sexual and domestic violence cases. Not the least of which is a juror’s preconceived notion that if a person were truly a “victim,” then that person would not have acted in a particular manner. Attitudes about the seemingly counterintuitive things victims can do – such as delayed

reporting, not taking opportunities to escape, or even acting at times to find other victims – are all things about which a juror may have beliefs that do not reflect the reality of the offense. It is helpful to fully explore human trafficking myths with potential jurors during voir dire and use the reality to educate your panel.

Another shared issue is the possibility that the victim will cease to cooperate with the prosecution, as a victim's non-appearance at trial would cry out for an explanation. The jury's understanding of the dynamics of the trafficking offense and the elements of coercive control are appropriate questions in these circumstances.

So, too, is exploring a potential juror's attitude about their ability to fairly evaluate the evidence and not insist upon hearing from the victim. Such a line of questioning could go like this: "Not every criminal trial requires the testimony of the victim. Can you think of an example?" The most obvious instance of this reality is a murder case, where the victim is obviously not available to testify. Yet murder cases are tried every day. The burden of proof is the same, it's just that the government must provide sufficient evidence in the absence of the victim's testimony. The same is true in a human trafficking case. Ask jurors if they can see the similarities and consider all other evidence even though they would like to hear from the victim.

All these issues implicate a victim's reaction to trauma. It's important to address the issues regarding the effect of trauma during voir dire, and whether there will be expert testimony at trial to explain the neurobiology of trauma. Ask if they have seen people who are scared or hurt behave in certain ways, and if they think that fear changed the way they acted. A qualified juror should be able to approach this issue with an open mind and not hold negative attitudes toward a victim who doesn't act as they believe she should. Use and modify your domestic violence and sexual assault voir dire questions to address these common issues with the jury.

In a sex trafficking case involving a minor or young adult (*i.e.*, under the age 21 years old) the issue of consent must always be discussed. For younger victims, people may dislike the law setting the age of consent, so asking jurors to acknowledge that they don't have to support the law, just fairly apply it, can reveal strongly held beliefs about the issue of minors and their ability to consent. This is especially critical to discuss where the victim is older, such as 16 or 17 years old. This part of the law could be controversial, and you should try to engage in a dialog with the jury on their attitudes and opinions about consent in trafficking cases.

## **Section B. Direct Examination of the Victim**

Conducting a direct examination of a human trafficking victim provides challenges not often present with other witnesses in criminal trials. Like victims in sexual assault cases, victims in human trafficking cases suffer trauma that can have a significant impact on their ability to recount events easily.<sup>70</sup> Of course, all prosecutors hope that by the time a case reaches trial, the victim feels safe and supported enough to testify comfortably and cogently. Regardless, the very act of testifying can be daunting and even traumatic for any witness. The prospect of secondary victimization (*i.e.*, of experiencing trauma by participating in the criminal justice system) is a very real barrier to testifying for many victims. For this reason, it is best to proceed carefully, cautiously, and with compassion and support from partners in the advocate community.

Of critical importance is a prosecutor meeting with the victim more than once, and well in advance of trial. The purpose of the meetings is not necessarily to practice testimony. Rather, it is more to educate the witness about the trial, to share with the witness how you expect the direct exam to go, and to assure the victim that they are supported by the entire prosecution team. As the victim becomes more comfortable with the prosecutor, he or she might be able to discuss more details of the offense.

Important areas to cover in direct examination include the victim's background and how she came to be victimized. Keep in mind that one goal of the victim's testimony is to allow the jury to understand the vulnerability of the victim and be less apt to backslide into victim blaming. But remember that a chronological, contextual narrative about some events is not always possible. Consider revising the direct exam to ask about the sensory

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<sup>70</sup> This issue is discussed in detail in Chapter 4 of this handbook, and the reader is urged to review that discussion before preparing the direct examination of a human trafficking victim.

and emotional details that are strongly encoded (and, for sensory details, can be corroborated by thorough investigation.) While it is important to help the jury to develop a mindset that prevents the jury from backsliding into victim blaming, it is axiomatic that prosecutors must directly confront and affirmatively bring out any of the victim's blameworthy behavior. Being seen as candid and not hiding so-called "bad facts" enhances the credibility of both witness and prosecutor. Things that are already judged as admissible such as drug use and other criminal activity should be brought out early and directly. Of course, that is only after careful consideration of the admissibility of any such negative information about the victim.

In your pretrial preparation, review whether it is appropriate to file motions to prohibit the defense from inquiring into inadmissible matters under Louisiana Code of Evidence.<sup>71</sup> Such evidence should first be relevant. Second, even if relevant, much of this evidence is specifically inadmissible, such as the victim's prior sexual history or when the relevance is substantially outweighed by the danger of unfair prejudice.

## **1. Effective Witness Preparation**

An effective direct examination begins with preparation of your case and your witness. This preparation includes:

- ***Reviewing the entire prosecution casefile and know all the facts of the case.***
- ***Reviewing the entire law enforcement file, including but not limited to all police reports, medical records, scientific reports, 911 calls, witness and victim statements, and physical evidence.***
- ***Interviewing and preparing victims, witnesses and law enforcement officers well before trial.***
- ***Meeting with and interviewing child victims and witnesses multiple times to establish comfort and trust.***
- ***Ensuring that you have reviewed all relevant materials before meeting with any victim or witness.***

## **2. Meeting with the Victim**

- ***Identify yourself to the victim. Tell the victim what you do and what is your role in the prosecution of the case.***
- ***Explain to her that the case is the "STATE OF LOUISIANA V. DEFENDANT," not "the victim versus the trafficker."***
- ***Explain that you will always tell the truth, and not what the victim wants to hear. And that this is what you expect in return from the victim.***
- ***Explain court procedure and the processes of bringing a case to trial, including a description of the various pretrial motions and pretrial dates.***
- ***Explain how long it may take for a case to go to trial. Cases often get continued, even over the objection of the state, and victims can become frustrated. Explain delays at the outset and assure her that you will not lose interest in the case if it takes a long time to come to trial.***

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<sup>71</sup> See La. Code of Evidence, Arts. 412 and 412.1, relative to evidence of victim's past sexual behavior and reference to manner and style of victim's attire at time of the offense, respectively.

- ***Allow the victim to read her statement and ask her relevant questions, but do not be intimidating or ask questions in a way that imply a negative judgment of the victim.***
- ***Introduce the victim to DA's office staff, including your secretary, your investigator, the Victim Assistance Coordinator, or anyone else who might be contacting her on your behalf. Discuss with the victim that someone who says they are with "the State" or "the Court" could be a defense attorney or defense investigator. While you cannot tell a victim not to talk to the defense, make certain that the victim knows that, under Louisiana law, any conversations they have with the defense may be recorded without their knowledge or consent. Assure them that you will never record them without their knowledge or consent.***
- ***Consider taking the victim to the courthouse and to the courtroom where she may be testifying to familiarize her with the environment, including the location of the jury box, the witness stand, etc.***
- ***Ask the victim what they are most afraid of when testifying. Ask what they need, such as personal items, help with getting assistance or any other need that, if left unmet, is a barrier to participating in the prosecution. Make sure that appropriate referrals are made to partners who can meet those needs.***

### **3. Pre-Trial Preparation for Victims**

When the case is nearing trial, you will need to prepare your victims and witnesses for their testimony in court:

- ***Review each of the victim's statements with the victim. Do not simply read the statements, ask the victim questions related to their statement so that the victim will be sure to understand your questions at trial.***
- ***Prepare the witnesses with any evidence that you will be using in connection with their testimony at trial. Do not blindside them in court.***
- ***Lift your head! Pay attention to the victim when they are answering your questions and observe their facial expressions and reactions. Don't take notes and miss these nonverbal clues. If possible, have someone else take notes of the meeting.***
- ***Point out things that are confusing in a non-judgmental way and allow the victim to explain them. REMEMBER WHAT YOU HAVE LEARNED ABOUT THE NEUROBIOLOGY OF TRAUMA in your conversations with the victim and in your direct examination!***
- ***Remember the phrasing of your questions – Do not ask "Why didn't you run away/scream/fight?" Instead, ask "What did you think was going to happen?" or, "What were you thinking while this was happening?"***
- ***Anticipate areas of cross examination and alert the victim of any possible areas of cross examination by the defense attorney.***

- *Do not promise a conviction or verdict: Tell the victim that you cannot predict what a judge/jury will do but tell them that you believe them and that you believe in the case. Also, discuss responsive verdicts and the possibility of a hung jury.*
- *Tell the victim and all witnesses to tell the truth, but to not “guess” at any answer.*
- *Tell the victim that it is perfectly permissible to meet and talk before trial. Make sure to tell the victim (and all witnesses) that the only answer they should ever give is the truth.*
- *Tell the victim that court is a serious proceeding, and that they should dress appropriately. Explain to them that sometimes clothing can distract the jury from what a witness is saying. Tell them that there is no need to wear anything fancy, just clothing that is comfortable and appropriate.*
- *Explain to the victim the basic courtroom procedure. That is, who asks questions, where the judge and jury sit, what to do if there is an objection, and any other procedures your court or judge follow.*
- *Tell the victim to be polite and respectful to defense counsel and the judge.*
- *File State’s Motion to Designated Victim and Case Agent to be Present During Testimony of all Witnesses (i.e., exempt from any sequestration order). This is an indispensable tool that is often overlooked by prosecutors.*

#### **4. Guidelines for Questions on Direct Examination**

- *Be explicit, straightforward, and unequivocal, not abrupt or unsympathetic to the victim.*
- *Do not just “dive” into the topic. Explain why you’re asking such personal questions and why you need to ask them.*
- *Do not ask victims to reenact what happened to them. Remember that the retelling along can provoke the trauma response.*
- *Practice active listening. Be sure to listen carefully and let the victim finish her answer. Do not be thinking of your next question while the victim is speaking. It may be helpful to echo the victim’s answers periodically as you move to the next question. Be sure not to be dismissive or distracted while during the victim’s testimony.*
- *It is important to keep in mind during the direct examination that coerced sexual contact is NOT consensual sex. Bring out the victim’s background and highlight her vulnerability. Bring out details in the victim’s story that show the coercion by the trafficker. Often this evidence is not readily apparent since the victim may not have even recognized the trafficker’s behavior as coercive. Allow the victim to completely finish their answer, even if that means sitting in silence for a while. We can miss important information if we move on too quickly.*
- *Ask sensory questions: “What did you see/hear/smell/feel?” “What were you thinking while this was happening?”*

- ***Make certain that you elicit the entire story. Do not assume that all relevant information is contained in the formal statements obtained by law enforcement during the investigation. It is important to learn everything that was said and done and ensure that the jury hears everything.***

## **Section C: Trial Tips**

Before proceeding to trial, it can be helpful to take a moment to reflect on how stressful a trial is for everyone involved. The prosecutor wants to ensure the admission of all relevant evidence, be persuasive, and obtain a just verdict. All witnesses – even “professional” witnesses like police officers – can be anxious about testifying and sometimes even terrified. This is especially true of victims. The victim is often scared about speaking publicly about the intimate facts of their ordeal, in an alien environment, and in front of the defendant, an individual who once wielded incredible power over them.

Cross-examination is usually especially frightening to a victim. They are often convinced that their character will be attacked and their life laid bare to judgment. A victim sometimes fears that the fate of the trial hangs on their every word.

While it is not possible to eliminate this stress entirely, thorough preparation on the part of the prosecutor can significantly ameliorate that anxiety and ease the concern of all involved. Your preparation will be obvious to everyone and place everyone’s mind at ease. It has the added benefit of being persuasive to juries and increasing the likelihood of being seen as a competent professional.

### **1. Prepare and Organize your Direct Examination Questions:**

- ***Make a folder, either paper or virtual, for each witness.***
- ***Outline the specific points you want to cover with each witness.***
- ***Use bullet points for easy review.***
- ***Itemize all evidence you want to use in connection with the witness’s testimony, and at what point you want to introduce that evidence through that witness.***
- ***Avoid too many “What happened next” questions. This type of question can be a runaway train with an inexperienced witness. Use more specific (but non-leading) questions to direct the testimony.***
- ***Non-leading appropriate direct questions include: “What could you see at that point?” “What did you hear?” “What did the defendant look like at that moment” “How did you feel/what were you thinking at this point?”***
- ***Pause and let the witness answer. The witness’ answer is more important than your questions and what forms the evidence that can be considered by the trier of fact.***
- ***Follow up and ask for details. Often a victim forgets to mention important details. This is where it is critical that you listen carefully to the witness during direct examination.***
- ***Don’t be afraid to backtrack with the witness if you’ve missed something or something the witness said needs clarification. Be sure to prepare the witness beforehand to be free to correct herself if she misspeaks.***

- ***Use your exhibits and remember to publish them to the jury; if the judge will allow, it is sometimes a good idea to publish to the jury as you go along, so the witness's testimony is fresh in their mind when they view the exhibits. The judge may allow the jurors to view all evidence again before you close your case.***
- ***Pay attention to your witness! If you do not look like you care, why should the jury listen?***

## **2. Protect your Witness during Cross Examination.**

### **Rule #1: Stay alert – You are not finished!**

- ***Cases are often lost during cross examination.***
- ***Anticipate defense questions and have the witness ready to answer them. If appropriate, ask those questions during direct.***
- ***Be very careful with redirect. Avoid the urge to get in the last word. Often redirect is not necessary. At most, redirect should be brief and only used where something said during cross needs clarification. If the witness did well on cross, it's best skip redirect.*** [Adapted from *The Prosecutor's Encyclopedia, Prep and Direct Examination of Victim*]

## **3. Select Rules of Evidence Important in Human Trafficking Trials**

If there is one piece of advice that can improve a trial prosecutor's presentation, both new and seasoned, it is "Know the rules of evidence!" An erudite prosecutor knows that the success of a case depends not only on an effective presentation but a command of the Criminal Code and Code of Evidence as well. The prosecutor should be the one person in the courtroom most knowledgeable about the rules of evidence. In that way, the rules can be properly used as both shield and sword, and will safeguard the fairness and integrity of the verdict.

### **a. Character Evidence**

Trafficking victims are concerned (like most witnesses) that their lives will be judged and their characters attacked by the choices they have made. This fear is often legitimate in that many trafficking victims have led what others may deem to be "unsavory" lives and have made poor choices, including criminal activity and sex work. While some of this evidence is admissible to prove character, most is not (though some can be admitted for other purposes). Essentially, the rules of evidence regarding character evidence run both ways, applying to both the state and defense witnesses, including, with some limitations, the defendant.

Character, prior "bad" acts, and reputational evidence are common areas of concern in trafficking case. A thorough understanding of the rules is necessary, and large enough in scope to be beyond the reach of this handbook. Use it as a jumping off point to further research, and a prompt to remind oneself of a need to evaluate each case for potential issues.

#### ***Article 404.***

***Character evidence generally not admissible in civil or criminal trial to prove conduct; exceptions; other criminal acts***

***A. Character evidence generally. Evidence of a person's character or a trait of his character, such as a moral quality, is not admissible in a***

***civil or criminal proceeding for the purpose of proving that he acted in conformity therewith on a particular occasion, except:***

- (1) ***Character of accused. Evidence of a pertinent trait of his character, such as a moral quality, offered by an accused, or by the prosecution to rebut the character evidence; provided that such evidence shall be restricted to showing those moral qualities pertinent to the crime with which he is charged, and that character evidence cannot destroy conclusive evidence of guilt.***

This is a straightforward recitation of the rule governing the admission of character evidence. Consider it a rule of inclusion, or at least a rule of limited exclusion. Character evidence is admissible if relevant to any issue other than that a person acted in conformity with that trait. In normal language, a person of good character can do bad things (as well as the inverse), so we do not assume they committed an offense simply because they are person of bad character.

Subsection (1) of Article 404 limits the use of character evidence against the accused; Subsection (2) limits the use of character evidence against the victim.

(2) ***Character of victim.***

- (a) ***Except as provided in Article 412, evidence of a pertinent trait of character, such as a moral quality, an overt act on the part of the victim at the time of the offense charged, evidence of his dangerous character is not admissible; provided further that when the accused pleads self-defense and there is a history of assaultive behavior between the victim and the accused and the accused lived in a familial or intimate relationship such as, but not limited to, the husband-wife, parent-child, or concubinage relationship, it shall not be necessary to first show a hostile demonstration or overt act on the part of the victim in order to introduce evidence of the dangerous character of the victim, including specific instances of conduct and domestic violence; and further provided that an expert's opinion as to the effects of the prior assaultive acts on the accused's state of mind is admissible***

This extensive language differs from many other states and the federal rule. It largely pertains to cases in which self-defense is an issue, except for the reference to Article 412. It is important to listen to the defendant's testimony, as they may inadvertently "open the door" to evidence of bad character in their zeal to present a good fact to the jury.

Article 404 (B) is an effective weapon in a prosecutor's arsenal. Specifically, Article 404(B) evidence requires a pretrial evidentiary hearing<sup>72</sup> to determine the admissibility of any prior bad act evidence.<sup>73</sup>

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<sup>72</sup> Precedent to that hearing, the State may file a Motion to Offer Evidence of Prior Bad Acts of Defendant pursuant to La. Code of Evidence, Article 404 (B) or, in the alternative, *State's Motion in Limine to Admit Prior Bad Act Evidence* under La. Code of Evidence, Article 404(B).

<sup>73</sup> Art. 404(B) evidentiary hearings, relative to the admissibility of defendant's prior bad acts, are known as a "Prieur" hearings -- taken from the holding of the Louisiana Supreme Court in *State v. Prieur*, 277 So.2d 126 (La. 1973). Most recently, that same court revisited Prieur in the matter of *State v. Taylor*, 217 So.3d 283 (La. 2016), specifically held that when seeking to introduce evidence pursuant to La. Code of Evidence, Article 404(B), the State need only make a showing of sufficient evidence to support a finding that the defendant committed the other crime, wrong, or act. Similarly worded to Article 404(B) with one important distinction, Art. 412.2 evidence of **prior sexually assaultive** behavior of a defendant merely requires **prior notice** to the defense of the prosecutor's intent to use such evidence at trial. This Motion would be styled as "*State's Notice of Intent to Use Prior Sexual Assaultive Behavior and Conduct of Defendant at Trial.*"



**B. Other crimes, wrongs, or acts.**

- (1) ***Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.***

Finally, Article 405 governs the admission of reputation evidence. "Reputation" is probably the word most used to describe one's character, although they are different. Witnesses legitimately fear losing a good reputation, or having the jury consider them as having a bad reputation. In reality, reputation evidence should be admitted in few trials.

**Article 405.**

***Methods of proving character***

- A. Reputation.** ***Except as provided in Article 412, in all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to general reputation only. On cross-examination of the character witness, inquiry is allowable into relevant specific instances of conduct.***
- B. Specific instances of conduct.** ***In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, such as in a prosecution for defamation or when there is a defense of entrapment, proof may also be made of specific instances of his conduct.***
- C. Foundation.** ***Before a person may be permitted to testify to the reputation of another person, a foundation must be established that the witness is familiar with that reputation.***

If admissible, it is generally only admissible through testimony about general reputation. Specific instances are allowed on cross examination only. Before a person is allowed to testify as to character, a foundation must be established that the witness is familiar with that reputation.

**b. Prior Acts of Sexual Conduct and Rape Shield**

This kind of prior act is especially concerning in sex trafficking cases. Proving the *prima facie* case likely requires testimony about the victim's involvement in commercial sexual activity. It is not unusual for sex trafficking victims to have been voluntarily engaged in sex work, something that makes them vulnerable to traffickers, before they became trafficked. Understanding the rule governing the admission of prior sexual conduct, though complicated, is essential in protecting victims from unnecessary secondary victimization.

**Article 412.**

***Victim's past sexual behavior in sexual assault cases; trafficking offenses***

- A. (1) Opinion and reputation evidence; sexual assault cases. When an accused is charged with a crime involving sexually assaultive behavior, reputation or opinion evidence of the past sexual behavior of the victim is not admissible.**
- (2) Other evidence; exceptions. When an accused is charged with a crime involving sexually assaultive behavior, evidence of specific instances of the victim's past sexual behavior is also not admissible except for:**
- (a) Evidence of past sexual behavior with persons other than the accused, upon the issue of whether or not the accused was the source of semen or injury; provided that such evidence is limited to a period not to exceed seventy-two hours prior to the time of the offense, and further provided that the jury be instructed at the time and in its final charge regarding the limited purpose for which the evidence is admitted; or**
- (b) Evidence of past sexual behavior with the accused offered by the accused upon the issue of whether the victim consented to the sexually assaultive behavior.**
- B. (1) Opinion and reputation evidence; trafficking. When an accused is charged with a crime involving human trafficking or trafficking of children for sexual purposes, reputation or opinion evidence of the past sexual behavior of the victim is not admissible.**
- (2) Evidence of specific instances of the victim's past sexual behavior is not admissible unless the evidence is offered by the prosecution in a criminal case to prove a pattern of trafficking activity by the defendant.**
- C. Motion. (1) Before the person, accused of committing a crime that involves sexually assaultive behavior, human trafficking, or trafficking of children for sexual purposes, may offer under Subparagraph (A)(2) or (B)(2) of this Article evidence of specific instances of the victim's past sexual behavior, the accused shall make a written motion in camera to offer such evidence. The motion shall be accompanied by a written statement of evidence setting forth the names and addresses of persons to be called as witnesses.**
- (2) The motion and statement of evidence shall be served on the state which shall make a reasonable effort to notify the victim prior to the hearing.**
- D. Time for a motion. The motion shall be made within the time for filing pre-trial motions specified in Code of Criminal Procedure Article 521, except that the court shall allow the motion to be made at a later date, if the court determines that:**
- (1) The evidence is of past sexual behavior with the accused, and the accused establishes that the motion was not timely made because of an impossibility arising through no fault of his own; or**

**(2) The evidence is of past sexual behavior with someone other than the accused, and the accused establishes that the evidence or the issue to which it relates is newly discovered and could not have been obtained earlier through the exercise of due diligence.**

**E. Hearing. (1) If the court determines that the statement of evidence contains evidence described in Subparagraph (A)(2) or (B)(2), the court shall order a hearing which shall be closed to determine if such evidence is admissible. At such hearing the parties may call witnesses.**

**(2) The victim, if present, has the right to attend the hearing and may be accompanied by counsel.**

**(3) If the court determines on the basis of the hearing described in Subparagraph (E)(1) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence may be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the victim may be examined or cross-examined. Introduction of such evidence shall be limited to that specified in the order.**

**(4) Any motion made under Subparagraph C and any statement of evidence, brief, record of a hearing, or like material made or used in connection with the motion shall be kept in a separate, sealed package as part of the record in the case. Nothing in this Article shall preclude the use of the testimony at such hearing in a subsequent prosecution for perjury or false swearing.**

**F. Past sexual behavior defined. For purposes of this Article, the term “past sexual behavior” means sexual behavior other than the sexual behavior with respect to which the offense of sexually assaultive behavior is alleged.**

**G. The rules of admissibility of evidence provided by this Article shall also apply to civil actions brought by the victim which are alleged to arise from sexually assaultive behavior, human trafficking, or trafficking of children for sexual purposes by the defendant, whether or not convicted of such crimes.**

### **c. Expert Testimony**

As previously noted, it is rather unlikely that a juror will have lived in the same world as victim of human trafficking. Nor is it reasonable to think that an ordinary juror knows what trafficking is or how traffickers perpetrate their crimes. Most assuredly, the average juror will not know how a victim might react to the trauma of being trafficked. If they have thought about it at all, it is likely that what is known is incorrect in most cases. These facts raise the possibility, if not probability, that expert testimony will be helpful to explain some fact in evidence.

## **Article 702.**

### **Testimony by experts**

**A. A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:**

- (1) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;**
- (2) The testimony is based on sufficient facts or data;**
- (3) The testimony is the product of reliable principles and methods; and**
- (4) The expert has reliably applied the principles and methods to the facts of the case.**

The linchpin of admissibility of expert testimony is whether it will be helpful to the jury understanding the evidence or to determine a fact in issue. Establishing helpfulness begins as early as voir dire, when jurors can reveal how little they know about human trafficking and the trafficked victim. This void of knowledge must be filled to allow jurors to fully understand the facts and evidence. For example, the average juror will not understand why a victim remained with the trafficker for some time, even in the face of occasional violence. It is likely that the ordinary juror would question why anyone would do that, and even unfairly judge the credibility of the victim who does not immediately escape at the first opportunity.

In the absence of expert testimony, the defense is free to offer a misguided or outright false explanation of a victim's actions. Thus, a juror's misconception remains unchallenged or falsely reinforced. Either way, the fairness of the proceedings is diminished as it relates to the victim.

There are several issues in human trafficking cases that can be fertile areas for expert testimony. Explaining the counter-intuitive behavior of trafficked victims is only one of the most obvious. Expert medical testimony relative to the behavior of victims of human trafficking is akin to expert medical testimony relative to victims of domestic violence or sexual abuse.

Less obvious is testimony to explain the financial workings of illegal enterprises like those run by traffickers. This knowledge is far beyond the ken of the ordinary juror. It is nearly tailor-made for expert testimony.

The role of the expert on many of the potential issues in trafficking cases is different than and has evolved from that of the conventional expert for which the above Article was first written. For this reason, modern courts cannot reflexively and rigidly apply the customary standards of admissibility set forth in Subsections 2-4 of the Article 702.

Under the discovery rules, the defense must give notice and provide reports or the substance of the defense expert's testimony prior to trial.

#### **d. Potential Privileges**

There is no general privilege for community-based serviced providers working with human trafficking victims. However, in most sex trafficking cases, communications between a victim and a service provider will be subject to a health care provider/patient privilege found in Article 510 of the La. Code of Evidence, which provides:

## **Article 510.**

### **Health care provider-patient privilege**

- (C) (1) General rule of privilege in criminal proceedings. In a criminal proceeding, a patient has a privilege to refuse to disclose and to prevent another person from disclosing a confidential communication made for the purpose of advice, diagnosis or treatment of his health condition between or among himself, his representative, and his physician or psychotherapist, and their representatives.**

The definition of health care provider includes “. . . a person who is engaged in any office, center, or institution referred to as a rape crisis center, who has undergone at least forty hours of sexual assault training and who is engaged in rendering advice, counseling, or assistance to victims of sexual assault.”<sup>74</sup> Therefore, any communications between a sex trafficking victim and a counselor who meets this statutory qualification should be subject to this privilege, which can be asserted by the victim or the service provider. Furthermore, the service provider at the time of the communication “is presumed to have authority to claim the privilege on behalf of the patient or deceased patient.”<sup>75</sup>

## **4. Special Considerations in Human Trafficking Trials**

Not surprisingly, many trafficking trials will rely heavily on the testimony of the victim. It should also be of no surprise that prosecutions of human traffickers can be document intensive, too. Documentary evidence is an invaluable means of corroboration and can be damning evidence against the defendant.

### **a. Cell Phone Service Provider Records**

The preceding chapter discussed the utility of getting records of the defendant’s and victim’s cellular phone provider during the investigation to prove identity, location, and movement of the phone and, by inference at least, the owner of the phone. If you intend to admit these records into evidence at trial, you must become familiar with the foundational requirements of authentication. It may require a company representative to testify to what the records represent, and how and why they are kept by the business.

For location data, anticipate needing a corporate representative to authenticate such records (if there is no business records exception) and a witness to explain how cell towers receive signals from cell phones, and how each cell tower has antennae that split the area of reception into sectors. Additionally, a separate expert may be necessary to explain the intricacies to give a lay understanding meaning to the raw data analyzed. In this area, you cannot simply rely on the business records exception and ignore the explanation of why the records are relevant.

### **b. Cell Phone Content and Social Media Content**

The content of cell phone communications is treated differently than most call data, as content is a communication from a person, and not a record kept by an instrument like a computer.

Although not just a hearsay problem, hearsay is certainly a potential issue with communication content. Of course, content that is proven to be from the defendant is not hearsay. Establishing the provenance of that content, — authenticating it as having come from the defendant — is key to establishing admissibility.

<sup>74</sup> La. Code of Evidence, Article 510(A)(2).

<sup>75</sup> La. Code of Evidence, Article 510(D).

Content that is gathered from the service provider will be easily established as having come from the phone owned by the defendant. Only slightly more problematic is content that is voluntarily shared by a witness or victim, as what is easily established is that it was received, and that the receiving device identified the number of the sending device. That the defendant is the person assigned to that number probably requires some confirmation from a witness with knowledge that the number belongs to the defendant. Importantly, that need not be from the provider, as someone who received calls or messages from the defendant or sent messages or calls to the defendant at that number, can provide the necessary testimony.

Even if testimony can establish that the number is assigned to the defendant, authenticating that it was the defendant who created the content is still required. Digital evidence like text messages share an authentication problem with the dinosaur known as the land line phone: it might be defendant's number but how do we authenticate that defendant was the caller, in essence the declarant?

In *State v. Smith*,<sup>76</sup> the defendant filed an interlocutory appeal of the trial court's refusal exclude the content of text messages offered by the State. The defendant argued during the hearing on his motion to exclude the evidence, and again on appeal, that the State failed to properly authenticate the text messages as having been sent by him. The messages at issue were sent over an unidentified social media platform but were called text messages throughout the proceedings. The Court of Appeals was called upon to determine the standards for authenticating social media messages and apply those to the evidence the State presented in the trial court.

The Court first held that the appropriate inquiry is whether the proponent of the evidence has produced sufficient evidence, direct or circumstantial, from which a reasonable juror could conclude that the thing offered is what the proponent purports it to be. "Consequently, the type and quantum of evidence will depend on the context and the purpose of its introduction."<sup>77</sup>

Citing Maryland's decision in *Sublet v. State*,<sup>78</sup> the *Smith* Court set out three possible, but not exclusive, means of authenticating social media postings: First, ask the purported creator if he created the profile and posted the message. Second, search the computer of the purported creator to discover if it was used to create the profile and post the message. Third, get the service provider to authenticate the creation of the profile and posting of the message. The Court went on to suggest, as had the court in *Sublet*, that the presence of information uniquely within the knowledge of the author, or other identifying characteristics, could be sufficient to authenticate digital evidence. Because the State offered no evidence to authenticate its proffered evidence, the trial court erred in admitting it.

A year later, the Fifth Circuit Court of Appeals went beyond mere suggestion and held that evidence of other identifying characteristics was sufficient to authenticate text messages. In *State v. Haydin*,<sup>79</sup> the recipient of the messages testified that messages were received on a cell phone used exclusively by the witness, and that the messages were sent from a cell number used by the defendant and stored in the witness's contacts, and that the witness had received messages from the same number in the past. This was sufficient evidence from which a reasonable juror could conclude that defendant was indeed the author of the text messages.<sup>80</sup>

Difficulty in authentication should not deter one from trying to admit content when it is relevant and material. Cell phone communication is nearly ubiquitous. Those born after the mid-nineties have lived in a world where cell phone and smart phone use is normal. Courts have slowly been catching up in evaluating the admissibility of cell phone content, including Louisiana's courts.

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<sup>76</sup> 192 So.3d 836 (La. App. 4 Cir. 2016).

<sup>77</sup> *Id.* at 842.

<sup>78</sup> 442 Md. 632, 113 A.3d 695 (Md. 2015).

<sup>79</sup> 235 So.3d 1293 (La.App. 5 Cir. 2017).

<sup>80</sup> See also *Archaga v. Johnson*, 280 So.3d 331 (La.App. 5 Cir. 2019)

Whether offering cell phone text messages or social media posts, digital evidence is uniquely suited to pre-trial motions *in limine*, especially if the presiding court has not had a chance to rule on the issue. You are encouraged to file these motions and build an adequate if not extensive record for the likely appeal.

### **c. Financial, Tax, and Employment Records**

Human trafficking cases can involve considerable amounts of money and, in forced labor cases not involving commercial sexual activity, a great many victims who may have a financial paper trail. Or, as might be the case, lack of a paper trail one would have if legitimately employed. These records, or their absence when expected to be there, can be essential evidence in trafficking cases.

Financial, tax, and labor records are the arcane world of specific experts. Like cell phone call data, their importance and meaning are not readily apparent, and a witness must be called to explain them. An independent forensic accountant would be a wonderful witness, but possibly an unaffordable luxury. Keep in mind that some state and federal investigators may have developed an expertise in this area, and can when properly qualified give clear, concise, and compelling testimony. A lay witness, too, could be helpful if basing their testimony on what they perceived.





# Chapter 7

## Forfeiture of Assets Used in Human Trafficking

*Those who deny freedom to others deserve it not for themselves.*

*Abraham Lincoln*

Human trafficking has been estimated to generate more than \$150 billion in illicit proceeds each year, according to data released by the International Labor Organization.<sup>81</sup> Unlike other criminal enterprises, where the commodity is easily identified as contraband and must be hidden, trafficked persons are not as easily identified. This makes it easy for victims to be “sold” repeatedly, lowering the risk of discovery, and yielding higher profits for their exploiters.<sup>82</sup>

Of course, identifying and saving victims from enslavement is the most important reason to relentlessly prosecute trafficking cases. And though the prison sentences for trafficking convictions can be long, there is a good chance that the trafficking enterprise will continue, or another will spring up in its place; the crime is simply too lucrative and the possibility of detection too low to deter the determined criminal. One way to hobble and ultimately destroy a trafficking enterprise is to cripple the ability to fund continuing operations and reduce the profit gained from human trafficking. Forfeiting the assets of organizations who operate human trafficking enterprises is the primary means of divesting the criminal of his unscrupulous gains.

### Section A: The Importance of Forfeiture

The overarching principle of forfeiture is that no one should profit from their wrongdoing. Defendants should relinquish their right to any property that is: (1) derived from any illegal activity or conduct; (2) used in furtherance of such activity or conduct; or (3) is an instrumentality of a crime. An investigation into the financial operation of a trafficking enterprise can not only find evidence that is valuable in proving the criminal offense, but it may also lead to the discovery of assets and property that are used or derived from the profits of the trafficking activity.<sup>83</sup>

Forfeiture of the *instrumentality* of a crime (such as firearm) has been a part of criminal law for some time. We have become so accustomed to this aspect of forfeiture that it happens almost mindlessly. Modern day forfeiture statutes expand on that initial premise. In other words, the criminal *should forfeit all the proceeds* of his crime, and not just the instrumentality of it. This, by design, expands the universe of assets that can be forfeited.

That expansion was created to address the realities of modern criminal activity, especially the movement of the proceeds of crimes into other assets to hide both the criminal activity and its proceeds. That is not to say that there was not organized crime in our history. Rather, as the scope and economic impact of such activities became more broadly known, as well as the apparent inability of existing laws to attack the profitability of criminal behavior, forfeiture laws were created to fill the void.

It is sometimes argued that forfeiture is unnecessary because restitution for the victim has been ordered in connection with the criminal conviction. However, this is a misperception. Restitution and forfeiture serve different purposes; restitution is designed to assist victims in rebuilding their lives, whereas forfeiture is a financial consequence

<sup>81</sup> Elizabeth G. Wright, *Follow the Money: Financial Crimes and Forfeiture in Human Trafficking Prosecutions*, United States Attorneys' Bulletin, November 2017.

<sup>82</sup> See *AEquitas, Strategies in Brief*, Sept. 2013. <https://aequitasresource.org/resources/>.

<sup>83</sup> See Wright, *supra*, at 87.

designed to dismantle a criminal enterprise. However, it is important to keep in mind that, of the two, restitution should be the paramount concern, which is why forfeited assets are likely to be used to satisfy any restitution order.

## Section B: Louisiana's Forfeiture Statute

The Louisiana statute broadly sets out the procedure for forfeiture. The statute identifies those crimes that permit forfeiture by reference. Louisiana's law departs from the law in many other states in that there is no separate forfeiture action created. Rather, forfeiture is mandatory and part of the judgment of sentence. In addition, what is ordered forfeited is specifically set out in statute and is limited in scope compared to some other state statutes. For example, Michigan's forfeiture law,<sup>84</sup> creates a separate civil action of forfeiture, permits the forfeiture of the instrumentalities of enumerated crimes, and allows the forfeiture of proceeds and *substituted* proceeds of the identified criminal activity. "Substituted proceeds of a crime" is defined as "any property obtained or any gain realized by the sale or exchange of proceeds of a crime."<sup>85</sup>

### 1. What Property is Subject to Forfeiture?

The procedure for forfeiture of assets used in human trafficking is governed by La. R.S. 15:539.1(A). It is an extensive statute detailing what can be seized, the disposition of the seized assets, the protection for lien holders and innocent owners, and how the proceeds of sale are to be distributed. As to what can be seized, the statute states:

- A. Upon conviction of a human trafficking-related offense as defined in R.S. 46:1844(W) (2)(a), ..., the court shall order that the personal property used in the commission of the offense be seized or impounded and sold at public sale or auction by the district attorney or otherwise distributed or disposed of in accordance with the provisions of this Section. The personal property made subject to seizure and disposition pursuant to this Section may include any electronic communication devices, computers, computer-related equipment, motor vehicles, photographic equipment used to record or create still or moving visual images of any victim that are recorded on paper, film, video tape, disc, or any other type of digital recording media, currency, instruments, or securities. Forfeiture of personal property under the provisions of this Section shall not preclude the application of any other remedy, civil or criminal, under any other provision of law. All materials seized as evidence in an offense enumerated in this Section shall constitute contraband. The court, upon motion of the prosecuting attorney, after contradictory hearing, shall order the destruction of the contraband when it is determined that it is no longer needed as evidence. The contraband shall be presumed necessary as evidence if an appeal of the conviction is pending, if the convicted person is pursuing post-conviction remedies, or the time for pursuing an appeal or post-conviction remedies has not expired.***

Upon conviction, the court shall order the seizure of personal property used in the commission of the offense. This is the first restriction imposed on forfeiture of assets and is limited to things used in the commission of the crime.

The law sets out a non-exclusive list of what personal property can be included, with electronic and digital devices described several times. Importantly, the law separates personal property that may be forfeited from that which is contraband. Anything seized as evidence is considered contraband and

can be ordered destroyed after a motion by the prosecutor and a contradictory hearing. Interestingly, however, real property appears to be exempt from forfeiture under this statute.

<sup>84</sup> Designated as MCL 600.4701 through 4710.

<sup>85</sup> MCL 600.4701(f).

## 2. Sale of Forfeited Property

The general rule is that personal property forfeited, that is not contraband, will be sold at a public sale or auction. That rule is set forth in La. R.S. 15:539.1(B).

***B. When personal property is forfeited under the provisions of this Section, the district attorney shall authorize a public sale or a public auction conducted by a licensed auctioneer, without appraisal, of that which is not required by law to be destroyed and which is not harmful to the public. Any currency, instruments, or securities forfeited shall be distributed or disposed of as provided in this Section.***

The DA *shall* authorize the sale. He or she has no discretion other than the choice of an appropriate manner of sale. Whether by public sale or auction, accepted business practices should be followed.

## 3. Protections for Innocent Owners and Lien Holders

### a. Stolen Property & Property Not Otherwise Owned by Defendant

The statute has extensive provisions protecting those who have a competing ownership interest in seized personal property. First, personal property that is stolen is exempt from sale. Similarly, property that is not owned by the defendant is exempt, provided the owner did not know that their property was being used in committing a crime. The agency storing this exempt property must return it to the true owner, but not until seizure and storage fees are paid. However, if the owner is an internet service provider, they are not required to pay the fees to have their property returned.<sup>86</sup>

### b. Innocent Co-Owners

Property that is co-owned by the defendant can be exempt if the co-owner can demonstrate that they were unaware of the trafficking crimes. This protection extends to spouses who assert an interest in the property. To exempt property, the interest holder must swear by affidavit that he [the gendered pronoun is used in the statute] owns the property in question, that he did not know, and reasonably could not have known, about the criminal conduct, and that he did not consent to using his property in the criminal activity.<sup>87</sup> The law specifically directs that any person who files a false affidavit is subject to prosecution for False Swearing under La. R.S. 14:125.

### c. Lien Holders

Not surprisingly, those who hold a properly recorded lien on seized property are protected and the property will not be sold. The lien holder must pay the fees related to seizure and storage to have the property released. Note that the lien must be properly recorded before the date of the offense to offer protection. It is not clear whether a valid lien holder, say a credit union, that loans the trafficker money during the on-going offense, is protected by this provision.<sup>88</sup>

## 4. Disposition of the Proceeds of the Sale

The general rule set out in Subsection (E) is that after the costs of seizure, storage, and sale of the property are paid, the remaining proceeds are first applied to any outstanding order of restitution. If any proceeds remain, they are split among various agencies in the following proportions:

- ***60% to the seizing agency or equitably if more than one agency is involved.***
- ***20% to the prosecuting agency.***

<sup>86</sup> La. R.S. 15:539.1(C)(1).

<sup>87</sup> La. R.S. 15:539.1(C)(2).

<sup>88</sup> La. R.S. 15:539.1(D).

- ***20% to the criminal court fund of the parish where the prosecution occurred.***

However, in human trafficking cases (and others listed in the law), Subsection (F) changes the distribution percentages for proceeds after the satisfaction of any restitution order.

- ***25% to the to the seizing agency or agencies allocated among the seizing agencies in proportion to their participation in the management of the investigation, seizure, and forfeiture.***
- ***25% to the prosecuting agency.***
- ***The remaining 50% to the Exploited Children's Special Fund.***

## **5. Forfeiture Procedure**

The mandatory forfeiture procedure begins when the defendant is convicted, and the court orders the seizure and sale of the property eligible to be forfeited, but not already seized as evidence.

However, assets can be hidden, sold, or given away while the case is pending. Waiting for conviction smacks of firmly closing the stable door long after the horse is gone. To address this problem, some districts find it useful to seek a warrant of seizure at the time of the initial arrest to protect the property from disposal by the trafficker while the criminal case is proceeding. When there is a guilty plea or conviction, the prosecutor will present an order of seizure to the court and ask that the court serve the defendant with that order. Forfeiture proceedings would then proceed as normal.

When this option is taken, the prosecutor must take all reasonable safeguards to protect the condition of the property seized. If cash is seized, some prosecutors will include in the warrant of seizure that the cash be placed in an interest-bearing account pending conclusion of the proceedings. Cash and other fungible property should not be aggregated in one account or stored with other property of the same kind. This forecloses most arguments that the storage resulted in misidentification or misuse of the property.

# Chapter 8

## Victims' Rights & Victim Assistance Programs

*It is a debasement of our common humanity . . . I'm talking about the injustice, the outrage of human trafficking, which must be called by its true name - modern slavery.* Barack Obama.

The Victims' Rights Movement began in response to the perception that the criminal justice system was more concerned with the protection of the constitutional rights of criminal defendants than it was for their victims. The United States has enacted legislation to enumerate and protect the rights of victims of crime in the federal court system. In this country, every state has enacted legislation and/or amended their state constitution to grant crime victims' rights they never had before, such as the right to be notified of and attend important court proceedings. The goal is to ease the burden on victims and their families, and to put their rights on equal (or nearly equal) footing with those of the offender.

### Section A: A Brief History of the Victims' Rights Movement

In 1972, the U.S. Supreme Court acknowledged the then-prevailing view that a crime victim cannot compel a criminal prosecution because "a private citizen lacks a judicial cognizable interest in the prosecution or non-prosecution of another."<sup>89</sup> The Supreme Court went on to explain that Congress was free to create legal rights for victims if so chose.

In 1982, President Ronald Reagan issued an Executive Order calling for the creation of a task force on victims of crime.<sup>90</sup> In response, the President's Task Force on Victims of Crime ("PTFVC") was formed and charged with conducting a nationwide study to assess the treatment of crime victims in the criminal justice system. Moreover, the PTFVC was to make specific recommendations to the President on how to improve the criminal justice system's response to victims.

Rather impressively, the PTFVC members had diverse backgrounds in experience, profession, and expertise. Members crisscrossed the nation gathering testimony and consulting with experts in the criminal justice field. The testimony of victims was expected to be an important part of the final report, and "not surprisingly, victims' voices provided both compelling and convincing evidence that their plight was indeed grave."<sup>91</sup>

The Final Report of the PTFVC was unanimous in its findings that the criminal justice system regularly re-victimized victims, tilted too much in favor of offenders, and that the poor treatment of victims was a widespread problem. The PTFVC made 68 recommendations for action in five areas:

- ***Proposed executive and legislative action at the federal and state levels.***
- ***Proposed federal action.***

<sup>89</sup> See *Linda S. v. Richard D.*, 410 U.S. 614 (1972).

<sup>90</sup> Executive Order 12360, *President's Task Force on Victims of Crime*, Office of the Federal Register. Washington, D.C., April 23, 1982.

<sup>91</sup> Melissa Hook and Anne Seymour, *A Retrospective of the 1982 President's Task Force on Victims of Crime: A Component of The Office For Victims of Crime Oral History Project*, December, 2004. [https://www.ncjrs.gov/ovc\\_archives/ncvrvw/2005/pg4d.html](https://www.ncjrs.gov/ovc_archives/ncvrvw/2005/pg4d.html).

- ***Proposed action for criminal justice system agencies (including police, prosecutors, the judiciary, and parole boards)***
- ***Proposed action for other organizations (including hospitals, the ministry, the Bar, schools, the mental health community, and the private sector).***
- ***A proposed amendment to the Federal Constitution.***<sup>92</sup>

The last of these areas, amending the U.S. Constitution, was generally seen by members of the PTFVC as necessary to effective and enforceable change envisioned in the other 67 recommendations.<sup>93</sup> A Victim's Rights amendment to the federal Constitution was first submitted in 1991, and it has been reintroduced several times since then. Despite the PTFVC's compelling & robust argument in favor of the amendment, it has yet to pass.

Even though a federal constitutional amendment has yet to pass, the PTFVC's other recommendations resulted in substantive changes to how the system recognizes and protects the rights of crime victims. Chief among these changes is the creation of the U.S. Department of Justice's Office for Victims of Crime; passage of the Victims of Crime Act of 1984, usually referred to as VOCA, and its creation of VOCA Assistance Administrators and Victim Compensation Programs in all states; and the establishment and growth of crime victim services at almost all levels of the criminal justice system.

Of course, the victims' rights movement was not created by the Task Force. Victims' rights groups had been active decades before arguing for changes to state and federal laws, with varying success. As far back as 1965, California established the first crime victim compensation board. In 1982, Congress passed the Federal Victim and Witness Protection Act ("FVWPA") in an effort "to enhance and protect the necessary role of crime victims" in the justice system, to assist victims without infringing on the rights of the defendant and provide a model for similar state laws.<sup>94</sup>

## **1. The Oklahoma City Bombing Trial**

On April 19, 1995, Timothy McVeigh and Terry Nichols bombed the Alfred P. Murrah Federal Building in Oklahoma City, killing 168 people and wounding many more. In the setting of this heinous act of domestic terrorism and subsequent court proceedings, the sizeable gaps in the FVWPA were all too acutely exposed: Victims and their families were told that they could not sit in the courtroom and attend the trial if they were going to be witnesses (even if they were only potential witnesses in the penalty phase.); there were no closed-circuit TV cameras allowed in the federal courtroom for victim family members who lived outside of Oklahoma and would not be able watch the trial; and, as was typical at the time, victims and victims' families were subjected to the ordeal of numerous, repetitive appeals, denying them the sense that they would ever see anything approaching final justice.

In response, a group of victims and victims' families sought and won an act of Congress allowing cameras in the Denver federal courtroom to stream the proceedings back to Oklahoma City. When McVeigh was convicted and sentenced to death, U.S. Attorney General John Ashcroft broadcast McVeigh's execution at an Indiana prison to the State of Oklahoma so that victims and families could see final justice for themselves.

Spurred to broader action by the revictimization it saw, Congress enacted The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") in 1996. Among other protections, AEDPA limits repetitive appeals and serial filing of federal habeas applications. In 1997 Congress passed the Victim Rights Clarification Act ("VRCA"), which states unequivocally that victims and their families have the right to attend the trial in cases affecting them.<sup>95</sup> Federal Rule of Evidence 615 was amended in 1988 in response to the Victim Rights Clarification Act and the Victim's Rights and Restitution Act of 1990.<sup>96</sup>

<sup>92</sup> See Executive Order 12360, *supra*.

<sup>93</sup> *Id.*

<sup>94</sup> Congressional Findings and Declaration of Purpose, 96 Stat. 1248, *Pub. L.* 97-291, §2, Oct. 12, 1982.

<sup>95</sup> 18 U.S.C. §3510.

<sup>96</sup> 42 U.S.C. § 10606. See Committee Notes on Rules (998 Amendment), 28 Appendix U.S.C. §615 - Excluding Witnesses.

## 2. The Legacy of Oklahoma City

The trial of the Oklahoma City bombing domestic terrorist came to serve as an iconic example of the justice system's mostly poor response to victims of crimes. It also galvanized a movement for changes in the treatment of victims and their families. In an article published by USA Today on April 19, 2015, the impact of the McVeigh trial on the burgeoning victims' rights movement was recognized: "[The Oklahoma City bombing's] legacy lives in the response McVeigh never saw coming. Instead of revolt, the bombing joined an army of survivors and victims' families in an unparalleled campaign that forever altered the landscape of victims' rights in the USA."<sup>97</sup>

Later in that article, Meg Garvin, Executive Director of the National Crime Victim Law Institute, described the effect that Oklahoma City bombing victims' efforts had on the area of victims' rights, casting a needed spotlight on a "fundamental flaw." Where victims had long been considered "pieces of evidence in criminal cases, not co-equal participants" in the criminal justice system, Garvin stated, "Oklahoma City was a rallying cry for remedying the law and it is still referenced today."<sup>98</sup>

## Section B: Victim Rights and the Immigrant Victim<sup>99</sup>

Traffickers will often target foreign nationals, sometimes bringing victims across borders from other countries or taking control of those smuggled across the border by a confederate. People who are already present in the United States without proper documents are especially vulnerable to a trafficker's threat to report them to immigrations officials. When law enforcement encounters these victims, it is important to address the victim's status quickly to ensure the victim's safety and secure their ability to remain in the country to assist in the investigation and prosecution of their trafficker. This section discusses the tools available when working with foreign nationals who are in the country without proper documentation.

### 1. Immigration Issues & Securing Visas in Human Trafficking Cases

The integrity of the border of the United States, the regulation of who can come into the country, the length of time of permitted stay, and employment eligibility status is solely a federal matter. The U.S. Citizenship and Immigration Services ("USCIS"), an agency with the Department of Homeland Security ("DHS"), administers the visa process, and makes the decision whether to grant visa applications.

As used in this context, a "visa" is a written document giving a person permission to come into or remain in the United States. There are two broad categories: (a) nonimmigrant visas, for those who are temporarily staying in the country for a specific purpose or time frame; and (b) immigrant visas, for those who eventually wish to become permanent residents, or if permitted, citizens of the United States.

Visas of both types come in a dizzying array of letters and numbers, depending on who the person is, their job, education, why they are coming to the country, and so on. And each has its own requirement for documenting or proving the basis for granting the visa. For example, foreign film actors must get a specific form of visa (O-visa or a H-2B) to remain in America to act in a film, while foreign students must get a different kind of visa (F or M-visa). The permission to remain in the country is limited to continuing the original purpose for which it was granted, or is otherwise time limited in some way. Some visas allow for a person to become a permanent resident or a citizen of the United States, while others do not.

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<sup>97</sup> USA Today, April 19, 2015.

<sup>98</sup> *Id.*

<sup>99</sup> As used heretofore, "immigrant" means a non-citizen person in this country, regardless of status, unless used in a quote or summary as a term of art. It is not dependent on whether they crossed the border with or without proper authority, willingly or unwillingly, whether they have a valid visa, whether they've overstayed the time limit or other limitations of a visa, or whether they are in the process of obtaining citizenship or permanent residency status. When a distinction is made between those who have a proper and current visa and those who do not, a person in the latter group will be identified as "undocumented" or "without a current visa." When necessary to distinguish between a citizen and non-citizen, "non-immigrant" is sometimes used in the law.

There are two kinds of visas that are of particular importance in human trafficking cases: the U-visa; and the T-visa. The U-visa is available to those who are victims of certain violent crimes, or who have experienced substantial abuse. The T-visa is similar but is specific to victims of severe forms of trafficking, defined as labor trafficking and sex trafficking. Another option available to victims of crime is that of asylum. However, the laws and procedures required to seek asylum are cumbersome and complex and are usually considered impractical. As such, only the T and U-visas are discussed in this manual.

## 2. T-visas and Trafficking Victims

As discussed in previous chapters, a person's immigration status can be a powerfully coercive tool for the trafficker. Foreign nationals often face many fears related to their immigration status, from the loss of their legal residency status to being exposed as illegally present in the country. This fear, which is sometimes heightened by the real possibility of forced separation from their children and other family members legally present in the United States, is leverage used to enslave victims and keep them in a state of involuntary servitude. The T-visa was created to break this hold traffickers have over victims.<sup>100</sup>

The T-visa is a temporary non-immigrant<sup>101</sup> visa that enables certain victims of a severe form of human trafficking to remain in the U.S. for up to four years if they have assisted law enforcement in an investigation or prosecution of human trafficking. A path to citizenship is not contemplated in the T-visa process. However, someone with a T-visa may be able to adjust their status and become a lawful, permanent resident, commonly referred to as a "Green Card." The T-visa authorizes lawful employment in the country and makes the visa holder eligible for certain federal and state benefits.

To secure a T-visa a person: ( 1) must be a victim of trafficking; (2) in the U.S. due to trafficking; (3) comply with any reasonable request from law enforcement for assistance in the investigation or prosecution of human trafficking; (4) Demonstrate that you would suffer extreme hardship involving unusual and severe harm if you were removed from the United States; and (5) be admissible to the United States or eligible for a waiver.

The T-visa is available not only to the victim of human trafficking, but to family members as well. Each T-visa is numbered depending upon the relationship to the victim. The T-1 visa is available to foreign citizens who are in the United States due to trafficking. T-designated visas are available to family members of victims applying to T-1 visas, depending upon the age of the victim. For example, a victim under the age of 21 may apply for a visa for his or her spouse (T-2), children (T-3), parents (T-4), and any unmarried siblings under the age of 18 (T-5). For victims over 21, only spouses and children qualify for T-visas, except where parents and minor siblings face a present risk of retaliation because of the applicant's escape from the trafficker and their cooperation with law enforcement.

Before a T-visa is granted by the USCIS, the application must be "certified." This is generally done by the agency conducting the investigation. The application may be certified by a broad group of law enforcement and criminal professionals, including federal, state, local, or tribal law enforcement agencies; prosecutors and judges; and other agencies that have jurisdiction to detect, investigate, or prosecute in their respective areas of expertise, such as child or family protective services, the Equal Employment Opportunity Commission, and the Department of Labor. The application requires the certifying agency to identify the crime committed against the victim, the dates of perpetration, where it occurred, a brief narrative description of the criminal activity and the victim's involvement in it, and a description of any injuries to the victim.<sup>102</sup>

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<sup>100</sup> Congress created this visa status in October 2000 as part of the TVPA.

<sup>101</sup> The T-visa is available to those who are not citizens of the U.S.

<sup>102</sup> To facilitate the process of certification, a form (Form I-918 Supplement B) available at <https://www.uscis.gov/sites/default/files/document/forms/i-918supb.pdf>.



Because assistance to law enforcement is necessary, the nature of the victim's assistance must be included in the certification. The victim/applicant must possess information about criminal activity -- *of which they are the victim* -- which would assist law enforcement in the investigation and prosecution of the crime. If the applicant only possesses information about other offenses of which they are not the victim, they cannot be considered for a T-Visa.

The certification must include a narrative explaining the nature of the assistance and how it is helpful to the investigation and prosecution. "Helpful" is defined in the form's instructions as "assisting law enforcement authorities in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim." The victim's duty to assist in the investigation and prosecution is an on-going one and continues for as long as needed. If the victim initially agrees to assist and later refuses, this requirement will not be met.

### **3. The Benefits Available to T-visa holders**

If all requirements are met and a T-visa granted, the victim is permitted to remain in the United States for up to four years. The time can be extended by one with a grant of immigration relief known as Continued Presence or "CP." Law enforcement officials must make the request on behalf of the victim who is also a potential witness.

The victim is eligible for numerous federal and State benefits and services to the same extent as refugees admitted to the United States. The holder of the T-visa will receive Certification and Eligibility letters from the DHS Office of Refugee Resettlement. These letters, which are intended for the safety, protection, and well-being of the victim, include housing assistance, food assistance; income assistance, employment assistance; English language training; health care; mental health services and foster care.

Specific services and assistance in the categories above include, among others, Temporary Assistance for Needy Families (TANF), Supplemental Nutrition Assistance Program (SNAP), Women, Infants and Children (WIC), and Supplemental Security Income (SSI).

In addition, a T-visa grants the person an Employment Authorization Document allowing them to work legally in the United States.<sup>103</sup> Furthermore, a T-visa allows for the possibility for the person to eventually become a resident by having their immigration status adjusted to "Lawful Permanent Resident," which, as the name implies, permits that person remain in the United States permanently.

### **4. U-visas for Victims of Other Serious Crimes**

The TVPA created U-visa status at the same time as T-visa status, extending the immigration deferral to victims of other serious crime who meet the appropriate criteria. To be eligible for U-visa status, the victim must be a victim of qualifying criminal activity from which the victim suffered "substantial physical or mental abuse." Additional criteria include the applicant possessing information about the crime and that the applicant was, is now, or is likely to be helpful in the investigation and prosecution of the crime.

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<sup>103</sup> A Form I-765 employment authorization document ("EAD" or "EAD card"), known popularly as a work permit, is a document issued by the USCIS that provides temporary employment authorization to noncitizens in the U.S.

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**The list of serious crimes is a long one, including the following:**

- *Abduction*
- *Abusive Sexual Contact*
- *Blackmail*
- *Domestic Violence*
- *Extortion*
- *False Imprisonment*
- *Female Genital Mutilation*
- *Felonious Assault*
- *Fraud in Foreign Labor Contracting*
- *Hostage*
- *Incest*
- *Involuntary Servitude*
- *Kidnapping*
- *Manslaughter*
- *Murder*
- *Obstruction of Justice*
- *Peonage*
- *Perjury*
- *Prostitution*
- *Rape*
- *Sexual Assault*
- *Sexual Exploitation*
- *Slave Trade*
- *Stalking*
- *Torture*
- *Trafficking*
- *Witness Tampering*
- *Unlawful Criminal Restraint*

***(Includes any similar state crimes if the elements of the crime are substantially similar)***

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Human trafficking and other related crimes (e.g., involuntary servitude) are included as qualifying crimes, even though the separate T-visa status exists. The process is nearly identical, including using the same I-918B in the application process.

There are several significant differences in eligibility and effect when comparing the T and U-visas. At the outset, the U-visa status is available only to those non-citizens who are otherwise admissible, unless they qualify for a waiver of inadmissibility.<sup>104</sup> There is no such requirement for T-visa status. Some common grounds for inadmissibility include, but are not limited to, being in the United States without proper documentation, entering the country without permission, lying to immigration officials, and falsely claiming to be a citizen for any benefit.

The U-visa also requires that the victim suffer substantial physical or mental abuse. Information documenting known or observed harm is entered on the same form used for T-visas (Part 3, Question 7) and can be supplemented with documentation like police reports. In general, physical or mental abuse means an injury or harm to the body, or harm to emotional or psychological well-being.<sup>105</sup> Whether an injury is substantial is, of course, fact dependent. Factors to consider include:

- ***The nature of the injury you suffered.***
- ***The severity of the abuser's conduct.***
- ***The severity of the harm you suffered.***
- ***The length of time that the harm was suffered.***
- ***The extent to which there is permanent or serious harm to appearance, health, or physical or mental health, including whether a pre-existing condition was made worse.***

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<sup>104</sup> INA §212(d)(14).

<sup>105</sup> 8 CFR § 214.14(a)(8).

No one factor is required to establish substantial harm. A series of acts of abuse — no one of which would be considered substantial abuse on its own — can be taken together and considered substantial physical or mental harm.<sup>106</sup>

The U-visa status grants some of the same benefits granted to those who hold T-visa status, including the ability to remain in the United States for four years. U-visa status can also be considered for CP for an additional year, or more if the original certifying agency confirms that the victim's presence is required to assist in the investigation or prosecution. U-visa holders may be granted work authorization and are eligible to adjust status to lawful permanent resident after three years.

The T and U-visa processes highlight several considerations for local law enforcement, prosecutors, and victim assistants. Chief among these is determining which of the two provides the most safety and stability for a victim under the circumstances of the case. With its specific application to trafficking victims and its broad sweep of eligibility for state and federal assistance, the T-visa would seem the better choice for the lion's share of trafficking cases.

The immigration law governing both visas is complex, if not byzantine. This highlights the need to work with experts, a local task force or MDT, and members of the immigrant advocacy community and/or immigration law bar. Effectively protecting the safety of victims and their families will at some point require that the victim apply for a T-visa. Since most local law enforcement agencies are unlikely expertise in the T-visa application process, partnering with an agency with specialized experience is highly favored.

Finally, it is advisable to develop a policy within local law enforcement agencies when deciding whether to file a certification in support of a T-visa. Such a policy guides agency staff on what evidence to collect and provide to the head of the agency who ultimately signs the certification (and is a means to judge accountability and performance.) A robust policy takes some of the subjectivity out of the exercise of discretion, increasing the probability that all cases will be considered uniformly.

## Section C: Victims' Rights in Louisiana

As Victims' Rights activism turned to the states, advocates worked on a two-pronged attack, amend state constitutions to elevate the rights of victims to the same degree as the rights of defendants, and enact specific legislation setting out the rights of victims and the concomitant duties and obligations of government actors.

In 1986, Rhode Island became the first state to pass a Victims' Rights constitutional amendment.<sup>107</sup> Other states followed suit, with Louisiana voters passing the Victims' Rights Amendment to the Louisiana Constitution in 1998.

This Amendment provides:

***A victim of crime shall have the right to reasonable notice and to be present and heard during all critical stages of preconviction and postconviction proceedings; the right to be informed upon the release from custody or the escape of the accused or the offender; the right to confer with the prosecution prior to final disposition of the case; the right to refuse to be interviewed by the accused or a representative of the accused; the right to review and comment on the presentence report prior to imposition of sentence; the right to seek restitution; and the right to a reasonably prompt conclusion of the case.***

After the passage of the amendment by voters, it became the duty of the Louisiana Legislature to enact enabling legislation. The Louisiana District Attorneys Association ("LDAA"), with input from victim groups, law enforcement, and other affected parties drafted enabling legislation. The Victims' Rights Law<sup>108</sup>("RCVWA") was enacted in 1999, and is codified in La. R.S. 46:1841 *et seq.*

<sup>106</sup> 8 CFR § 214.14(b)(1).

<sup>107</sup> Article 1, § 23, State of Rhode Island Constitution.

<sup>108</sup> This Chapter of La. Criminal Code is styled "*Rights of Crime Victims and Witnesses*."

The Legislature was clear in its reasons for enacting the Victims' Rights Law, expressly declaring its intent "to ensure that all victims and witnesses of crime are treated with dignity, respect, courtesy, and sensitivity, and that the rights extended in this Chapter to victims and witnesses of crime are honored and protected by the law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protection afforded the criminal defendants."<sup>109</sup> Importantly, this statement of intent tasks the criminal justice system to place the rights enumerated in the statute on a level with those given to criminal defendants.

As part of this legislation, La. R.S. 16:17 was enacted to create the Crime Victims Assistance Program. By statute, the purpose of this program is "to assist victims and their families through the entire criminal justice process and to facilitate the delivery of victims' services and rights as provided by law."<sup>110</sup> Each judicial District Attorney's office has at least one victim assistance coordinator by statute.

## **1. Eligible Victims**

Except in cases of sexual assault, a victim who wishes to take advantage of the rights granted by the statute must report the crime to law enforcement within 72 hours of its perpetration or its discovery, unless "extenuating circumstances" exist justifying the later report.<sup>111</sup> Sexual assault victims are granted the full panoply of rights regardless of whether the victim reports the crime to law enforcement or healthcare provider. In addition, the sexual assault victim's rights do not depend upon receiving a medical-forensic examination or the administration of a sexual assault collection kit.<sup>112</sup>

A victim must register with the appropriate law enforcement agency as a condition precedent to fully exercising the notification and other rights granted in the statute. The victim can register at any time during the process of the case.<sup>113</sup>

## **2. The Basic Rights for Victims**

### **a. Right to be Informed of Services Available to Crime Victims.**

The first enumerated statutory right is the foundational right to know what rights a victim now has, starting with what emergency services are available, what information victims and families are entitled to, and what is required to fully exercise the rights afforded by statute. The statute creates a seamless notification process across each stage of a criminal case. For example, the Louisiana Department of Public Safety and Corrections is directed to provide a way for victims to get post-conviction information on appeals, parole, and the like.<sup>114</sup>

### **b. Right to be Notified of Case Status**

A victim who properly "registers" to receive notice is entitled to notice of hearings, to be notified of any release of the defendant on bond or otherwise, whether the defendant has accepted or rejected

charges by the DA's office and notice of all court proceedings.<sup>115</sup> The victim has not only the right to be notified, but also to be present at all hearings. <sup>116</sup> Once charges are filed by the DA's office, it is the responsibility of the Clerk of Court to notify the victim of upcoming court dates. In practice, however, it is often the DA's Victim Assistance Coordinator ("VAC") who maintains contact with the victim, presents general updates on the case, and provides notices of all upcoming hearings.<sup>117</sup>

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<sup>109</sup> La. R.S. 46:1841.

<sup>110</sup> La. R.S. 16:17(A).

<sup>111</sup> La. R.S. 46:1843.

<sup>112</sup> La. R.S. 46:1845.

<sup>113</sup> La. R.S. 46:1844.

<sup>114</sup> La. R.S. 46:1844(A)(2).

<sup>115</sup> La. R.S. 46:1844(A).

<sup>116</sup> La. R.S. 46:1844(K).

<sup>117</sup> La. R.S. 46:1844(B).

### **c. Right to be Interviewed**

The District Attorney's office is required to make all reasonable efforts to interview the victim to determine the facts of the case and determine if the victim is requesting restitution. The prosecutor is also required to determine the victim's opinion on disposition of the case, including plea negotiations, victim impact statements, sentencing, probation and parole information, and the amount of restitution.<sup>118</sup>

### **d. Protecting Victim Safety**

All agencies are required to provide a safe, private place in which to conduct interviews of victims. "All agencies" includes the courts, which are mandated to provide a safe waiting place for the victim who is waiting to testify.<sup>119</sup>

### **e. Right to Support Person During Interviews**

A victim has the right to have someone with them during key parts of the investigation and prosecution. For example, a victim may choose to be represented by an attorney when conferring with law enforcement and prosecutors about the case.<sup>120</sup> During interviews, the victim has the right to have a VAC and a community-based advocate present during interviews to provide emotional support.<sup>121</sup>

It is important to note the subtle difference between these two provisions; the statute does not give a right to the victim's attorney to be present during interviews of the victim, but only to "confer" with police and prosecutors. If a victim's counsel is unaware of this provision, they may think that their representation extends to the police or prosecutor interview and need to be reminded or educated on this limit.

### **f. The Right to Make a Victim Impact Statement**

The ability to address the court through a victim impact statement is an important part of making the criminal justice system responsive to the needs of victims, and a necessary part of making victim's whole. For many, the simple fact that they are being heard and believed helps them heal. Victim impact statements may be made orally, or in writing. The impact statement is not limited to the named victim; friends and family members can inform the court of the impact of the offender's crime on their lives and relationship with the victim.

Keep in mind that the sentencing hearing can be a nerve-wracking and traumatic experience for the victim. Undoubtedly, a victim may need considerable emotional support to fully participate. Be prepared that for the victim, recalling a terrible event and its impact can trigger long-buried emotions and cause refreshed trauma of the crime. It may help a victim to write down their statement so they can access or refer to it when giving their statement. The written victim impact statement can be made part of the record so that it accurately reflects true significance and imprint of a crime.

A victim impact statement can make a profound difference even beyond the trial phase. For example, if the victim cannot be found at the time of a parole hearing, the record will contain the prior victim's impact statement, which the Louisiana Pardon & Parole Board can consider in making decisions on prisoner release applications.

<sup>118</sup> La. R.S. 46:1844 (B)(2) and (D)(2).

<sup>119</sup> La. R.S. 46:1844(G).

<sup>120</sup> La. R.S. 46:1844(D)(1).

<sup>121</sup> La. R.S. 46:1844(C)(2).

### 3. The Right of Restitution

The right of restitution for the losses caused by the crime is an important step toward making the victim whole. Unfortunately, for some victims, an order of restitution is a hollow victory. In 2018, only 27% of federal trafficking victims received restitution. That is because victims often lack the resources to hire an attorney to assist them in collecting restitution.<sup>122</sup>

If it is not already, restitution orders for victims should be made a routine part of a prosecutor's requests when a defendant is sentenced. The restitution order should include a specified amount since it may be difficult to establish the specific loss later down the line.

While the statute provides that a victim need not pay court costs for filing orders of restitution, there is often no guidance or assistance available to the victim in collecting the court-ordered restitution. A partnership between prosecutors and community-based advocacy or service organizations who assist victims can help. Community-based service providers can often guide victims through what for them is a mysterious process. Keep in mind when considering restitution that the human trafficking forfeiture provisions direct that restitution shall be paid out of the proceeds from forfeited assets.

### 4. Rights and Protections Specific to Trafficking Victims

The human trafficking statutes highlight the importance of victims' rights and the need to provide specialized services to victims of sex trafficking. La. R.S. 14:46.2(F)(3) provides:

***Any person determined to be a victim pursuant to the provisions of this Subsection shall be notified of any treatment or specialized services for sexually exploited persons to the extent that such services are available.***

The availability of such specialized services may be limited. The DA's office can and should have a leading role in building capacity and sustainability in this area, working within the Human Trafficking Task Force or MDT model. A community-based provider may already exist that can add or expand services for sexually exploited persons to meet the increased need that can come with increasing numbers of trafficking cases.

La. R.S. 14:46.3(E) provides:

***No victim of trafficking as provided by the provisions of this Section shall be prosecuted for unlawful acts committed as a direct result of being trafficked. Any child determined to be a victim pursuant to the provisions of this Subsection shall be eligible for specialized services for sexually exploited children.***

In enacting this subsection, the Legislature wanted to ensure that victims of child sex trafficking were recognized as sexually exploited children and eligible for existing and available specialized services. Of course, availability of services in every district is an issue, as is capacity and sustainability in those that have specialized service providers.

Rights specific to victims of human trafficking appear in two sections of the RCVWA. Both sections include crimes other than human trafficking, evidencing the Legislature's belief that some shared aspect or characteristic of the crime, perpetrator, or victim justifies the grant of additional protection.

In discussing these protections, the term "human trafficking" is meant to include not only human trafficking in violation of 14:46.2 and 14:26.3, but also related offenses listed in the statute, to wit:

- **14:81.1 Pornography involving Juveniles**

<sup>122</sup>Rae Rohm, *What is the TVPA?*, Dressember Foundation, March 13, 2021, accessed at <https://www.dressember.org/blog/what-is-the-trafficking-victims-protection-act?rq=what%20is%20the%20tpva>.

- **14:81.3 Computer-aided solicitation of a minor**
- **14:82 Prostitution**
- **14: 82.1 Prostitution; persons under 18**
- **14:82.2 Purchase of commercial sexual activity**
- **14:83 Soliciting for prostitutes**
- **14:83.1 Inciting prostitution**
- **4:83.2 Promoting prostitution**
- **14:83.3 Prostitution by massage**
- **14:83.4 Massage; sexual conduct prohibited**
- **14:84 Pandering**
- **14:85 Letting premises for prostitution**
- **14:86. Enticing persons into prostitution**
- **14:89.2. Crime against nature by solicitation**
- **14:104. Keeping a disorderly place**
- **14:105. Letting a disorderly place**
- **14:282. Operation of places of prostitution prohibited; penalty**

## **5. The Right of Confidentiality**

Found at La. R.S. 46:1844 (W) in the basic rights for victims and witnesses, certain crime victims are afforded a greater measure of confidentiality and safety by protecting their names from disclosure where possible. These protections are necessary and essential and are given to minor victims, victims of sex offenses, and victims of human trafficking-related offenses. This statute unapologetically serves those victims who are especially vulnerable to psychological and reputational harm should their names be disclosed.

The protections are broad, applying to “all public officials and officers and public agencies.” The statute goes on to provide a non-exclusive list of public agencies which are covered under the act, including law enforcement agencies, sheriffs, district attorneys, judicial officers, court clerks. Although not in the statute, employees of these agencies, like an assistant district attorney, is covered.<sup>123</sup>

Importantly, attorneys are specifically covered in a separate subsection. They are likewise prohibited from disclosing the same identifying information, except during trial. An attorney must use indefinite descriptors in all pleadings (e.g., replacing proper names with initials or abbreviations). If it is necessary to identify the victim in pleadings, the pleading must be filed with a request to keep them under seal.<sup>124</sup> Failure to comply with either provision is punishable by contempt of court.

<sup>123</sup> La. R.S. 46:1844(W)(1)(a).

<sup>124</sup> La. R.S. 46:1844(W)(1)(b).

## 6. Freedom from Unconsented Communication with Offender

This protection is set out in the RCVWA at La. R.S. 46:1846. Interestingly, it is written as a prohibition on defendants and their immediate family from communicating with the commercial sex trafficking victim, as well as victims of other crimes:

### ***Communication between offender and victim prohibited; exceptions***

***A person who has been charged by bill of information or indictment with any crime of violence as defined in R.S. 14:2 committed upon any person, any felony sex offense as defined in R.S. 46:1844(W) committed upon any person, any felony human trafficking- related offense as defined in R.S. 46:1844(W) committed upon any person, or any offense, that is a felony, committed upon a family member, household member, or dating partner, as those terms are defined by R.S. 46:2132, or any immediate family member of such person, shall be prohibited from communicating, either by electronic communication, in writing, or orally, with a victim of the offense, or any of his immediate family members for which the person has been charged or for which disposition of the case is pending.***

It is the hope of every victim and their family that their abuser never contacts them, and this statute embodies the concern that the risks and consequences are greater in the identified cases. Experience shows that the likelihood of contact is greater, and that the motive or intended result puts victims at substantial risk. The risks include that the hoped-for outcome of changing the victim's testimony or making them unavailable for trial will come to fruition. More concerning is the heightened risk that serious harm or death can be the result of communication with the victim.

This section does not apply when the victim consents to the communication, provided that the consent is communicated through the prosecutor, and the communication is made through the offender's attorney, the attorney's staff, or the defendant if represented *pro se* or *in propria persona*.<sup>125</sup> This dual layer of procedural protection may make communications prohibitively difficult. Few offenders will want to use counsel as their messenger, for fear that threatening communications would not be delivered or even disclosed to law enforcement.

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<sup>125</sup> La. R.S. 46:1846(B)(1) and (2).



# Conclusion

Investigating, prosecuting and preventing human trafficking is crucial and indispensable work. In each instance that a trafficker is brought to justice, a victim is spared further abuse. As noted throughout this handbook, human trafficking investigations and prosecutions present uncommon challenges such as dealing with overwhelmed victims who have experienced crushing trauma. By creating a collaborative trauma-informed, victim involved response, we take a significant stride towards securing justice for the survivor.

Human trafficking is a crime that is both subtle and blatant. In fact, the key to any successful trafficking prosecution is collaboration. Sharing information, resources and ideas is the best way to combat traffickers. Indeed, sharing this information helps find the essential evidence to fight this modern epidemic. By working together, we will ultimately support victims and successfully prosecute the traffickers. Prosecutors and law enforcement are urged to join or take the lead in forming a MDT to combat human trafficking. It is in establishing a MDT and holding regular meetings that evidence will be uncovered which would have otherwise remained obscured. Other stakeholders include: The Department of Child & Family Services investigators and case managers, Department of Child & Family Service regional human trafficking coordinators, labor department investigators, health care system workers, and school system truancy officers to name a few.

We urge you to educate the public on human trafficking as greater public awareness can lead to more reporting and more survivors released from bondage.

For more information on combatting human trafficking, please see the Resource List in this handbook or contact the LDAA at (225) 343-0171 or by mail at 2525 Quail Drive, Baton Rouge, LA. 70808.



# Human Trafficking Resources

## General Information on Human Trafficking on the Web

*U.S. Department of Justice, [www.justice.gov/humantrafficking](http://www.justice.gov/humantrafficking)*

*U.S. Department of Justice, Office for Victims of Crime. About Human Trafficking, [www.ovc.ojp.gov/program/human-trafficking/about-human-trafficking](http://www.ovc.ojp.gov/program/human-trafficking/about-human-trafficking).*

*National Conference of State Legislatures, Human Trafficking Overview,*

## National Victim Assistance Resources and Information

*National Human Trafficking Hotline, [humantraffickinghotline.org](http://humantraffickinghotline.org),  
1-888-373-7888. TTY: 711 \*Text:2333733*

## State Victim Assistance Resources and Information

The National Human Trafficking Referral Directory Lists the following agencies who deliver direct services to human trafficking victims. This List is not exhaustive.

### ***Baton Rouge***

#### ***Empower 225***

24/7 Emergency (404) 667-3413

Main Business (404) 667-3413

[empower225.org](http://empower225.org)

#### ***Trafficking Hope Inc.***

Baton Rouge, LA, 70810

Main Business: (225). 891-0000

[www.traffickinghope.org](http://www.traffickinghope.org)

### ***New Orleans Area***

#### ***Covenant House New Orleans***

Emergency: national hotline

Main Business (504) 584-1111

[www.covenanthousenola.org](http://www.covenanthousenola.org)

#### ***Eden House***

Primary Referral: (504) 407-0943

Main Business: (594) 407-0943

[edenhousenola.org](http://edenhousenola.org)

***Jewish Family Service of Greater New Orleans*** 

Metairie, LA, 70002

Primary Referral: National Hotline

Main Business: (504) 831-8475

[jfsneworleans.org/services/refugee-human-trafficking-assistance](http://jfsneworleans.org/services/refugee-human-trafficking-assistance)

***Louisiana Child and Youth Trafficking Collaborative - Region 1*** 

Gretna, LA

Primary Referral: (504) 638-7890

Main Business: (504) 638-7890

SMS: (504) 638-7890

[www.lacacs.org/lcytc](http://www.lacacs.org/lcytc)

***New Orleans Family Justice Center***

New Orleans, LA

Primary Referral: (504) 866-9554

24-hr hotline at Crescent House Shelter

Secondary Referral: (504) 503-0878

Hope Community Health Clinic Mon-Fri, 9 am-5 pm.

Main Business: (504) 592-4005

[nofjc.org](http://nofjc.org)