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Holding on to Clarity: Reconciling the Federal Kidnapping Statute with the Trafficking Victims Protection Act

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NOTE

Holding on to Clarity: Reconciling the Federal Kidnapping Statute with the Trafficking Victims Protection Act

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In recent decades, the international community has come to recognize human trafficking as a problem of epidemic proportions. Congress responded to this global crisis in 2000 by passing the Trafficking Victims Protection Act (TVPA) and has since supplemented that comprehensive enactment. But, in light of the widespread use of psychological rather than physical coercion in trafficking cases, a long-standing split among federal courts regarding the scope of the federal kidnapping statute raises significant concerns about the United States' efforts to combat traffickers. In particular, the broad interpretation adopted by several circuits threatens effective enforcement of statutes designed to prosecute traffickers, endangers the due process rights of potential defendants, and risks rendering the criminal provisions of the TVPA superfluous. This Note argues that those broader interpretations are incorrect as a matter of proper statutory interpretation, and especially when considered in light of the passage of the TVPA. It further contends that, in kidnapping-by-deception cases, the prosecution must demonstrate that the defendant intended to back up the deception with force or the threat of force if his ruse failed.

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Introduction

Courts have recognized that slavery and involuntary servitude are evolving threats to human rights—likely to morph into forms designed to evade the letter of the law—at least since the period immediately following the passage of the Thirteenth Amendment.[1] In the modern world, slavery and involuntary servitude manifest themselves in the form of human trafficking.[2] As commentators and the public alike have become aware over the past decade, the problem of human trafficking "has reached epidemic proportions."[3] Indeed, there are "more people in slavery today than ever before."[4] The 2014 edition of the Walk Free Foundation's *Global Slavery Index* estimates that

1. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 69 (1872) ("The word servitude is of larger meaning than slavery . . . . It was very well understood that in the form of apprenticeship for long terms . . . or by reducing the slaves to the condition of serfs attached to the plantation, the purpose of the article might have been evaded, if only the word slavery had been used.").

2. Kathleen Kim, *Psychological Coercion in the Context of Modern-Day Involuntary Labor: Revisiting* United States v. Kozminski *and Understanding Human Trafficking*, 38 U. Tol. L. Rev. 941, 941 (2007) ("Human trafficking is synonymous with modern-day slavery according to legislators, law enforcement, immigrant rights advocates, women's rights advocates, and the public at large.").

3. *See, e.g.*, *id.* at 955.

4. *Slavery Today*, Free the Slaves, http://www.freetheslaves.net/about-slavery/slavery-today/ (last visited May 15, 2015).

approximately 35.8 million people are held as slaves today,[5] which is especially startling when compared to estimates placing the total volume of people sold into slavery during the course of the Trans-Atlantic slave trade around 12 million.[6]

Congress responded to this threat in 2000 by passing the Trafficking of Victims and Violence Protection Act of 2000,[7] more commonly known as the Trafficking Victims Protection Act of 2000 (TVPA).[8] The TVPA combats human trafficking holistically by providing for the implementation of programs to prevent human trafficking, programs to protect and assist victims, and provisions focused on the prosecution of human traffickers.[9] In particular the TVPA modifies the provisions of the U.S. Code criminalizing forced labor in order to combat human trafficking.[10]

But there are also other statutes used to prosecute defendants in trafficking cases.[11] The federal kidnapping statute (§ 1201(a)) is one of these independent avenues for prosecution.[12]

Traffickers often take advantage of members of vulnerable populations by inducing them into forced labor.[13] One attribute that differentiates human trafficking from other crimes is the frequency with which traffickers utilize psychological coercion and deception to control their victims, sometimes without any corresponding use of physical force or threats.[14] Section 1201(a) requires both a "taking" and a "holding" of a victim.[15] Although the statute clearly contemplates a "taking" by deception, it is not clear whether continued trickery or falsehood alone is enough to constitute a "holding."[16] As the Second Circuit recently recognized, the question of whether the use of deception alone would allow for prosecution under § 1201(a)—without

5. Walk Free Found., The Global Slavery Index 2014 5 (2014), http://d3mj66ag90b5fy.cloudfront.net/wp-content/uploads/2014/11/Global_Slavery_Index_2014_final_lowres.pdf. The Global Slavery Index defines slavery as "one person possessing or controlling another person in such as [sic] a way as to significantly deprive that person of their individual liberty, with the intention of exploiting that person through their use, management, profit, transfer or disposal." *Id.* at 10. The Index views human trafficking as a pseudonym for slavery. *Id.* at 11.

6. *Estimates*, Voyages: The Trans-Atlantic Slave Trade Database, http://www.slavevoyages.org/tast/assessment/estimates.faces (last visited May 15, 2015).

7. Pub. L. No. 106-386, 114 Stat. 1464 (2000).

8. *See id.* § 101.

9. *See infra* Section I.B.

10. 18 U.S.C. § 1589 (2012).

11. Kelly E. Hyland, *Protecting Human Victims of Trafficking: An American Framework*, 17 Berkeley Women's L.J. 29, 48–49 (2001).

12. 18 U.S.C. § 1201(a).

13. *See infra* notes 53–57 and accompanying text.

14. *See infra* notes 49–51 and accompanying text.

15. *See infra* text accompanying notes 186–198. A "taking" in this context refers to the process by which a kidnapper gains control of his or her victim; the term "taking" does not have any Fifth Amendment connotations. A "holding" refers to the manner in which the kidnapper maintains that control. The contours of that definition have long divided the federal courts. *See infra* text accompanying note 198.

16. United States v. Corbett, 750 F.3d 245, 251 (2d Cir. 2014).

the intention to use physical force if psychological coercion fails—has divided the federal circuits.[17]

The Fifth and Eighth Circuits have answered that question in the affirmative.[18] The Eleventh Circuit, by contrast, has concluded that the prosecution must show a willingness to back up the deception, if it were to fail, with the use of force or threats.[19] Complicating matters further, the Fourth Circuit sometimes appears to agree with the Eleventh Circuit,[20] but at other times proposes an intermediate test requiring only the showing of an opportunity to use force to back up the deception.[21] The resulting confusion has the potential to derail implementation of the TVPA,[22] endangers the due process rights of defendants,[23] and frustrates police attempts to apprehend human traffickers.[24]

Moreover, this confusion is compounded by the fact that *none* of the circuits have provided any significant interpretive analysis supporting their readings of § 1201(a). Nor have any of the circuits considered the impact of their readings on the effort to combat human trafficking. Thus, the overlap between the TVPA and § 1201(a) will bring an issue that has long divided federal courts to the forefront in a way that makes its resolution critical to the United States' continued efforts to combat trafficking.

This Note fills that void by providing an in-depth inquiry into the meaning of § 1201(a) and exploring the significance of this issue in the human trafficking context. It concludes that § 1201(a) requires a demonstrated willingness to use force, and that this interpretation is necessary to properly align § 1201(a) with the TVPA and provide much-needed clarity to authorities seeking to combat human trafficking.

Part I discusses the nature and extent of the problem of human trafficking in the United States and Congress's comprehensive response to it. Part II explores the current split in authority regarding § 1201(a). Part III argues that a broad interpretation of § 1201(a) brings it into conflict with the TVPA and that adopting the interpretation favored by the Eleventh Circuit is required to reconcile the two statutes. Part IV argues that other traditional methods of statutory interpretation support this narrower interpretation.

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17. *Id.*

18. United States v. Garza-Robles, 627 F.3d 161, 166–68 (5th Cir. 2010); United States v. Stands, 105 F.3d 1565, 1576 (8th Cir. 1997); United States v. Carrion-Caliz, 944 F.2d 220, 225–26 (5th Cir. 1991); United States v. Hoog, 504 F.2d 45, 50–51 (8th Cir. 1974).

19. United States v. Boone, 959 F.2d 1550, 1555–56 (11th Cir. 1992).

20. United States v. Higgs, 353 F.3d 281, 313 (4th Cir. 2003).

21. *See* United States v. Lentz, 383 F.3d 191, 202–03 (4th Cir. 2004).

22. *See infra* Sections III.B, III.D.

23. *See infra* Section III.C.

24. *See infra* Section III.D.

I. The Ongoing Effort to Combat Human Trafficking

Increasingly, countries around the world have realized that the problem of human trafficking has escalated.[25] Many nations, including the United States, have responded with legislative action designed to combat this modern manifestation of slavery.[26] But trafficking is notoriously difficult to define[27] and even more difficult to combat.[28] This Part explores human trafficking in the United States and the TVPA. Section I.A discusses the extent of human trafficking in the United States. Section I.B details Congress's response to this growing criminal enterprise.

A. *The Prevalence of Human Trafficking in the United States*

Attempts to quantify the number of human trafficking victims—both in the United States and internationally—have been largely unsuccessful.[29] Globally, estimates of those held in modern-day slavery vary; for instance, in 2012, although the International Labor Organization estimated that the number was approximately 20.9 million people,[30] the State Department had previously reported that the number could fall anywhere between 4 million and 27 million people.[31] These differences could be the result of varying research methodologies,[32] but regardless of the actual number of victims, it is clear that human trafficking is among the "fastest growing illegal businesses" in the modern world.[33]

"Like the global figures, estimates of the scope of trafficking in the United States also vary widely."[34] Estimates have focused almost exclusively on the prevalence of international trafficking and largely ignored interstate

25. Kim, *supra* note 2, at 955 (quoting U.N. Office on Drugs and Crime, FAQ on Trafficking in Human Beings (Mar. 24, 2007)).

26. U.N. Office on Drugs and Crime, Global Report on Trafficking in Persons 22–25 (2009), http://www.unodc.org/documents/human-trafficking/Global_Report_on_TIP.pdf.

27. Kim, *supra* note 2, at 960 ("Both international and domestic legal forums have struggled to capture the conceptual complexity of human trafficking in consistent legal definitions that facilitate the enforcement of human trafficking crimes.").

28. *Prosecution*, humantrafficking.org, http://www.humantrafficking.org/combat_trafficking/prosecution (last visited May 15, 2015).

29. Kim, *supra* note 2, at 956–57.

30. Int'l Labour Office, ILO Global Estimate of Forced Labour 13 (2012), http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—declaration/documents/publication/wcms_182004.pdf.

31. U.S. Dep't of State, Trafficking in Persons Report 8 (2007), http://www.state.gov/documents/organization/82902.pdf.

32. Kim, *supra* note 2, at 956.

33. *See, e.g.*, Juliet Stumpf & Bruce Friedman, *Advancing Civil Rights Through Immigration Law: One Step Forward, Two Steps Back?*, 6 N.Y.U. J. Legis. & Pub. Pol'y 131, 150 (2003).

34. Kim, *supra* note 2, at 956.

trafficking.[35] The Department of Health and Human Services suggests that the best way to assess the scope of the problem domestically is to consider the number of individuals considered to be at risk of exploitation.[36] Although many of these estimates consider only children,[37] the numbers are striking. By one 2002 estimate, between 244,000 and 325,000 young people were considered to be at risk for sexual exploitation in the United States,[38] and for at least some time during 1999, 1.7 million young people were characterized as "runaway or throwaway youth."[39] Likewise, notwithstanding child labor statutes and the valiant efforts of an understaffed Department of Labor, many children are likely illegally employed across the United States.[40] Unfortunately, studies providing numerical estimates for how many of these at-risk children are actually trafficked or exploring the size or victimization of other at-risk groups are few and far between.[41]

Similarly, the perpetrators of human trafficking are not readily categorized.[42] Although large criminal syndicates do orchestrate human trafficking schemes throughout the world,[43] human traffickers in the United States come in many forms; they include individuals and families who often utilize larger criminal networks.[44] As one might expect, different offenders are motivated by a diverse range of goals, but profitability[45] and the economic

35. Heather J. Clawson et al., U.S. Dep't of Health and Human Serv., Human Trafficking into and Within the United States: A Review of the Literature 4 (2009), *available at* http://aspe.hhs.gov/hsp/07/humantrafficking/litrev/index.pdf.

36. *Id.* at 4–7.

37. *Id.*

38. Richard J. Estes & Neil Alan Weiner, Univ. of Pa., The Commercial Exploitation of Children in the U.S., Canada and Mexico 144 (rev. 2002).

39. Clawson et al., *supra* note 35, at 5.

40. *See id.* at 6. In 2004, the department's Wage and Hours Division reported that 5,840 children were employed in violation of child labor laws. *Id.* When combined with the fact that only thirty-four individuals were charged with enforcing those laws, which amounts to about one for every 95,000 child laborers, this number is striking and suggests that the exploitation of child labor is very much widespread. *Id.*

41. Accordingly, the numbers pertaining to at-risk children are provided to give some statistical context to claims that human trafficking is rampant in the United States, despite the fact that actual estimates of domestic human trafficking are not available.

42. *See* LeRoy G. Potts, Jr., Note, *Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons*, 35 Geo. Wash. Int'l L. Rev. 227, 232–33 (2003).

43. *See* Global Survival Network, Crime & Servitude: An Exposé of the Traffic in Women for Prostitution from the Newly Independent States 28 (1997).

44. Amy O'Neill Richard, International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime 13 (1999); Kelly E. Hyland, *The Impact of the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children*, Hum. Rts. Brief, Winter 2001, at 30, 30.

45. *See International Trafficking in Women and Children: Hearings Before the Subcomm. on Near E. & S. Asian Affairs of the S. Comm. on Foreign Relations*, 106th Cong. 11 (2000) (statement of Frank E. Loy, Under Secretary of State for Global Affairs); Bimal Ghosh, Huddled Masses and Uncertain Shores: Insights into Irregular Migration 32 (1998).

advantages of a source of labor that is not subject to ordinary workplace regulation[46] are chief among them.

Even though human trafficking is difficult to define because of the vast differences between perpetrators and the varying goals involved,[47]

> [t]here are similarities across the reported cases which often include little or no pay for menial and difficult work, debt bondage, confiscated documents such as passports, undocumented immigrant status, long and grueling work hours, as well as threats of harm, physical assault, and emotional abuse.[48]

Particularly significant among these commonalities are the "powerful effects of psychological coercion" that "play a key role in entrapment and continued enslavement" in human trafficking cases.[49] When considering the TVPA, Congress provided a striking description of this sort of manipulation common among trafficking cases:

> [For instance, a] nanny is led to believe that children in her care will be harmed if she leaves the home. 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.[50]

In such cases, "there may be no visible signs of physical restraint" and the constraints imposed on the worker's freedom may be very difficult to identify.[51]

Moreover, "[t]rafficked persons are often in a precarious life situation in their country of origin,"[52] which makes them especially susceptible to common types of psychological coercion employed by traffickers, such as suggestions of deportation.[53] For instance, in 2001 two individuals lured three impoverished Jamaican men to the individuals' tree farm in New Hampshire with promises of lucrative employment.[54] Once they arrived, the men's

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46. *Compare* Sheila Neville & Susana Martinez, *The Law of Human Trafficking: What Legal Aid Providers Should Know*, 37 Clearinghouse Rev. 551, 554 (2004) ("[T]raffickers maximize their profits by keeping their costs low. . . . Victims are usually forced to work long hours, sometimes every day, for little or no pay."), *with* 29 U.S.C. § 206 (2012) (establishing a minimum wage), *and id.* at § 207 (establishing a limit on the maximum number of hours employees can work).

47. Kim, *supra* note 2, at 955–60.

48. T.K. Logan et al., *Understanding Human Trafficking in the United States*, 10 Trauma, Violence & Abuse 3, 4 (2009).

49. *Id.*

50. H.R. Rep. No. 106-939, at 101 (2000) (Conf. Rep.).

51. Kim, *supra* note 2, at 942. Of course, many human traffickers do use physical force. This Note does not claim otherwise, despite its focus on trafficking that does not involve such force.

52. *Id.* at 958.

53. *See id.* at 958–60.

54. United States v. Bradley, 390 F.3d 145, 149 (1st Cir. 2004), *vacated*, 545 U.S. 1101 (2005). Prior to recruiting the three victims in this case, the two defendants had abused two

travel documents were confiscated and they were told tales of a similar worker who would be "destroy[ed]" because he ran away.[55] Although the men were physically free to travel around the neighborhood unaccompanied, they were forced to work on the tree farm through psychological coercion and fear.[56] As this case illustrates, "[t]raffickers prey on those with few economic opportunities and those struggling to meet basic needs," who often share characteristics like "poverty, young age, limited education, lack of work opportunities, lack of family support . . . , history of previous sexual abuse, health or mental health challenges, [etc.]."[57] Although these examples focus on international trafficking victims, domestic trafficking victims are often targeted for similar reasons.[58]

Drawing on these similarities—namely, the use of psychological coercion, sometimes accompanied by physical force, and the vulnerability of victim populations—the United Nations defines human trafficking as:

> the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[59]

This definition recognizes the broad range of tactics traffickers utilize to control their victims. Congress has adopted a similarly capacious definition in the TVPA:

> The term "severe forms of trafficking in persons" means (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.[60]

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other Jamaican men they had lured to the United States. *Id.* at 148. One of these men fled and the other returned to Jamaica after his visa expired. *Id.*

55. *Id.* at 149.

56. *Id.*

57. Clawson et al., *supra* note 35, at 7.

58. *See infra* notes 174–177 and accompanying text.

59. G.A. Res. 55/25, annex II, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime (Jan. 8, 2001), http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf.

60. 22 U.S.C. § 7102(8) (2012).

As the next Section details, this broad definition of trafficking is part of a comprehensive congressional effort to combat human trafficking in the United States.

B. *The Passage of the Trafficking Victims Protection Act*

The United States was one of the earliest countries to comprehensively address human trafficking.[61] President Clinton signed the TVPA into law on October 28, 2000, in the waning days of his administration.[62] The TVPA enjoyed broad bipartisan support in both houses of Congress and passed by a vote of 371-1 in the House and 95-0 in the Senate.[63] The Act both (1) created a comprehensive scheme for responding to the many facets of the human trafficking problem, and (2) assuaged due process concerns that prevented existing statutes from effectively responding to the psychological coercion frequently present in trafficking cases.

1. The TVPA was Designed to Provide a Comprehensive Response to Human Trafficking

The TVPA is a broad, thorough, and comprehensive effort to provide a coherent means of combating human trafficking. The Act's three parts focus on the prevention of human trafficking, the protection of and assistance to of victims, and the prosecution and punishment of traffickers.[64]

The TVPA directs the President to establish programs to help prevent human trafficking.[65] The Act places a heavy emphasis on promoting public awareness of the dangers of trafficking and available protections.[66] Subsequent amendments have added to these TVPA programs. For instance, in 2003 Congress added provisions for the support of border interdiction programs,[67] and in 2008, Congress gave the President authority to provide

61. *See* Hyland, *supra* note 11, at 30–31.

62. Presidential Statement on Signing the Victims of Trafficking and Violence Protection Act of 2000, 36 Weekly Comp. Pres Doc. (Oct. 28, 2000), http://www.gpo.gov/fdsys/pkg/WCPD-2000-11-06/pdf/WCPD-2000-11-06-Pg2662.pdf.

63. Hyland, *supra* note 11, at 61.

64. *Id.* at 62; *see also* Joan Fitzpatrick, *Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking*, 24 Mich. J. Int'l L. 1143, 1159–60 (2003).

65. 22 U.S.C. § 7104(a) (2012); Hyland, *supra* note 11, at 62. Congress suggests several avenues for addressing the trafficking issue, including: "microcredit lending programs, training in business development, skills training, and job counseling," "programs to promote women's participation in economic decisionmaking," "programs to keep children, especially girls, in elementary and secondary schools, and to educate persons who have been victims of trafficking," "development of educational curricula regarding the dangers of trafficking," and "grants to nongovernmental organizations to accelerate and advance the political, economic, social, and educational roles and capacities of women in their countries." 22 U.S.C. § 7104(a).

66. 22 U.S.C. § 7104(b).

67. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, §3, 117 Stat. 2875, 2875–77 (codified as amended at 22 U.S.C. § 7104(c)).

technical assistance to expand the capacity of foreign governments to cope with human trafficking.[68]

The TVPA also takes major steps to protect and assist victims of human trafficking.[69] First, the Act directs the Department of State and the U.S. Agency for International Development (USAID) to "establish and carry out programs and initiatives in foreign countries to assist in the safe integration, reintegration, or resettlement, as appropriate, of victims of trafficking."[70] Second, Congress "increased protections for refugees and internally displaced persons," in coordination with intergovernmental and nongovernmental organizations (NGOs), to prevent their exploitation by human traffickers.[71] Third, the TVPA "affords assistance to trafficking victims in the United States regardless of immigration status," which clears the way for them to obtain compensation and services from the Crime Victims Fund.[72] Fourth, it authorizes the Department of Justice to make grants to states, Indian tribes, units of local government, and nonprofits or NGOs "to develop, expand, or strengthen victim service programs for victims of trafficking."[73] And finally, the TVPA mandates that, by 180 days after its passage, federal agencies had to promulgate regulations to ensure that trafficking victims in the custody of the federal government "not be detained in facilities inappropriate to their status as crime victims," "receive necessary medical care and other assistance," and receive protection if their "safety is at risk or there is danger of additional harm by recapture."[74]

Most significantly for the purposes of this Note, the TVPA provides for criminal prosecution of human traffickers by creating several new offenses and modifying others.[75] Of particular relevance are the changes the Act

68. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, §103, 122 Stat. 5044, 5046 (codified as amended at 22 U.S.C. § 7104(i)). Forms of authorized technical assistance include efforts to expand the capacity of foreign governments to do the following: (1) investigate private entities that might be exploiting victims, (2) provide information to members of their public, (3) ensure that workers are being adequately protected, and (4) conduct census-like registrations of vulnerable populations. *Id.*

69. Hyland, *supra* note 11, at 62–63.

70. 22 U.S.C. § 7105(a)(1). In 2003, 2006, and 2008 Congress expanded on the requirements for Department of State and USAID programs, directing that these programs must (to the maximum extent practicable) provide "[s]upport for nongovernmental organizations and advocates to provide legal, social, and other services and assistance" to trafficking victims, *id.* § 7105(a)(1)(B), and "[e]ducation and training for trafficked women and girls," *id.* § 7105 (a)(1)(C).

71. *Id.* § 7105(a)(1)(F).

72. Hyland, *supra* note 11, at 63.

73. 22 U.S.C. § 7105(b)(2)(A).

74. 22 U.S.C. § 7105(c). The Act also provided for the issuance of a T visa for some trafficking victims, Hyland, *supra* note 11, at 65, and took several other steps to help protect trafficking victims. For a full catalog of the original provisions of the Act, see *id*. Those interested in learning how these provisions have been supplemented or altered in the interim (though not in ways that substantively affect the portions of the Act discussed above) can review the current codification of these portions of the TVPA at 22 U.S.C. § 7105.

75. Hyland, *supra* note 11, at 65–66.

made to § 1589 of Chapter 18 of the U.S. Code, which prohibits the use or provision of forced labor. The Act expanded the standard penalty for violations from ten years to twenty years in prison and allowed for a life sentence if one of several aggravating factors, such as kidnapping or the death of a victim, is present.[76] The Act's criminal provisions, both as adopted and as amended, thus mirror the comprehensive nature of its other sections devoted to prevention and victim services.[77] But the TVPA did more than simply modify § 1589 to combat human trafficking. It also sought to address the due process concerns raised by the prosecution of deception-based forced labor that the Supreme Court raised in the late 1980s.

2. The TVPA Resolved Preexisting Due Process Concerns Surrounding the Criminalization of Deception-Based Forced Labor

In the early 1980s, conflicting circuit decisions created confusion regarding the meaning of the federal prohibition on involuntary servitude (§ 1584), which reads: "Whoever knowingly and willfully holds to involuntary servitude . . . any other person for any term . . . shall be fined under this title or imprisoned not more than 20 years, or both."[78] The Second Circuit had previously concluded that psychological coercion or deception alone was not sufficient to constitute a "holding to involuntary servitude," and instead held that a threat of physical or legal force was necessary.[79] The Ninth Circuit disagreed, concluding that "[a] holding in involuntary servitude occurs when an individual coerces another into his service by improper or wrongful conduct that is intended to cause, and does cause, the other person to believe that he or she has no alternative but to perform the labor," regardless of whether that conduct is a threat of physical or legal force or psychological coercion.[80]

Four years later, in *United States v. Kozminski*, the Supreme Court sided with the Second Circuit.[81] In reaching this result, the Supreme Court relied heavily on the history of § 1584 itself,[82] and that analysis is not necessarily

76. 18 U.S.C. § 1589(d) (2012); Hyland, *supra* note 11, at 65.

77. The TVPA also contained several additional enforcement-related directives. For instance, the Act created "an Interagency Task Force to monitor and combat trafficking in persons . . . [by] coordinating the implementation of the legislation; facilitating cooperative international efforts for prevention, prosecution, and reintegration; and expanding interagency data collection and research." Hyland, *supra* note 11, at 66. Additionally, "as an additional enforcement measure, the [TVPA] devotes three sections to the application of international sanctions." *Id.* at 67.

78. 18 U.S.C. § 1584(a).

79. *See* United States v. Shackney, 333 F.2d 475, 480, 487 (2d Cir. 1964).

80. United States v. Mussry, 726 F.2d 1448, 1453 (9th Cir. 1984), *abrogated by* United States v. Kozminski, 487 U.S. 931 (1988).

81. United States v. Kozminski, 487 U.S. 931 (1988) (concluding that a holding to involuntary servitude requires the use or threat of physical or legal force).

82. *Id.* at 944–48.

applicable to § 1201(a). But, the *Kozminski* Court's analysis is highly relevant in several other respects. Justice O'Connor's opinion for the majority expressed a deep concern that the broader interpretation of § 1584 favored by the government

> would appear to *criminalize a broad range of day-to-day activity*; would delegate to prosecutors and juries the inherently legislative task of determining what type of coercive activities are so morally reprehensible that they should be punished as crimes; would subject individuals to the *risk of arbitrary or discriminatory prosecution* and conviction. . . . Moreover, as the Government would interpret the statutes, the type of coercion prohibited would depend entirely upon the victim's state of mind. Under such a view, the statutes would provide almost no objective indication of the conduct or condition they prohibit, and thus *would fail to provide fair notice* to ordinary people who are required to conform their conduct to the law.[83]

As this Note discusses below, these are precisely the same concerns created by the Eighth and Fifth Circuits' interpretation of § 1201(a) as well as the standard articulated by the Fourth Circuit in *United States v. Lentz*.[84]

This concern does not mean that psychological coercion of the type that is common in human trafficking settings could never be criminalized, a fact explicitly recognized by the *Kozminski* Court's invitation to Congress to change § 1584.[85] The TVPA, as originally enacted, did just that. It allows prosecution even when traffickers do not threaten physical violence or the abuse of legal process,[86] such as reporting illegal immigrants who refuse to comply to the authorities. Indeed, Congress's motivation in explicitly defining "serious harm" to include psychological coercion in the TVPA was to prevent *Kozminski*'s application in the human trafficking context.[87] In 2008 Congress added a definition of "serious harm" to further clarify this point:

> The term "serious harm" means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.[88]

These changes are significant, not only because they overturn *Kozminski* in the context of § 1589 prosecutions, but also because they seek to address the Court's due process concerns. They provide a standard that reduces the chance of arbitrary enforcement and excludes innocent conduct in a way that the naked word "hold" in the original forced labor statute did not. The

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83. *Id.* at 949–50 (emphases added).

84. *See infra* Section III.C.

85. *See Kozminski*, 487 U.S. at 952.

86. Kim, *supra* note 2, at 963–65.

87. H.R. Rep. No. 106-939, at 101 (2000) (Conf. Rep.); *see also* 22 U.S.C. § 7101(b)(13) (2012) (congressional findings of TVPA); Kim, *supra* note 2, at 963–64.

88. 18 U.S.C. § 1589(c)(2) (2012).

Kozminski Court's concerns—and, as discussed in Section III.C, those concerns surrounding § 1201(a)—are not implicated to the same extent when Congress has provided a standard by which the public can measure the degree of psychological coercion or deception that has been criminalized.[89] Congress has done so in the TVPA.[90] On the other hand, a broad and largely unexplained judicial interpretation of a statute that lacks the TVPA's clear guidance regarding psychological coercion powerfully emphasized the concerns articulated in *Kozminski*.[91]

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These aspects of the TVPA—its comprehensiveness and efforts to address the concerns raised by the *Kozminski* Court—when coupled with the major role deception plays in human trafficking directly implicate the long-standing split between the circuits regarding the meaning of "hold" in § 1201(a). As the next two Parts reveal, the inherent contradiction between the broad approach taken by the Fifth and Eighth Circuits and these critical functions of the TVPA provides compelling support for the Eleventh Circuit's narrower interpretation. The intermediate approach of the Fourth Circuit creates contradictions similar to the broad approaches.

II. Varying Circuit Interpretations Create Deeply Troubling Ambiguity Surrounding § 1201(a)'s "Hold" Requirement

Before Part III considers how conflict with the TVPA bears on the resolution of the confusion surrounding the meaning of "hold" as used in § 1201(a), this Part describes the split in authority causing the ambiguity. This Part argues that the approaches taken by the courts of appeals in kidnapping-by-deception cases are not compatible with each other, and have not been for some time, despite the failure of most circuits to recognize the split or provide any significant rationale supporting their chosen approach.

The Supreme Court has only addressed the meaning of § 1201(a) once. In *Chatwin v. United States*, Chatwin (a sixty-eight-year-old widower) employed a fifteen-year-old girl as a housekeeper at his home in Utah where he and another individual convinced her that "plural" or "celestial" marriage was a true expression of the Mormon faith.[92] The girl was eventually converted to Chatwin's way of thinking and entered a "celestial" marriage with him, after which she became pregnant.[93] When the girl's parents learned of this they notified the authorities, who took her into custody.[94] Chatwin and

89. *Cf. Kozminski*, 487 U.S. at 949–52 (inviting *Congress* to define "holding" to involuntary servitude to include psychological coercion).

90. *See* 18 U.S.C. § 1589(c)(2).

91. *See Kozminski*, 487 U.S. at 949–52.

92. 326 U.S. 455, 457 (1946). Moreover, there was evidence that the girl had a mental age of only seven. *Chatwin*, 326 U.S. at 457.

93. *Id.* at 457–58.

94. *Id.* at 458.

two codefendants then convinced the girl that she should abide "by the law of God" and run away with them to Mexico; she assented and went to Mexico with the men, where she and Chatwin participated in a civil marriage ceremony.[95] The girl was then brought back to the United States and lived with Chatwin in Arizona for over two years before federal authorities discovered her.[96] Chatwin was convicted of kidnapping, but the Supreme Court reversed his conviction.[97]

The *Chatwin* Court explained that "[t]he act of holding a kidnaped person for a proscribed purpose necessarily implies an unlawful physical or mental restraint for an appreciable period against the person's will and with a willful intent so to confine the victim."[98] In concluding that Chatwin's conduct did not fall within the statute, the Court emphasized that there was no proof that Chatwin "imposed at any time an unlawful physical *or mental* restraint," that "[n]othing indicate[d] that she was deprived of her liberty," that the girl was "perfectly free to leave," and that "[t]here [was] no proof that Chatwin or any of the other petitioners willfully intended through force, fear *or deception* to confine the girl against her desires."[99] Thus, *Chatwin* definitively established that a kidnapping conviction cannot stand when a victim accompanies the defendant voluntarily. On the other hand, the Court's language also implies that when a defendant uses "deception," a kidnapping conviction is permissible.[100]

Because *Chatwin* implicitly recognizes the possibility of "kidnapping by deception" but does not explain what is sufficient for prosecution, it provides little guidance to lower courts determining when deception rises to the level of kidnapping. This has led to widespread confusion among the circuits.

As the Second Circuit recognized in *United States v. Corbett* in April 2014, there is a longstanding split in authority regarding the meaning of the word "hold" in § 1201(a),[101] which reads:

> [w]hoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and *holds* for ransom or reward or otherwise any person, except in the case of a minor by the parents thereof, when [*inter alia*] (1) the person is willfully transported in interstate or foreign commerce . . . shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.[102]

95. *Id.*

96. *Id.*

97. *Id.* at 459–61, 465.

98. *Id.* at 460.

99. *Id.* (emphases added).

100. *See supra* text accompanying note 99.

101. 750 F.3d 245, 251 (2d Cir. 2014).

102. 18 U.S.C. § 1201(a) (2012) (emphasis added). The "*inter alia*" here signals the omission of the plethora of jurisdictional hooks besides transportation in interstate or foreign commerce that have been added to § 1201(a) since its adoption in order to expand the number of

The Second Circuit explained that § 1201(a) "plainly reaches a defendant who 'seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away' his victim by deceit . . . [, but l]ess clear is whether [section 1201(a)] covers a defendant who *continues* to use trickery to 'hold' his victim captive, without resorting to physical or psychological coercion."[103]

The Eleventh Circuit, relying heavily on *Chatwin*, requires intent to use or threaten force in addition to deception in order to demonstrate the "holding" necessary to obtain a conviction. For instance, in *United States v. Boone*, Samuel Boone met with Jonathan Wood and, after an afternoon of alcohol and drug use, induced Wood to travel with him to Georgia by falsely telling him of a marijuana patch there.[104] Boone drove with Wood to a secluded area, where they entered the woods.[105] When Wood discovered he had been deceived, Boone stabbed Wood twice and slit his throat before leaving him to die.[106] Boone was convicted of kidnapping on May 7, 1991, but appealed on the grounds that Wood's choice to travel with him had been entirely voluntary.[107] The Eleventh Circuit rejected this challenge, but it held that "[t]o determine whether a kidnapping by inveiglement has occurred prior to transportation, a fact finder must ascertain whether the alleged kidnapper *had the willingness and intent to use physical or psychological force to complete the kidnapping* in the event that his deception failed."[108]

In contrast, several circuits do not appear to require any showing of intent to resort to physical or psychological force if the defendant's deception fails to maintain control of the intended victim. For instance, in *United States v. Hoog*, the Eighth Circuit upheld a kidnapping conviction. In that case, Hoog and his son lured several women into a car on different occasions under the pretext of transporting them to a job interview before taking them to isolated locations and sexually assaulting them.[109] In so doing, the *Hoog* Court made no mention of any willingness on the part of the defendants to back up this deception by force, concluding only that: "[o]nce they had accepted a ride, Hoog or Mills lured or enticed each of [the women]—again by

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kidnapping cases that fall within federal jurisdiction. *See id.* § 1201(a)(1)–(5). Such additional hooks include performance of such an act within the maritime jurisdiction of the United States, *id.* § 1201(a)(2), within the special aircraft jurisdiction of the United States, *id.* § 1201(a)(3), against the person of a foreign official, internationally protected person, or official guest, *id.* § 1201(a)(4), or against officers or employees of the federal government, *id.* § 1201(a)(5).

103. *Corbett*, 750 F.3d at 251.

104. 959 F.2d 1550, 1552 (11th Cir. 1992).

105. *Boone*, 959 F.2d at 1552–53.

106. *Id.* at 1553.

107. *Id.* at 1554, 1556–57.

108. *Id.* at 1555 (emphasis added). The Eleventh Circuit later re-emphasized this requirement, stating "[w]here an inveiglement occurs and *force is held in reserve only because the kidnapper's deception is operating successfully*, an unlawful interference with the actions of another has occurred . . . such that a kidnapping and holding has occurred under the statute." *Id.* at 1556 (emphasis added).

109. 504 F.2d 45 (8th Cir. 1974).

false promises—to stay in the vehicle during its roundabout course into Kansas[; t]he complaining witnesses were manifestly 'inveigled' or 'decoyed' into accepting rides within the plain meaning of 18 U.S.C. § 1201(a)."[110] Conspicuously absent from this discussion is any requirement that the prosecution prove that either Hoog or his son intended to use or threaten force if the deception failed.[111]

Likewise, the Fifth Circuit does not require a specific intent to use or threaten force. For instance, Ramiro Carrion-Caliz, after transporting several Guatemalan immigrants into the United States illegally, persuaded them to remain in a house in Texas by convincing the immigrants that they would be captured and deported if they left.[112] He then attempted to extort ransom money from the immigrants' family, claiming that he was holding them hostage and that they would disappear if his ransom demands were not met.[113] In recognizing that psychological deception was sufficient to constitute a holding, the Fifth Circuit's decision—using § 1201(a) to interpret the Hostage Taking Act—emphasized that

> kidnapping convictions have been meted out to kidnappers who deceive their victims into accompanying them, *or into remaining with them*. . . . [t]he Government need not show that Carrion [sic] physically restrained or confined [his victims], or that he threatened them with physical force or violence. It is enough *that he frightened or deceived them sufficiently to cause them to remain* in his house when they would have preferred to join [a relative] in Miami.[114]

Meanwhile, the Fourth Circuit seems to have split with itself on this issue. In 2003, the Fourth Circuit appeared to follow the lead of the Eleventh Circuit, concluding that the evidence against a defendant charged with kidnapping was sufficient to show that he "at least was prepared to confine [his

110. *Hoog*, 504 F.2d at 51.

111. Similarly, in 1997, when the Eighth Circuit again considered a kidnapping-by-deception case, it reached a similar result. United States v. Stands, 105 F.3d 1565 (8th Cir. 1997). In this case, Phillip Stands lured Gary Torrez to an isolated location on a Native American reservation to view "ancestral lands" before assaulting him. *Id.* at 1568–70. In affirming Stands' conviction for kidnapping, the court stated that "[Stands] encouraged Torrez to get into and remain in the car when he might otherwise have wished to go on his way. . . . We believe the evidence is more than sufficient to support the government's contention that Phillip inveigled or decoyed Torrez into joining the group." *Id.* at 1576. The court did not mention a willingness to back up this deception with force or threats.

112. United States v. Carrion-Caliz, 944 F.2d 220, 221 (5th Cir. 1991).

113. *Id.* at 222.

114. *Id.* at 225–26 (emphases added) (footnote omitted). The Fifth Circuit has adopted this line of reasoning on at least one other occasion. *See* United States v. Garza-Robles, 627 F.3d 161, 166 (5th Cir. 2010) ("[F]ear or deception [ ] can be sufficient to restrain a person against [his] will." (third alteration in original) (quoting *Carrion-Caliz*, 944 F.2d at 225)). *Garza-Robles* made no mention of an intent to use force if necessary element, but concluded that the government's deception-only theory was not supported by the evidence in this instance. *Id.*

victims] at gunpoint if necessary."[115] But, the Fourth Circuit has not been consistent in its application of this standard; at times it appears to adopt an intermediate approach. For example, in *United States v. Lentz*, the government alleged that a defendant had lured his ex-wife to his house in order to kill her by telling her that she could pick their child up at his residence.[116] The Fourth Circuit held that a jury could reasonably find a "holding" of the victim, because "[f]rom the moment [the ex-wife] pulled up at [the defendant]'s home, she was in his company and no longer 'perfectly free to leave' . . . . Rather [the defendant] was then *in a position to confine her physically if necessary*."[117] *Lentz* thus suggested that the prosecution need not show that a defendant *intended* to back up a failed deception by physical force or threats, but merely that he had the *opportunity* to do so.

Thus, as the Second Circuit explicitly recognized in *Corbett*, current case law does not make clear what exactly must be proven in kidnapping-by-deception cases. The Eleventh Circuit, and perhaps the Fourth Circuit under its reasoning in *Higgs*, seem to require proof of a specific intent to back up—with threats or actual physical force—a deception used to lure victims into accompanying the defendant.[118] The Eighth and Fifth Circuits, to the contrary, appear to allow a "holding" entirely by deception without any additional showing of intent. Finally, and in contrast to *Higgs*, the Fourth Circuit's reasoning in *Lentz* suggests an intermediate approach requiring only the "opportunity" to use force.

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115. United States v. Higgs, 353 F.3d 281, 313 (4th Cir. 2003) (citing United States v. Boone, 959 F.2d 1550, 1555 (11th Cir. 1992)). In *Higgs*, the defendants lured several young women into a van under the pretext of driving them home, took them to a secluded location, and murdered them. *Id.* at 289–90. Higgs appealed his kidnapping convictions, arguing that the victims voluntarily decided to enter the van and travel with the defendants. *Id.* at 313.

116. United States v. Lentz, 383 F.3d 191, 196–98 (4th Cir. 2004).

117. *Id.* at 202–03 (emphasis added) (quoting Chatwin v. United States, 326 U.S. 455, 460 (1946)). The Fourth Circuit also concluded that the jury could have inferred a brief holding prior to the murder once the ex-wife had entered the defendant's house. *Id.* at 203. The *Lentz* Court declined to consider the government's argument that the ex-wife was held by deception during her solo car ride between Virginia and Maryland. *Id.* at 205 n.3.

118. "Specific intent," as opposed to "general intent," is a term that frequently causes confusion among both lawyers and law students. Joshua Dressler, Understanding Criminal Law § 10.06 (6th ed. 2012). As used in this Note, a "specific intent offense" is one

> in which the definition of the crime expressly: (1) includes an intent or purpose to do some future act, or to achieve some further consequence (i.e., a special motive for the conduct), beyond the conduct or result that constitutes the *actus reus* for the offense; or (2) provides that the actor must be aware of a statutory attendant circumstance.

Id.; *accord* Wayne R. LaFave, Criminal Law § 5.2 (5th ed. 2010). In this instance, beyond the general intent to induce the victim into accompanying him by deception, the Eleventh Circuit appeared to require an additional intent to back up that deception by force or threats. This resembles statutes that require intent to achieve a particular goal in addition to intent to commit the actus reus of an offense (e.g. definitions of burglary which require both an intentional breaking and entering as well as an intent to commit a felony inside). *See* Dressler, *supra*, §§ 10.06, 12.03. Accordingly, this Note refers to the additional element required by the Eleventh Circuit as a "specific intent" element.

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None of these courts have provided any significant reasoning to justify their interpretations of § 1201(a) and none have considered the broader implications of their interpretations, particularly in the human trafficking context. At best, these divided circuits create confusion as to the burden the government must bear in kidnapping prosecutions; at worst, the opinions are entirely contradictory. As Part III demonstrates, reconciling § 1201(a) with the TVPA provides a way to clarify the prosecution's burden in § 1201(a) prosecutions.

III. A Narrower Interpretation of the "Hold" Requirement is Necessary to Reconcile § 1201(a) with the TVPA

This Part argues that, given the two central aspects of the TVPA discussed in Section I.B, the broad interpretation of § 1201(a) adopted by the Fifth and Eighth Circuits inherently frustrates the TVPA's proper function. Thus, reconciling § 1201(a) with the TVPA requires adopting the Eleventh Circuit's narrow construction. Section III.A demonstrates that the broad construction of § 1201(a) renders a portion of the TVPA superfluous. Section III.B argues that a broad construction also dilutes the moral force of the TVPA. Section III.C suggests that reading § 1201(a) broadly implicates the precise due process concerns Congress sought to avoid in human trafficking prosecutions when it amended § 1589. And finally, Section III.D explains that ambiguity in the federal statutes designed and used to combat human trafficking has been recognized as a threat to the successful apprehension and prosecution of traffickers.[119] Although Section III.D does not bear directly on *how* that ambiguity should be resolved, it is relevant here because it emphasizes *why* a resolution is urgently needed.

A. *A Broad Interpretation of § 1201(a) Renders a Portion of the TVPA Superfluous*

Courts "generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."[120] "Hence laws dealing with the same subject—being *in pari materia* . . . —should if possible be interpreted harmoniously."[121] Thus, where possible, the provisions of Title 18 of the U.S. Code (setting forth all federal criminal offenses) should be read as a coherent whole.[122] This is true even though it means that a later statute may affect the meaning of an earlier statute, so long as the earlier statute has not

119. *See, e.g.*, Kim, *supra* note 2, at 969–72.

120. Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 184–85 (1988).

121. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 252 (2012); *see also* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 539 (1947).

122. *See* Scalia & Garner, *supra* note 121, at 254 (citing United States v. Ressam, 553 U.S. 272 (2008)).

already been given an authoritative judicial interpretation on the point at issue.[123]

As discussed above, one portion of the TVPA creates criminal sanctions for those who engage in human trafficking.[124] Among those is § 1589, which provides

> Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means—(1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person; (2) by means of serious harm or threats of serious harm to that person or another person; (3) by means of the abuse or threatened abuse of law or legal process; or (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint, shall be . . . fined under this title, imprisoned not more than 20 years, or both. If death results . . . or if the violation includes kidnaping . . . the defendant shall be fined under this title, imprisoned for any term of years or life, or both.[125]

In contrast to § 1201(a), which allows punishment regardless of the defendant's purpose,[126] § 1589 requires that the defendant's action be motivated by a desire to provide or obtain labor or services. The section also explicitly increases punishment if a kidnapping is involved, suggesting that at least some cases could not be considered kidnapping. Finally, subsection (c) of § 1589 includes "psychological, financial, or reputational harm" in the *definition* of "serious harm."[127] The TVPA thus explicitly recognizes the sort of psychological deception that was previously discussed in the context of § 1201(a).

But the broad reading of § 1201(a) proposed by the Eighth and Fifth Circuits and the intermediate approach of the Fourth Circuit would render this statute superfluous in a large number of human trafficking cases.[128] Because these interpretations do not require that the defendant be willing to use force, any deception would be sufficient to allow prosecutors to charge under both statutes, or perhaps even ignore § 1589 entirely.[129] After all, few prosecutors would elect to proceed under § 1589, which provides only a

123. *Id.* at 254–55.

124. Hyland, *supra* note 11, at 65–66.

125. 18 U.S.C. § 1589(a), (d) (2012).

126. 18 U.S.C. § 1201(a) (criminalizing kidnapping when the defendant "holds for ransom or reward or *otherwise*" (emphasis added)).

127. 18 U.S.C. §1589(c)(2) (emphasis added).

128. There are human trafficking cases in which force is used, but none of § 1201(a)'s jurisdictional hooks are implicated; in such cases, § 1201(a) and § 1589 clearly do not overlap. But, given the highly mobile nature of most trafficking operations, and the movement frequently necessary even in smaller operations, these cases are likely to be few and far between.

129. *See infra* Section IV.A.

twenty-year maximum in most cases,[130] when they could proceed under § 1201(a) and bargain with a guaranteed maximum of life in prison. Moreover, § 1201(a) contains no "purpose" limitation, another feature that might make it more attractive to prosecutors.

It makes little sense for Congress to have included a higher penalty for forced labor involving a kidnapping if nearly every incidence of forced labor could be considered a kidnapping. Crossing state lines with a victim or happening to trigger one of the other jurisdictional hooks contained in § 1201(a), perhaps by blind (bad) luck, seems like a very odd reason to allow the imposition of a life sentence. Yet under the interpretations favored by the Fifth and Eighth Circuits and the Fourth Circuit in *Lentz*, only cases without such a hook would preclude a kidnapping charge, since only deception[131] and not any specific intent is required in these jurisdictions.

Thus, a broad reading of § 1201(a) tempts prosecutors to ignore Congress's chosen means of punishing human traffickers (§ 1589) by providing a more attractive avenue to obtain conviction (§ 1201(a)). A broad interpretation of § 1201(a) encourages prosecutors to pursue the more severe kidnapping charge rather than proceed under the framework of the TVPA. Indeed, the breathtaking scope of § 1201(a) writ large (as suggested by the Eighth and Fifth Circuits) would render the TVPA's criminal provisions superfluous in any case in which the prosecution could find a jurisdictional hook.[132]

That the interpretation of § 1201(a) favored by the Fifth and Eighth Circuits could render § 1589 largely superfluous in the vast majority of cases militates strongly in favor of the narrow construction the Eleventh Circuit adopted.[133] After all, if the rule against surplusage[134] leads courts to read statutes to avoid depriving a *single word* of meaning, it hardly makes sense that they would read a statute to render an *entire section* of the U.S. Code redundant.

B. *A Broad Interpretation of Section 1201(a) Dilutes the Moral Force of the TVPA*

As Professor Uhlmann argues, criminal laws are not just about retribution or rehabilitation, they also have moral force:[135] "Criminal prosecution

130. Unless, of course, he could prove that a kidnapping occurred *in addition* to forced labor; alternatively, the prosecutor guarantees the availability of a life sentence (without any additional proof) by charging under § 1201(a) in the first place.

131. The *Lentz* standard also requires the "opportunity to use force," but that requirement really amounts to nothing more than a presence requirement, and not a very clear one at that.

132. *See supra* note 102 and accompanying text (describing the jurisdictional hooks present in § 1201(a)); *see also supra* Section III.A (describing the reasons why the statute does not give the federal government plenary jurisdiction over all kidnapping cases).

133. *See supra* Part II.

134. *See infra* notes 196–197 and accompanying text.

135. David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 Md. L. Rev. 1295, 1335–36 (2013).

has a stigmatizing effect that civil enforcement does not. . . . When we criminalize conduct, we make clear that it is outside the bounds of acceptable conduct in our society."[136] Adopting a broad interpretation of § 1201(a)[137] dilutes the moral force of the TVPA by undermining congressional judgments about the relative culpability of different subsets of traffickers and by encouraging prosecutors to use it only as a superfluous, secondary charge.

Just as rendering conduct criminal in the first place sends a message that conduct is immoral and impermissible in a civilized society, the level of punishment attached to a criminal conviction expresses a moral judgment.[138] It expresses our collective view as to the level of condemnation a given act deserves. The moral judgment component explains why we do not levy the same punishment on a thief as we do a murderer. Moreover, it is Congress that bears primary responsibility for determining which punishments are proportional and which are not,[139] because the legislature, not the courts, best reflects societal judgments about culpability.[140]

In the TVPA, Congress chose to utilize § 1589 to punish traffickers and to magnify sentences only in a certain subset of cases, namely those involving a death or kidnapping.[141] This decision clearly reflects a congressional determination that those cases are particularly heinous and cry out for a particularly severe punishment: the possibility of life in prison. But the interpretation of the Fifth and Eighth Circuits, and the *Lentz* standard, would undo this determination by allowing the possibility of a life sentence under § 1201(a) in nearly every human trafficking prosecution.[142] Thus, failing to require the willingness to use force or threats in kidnapping prosecutions is a judicial end run around the moral judgments about culpability reflected in the TVPA. Section 1589 considers every act of human trafficking to be reprehensible and criminal, but it does *not* consider them to be equally so; the

136. *Id.* at 1336.

137. This includes the "intermediate approach" favored by the Fourth Circuit.

138. Proportionality between crime and punishment is a fundamental principle of justice dating back to time immemorial. *See, e.g.*, U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); *Leviticus* 24:19–20 (St. Joseph) ("Anyone who inflicts an injury on his neighbor shall receive the same in return. Limb for limb, eye for eye, tooth for tooth! The same injury that a man gives another shall be inflicted on him in return."); Hammurabi, The Code of Hammurabi (L.W. King trans., Yale L. Sch.: Avalon Proj. 1915) (1780 B.C.E.), http://avalon.law.yale.edu/subject_menus/hammenu.asp. *But see Matthew* 5:38–39 (St. Joseph) ("You have heard that it was said, 'An eye for an eye and a tooth for a tooth.' But I say to you, offer no resistance to one who is evil. When someone strikes you on (your) right cheek, turn the other one to him as well.").

139. *See* Ewing v. California, 538 U.S. 11, 25–28 (2003) (plurality opinion); *cf.* Calder v. Bull, 3 U.S. (3 Dall.) 386, 399 (1798) (opinion of Iredell, J.).

140. *See Ewing*, 538 U.S. at 26. The courts may intervene only in the exceedingly rare case that a sentence is "grossly disproportionate" to the offense charged. *See* Solem v. Helm, 463 U.S. 277, 286–90 (1983).

141. *See* 18 U.S.C. § 1589(d) (2012).

142. *See supra* Section III.A.

courts should not adopt a judicial interpretation that disrupts this clearly expressed congressional determination that not all human traffickers deserve to face life in prison.[143]

Furthermore, given the comprehensive scheme Congress adopted in the TVPA to combat human trafficking, it seems clear that Congress intended the TVPA (and particularly § 1589) to do most of the work in human trafficking prosecutions. True, most prosecutors would likely still charge both offenses,[144] but it seems unlikely that Congress's intent in passing § 1589 was simply to create a frequently duplicative penalty that might be useful in prosecutors' plea bargaining negotiations. Using § 1589 merely to enhance the government's bargaining position sends the message that the TVPA is not sufficient on its own and suggests that it is unnecessary because human trafficking is just common criminal activity punishable by general federal statutes.

In the face of the dire threat human trafficking presents in our society, some may ask why courts should favor an interpretation that protects at least some human traffickers from the possibility of a life sentence that § 1201(a) provides. But there is good reason to believe that, despite our best intentions, the impulse to magnify punishments in response to our fear of crime does not reflect humanity's best judgment.[145] Where Congress has chosen not to give in to that fear and to design what it believes to be a rationally tiered system of punishment for human trafficking, courts should not second-guess that judgment. Moreover, it is a fundamental principle of American criminal justice that no man should be deprived of his liberty by disregarding his rights, even if he is charged with the most egregious of crimes.[146] As the next Section reveals, a broad interpretation of § 1201(a) majorly threatens those rights.

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143. Life in prison is the second-most extreme sanction in the criminal system, the most extreme sanction being the death penalty.

144. There are many occasions in which prosecutors will indict a defendant on many counts of a single crime (horizontal overcharging) or many crimes (vertical overcharging) in the hopes of inducing a plea bargain to a few or one of those charges in exchange for the dismissal of the others. Albert A. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 85–90 (1968). Prosecutors may also adopt those strategies to create a safety net at trial, hoping that even if the jury does not convict on the kidnapping charge, it would still convict on a forced labor charge. *Cf. id.* at 93 (indicating that many prosecutors like to "play it safe" when it comes to charging because unknown factual circumstances may arise after jeopardy has attached).

145. *See* Scott R. Hechinger, *Juvenile Life Without Parole: An Antidote to Congress's One-Way Criminal Law Ratchet?*, 35 N.Y.U. REV. L. & SOC. CHANGE 408, 427–44 (2011); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529–69 (2001).

146. *See* Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. (forthcoming 2015) (reaffirming that despite the need for confessions in criminal cases, the rights of defendants must still be protected in the interrogation room). As the Supreme Court famously expounded:

> A recurrent argument made in these cases is that society's need for interrogation outweighs the privilege. . . . The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the

C. *A Broad Reading of § 1201(A) Violates the Due Process Rights of Potential Defendants in a Way the TVPA Was Designed to Avoid*

As the *Kozminski* decision clearly demonstrates, ambiguity in criminal statutes is problematic from a due process perspective and raises significant constitutional questions. The Supreme Court has made clear that the Due Process Clauses of the Fifth Amendment (for federal statutes) and the Fourteenth Amendment (for state statutes) render a criminal statute void where "men of common intelligence must necessarily guess at its meaning and differ as to its application."[147] One key reason for this protection is that citizens have a right to reasonable notice of what criminal law prohibits.[148]

Vague statutes also tend to sweep too broadly so as to include "activities which by modern standards are normally innocent."[149] Moreover, vague criminal statutes are problematic because of "the unfettered discretion [they] place in the hands of the . . . police."[150]

> Where . . . there are no standards governing the exercise of the discretion granted by the ordinance, [a vague statute] permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure."[151]

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power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged. . . . "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled [sic] if it fails to observe the law scrupulously. . . . To declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."

Miranda v. Arizona, 384 U.S. 436, 479–80 (1966) (quoting Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)); *cf., e.g.*, *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."); 4 William Blackstone, Commentaries *352 ("[I]t is better that ten guilty persons escape, than that one innocent suffer."); D. Graham Burnett, A Trial by Jury 163–64 (2001) ("I think that we all understand why [the burden of proof is so great]: to protect citizens from the . . . tremendous power of the state. . . . [T]rue justice, final justice, absolute justice, belongs to God; human justice can only be cautious, not perfect. For this reason is the burden so heavy.").

147. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926). Note, however, that courts did not, in many early cases, tie void-for-vagueness decisions to specific parts of the Constitution. *See* Ralph W. Aigler, *Legislation in Vague or General Terms*, 21 Mich. L. Rev. 831 (1923).

148. City of Chicago v. Morales, 527 U.S. 41, 56 (1999); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

149. Papachristou v. City of Jacksonville, 405 U.S. 156, 163 (1972).

150. *Id.* at 168.

151. *Id.* at 170 (quoting Thornhill v. Alabama, 310 U.S. 88, 97–98 (1940)).

Therefore, although the "void for vagueness" doctrine does not require a legislature to speak with perfect clarity[152] and is not employed merely because hypothetical cases are difficult to classify,[153] it does provide a meaningful restriction on the powers of elected legislatures and executives.

These concerns are implicated by the interpretations of § 1201(a) adopted by some circuits. For example, an uncle in Ohio, in order to "induce" his nephew to come with him to Michigan, might falsely promise a hunting trip, knowing that the child's parents had a surprise birthday party waiting for his nephew there. Under an interpretation of § 1201(a) that allows holding by deception with no requirement that the uncle be willing to back up that deception by force,[154] it is unclear if the uncle would be guilty of kidnapping. Of course, one can hardly imagine *any* federal prosecutor who would bring that case—or any FBI agent willing to charge it—but that is precisely the point: the enforcement of the statute is left completely to the arbitrary and potentially discriminatory discretion of law enforcement. Thus the Eighth and Fifth Circuits' interpretations, as well as the *Lentz* court's methodology, raise serious constitutional doubts about § 1201(a) from a due process perspective.[155]

Even in cases that are not so innocent, defendants have a constitutional right to know what conduct is prohibited by a criminal statute.[156] The constitutional doubts created by this ambiguity endanger the convictions of kidnappers in jurisdictions that do not impose the Eleventh Circuit's specific intent requirement. Given that many traffickers employ psychological coercion, those jurisdictions without an intent requirement may be particularly vulnerable to challenges on these grounds.[157]

If these concerns look familiar, it is because they are precisely the same concerns the Supreme Court raised in *Kozminski* when it determined the proper meaning of the word "hold" in a different context.[158] As in that case, Congress has the power to remedy these concerns in order to allow courts to confidently sanction human traffickers. And, it did, in the TVPA.[159] Congress's decision to take that step in the TVPA rather than through § 1201(a) is a compelling reason *not* to interpret § 1201(a) broadly. Through the TVPA, Congress provided a means of protecting due process rights while

152. *See* LaFave, *supra* note 118, § 2.3(a).

153. United States v. Williams, 553 U.S. 285, 303 (2008) ("The 'mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.'" (quoting Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 800 (1984))); *accord* United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 32 (1963); United States v. Harriss, 347 U.S. 612, 626 (1954).

154. And one would hope that an uncle would not be willing to apply physical force in order to get a child to attend his or her own birthday party.

155. *See supra* notes 147–153 and accompanying text.

156. *See supra* note 148 and accompanying text.

157. *See generally* Kim, *supra* note 2 (describing the legal function of psychological coercion in modern-day slavery).

158. *See supra* Section I.B.2.

159. *See supra* Section I.B.2.

still combating human trafficking; the role of the courts is to give life to that scheme, not to allow prosecutors to strangle it by circumvention.

Moreover, the Supreme Court has made clear that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court's] duty is to adopt the latter."[160] This rule of construction, known as constitutional avoidance, applies not only in cases in which one interpretation of a statute *would* render it unconstitutional, but also where a construction raises serious questions about whether it *might* do so.[161] "[I]t represents [a] judicial policy . . . [a] judgment that statutes *ought not* to tread on questionable constitutional grounds unless they do so clearly, or perhaps a judgment that courts should minimize the occasions on which they confront and perhaps contradict the legislative branch."[162] And while this rule has been criticized,[163] it is undoubtedly settled law.[164] Here, the interpretation articulated by the Eighth and Fifth Circuits, as well as that developed by the *Lentz* court, raises significant constitutional due process questions, whereas the interpretation adopted by the Eleventh Circuit does not.[165] Accordingly, the constitutional avoidance canon directs that courts should adopt the latter.

D. *Ambiguity in § 1201(a) Leads to Confused Human Trafficking Enforcement*

The law places a high premium on certainty and clarity in most fields,[166] but those concerns are particularly acute in criminal law. The lack of clarity in criminal laws may lead to arbitrary enforcement by law enforcement officials, who have inadequate guidance as to what conduct is prohibited.[167] Furthermore, uncertainty over when the law allows the police to intervene may

160. United States *ex rel.* Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 407–08 (1909).

161. Gomez v. United States, 490 U.S. 858, 864 (1989) ("It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question."); Scalia & Garner, *supra* note 121, at 247–48 (citing Crowell v. Benson, 285 U.S. 22, 62 (1932)).

162. Scalia & Garner, *supra* note 121, at 249.

163. *E.g.*, Henry J. Friendly, Benchmarks 211–12 (1967); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 815–16 (1983).

164. Scalia & Garner, *supra* note 121, at 249–50.

165. *See supra* text accompanying notes 154–157.

166. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) (citing Benjamin Cardozo, The Nature of the Judicial Process 149 (1921)) (purpose of following precedent is certainty); Allen v. McCurry, 449 U.S. 90, 94 (1980) (purpose of doctrines of res judicata and collateral estoppel is certainty/clarity); Joseph M. Perillo, Calamari and Perillo on Contracts § 3.2(b) (6th ed. 2009) (purpose of the parol evidence rule is certainty and clarity); Joseph William Singer, Property § 11.3.2 (4th ed. 2014) (purpose of the Statute of Frauds is certainty).

167. *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 347–54 (2001) (explaining the special need for clarity in criminal procedure rules involving investigations—such as searches

lead officers to hesitate in action, endangering public safety.[168] Thus, despite the fact that legislatures frequently pass vague or loosely worded criminal statutes that delegate important enforcement decisions to prosecutors,[169] the vast amount of discretion this creates often leads to undesirable results.[170]

The concerns raised by vague criminal laws are clearly illustrated in the human trafficking context when prosecutors have demonstrated marked uncertainty regarding their ability to prosecute cases in which physical coercion is not present.[171] In one instance, a federal prosecutor argued that prosecution was impossible when faced with a ring of traffickers who brought women to the United States from Korea and intimidated them into providing commercial sex services.[172] The prosecutor explained his decision by emphasizing that the coercion involved—employer intimidation and cultural isolation that led the women to believe they had no choice but to submit—was entirely within the victims' minds.[173] This case illustrates the sort of confusion statutory ambiguity can create regarding the psychological coercion inherent in many human trafficking cases. This confusion is amplified when the kidnapping statute is also at issue. Uncertainty on the part of law enforcement and prosecutors consequently endangers the already vulnerable victims of human trafficking, who laws like the TVPA are designed to protect. After all, prosecutors who are confused as to how to prove their cases may simply decide not to bring them.

Similar confusion exists when drugs are used to facilitate human trafficking. Consider a recent incident in which "recruiters" from a Florida farm induced members of vulnerable populations, such as the homeless and those already addicted to crack cocaine, to travel to their farm.[174] Once there, the farm owners used a combination of debt and crack cocaine to keep workers in perpetual peonage.[175] LeRoy Smith, a man with only a fifth-grade education who had been previously "trolling Atlanta's gay district" and trading

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and seizures—because of the pressures police officers face on a daily basis); City of Chicago v. Morales, 527 U.S. 41, 60–64 (1999).

168. One can easily draw this conclusion from the confusion surrounding attempted crimes in which a lack of clarity concerning when police can intervene has tied up courts for years and thus creates problems with training law enforcement officers about when they can or cannot intervene in the interest of public safety. *See* LaFave, *supra* note 118, §§ 11.2(b), 11.4 (explaining that the purpose of attempt law is to allow police to intervene prior to the commission of a crime and discussing the confusion created by the multiplicity of approaches adopted by courts to determine when intervention can occur).

169. Stuntz, *supra* note 145, at 546–57.

170. Kim, *supra* note 2, at 969. For example, prosecutors may fail to bring charges due to uncertainty surrounding the elements of the charges. *Id.*

171. *Id.* at 970–72.

172. *Id.* at 971–72.

173. *Id.* at 972.

174. Ben Montgomery, *Drugs, Debt Bind Laborers in Slavery*, Tampa Bay Times, May 13, 2012, at 1A.

175. *Id.* Specifically workers would be induced to take out loans to pay for food and crack cocaine, which their "wages" would never be able to pay back. *Id.*

sexual acts for crack, was able to simply slip away from the farm in the night.[176] In his words, "[t]he only reason there's no shackles is because now they make the people submit to the cocaine. That's what they use to basically control the people."[177]

This case beautifully illustrates the ambiguity created by the current split in authority, because it is unclear whether the Florida recruiters could be convicted of kidnapping. Smith mentioned no physical abuse, stated that cocaine, rather than physical restraint, was the sole means used to control the victims,[178] and was apparently able to slip away without much difficulty. These factors suggest that the farm owners might not be willing to use force to detain a worker who wanted to leave. At the very least, there is a colorable argument to that effect. Whereas the rationales adopted by the Eighth and Fifth Circuits and the *Lentz* court could support charges based solely on this information, law enforcement operating under the reasoning of the Eleventh Circuit or the *Higgs* court might need more evidence.[179] This sort of uncertainty could cause a prosecutor to elect not to charge a case, or to delay in order to gather more evidence (allowing the harms experienced by victims to multiply along the way).

Even if prosecutors do not hesitate to bring charges, uncertainty in the legal standard jeopardizes convictions to the extent it obscures the elements the government must satisfy. Moreover, § 1201(a) imposes the stiffest penalties of all the statutes frequently used to prosecute human traffickers.[180] Accordingly, ambiguities in its interpretation may cause these enforcement difficulties to be more acute, because law enforcement officers may wait until they have gathered enough evidence to obtain a kidnapping conviction before making any arrests.

Of course, these problems do not necessarily suggest that § 1201(a) *must* be interpreted narrowly, rather they only indicate that the ambiguity should be settled one way or the other. While enforcement uncertainty does

176. *Id.*

177. *Id.*

178. Assuming, for the moment, that cocaine itself could not be counted as physical force so long as the workers use it voluntarily.

179. It is true that prosecutors and law enforcement officers could probably proceed under other federal statutes, such as the forced labor statute modified by the TVPA. *See* 18 U.S.C. § 1589 (2012). But, especially in circumstances as egregious as this, law enforcement and prosecutors have an incentive to try to maximize the charges they can bring against defendants. Additionally, they may still hesitate in order to try and gather sufficient evidence to charge under the kidnapping statute. *See id.* § 1201(a). This effect will occur only at the margins. For those who might die from an overdose on crack cocaine in the meantime, however, marginal effects could literally become a matter of life and death.

180. *See* Hyland, *supra* note 11, at 48–49 (listing the typical charges brought by prosecutors against human traffickers). *Compare* 18 U.S.C. § 1201 (defining kidnapping and providing for a penalty of up to life in prison), *with id.* § 1581 (defining peonage and setting a maximum penalty of twenty years unless certain other crimes are involved), *and id.* § 1584 (defining sale into involuntary servitude and setting a maximum penalty of twenty years unless a kidnapping is involved), *and id.* § 1589 (defining forced labor and setting a maximum penalty of twenty years unless other crimes such as kidnapping or murder are involved).

show how the split over the meaning of § 1201(a) hinders the effectiveness of the TVPA, it does not indicate the best way to reconcile these two statutes. The problems discussed in this Section do, however, indicate why the resolution of this circuit split is so critical—the preceding sections make clear how that should be done.

IV. Other Traditional Methods of Statutory Interpretation Also Support a Narrow Reading of Section 1201(a)

Part III demonstrated that adopting the narrow interpretation of § 1201(a) favored by the Eleventh Circuit is necessary in order to effectively reconcile § 1201(a) with the TVPA. This Part concludes this Note's analysis by suggesting that other traditional forms of statutory construction also favor the Eleventh Circuit's interpretation. Section IV.A determines that the plain text of § 1201(a) suggests that it should be read narrowly. Section IV.B argues that the legislative history of § 1201(a) supports this conclusion. Section IV.C points to at least one additional strand of Supreme Court precedent that favors the Eleventh Circuit's § 1201(a) approach.

A. *The Text of the Kidnapping Statute Supports Requiring an Intent to Hold by Force or Threat*

Any question involving the proper construction of an arguably ambiguous statute begins with the statute's text.[181] "The words of a statute . . . are to be taken in their natural . . . and ordinary signification and import . . . ."[182] Accordingly, the first place to look for guidance as to the meaning of "hold" in the context of § 1201(a) is in a dictionary.[183] To "hold" something or someone as used in contexts similar to the wording of § 1201(a),[184] generally means: "to have possession or ownership of or have at one's disposal," "to keep under restraint," "to have or maintain in the grasp," or "to prevent from leaving or getting away."[185] What unites this series of definitions is the

181. Scalia & Garner, *supra* note 121, at 16. Indeed, some scholars (and jurists) think that the inquiry should not only begin with the text, but also end there. *Id.* at 16–18; *cf.* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum. L. Rev. 673 (1997) (arguing that the use of legislative history impermissibly empowers a subset of Congress). *But cf.* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 863–64 (1992) (arguing that legislative history is a necessary tool to understand the meaning of a statute). This Note takes no position on this debate as it contends that both textualist and purposivist readings of § 1201(a) compel the same interpretation.

182. 1 James Kent, Commentaries *462.

183. Judges often view dictionaries as excellent indicators of the so-called common or ordinary sense of a word. *See, e.g.*, Scalia & Garner, *supra* note 121, at 70, 415–24.

184. 18 U.S.C. § 1201 ("Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and *holds* . . . any person . . . . shall be punished . . . ." (emphasis added)).

185. Merriam-Webster's Collegiate Dictionary 592 (11th ed. 2003). It is important to acknowledge that § 1201(a) was originally adopted in 1932, An Act Forbidding the Transportation of Any Person in Interstate or Foreign Commerce, Kidnaped, or Otherwise Unlawfully Detained, and Making Such Act a Felony (Lindbergh Kidnapping Act), Pub. L. No. 72-

idea that the exercise of control must be such that the object or person to be controlled is not perfectly free to leave. It is a stretch to apply that definition when an alleged kidnapper had no intention to use force or threats to back up the deception he has employed to induce a victim to accompany him.

On the other hand, these definitions do not explicitly preclude consideration of deception as a means of exercising such control, leaving the statute at least arguably ambiguous. Moreover, the statute itself mentions "decoy" and "inveiglement" as means of gaining control.[186] So, critics might ask, why should we presume the legislature did not also intend them to satisfy the holding requirement?[187] Responding to this argument requires looking to two canons of construction: (1) the conjunctive/disjunctive canon, and (2) the rule against surplusage.

First, it is a common rule of both law and grammar that the word "and" in a conjunctive list of elements typically separates two or more distinct elements that must both be met.[188] In their recent treatise on textualism, Justice Scalia and Bryan Garner describe *Office Max, Inc. v. United States*[189] as an example of the proper application of this canon.[190] There, the Sixth Circuit concluded that, because the statute allowed a tax only where "there is a toll charge which varies in amount with the distance and elapsed transmission time of each individual communication,"[191] Office Max could not be taxed on a service whose price varied only based on one of these elements.[192]

In the case of § 1201(a), both a taking—whether in the form of a physical abduction or an "inveigle[ment]" or a "decoy[ ]"—and a holding must occur.[193] This suggests that the word "holds" creates a separate requirement, *above and beyond* the decoy or inveiglement used to gain control of the victim. Moreover, "holds" occurs outside of the disjunctive list containing

189, 47 Stat. 326 (1932) (codified as amended at 18 U.S.C. § 1201), and words do change meaning over time, *see, e.g.*, James Bradstreet Greenough & George Lyman Kittredge, Words and Their Ways in English Speech 234–59 (1901). Accordingly, most textualists insist that the only way to properly explore ordinary meaning is to examine dictionaries from the time the statute was framed; some even go so far as to provide a comprehensive listing of "good" dictionaries to use for each time period. *E.g.*, Scalia & Garner, *supra* note 121, at 78–92, 415–24. Absent any indication that the definition of the word "hold" has shifted radically since the 1930s, however, a lexicographic examination of slight changes in its meaning (if any) is beyond the scope of this Note, particularly because it is likely to turn up nothing of relevance to the process of interpretation.

186. 18 U.S.C. § 1201(a).

187. *But see infra* notes 202–203 and accompanying text.

188. Scalia & Garner, *supra* note 121, at 116–19.

189. 428 F.3d 583 (6th Cir. 2005).

190. Scalia & Garner, *supra* note 121, at 117–19.

191. 26 U.S.C. § 4252(b)(1) (2012) (emphasis added).

192. *Office Max, Inc.*, 428 F.3d at 588–92.

193. 18 U.S.C. § 1201(a) (2012).

"decoys" and "inveigles,"[194] so they are not meant to provide clarification to the meaning of "holds."[195]

Second, the rule against surplusage directs that "courts must . . . lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory."[196] In other words, "[b]ecause legal drafters should not include words that have no effect, courts avoid a reading that renders some words altogether redundant."[197] Here, if the same deception that satisfied the first, "taking," element of section 1201(a) also satisfied the second, "holding," element it would render the latter wholly irrelevant. One who kidnaps a victim by physical force or threats has clearly done something beyond applying the initial force necessary to "take" his victim. With each passing second, the kidnapper continues to apply force to "hold" the victim. The same does not necessarily follow where the victim is "taken" by deception; the alleged kidnaper may do or say nothing additional to the victim once he enters the vehicle or agrees to come along. Absent a metaphysical consideration of the deception as a continuing act, which would seem to wholly vitiate any conception of taking and holding as separate elements,[198] the alleged kidnapper has done *nothing* beyond the initial taking. Hence the broad holdings of the *Hoog* and *Carrion-Caliz* courts cannot be reconciled with the text of § 1201(a).

Of course, the Eleventh Circuit is undoubtedly right to hold that a kidnapper should not be allowed to escape conviction "[w]here an inveiglement occurs and *force is held in reserve only because the kidnapper's deception is operating successfully*."[199] After all, statutes should not be construed so as to cause an absurd result.[200] But, that is not to say that nothing should be required in addition to the deception. This is precisely why the Eleventh Circuit reached the correct conclusion when it required proof of a specific

194. Separated as noted previously by the word "and."

195. *See* Scalia & Garner, *supra* note 121, at 117–19. Thus, the traditional canon *noscitur a sociis*—which holds that where words "are associated in a context suggesting that [they] have something in common, they should be assigned a permissible meaning that makes them similar," *id.* at 195, and especially that "words grouped in a list should be given related meanings," *id.* (quoting Third Nat'l Bank in Nashville v. Impac Ltd., 432 U.S. 312, 322 (1977))—does not apply, because "hold" falls outside the list containing "decoys" and "inveigles."

196. *See* Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union 58 (The Lawbook Exchange, Ltd. 1999) (1868).

197. Scalia & Garner, *supra* note 121, at 176 (citing Lowe v. SEC, 472 U.S. 181, 207 n.53 (1985); Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979); and Burdon Cent. Sugar Ref. Co. v. Payne, 167 U.S. 127, 142 (1897)); *accord* United States v. Butler, 297 U.S. 1, 65 (1936) ("These words cannot be meaningless, else they would not have been used.").

198. To briefly expand on this point, to say that the original deception can—as a "continuing act"—satisfy both the taking and the holding requirements, is to read one or the other out of the statute, because that they are separate element suggests that the word "hold" must add something that the taking requirement alone does not convey.

199. United States v. Boone, 959 F.2d 1550, 1556 (11th Cir. 1992) (emphasis added).

200. *See, e.g.*, Cernauskas v. Fletcher, 201 S.W.2d 999, 1000 (Ark. 1947) (reading "in conflict herewith" into an act that repeals "[a]ll laws and parts of laws"); Grey v. Pearson, (1857)

intent to use force or threats to back up a ruse in kidnapping-by-deception cases.[201] That interpretation provides a reasonable understanding of the statute that avoids both absurdity and reading the "holding" requirement into oblivion. The alternative formulation offered by the *Lentz* court, requiring only the opportunity to use force, does not meet these criteria. That standard would require nothing beyond physical proximity between the alleged defendant and the alleged victim.

Finally, if there is any remaining ambiguity after the exhaustion of the traditional textual methods of statutory interpretation, the rule of lenity dictates that a criminal statute must be interpreted in favor of the defendant.[202] In this case, then, the rule of lenity favors a narrow interpretation:[203] as a matter of textual interpretation, § 1201(a) requires an intention to use force or threats to back up a deceptive taking.

B. *The History and Purpose of § 1201(a) Provide Support for this Narrower Reading*

Congress intended § 1201(a) to supplement, rather than replace, state kidnapping statutes. Its intent was to provide a remedy for the administrative conflicts that often occurred when kidnappers crossed state lines and thus required coordination between the law enforcement agencies of other states. This history and purpose, though it does not directly speak to the definition of kidnapping, at least counsels caution when an interpretation would greatly expand federal jurisdiction.

On March 1, 1932, the infant son of Charles and Anne Lindbergh[204] was kidnapped in what was, at the time, referred to as the "crime of the century."[205] Tragically, the child's body was found in the woods only a few miles from his parents' home; however, the case still triggered national concern over the way "conflicting state laws forced the authorities to conform an otherwise national manhunt to the particular idiosyncrasies of each state

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10 Eng. Rep. 1216 (H.L.) 1234; 6 H.L.C. 61, 106 ("[I]n construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity."); 1 William Blackstone, Commentaries *60 (discussing how the ancient law that "whoever drew blood in the streets should be punished with the utmost severity" did not apply to surgeons).

201. *Boone*, 959 F.2d at 1555.

202. Scalia & Garner, *supra* note 121, at 296–302; *see also* Moskal v. United States, 498 U.S. 103, 108 (1990) (indicating that the rule of lenity is only applied "*after* resort to 'the language and structure, legislative history, and motivating policies' of the statute" (quoting Bifulco v. United States, 447 U.S. 381, 387 (1980))).

203. For this rule to apply, one must be persuaded that the plain text of 18 U.S.C. § 1201(a) (2012) is ambiguous at all.

204. Lindbergh had by this time become a national celebrity as a result of his nonstop flight from New York to Paris using a monoplane named the "Spirit of St. Louis." *See generally* A. Scott Berg, Lindbergh (1998).

205. M. Todd Scott, Comment, *Kidnapping Federalism:* United States v. Wills *and the Constitutionality of Extending Federal Criminal Law into the States*, 93 J. Crim. L. & Criminology 753, 753–54 (2003).

into which it extended."[206] Testimony before the House Committee on the Judiciary revealed that of the 279 kidnappings which took place in 1931, prosecutors only secured sixty-nine convictions, and that in at least forty-four of these cases the kidnapper crossed state lines.[207] Kidnapping, at that time, had become something of a growth industry for organized criminals, who would often kidnap a victim in one state and take the victim across state lines precisely because it would create jurisdictional problems.[208]

The Lindbergh Law (which would eventually become § 1201(a)) was meant to provide a federal solution to these problems.[209] Yet even at the time of passage, there were grave concerns about infringing too greatly on the traditional jurisdiction of the states; after all, kidnapping was already a crime in every state.[210] Indeed, the House version of the bill initially called for a plan that would allow the governor of a state and the U.S. Department of Justice to deputize state law enforcement personnel to act extrajurisdictionally in such cases rather than rely on federal law enforcement officers.[211] Although this plan obviously did not prevail, partly because it would occasion delay in pursuing kidnappers[212] and might have caused the bill's defeat,[213] among other reasons,[214] it still demonstrates a hesitation to expand federal jurisdiction too far.

In 1934, Congress amended § 1201(a) so that a person who was not released by his kidnappers within seven days would be presumed to have traveled in interstate commerce.[215] Though this action expanded federal jurisdiction, it is worth noting that the Senate had originally suggested that the presumption attach after three days, so the amendment adopted was a careful compromise between expanded state and federal authority.[216]

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206. *Id.*

207. *Forbidding the Transportation of Any Person or Persons in Interstate or Foreign Commerce, Kidnaped or Otherwise Unlawfully Detained: Hearing on H.R. 5657 Before the H. Comm. on the Judiciary*, 72nd Cong. 5 (1932) (statement of Cleveland A. Newton); Horace L. Bomar, Jr., *The Lindbergh Law*, 1 Law & Contemp. Probs. 435, 435 (1934).

208. Barry Cushman, *Headline Kidnappings and the Origins of the Lindbergh Law*, 55 St. Louis U. L.J. 1293, 1294–95 (2011). For instance, such action put them beyond the jurisdiction of the police in the state of abduction, and witnesses in the state of destination were beyond the subpoena powers of those police as well. *Id.*

209. Scott, *supra* note 205, at 753–54; *see* Britenae M. Coates, Comment, *The Fourth Circuit's New Interpretation of the Federal Kidnapping Act in* United States v. Wills *and the Resulting Expansion of Federal Jurisdiction*, 80 N.C. L. Rev. 2041, 2044–46 & n.20 (2002).

210. Bomar, *supra* note 207, at 435–37.

211. *Id.* at 436–37.

212. 75 Cong. Rec. 13,288 (1932) (statement of Rep. Andrew J. Montague).

213. *See* 75 Cong. Rec. 13,299.

214. Bomar, *supra* note 207, at 437.

215. Diana M. Concannon, Kidnapping: An Investigator's Guide to Profiling 13 (2008).

216. Bomar, *supra* note 207, at 440.

The current version of the statute, after codification and more than eighty years of tweaking, attaches the presumption after twenty-four hours[217] and includes a number of additional jurisdictional hooks.[218] It is undoubtedly true that this evolution reflects incremental expansion of federal jurisdiction over kidnapping, but what Congress chose not to do is far more telling. Since 1932, the federal commerce power[219] has expanded to such an extent that Congress could almost certainly provide for plenary federal jurisdiction over kidnapping cases.[220] It has not done so, and has instead elected to only gradually expand § 1201(a)'s reach.

Though it is dangerous to draw conclusions from legislative inaction,[221] the heavy consideration of states' rights at the Lindbergh Law's inception and the slow and incremental method of expansion Congress has adopted since then at least caution against a judicial interpretation that would sweep a large amount of activity within the scope of § 1201(a).

C. *A Specific Intent Requirement Better Comports with Supreme Court Precedent Regarding Comprehensive Legislative Enactments*

Though the Supreme Court has not addressed § 1201(a) since *Chatwin*, its precedents are not completely silent on the meaning of the word "hold" in this context.[222]

Beyond the ordinary principle that statutes should not be interpreted in isolation, that the TVPA provides a comprehensive scheme for addressing human trafficking should preclude a broad interpretation of "hold" in § 1201(a). In *FDA v. Brown & Williamson Tobacco Corp.*, the Supreme Court found the FDA's determination that it had jurisdiction over tobacco under

217. 18 U.S.C. § 1201(b) (2012). The presumption only attaches, however, if the jurisdictional hook claimed is transportation in interstate or foreign commerce (§ 1201(a)(1)). *See id.*

218. *See supra* note 102.

219. U.S. Const. art. I, § 8, cl. 3.

220. *Cf.* Gonzales v. Raich, 545 U.S. 1 (2005) ("Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." (quoting Perez v. United States, 402 U.S. 146, 152 (1971))); Wickard v. Filburn, 317 U.S. 111, 127–28 (1942) ("That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.").

221. United States v. Craft, 535 U.S. 274, 287 (2002) ("[C]ongressional inaction [often] lacks persuasive significance because several equally tenable inferences may be drawn from such inaction . . . ." (quoting Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 187 (1994))); *cf.* William N. Eskridge, Jr., *Vetogates,* Chevron*, Preemption*, 83 Notre Dame L. Rev. 1441, 1444–48 (2008) (describing the numerous barriers to congressional action and concluding that "[t]he obvious consequence of the vetogates structure is that federal statutes are hard to enact"). In fact, some argue that it is dangerous to draw conclusions even from legislative history itself. *E.g.*, Scalia & Garner, *supra* note 121, at 369–90.

222. Indeed, *Chatwin* could be read as militating against the interpretations adopted by the Fifth and Eighth Circuits. *See* Chatwin v. United States, 326 U.S. 455, 460 (1946) ("Nothing indicates that [the girl] was deprived of her liberty . . . . [She was] perfectly free to leave.").

the Pure Food and Drug Act was unreasonable because Congress had enacted a comprehensive set of statutes to govern tobacco products elsewhere.[223]

Similarly, Congress created a comprehensive scheme in the TVPA to combat human trafficking, covering prevention, protection and victim assistance, and prosecution.[224] Therefore, by deferring to Congress's comprehensive scheme for regulating human trafficking and reading § 1201(a) of the federal kidnapping statute narrowly, courts would allow the TVPA to work the way Congress designed it. By adopting a narrow interpretation of § 1201(a), courts would provide clear guidance to prosecutors, law enforcement officers, and criminal defendants regarding what conduct is prohibited, what elements must be satisfied, and what punishments courts are likely to impose. These consequences provide compelling support for the Eleventh Circuit's interpretation.

Conclusion

The confusion surrounding the meaning of the word "hold" in § 1201(a) has avoided attention largely because many traditional kidnapping cases stem from situations in which a willingness to use force is not seriously in dispute. Human trafficking changes that analysis. Through the TVPA, the United States became one of the first countries in the world to address human trafficking in a comprehensive way. Reading § 1201(a) broadly has the potential to create a conflict with the TVPA that renders substantial portions of the TVPA superfluous, dilutes its moral force, and raises the very due process concerns Congress sought to avoid in drafting § 1589. Even if adopting a narrow interpretation means that some human traffickers will face lower maximum sentences, failing to do so would be a step backward. Adopting a broader or intermediate interpretation would undermine the will of Congress, infringe on the rights of defendants, undercut respect for the TVPA and its critical place in the global fight against traffickers, and, most importantly, represent a failure to consider how human trafficking can and should influence the way we think about criminal law.

223. 529 U.S. 120, 126 (2000); *see also* Massachusetts v. EPA, 549 U.S. 497, 511–14, 527–32 (2007) (recognizing that the principle set forth in *Brown & Williamson* was valid, but declining to find a comprehensive legislative response with regards to climate change).

224. Hyland, *supra* note 11, at 62; *see also supra* Section I.B.1.