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WHERE THE RUBBER MEETS THE ROAD: THE USE OF CONDOMS TO SATISFY THE FEDERAL NEXUS REQUIREMENT IN SEX TRAFFICKING OF MINORS PROSECUTIONS

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WHERE THE RUBBER MEETS THE ROAD: THE USE OF CONDOMS
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TRAFFICKING OF MINORS PROSECUTIONS

*Jessica Bove**

In 2015, a Chicago police officer faced a minimum of ten years in prison after pleading guilty to federal sex trafficking of a minor.¹ The officer engaged in sexual intercourse with a fourteen-year-old girl.² Prosecutors stated that the authority to charge the officer federally came from the Commerce Clause.³ However, the officer did not cross state lines and the activities of the offense occurred exclusively in Illinois.⁴ Federal prosecution was possible because the condoms the officer used were manufactured outside of Illinois and therefore affected interstate commerce.⁵ Because federal prosecution applies a harsher penalty than a potential state prosecution, the officer faced a longer term of imprisonment than if he were to have been charged by an Illinois District Attorney's Office.⁶ A federal sex trafficking charge carries a mandatory minimum of ten years imprisonment, whereas if the officer was charged with a sex crime in state court, the minimum prison time would have been six years.⁷

While it is widely accepted that the federal nexus requirement is met in areas such as gun crimes, utilizing condoms as an avenue to interstate

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¹ Jared Gilmour, *Chicago Cop Paid Teen Runaways for Sex. Out-of-State Condoms Made it a Federal Crime, Records Say*, THE KANSAS CITY STAR (May 18, 2018, 9:14 PM), <https://www.kansascity.com/news/state/illinois/article211467074.html>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Patrick M. O'Connell, *Chicago Cop's Use of Condoms Made Outside of Illinois Allowed Prosecutors to Pursue Federal Sex Crime Charges*, CHI. TRIB. (May 18, 2018, 1:10 PM), <https://www.chicagotribune.com/news/ct-met-federal-charges-condom-crime-20180517-story.html>.

commerce is relatively uncommon.⁸ Arguments exist that the use of condoms to establish a federal nexus is an overextension of the commerce clause.⁹ This paper argues that the use of condoms and other instrumentalities of interstate commerce to federally prosecute sex trafficking of minors is not an overextension of the Commerce Clause. Courts have been clear that only a *de minimis* effect on commerce is required to fulfill the federal nexus requirement as applied to Section 1591. Additionally, legislative history suggests that Congress intended for trafficking of minors to be prosecuted federally. Federal prosecution of sex trafficking also serves an important public policy function, with federal prosecution providing harsher penalties for offenders and greater protection for victims.

The argument exists that using condoms to satisfy the federal nexus requirement is an overextension of the Commerce Clause.¹⁰ Without much effort one can create a “federal nexus for any conduct.”¹¹ The worry exists that a broad interpretation of the commerce clause will allow federal agents to charge any crime federally.¹² Additionally, people argue that this broad interpretation allows “run-of-the-mill” prostitution to be charged federally when it should remain under the jurisdiction of the states.¹³

Many defense arguments mirror that of the defendant in *United States v. Washington*.¹⁴ Defendant argued that his conduct did not rise to the level of sex trafficking and should not be prosecuted federally because his conduct occurred in a single state.¹⁵ The argument exists that in enacting Section 1591, Congress sought to prosecute international sex trafficking and leave prostitution to the states.¹⁶ Applying Section 1591 to conduct within a single state intrudes upon state authority.¹⁷ Additionally, the Defendant argued that

⁸ *Id.*

⁹ See Scott H. Greenfield, *Short Take: The Flaccid Commerce Clause*, SIMPLE JUSTICE: A CRIMINAL DEFENSE BLOG (May 25, 2018), <https://blog.simplejustice.us/2018/05/25/short-take-the-flaccid-commerce-clause/>.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *United States v. Washington*, No. 3:15-CR-59, 2015 WL 13735981, at 2 (E.D. Tenn. Oct. 29, 2015) (Guyton, Mag. J.), *adopted by* *United States v. Washington*, No. 3:15-CR-059, 2015 WL 7761088 (E.D. Tenn. Dec. 2, 2015).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

the conduct creating a federal nexus must have a substantial effect on interstate commerce.¹⁸

This argument relies upon the constitutional principle of federalism.¹⁹ Under federalism, the national government is limited to enumerated powers and the remaining powers are left to the states and the people.²⁰ States are given the authority to enact legislation for the public good.²¹ Any criminal act committed solely within a state must be prosecuted at a state level unless it is related to the execution of a Congressional power or is within the jurisdiction of the United States.²² When applying a federal statute to state crimes, courts must construe the statute narrowly.²³ An exception exists only when Congress expressly states that it intends to cause a major shift in the balance of state and federal criminal jurisdiction.²⁴ People argue that Section 1591 is construed broadly, not narrowly, and does not comply with the principles of federalism.²⁵

I. COMMERCE CLAUSE APPLICATION

Section 1591 of the United States Code governs federal sex trafficking offenses.²⁶ The statute distinguishes between two offenses: sex trafficking of a minor and sex trafficking of an adult.²⁷ The main distinction between these two offenses is that sex trafficking of a minor requires no proof of force, fraud, or coercion, whereas sex trafficking of an adult does.²⁸ This article will focus exclusively on Section 1591(a), sex trafficking of a minor.²⁹ The offense requires that the defendant knowingly, “recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by

¹⁸ *Id.*

¹⁹ *Id.* at 6.

²⁰ *Id.*

²¹ *Id.* at 8 (internal quotations omitted).

²² *Id.* at 8–9 (internal quotations omitted).

²³ *Id.* at 9.

²⁴ *Id.*

²⁵ *Id.* at 8.

²⁶ 18 U.S.C. § 1591 (2018).

²⁷ Hilary Axam & Jennifer Toritto Leonardo, *Human Trafficking: The Fundamentals*, 65 THE U.S. ATT’YS’ BULL. 3, 7 (Nov. 2017), <https://www.justice.gov/usao/page/file/1008856/download>.

²⁸ *Id.*

²⁹ 18 U.S.C. § 1591(a) (2018).

any means a person,”³⁰ or that the defendant “benefits, financially or by receiving anything of value, from participation in a venture which has engaged in” one of these acts.³¹

Additionally, Section 1591 requires proof that the conduct was “in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States.”³² “The requisite effect on interstate or foreign commerce can be established through the aggregate impact of intrastate commercial transactions, as recognized in well-established commerce clause case law, and the effect need only be *de minimis*.”³³ The federal nexus can be satisfied through the use of facilities and instrumentalities of interstate commerce such as cellphones, the internet, financial institutions, and hotels.³⁴ It can also be satisfied “by the use of products moving in interstate commerce such as condoms, pharmaceuticals, and prostitution paraphernalia.”³⁵

The final element of Section 1591(a) requires proof that “the defendant acted knowingly or in reckless disregard of the fact that the person trafficked was not eighteen years old.”³⁶ The “reckless disregard” language was added to the TVPRA in 2008 and expands the necessary *mens rea* requirement.³⁷

A number of appellate courts have concluded that no *mens rea* requirement exists for the interstate commerce element of Section 1591.³⁸ Legislative history suggests that Congress intended Section 1591 to be interpreted broadly and not limited to the “surely trifling number of sex traffickers who know, for example, that using a hotel room or out-of-state condoms affects interstate commerce as that term is understood in constitutional law.”³⁹ Requiring that traffickers knowingly engage in

³⁰ 18 U.S.C. § 1591(a)(1) (2018).

³¹ 18 U.S.C. § 1591(a)(2) (2018).

³² 18 U.S.C. § 1591(a) (2018).

³³ Axam & Leonardo, *supra* note 27, at 7.

³⁴ *Id.*

³⁵ *Id.*

³⁶ 18 U.S.C. § 1591(a) (2018).

³⁷ Axam & Leonardo, *supra* note 27, at 7–8.

³⁸ Phylcia Preston, *The Human Trafficking Challenge: Prosecutorial Hurdles in Criminal Human Trafficking Litigation*, 699 LAW SCHOOL STUDENT SCHOLARSHIP 1, 13 (2015), https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1702&context=student_scholarship. See also *United States v. Sawyer*, 733 F.3d 228 (7th Cir. 2013); *United States v. Phea*, 755 F.3d 255, 265 (5th Cir. 2014); *United States v. Evans*, 476 F.3d 1176, 1180 n. 2 (11th Cir. 2007).

³⁹ Preston, *supra* note 38 (quoting *Sawyer*, 733 F.3d at 230).

interstate commerce would reduce the amount of traffickers subject to prosecutions and would contravene Congress's purpose in enacting Section 1591.⁴⁰ To satisfy the interstate commerce element, prosecutors need only establish that the trafficking had a *de minimis* effect on interstate commerce.⁴¹ Cell phones, credit card usage, hotels, and condoms manufactured out of state are all sufficient evidence to create a federal nexus and affect interstate commerce.⁴²

There is lengthy history of case law in which the Supreme Court determined what type of activities affect interstate commerce. In *United States v. Lopez*, the Court held that the Gun-Free School Zones Act—making it a federal offense to possess a firearm in a school zone—did not substantially affect interstate commerce.⁴³ The Court held that the Act exceeded the authority of Congress to regulate commerce among the states.⁴⁴ In making its determination, the Court identified three broad categories of activity that Congress can regulate.⁴⁵ First, Congress can regulate the use of channels of interstate commerce.⁴⁶ Second, Congress can regulate instrumentalities of interstate commerce.⁴⁷ Finally, Congress can regulate activities that “substantially affect interstate commerce.”⁴⁸

The Government in *Lopez* argued that the possession of a firearm in a school zone affected interstate commerce because it threatened the education system which would adversely affect commerce.⁴⁹ However, the court reasoned that to uphold the Government's argument would require the Court to “pile inference upon inference.”⁵⁰ In *United States v. Morrison*, the Supreme Court held that Congress can only regulate activity that is economic in nature.⁵¹ The Court said that Congress did not have the authority under the

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *United States v. Lopez*, 514 U.S. 549, 551 (1995).

⁴⁴ *Id.*

⁴⁵ *Id.* at 558.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 564.

⁵⁰ *Id.* at 567.

⁵¹ *United States v. Morrison*, 52 U.S. 598, 613 (2000).

Commerce Clause to regulate violence against women because it was not economic activity.⁵²

However, the question still existed of whether the third category outlined in *Lopez*—in which Congress can regulate activity that has a substantial effect on interstate commerce—concerned the economic nature of the “class of activity” to be regulated or the activity’s individual effect on commerce.⁵³ The Supreme Court provided clarification on this question in *Gonzales v. Raich*.⁵⁴ In *Raich*, the Court held that Congress had the power regulate purely intrastate activity because the Commerce Clause includes “purely local activities that are part of an economic class of activities that have a substantial effect on interstate commerce.”⁵⁵ Congress can regulate individual instances of conduct that only have a *de minimis* effect on interstate commerce as long as the class of activity regulated is economic in nature.⁵⁶

United States v. Evans addresses this issue as specifically applied to Section 1591.⁵⁷ *Evans* involved the sex trafficking of a fourteen-year-old girl in Florida.⁵⁸ *Evans* communicated with the minor through a cellphone and supplied her with LifeStyle condoms.⁵⁹ LifeStyle was produced overseas and imported into Georgia for sale throughout the United States.⁶⁰ The *Evans* court found that although defendant engaged in purely intrastate activity, prosecution under Section 1591 was constitutional.⁶¹ The court said that Section 1591 “was enacted as part of the Trafficking Victims Protection Act of 2000,” which “criminalizes and attempts to prevent slavery, involuntary servitude, and human trafficking . . . particularly of women and children in the sex industry.”⁶² The *Evans* Court held that sex trafficking had an

⁵² *Id.*

⁵³ Charles Doyle, *Sex Trafficking: An Overview of Federal Criminal Law*, CONG. RES. REPORT (June 25, 2015), <https://fas.org/sgp/crs/misc/R43597.pdf>.

⁵⁴ See *Gonzales v. Raich*, 545 U.S. 1 (2005).

⁵⁵ Doyle, *supra* note 53 (quoting *Gonzales v. Raich*, 545 U.S. 1, 18 (2005)).

⁵⁶ Doyle, *supra* note 53.

⁵⁷ Leslie A. Hagen & Benjamin L. Whittemore, *Combating Trafficking of Native Americans and Alaska Natives* 65 THE U.S. ATT’YS’ BULL. 149, 158 (Nov. 2017), <https://www.justice.gov/usao/page/file/1008856/download>.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

“aggregate economic impact on interstate . . . commerce.”⁶³ *Evans* is frequently cited to support a broad interpretation of interstate commerce when applied to Section 1951.⁶⁴

Additionally, courts have pointed out that aside from the physical conduct of trafficking affecting interstate commerce, the use of condoms and cellphones employs an instrumentality of interstate commerce.⁶⁵ Congress’s authority to regulate interstate commerce also extends to instrumentalities of commerce.⁶⁶

II. THE IMPORTANCE OF FEDERAL PROSECUTION FROM A PUBLIC POLICY STANDPOINT

Sexual trafficking of minors is a prevalent issue in the United States. In 2018, “an estimated 1 out of 7 runaway children reported to the National Center for Missing and Exploited Children were likely child sex trafficking victims.”⁶⁷ This crisis affects the most vulnerable children.⁶⁸ Research has shown that children who are homeless or runaways, LGBTQ, African American, or Latino, and children interacting with the child welfare system are more likely to become victims of human trafficking.⁶⁹ While the exact number of victims is unknown,⁷⁰ Congress has cited research that up to 300,000 American minors are at risk for commercial sexual exploitation.⁷¹ An article by the Department of Justice’s Office of Juvenile Justice and Delinquency Prevention estimates that the children who enter into prostitution are on average thirteen or fourteen years old.⁷²

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *United States v. Washington*, No. 3:15-CR-59, 2015 WL at 3.

⁶⁶ *Id.* (citing *U.S. v. Willoughby*, 742 F.3d 229, 240 (6th Cir. 2014)).

⁶⁷ THORN, <https://www.thorn.org/child-trafficking-statistics/> (last visited Mar. 6, 2020).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Child Welfare Information Gateway, *Human Trafficking and Child Welfare: A Guide for Child Welfare Agencies*, U.S. DEP’T OF HEALTH & HUM. SERV. 1, 3 (2017), https://www.childwelfare.gov/pubPDFs/trafficking_agencies.pdf.

⁷¹ Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. 109-164, § 2(5), 119 Stat. 3558, 3559 (2006).

⁷² William Adams et al., *Effects of Federal Legislation on the Commercial Sexual Exploitation of Children*, JUV. JUST. BULL., July 2010, at 3, <https://www.ncjrs.gov/pdffiles1/ojdp/228631.pdf>.

Therefore, the use of condoms to fulfill the federal nexus requirement may be a way for United States Attorney's Offices to make a "policy statement about the seriousness of human trafficking" when making charging decisions.⁷³ Additionally, Congress has adamantly responded to the human trafficking crisis by enacting legislation over the past 20 years.⁷⁴ The Trafficking Victims Protection Act of 2000 ("TVPA") "was the first comprehensive [legislation] to address human trafficking."⁷⁵ The TVPA and subsequent reauthorizations "laid the foundation for prevention and prosecution of human trafficking."⁷⁶ Provisions within the TVPA create a definition for trafficking and create agencies within the Department of State to combat trafficking, provide restitution for victims, and strengthen the prosecution and punishment of offenders.⁷⁷

In 2014, Congress enacted the Preventing Sex Trafficking and Strengthening Families Act.⁷⁸ The Act requires title IV-E agencies to develop policies to provide services for children in child welfare agencies who are either at-risk or victims of sex trafficking.⁷⁹ In 2015, the Justice for Victims of Trafficking Act ("JVTA") "further established Federal requirements and protections relating to human trafficking."⁸⁰ In 2015, the Justice for Victims of Trafficking Act ("JVTA") "established further federal requirements and protections for human trafficking."⁸¹ The JVTA amended the TVPA to allow victims of trafficking to obtain benefits and services without needing to obtain official certification of their victim status.⁸² "It also expanded the definition of "'child abuse' under the Victims of Child Abuse Act of 1990 to include human trafficking."⁸³ Additionally, the White House and other federal offices created programs and initiatives to respond to human trafficking.⁸⁴ The Department of Health and Human Services, Department of

⁷³ O'Connell, *supra* note 7.

⁷⁴ Child Welfare Information Gateway, *supra* note 70, at 4.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 5.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 8.

Homeland Security, Department of Justice, and Department of State have all created initiatives to combat human trafficking.⁸⁵

Another benefit to federal prosecution is the mandatory minimum sentences for sex trafficking offenders. Sex trafficking violations carry a mandatory minimum sentence of ten years imprisonment.⁸⁶ The mandatory minimum sentence is raised to fifteen years when the offense involves force, fraud, or coercion of a minor under fourteen years of age.⁸⁷ Higher terms of imprisonment for traffickers is one of the major impacts of the TVPA.⁸⁸ Sex trafficking offenders can potentially face a maximum penalty of life imprisonment, particularly when their offense is paired with other aggravating factors.⁸⁹

In addition to offenders facing harsher penalties, the federal system also provides greater protection for victims of sex trafficking than the states.⁹⁰ The TVPA establishes that minors who engage in commercial sex are *victims* of sex trafficking.⁹¹ However, prostitution laws govern the state prosecution of sex trafficking.⁹² Many state definitions of prostitution do not include age.⁹³ Therefore, a seventeen-year-old who engages in commercial sex can face criminal prostitution charges under state law.⁹⁴ However, under federal law they are deemed a victim and entitled to protections.⁹⁵ While federal law does not completely resolve the “victim-perpetrator dilemma,” it recognizes that victims should not be inappropriately penalized for conduct that resulted from their victimization.⁹⁶ The growing awareness of sex trafficking has

⁸⁵ *Id.* at 8–9.

⁸⁶ Axam & Leonardo, *supra* note 27, at 13.

⁸⁷ *Id.*

⁸⁸ Vasantha Rao, *Understanding and Applying the Sentencing Guidelines for Trafficking and Related Convictions*, 65 THE U.S. ATT’YS’ BULL. 105, 105 (Nov. 2017), <https://www.justice.gov/usao/page/file/1008856/download>.

⁸⁹ *Id.*

⁹⁰ Susan Crile, *A Minor Conflict: Why the Objectives of Federal Sex Trafficking Legislation Preempt the Enforcement of State Prostitution Laws Against Minors*, 61 AM. U. L. REV. 1783, 1786–87 (2012).

⁹¹ *Id.*

⁹² *Id.* at 1786.

⁹³ *Id.*

⁹⁴ *Id.* at 1787.

⁹⁵ *Id.*

⁹⁶ Jeffrey H. Zeeman & Karen Stauss, *Criminal Conduct of Victims: Policy Considerations*, 65 U.S. ATT’YS’ BULL. 139, 143 (Nov. 2017), <https://www.justice.gov/usao/page/file/1008856/download>.

encouraged some states to reconsider how their prostitution laws apply to minors, and legislation in a minority of states protects minors from possible prostitution charges.⁹⁷ Some states prohibit prosecution of certain offenses by sex trafficking victims.⁹⁸ Others provide expungement and vacatur provisions to relieve victims of criminal charges.⁹⁹ However, the traditional model in which prostituted minors are viewed as offenders remains the status quo in a majority of states.¹⁰⁰

Therefore, the usage of condoms to meet the federal nexus requirement and allow for federal prosecution of sex trafficking is not an overextension of the commerce clause. Both case law and congressional involvement have demonstrated that condoms and other instrumentalities of sex crimes have an effect on interstate commerce. Prosecuting sex crimes federally also serves an important public policy function by providing lengthier sentences for offenders and protecting victims from facing potential prosecution.

⁹⁷ Crile, *supra* note 90, at 1788.

⁹⁸ Zeeman & Stauss, *supra* note 96, at 144.

⁹⁹ *Id.*

¹⁰⁰ Crile, *supra* note 90, at 1788.