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## The Victims of Trafficking and Violence Protection Act of 2000: Will it Become the Thirteenth Amendment of the Twenty-First Century?

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COMMENT

THE VICTIMS OF TRAFFICKING AND  
VIOLENCE PROTECTION ACT OF 2000:  
WILL IT BECOME THE THIRTEENTH  
AMENDMENT OF THE TWENTY-FIRST  
CENTURY?

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## I. INTRODUCTION

Rosa came to the United States at the age of seventeen thinking that she would be employed to work with the elderly or to wait on tables.<sup>1</sup> To her surprise and horror, upon arrival in Florida, she was forced to work as a prostitute for the Cadena family.<sup>2</sup> Rosa was told she owed the family a \$2300 smuggling fee for bringing her to the United States, a fee which had never been mentioned before she left Mexico.<sup>3</sup> Rosa, once here, found her body sold to a different man every fifteen minutes, often for twelve hours per day.<sup>4</sup> Another woman, also held captive by the Cadena family, testified she was locked in a dark closet for fifteen days upon complaining about the number of customers she was being forced to have sex with.<sup>5</sup> These women were not allowed to go outside without a guard and were constantly threatened that if they left, their families, back in their respective homeland, would suffer the consequences of their escape. After this ring was uncovered, the women were jailed alongside a group of low-level Cadena employees.<sup>6</sup> Since the women had no legal status and were witnesses, they could rightfully be detained.<sup>7</sup> The women were eventually released after spending one to five months in jail and to this day they are

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1. Amy Driscoll, *A Case of Modern-Day Slavery*, MIAMI HERALD, July 11, 1999, at 1L.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 2L.

6. *Id.*

7. *Id.*

still afraid to reveal their real names for fear of retribution.<sup>8</sup> As for the traffickers, the ringleader, Rogerio Cadena, received a fifteen-year prison sentence and was ordered to pay one million dollars in restitution to the victims.<sup>9</sup> As for the other traffickers, the sentences ranged from two and a half to six and a half years.<sup>10</sup> The relatively minor ramifications that a trafficker faces provide little deterrence against engaging in such horrific crimes.

The sentences would be appropriate if one victim was trafficked in this manner, but this is not the case. Seventeen victims testified at the trial.<sup>11</sup> All had similar experiences as to that of Rosa.<sup>12</sup> The United States District Court Judge, Kenneth Ryskamp, who presided over this case, called it "one of the most base, vile, most despicable, more reprehensible crimes that I think I have ever encountered. . .utterly disgusting."<sup>13</sup> Yet the ringleader only received a fifteen year sentence. This sentence seems unfair considering the gruesome nature of this crime. Compare this with the sentence for aggravated sexual abuse where a conviction can mean life in prison.<sup>14</sup> However prior to the passing of the Victims of Trafficking and Violence Protection Act of 2000,<sup>15</sup> ("Trafficking Act") the maximum sentence one could receive was ten years for a single violation of 18 U.S.C. §§ 1581, 1583, or 1584.<sup>16</sup>

The story of Rosa and the one other unnamed Cadena victim is not an isolated event. According to Congress, approximately

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8. *Id.*

9. United States v. Cadena, Superseding Indictment, Case No. 98-14015-CR-RYSKAMP, US District Court, Southern District of Florida, April 23, 1998 (10 year sentence for conspiracy to violate civil rights in violation of 18 U.S.C. 241; 5 years for use of a firearm in commission of a felony).

10. See Amy O'Neill Richard, *International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime*, Center for the Study of Intelligence 39, available at <http://www.cia.gov/csi/monograph/women/trafficking.pdf> (November 1999). See also, Driscoll, *supra* note 1 at 2L. (Several of the other ringleaders are still at large today living in Mexico).

11. Driscoll, *supra* note 1, at 2L.

12. See *id.*

13. *Id.*

14. 18 U.S.C.A. § 2241 (2000).

15. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102(b)(1), 114 Stat. 1464 (2000) (codified and amended in scattered sections of 8, 18, 22 U.S.C.).

16. 18 U.S.C. §§ 1581, 1583, or 1584 (1999).

fifty thousand women and children are trafficked into the United States every year.<sup>17</sup> Moreover, each year an estimated seven hundred thousand to two million women and children are trafficked within or across international borders.<sup>18</sup> This problem does not only involve trafficking into the sex trade, but also involves trafficking into domestic servitude, bonded sweatshop labor, or other debt bondage.<sup>19</sup> The victims, like Rosa, typically arrive in their destination country under false pretenses and are promised a better life.<sup>20</sup> Once they arrive, their documents are taken away and they are informed of a smuggling debt that they must repay.<sup>21</sup> These victims are afraid to approach law enforcement authorities for fear of deportation and also for fear of retribution against themselves or their families.<sup>22</sup>

On October 28, 2000, President Clinton signed into law the Trafficking Act.<sup>23</sup> According to Congress, the purpose of the Trafficking Act is to "combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims."<sup>24</sup> This will be the only comprehensive law that exists on trafficking of human beings. Prior to passage of the Trafficking Act, the laws of the United States denied trafficking victims any effective remedies and, more often than not, the victims faced harsher punishments than the actual traffickers.<sup>25</sup> One reason for this disparity is that typically under pre-existing laws prosecutors would enter into plea agreements with the traffickers so as to

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17. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102(b)(1), 114 Stat. 1464, 1465 (2000).

18. Office of the Press Secretary, The White House, *Fact Sheet: Migrant Smuggling and Trafficking in Persons*, at <http://www.usinfo.state.gov/topical/global/traffic/00121501.htm> (Dec. 15, 2000).

19. *The Sex Trade: Trafficking of Women and Children in Europe and the United States: Hearing Before the Comm. on Security and Cooperation in Europe*, 106<sup>th</sup> Cong., (1999) (statement of Anita Botti, Deputy Director for International Women's Initiatives, President's Interagency Council on Women) [hereinafter statement of Anita Botti].

20. *The Sex Trade: Trafficking of Women and Children in Europe and the United States: Hearing before the Commission on Security and Cooperation in Europe*, 106<sup>th</sup> Cong., (1999) (opening statement of Hon. Christopher H. Smith, Chairman) [hereinafter statement of Chairman].

21. *Id.*

22. *Id.*

23. Victims of Trafficking and Violence Protection Act of 2000, *supra* note 15.

24. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102(a), 22 U.S.C. § 7107(a) (2000).

25. Statement of Chairman, *supra* note 20.

avoid the victim's need to testify at trial and relive the terror of the experience.<sup>26</sup> This in turn led to lesser sentences. The victims, on the other hand, were deported unless they could qualify for a visa.<sup>27</sup> While awaiting deportation, these victims were not housed in facilities that were appropriate for their status as crime victims, rather, they were often detained in prisons and or jails.<sup>28</sup>

Although on the surface the United States takes a harsh stance towards human rights violators, the most egregious human rights violations exist, sometimes undetected, within its own borders. These crimes, though they are fairly widespread in the United States, are not prosecuted often, due in part to the lack of tools available to prosecutors.<sup>29</sup>

Even though trafficking human beings is a transnational crime, this comment will focus, where possible, on the problem of trafficking as it occurs in the Americas. It will first identify the problem, then discuss the laws that have been used to prosecute these crimes in the past, and why they have for the most part, been unsuccessful. The next section will discuss whether the Trafficking Act will be an effective tool for prosecutors in fighting this modern day form of slavery. Finally the comment will discuss how the United States immigration laws have been amended by the Trafficking Act.

## II. THE PROBLEM

Over the past decade, the world has seen a drastic rise in the number of people trafficked into various forms of involuntary servitude, due partially to economic troubles and wars in Eastern Europe.<sup>30</sup> This form of trafficking is also the fastest growing

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26. Richard, *supra* note 10 at 34.

27. *See id.* at 39-41.

28. *Id.*

29. *International Trafficking in Women and Children: Prosecution, Testimonies, and Prevention: Hearings on International Trafficking of Women and Children before the Subcomm. on Near Eastern and South Asian Affairs, of the Comm. on Foreign Relations, U.S. Senate., 106<sup>th</sup> Cong., (2000) (Statement of William R. Yeomans, Chief of Staff, Civil Rights Division United States Department of Justice), available at <http://www.usinfo.state.gov/topical/global/traffic/00040501.htm>, [hereinafter statement of William R. Yeomans].*

30. *See* Miko, Francis T., Specialist in International Relations, Foreign Affairs, Defense and Trade Division, Trafficking in Women and Children: The U.S. and International Response. Congressional Research Service Report 98-649C, available at

source of profits for organized crime enterprises worldwide.<sup>31</sup> According to some estimates, it is calculated that traffickers move as many as 4 million illegal migrants worldwide every year, earning up to seven billion dollars.<sup>32</sup>

The international community, along with the United States, concurs that this problem is one that needs to be eradicated, but measures taken up until this point have proved inadequate.<sup>33</sup> Under United States laws, trafficking crimes traditionally have been prosecuted under the statutes passed to enforce the Thirteenth Amendment.<sup>34</sup> In general, these statutes make it illegal to hold another in a condition of peonage<sup>35</sup>, to entice another into involuntary servitude<sup>36</sup>, or to sell another into involuntary servitude.<sup>37</sup>

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<http://www.usis.it/policy/topics/trafficking/crs000510.htm> (May 10, 2000).

31. International Organization of Migration, *Migrant Trafficking in Central and North America*, at [http://www.iom.int/migrationweb/reg\\_approaches/puebla/seminar.html](http://www.iom.int/migrationweb/reg_approaches/puebla/seminar.html) (last visited March 24, 2001).

32. *Id.* This number is estimated because as with many underground criminal enterprises it is difficult to ascertain the exact numbers.

33. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102(b)(23), 22 U.S.C. § 7107(b)(23)(2000).

34. Other laws which could be used to prosecute these offense are: The Fair Labor Standards Act 29 U.S.C. §§201-19 (2000), The Mann Act 18 U.S.C. §§ 2421-24 (2000), Racketeer Influenced and Corrupt Organizations Act 18 U.S.C. §§1961-1968(2000); and conspiring to deprive one of their civil rights 18 U.S.C. § 241 (2000).

35. 18 U.S.C. § 1581(a)(2000). The statute provides in relevant part that: whoever holds or returns any person to a condition of peonage . . . shall be fined . . . 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.

*Id.*

36. 18 U.S.C. § 1583 (2000). The statute provides that: whoever kidnaps or carries away any other person, with the intent that such other person be sold into involuntary servitude, or held as a slave; or whoever entices, persuades, or induces any other person to go on board any vessel or to any other place with the intent that he may be held as a slave, or sent out of the country to be so made or held— Shall be fined . . . 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.

*Id.*

37. 18 U.S.C. § 1584 (2000). The statute provides that:

### A. *The Debate Over How To Define Trafficking*

Different organizations<sup>38</sup> define trafficking depending on the organization's goals.<sup>39</sup> The United States government defines trafficking as:

"[a] scheme involving a continuum of actors and actions. It includes recruitment, abduction, transport, harboring, transfer, sale or receipt of persons through various types of coercion, force, fraud or deception for the purpose of placing persons in situations of slavery or slavery-like conditions, servitude, forced labor or services. Examples include, but are not limited to, sexual servitude, coerced prostitution, domestic servitude, bonded sweatshop labor or other debt bondage."<sup>40</sup>

Women's rights advocates define trafficking much differently.<sup>41</sup> When defining commercial sex acts such as prostitution, consent is irrelevant.<sup>42</sup> The commercial sex industry breaks down the definition of trafficking into a debate between whether these victims are forced or coerced versus initial consent, which could act as a defense against prosecution. In the government's view, prostitution is only considered trafficking when it is coerced, whereas the women's groups consider consent to be irrelevant because their position is that there can be no

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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.

*Id.*

38. See Miko, *supra* note 30.

39. Richard, *supra* note 10, at 31. This definitional difference exists even within various branches of the government.

40. United States Government, *About Trafficking in Women and Children*, at <http://www.secretary.state.gov/www/picw/trafficking/def.htm> (last visited March 27, 2001). This definition has changed since the enactment of the Trafficking Act. See also Miko, *supra* note 30.

41. See *Hearings on Trafficking, Sub-Committee on International Operations and Human Rights*. United States Congress, 106<sup>th</sup> Cong., (1999) (Statement of Dr. Janice G. Raymond, Co-Executive Director, Coalition Against Trafficking in Women), available at <http://www.uri.edu/artsci/wms/hughes/catw/contest.htm>.

42. *Id.*



consent to prostitution.<sup>43</sup>

While the debate over how to define trafficking is relevant, it is not controlling when it comes to prosecuting these crimes. Because the United States does not have a specific criminal law that prohibits trafficking in persons, the country has turned to the laws enacted to carry out the Thirteenth Amendment. So the definition that counts for the purpose of prosecuting these offenses is the one for involuntary servitude. If the definition of involuntary servitude is based primarily on force or slavery-like conditions, it would be insufficient to protect all women who are trafficked since traffickers now use more subtle ways to traffic women that do not always involve the traditional notions of force.<sup>44</sup> For example<sup>45</sup>, in a recent case a woman was hired as a domestic helper, once she arrived, the traffickers took her passport and forced her to work sixteen-hour days, seven days a week. When she would complain her captors threatened to have her deported. They also told her that if she ever left the house unescorted they would call the police and she would be put into jail.

As horrible as this example sounds, prior to the passage of the Trafficking Act, these traffickers would not be prosecuted.<sup>46</sup> This is because according to the United States Supreme Court, psychological and economic coercion were not enough to constitute involuntary servitude.<sup>47</sup> While these traffickers could have been convicted under the Fair Labor Standards Act, the penalties for a violation of this act would only carry 6 months in prison for a second violation.<sup>48</sup> This is why prosecutors were often unwilling to prosecute labor cases that did not rise to the level of involuntary servitude.<sup>49</sup> In sum, involuntary servitude should extend to cover psychological and economic coercion because without this extension these types of crimes will go unprosecuted.

The definition for involuntary servitude has been amended

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43. *Id.*

44. Statement of William R. Yeomans, *supra* note 29, at 80.

45. *Id.*

46. *Id.*

47. See *United States v. Kozminski*, 487 U.S. 931, 952 (1988).

48. 18 U.S.C.A. § 216 (2000).

49. Richard, *supra* note 10, at 34.

by the Trafficking Act.<sup>50</sup> This definition should not present too many problems, depending upon how broadly case law interprets it. It should be broad enough to cover all forms of trafficking, including the examples set forth above. Furthermore, consent of the victim should not be a factor, especially since Congress has added multiple sections dealing specifically with the more subtle ways of trafficking.<sup>51</sup> Although it is not perfect, all groups should be pleased with the criminal law aspects of the Trafficking Act, because it imposes certain sentences on those who engage in the different forms of modern-day trafficking. This topic will be discussed in greater detail later in this comment.

### *B. Why Trafficking Takes Place*

Traffickers often target women and girls who are disproportionately affected by poverty, lack of education, chronic unemployment, discrimination, and lack of economic opportunities in their countries of origin.<sup>52</sup> This, combined with the low status of women in a given society and the growth of organized crime, all have lead to the expansion of the trafficking networks throughout the world.<sup>53</sup> Trafficking in human beings has seen a rise in numbers due to the break up of countries in the European community.<sup>54</sup>

### *C. What Role Do Latin America and the Caribbean Play in Trafficking?*

As mentioned earlier, fifty thousand women and children are trafficked into the United States annually. These women and children primarily come from Latin America, the former Soviet

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50. Victims of Trafficking and Violence Protection Act of 2000, § 103(5), 22 U.S.C. § 7102(5)(2000). The Act states that involuntary servitude:

includes a condition of servitude induced by means of- (a) any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such a condition, that person or another person would suffer serious harm or physical restraint; or (b) the abuse or threatened abuse of the legal process.

*Id.*

51. See 18 U.S.C.S § 1589 (2000).

52. See Victims of Trafficking and Violence Protection Act of 2000, § 102(4), 22 U.S.C. § 7101(4)(2000).

53. *Id.*

54. See Miko, *supra* note 30.

Union, and South East Asia.<sup>55</sup> It is estimated that over one hundred thousand women and children per year are trafficked from Latin American and Caribbean countries.<sup>56</sup> Not only do Latin America and the Caribbean play an important role in the numbers of those trafficked directly to the United States, but the region also serves as a major gateway for those trafficked into this country that originate elsewhere.<sup>57</sup>

As an example, the Dominican Republic has the fourth highest number of women in the world working overseas in the sex trade.<sup>58</sup> The current number is estimated at fifty thousand women overseas.<sup>59</sup> Women interviewed by the International Organization for Migration, stated that the main cause for the high number was the poor economic situation and the lack of job opportunities.<sup>60</sup> Similarly, Mexico has been listed by the United Nations as the number one center for the supply of young children to North America.<sup>61</sup> Also Brazil is listed as having one of the worst child prostitution problems in the world.<sup>62</sup> Finally, according to the Organization of American States, more than two million children are being sexually exploited in Latin America.<sup>63</sup>

### III. LAWS USED TO PROSECUTE TRAFFICKERS PRIOR TO THE PASSAGE OF THE TRAFFICKING ACT

Before the Trafficking Act, the laws in the United States prohibiting the trafficking of human beings were unsuccessful because of fear among the victims, law enforcement disbelief, and low punishments for violators.<sup>64</sup>

One reason for the low success rate is that the victims are

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55. Statement of Anita Botti, *supra* note 19.

56. Miko, *supra* note 30.

57. See Migrant Trafficking in Central and North America, *supra* note 31.

58. International Organization for Migration, Migration Information Programme, *Trafficking in Women from the Dominican Republic for Sexual Exploitation*, at [http://www.iom.int/iom/publications/books\\_studies\\_surveys/MIP\\_Dominica\\_traff\\_eng.htm](http://www.iom.int/iom/publications/books_studies_surveys/MIP_Dominica_traff_eng.htm). Note that Thailand, Brazil, and the Philippines are ahead of the Dominican Republic.

59. *Id.*

60. *Id.* However, it seems as if most of the women that migrate from the Dominican Republic do so on their own accord, yet, many still have a negative experience overseas.

61. Coalition against Trafficking in Women, *Fact Book on Global Sexual Exploitation, Mexico*, at <http://www.uri.edu/artsci/wms/hughes/catw/mexico.htm> (last visited March 24, 2001).

62. Miko, *supra* note 30.

63. Miko, *supra* note 30.

64. See Richard, *supra* note 10, at 31-38; see also, Miko, *supra* note 31.

often hesitant about coming forward due to fear of retribution and deportation.<sup>65</sup> These same victims also fear the humiliation and anxiety that a trial could bring.<sup>66</sup>

Another reason for lack of enforcement is not the laws themselves, but is the stereotypical assumption of law enforcement personnel<sup>67</sup> that the "victims" willingly participated in the crime. This leads to a refusal to recognize that a problem really does exist. One INS agent stated that "there are no innocent victims, they are all willing participants."<sup>68</sup> While there is no direct evidence that this is a widespread belief shared by all law enforcement personnel, there is definitely a lack of understanding and communication.<sup>69</sup>

By mislabeling instances of trafficking as "worker exploitation cases,"<sup>70</sup> The Department of Justice reinforces the lack of understanding of how appalling the conditions these women face are. In addition, mislabeling the crime fails to account for the fact that many of the victims are faced with slavery-type conditions. The Department's characterization of the crimes as wage and hour violations does not contemplate the seriousness of the violations.<sup>71</sup>

Perhaps the biggest reason for non-enforcement is that the United States, prior to the Trafficking Act, did have laws to prosecute these crimes, but for various reasons, prosecutors chose not to use these laws.<sup>72</sup> The reason may be that these laws provided little or no deterrent effect<sup>73</sup> because the penalties were minimal.<sup>74</sup>

An example comes from a 1995 case where Thai women were transported from Thailand to New York.<sup>75</sup> The traffickers told

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65. See Richard, *supra* note 10 at 32.

66. *Id.*

67. For the purpose of this comment Law Enforcement personnel includes the INS, the FBI, and State and Local Law Enforcement Agencies.

68. *Id.* at 31.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 33.

73. See Statement of William R. Yeomans, *supra* note 29, at 78.

74. *Id.*

75. See *United States v. Kedjumnong*, 1996 U.S. App. LEXIS 13581 (2d Cir. June 7, 1996); See also *United States v. Wattanasiri*, 1998 U.S. App. LEXIS 4432 (2d Cir. March 9, 1998).

the women that upon their arrival in the United States, they would have jobs as waitresses.<sup>76</sup> Once here, however, they were forced into prostitution and were held in an underground brothel with bars on the windows.<sup>77</sup> The women were informed that they could not leave until they paid off their thirty-five thousand dollar smuggling debt.<sup>78</sup> To pay off this debt they were forced to sleep with several hundred men.<sup>79</sup> Once apprehended the traffickers were given sentences which ranged between four and nine years.<sup>80</sup> Prior to the Trafficking Act, the maximum penalty a trafficker could receive was ten years, which was the maximum penalty allowed for violation of 18 U.S.C. §§ 1581(a), 1583, or 1584.<sup>81</sup> When compared with drug trafficking laws,<sup>82</sup> this sentence pales in comparison. Therefore, it was considered impractical for prosecutors to pursue traffickers because of the work required to investigate and prosecute the crimes compared to the sentences received.<sup>83</sup> According to the prosecutors, the "sentences do not appear to account for all of the human rights and civil violations inflicted upon the victim."<sup>84</sup> These prosecutors would like to see longer sentences for their effort. The passage of a uniform trafficking act creates less work for the prosecutors, because they can now rely on one body of law, instead of having to combine various other laws.<sup>85</sup>

Due to the aforementioned reasons, prosecutors were calling for a comprehensive United States law which would attack and solve these three troubling areas.<sup>86</sup>

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76. Richard, *supra* note 10, at 49.

77. *Id.*

78. *Id.*

79. *Kedjumnong* at \*2.

80. See Richard, *supra* note 10, at 49.

81. 18 U.S.C. §§ 1581, 1583, 1584 (1999).

82. The statutory maximum penalty for dealing ten grams of LSD or distributing one kilo of heroin is life in prison. 21 U.S.C.A. § 841(b)(1) (2000).

83. See Richard, *supra* note 10, at 34. Prosecutors have in the past been forced to use a wide array of offenses to prosecute these crimes, which in turn has made their job much more difficult.

84. See Richard, *supra* note 10 at 34.

85. See *id.* at 34-35.

86. See Statement of William R. Yeomans, *supra* note 29; see also, Richard *supra* note 10, at 35.

IV. HOW THE TRAFFICKING ACT AFFECTS CRIMINAL LAW<sup>87</sup>

Prior to passage of the Trafficking Act, law enforcement personnel shared the opinion that "[s]trengthened enforcement and prosecution against traffickers is crucial as trafficking is growing, in part, because it remains a high-profit, relatively low-risk criminal enterprise."<sup>88</sup>

Title 18 U.S.C. §§1581-1584 were passed pursuant to section two of the Thirteenth Amendment.<sup>89</sup> These statutes prohibit involuntary servitude of all forms, and not just those involving slavery as it was known prior to the enactment of the Thirteenth Amendment.<sup>90</sup> In the past, these laws have been used to convict defendants of a wide array of criminal activities.<sup>91</sup>

For a conviction under 18 U.S.C. § 1581,<sup>92</sup> the prosecution must prove the conduct exhibited by the defendant amounted to peonage, defined as "a status or condition of compulsory service, based upon the indebtedness of the peon to the master."<sup>93</sup> Once established that the conduct amounted to peonage, the prosecution must then show that the victim was held in that condition of peonage against their will in order to perform personal services in discharge of debt.<sup>94</sup> To show that victims were held in peonage, the prosecution must prove that the person was held against his or her will for the purpose of making that

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87. See *Kozminski*, 487 U.S. at 942-53. The discussion in this note is limited, so it will not discuss any conspiracy charges that can be brought under 18 U.S.C.A. § 241, such as conspiracy to interfere with an individual's Thirteenth Amendment right to be free from involuntary servitude.

88. Statement of William R. Yeomans, *supra* note 29, at 79.

89. The second section of the Thirteen Amendment provides that "Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XIII, § 2.

90. "The [Thirteenth] Amendment and [its] legislation were intended to eradicate not merely the formal system of slavery that existed in the southern states prior to the Civil War, but all forms of compulsory, involuntary service." *United States v. Booker*, 655 F.2d 562, 564 (4<sup>th</sup> Cir. 1981); see also *Pollock v. Williams*, 322 U.S. 4 (1944); *Bailey v. Alabama*, 219 U.S. 219 (1911).

91. See *United States v. Booker*, 655 F.2d 562, 563 (4<sup>th</sup> Cir. 1981). Defendants promised their victims free transportation and steady stream of work. Once in North Carolina the victims discovered that work was intermittent and they had to pay for the transportation. They were also forbidden to leave (by beatings) until they had paid their debt to their captors. Defendants were held to have violated 18 U.S.C. §1583 by running this migrant camp since they had the intent to hold their victims as slaves.

92. 18 U.S.C. 1581(a) (2000).

93. See *Clyatt v. United States*, 197 U.S. 207 (1905).

94. *Hodges v. United States*, 203 U.S. 1 (1906).

person render personal services in order to liquidate a debt owed.<sup>95</sup> This section has been used to prosecute some slave labor cases. For example, in *United States v. Mussry*,<sup>96</sup> Section 1581 was used to prosecute defendants that held, against their will, Indonesian servants who spoke very little English. The defendants enticed the servants to travel to the United States, paid them little money for their services, and withheld their passports and return airline tickets. The defendants then required them to work off, as servants, the debts resulting from the costs of their transportation.<sup>97</sup> According to the Ninth Circuit in *Mussry*, because peonage was defined as involuntary servitude for the purpose of liquidating a debt, the government must show a holding in involuntary servitude in order to charge the defendants with a violation of § 1581.<sup>98</sup>

In order to prove a violation of 18 U.S.C. § 1583,<sup>99</sup> the prosecution must show that the trafficker kidnapped or carried away another person with intent to sell that person into involuntary servitude, or to hold them as a slave. Prior to the Trafficking Act, Section 1583 carried a sentence of only ten years. In order to get longer prison sentences, prosecutors could use the 18 U.S.C. § 1201, generally known as the federal kidnapping statute.<sup>100</sup> Federal kidnapping is punishable by imprisonment for any term of years or for life and, if the death of any person results, the defendant is punished by death or life imprisonment. For example, in an involuntary servitude case prosecuted in California,<sup>101</sup> the defendants were charged with violations of 18 U.S.C. § 371, 18 U.S.C. § 1584, and 18 U.S.C. § 1201.<sup>102</sup> Possibly the reason these defendants were charged with Section 1201 instead of Section 1583 was so the prosecution could obtain

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95. See *Bernal v. United States*, 241 F. 339, 342 (5<sup>th</sup> Cir. 1917); *Pierce v. United States*, 146 F.2d 84, 86 (5<sup>th</sup> Cir. 1944).

96. *U.S. v. Mussry*, 726 F.2d 1448 (9<sup>th</sup> Cir. 1984).

97. *Id.* at 1450.

98. *Id.* at 1455-56.

99. 18 U.S.C. § 1583 (2000).

100. *Hattaway v. United States*, 399 F.2d 431 (5<sup>th</sup> Cir. 1968). Elements to be established in prosecution under 18 U.S.C. § 1201 are: (1) transportation in interstate commerce (2) of unconsenting person who is (3) held for ransom or reward, or otherwise and (4) doing such acts knowingly and willfully. See 18 U.S.C. § 1201.

101. *United States v. Manasurangkun*, First Superseding Indictment, Case No. 95-714(A)-ABC, at [www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title8/cvr00150.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title8/cvr00150.htm).

102. *Id.* The defendants were also charged with numerous other offenses, however only the ones which apply to this comment are listed herein.

longer sentences if the defendants were convicted.

To convict a defendant for violating 18 U.S.C. § 1584<sup>103</sup> the prosecution would have to prove (a) that the defendant held the victim in involuntary servitude; (b) that such holding was for a period of time; (c) that the defendant used force; and (d) that the defendant acted knowingly and willfully.<sup>104</sup> How much and what kind of force is necessary? More specifically, what is meant by the term involuntary servitude and what methods or means of coercion are sufficient in deciding whether the holding is involuntary? These questions were ultimately decided by the United States Supreme Court in *United States v. Kozminski*,<sup>105</sup> where the court held that involuntary servitude involves compulsion of services by the use of or the threatened use of physical or legal coercion.<sup>106</sup> A Department of Justice official testified before a Senate subcommittee that this definition hinders prosecutorial efforts in trafficking cases and that as a result, they are unable to reach those traffickers that use "more subtle, but no less heinous forms of coercion that wrongfully keep the victim from leaving his or her labor or services."<sup>107</sup>

The development of these laws has expanded greatly over the past few decades due to the influx of migrant farm labor. Because many of these cases do not rise to the level of peonage but do rise to the level of involuntary servitude, courts have struggled over the years to define involuntary servitude in a way as to cover these new forms of slavery. This struggle eventually lead to a split among the circuits as to the meaning of involuntary servitude.<sup>108</sup>

As was seen with migrant labor cases, the law again is being expanded due to the increase in trafficking of human beings, this

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103. 18 U.S.C. § 1584 (2000).

104. *United States v. Kozminski*, 487 U.S. 931, 952 (1988). *See also*, Department of Justice, Civil Rights Resource Manual 55, *available at* [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title8/cvr00055.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title8/cvr00055.htm) (February 1998).

105. 487 U.S. 931 (1988).

106. *Id.* at 948.

107. Statement of William R. Yeomans, *supra* note 29, at 80.

108. The Second Circuit had restricted the definition of Involuntary Servitude to include only physical threats. *See United States v. Shackney*, 333 F.2d 475 (2d Cir. 1964); *see also*, *United States v. Harris*, 701 F.2d 1095 (4<sup>th</sup> Cir. 1983). Whereas the Ninth Circuit in *United States v. Mussry*, 726 F.2d 1448 (9<sup>th</sup> Cir. 1984), concluded that involuntary servitude can occur when psychological coercion was used. *See also*, *United States v. Warren*, 772 F.2d 827 (11<sup>th</sup> Cir. 1985).



time the expansion is from Congress. The laws implementing the Thirteenth Amendment have proved themselves inadequate to deal with the ever-increasing problem of trafficking of human beings.<sup>109</sup> So once again the definition of involuntary servitude needed to expand to cover this modern-day form of slavery.<sup>110</sup> The goal of the Trafficking Act is the elimination of trafficking. To accomplish this goal Congress was forced to amend the definition of involuntary servitude and coercion as it was defined by *Kozminski*.<sup>111</sup>

*A. Does this Act Solve the Problem Created by the Court in Kozminski?*<sup>112</sup>

In *Kozminski*, the Court reasoned that its holding was the understood meaning of a phrase in the Thirteenth Amendment and that a broader definition would prohibit a broad range of day-to-day activities.<sup>113</sup> The Court determined that because Congress used the same phrase in the statute enacted to enforce the Amendment as they had in the Amendment itself, that led to the conclusion that Congress intended the phrase to have the same meaning in both places.<sup>114</sup> The Court goes on to say that in the "absence of any *contrary* indications, we therefore give effect to congressional intent by construing 'involuntary servitude' in a way consistent with the understanding of the Thirteenth Amendment that prevailed at the time of § 1584's enactment."<sup>115</sup>

It was the intention of Congress in passing the Trafficking Act to change the definition of involuntary servitude as it applies to Section 1583 and Section 1584, and as it was set out by *Kozminski*.<sup>116</sup> Congress, in passing this act, seems to have

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109. See Statement of William R. Yeomans, *supra* note 29. Not only have the punishments received been inadequate, it seems that the definition of involuntary servitude provided by the Court in *Kozminski* has hindered prosecutors.

110. *Id.*

111. See *Kominski*, 487 U.S. at 952.

112. *Id.*

113. *Id.* at 949.

114. *Id.* at 945.

115. *Id.* at 945 (internal citations omitted) (emphasis added).

116. *Id.*

answered the challenge issued to it by the *Kozminski* Court,<sup>117</sup> and in so doing it seems as if *Kozminski* is no longer good law.

Support for this intent to amend the definition is found in the Trafficking Act itself. One of the findings made by Congress states that involuntary servitude statutes are intended to reach cases in which persons are held in a condition of servitude through nonviolent coercion.<sup>118</sup> Congress also states that, in *Kozminski*, the Supreme Court found that 18 U.S.C. § 1584 should be narrowly interpreted absent a definition of involuntary servitude by Congress.<sup>119</sup> In the definition section of the Trafficking Act Congress defines involuntary servitude.<sup>120</sup> This indicates congressional intent to amend the definition as set forth by the Court in *Kozminski*.

Enactment of this legislation has provided prosecutors with a wide array of tools to prosecute these crimes. Not only do prosecutors now have the expanded definition of involuntary servitude, they also now have additional laws with which to specifically prosecute these crimes.

Congress also amended the existing laws, 18 U.S.C. §§1581-1583,<sup>121</sup> to increase the penalty for a violation of any of these sections from ten years to twenty years. Also added at the end of each section is a sentence which provides:

"that if death results from the violation of this section, or if the violation includes kidnapping, or an attempt to kidnap, aggravated sexual abuse or an 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 both."<sup>122</sup>

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117. *Id.* at 952. "Absent change by Congress, we hold 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." *Kozminski*, U.S. 487 at 952. (emphasis added)

118. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102(b)(13), 22 U.S.C.A. § 7101(b)(13) (2000).

119. *Id.*

120. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 103(5), 22 U.S.C.A. § 7102(5) (2000). Involuntary servitude includes a condition of servitude induced by means of (a) any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or (b) the abuse threatened abuse of the legal system. *Id.*

121. 18 U.S.C. § 1581 (2000); 18 U.S.C. § 1583 (2000).

122. This sentence is found at the end of 18 U.S.C. §§ 1581, 1583, 1584, 1589, 1590

*B. New Sections Added to Title 18 of the U.S. Code by  
the Trafficking Act*

In the Trafficking Act Congress added multiple sections to Chapter 77, Title 18 of the U.S. Code. 18 U.S.C. §§ 1589, 1590, 1591, 1592, 1593 and 1594 were all added by this Act.

Title 18 U.S.C. § 1589<sup>123</sup> was specifically added to address issues raised by the Supreme Court in *Kozminski*.<sup>124</sup> It prohibits the increasingly subtle methods used by traffickers. These subtle methods include instances where traffickers threaten harm to third persons, restrain their victims without physical violence or injury, or threaten dire consequences by means other than overt violence.<sup>125</sup> Section 1589 will provide federal prosecutors with the tools to combat severe forms of worker exploitation that do not rise to the level of involuntary servitude as defined in *Kozminski*.<sup>126</sup> Because Section 1589 only requires prosecutors to show a threat of serious harm, or a scheme, plan, or pattern intended to cause a person to believe that such harm would occur, prosecutors will not have to show physical harm or threats of force against the victim, as was required by *Kozminski*.<sup>127</sup> Serious harm refers to a broad array of harms, including both physical and nonphysical.<sup>128</sup> Also "[Section] 1589's terms and provisions are intended to be construed with respect to the

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(2000).

123. 18 U.S.C. § 1589 (2000). The statute provides in part that: whoever knowingly provides or obtains the labor or services of a person- (1) by threats of serious harm to, or physical restraint against, that person or another person; (2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or (3) by means of the abuse or threatened abuse of law or the legal process, shall be fined under this title or imprisoned not more than 20 years, or both.

*Id.*

124. H.R. Conf. Rep. No. 106-939, at 100 (2000), available at [http://www.rainn.org/vawa/final\\_vawa.pdf](http://www.rainn.org/vawa/final_vawa.pdf).

125. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102(b)(13), 22 U.S.C.A. § 7101(b)(13) (2000).

126. H.R. Conf. Rep., *supra* note 123 at 101.

127. *Id.*

128. *Id.*

individual circumstances of victims that are relevant in determining whether a particular type or certain degree of harm or coercion is sufficient to maintain or obtain a victim's labor or services, including the age and background of the victim."<sup>129</sup>

How does this section resolve the various issues raised in *Kozminski*? First, as mentioned, it addresses the increasingly subtle methods used by traffickers, which were not covered by the definition of involuntary servitude as decided by *Kozminski*. Second, it broadens the harms covered. By not requiring the prosecution to prove physical harm or threats of force against the victims, it allows for a wider array of activities to be covered. In its definition of serious harm, Congress states that the court in applying this definition should take into account the specific vulnerabilities of the victims. This is consistent with what the Supreme Court stated in *Kozminski*.<sup>130</sup> It is also intended by Congress that more cases will be prosecuted against traffickers who traffic their victims into domestic service.<sup>131</sup> In this context traffickers will now be prosecuted not only when they use physical abuse to keep the victim in service, but also when the traffickers use more subtle means designed to cause the victim to believe that serious harm will result to themselves or their families if he or she leaves.<sup>132</sup> This broad language of "plan, scheme, or pattern" was intended to cover a broad spectrum of offenses which should also result in a larger number of convictions.

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129. *Id.*

130. In *Kozminski*, Justice O'Connor writes that "vulnerabilities of the victim are relevant in determining whether the physical or legal coercion or threats thereof could plausibly have compelled the victim to serve." *Kominiski*, 487 U.S. at 952. But, that section 1584 eliminated the need for any special distinction among or protection of, special classes of victims.

131. H.R. Conf. Rep. No. 106-939, *supra* note 123, at 101.

132. *Id.*

Also in other cases a scheme, plan, or pattern intended to cause a belief of serious harm may refer to intentionally causing the victim to believe that her family will face harms such as banishment, starvation, or bankruptcy in their home country. Another example cited is if an adult claims a false legal relationship with a child in order to put that child into a condition of servitude, this may constitute a scheme, plan, or pattern, if there is a showing that such a scheme was intended to create the belief that the victim or some other person would suffer serious harm.

*Id.*

New Section 1590<sup>133</sup> prohibits trafficking by any person in violation of Chapter 77, Title 18. This section provides in part that "[w]hoever knowingly recruits, harbors, transports, provides, or obtains by any means, any person for labor or services in violation of this chapter shall be fined . . . or imprisoned not more than 20 years or both."<sup>134</sup> This section looks as if it will hold accountable a greater number of persons, because it implicates traffickers and those who receive the services of the victims, which allows for prosecutions of all of those involved in the trafficking. Most importantly, it carries with it the enhanced criminal penalties. This is a significant change in the existing laws, because now there are specific provisions that can be used to convict all of these individuals.

New Section 1591<sup>135</sup> punishes the trafficking of persons into a

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133. 18 U.S.C. § 1590 (2000). The statute provides:  
whoever knowingly recruits, harbors, transports, provides, or obtains by any means, any person for labor or services in violation of this chapter shall be fined under this title or imprisoned not more than 20 years, or both. If death results from 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.

*Id.*

134. *Id.*

135. 18 U.S.C. § 1591 (2000). The statute provides that:

Whoever knowingly—

(1) in or affecting interstate commerce, recruits, entices, harbors, transports, provides, or obtains 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 that force, fraud, or coercion described in subsection (c)(2) will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

(b) The punishment for an offense under subsection (a) is—

(1) if the offense was effected by force, fraud, or coercion or if the person transported had not attained the age of 14 years at the time of such offense, by a fine under this title or imprisonment for any term of years or for life, or both; or

(2) if the offense was not so effected, and the person transported 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 or imprisonment for not more than 20 years, or both.

(c) In this section:

(1) The term "commercial sex act" means any sex act, on account of which anything of value is given to or received by any person.

criminal sex act by force, fraud, or coercion. This will also broaden the offenses which can be prosecuted because not only does this statute punish those who are actively participating, but it also punishes anyone who benefits financially from a violation of this section.

New Section 1592<sup>136</sup> generally punishes wrongful conduct with respect to immigration and identification documents used in the course of a violation or attempt to violate of one of the trafficking statutes.<sup>137</sup> According to Congress, the intent of this new section is to address, in part, where other crimes of Chapter 77 are not completed, but where there is evidence that a trafficker intended to commit such a crime and withheld or destroyed immigration or identification documents for the

(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 "venture" means any group of two or more individuals associated in fact, whether or not a legal entity.

*Id.*

136. 18 U.S.C. 1592 (2000). The statute provides that:

(a) Whoever knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person—

(1) in the course of a violation of section 1581, 1583, 1584, 1589, 1590, 1591, or 1594(a);

(2) with intent to violate section 1581, 1583, 1584, 1589, 1590, or 1591; or

(3) to prevent or restrict or to attempt to prevent or restrict, without lawful authority, the person's liberty to move or travel, in order to maintain the labor or services of that person, when the person is or has been a victim of a severe form of trafficking in persons, as defined in section 103 of the Trafficking Victims Protection Act of 2000 [22 USCS § 7102], shall be fined under this title or imprisoned for not more than 5 years, or both.

(b) Subsection (a) does not apply to the conduct of a person who is or has been a victim of a severe form of trafficking in persons, as defined in section 103 of the Trafficking Victims Protection Act of 2000 [22 USCS § 7102], if that conduct is caused by, or incident to, that trafficking.

*Id.*

137. 18 U.S.C. 1592(a)(1) (2000).

purpose of preventing the trafficking victim from escaping.<sup>138</sup> This section provides the prosecutors with yet one more tool with which to prosecute traffickers.

## V. HOW WILL THE TRAFFICKING ACT AFFECT VICTIMS?

The Trafficking Act will make available benefits which were previously unavailable to immigrant victims, and it will amend current immigration laws as they pertain to aliens who are victims of trafficking.

### A. *Victims Assistance Included in the Trafficking Act*

Prior to the Trafficking Act, it was believed by some INS agents that many United States attorneys would not take involuntary servitude cases involving minors because of the lack of adequate facilities for them to be housed in while awaiting trial.<sup>139</sup>

Section 107(b)(1)(A) of the Trafficking Act allows those who qualify as a "victim of a severe form of trafficking"<sup>140</sup> to qualify for all benefits and services that are available under any Federal or State program or activity . . . to the same extent as an alien who is admitted to the United States as a refugee under section 207 of the Immigration and Nationality Act.<sup>141</sup>

To qualify for this assistance, the victim must meet the requirements set forth in the definition section to qualify as a "victim of severe form of trafficking," and the victim must not have attained the age of 18, or he or she could qualify if they are

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138. H.R. Conf. Rep. No. 106-939, *supra* note 123, at 102.

139. See Richard, *supra* note 10, at 40.

140. Victims of Trafficking and Violence Protection Act of 2000, § 103(8), 22 U.S.C. § 7102(8) (2000). The Act states that:

severe forms of trafficking in persons means: A) sex trafficking where a person is induced to commit a commercial sex act by force, fraud, or coercion, or in which the person induced to perform such act has not attained the 18 years of age; or B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

*Id.*

141. Victims of Trafficking and Violence Protection Act of 2000, § 107(b)(1)(a), 22 U.S.C. § 7105(b)(1)(a)(2000).

the subject of a certification.<sup>142</sup> So if the victim is over 18 years old he or she must be willing to cooperate with the prosecution so as to be the subject of a certification. Section 7(c) of this bill provides that victims and their families will be provided with protection, and will not be detained in facilities inappropriate to their status as a victim.<sup>143</sup> While it is not defined in this act, it can be assumed from the legislative history that this means that these victims will be housed in shelters and not prisons or detention centers.<sup>144</sup>

Even though Congress states in the Trafficking Act that no victim "shall be detained in facilities inappropriate with their status as crime victims," this only applies to "victims of severe forms of trafficking,"<sup>145</sup> as does virtually all victim's benefits provisions included in this bill.

There is no indication how the standard "severe forms of trafficking" is to be interpreted. The definition provided in the Trafficking Act seems fairly broad, but it will most likely exclude some victims from coverage. If this happens, then the Trafficking Act will need to be amended. Congress, by doing this, is trying to eliminate any chances of fraud. The fear is that if a strict definition is not applied, then the line between alien smuggling and trafficking in women will be a difficult one to draw.<sup>146</sup> The standard, however, may prove to be too stringent and may exclude some legitimate victims who have been trafficked in a manner not covered by the Trafficking Act.

If this process turns out to be too strict to protect all victims, new problems will be created. Therefore, the Trafficking Act, should be liberally interpreted. If a strict application of "victims of severe forms of trafficking" is to be applied, not all trafficking victims will qualify, thus making the Trafficking Act ineffective.

The standard, "severe forms of trafficking," is a standard

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142. Victims of Trafficking and Violence Protection Act of 2000, § 107(b)(1)(e), 22 U.S.C. § 7105(b)(1)(e) (2000). For certification the victim must be willing to participate in the investigation and prosecution of severe forms of trafficking and they must have applied for a visa under 101(a)(15)(T) of the INA or the victim could also qualify if their presence is needed to effectuate prosecution of the traffickers.

143. *Id.*

144. See H.R. Conf. Rep. No. 106-939, *supra* note 123 at 93.

145. Victims of Trafficking and Violence Protection Act of 2000, § 107(c)(1)(a), 22 U.S.C. § 7105(c)(1)(a)(2000).

146. See H.R. Conf. Rep. No. 106-939, *supra* note 123.



which is going to be difficult to apply. There are no provisions in the Trafficking Act which set forth how the determination is to be made as to who falls within the statutory definition. This standard will be impossible for agents to apply. A split-second determination will need to be made on whether to take the victim to a detention center or to an appropriate facility set up through the Trafficking Act. However, this is a determination that cannot be made on the site without an investigation into the actual events that took place. Before the aforementioned determination is made, victims should be treated as if they qualified as a victim of severe forms of trafficking, until a determination is made otherwise by the Attorney General.<sup>147</sup> Prior to the Trafficking Act, victims who were not material witnesses were usually detained and deported to their home country.<sup>148</sup> Some gave videotaped depositions under Federal Rule of Criminal Procedure 15.<sup>149</sup> Therefore, if a strict interpretation of the Trafficking Act is implemented, then our system will revert back to treating victims as criminals.

### *B. How Will the Trafficking Act Affect Immigration Law?*

The Trafficking Act creates a new visa, the "T" visa.<sup>150</sup> This visa will allow certain victims of trafficking to stay in the United States.<sup>151</sup> The criteria are that the victim (a) is or has been a victim of severe form of trafficking as defined in section 103(8); (b) is physically present due to that trafficking; (c) has complied with requests for help in the investigation or prosecution of traffickers or has not reached the age of 15; and (d) the alien would suffer extreme hardship upon removal. It also allows the Attorney General, if necessary, to grant a "T" visa to the victim's spouse, children and parents if the victim is under 21. If the victim is over 21, the Attorney General may grant a "T" visa to the victim's spouse, and children. The Trafficking Act places a

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147. It will be assumed that the Attorney General will make this determination even though the Trafficking Act does not specify who is to make this determination.

148. See Richard, *supra* note 10, at 40.

149. *Id.*

150. Victims of Trafficking and Violence Protection Act of 2000, § 107(e)(1), 8 U.S.C. § 1105(a)(15)(T)(2000).

151. *Id.*

cap of 5,000 "T" visas per year.<sup>152</sup>

Subsection (f) of the Trafficking Act allows the Attorney General to adjust the status of an alien admitted under the "T" visa to that of permanent resident. The adjustment is allowed when the alien (a) has been physically present in the United States for a continuous period of at least three years since the date of admission as a nonimmigrant; (b) has throughout this period been a person of good moral character; (c) during such period, complied with any reasonable request for assistance in the investigations or prosecution of acts of trafficking or that the alien would suffer *extreme hardship* involving unusual and severe harm upon removal from the United States.<sup>153</sup> Again a cap is placed and the total number of those whose status may be adjusted is 5,000.<sup>154</sup>

The purpose of these sections is to provide an incentive for victims to testify against traffickers,<sup>155</sup> to protect these women and their families from the traffickers here and abroad, and to allow these victims protection that is currently available to only those victims who are citizens. This section also helps to differentiate between alien smuggling and trafficking.<sup>156</sup> Alien smuggling is where an individual pays to be brought to the United States in exchange for a smuggling fee. Trafficking, as this comment has pointed out, involves some degree of coercion and generally is involuntary. Congress states that an applicant who is smuggled into the U.S. is not eligible to receive the "T" visa unless he or she at some point has become a victim of a severe form of trafficking.<sup>157</sup>

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152. Victims of Trafficking and Violence Protection Act of 2000, § 107(e)(2)(b)(n)(2), 8 U.S.C. § 1184(A)(15)(T)(2000). This number does not apply to the spouses, children, or parents, only to the principle alien. The Act also has a provision directing the Attorney General to submit a report once a year stating whether any otherwise eligible applicant has been denied a visa or adjustment status based solely on account of the annual limitation. See *id.* at 7(g). This limitation according to Congress should be sufficient however, if experience dictates otherwise then it would be appropriate for congress to consider increasing the limit. See H.R. Conf. Rep. No. 106-939, *supra* note 123.

153. Victims of Trafficking and Violence Protection Act of 2000, § 107(f), 8 U.S.C. § 1255 (2000). (emphasis added)

154. Victims of Trafficking and Violence Protection Act of 2000, § 107(f)(3)(A), 8 U.S.C. § 1255 (3)(a)(2000).

155. See H.R. Conf. Rep. No. 106-939, *supra* note 123, at 94-95.

156. *Id.*

157. *Id.* at 95.

### *C. How will These Sections be Applied?*

There are many areas in these two sections which will have to be interpreted in the years to follow before we really understand how Congress intended them to be applied.

The first of these areas is who qualifies as a "victim of a severe form of trafficking." Why should victims who receive maltreatment not rising to the level of severe forms of trafficking be excluded from receiving benefits and the "T" visa? This question will eventually have to be answered by the courts and by the INS. It should be answered on a case-by-case basis in a very liberal fashion so as to allow as many victims as possible to qualify for benefits and the "T" visa. However, this will probably not be the case. The courts and the INS will likely interpret this language very strictly so as to prevent any fraud on the part of "victims." In fact, in the committee report attached to the bill, Congress stated that in the Trafficking Act they intentionally included the term "victims of trafficking" instead of "victims of severe forms of trafficking."<sup>158</sup> Congress determined the reason for this inclusion is to encompass a broader range of victims in these areas, and that the "severe forms of trafficking" standard is intended to be narrower than the "victims of trafficking standard."<sup>159</sup> Moreover, the White House believes the "victims of severe forms of trafficking" standard is stringent and has criticized the "T" visa as being too restrictive to accomplish its stated goals.<sup>160</sup> Even though this statement dealt with a previous version of the Trafficking Act, this section of the legislation has not changed much throughout the legislative process.

The next area that will need to be interpreted is the standard of extreme hardship involving unusual and severe harm upon removal. According to Congress, it is expected that the INS will interpret this clause to be a higher standard than just extreme hardship.<sup>161</sup> Congress states that this standard

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158. *Id.* at 90-91. Some examples where the term "victim of trafficking appears in the Trafficking Act are (1) in the prevention of trafficking section (22 U.S.C. § 7104) and (2) in the section on Assistance for victims of trafficking in Other Countries (22 U.S.C. § 7105).

159. H.R. Conf. Rep. No. 106-939, *supra* note 123, at 90-91.

160. Office of Management and Budget, The White House, *H.R. 3244- Trafficking Victims Protection Act of 2000*, at <http://www.whitehouse.gov/OMB/legislative/sap/106-2/HR3244-h.html> (May 9, 2000). This statement was issued based on a previous version of the Trafficking Act.

161. H.R. Conf. Rep. No. 106-939, *supra* note 123, at 95.

should cover situations where a victim is likely to face genuine and serious hardship if removed, whether or not the severe harm is physical harm on account of being trafficked. This extreme hardship should encompass more than the normal economic and social disruptions involved in deportation.<sup>162</sup>

Again this standard may prove to be very difficult to satisfy. Because this is a mandatory provision of the "T" visa, the number of those who qualify will depend on how strictly it is interpreted.

This process can be compared to that of the process for the "S" visa.<sup>163</sup> The process used for the "S" visa is also very complicated.<sup>164</sup> According to an INS agent handling a trafficking case, he claims that he filed at least 700 documents for 75 victims.<sup>165</sup> While the process might not be as complex as the "S" visa, the "T" visa does have a number of steps and qualifications that the victim must achieve before he or she will qualify for the visa. The process for the "T" visa may be too complicated to accomplish its overall goal, which is ultimately to help and protect the victims. Opponents to the strictness of the "T" visa will rightfully argue that we should at least allow these victims to stay. After all, they have or will presumably aid in punishing these traffickers. By limiting the assistance, the visa, and adjustment of status to only "severe forms of trafficking," too many victims will fall through the cracks and will not be able to qualify either because the process is too stringent or just because they were not trafficked with enough force. Although the purpose is legitimate, to prevent fraudulent claims, what incentive do these victims have to testify if they are not going to be allowed to stay? This could ultimately end up crippling this promising legislation.

While the Trafficking Act is beneficial and much better than what existed prior to it, there are some shortcomings and

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162. *Id.*

163. See 8 USCS § 1101 (a)(15)(s)(2000). Under the "S" visa The Attorney General could grant the visa to an alien who "(I) is in possession of critical reliable information concerning a criminal organization or enterprise; (II) is willing to supply or has supplied such information to Federal or State law enforcement authorities or a Federal or State court; and (III) whose presence in the United States the Attorney General determines is essential to the success of an authorized criminal investigation or the successful prosecution of an individual involved in the criminal organization or enterprise." *Id.*

164. See Richard, *supra* note 10 at 41.

165. *Id.*

treatment of victims may prove to be one of them.<sup>166</sup> If it does, what will likely happen is that the prosecutors will have more than enough tools to prosecute these offenses; however, they will be missing the most important part, a witness.

## VI. HOW THE TRAFFICKING ACT AIMS AT STOPPING THE PROBLEM WORLDWIDE

Trafficking in human beings is a transnational crime. In order to stop the problem, the United States must receive cooperation from the rest of the world. A finding included in the Trafficking Act declares that trafficking enforcement is hindered by official indifference, by corruption, and sometimes even by official participation in the trafficking.<sup>167</sup> Another battle is that the victims, typically illegal immigrants in the destination country, are often treated harsher than the actual traffickers.<sup>168</sup> Associated with this problem is that prior to the Trafficking Act, victims of trafficking in the United States were not entitled to protection or any other victims benefits due to their immigration status. The Trafficking Act aims to solve these problems.

Section 104 of the Trafficking Act requires that the United States Department of the State prepare a report for each country that receives economic<sup>169</sup> and/or security assistance.<sup>170</sup> These nations are usually countries of origin, transit, or destination for victims of trafficking.<sup>171</sup> This report will specifically discuss nine issues, which generally deal with whether government authorities in that country participate in, facilitate, or condone trafficking. It will also list any steps that the respective government has taken to prohibit official corruption in trafficking and any steps taken to curb trafficking, including whether or not they cooperate with extradition requests. Another issue is the steps taken to assist victims of trafficking including whether or

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166. See Office of Management and Budget, *supra* note 159.

167. Victims of Trafficking and Violence Protection Act of 2000, § 102(b)(16), 22 U.S.C. § 7101 (b)(16)(2000).

168. Victims of Trafficking and Violence Protection Act of 2000, § 102(b)(16), 22 U.S.C. § 7101 (b)(16)(2000).

169. Victims of Trafficking and Violence Protection Act of 2000, § 104(a), 22 U.S.C. § 2151(n)(2000).

170. Victims of Trafficking and Violence Protection Act of 2000, § 104(b), 22 U.S.C. § 2304(2000).

171. Victims of Trafficking and Violence Protection Act of 2000, § 104(a)-(b), 22 U.S.C. §§ 2151(n), 2304(2000).

not that victim is treated as a victim or a criminal. This section is an important feature of the legislation because trafficking cannot be entirely solved by the United States alone; it will have to be a worldwide effort.

Section 106 requires the President to establish initiatives to enhance economic opportunity for potential victims of trafficking.<sup>172</sup> This will make it possible to intervene and stop the trafficking before it starts. It is primarily designed to inform potential victims of the problem. In addition, Section 106 provides the victims with alternatives, such as business training, programs to keep children in school, and grants to advance the status of women in these countries. Since the trafficking industry is driven primarily by ignorance, it is extremely important that those in war-plagued and economically unstable countries learn about these dangers.

In Section 110 of the Trafficking Act, Congress gives the President the opportunity to deny non-humanitarian, non-trade-related foreign assistance to governments which do not comply with, nor make any significant efforts to comply with, the minimum standards set forth for the elimination of trafficking.<sup>173</sup> The minimum standards as set forth in the legislation consist of the following: (1) the government should prohibit and punish severe forms of trafficking in persons; (2) it should proscribe punishments that are commensurate with the graveness of the crimes; (3) for the knowing commission of any act of severe form of trafficking in persons it should provide punishments that are sufficiently stringent to deter and that adequately reflect the heinous nature of the crime; and (4) it should make serious and sustained efforts to eliminate severe forms of trafficking in persons.<sup>174</sup> While these are very comprehensive provisions and will be difficult to comply with, they are nonetheless very necessary in light of the problem. Because, as noted earlier, this is a transnational problem, the United States alone cannot solve it. Our nation needs the help of all the source and/or destination countries. The only way to gain compliance is to use some sort of sanction for non-compliance.

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172. Victims of Trafficking and Violence Protection Act of 2000, § 108(a), 22 U.S.C. § 7106(a)(2000).

173. Victims of Trafficking and Violence Protection Act of 2000, § 108(a), 22 U.S.C. § 7106(a)(2000).

174. *Id.*

Use of economic sanctions as a foreign policy tool is not a new idea. Economic sanctions have been applied in many foreign policy contexts.<sup>175</sup> One of the most visible applications of economic sanctions is in the drug trafficking context.<sup>176</sup> Under this statute, the President is required to submit a report which is then used to determine which countries are major drug producing and drug-transit countries.<sup>177</sup> From the report, the President then determines which countries are to have aid withheld.<sup>178</sup> This law not only requires the withholding of foreign aid, it also as the Trafficking Act does, allows the United States to provide assistance to foreign countries to help prevent drug trafficking.<sup>179</sup>

When used correctly, economic sanctions can be a very effective tool for advancing our foreign policy interests.<sup>180</sup> However, when it is incorrectly applied it can actually hinder the realization of our foreign policy goals and it may even come as a significant cost to other United States policy objectives.<sup>181</sup> For example, the White Houses' Office of Management and Budget ("OMB") discussed some of these same concerns with an earlier version of this legislation.<sup>182</sup> The statements generally critiqued the legislation for what it believed would result in a "debilitating effect on the fight against trafficking."<sup>183</sup> The OMB has also stated that the bill would require the United States to impose sanctions on governments that were working in good faith to combat trafficking.<sup>184</sup> Do these provisions still exist in the legislation or were they cured in the legislative process? It seems that the final version of the Trafficking Act has solved these

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175. Testimony before the Senate Foreign Relations Committee (statement of Stuart E. Eizenstat, Under Secretary of State for Economics, Business, and Agricultural Affairs), at [http://www.state.gov/www/policy\\_remarks/1999/990701\\_eizen\\_sanctions.html](http://www.state.gov/www/policy_remarks/1999/990701_eizen_sanctions.html) (July 1, 1999).

176. 22 U.S.C.A. § 2291 (2000). Since this topic is not the focus of this note, it will be dealt with in a very general context.

177. 22 U.S.C.A. § 2291(h) (2000).

178. 22 U.S.C.A. § 2291(j) (2000).

179. 22 U.S.C.A. § 2291 (2000).

180. Testimony before the Senate Foreign Relations Committee (statement of Stuart E. Eizenstat, Under Secretary of State for Economics, Business, and Agricultural Affairs), at [http://www.state.gov/www/policy\\_remarks/1999/990701\\_eizen\\_sanctions.html](http://www.state.gov/www/policy_remarks/1999/990701_eizen_sanctions.html) (July 1, 1999).

181. *Id.*

182. Office of Management and Budget, *supra* note 159.

183. *Id.*

184. *Id.*

concerns. It does this by first using language that gives previously non-abiding countries many opportunities to comply. It states that the United States may withhold assistance to countries that are not complying with the minimum standards, and those that are not making significant efforts<sup>185</sup> to bring themselves into compliance with the minimum standards.<sup>186</sup> Moreover, Section 110(d)(4) and(5) allow the President to continue providing aid if it is within the national interest to do so, even in spite of a country's failure to comply with the minimum standards or to make significant efforts to bring itself within the minimum standards.

Whether economic sanctions truly work may be a difficult question to answer "since the costs and gains cannot be measured in dollars and cents on a spreadsheet."<sup>187</sup> However, it seems as if the economic sanctions included in the Trafficking Act will be flexible enough to succeed even though the statute itself seems difficult to comply with.

## VII. CONCLUSION

Congress and prosecutors alike are aware that the Trafficking Act will be a work in progress. This was pointed out by Congress: "the conferees are aware that that the Department of Justice may seek additional statutory changes in future years to further address the issues raised in *Kozminski*, as courts and prosecutors develop experience with the new crimes created by this act."<sup>188</sup>

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185. Victims of Trafficking and Violence Protection Act of 2000, § 110, 22 USCA § 7107 (2000). The Act states in pertinent part that in determining whether the government is making significant efforts the Secretary of State shall consider:

the extent to which the country is a country of origin, transit, or destination for severe forms of trafficking; (b) the extent of noncompliance with the minimum standards by the government and, particularly, the extent to which officials or employees of the government have participated in, facilitated, condoned, or are otherwise complicit in severe forms of trafficking; and (c) what measures are reasonable to bring the government into compliance with the minimum standards in light of the resources and capabilities of the government.

*Id.*

186. Victims of Trafficking and Violence Protection Act of 2000, § 110(a)(1)-(2), 22 U.S.C. § 7107(a)(1)-(2)(2000).

187. See Office of Management and Budget, *supra* note 159.

188. H.R. Conf. Rep. No. 106-939, *supra* note 123, at 101.



While the Trafficking Act is not perfect, it should prove to be an asset to prosecutors and is better than past legislation. Under the Trafficking Act, Congress has provided prosecutors with more than enough crimes to punish these offenses. But possibly the two most useful things included in the Trafficking Act are: (a) increased punishments and (b) a broader definition of involuntary servitude.

The Trafficking Act will only be effective if cooperation is received from abroad. Because this is a transnational crime, every country must participate in the eradication of trafficking. This legislation is more of a stance by the United States government that it is serious about stopping this epidemic.

There are however, obstacles, that need to be overcome in order for the Trafficking Act to work. First, the fear of law enforcement needs to be overcome. Hopefully the educational components included in the Trafficking Act will help to dispel the myths that the traffickers use to keep their victims confined. If the victims are too scared to come forward and seek assistance, the traffickers may never be caught, because chances are that law enforcement will not discover such crimes. The second fear is that of deportation. These myths need to be dispelled through education and by getting to these victims early, before they are even trafficked.

Perhaps the biggest obstacle that needs to be overcome is the appearance that the United States government is taking advantage of the victims. The worst-case scenario is that the government gets the victim's testimony, but then the victim is deported because he or she cannot meet the severe trafficking standard. This standard will most likely need to be lowered.

This act contains many sections and many new criminal statutes, how these various statutes can be used to prosecute traffickers, will be determined in case law in the coming years. However, it seems as if Congress has responded to the 'challenge' issued to it by prosecutors and the United States Supreme Court. In so doing, Congress provided prosecutors with the tools needed to combat trafficking. However, the trafficking problem will not be completely solved unless the United States makes a strong commitment to helping the victims.

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