

Summer 2022

Getting Out of Traffic: Applying White Collar Investigative Tactics to Increase Detection of Sex Trafficking Cases

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COMMENTS

GETTING OUT OF TRAFFIC: APPLYING WHITE COLLAR INVESTIGATIVE TACTICS TO INCREASE DETECTION OF SEX TRAFFICKING CASES

Evan Binder*

When federal authorities investigate sex trafficking, three realities are consistently present. First, most sex trafficking investigations begin in response to an individual affirmatively bringing evidence to investigators. Second, the elements required to prove a someone guilty of sex trafficking under federal sex trafficking laws incentivize prosecutors to rely on victim testimony and their cooperation throughout the life of the investigation. This can be, and often is, psychologically traumatizing for the victim. Third, most cases are viewed through a traditional tripartite structure, involving the trafficker, the victim(s), and the purchasers of the sex act (johns). However, recent high-profile sex trafficking indictments of Jeffrey Epstein and the lifestyle brand NXIVM demonstrate that trafficking schemes are frequently much more complex than that tripartite structure and involve many other individuals who either participated or were involved in the illicit conduct. As such, the way federal authorities investigate sex trafficking can, and should be, reimagined.

Combining this knowledge with further research into the psychological effects of saddling victims with the burden of carrying an investigation

* J.D. Candidate 2022, Northwestern Pritzker School of Law. Thank you to Professor Meredith Rountree for invaluable insight and guidance through the entire research and writing process. Special thanks to the editors of the *Journal of Criminal Law and Criminology*, especially Carly Pace, Barrett Cooney, Elisabeth Logan, Liamarie Quinde, Danny Dvorak, Amanda Gvozden, Curtis French, and Teresa Manning. Finally, thank you to my mother and expert proof-reader Kathy Binder for catching every redundant phrasing, tense issue, and missing comma.

through to conviction, sex trafficking investigators can look to prosecutorial tactics used by the Antitrust Division of the Department of Justice. Since 1993, the Antitrust Division has operated their Amnesty Program, which grants immunity to those who either engage in or have knowledge of an illegal price-fixing scheme, and voluntarily bring this information to the government. The Division has seen great success with their leniency program, as over 90% of cases in the Division now begin with an amnesty cooperator. This Comment proposes that a similar leniency program could be utilized for investigating sex trafficking. A leniency program recognizes the three realities listed above: it fits within a reactive process for identifying cases, it relieves burdens on victims to begin investigations, and it recognizes that there are many other individuals who could provide information about illegal trafficking.

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INTRODUCTION

On July 8, 2019, the U.S. Attorney’s Office for the Southern District of New York announced that it had indicted billionaire financier Jeffrey Epstein

on one count of sex trafficking and one count of sex trafficking conspiracy.¹ The indictment alleged that over the course of four years, from 2002 through 2005, Epstein had “enticed and recruited . . . minor girls to visit his mansion . . . to engage in sex acts with him, after which he would give the victims hundreds of dollars in cash.”² These sex acts typically took the form of one-off “massages,” which in actuality were sexual abuse.³ Epstein furthered the scheme by paying his victims to recruit additional minor girls to abuse.⁴

The indictment mentioned only the victims,⁵ three anonymized employees, and Epstein himself.⁶ While the conduct detailed in the indictment was more than sufficient to substantiate the sex trafficking charges against Epstein, it did not encompass the full range of allegations of sexual misconduct levied against the disgraced financier. The indictment also did not indicate all of the persons who may have been involved in the exploitation, such as other abusers, enablers, and victims.⁷ Victims claimed they were transported around the world as Epstein’s sex slaves, both for him and his powerful friends, ranging from British monarch Prince Andrew to

¹ *United States v. Jeffrey Epstein, 19 Cr. 490 (RMB)*, U.S. DEP’T OF JUST. (Sept. 4, 2019), <https://www.justice.gov/usao-sdny/programs/victim-witness-services/united-states-v-jeffrey-epstein-19-cr-490-rmb> [<https://perma.cc/H2J3-7YTA>].

² Indictment at 1, *United States v. Epstein*, No. 19-crim-490 (S.D.N.Y. 2019).

³ *Id.* at 3.

⁴ *Id.* at 1–2.

⁵ There is considerable debate about whether those who have had sex crimes inflicted upon them identify as victims or by another term, such as survivor. *See, e.g., Key Terms and Phrases*, RAINN, <https://www.rainn.org/articles/key-terms-and-phrases> [<https://perma.cc/CR C9-3CTQ>]. Those who have undergone such traumas are free and empowered to identify by any label they see fit, and I do not mean to diminish their voices. However, while prosecutors and investigators are also aware of the benefits of the term survivor, the term victim is used by experts in the criminal justice system to describe persons who have been subjected to a crime. SEXUAL ASSAULT KIT INITIATIVE, VICTIM OR SURVIVOR: TERMINOLOGY FROM INVESTIGATION THROUGH PROSECUTION I, <https://sakitta.org/toolkit/docs/Victim-or-Survivor-Terminology-from-Investigation-Through-Prosecution.pdf> [<https://perma.cc/5SNG-G5KG>]; *Crime Victimization Glossary*, OFF. FOR VICTIMS OF CRIME (May 18, 2020), <https://ovc.ojp.gov/library/crime-victimization-glossary> [<https://perma.cc/22SK-SGES>]. Therefore, for purposes of clarity, I will identify those who were trafficked as victims throughout this Comment.

⁶ *See* Indictment, *supra* note 2, at 1–6.

⁷ *See, e.g., Jeffrey Epstein: Filthy Rich: The Island* (Netflix May 27, 2020) (containing interview with Epstein victim Sarah Ransome, in which she describes being held on Epstein’s private Caribbean island as a sex slave); Julie K. Brown, *New Jeffrey Epstein Accuser Goes Public; Defamation Lawsuit Targets Dershowitz*, MIA. HERALD (Apr. 16, 2019), <https://www.miamiherald.com/news/nation-world/article229277874.html> (reporting on lawsuit by Maria Farmer alleging that Epstein sexually assaulted her sister in 1996).

former United States senator George Mitchell.⁸ Epstein allegedly “loaned” girls to prominent American politicians, foreign presidents, and business executives,⁹ and would film the sex acts on his properties for possible blackmail.¹⁰ While none of these allegations served as the basis for criminal charges, the allegations revealed a world of illicit sex trafficking much wider than that alleged in the July 8, 2019 indictment.¹¹

Epstein’s case illustrates two realities about investigating sex trafficking: (1) sex trafficking schemes and organizations are frequently much more complex than just a trafficker and victim(s), yet (2) even with this complexity, sex trafficking cases are centered around victims testifying against their traffickers. While the nuances of Epstein’s schemes may have been specific to him, the level of complexity of his conduct was not unique. In South Dakota, prosecutors convicted a doctor of giving fraudulent Oxycontin prescriptions to minor victims in exchange for sex, even though he knew they were being trafficked.¹² In southern California, street level traffickers earned cash by selling commercial sex acts with trafficked women and moved that cash all around the world through “mules” who hid the cash in objects such as clothing or toys.¹³

These examples only capture a sliver of the diversity of trafficking schemes currently operating today. While the methods of each scheme differ,

⁸ See Adam Withnall, *Teenage ‘Sex Slave’ Virginia Roberts Claims She Was Paid £10,000 by Jeffrey Epstein to Have Sex with Prince Andrew*, INDEPENDENT (Jan. 4, 2015, 3:33 PM), <https://www.independent.co.uk/news/people/teenage-sex-slave-virginia-roberts-claims-she-was-paid-ps10-000-jeffrey-epstein-have-sex-prince-andrew-london-home-9956338.html> [<https://perma.cc/4VZ5-RCTQ>]; Jane Musgrave, John Pacenti & Lulu Ramadan, *Jeffrey Epstein Victim: He Farmed Me Out to Ex-Senator, Governor for Sex*, PALM BEACH POST (Aug. 9, 2019), <https://www.palmbeachpost.com/news/20190809/jeffrey-epstein-victim-he-farmed-me-out-to-ex-senator-governor-for-sex> [<https://perma.cc/LK7W-9G4U>].

⁹ Paul Lewis, *Jeffrey Epstein: The Rise and Fall of Teacher Turned Tycoon*, GUARDIAN (Jan. 4, 2015), <https://www.theguardian.com/us-news/2015/jan/02/jeffrey-epstein-rise-and-fall-of-teacher-turned-tycoon> [<https://perma.cc/EZ7N-SZHS>].

¹⁰ Pooja Bhagat, *Prince Andrew Might Have Been Caught On Tape With ‘Sex Slave’*, INT’L BUS. TIMES (Jan. 7, 2015), <https://www.ibtimes.com.au/prince-andrew-might-have-been-caught-tape-sex-slave-1407641> [<https://perma.cc/CR8Z-RLSC>].

¹¹ See Indictment, *supra* note 2, at 8–12.

¹² NAT’L HUM. TRAFFICKING RES. CTR., TEN YEARS OF SEX TRAFFICKING CASES IN THE UNITED STATES 4, <https://humantraffickinghotline.org/sites/default/files/Sex%20Trafficking%20Prosecutions%20in%20the%20US%202006-2015%20-FINAL.pdf> [<https://perma.cc/KS A9-3F7R>]; Factual Basis Statement at 1, United States v. Payer, No. 10-cr-40081 (S.D. 2010).

¹³ Opal Singleton, *International Sex Trafficking and Money Laundering Rings in Southern California*, USC SAFE COMTYS. INST. (Aug. 10, 2020), <https://sci.usc.edu/2020/08/10/international-sex-trafficking-and-money-laundering-rings-in-southern-california/> [<https://perma.cc/9K8F-P9AL>].

they are all secretive and involve many individuals other than the victim and the lead trafficker. The secretiveness of sex trafficking stymies investigative efforts, as detecting such schemes is incredibly difficult.¹⁴ However, because these schemes are wide in scope, due to the sheer number of people involved, many individuals have knowledge about them and are simply not coming forward to investigators with that knowledge.¹⁵

When investigating sex trafficking, investigators do not seem to acknowledge either of these realities. Instead of using proactive measures to detect sex trafficking rings, over half of all sex trafficking cases begin by a third-party tip to law enforcement.¹⁶ Further, the law that sex traffickers are prosecuted under, the Trafficking Victim's Protection Act, puts victims at the center of investigations.¹⁷ As a result, investigators become fixated on charging traffickers based on victim testimony at the expense of pursuing investigative avenues involving others in the trafficking scheme.¹⁸ This strategy puts a great burden on the victim to provide enough evidence to convict her trafficker (assuming she is willing to participate) while ignoring other key sources of information and testimony.¹⁹

¹⁴ AMY FARRELL, JACK MCDEVITT, REBECCA PFEFFER, STEPHANIE FAHY, COLLEEN OWENS, MEREDITH DANK & WILLIAM ADAMS., URBAN INST. JUST. POL'Y CTR., IDENTIFYING CHALLENGES TO IMPROVE THE INVESTIGATION AND PROSECUTION OF STATE AND LOCAL HUMAN TRAFFICKING CASES 75 (2012), <https://www.urban.org/sites/default/files/publication/25526/412593-Identifying-Challenges-to-Improve-the-Investigation-and-Prosecution-of-State-and-Local-Human-Trafficking-Cases.PDF> [<https://perma.cc/NY5X-3MPZ>].

¹⁵ See Jennifer A. L. Sheldon-Sherman, *The Missing "P": Prosecution, Prevention, Protection, and Partnership in the Trafficking Victims Protection Act*, 117 PENN ST. L. REV. 443, 473 (2012) (noting the widespread nature of many trafficking rings); FARRELL, MCDEVITT, PFEFFER, FAHY, OWENS, DANK & ADAMS, *supra* note 14, at 42 (finding that only 3% of all cases begin through a confidential informant aware of possible sex trafficking).

¹⁶ FARRELL, MCDEVITT, PFEFFER, FAHY, OWENS, DANK & ADAMS, *supra* note 14, at 39–40.

¹⁷ See 18 U.S.C. § 1591(a) (requiring prosecutors to prove that traffickers used “force, threats of force, fraud, [or] coercion . . . to cause the [victim] to engage in a commercial sex act”).

¹⁸ FARRELL, MCDEVITT, PFEFFER, FAHY, OWENS, DANK & ADAMS, *supra* note 14, at 201–02.

¹⁹ Throughout this Comment, I will be identifying victims as female and traffickers as male, as victims and traffickers are most likely to be female and male, respectively. See *id.* at 56–57. However, while women make up the majority of victims, men and boys are certainly trafficked as well. See DUREN BANKS & TRACEY KYCKELHAHN, BUREAU OF JUST. STATISTICS, U.S. DEP'T OF JUST., CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS, 2008–2010, at 6 (2011). Women are also frequently involved as traffickers as well. See Singleton, *supra* note 13. However, for clarity I will refer to victims as women and traffickers as men throughout this Comment.

While worlds apart, antitrust prosecutions offer a useful alternative model for pursuing sex trafficking organizations. The federal government's antitrust enforcement powers focus on schemes, called "cartels," between market competitors (for example, Virgin Atlantic versus British Airways²⁰) to fix prices, rig bids, or artificially manipulate the market for their own financial gain.²¹ Like sex trafficking, these crimes are highly complex, as they involve coordination between multiple participating parties, and are highly secretive.²² Cartel work is known to and facilitated by multiple people all sharing the same incentive to stay silent.²³ Cartel and sex trafficking investigators primarily rely on tips and self-reporting from those with knowledge of the criminal activity. Neither focus on proactive methods of detection.²⁴

Recognizing that antitrust crimes are difficult to detect but involve many persons that can serve as possible witnesses or sources of evidence, the Department of Justice's Antitrust Division created a leniency program for cartel participants to come forward to alert government authorities about ongoing antitrust conspiracies.²⁵ Anyone with knowledge of or who participated in a cartel can bring evidence to the government in exchange for

²⁰ Press Release, Department of Justice, British Airways PLC and Korean Air Lines Co. Ltd. Agree to Plead Guilty and Pay Criminal Fines Totaling \$600 Million For Fixing Prices on Passenger and Cargo Flights (Aug. 1, 2007), https://www.justice.gov/archive/atr/public/press_releases/2007/224928.htm [<https://perma.cc/WL8Y-HUQ6>].

²¹ Sherman Act, 15 U.S.C. § 2. *See also The Antitrust Laws*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> [<https://perma.cc/VMN8-YLD8>].

²² Sandra Marco Colino, *The Perks of Being a Whistleblower: Designing Efficient Leniency Programs in New Antitrust Jurisdictions*, 50 VAND. J. TRANSNAT'L L. 535, 538 (2017).

²³ Stephen A. Fraser, *Placing the Foreign Corrupt Practices Act on the Tracks in the Race for Amnesty*, 90 TEX. L. REV. 1009, 1018 (2012).

²⁴ *See, e.g.*, FARRELL, MCDEVITT, PFEFFER, FAHY, OWENS, DANK & ADAMS, *supra* note 14, at 77, 80 (discussing investigators reliance on reactive case identification methods); Scott D. Hammond, Deputy Assistant Att'y Gen. for Crim. Enf't, Antitrust Div., U.S. Dep't of Just., *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, Presented at the 24th Annual National Institute on White Collar Crime 3 (Feb. 25, 2010), <https://www.justice.gov/atr/file/518241/download> [<https://perma.cc/FYU3-W8G3>] [hereinafter Hammond, *Evolution of Criminal Antitrust Enforcement*] (noting that over 90% of cases prosecuted by the Antitrust Division originate from leniency program participants).

²⁵ ANTITRUST DIV., U.S. DEP'T OF JUST., CORPORATE LENIENCY POLICY (1993), <https://www.justice.gov/atr/file/810281/download> [<https://perma.cc/9QKP-FESR>] [hereinafter CORPORATE LENIENCY POLICY].

complete immunity from criminal charges.²⁶ From the government's perspective, leniency allows investigators to learn about criminal cartels they otherwise would have no idea existed.²⁷ For cartel members, it allows companies and individuals to report wrongdoing without the fear of exposing themselves to charges.²⁸ Since its inception, the leniency program has been a resounding success, as over 90% of criminal antitrust investigations involve a leniency applicant.²⁹

Given the similarities between sex trafficking and antitrust crimes, this Comment proposes that a Department of Justice, Antitrust Division-style leniency program should be adopted for sex trafficking investigations. Like antitrust crimes, authorities have difficulty identifying sex trafficking and those with a desire to come forward may be reluctant to expose themselves to charges. Therefore, a leniency program for sex trafficking prosecutions demonstrates potential for identifying cases that would otherwise go undetected. Thus, this Comment will show how sex trafficking investigations would benefit from such a program. Part I scrutinizes how sex trafficking rings operate and how they are currently prosecuted. Part II examines the wider scope of sex trafficking, departing from the traditional model employed by prosecutors and investigators. Part III explores how such cases are investigated and identifies the many actors who could qualify for immunity for their testimony and details the creation and success of the Antitrust Division's Amnesty Program. Part IV argues that because of their similarities and the remarkable success of the program for the Antitrust Division, offices investigating sex trafficking should implement their own version of the Amnesty Program.

²⁶ Colino, *supra* note 22, at 543. There are other provisions limiting who is eligible for leniency, such as the company or individual must be the first in the scheme to cooperate. *See infra* Section III.B.

²⁷ *See* Scott D. Hammond, Dir. Of Crim. Enf't, Antitrust Div., U.S. Dep't of Just., Detecting and Deterring Cartel Activity Through an Effective Leniency Program, Presented at the International Workshop on Cartels 4 (Nov. 21, 2000), <https://www.justice.gov/atr/file/518521/download> [<https://perma.cc/9NQG-ZMT5>] [hereinafter Hammond, Detecting and Deterring].

²⁸ Gary R. Spratling, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Corporate Leniency Policy: Answers to Recurring Questions, Presented at the ABA Antitrust Section 1998 Spring Meeting 1 (April 1, 1998), <https://www.justice.gov/atr/file/519531/download> [<https://perma.cc/77GM-SBS2>] [hereinafter Spratling, Corporate Leniency Policy].

²⁹ Hammond, Evolution of Criminal Antitrust Enforcement, *supra* note 24, at 3.

I. SEX TRAFFICKING INVESTIGATIONS

This Part will explore sex trafficking and how it is investigated and prosecuted. Part I is divided into three sections exploring both how sex trafficking currently operates in the United States and how authorities investigate and prosecute offenders. The first section will detail the traditional three-part model that investigators rely on in defining sex trafficking. Next, the Comment will analyze developments in federal statutes addressing sex trafficking. Finally, within this legal framework, the final section examines the ways in which sex trafficking investigations originate.

A. THE NATURE OF SEX TRAFFICKING

In the early 20th century, organized prostitution and sex trafficking frequently took place at a central location, most commonly called a brothel.³⁰ However, the enterprise, and the involved criminal activity, has modernized, increasing its complexity and secretiveness. Through technological development and greater avoidance of law enforcement, sex trafficking takes place at various locations through various forms.³¹ Common to all locations is their secretiveness. Traffickers go to great lengths to keep their victims out of sight of those likely to take notice and alert authorities.³² This secretiveness both furthers the enterprise and makes detection even more difficult.³³

In the traditional framework of trafficking schemes, sex trafficking consists of three types of actors: the traffickers, the victims, and the clients.³⁴ Under this traditional model, the trafficker is the organizer or operator of the

³⁰ 1 HOWARD B. WOOLSTON, PROSTITUTION IN THE UNITED STATES: PRIOR TO THE ENTRANCE OF THE UNITED STATES INTO THE WORLD WAR 38–39 (1921).

³¹ Victims may be delivered to those purchasing illicit sex acts, with over 40% of sex trafficking cases involving victims meeting clients at the client's residence. FARRELL, MCDEVITT, PFEFFER, FAHY, OWENS, DANK & ADAMS, *supra* note 14, at 40. Some traffickers also have roving meeting spots, while others keep victims at one location. Jennifer Gentile Long, *Enhancing Prosecutions of Human Trafficking and Related Violence Against Sexually Exploited Women*, STRATEGIES: THE PROSECUTORS' NEWSL. ON VIOLENCE AGAINST WOMEN, (Aequitas), May 2012, at 3–4. Other common locations take place at lawful businesses, including hotels and motels, massage parlors, or through an escort service. FARRELL, MCDEVITT, PFEFFER, FAHY, OWENS, DANK & ADAMS, *supra* note 14, at 40–41.

³² FARRELL, MCDEVITT, PFEFFER, FAHY, OWENS, DANK & ADAMS, *supra* note 14, at 75.

³³ As discussed more fully *infra* at Part I.C, sex trafficking cases begin not from detection by investigators, but rather by an individual reporting possible illicit activity. *See id.* at 39–40. To maintain secrecy, investigators lament that traffickers change their methods constantly, and operate during business hours to avoid detection. *Id.* at 75.

³⁴ *See* Stephen C. Parker & Jonathan T. Skrmetti, *Pimps Down: A Prosecutorial Perspective on Domestic Sex Trafficking*, 43 U. MEM. L. REV. 1013, 1019–30 (2013).

trafficking ring and plays an active role in the control over their victims.³⁵ While any person who aids or abets a sex trafficking scheme could be considered a perpetrator, under the traditional model, the individual who exerts force over the victims and leads the trafficking ring is considered the perpetrator.³⁶ Traffickers gain control over victims by establishing their subservience through many means, ranging from cultivating a false romantic relationship to physical violence.³⁷ While the techniques may vary, the trafficker is the primary criminal facilitator. Without the trafficker, the trafficking would not exist.

The second group in the traditional model are victims. Victims are defined as persons subjected to sex trafficking.³⁸ More specifically, women or girls who are transported or recruited under the duress of force or coercion for the purpose of exploitation are victims of trafficking.³⁹ Victims are controlled by their traffickers and forced to engage in commercial sex acts, while seeing little to none of the profit.⁴⁰ These commercial sex acts encompass more than just prostitution. Victims can be forced to take part in stripping, mail-order marriages, and pornography.⁴¹ There is no single way that one becomes a victim, as traffickers rely on several methods to identify

³⁵ *Id.* at 1023.

³⁶ *See id.* at 1023–24. *See also* Michelle Jeffs, *Punishing Pimps and Johns: Sex Trafficking and Utah's Laws*, 28 *BYU J. PUB. L.* 219, 224–26 (2013).

³⁷ Traffickers rely on a number of different means of control, including psychological coercion, separation from friends or loved ones, or physical violence. Jeffs, *supra* note 36, at 225; Sarah Crocker, Note, *Stripping Agency from Top to Bottom: The Need for a Sentencing Guideline Safety Valve for Bottoms Prosecuted Under the Federal Sex Trafficking Statutes*, 111 *Nw. U. L. REV.* 753, 761 (2017). Pimps will commonly “groom” victims, in a process where they identify young girls who are likely to have experienced trauma and neglect. *See* Parker & Skrmetti, *supra* note 34, at 1025–27. The pimp will falsely cultivate feelings of love and security with the victim, creating a sense of loyalty by the victim toward her trafficker. *Id.* at 1025. Other traffickers offer false promises of a better life in a foreign country, enticing women from developing nations with job opportunities in a wealthier country, only to force them into sex work. *See* Donna M. Hughes, *Combating Sex Trafficking: A Perpetrator-Focused Approach*, 6 *U. ST. THOMAS L.J.* 28, 51 (2008). Some traffickers will place an artificial debt (called a “debt bondage”) upon victims that they must pay off before they are given their agency and autonomy back, and even then they are still under the trafficker’s control. *See* Sheldon-Sherman, *supra* note 15, at 448.

³⁸ Jeffs, *supra* note 36, at 222.

³⁹ *See, e.g.*, FINANCIAL ACTION TASK FORCE, FINANCIAL FLOWS FROM HUMAN TRAFFICKING 25–26 (2018), <https://www.fatf-gafi.org/media/fatf/content/images/human-trafficking-2018.pdf> [<https://perma.cc/2BK8-XZWW>] [hereinafter FATF REPORT].

⁴⁰ *See* Hughes, *supra* note 37, at 51; Parker & Skrmetti, *supra* note 34, at 1018.

⁴¹ Sheldon-Sherman, *supra* note 15, at 448.

and recruit women and girls.⁴² However, all victims possess some vulnerability, whether financial, emotional, or psychological.⁴³ Traffickers recognize these vulnerabilities and take advantage of them.⁴⁴

The final group in the traditional framework are the clients, commonly referred to as “johns.” They provide the demand that allows sex trafficking schemes to thrive.⁴⁵ Johns can be matched with victims in a number of ways including through the internet, escort services, or direct contact with the trafficker.⁴⁶ Johns may or may not be aware that victims are being trafficked and may believe that they are engaged with women who are willing sex workers.⁴⁷

While this tripartite structure is factually true in many circumstances,⁴⁸ it is unduly limiting, as evidenced by the conduct of Jeffrey Epstein and other notable examples.⁴⁹ Pimps, victims, and johns are by no means the only actors involved in sex trafficking. Examples such as Epstein show that schemes can operate amongst the world’s financial and political elites involving many more people than just the categories in the traditional approach. They can also operate among street gangs due in part to the lucrative nature of sex trafficking and the low risk of detection.⁵⁰ Others build

⁴² Recent examples include traffickers posing as modeling agencies, *United States v. Flanders*, 752 F.3d 1317, 1326 (11th Cir. 2014), recruitment through internet chat rooms, *United States v. Chappell*, 779 F.3d 872, 874 (8th Cir. 2015), or advertising job opportunities in the U.S., *State v. Vass*, No. 14-22076B (Fla. Miami-Dade County Ct. Nov. 15, 2015). See NAT’L HUM. TRAFFICKING RES. CTR., *supra* note 12, at 3–5.

⁴³ See Crocker, *supra* note 37, at 767.

⁴⁴ Parker & Skrmetti, *supra* note 34, at 1017.

⁴⁵ Jeffs, *supra* note 36, at 224.

⁴⁶ FARRELL, MCDEVITT, PFEFFER, FAHY, OWENS, DANK & ADAMS, *supra* note 14, at 76–77, 152; Long, *supra* note 31, at 3–4.

⁴⁷ Jeffs, *supra* note 36, at 224.

⁴⁸ See *id.* at 226; Parker & Skrmetti, *supra* note 34, at 1018.

⁴⁹ Another high-profile sex trafficking case was the NXIVM sex cult, popularized by the HBO docuseries *The Vow*. Dan Reilly, *What to Know About HBO’s The Vow and the NXIVM Sex Cult*, VULTURE (Aug. 24, 2020), <https://www.vulture.com/article/the-vow-nxivm-cult-what-to-know.html> [<https://perma.cc/8KFA-QJ9N>]. Branded as providing self-improvement services, the company operated as an underground sex cult, leading to the conviction of six individuals on charges related to sex trafficking. Vanessa Grigoriadis, *Inside Nxivm, the ‘Sex Cult’ That Preached Empowerment*, N.Y. TIMES (May 30, 2018), <https://www.nytimes.com/2018/05/30/magazine/sex-cult-empowerment-nxivm-keith-raniere.html> [<https://perma.cc/745N-DUU8>]; Andrew R. Chow, *NXIVM Leader Keith Raniere Has Been Convicted for Keeping Women as ‘Sex Slaves.’ Here Are the Major Players in the Case*, TIME (June 19, 2019, 5:24 PM), <https://time.com/5568135/nxivm-allison-mack-raniere/> [<https://perma.cc/R2HT-35LB>].

⁵⁰ Long, *supra* note 31, at 5–6.

industries around sex trafficking by operating lawful businesses, such as strip clubs, pornography production companies, or massage parlors, and traffic victims through those businesses.⁵¹ With the many forms of sex trafficking comes massive profits. The value of the global trade of persons for commercial sex practices ranges from lower estimates around \$7–12 billion⁵² to upwards of \$99 billion a year.⁵³ On a smaller scale, a trafficker can make between \$4,000 and \$50,000 per victim.⁵⁴

B. THE TRAFFICKING VICTIMS PROTECTION ACT OF 2000 AND THE “VICTIM-CENTERED” APPROACH

Today, sex trafficking is prosecuted under the Trafficking Victims Protection Act of 2000 (TVPA).⁵⁵ Recognizing the lack of comprehensive modern anti-sex trafficking legislation,⁵⁶ the TVPA punishes anyone who “recruits, entices, harbors, transports, provides, obtains, . . . [or] maintains . . . by any means a person” or “benefits, financially or by receiving anything of value, from participation” in the sex trafficking scheme.⁵⁷ To be found guilty of sex trafficking under the TVPA, the government must prove: (1) the defendant acted in furtherance of or benefit from a commercial sex act, (2) the defendant knew or recklessly disregarded that force, fraud, or coercion would cause the victim to engage in a

⁵¹ Sheldon-Sherman, *supra* note 15, at 448; Hughes, *supra* note 37, at 28, 35.

⁵² Donna M. Hughes, *The “Natasha” Trade: The Transnational Shadow Market of Trafficking in Women*, 53 J. INT’L AFFS. 625, 625 (2000).

⁵³ FATF REPORT, *supra* note 39, at 13.

⁵⁴ Jeffs, *supra* note 36, at 219 (quoting *Human Trafficking’s Dirty Profits and Huge Costs*, INTER-AMERICAN DEV. BANK (Nov. 2, 2006), <https://www.iadb.org/en/news/human-traffickings-dirty-profits-and-huge-costs> [<https://perma.cc/7XUK-MDTD>]).

⁵⁵ 18 U.S.C. § 1591; Parker & Skrmetti, *supra* note 34, at 1030.

⁵⁶ Prior to the TVPA’s passage, federal prosecutors relied on a patchwork of different statutes, none of which were specifically written to combat sex trafficking. *See* Crocker, *supra* note 37, at 757–58. Such statutes included post-Civil War anti-slavery and involuntary servitude laws, 18 U.S.C. §§ 1581–84, and the Mann Act of 1910, 18 U.S.C. §§ 1421–24, which criminalized transporting individuals in furtherance of prostitution. *See also* Sheldon-Sherman, *supra* note 15, at 451. However, because these laws attempted to solve different problems in much earlier time periods, they were too limited to reflect the nuance of modern sex trafficking. *See, e.g.*, 18 U.S.C. §§ 1581–84 (outlining criminal penalties for involuntary servitude only recognizing physical coercion). The TVPA was passed specifically to combat human trafficking, instead of continuing to wedge sex trafficking prosecution and prevention into an existing law. *See* 22 U.S.C. § 7101.

⁵⁷ 18 U.S.C. § 1591(a)(2).

commercial sex act or that the victim was under 18 years of age, and (3) the activity was in or affecting interstate or foreign commerce.⁵⁸

The criminal sanctions are only one subset of the TVPA's legislative goals. The law's central purposes have been called the "three P's": punish traffickers, prevent trafficking (internationally and domestically), and provide services to victims.⁵⁹ The three P's lay out the ultimate aim of the TVPA: to eradicate sex trafficking and ensure victims are identified and assisted.⁶⁰ In addition to the criminal sanctions, the law focuses more widely on the welfare of victims, providing funding for services such as psychological counseling, housing, and legal services.⁶¹

The TVPA notably adopts a "victim-centered" approach. Investigators and humanitarians concentrate on uncovering sex trafficking rings to save victims from further abuse.⁶² Once victims are no longer under the control of their traffickers, the TVPA provides victims with financial assistance and emotional services to help them overcome their trauma.⁶³ The victim-centered approach extends to prosecution of traffickers, as cases are centered on victim testimony.⁶⁴

The key element to convict a perpetrator of sex trafficking is the requirement that the victim was under the "threat[] of force, fraud, [or] coercion."⁶⁵ A victim can single-handedly prove this element, as she is the person best positioned to testify about physical harm inflicted upon her or about how she was coerced or defrauded under the TVPA.⁶⁶ It is nearly impossible to bring a successful case under the TVPA without victim testimony.⁶⁷ In addition to satisfying the duress elements of the TVPA,

⁵⁸ *Id.*; see also Parker & Skrmetti, *supra* note 34, at 1032.

⁵⁹ 22 U.S.C. § 7101(a) ("The purposes of this chapter are to combat trafficking in persons, . . . to ensure just and effective punishment of traffickers, and to protect their victims.").

⁶⁰ Hughes, *supra* note 37, at 36–37.

⁶¹ Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 203, 129 Stat. 227, 247 (2015).

⁶² Hughes, *supra* note 37, at 37.

⁶³ Sheldon-Sherman, *supra* note 15, at 456.

⁶⁴ Hughes, *supra* note 37, at 38.

⁶⁵ 18 U.S.C. § 1591(a)(2).

⁶⁶ Terry Coonan, *Anatomy of a Sex Trafficking Case*, 5 INTERCULTURAL HUM. RTS. L. REV. 313, 341 (2010).

⁶⁷ Hughes, *supra* note 37, at 37; Coonan, *supra* note 66, at 341. Commenting on the necessity of victim's cooperation in obtaining a TVPA conviction, federal prosecutors state that "there's just no way to do it . . . without having to call the [victims as witnesses]." FARRELL, MCDEVITT, PFEFFER, FAHY, OWENS, DANK & ADAMS, *supra* note 14, at 202.

victims also shed light on other aspects of their trafficking, leading to additional evidence. A victim can identify her perpetrators across the organization's hierarchy, ranging from those in charge of recruiting new prostitutes to the head of the ring.⁶⁸ She can provide phone numbers of those involved. She can identify locations in which she met clients and how they were paid. At trial, a victim can offer a compelling narrative for a jury to sympathize with, which increases the likelihood of conviction.⁶⁹ Given the breadth of information that a victim can provide, it is clear why investigators train their focus on them to build cases against traffickers.

However, centering cases around victim cooperation has complex consequences, both for the investigators and for the victims themselves. Before a victim can begin contributing to the criminal investigation against her trafficker, investigators spend a great deal of time and effort determining whether that individual should even be considered a victim,⁷⁰ asking whether the individual willingly took part in sex work or is a perpetrator furthering the scheme.⁷¹ To be considered a victim under the TVPA, she must either (1) be a minor or (2) have been under the duress of force, fraud, or coercion.⁷² If she is a victim, investigators further assess whether she moved up the ranks within the sex trafficking ring to become a "bottom," (i.e., someone with more responsibility in recruiting and overseeing the forced prostitution of other victims).⁷³ The decision whether to see someone as a bottom or as a victim determines whether the individual becomes the star witness in building a sex trafficking case or one of the prosecution's targets.⁷⁴ Reaching this determination can take weeks as prosecutors interview an individual to comprehend the full extent of her story.⁷⁵

⁶⁸ Sheldon-Sherman, *supra* note 15, at 476.

⁶⁹ *See id.*

⁷⁰ Crocker, *supra* note 37, at 773.

⁷¹ *Id.*

⁷² 18 U.S.C. § 1591(a)(2).

⁷³ Crocker, *supra* note 37, at 771–73.

⁷⁴ Hughes, *supra* note 37, at 37; Crocker, *supra* note 37, at 775–76.

⁷⁵ *Id.* While bottoms are not always charged, see, for example, *Jeffrey Epstein: Filthy Rich: Hunting Grounds* (Netflix May 27, 2020) (showing interviews with Epstein's victims who faced criminal liability but were not charged), bottoms who have been previously victimized are common in many different types of trafficking schemes, and are sometimes charged by prosecutors. See, e.g., Crocker, *supra* note 37, at 778; Criminal Complaint, United States v. Campbell, No. 1:10-cr-00026 (N.D. Ill. Jan. 12, 2010); Government Sentencing Memorandum, United States v. Campbell, No. 1:10-cr-00026 (N.D. Ill. May 8, 2012) (charging bottom even though she had been previously victimized); Indictment, United States v. Ranieri, No. CR-18-204 (E.D.N.Y. Apr. 19, 2018) (charging Alison Mack in the NXIVM scheme).

Even if investigators determine that the identified individual is a victim of sex trafficking and can potentially become the prosecution's key witness, the feeling may not be mutual. Many victims may believe they have done something wrong and are afraid they will be prosecuted.⁷⁶ Even if the victim understands that she was victimized, she may be unwilling to cooperate with the investigation for any number of other reasons—for example, she may not trust the government to keep her safe or obtain justice in her case.⁷⁷ She may feel that she has no alternatives besides the life provided by her trafficker,⁷⁸ or may feel a sense of love and loyalty towards her trafficker.⁷⁹ Or she may be fearful of repercussions by her perpetrator and determine it is safer not to say anything that could make her situation worse than it already is.⁸⁰ These issues are exacerbated for victims trafficked from other countries where obstacles such as a language barrier or unfamiliarity with government services prevent victims from cooperating.⁸¹

Even if a victim overcomes these obstacles and initially cooperates with investigators, the protracted process of building and prosecuting a case can become too much for a victim to handle.⁸² Cooperation with investigators can take years, requiring victims to recount their trauma dozens of times through investigation and trial.⁸³ Because trauma affects everyone differently, the victim may have trouble remembering details of her abuse undermining her

⁷⁶ FARRELL, MCDEVITT, PFEFFER, FAHY, OWENS, DANK & ADAMS, *supra* note 14, at 81–82.

⁷⁷ Sheldon-Sherman, *supra* note 15, at 464.

⁷⁸ Jennifer Gentile Long & Teresa Garvey, *No Victim? Don't Give Up*, STRATEGIES: THE PROSECUTORS' NEWSL. ON VIOLENCE AGAINST WOMEN (Aequitas), Nov. 2012, at 1.

⁷⁹ Crocker, *supra* note 37, at 768.

⁸⁰ Sheldon-Sherman, *supra* note 15, at 449–50.

⁸¹ The United States Department of State estimates that between 14,500 to 17,500 persons are trafficked into the United States from other countries. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 23 (2004), <https://2009-2017.state.gov/documents/organization/34158.pdf> [<https://perma.cc/9GC5-BEXM>]. When interacting with police, they may not speak English, which logistically makes investigating that much more difficult. FARRELL, MCDEVITT, PFEFFER, FAHY, OWENS, DANK & ADAMS, *supra* note 14, at 89. If the woman is in the United States illegally or has entered the country through visa or passport fraud, she may be unwilling to discuss the nuances of her case, as it could have her deported. Sheldon-Sherman, *supra* note 15, at 464. If the victim comes from a nation with police corruption or police participation in the sex trafficking industry, she may never trust American investigators enough to give valuable evidence in a case against her trafficker. *Id.* at 465.

⁸² Sheldon-Sherman, *supra* note 15, at 465

⁸³ See Hughes, *supra* note 37, at 37–38.

ability to aid investigators and withstand cross-examination (should the case go to trial).⁸⁴

These issues are only exacerbated if a victim does not cooperate or decides midway through the investigation to stop cooperating. Prosecutors will go to great lengths to ensure victims' testimony because of how central they are to the government's case.⁸⁵ And because victims engaged in illegal sex work (even against their will), prosecutors possess ever-present leverage over victims and are able to charge them at any time.⁸⁶ Prosecutors will either charge or threaten to charge the victim with a crime to ensure she testifies against her trafficker.⁸⁷ Where the victim is a minor, prosecutors sometimes charge them with a misdemeanor offense to hold them in a state facility thereby separating and protecting them from their traffickers to ensure their testimony.⁸⁸ These tactics, while useful for the prosecutor's case, only make the victim's recovery that much harder. Because the government is threatening them with a criminal record, victims can feel re-victimized as they are still expected to be subservient to a more powerful actor or face harsh consequences.⁸⁹ In the effort to convict a trafficker, the victim of the trafficking becomes victim to the might of the prosecutor and the stigma of a criminal record.⁹⁰

The reliance on victims also goes against the entire purpose of the TVPA: to ensure and protect the welfare of victims. Placing the responsibility of successful prosecution on the victim's testimony is a heavy burden that many may not be equipped to emotionally handle.⁹¹ At the very least, such an experience is mentally and emotionally taxing and does not further the TVPA's stated purpose to benefit the victim as she moves past her experiences with trafficking.⁹² It is counterintuitive to simultaneously promote a law to help victims overcome their trafficking experiences while also requiring them to relive the horrors of those experiences time and again throughout the investigative process. While we cannot expect to prosecute every sex trafficking case without any victim testimony, investigators can

⁸⁴ Sheldon-Sherman, *supra* note 15, at 465.

⁸⁵ Robert Moossy, *Sex Trafficking: Identifying Cases and Victims*, 262 NAT'L INST. JUST. J. 2, 7 (2009).

⁸⁶ See Jeffs, *supra* note 36, at 251.

⁸⁷ Crocker, *supra* note 37, at 777–78.

⁸⁸ Jeffs, *supra* note 36, at 251.

⁸⁹ See Crocker, *supra* note 37, at 778.

⁹⁰ *Id.* See also Jeffs, *supra* note 36, at 251.

⁹¹ Sheldon-Sherman, *supra* note 15, at 465.

⁹² See 22 U.S.C. § 7101(a).

rely on other avenues of evidence-gathering to lessen the evidentiary burden placed upon the victim.⁹³ As this Comment argues in greater depth in Part IV, implementing a program that incentivizes perpetrators to come forward with evidence of sex trafficking would go great lengths toward easing that burden off victims.

C. HOW SEX TRAFFICKING INVESTIGATIONS BEGIN

Though Congress sought to stop sex trafficking and protect victims through the TVPA, they did not include proactive detection techniques and strategies in their reform.⁹⁴ To identify sex trafficking cases, prosecutors overwhelmingly adopt a reactive approach, waiting for law enforcement authorities to bring cases to them instead of devoting resources to detecting these cases themselves.⁹⁵ This approach is evident in the investigative statistics, with 37% of all sex trafficking cases beginning as a tip from a third-party to law enforcement.⁹⁶ Additionally, 18% of new cases are identified during the course of existing sex trafficking investigations.⁹⁷ Conversely, only 10% of all cases began with a victim self-reporting to police.⁹⁸

By comparison, sex trafficking violations detected by proactive investigative measures only make up a fraction of documented cases,

⁹³ See, e.g., Hughes, *supra* note 37, at 37–38 (arguing to refocus trafficking investigations to center on perpetrators instead of victims); Human Trafficking Fraud Enforcement Act of 2015, H.R. 1311, 114th Cong. (2015) (proposing new criminal enhancements for tax evasion in furtherance of sex trafficking).

⁹⁴ See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1465 (2000). While the TVPA is notable for its expansion of sex trafficking penalties and its focus on the welfare of victims after they have been removed from their traffickers' grasp, see Crocker, *supra* note 37, at 759, Congress did not create any new methods of detection, nor did they empower agencies to rely on proactive detection methods.

⁹⁵ FARRELL, McDEVITT, PFEFFER, FAHY, OWENS, DANK & ADAMS, *supra* note 14, at 196.

⁹⁶ *Id.* at 42. These tips come from a number of different sources, ranging from a bystander who simply suspects wrongdoing to a john who believes that a prostitute was being trafficked. *Id.* at 39–40, 44. Interestingly, it is not uncommon for johns to notify investigators that the prostitute they had illegally engaged with was possibly being trafficked. What makes it surprising is also what limits the number of tips: the john is engaging in an illegal activity. Because prostitution is widely illegal, a john opens himself up to criminal liability in order to report his suspicion of sex trafficking. Even though some are willing to eschew their own self-interest and report possible trafficking, many others are likely deterred from reporting possible trafficking because of the illegality of prostitution.

⁹⁷ *Id.* at 42. Because many of the cases that were discovered through ongoing investigations were somehow originally detected, it is likely that many of those cases also originated from a third-party tip. As such, it is likely that upwards of half of all cases ultimately began from third-party tips.

⁹⁸ *Id.* at 217.

comprising about 12% of sex trafficking cases.⁹⁹ These totals confirm that investigators are not discovering their cases through proactive detection, and that prosecutors are mostly at the whim of good Samaritans reporting suspected illicit conduct. The reliance on third-party reporting also illustrates the problems of building cases around victim cooperation and testimony. Even if a victim self-reports, she is still saddled with the difficulties of cooperating throughout the entire investigative process.¹⁰⁰ Yet the vast majority of victims do not voluntarily come forward—they are discovered through other means.¹⁰¹ As a result, victims need to be convinced from the outset to participate in what could be a years-long investigation, which can breed skepticism, contempt, or unreliability on the part of the victim.

This data shows that neither perpetrators nor victims come forward to investigators to report trafficking, as there is little incentive to do so. Unless investigators are willing to exponentially increase proactive detection efforts, the incentives for reporting illegal activity need to change. The secretive nature of sex trafficking is an impediment to adequate detection, as there are only so many third-party observers who are willing to report suspicious activity. Because of this, if Congress wants to effectuate its purpose of eradicating sex trafficking, it needs to create further avenues to increase detection.

II. THE WIDER SCOPE OF SEX TRAFFICKING

Any criminal organization, especially one with an international reach, involves more people than the trafficker, the john, and the victim. Everyone involved in the ring ensures its success and prevents detection. Individuals managing the finances of a trafficking organization, hotel employees, internet domain providers, or bank employees all have relevant information. Each may face criminal liability for their role in facilitating illegal sex trafficking. However, it is difficult for prosecutors to charge them under the TVPA, as such individuals may not have the required intent or knowledge of the trafficking, or because prosecutors cannot prove that they engaged in, or conspired in, the requisite fraud, force, or coercion.¹⁰² However, these

⁹⁹ *Id.* at 40. Examples of proactive measures include sting operations, intelligence development on local criminal activities, or standardization of questionnaires for service provider interviews of runaway children. *Id.* at 42, 73, 79.

¹⁰⁰ *See supra* Part I.B.

¹⁰¹ *See* FARRELL, MCDEVITT, PFEFFER, FAHY, OWENS, DANK & ADAMS, *supra* note 14, at 42.

¹⁰² *See supra* Part I.B (discussing the required elements of proof for conviction under the TVPA).

individuals are not immune from criminal prosecution, and they know it. While they may not be charged under the TVPA, many other charges could be brought against persons who are involved in some capacity including money laundering, visa fraud, and illegally facilitating sex trafficking online, among many others.¹⁰³

As this Comment discusses in Part IV, all of these people have information about the sex trafficking organization that would be valuable to investigators. However, because of their vulnerability to criminal charges (real or imagined), these individuals are unlikely to come forward to cooperate with investigators.

The following subsections examine other individuals potentially involved in facilitating or allowing the sex trafficking organizations to covertly operate. By understanding the organization's ancillary actors and their criminal vulnerability, we can better understand who can become potential cooperators and why they are currently unwilling to come forward to alert investigators of illicit conduct.

A. THOSE INVOLVED IN FINANCIAL CRIME

As victims are trafficked across the world, the money follows. Any person who earns money through illicit means and transfers it through legitimate channels such as bank accounts or investments opens themselves up to charges of money laundering.¹⁰⁴ Individuals can engage in money laundering in many ways. Ill-gotten funds can be used to further the criminal enterprise, including purchasing plane tickets to transport victims or hotel rooms for buyers.¹⁰⁵ Proceeds can be used for bribery, including but not limited to public officials, to ensure secrecy.¹⁰⁶ Money can be stored in an offshore account in a country with strong bank privacy laws, such as the Cayman Islands.¹⁰⁷ Offenders will also try to funnel illegal funds through

¹⁰³ See, e.g., 18 U.S.C. § 1956 (laundering of monetary instruments); 18 U.S.C. § 1546 (fraud and misuse of visas, permits, and other documents); 18 U.S.C. § 2421A (promotion or facilitation of prostitution and reckless disregard of sex trafficking).

¹⁰⁴ Cynthia Shepherd Torg, *Human Trafficking Enforcement in the United States*, 14 TUL. J. INT'L & COMPAR. L. 503, 511 (2006).

¹⁰⁵ DEP'T OF STATE, REPORT TO CONGRESS ON AN ANALYSIS OF ANTI-MONEY LAUNDERING EFFORTS RELATED TO HUMAN TRAFFICKING SECTION 7154(A) OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2020, at 1 (2019) [hereinafter DEP'T OF STATE ANTI-MONEY LAUNDERING REPORT].

¹⁰⁶ *Id.*

¹⁰⁷ Torg, *supra* note 105, at 511.

facially legal means, such as businesses (including the businesses that traffic women, such as strip clubs) or real estate.¹⁰⁸

Money laundering is still seen as the “Achilles heel” of international criminal organizations.¹⁰⁹ When money moves through established financial systems, such as through banks or regulated exchanges, it produces a documented history of those transactions.¹¹⁰ For example, in a Southern California large-scale trafficking ring, investigators were able to identify fifty bank accounts in nine different banks containing proceeds from sex trafficking, which was used to buy real estate in the surrounding area.¹¹¹ When that much money, all derived through illicit means, is transported through multiple channels, many individuals may have knowledge about its source or have participated in the laundering. Examples of persons involved or having knowledge about trafficking schemes include those who manage the ring’s finances, including bookkeepers, accountants, or financial advisors. Bank employees may also be valuable sources of information, as they may come to learn about the source of illicit funds and may not immediately report their customer. Many who facilitate money laundering may do so unwittingly, only learning the truth later, and do not actually face criminal charges. Yet because they unintentionally find themselves involved, they may fear investigators believe they were involved in the trafficking organization all along. It is this fear that incentivizes further silence, which allows the trafficking to continue to go undetected.

Those who are engaged in money laundering are frequently vulnerable to other financial crimes, including tax fraud and Bank Secrecy Act (BSA) violations.¹¹² Because funds generated through trafficking are obtained illicitly, perpetrators are unlikely to include them on tax returns, which leaves them vulnerable to tax fraud.¹¹³ Traffickers may expose themselves to tax fraud charges by stealing victims’ identities, filing false tax returns, or seizing fraudulent tax refunds, among other tactics.¹¹⁴ Those who store funds in

¹⁰⁸ *Id.*; FARRELL, MCDEVITT, PFEFFER, FAHY, OWENS, DANK & ADAMS, *supra* note 14, at 214. *See also* FATF REPORT, *supra* note 39, at 39.

¹⁰⁹ Torg, *supra* note 105, at 511.

¹¹⁰ DEP’T OF STATE ANTI-MONEY LAUNDERING REPORT, *supra* note 106, at 1–2.

¹¹¹ Singleton, *supra* note 13.

¹¹² Peter E. Meltzer, *Keeping Drug Money from Reaching the Wash Cycle: A Guide to the Bank Secrecy Act*, 108 BANKING L.J. 230, 230–31 (1991).

¹¹³ THE HUM. TRAFFICKING LEGAL CTR., ROPES & GRAY LLP & UNIV. OF BALT. L. SCH., AN ADVOCATE’S GUIDE TO TAX ISSUES AFFECTING VICTIMS OF HUMAN TRAFFICKING 5–6 (2019), <https://www.htlegalcenter.org/wp-content/uploads/An-Advocates-Guide-to-Tax-Issues-Affecting-Victims-of-Human-Trafficking.pdf> [<https://perma.cc/DL3M-4Z3A>].

¹¹⁴ *Id.* at 6.

offshore accounts are likely not reporting the existence of those accounts to the U.S. Treasury Department.¹¹⁵ It is a criminal violation to willingly and knowingly fail to file reports of foreign bank and financial accounts.¹¹⁶ Any individual who assists traffickers in tax preparation may have knowledge of either the tax crimes or underlying crimes or may have participated themselves.

The banks, and people who work for them, that operate accounts for traffickers can also be exposed to criminal liability. Under the BSA, financial institutions are required to report suspicious financial activity to the federal government.¹¹⁷ If the institution willingly fails to comply with these requirements, then they may face criminal penalties.¹¹⁸ As multinational institutions, banks employ many people who (unwittingly) interact with traffickers.¹¹⁹ Employees may suspect illegal activity but are not certain enough to flag such transactions. If they later come to learn that money was being illegally transferred and it went undetected, employees, or the bank itself, may be reticent to then blow the whistle and comply with their obligations under the BSA because doing so might alert authorities to indifference or an unwillingness to comply with the law earlier.¹²⁰ While this would not definitively lead to charges for the bank or employees, the hesitation to report prevents investigators from gaining another entry point into a sex trafficking ring.

¹¹⁵ See 31 U.S.C. §§ 5314, 5322(a).

¹¹⁶ 31 U.S.C. §§ 5314, 5322(a).

¹¹⁷ 31 U.S.C. § 5311. See also *FinCEN's Mandate From Congress*, U.S. FIN. CRIMES ENF'T NETWORK, <https://www.fincen.gov/resources/statutes-regulations/fincens-mandate-congress> [<https://perma.cc/E4BJ-LTFM>] (“[The Bank Secrecy Act] requires U.S. financial institutions to assist U.S. government agencies to detect and prevent money laundering. Specifically, the act requires financial institutions to keep records of cash purchases of negotiable instruments, file reports of cash transactions exceeding \$10,000 (daily aggregate amount), and to report suspicious activity that might signify money laundering, tax evasion, or other criminal activities.”).

¹¹⁸ DEP'T OF STATE ANTI-MONEY LAUNDERING REPORT, *supra* note 106, at 1.

¹¹⁹ In 2020, in compliance with their BSA obligations, banks and other similar financial institutions filed 3,080 Suspicious Activity Reports (SAR) based on suspicions of transactions related to human trafficking. *Suspicious Activity Report Statistics*, U.S. FIN. CRIMES ENF'T NETWORK, <https://www.fincen.gov/reports/sar-stats> [<https://perma.cc/3QLH-NH7N>]. While this number is both overinclusive (not every SAR filed suspecting human trafficking is definitively connected to trafficking) and underinclusive (not every instance of financial transaction connected to human trafficking is captured in SARs), it illustrates the level of interaction between traffickers and employees of major financial institutions.

¹²⁰ See Jonathan J. Rusch, *Hue and Cry in the Counting-House: Some Observations on the Bank Secrecy Act*, 37 CATH. U. L. REV. 465, 478 (1988).

B. THOSE INVOLVED IN VISA AND PASSPORT FRAUD

An essential facet of the operation of sex trafficking organizations is the transportation of victims, both domestically and internationally.¹²¹ When transporting victims, perpetrators frequently violate criminal statutes related to immigration.¹²² Passport and visa fraud are common when illicitly transporting persons across borders.¹²³ Traffickers may work with document forgers to create false documentation for victims, such as visas or passports.¹²⁴ Those who assist the trafficker may later become aware that they are facilitating sex trafficking. They could offer insight to investigators but may be reluctant to do so because of their vulnerability for visa or passport fraud charges.¹²⁵

For wealthier traffickers, such as Jeffrey Epstein, victims may travel with their perpetrators on privately chartered planes.¹²⁶ To avoid detection, perpetrators may direct the flight company not to reflect the victim's presence on the flight manifest. In Epstein's case, he frequently transported women and underaged girls to his private island in the U.S. Virgin Islands by way of his private plane, which frequently did not comply with laws requiring all visitors to possess either a U.S. passport or a raised-seal birth certificate and valid U.S. identification.¹²⁷ Any individual who helps facilitate any form of visa fraud may be criminally liable, including forgers of official documents and pilots or employees of the chartered plane company.

C. INTERNET PROVIDERS

Traffickers commonly use the internet to conduct business with johns.¹²⁸ These transactions regularly take place on websites tailored for

¹²¹ See POLARIS PROJECT, 2019 DATA REPORT: THE U.S. NATIONAL HUMAN TRAFFICKING HOTLINE 3 (2019), <https://polarisproject.org/wp-content/uploads/2019/09/Polaris-2019-US-National-Human-Trafficking-Hotline-Data-Report.pdf> [<https://perma.cc/8MLB-68CP>]; FATF REPORT, *supra* note 39, at 24–25.

¹²² Torg, *supra* note 105, at 513–14.

¹²³ *Id.* at 505–06.

¹²⁴ *Id.*

¹²⁵ See 18 U.S.C. § 1546 (“Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card . . . [s]hall be fined under this title or imprisoned not more than . . . 15 years . . .”).

¹²⁶ See, e.g., *Jeffrey Epstein: Filthy Rich: The Island* (Netflix May 27, 2020).

¹²⁷ *Id.*

¹²⁸ FARRELL, McDEVITT, PFEFFER, FAHY, OWENS, DANK & ADAMS, *supra* note 14, at 76–77; Long, *supra* note 31, at 3–4.

transactional sex work, which operate within a gray area of legality.¹²⁹ There exist open questions about whether a website faces criminal liability when its users connect for illegal purposes. For example, the website Backpage.com (Backpage) and its corporate heads were charged when the business earned well over \$100 million serving as a platform for sex traffickers.¹³⁰ The government seized the domain, and seven executives were indicted for facilitating prostitution and money laundering.¹³¹ In addition to the charged conduct, Backpage executives were alleged to have defrauded credit card companies and used cryptocurrency to conduct transactions.¹³²

The Backpage case shows the breadth of possible illegal activity by web hosts facilitating sex trafficking transactions. Under the Stop Enabling Sex Trafficking Act, it is illegal for web hosts to knowingly assist, facilitate, or support sex trafficking.¹³³ These companies, ranging from Craigslist to Facebook, may have no intention of facilitating sex trafficking and yet find themselves as the host enabling sex trafficking networks around the world.¹³⁴ Either the company itself or its employees may face some form of criminal liability. Or they may feel the threat of criminal liability and are reluctant to come forward with information about possible sex trafficking for fear of exposing themselves to charges or negative press. If either the company or employees were to cooperate with authorities from the outset, investigators could obtain access to vast amounts of information on traffickers, including names, locations, or financial sources. Even if traffickers use obscuring tactics when using the websites such as false identities or cryptocurrencies, that information can still lead to substantial investigative developments.¹³⁵

¹²⁹ See, e.g., FATF REPORT, *supra* note 39, at 23; Will Neal, *US Court Approves Sex-Trafficking Lawsuits Against Facebook*, ORGANIZED CRIME & CORRUPTION REPORTING PROJECT (Apr. 29, 2020, 4:16 PM), <https://www.occrp.org/en/daily/12224-us-court-approves-sex-trafficking-lawsuits-against-facebook> [<https://perma.cc/H7KK-EBRF>].

¹³⁰ FATF REPORT, *supra* note 39, at 23.

¹³¹ Indictment at 41–42, 48–51, 54–60, *United States v. Lacey*, No. CR-18-00422-PHX-SPL (D. Ariz. Mar. 28, 2018).

¹³² FATF REPORT, *supra* note 39, at 23.

¹³³ Aja Romano, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet As We Know It*, VOX (July 2, 2018, 1:08 PM), <https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom> [<https://perma.cc/R4F7-74C6>].

¹³⁴ Mary Graw Leary, *Fighting Fire with Fire: Technology in Child Sex Trafficking*, 21 DUKE J. GENDER L. & POL'Y 289, 308–09 (2014).

¹³⁵ See, e.g., FATF REPORT, *supra* note 39, at 23.

While these groups of actors are illustrative examples of those with valuable information about sex trafficking, they are far from the only ones.¹³⁶ The breadth of possible perpetrators involved in sex trafficking demonstrates the rich variety of sources available to fuel an investigation. The common practice of relying on victims to develop chargeable cases against traffickers is not necessary. Investigators must change the perpetrator's motives and incentivize them to bring information to investigators instead of maintaining the secrecy that allows trafficking rings to thrive.

III. ANTITRUST DIVISION'S AMNESTY PROGRAM

This Part will examine the Antitrust Division's Amnesty Program, focusing on both its history and its functioning. First, I explore the history and development of the Amnesty Program, explaining how it grew from an ambiguous, little-used policy to the centerpiece of market manipulation prosecution. Second, I discuss how the program operates for both investigators and participants. Finally, I examine the underlying reasons motivating the Department of Justice to implement and rely upon the Amnesty Program.

A. ANTITRUST DIVISION AND AMNESTY PROGRAM OVERVIEW

In 1890, Congress passed the Sherman Act to respond to corporations forming monopolies to control the marketplace.¹³⁷ Today, the Antitrust Division of the Department of Justice pursues criminal charges against companies that agree with competitors to fix prices, divide markets to curtail consumer choices, or to rig bids at the expense of the consumer.¹³⁸ Agreements between competitors range in size and scope, from rigging bids

¹³⁶ Other examples of businesses that provide services for traffickers, such as hotels, restaurants, taxi services, landlords leasing to traffickers, and telephone dispatchers, are called "secondary profiteers." Hughes, *supra* note 37, at 40. Employees of these businesses may be knowledgeable or complicit.

¹³⁷ Dick Thornburgh, *Celebrating the Sherman: 100 Years of Antitrust Act: Sherman Act Commemoration*, 1 JUST. 36, 38 (1991).

¹³⁸ INT'L COMPETITION POL'Y ADVISORY COMM., U.S. DEP'T OF JUST., FINAL REPORT TO THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST 163 (2000), <https://www.justice.gov/atr/chapter-4> [<https://perma.cc/K8XC-YTWB>]. Market competitors engage in bid rigging when they "agree in advance who will submit the winning bid on a contract being let through the competitive bidding process," which has the effect of artificially raising prices passed down to consumers. U.S. DEP'T OF JUST., PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES: WHAT THEY ARE AND WHAT TO LOOK FOR 2 (2021), <https://www.justice.gov/atr/file/810261/download#:~:text=Bid%20rigging%20is%20the%20way,services%20by%20soliciting%20competing%20bids> [<https://perma.cc/7UHG-SMQ4>].

on foreclosure auctions in Palm Beach County, Florida¹³⁹ to international price fixing on auto parts sold to the largest automakers around the world.¹⁴⁰

Antitrust violations, like sex trafficking crimes, are defined by their secrecy and difficulty to detect.¹⁴¹ Agreements between companies to fix prices illegally or rig bids for services are themselves crimes.¹⁴² To reach these agreements, companies must trust each other not to be detected, as any outside detection leading back to investigators assures mutual destruction.¹⁴³ From the perspective of cartel members, trust among participants is paramount to maintaining the lucrative windfalls companies gain through market manipulation.¹⁴⁴

It is the cartel's success that motivates the Antitrust Division's leniency program.¹⁴⁵ The leniency program "provide[s] enforcers with an investigative tool to uncover cartels that may have otherwise gone undetected and continued to harm consumers."¹⁴⁶ Fearing that existing investigative tactics were not detecting many Sherman Act violations, the Division implemented the first iteration of the Amnesty Program in 1978.¹⁴⁷ Under the 1978 model, corporations who self-reported their own illegal cartel activity were eligible for complete immunity from prosecution.¹⁴⁸ However, leniency was only available to corporations who reported conduct that was not already under investigation by the DOJ.¹⁴⁹ And even if a company met this requirement, prosecutors still retained discretion about whether to grant immunity.¹⁵⁰ To guide whether amnesty should be granted, prosecutors relied

¹³⁹ *Third Real Estate Investor Pleads Guilty to Bid Rigging in Florida Online Foreclosure Auctions*, U.S. DEP'T OF JUST. (Nov. 9, 2018), <https://www.justice.gov/opa/pr/third-real-estate-investor-pleads-guilty-bid-rigging-florida-online-foreclosure-auctions> [https://perma.cc/5RWW-STU6].

¹⁴⁰ See, e.g., Plea Agreement at 2–3, *United States v. NGK Spark Plug Co., Ltd.*, No. 14-cr-20494-GCS (E.D. Mich. Oct. 8, 2014); Plea Agreement at 3–4, *United States v. Corning Int'l Kabushiki Kaisha*, No. 16-20357 (E.D. Mich. May 16, 2016).

¹⁴¹ See Colino, *supra* note 22, at 538; Fraser, *supra* note 23, at 1018.

¹⁴² Hammond, *Detecting and Deterring*, *supra* note 27, at 2.

¹⁴³ Colino, *supra* note 22, at 538.

¹⁴⁴ See Hammond, *Detecting and Deterring*, *supra* note 27, at 5.

¹⁴⁵ The Antitrust Division refers to their policy for granting immunity as both the Leniency Program and the Amnesty Program. As such, I will use them both interchangeably. I will also use immunity, amnesty, and leniency interchangeably to describe what qualifying witnesses receive for their cooperation.

¹⁴⁶ Hammond, *Evolution of Criminal Antitrust Enforcement*, *supra* note 24, at 2.

¹⁴⁷ Hammond, *Detecting and Deterring*, *supra* note 27, at 1.

¹⁴⁸ *Id.*

¹⁴⁹ Colino, *supra* note 22, at 555.

¹⁵⁰ *Id.*

on seven specific, yet amorphous, requirements that cooperating companies must have met. Among these requirements, “the DOJ should not reasonably expect to become aware of the undercover cartel without the report of the leniency applicant” and consideration would be given “to the ‘candor and completeness’ with which the firm reported the violation”¹⁵¹

Because the program required a demanding and unclear standard for amnesty, it was rarely used and did not result in many successful prosecutions.¹⁵² It was especially unsuccessful in aiding detection of larger international cartels; none were discovered in the fifteen years of the program’s active implementation.¹⁵³ Defense attorneys advising clients on criminal antitrust matters were unable to determine whether their clients would qualify for leniency, and as such would not recommend cooperating with the government through the program.¹⁵⁴ In response to flagging efficacy, the Division overhauled the program in 1993, lowering the requirements to qualify for amnesty, offering it to more actors within cartels, and, depending on the level of cooperation, making immunity automatic to participants.¹⁵⁵ The program was the first of its kind for the Department of Justice, as other sections relied exclusively on prosecutorial discretion for granting immunity.¹⁵⁶ The update included three major revisions. First, amnesty is *automatically* granted when no pre-existing investigations exist. This differs from the previous policy that allowed amnesty to be withheld.¹⁵⁷ Second, leniency may still be available even if the Division’s investigation is already

¹⁵¹ *Id.*

¹⁵² See Hammond, Evolution of Criminal Antitrust Enforcement, *supra* note 24, at 2.

¹⁵³ Hammond, Detecting and Deterring, *supra* note 27, at 1.

¹⁵⁴ See Fraser, *supra* note 23, at 1015.

¹⁵⁵ Hammond, Evolution of Criminal Antitrust Enforcement, *supra* note 24, at 2; Michael A. Geibelson & Matthew D. Taggart, *The Antitrust Division’s Amnesty Program: An Update*, ROBINS, KAPLAN, MILLER & CIRESI LLP, <https://www.robinskaplan.com/-/media/pdfs/the-antitrust-division-s-amnesty-program-an-update.pdf> [<https://perma.cc/UQ9T-CDG6>].

¹⁵⁶ See Colino, *supra* note 22, at 555; Gary Spratling, Deputy Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Just., Making Companies an Offer They Shouldn’t Refuse: The Antitrust Division’s Corporate Leniency Policy—An Update, Presented at The Bar Association of the District of Columbia’s 35th Annual Symposium on Associations and Antitrust (Feb. 16, 1999), <https://www.justice.gov/atr/speech/making-companies-offer-they-shouldnt-refuse-antitrust-divisions-corporate-leniency-policy> [<https://perma.cc/VCU9-3NTM>].

¹⁵⁷ Hammond, Detecting and Deterring, *supra* note 27, at 2; Hammond, Evolution of Criminal Antitrust Enforcement, *supra* note 24, at 2.

underway.¹⁵⁸ Third, for corporations that qualify, all officers and employees who agree to cooperate also receive automatic amnesty.¹⁵⁹

By all measures, the 1993 Amnesty Program policy changes represented an unqualified success in investigating and prosecuting illegal cartels.¹⁶⁰ Deputy attorneys general from both Democratic and Republican administrations uniformly agree that the Amnesty Program is the “single greatest investigative tool available to anti-cartel enforcers.”¹⁶¹ In the first six years of the program, applications for leniency increased by over twenty times compared to the previous iteration of the program.¹⁶² From 1996–2003, when the leniency program was more widely understood and trusted by companies and defense attorneys, the Division assessed over \$5 billion in fines, with over 90% resulting from investigations assisted by leniency applicants.¹⁶³ The Amnesty Program is also quantitatively more effective at identifying cartels than all search warrants, secret audio or videotape, and FBI interrogations combined.¹⁶⁴

The success of the Division’s leniency program has expanded to other investigative divisions, both in the DOJ and around the world. Within the DOJ, the Fraud Section of the Criminal Division has adopted its own version for investigating Foreign Corrupt Practices Act cases, formalizing its

¹⁵⁸ Hammond, *Detecting and Deterring*, *supra* note 27, at 2; Hammond, *Evolution of Criminal Antitrust Enforcement*, *supra* note 24, at 2.

¹⁵⁹ Hammond, *Detecting and Deterring*, *supra* note 27, at 2; Hammond, *Evolution of Criminal Antitrust Enforcement*, *supra* note 24, at 2; *see also* CORPORATE LENIENCY POLICY, *supra* note 25, at 4.

¹⁶⁰ Hammond, *Evolution of Criminal Antitrust Enforcement*, *supra* note 24, at 2–3.

¹⁶¹ Hammond, *Detecting and Deterring*, *supra* note 27, at 1; *see also* Spratling, *supra* note 157, at 1 (serving under the Republican Bush Administration).

¹⁶² Gary R. Spratling, Deputy Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Just., *Transparency in Enforcement Maximizes Cooperation from Antitrust Offenders*, Presented at Fordham Corporate Law Institute 26th Annual Conference on International Antitrust Law & Policy (Oct. 15, 1999), <https://www.justice.gov/atr/speech/transparency-enforcement-maximizes-cooperation-antitrust-offenders> [<https://perma.cc/3MNJ-H58M>]. Prior to the 1993 policy changes, the Division only obtained one amnesty applicant per year. Scott D. Hammond, Dir. of Crim. Enf’t, Antitrust Div., U.S. Dep’t of Just., *A Summary Overview of the Antitrust Division’s Criminal Enforcement Program*, Presented at the New York State Bar Association Annual Meeting (Jan. 23, 2003), <https://www.justice.gov/atr/speech/summary-overview-antitrust-divisions-criminal-enforcement-program> [<https://perma.cc/N92A-9BN8>]. After those changes were implemented, the application rate surged to over one application per month. *Id.*

¹⁶³ Hammond, *Evolution of Criminal Antitrust Enforcement*, *supra* note 24, at 3.

¹⁶⁴ *Id.*

program in 2018 after a successful two-year trial implementation.¹⁶⁵ Based on the success of the United States' Amnesty Program, countries around the world have adopted their own versions, including Canada, Brazil, the United Kingdom, Germany, Hong Kong, and South Korea, among others.¹⁶⁶

B. THE FUNCTION OF THE ANTITRUST AMNESTY PROGRAM

To receive amnesty protections, an applicant is not required to meet an evidentiary sufficiency threshold, meaning that the applicant does not have to provide enough evidence on their own to substantiate charges against another cartel participant.¹⁶⁷ The evidence only needs to be substantial enough to warrant opening an investigation.¹⁶⁸ In some instances, a leniency applicant is an integral player in the cartel and thus can provide enough evidence themselves to bring charges against other companies. In other instances, an amnesty applicant helps facilitate the cartel and is thus exposed to criminal liability but is not one of the main conspirators and cannot provide information about the full scope of the scheme.¹⁶⁹ Previous applicants in this position have provided information that allowed investigators to obtain search warrants for more culpable cartel members, leading to charges. In one instance, a successful leniency applicant brought information to the attention of the Antitrust Division that, through further investigation, led to six conspirators pleading guilty and over \$300 million in fines.¹⁷⁰

For each specific cartel, only one amnesty application is granted.¹⁷¹ To receive leniency, companies are required to cooperate throughout the length

¹⁶⁵ U.S. Dep't of Just., Just. Manual § 9-47.120 (2019); Rod J. Rosenstein, Deputy Att'y Gen., Deputy Attorney General Rosenstein Delivers Remarks at the 34th International Conference on the Foreign Corrupt Practices Act 3 (Nov. 29, 2017), <https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign> [<https://perma.cc/MN2A-WFBC>].

¹⁶⁶ Scott D. Hammond, Dir. of Crim. Enf't, Antitrust Div., U.S. Dep't of Just., Cornerstones of An Effective Leniency Program, Presented at the ICN Workshop on Leniency Programs 15 (Nov. 22-23, 2004), <https://www.justice.gov/atr/file/518156/download> [<https://perma.cc/YD44-G2NJ>] [hereinafter Hammond, Cornerstones]; Colino, *supra* note 22, at 563.

¹⁶⁷ Hammond, Detecting and Deterring, *supra* note 27, at 3.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 7–8.

¹⁷⁰ *Id.* at 8.

¹⁷¹ Robert W. Tarun & Peter P. Tomczak, *A Proposal for a United States Department of Justice Foreign Corrupt Practices Act Leniency Policy*, 47 AM. CRIM. L. REV. 153, 174–76 (2010). Only allowing one company to receive amnesty incentivizes companies to come forward as fast as possible, as they must compete against their co-conspirators to receive immunity.

of the investigation.¹⁷² The company receiving amnesty must disclose all relevant facts, produce all unprivileged documents and communications as requested by the Division, and make their officers and employees available for interview, among other obligations.¹⁷³ Cooperators can be sent back into the cartel while working with the government for evidence gathering purposes, such as covertly recording conspiratorial meetings.¹⁷⁴ While it is rare, leniency applicants can have their agreement revoked if they do not provide the requisite information requested by the government or if the government later learns that the leniency applicant was untruthful or withholding of information.¹⁷⁵

There is one important limitation on who can receive amnesty: the applicant cannot have “coerced another party to take part in the offense and must not be ‘the’ instigator or ‘the’ leader.”¹⁷⁶ For schemes in which there is a single organizer or single ringleader, that company or actor is not eligible for amnesty.¹⁷⁷ However, if the conspiracy is among two or more co-conspirators that share equal or near-equal culpability, then all conspirators are eligible for amnesty protections.¹⁷⁸ This balancing prevents the most culpable participant in the scheme from receiving immunity for providing information against lesser participants in the trafficking scheme, while still offering cooperation opportunities for lesser or equally culpable participants.¹⁷⁹

C. PHILOSOPHICAL JUSTIFICATION OF THE AMNESTY PROGRAM

The leniency program increases detection of illegal cartels. Because illegal antitrust violations are so secretive, there are not many avenues through which investigators can pierce the cone of silence shared by co-

¹⁷² CORPORATE LENIENCY POLICY, *supra* note 25, at 2.

¹⁷³ *Id.*; Tarun & Tomczak, *supra* note 172, at 177.

¹⁷⁴ Scott D. Hammond, Deputy Assistant Att’y Gen. for Crim. Enf’t, Antitrust Div., U.S. Dep’t of Just., Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations, Presented at the 54th Annual American Bar Association Section of Antitrust Law Spring Meeting 2, 13 (Mar. 29, 2006), <https://www.justice.gov/atr/file/518436/download> [<https://perma.cc/64FP-JGPT>].

¹⁷⁵ DEP’T OF JUST., FREQUENTLY ASKED QUESTIONS ABOUT THE ANTITRUST DIVISION’S LENIENCY PROGRAM AND MODEL LENIENCY LETTERS 25–26 (2017), <https://www.justice.gov/atr/page/file/926521/download> [<https://perma.cc/VSG2-DMB9>].

¹⁷⁶ Hammond, Detecting and Deterring, *supra* note 27, at 9.

¹⁷⁷ *Id.*

¹⁷⁸ Spratling, Corporate Leniency Policy, *supra* note 28, at 9.

¹⁷⁹ Hammond, Detecting and Deterring, *supra* note 27, at 9.

conspirators. Offering a leniency program allows for discovery of massive international cartels that otherwise would never be detected.¹⁸⁰

One common objection to the Amnesty Program is that individuals and companies who are criminally liable and have committed conduct that deserves to be punished benefit unfairly.¹⁸¹ However, this objection creates a false dichotomy. Implementing a leniency program is not a choice between punishing all perpetrators or punishing only a few. Rather, it is a decision to hold most of the culpable actors of a cartel accountable when the alternative is holding none of them accountable, because the cartel would otherwise go undetected. Discovering and stopping market manipulation provides the greatest benefits to consumers.¹⁸² While the costs of immunizing a criminal actor are high, most members of the cartel are ultimately held accountable, and the public benefits from the cease in the market manipulation.¹⁸³

Working with leniency applicants also allows the Antitrust Division to begin investigating specific cartels as early as possible. With a cooperator, investigators can covertly oversee a live, ongoing conspiracy.¹⁸⁴ Early detection helps avoid running out of time before decisions can be made on whether to bring charges,¹⁸⁵ even if the conspiracy has been broken or stops for any reason, which starts the clock on the five-year statute of limitations.¹⁸⁶ Cooperating companies allow the government to expedite many investigative processes.¹⁸⁷ For instance, where the Antitrust Division would have to send subpoenas to companies and engage in a protracted back-and-forth about subpoena compliance, amnesty applicants are required to provide requested documentation and information in a timely manner or risk losing cooperation credit.¹⁸⁸

¹⁸⁰ Hammond, Cornerstones, *supra* note 167, at 2–3. This approach is borne out in the statistics, where the amount of fines radically increased when the modern leniency program was implemented, as almost 90% of investigations involve a leniency applicant. Hammond, Evolution of Criminal Antitrust Enforcement, *supra* note 24, at 3.

¹⁸¹ ORGANISATION FOR ECON. COOP. AND DEV., ROUNDTABLE ON CHALLENGES AND COORDINATION OF LENIENCY PROGRAMMES – NOTE BY THE UNITED STATES 3 (2018), https://www.ftc.gov/system/files/attachments/us-submissions-oced-2010-present-other-international-competition-fora/leniency_united_states.pdf [<https://perma.cc/86S5-AU8Z>].

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Hammond, Evolution of Criminal Antitrust Enforcement, *supra* note 174, at 2.

¹⁸⁵ U.S. Dep't of Just., Just. Manual § 9-28.700 (2018).

¹⁸⁶ 18 U.S.C. § 3282.

¹⁸⁷ U.S. Dep't of Just., Just. Manual § 9-28.700 (2018).

¹⁸⁸ Tarun & Tomczak, *supra* note 171, at 172, 175–76.

The Amnesty Program also changes the mindset of cartel participants. Without the Amnesty Program, a cartel participant's only incentive is to covertly continue the illicit operation.¹⁸⁹ However, when companies are aware that there is only one get-out-of-jail free card, "it will induce organizations already under investigation to abandon the cartel stonewall, race to the government, and provide evidence against the other cartel members."¹⁹⁰ The leniency program creates the omnipresent threat of government intervention.

While many cartel participants have benefited from receiving amnesty, the Antitrust Division still has limits to ensure that wrongdoers are properly punished. First, the fact that the rule only allows one leniency applicant per criminal cartel limits potential abuses of leniency.¹⁹¹ Second, even if a cooperator successfully receives immunity, those affected by their conduct can still bring civil claims against them, so they may still feel some negative impact by coming forward.¹⁹² These limits still ensure that cooperators are held to account in some way, without frustrating the Division's purpose of detecting as many illegal cartels as possible.

IV. AMNESTY PROGRAM PROPOSAL FOR SEX TRAFFICKING INVESTIGATIONS

This Part will demonstrate the benefits of a leniency program applied to sex trafficking prosecutions. While sex trafficking and antitrust violations do not appear facially similar, they share two key characteristics. First, criminal activity for both is conducted secretly, and is thus difficult to detect. Second, investigations into said criminal activity are primarily initiated through outside individuals or corporations bringing the illicit conduct to the attention of investigators. The Antitrust Division's Leniency Program recognizes both realities and counteracts them by enabling greater detection. Because of these commonalities between antitrust and sex trafficking, offices prosecuting sex trafficking should implement their own version of a leniency program.

Like the Antitrust Division's program, a leniency program in sex trafficking would be available to anyone involved in furthering the scheme. Because of the many associated crimes frequently committed by individuals engaging in trafficking (e.g., money laundering, prostitution, visa fraud), any person offering information on sex trafficking can receive immunity for any

¹⁸⁹ Fraser, *supra* note 23, at 1018.

¹⁹⁰ Hammond, Cornerstones, *supra* note 167, at 1.

¹⁹¹ Colino, *supra* note 22, at 552.

¹⁹² *Id.*

criminal activity associated with the enterprise. A leniency program gives those individuals an option to alert authorities without fearing for their own freedom. Thus, for those who would consider reporting but are afraid of their own criminal liability, a leniency program removes the incentive not to report. This is especially beneficial given the number of ancillary participants (for example, property owners, bank employees, Johns) whose conduct may or may not be illegal. In many instances, potential leniency applicants may not have violated any laws but fear that they have. A leniency program can eliminate questions about whether their conduct is illegal and whether they should report.

A leniency program also changes the incentive structures of those within the criminal enterprise. Secret criminal organizations are strong because everyone shares the same motivation to maintain the secrecy. The Amnesty Program undermines the trust among conspirators to remain silent because each member has the option to report conduct to the government. If conspirators face a persistent threat that one person can be the first in the proverbial lifeboat by reporting their conduct to investigators, this will undermine the trust necessary to maintain secrecy, a critical aspect in trafficking. The Antitrust Division's model adds competing motivations for conspirators that can blow up the entire criminal enterprise.

As with the Antitrust Division's program, a trafficking leniency program would consider a number of preconditions, including whether the government was already aware of the trafficking organization, whether the applicant provides all requested information, and whether the applicant agrees to cooperate throughout the life of the investigation and prosecution.¹⁹³ The Division's bar on granting amnesty to leaders or organizers also would apply to ensure that the most culpable are not immunized only to turn on lesser offenders.¹⁹⁴ It would not serve the aims of justice if the leader of a trafficking organization could obtain immunity only to testify against associates who acted based on his direction.

A leniency program also aligns with current methods for pursuing sex trafficking since those investigations are already reliant on others to bring forth information of illicit activity. The program does not require law enforcement to do anything differently or require additional expenditures to develop proactive measures. By offering an amnesty program, those within an illicit scheme are incentivized to come forward, adding many new sources of information to begin investigations. There are no additional financial burdens imposed on investigative bodies. An investigation itself would

¹⁹³ See CORPORATE LENIENCY POLICY, *supra* note 25, at 2.

¹⁹⁴ See *id.* at 4.

proceed as it normally does. The only difference from the current, victim-focused model of investigation is that this approach would increase the methods available to begin investigations into sex trafficking. This is an especially key facet given legislative reticence and lack of availability of funds to expand investigative resources.¹⁹⁵ A leniency program would require no increase in resources while potentially offering a great increase in detection of criminal activity.

Underlying the leniency program is the philosophical determination that detection is the most important facet when investigating criminal cartels. The Antitrust Division has weighed the considerations and has concluded that detecting and stopping criminal cartels from operating and harming the American consumer is their paramount concern.¹⁹⁶ The cost of holding most, but not all, participants criminally accountable is a worthwhile price. The same logic can be applied to sex trafficking. As in antitrust crimes, the government is not presented with a choice between prosecuting all perpetrators or just a few. Rather, it faces a decision between holding most accountable or holding none accountable, because the trafficking scheme would not have been discovered otherwise. Recognizing the reality that great amounts of trafficking are not otherwise detected makes that tradeoff worthwhile.

A leniency program also aligns with the victim-centered approach established through the TVPA. By implementing a leniency program, detection of cases should rise. Greater detection leads to liberation of more women and girls trapped in sex trafficking schemes around the world. As a result, more women and girls regain their agency and autonomy. If Congress's ultimate goal of eradicating sex trafficking is to ever be realized, the government must start by increasing detection. An amnesty program furthers this purpose.

¹⁹⁵ The failed push to pass the Build Back Better Act exemplifies the lack of desire to expand investigative resources for Department of Justice offices. Stefan Becket & Ed O'Keefe, *Manchin Pulls Support for Biden's \$1.75 Trillion Social Spending Plan*, CBS NEWS (Dec. 20, 2021, 7:16 AM), <https://www.cbsnews.com/news/manchin-build-back-better-act-pull-support-biden/> [<https://perma.cc/BRA2-F6YQ>]. See also *NACO Legislative Analysis: Build Back Better Act*, NAT'L ASSOC. OF CNTYS. (Nov. 11, 2021), <https://www.naco.org/resources/featured/buildbackbetter> [<https://perma.cc/9URQ-SZBN>] (allocating \$2.5 billion for DOJ grants to state and local government to support innovative methods to criminal justice and policing initiatives); *The Economic Evidence Behind 10 Policies in the Build Back Better Act*, WASH. CNTR. FOR EQUITABLE GROWTH (Nov. 24, 2021), <https://equitablegrowth.org/the-economic-evidence-behind-10-policies-in-the-build-back-better-act/> [<https://perma.cc/DN5G-U4G8>] (outlining the appropriations dedicated for DOJ antitrust enforcement).

¹⁹⁶ Hammond, *Detecting and Deterring*, *supra* note 27, at 3.

An amnesty program also can relieve the burden on victims to sustain an entire investigation. Because avenues for starting an investigation increase, the victim is less likely to be saddled with the burden of forming the core of the investigation. Her testimony may ultimately be necessary, but she does not have to be the starting point of all gathered evidence. Instead of relying heavily on victims from the outset, investigations will originate and grow from individuals who have agreed to cooperate throughout the life of the investigation. Not only will more victims be saved from their traffickers, but they will also not have to relive their traumas repeatedly through constant investigative interviews. Instead, victims will have the opportunity to focus solely on their recovery from the abuse.

For perpetrators to come forward, an automatic amnesty program is necessary to combat sex trafficking more effectively, and we cannot continue to rely on prosecutors granting immunity on an ad hoc basis. The revisions to the Antitrust Division's Amnesty Program demonstrate the importance of having clear standards in both how to qualify for immunity and what one gains from cooperating. It was unclear in the first version of the program whether immunity would actually be granted, so cooperators did not feel comfortable coming forward. Only when the process for immunity was formalized did cooperators start coming forward in great numbers. The same logic applies for sex trafficking. Traffickers already do not report illicit conduct in the absence of guarantees of immunity. If individualized grants of immunity were sufficient for incentivizing cooperators, then we would likely see a significant number of investigations begin with a participant in the trafficking scheme. In order to have perpetrators report their conduct, the leniency applicant must trust that they will receive immunity protections, and not be punished, if they come forward.

CONCLUSION

The current state of sex trafficking investigations is at a standstill. Participants in sex trafficking rings have every incentive to stay quiet and not report illicit conduct to authorities, and investigators are unable to detect many existing trafficking schemes. Cartel investigators faced the same problems, which reflects the brilliance of the Antitrust Division's Amnesty Program. By offering immunity to only one cartel participant in exchange for voluntary cooperation, the leniency program changes the incentives for those in the criminal agreement and increases detection of covert criminal enterprises. No additional resources are required to implement the program, since the only change is the voluntary cooperation of criminal participants. The Antitrust Division's success, and the subsequent adoption of similar programs in other Department offices and by other countries around the

world, demonstrates the potential for a similar program for sex trafficking. The primary purpose of sex trafficking detection and investigation is not about holding those accountable to the greatest extent possible. It is about rescuing victims from the clutches of their traffickers. If vast criminal organizations can be halted because one participant is immunized, and all of those being trafficked can be saved, the trade-off is worthwhile. If an amnesty program had been available, perhaps one of Epstein's many associates and employees would have come forward earlier. Maybe then prosecutors would not have had to rely on 15-year-old evidence, derived almost entirely from victim testimony. Maybe then we could have stopped a globe-spanning sex trafficking scheme decades earlier. Perhaps we can still halt countless other schemes that have gone and continue to go undetected.