Follow the Money: Financial Crimes and Forfeiture in Human Trafficking Prosecutions

Elizabeth G. Wright
Trial Attorney
Money Laundering and Asset Recovery Section
Criminal Division

I. Introduction

Many human trafficking crimes generate substantial criminal proceeds resulting from the exploitation of vulnerable victims for commercial sex or labor. Financial investigations have proven highly effective in developing high-impact human trafficking cases. This Article examines the role of financial investigations and financial crime charges in human trafficking prosecutions—including the role of financial evidence in identifying additional victims and perpetrators, corroborating testimonial evidence, and proving coercion—and encourages the forfeiture of criminal proceeds and related assets to dismantle and deter trafficking enterprises. The Article promotes incorporating financial investigations and financial crime charges, including money laundering charges, into effective anti-trafficking enforcement strategies, and provides guidance on procedures for remission of seized assets to satisfy restitution orders benefiting trafficking victims.

II. Why Financial Investigations Are Important to Human Trafficking Prosecutions

Human trafficking has been estimated to generate more than $150 billion in illicit proceeds each year, according to the calculation most recently released by the International Labor Organization.[1] It has also been ranked among the top three most lucrative criminal businesses, after drug trafficking and counterfeiting, for instance, by the United Nations Office on Drugs and Crime (UNODC).[2]

The profit motive certainly plays out in domestic human trafficking cases as well, and the regularly charged Chapter 77 offenses from Title 18 of the United States Code are specifically geared towards the financial orientation. Looking to both sex trafficking and forced labor under 18 U.S.C. §§ 1589 and 1591, the commercial nexus is plain. Section 1589 prohibits "provid[ing] or obtain[ing] the *labor or services* of a person" through the prohibited means.[3] Section 1591 prohibits taking actions while knowing that prohibited means will be used to "cause [a] person to engage in a *commercial* sex act," or in connection with "a *commercial* sex act" by a minor.[4]

[1] *See, e.g.*, *Forced Labour, Modern Slavery and Human Trafficking*, INT'L LABOUR ORG. (last visited July 20, 2017).
[2] *See, e.g.*, Press Release, UNODC, New UNODC Campaign Highlights Transnational Organized Crime as a US $870 Billion a Year Business (July 16, 2012).
[3] 18 U.S.C. § 1589(a) (2012) (emphasis added).
[4] *Id.* § 1591(a) (2012 & Supp. III 2015) (emphases added).

Often, when criminals earn money from their illegal acts, they seek ways to hide those funds; they spend them, often to benefit or perpetuate their criminal organizations; or they try to get them into, or move them through, the financial system without attracting attention, for future use. Frequently, these transactions occur internationally and involve large amounts of money. And also, frequently, these efforts can violate anti-money laundering laws such as 18 U.S.C. §§ 1956 and 1957 or the prohibition against structuring in 31 U.S.C. § 5324. Financial investigations can uncover these illegal activities and enable charges that accurately reflect and address what has occurred. Financial investigations, through these charges and otherwise, can often better enable the use of forfeiture as well, which is critical to depriving criminal organizations of their illegal earnings and the tools they use to conduct and promote illegal activity.

Accordingly, attending to the financial aspects of human trafficking cases is very important and increasingly recognized as a fundamental method for effectively combatting human trafficking. When dealing with such financially motivated and highly profitable crimes, which need illicit funds in order to keep functioning, it is essential to recognize that those involved will be working both to earn more money and to preserve their assets in ways that law enforcement can pursue. This Article addresses several facets of the effectiveness of financial investigations and charges in developing high-impact human trafficking cases. It further recommends including financial charges and pursuing forfeiture whenever appropriate in anti-trafficking law enforcement strategies.

III. The Specific Utility of Financial Investigations in These Cases

Combatting human trafficking from a financial vantage point has many benefits that have helped develop—and are expected to play an increasing role in—powerful prosecutions in this area. As examples:

A. Financial Evidence Highlights the Traffickers' Motive and Knowledge

Whether or not financial charges appear in a human trafficking case, financial investigations regularly provide valuable evidentiary contributions. Showing why traffickers engage in their exploitative activity—to make money and enjoy an expensive lifestyle—can be key to painting the appropriate picture of the traffickers' profit and greed. Following both the money (held by the traffickers) and the debt or lack of money (held by the victims) tracks the relationships' power structure and coercion. In addition, acts of hiding the money and the criminal activity through structuring or other financial crimes can provide significant evidence of the traffickers' consciousness of guilt. That evidence can also demonstrate the traffickers' and their co-conspirators' knowledge of the initial illegal activity because it explains why they may have avoided banks or used deceptive corporate forms to conceal assets, for instance, thereafter.

B. Financial Evidence Distinguishes the Traffickers from the Victims and Other Players—and Can Also Help Identify Additional Victims and Perpetrators

The contrasts presented between the traffickers and victims through financial evidence are immense. In sex trafficking cases, for instance, the victims are regularly distinguished by being unable to keep or spend the proceeds of their work; instead, the trafficker controls the funds—and juries can readily understand that this situation stands in stark contrast to less exploitative relationships. Juxtaposing the wealth of those who hold others in domestic servitude with the abuse and starvation of labor trafficking victims in the traffickers' beautiful residences brings home the horror of that exploitation. And jurors well understand that employees would not sign their full paychecks back to their employers under normal circumstances. Thus, financial evidence alone can provide effective evidence of coercion.

Following the bank record paper trail can have significant benefits beyond helping to show coercion as well. A financial investigation can identify prior or additional victims (who may also have been induced to sign over "paychecks" to their traffickers, for instance, or deposited money into the traffickers' bank accounts). It can illustrate the evolution of individuals' roles, including where some individuals who were victims may also begin to exercise coercion in a sex trafficking scheme. And it can identify additional perpetrators. Those perpetrators may have taken victims to a bank in order to facilitate sign-overs, directed financial transactions into specific bank accounts, or made their own accounts or accounts they control available for exploitative collection of victims' earnings. Tracking where the money goes can also identify co-conspirators by showing who is receiving money from the illegal activity or spending money on behalf of the scheme. These individuals often have power, control, and responsibility, or are operating at a higher level in the criminal organization, sometimes overseas.

C. Financial Evidence Helps Identify Gatekeepers and Their Roles

Some individuals, referred to as "gatekeepers," help people who they know are involved in illegal activity launder their proceeds. By doing so, they commit their own financial crimes, including when they operate as unlicensed money transmitting businesses in violation of 18 U.S.C. § 1960. Because gatekeepers may work with several different traffickers or criminal organizations, prosecuting them can help disrupt and dismantle pathways for illicit activity in unique and desirable ways. Tracking funds flowing to a single gatekeeper, for instance, can lead to multiple criminal organizations and result in additional targets and more cases. And often, it can present the best chance to accomplish such law enforcement goals as dismantling criminal groups and arresting those whose incarceration will have the greatest impact on the organization.

D. Financial Evidence Can Enable Additional Charges and Higher Penalties

Pursuit of financial evidence can enable an array of financial charges, including multiple forms of money laundering and structuring and other financial crimes, such as bank fraud. Such charges allow prosecutions to better capture the breadth of an individual's or organization's criminal conduct. Often, financial charges will also enable higher sentences by increasing the relevant statutory maximum penalties and advisory sentencing ranges under the United States Sentencing Guidelines. Additionally, familiarity with the financial side of the criminal activity facilitates forfeiture, which can expand the consequences to fit the crimes and deter criminal conduct by depriving the traffickers of the fruits and tools of their illegal activity. (Further, money laundering charges regularly expand the scope of forfeiture to include different and additional property that would not be forfeitable under other statutes, as discussed below.) In other words, through financial investigations, a more thorough case can be brought against the traffickers, and higher penalties may be imposed. Indeed, traffickers may have factored jail into their calculus as a cost of doing business, expecting to exit to the comfort of the houses and expensive cars they have accumulated; hence, depriving them of that opportunity can be especially powerful.

E. Financial Evidence Corroborates Victims and Other Witnesses

Having financial evidence, often from disinterested third parties such as banks and unrelated businesses, also benefits human trafficking cases by providing corroboration to victims and other witnesses. This evidence includes bank withdrawal and deposit slips; credit or debit card payment records documenting travel, such as flight, gas, and hotel expenses; advertising payments; and other purchases that may match victims' memories, even if the victims do not recall specific dates or locations otherwise. (Advertising payments and other expenditures can often be the basis for specific money laundering charges, as well.) In addition, one credit report or bank account or corporate registration document can lead to multiple others and help establish relationships and patterns of activity that shed true light on how the criminal enterprise works.

With or without financial charges, having this impartial documentation and the financial trail reduces pressure on victims by providing independent evidence of the occurrence of events, and supplements their testimony in black-and-white. This evidence will remain available and unintimidated for trial, even if witnesses may not be—including evidence against traffickers who are accustomed to dominating their victims and expect to do so at trial as well. And the documents will say what the documents say even when memories may fade.

Financial evidence is also useful for interviewing traffickers and can both establish relationships (for instance, through bank or ATM video showing a victim accompanied by the trafficker) and contradict the traffickers' accounts in indisputable ways, including in such areas as illustrating early on that the traffickers know the victims. Bank tellers may have overheard conversations between a trafficker and victims or witnessed the trafficker instructing victims on how they must deposit money into particular accounts, or may have observed forceful actions, bruises, or other injuries that otherwise are hidden from public view. Financial evidence can also be a basis for expert witness testimony and other perspectives that can be persuasive for the jury and that responds to different jurors' learning styles. That tailoring can be especially useful given the uncomfortable topics of coercion and abuse that are present in these cases.

F. Financial Evidence Enables Forfeiture and Helps Facilitate the Satisfaction of Victims' Restitution Orders

Even without money laundering charges, financial investigations often enable identifying assets for forfeiture, and having the ability to seize the traffickers' assets to help victims recover is highly rewarding. Forfeiture provides unique tools for restraint of assets, so assets that would otherwise be spent or hidden by the end of a case can be brought into government custody for forfeiture at the beginning, even before indictment. The use of both civil and criminal forfeiture tools can enable the forfeiture of certain properties that facilitated the crimes, or proceeds, as well, even where they may be titled in others' names, in order again to both prevent the traffickers from further benefiting from their crimes and to help get recovery to victims where possible.

Forfeiture orders may be used to collect against assets of the traffickers for lengthy periods after the crime, too, and help eliminate windfalls to traffickers if they managed to secrete, or if they later procure or even inherit, assets. Even when forfeitures are limited, even nominal payments to victims from the traffickers' assets may have desirable, empowering effects. This Article discusses forfeiture and the process for helping to get forfeited assets to victims in further detail below.

IV. Elements of Financial Investigations

A financial investigation occurs alongside a criminal investigation and focuses on the money generated by and spent on criminal activity, often dealing with "specified unlawful activity" based on that term's use in the money laundering statutes and for forfeiture. At times, the financial investigation may comprise the entire investigation, such as in tax and some fraud cases, but it may also complement the criminal investigation that is underway on any other substantive crimes. Financial investigations are especially important in money-motivated and profitable crimes to better understand the motivation and additional criminal activity of these enterprises.

Goals of a financial investigation include: (1) understanding the flow of money and developing evidence for money laundering or other financial charges (including tax charges) against all defendants, if applicable; and (2) identifying assets for seizure or forfeiture before they are spent or hidden. This often includes identifying specific relevant transactions and their role in connection with the criminal conduct (promotion, for instance), as well as working to evaluate the overall picture of incoming funds and outgoing expenses to understand the traffickers' finances as fully as possible.

This type of evaluation is important in part because money laundering is essentially the second step in a two-step process: first, one is looking for a completed crime that generated money or "proceeds;" and second, one identifies what the perpetrators did with those proceeds (spending, hiding, or otherwise) that might generate a money laundering charge or further investigation. Seeing how money is used (where the proceeds end up) also enables tracing of assets back to the crime in a valuable way because forfeiture covers such proceeds in many forms—and financial documents are key to this process. They can show, for instance, that a trafficker had no assets as of a particular date when the trafficker declared bankruptcy—which establishes a baseline for the illegal earnings since that time.

Insurance information, income reported (or notably, not reported), and other information appearing on tax returns can also provide valuable leads for both the overall case and forfeiture. This information can, as examples, document a trafficker's claimed lack of legitimate income compared to a lavish lifestyle; provide (or refute) claimed employment information; reveal jewelry and other assets; or indicate corporate forms that may have facilitated concealment. (Businesses can be subject to forfeiture on that basis.)

It must be kept in mind, though, that financial investigations take time, and some tools—such as through a grand jury—may only be available before indictment, so starting those processes as early as possible is the most helpful, especially when responses may be desired from outside the United States. In addition, an early start can help capture additional assets before they are spent or moved overseas, for instance, either as part of the normal operations of the criminal enterprise or if the traffickers learn about law enforcement's investigation.

It is helpful as part of the financial investigation, too, to think broadly about what types of financial evidence and documents may be available in a case. A great deal of evidence is available publicly and on the Internet, including through typical search engines, social networks (where traffickers may accumulate celebratory photographs of cash), advertising, and property-related searches such as Zillow (for both valuation and timing-of-transfer information) and mortgage searches. Electronically available documents may also include court records, which provide information on property ownership, company information, bankruptcies, and family relationships and events, including divorces, births, and deaths (and which can be used to identify family members who may be "straw owners" of certain properties). Other evidence entails some expectation of privacy and may require legal process, and some evidence almost always requires specific legal process, such as a grand jury subpoena or search warrant.

Traditional law enforcement methods such as detailed interviews, surveillance (including of trips to and from banks), use of subscription databases regarding both people and assets, and searches (which should cover financial documents wherever applicable, in any event), can also readily be adapted to the financial angle. This should always receive attention separately from other pursuits in the course of the criminal investigation. Public records and other sources of information may assist in identifying additional witnesses or assets, including a review of bills, utility information, bank statements, mail, receipts, and notes that traffickers throw away. This evidence supplements formal banking records and both domestic and international money transfer records that may be obtained. And much of a financial investigation may be pursued well before the investigation is known to the traffickers, which can facilitate accumulating the desirable variety of evidence that will be useful in the prosecution down the road.

Documents created and retained pursuant to the Bank Secrecy Act of 1970 ("BSA")[5] and its accompanying regulations—which, among other things, introduced multiple reporting requirements designed to prevent criminals from exploiting the U.S. financial system—can also be useful in financial

[5] *See* 31 U.S.C. §§ 5311–5332 (2012 & Supp. III 2015).

investigations in human trafficking cases, as elsewhere. Their utility includes identifying bank accounts, financial activity, and other accountholders, which may help lead to the early determination of traffickers' identifiers, their locations and the locations of their assets, and the identification of co-conspirators, as well as enabling early analysis of financial flows.

The key BSA reports include currency transaction reports ("CTRs" and "CTR-Cs") that must be completed by "financial institutions" (including check cashers and casinos) for deposits, withdrawals, or exchanges of currency over $10,000; Forms 8300 that must be filed by non-financial trades and businesses, including lawyers, when a single or related or connected transaction(s) totals more than $10,000 in cash (including cashier's checks, money orders, and traveler's checks with lower face values) within a 12-month period; currency and monetary instrument reports ("CMIRs") that must be completed by individuals when transporting (or causing the transportation of) monetary instruments totaling more than $10,000 into or out of the United States; and suspicious activity reports ("SARs") that banks must file "relevant to a possible violation of law or regulation" pursuant to 31 C.F.R. § 1020.320. Penalties also apply to individuals or entities failing to file or evading these reports, which can be pursued, if appropriate (and other laws provide reporting requirements that can regularly be useful as well).

V. Money Laundering Charges

After crimes generate money, money laundering is generally "the processing of these criminal proceeds to disguise their illegal origin."[6] Money laundering entails hiding the existence or the illegal source of income, often by disguising the income to make it appear legitimate so that it can be spent without arousing suspicion—or trying to use such illicit funds for some purpose within the criminal scheme (which is commonly referred to as "promotion" money laundering)[7]—among other activity. Essentially, money laundering takes "dirty" money, or illegally earned "proceeds," and attempts to make that money look "clean," often combined with using that money to advance the criminal cause.

Federal money laundering charges almost always must begin with the illegal proceeds generated by an "SUA" or "specified unlawful activity," and many crimes relevant to human trafficking constitute SUAs.[8] "Proceeds" include the amounts earned from sex acts or earnings traceable to forced labor in human trafficking cases. Money laundering may occur, for instance, when money goes into banks, introducing illicit moneys into a financial system and using them for even legitimate purposes. And the point when money is first introduced into a financial system can be a useful time to identify it as

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[6] *What Is Money Laundering?*, FINANCIAL ACTION TASK FORCE ("FATF") (last visited July 20, 2017); *see also, e.g.*, *Money Laundering*, U.S. DEP'T OF TREASURY ("Treasury Department") (last visited July 20, 2017).

[7] Certain money laundering cases and, specifically, cases involving "merger"—which arises regularly in human trafficking cases—require prior consultation with the Money Laundering and Asset Recovery Section. *See, e.g.*, U.S. DEP'T. OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-105.330 (2016).

[8] SUAs relevant to human trafficking cases include a variety of offenses listed under 18 U.S.C. §§ 1956(c)(7) and 1961(1), such as these (which appear in Title 18, unless otherwise specified): human trafficking (§§ 1581–1597); the Mann Act (§§ 2421–2424); interstate (or foreign) travel or transportation in aid of racketeering enterprises ("ITAR" or the "Travel Act") (§ 1952); sexual exploitation of children (§§ 2251, 2252, 2252A (if an actual minor), and 2260); alien harboring or smuggling (8 U.S.C. §§ 1324, 1327, and 1328) for financial gain; citizenship or naturalization fraud (§§ 1425, 1426, and 1427); passport or visa fraud (§§ 1542, 1543, 1544, and 1546); fraud in foreign labor contracting (§ 1351); identification document fraud and access device fraud (§§ 1028 and 1029); money laundering (§§ 1956, 1957, and 1960); the RICO offenses at Section 1961(1) (except Title 31 offenses); mail and wire fraud (§§ 1341, 1343); some extortion and hostage-taking-related offenses (§§ 875, 1116, 1201, and 1203); state-law kidnapping and extortion; obstruction of justice; and some foreign offenses and offenses in violation of other laws. Further, the statutory definition includes "trafficking in persons, selling or buying of children, sexual exploitation of children, or transporting, recruiting or harboring a person, including a child, for commercial sex acts." 18 U.S.C. § 1956(c)(7)(B)(vii) (2012).

"proceeds," in part because that introduction often requires personal interaction with a bank or other entity before the money is able to be transferred electronically.

Key money laundering charges relevant to human trafficking investigations include the basic and international money laundering provisions of 18 U.S.C. §§ 1956(a)(1) and (a)(2); the "spending statute," 18 U.S.C. § 1957; structuring in violation of 31 U.S.C. § 5324; operating unlicensed money transmitting businesses in violation of 18 U.S.C. § 1960; and conspiracy to violate either Section 1956 or Section 1957 (or both) in violation of 18 U.S.C. § 1956(h).

Although the four provisions of Section 1956(a)(1) contain different elements, it is key to note that "laundering" can be as simple as the transfer of SUA proceeds from one person to another, if the intent requirements are met. And money laundering is not limited to any specific monetary amount or to cash or other funds moving into banks or out of the country. Instead, the required "financial transaction" (an element of any charge under Section 1956(a)(1)) is defined broadly, including the transfer of title to any real property, vehicle, vessel, or aircraft, even when no exchange of funds occurs—and transactions involving use of a "financial institution" which is engaged in, or the activities that effect, interstate or foreign commerce in any way or degree.[9] The term "transaction" itself, indeed, includes loans, pledges, gifts, "or other disposition[s]," and with respect to financial institutions, includes "use of a safe deposit box."[10] In addition, financial institutions may include not only domestic and foreign banks, but also casinos, currency exchanges, insurance companies, jewelers, travel agencies, and car and boat dealerships.

Financial transactions for purposes of charging money laundering under Section 1956(a)(1) can include purchases of items, such as renting hotel rooms in new areas, paying advertising or recruiting expenses to expand geographic reach, or buying supplies for future use such as in a "massage" parlor or forced labor operation. Moreover, while the prosecution must prove the type of SUA that generated the proceeds, the specific crime transaction need not be proven (and one can use proof of lack of other income). And the defendant does not need to know the SUA; he or she need only know that the funds were from some form, but not necessarily what form, of felony (federal, state, or foreign). That knowledge can be proven by circumstantial evidence.

Similarly, it is useful to remember that Section 1956(a)(2), prohibiting international money laundering, can be violated by moving *any* money internationally with the intent to promote an SUA, whether or not that money constituted "proceeds." And the violation includes attempted transfers of funds and transactions designed "in whole or in part" to conceal that nature of proceeds or to avoid a transaction reporting requirement. The "monetary instruments" covered by these provisions include coin and currency, foreign money, personal and bank and travelers' checks, and money orders, as well as investment securities or negotiable instruments. Further, as to both basic and international money laundering, there is not a general requirement of the involvement of a bank.

Section 1957(a) prohibits knowingly engaging or attempting to engage in a "monetary transaction" with proceeds of an SUA in an amount greater than $10,000. It omits the required intent elements of Section 1956(a)(1), but does include a threshold amount ($10,000). A "monetary transaction" differs somewhat from a "financial transaction," and generally requires the involvement of a domestic or foreign bank.[11] Section 1957(a) applies in the United States *or* to non-U.S. persons outside the United States. And again, the SUA does not need to be known by the defendant. Indeed, under Section 1957, the defendant need only have known that the proceeds were criminally derived, which includes from a

[9] *See id.* § 1956(c)(3)–(4).
[10] Id. § 1956(c)(3).
[11] *See id.* § 1957(f)(1).

misdemeanor (rather than a felony). Section 1957(a) can be specifically geared, therefore, towards third parties who knowingly deal with traffickers and help them to spend their ill-gotten gains.

The crime of "structuring" pertains to breaking up cash transactions (or attempting to do so) in order to evade the BSA reporting requirements, as defined in 31 C.F.R. § 1010.100(xx). As noted above, the BSA imposes reporting requirements on banks and other institutions, and intentional efforts to stay below the CTR reporting threshold or otherwise avoid the BSA reporting requirements (including pertaining to CMIRs, Forms 8300, and an identification requirement applying to transactions greater than or equal to $3,000) constitute the crime of structuring.[12] Proof is required that the traffickers knew of the relevant reporting requirements, but not that they knew that structuring was illegal—and even when direct evidence of this is lacking, one can infer the trafficker's motive and intent to evade the reporting requirements based upon the transactions themselves, either alone or in combination with the criminal origin of the funds. Notably, structuring can include transaction amounts that are *not* just under $10,000; deposits in lower amounts at different locations or on successive days, for instance, can similarly constitute structuring.[13]

Section 1960—which is highly relevant to "gatekeepers" (those laundering money for criminal organizations of which they may not otherwise be a part)—makes it a crime to conduct a money transmitting business that operates without a state license (whether the defendant knows of that licensing requirement or not—and many states do have such licensing requirements) *or* fails to register with the Financial Crimes Enforcement Network ("FinCEN") *or* knowingly transports or transmits funds that the defendant knows are derived from a criminal offense or that are intended to promote unlawful activity. Money transmitting businesses include check cashers, currency exchanges, and any person who engages as a business in the transmission of funds, by any and all means, including by fax or courier.[14] Individuals can also conspire to structure or operate an illegal money transmitting business in violation of 18 U.S.C. § 371.

The money laundering conspiracy provision criminalizes conspiring to commit any of the offenses set forth in Sections 1956 or 1957. For the conspiracy, there must be at least two participants (not including any undercover agent or informant), and the government must prove, stated generally, that each defendant joined the conspiracy at some point with knowledge of at least some of its purposes or objectives and with the intent to accomplish them. The government does not need to prove that the conspirators knew the precise SUA that generated the proceeds being laundered, or that any transactions were actually conducted, just that two or more people intended to launder "dirty" money. In addition, unlike other conspiracy provisions, there is no requirement of proof of an "overt act" in furtherance of the conspiracy; the proof boils down to the agreement. This statute can facilitate prosecution of spouses in domestic servant cases and others who join in a human trafficking scheme. It is also a useful tool for charging money laundering over a period of time without accumulating multiple counts (because each act of money laundering itself must be charged as a separate offense)—as well as broadening the scope of relevant and admissible evidence in the case to include all of the financial information that has been gathered.

Accordingly, with money laundering, there are a number of charging options that can be appropriately tailored to fit the facts of each prosecution, including to accommodate considerations of venue and admissibility. Different case law considerations come into play in different circuits and

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[12] *See* 31 U.S.C. § 5324 (2012).

[13] In order to prioritize addressing the most serious structuring offenses, the Internal Revenue Service and the Department of Justice have specific policies pertaining to structuring cases and forfeiture in relation to structuring. Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Attorney General Restricts Use of Asset Forfeiture in Structuring Offenses (Mar. 31, 2015).

[14] *See* 31 U.S.C. § 5330(d)(1) (2001).

districts, so circuit case law must be consulted in connection with any case.[15] But the incorporation of potential money laundering charges—separately from the financial investigations themselves—as a critical component of an effective anti-trafficking enforcement strategy bears noting for these charges' adaptability and accessibility in human trafficking cases. The charges are also adaptable to the evolution of human trafficking methods—including the use of gift cards and virtual currency—and the fact that criminal organizations regularly utilize multiple methods at a time for financial transactions. Therefore, this Article recommends always considering these additions in order to capture the money-moving conduct of these profit-motivated defendants.

VI. Forfeiture

Financial investigations are also pivotal in enabling forfeiture in human trafficking cases, which regularly provides the best mechanism and opportunity to restrain and secure assets for recovery by victims. Forfeiture is the taking of property by the government, without compensation, because it was obtained or used in a manner contrary to the law. Purposes of forfeiture include: punishing the criminal, deterring illegal activity, removing the tools of the trade, disrupting and dismantling the organization, protecting the community (such as by possibly assisting in the removal of nuisance properties that may be utilized by traffickers), and returning assets to victims in a fair and orderly way (which can be accomplished most effectively through the combination of restitution orders with forfeiture tools in these cases). In short, the work that law enforcement does in this area is designed to ensure that crime does not pay, and to assist victims where possible.

The background principle of forfeiture is that a defendant relinquishes his right to property by using it in an illegal way or if it is derived from illegal activity. Proof of this illegal use or acquisition (often referred to as the "nexus" of the property to the crime, and which must be proved by a preponderance of the evidence, including hearsay evidence) is often developed as part of the overall investigation in these cases. Financial investigations, though, including with agents and analysts specializing in the review and understanding of financial documents (and who can similarly free up other law enforcement officers to assist with other challenges in human trafficking cases), can be especially valuable to see what property is viable for forfeiture, including analyzing ownership and other records to appraise how forfeiture should best proceed.

Forfeiture has both judicial (civil and criminal) and administrative processes. All forms of federal forfeiture hinge, though, on nexus, the property's relationship to the crime at issue. Except for certain terrorism offenses or in certain circumstances *after* a judicial forfeiture order is entered (by the mechanism of "substitute property" under 21 U.S.C. § 853(p)), there is no ability to forfeit *other* funds just because they belong to a defendant. So linking property to its specific relationship to the offense is key. Because, like other aspects of financial investigations, this takes time, beginning these inquiries as early as possible in any investigation is important. Additionally, there are timing requirements and deadlines attached to forfeiture proceedings that also merit early attention.

A misperception regarding forfeiture is that it is perhaps duplicative or unnecessary when restitution will be ordered, but the opposite is true. Both should be pursued in every case. Notably, restitution and forfeiture serve different purposes, restitution being geared towards making victims whole and relating to losses, whereas forfeiture is a form of punishment and relates to money earned or property used in the criminal enterprise, so they are not mutually exclusive, and both are mandatory in criminal cases where their prerequisites are met. In addition, due to its accompanying tools for seizure and restraint

[15] Certain consultation or approval requirements apply to a variety of money laundering charges as well, and the Money Laundering and Asset Recovery Section is available to assist on any questions that arise.

of forfeitable assets (seizure warrants, arrest warrants *in rem*, and protective orders to secure and maintain assets, *e.g.*), forfeiture offers opportunities that pursuit of restitution alone does not. Additionally, forfeiture complements restitution because forfeited funds, whether forfeited administratively or through judicial (civil or criminal) processes, can be directed to fulfilling restitution orders (through remission or restoration) or potentially used to cover victims' losses even where no restitution order was entered (through remission). The specific procedures and decision-makers for each process may differ—as they may depending on the identity of the agency involved—but the goals remain the same. Informing everyone involved that a case is a victim case can facilitate those efforts—as can making sure that the Department of Justice or Treasury agency forfeiture personnel (if a Treasury Department agency is involved) obligate the funds for victim compensation as soon as assets are seized.

Property subject to forfeiture includes real property (houses, restaurants, stores, strip malls, hotels, farms, and office parks); tangible personal property (cash, jewelry, art, boats, airplanes, and cars); and intangible personal property (professional licenses (medical, pharmacy, liquor, and potentially licenses to practice law), bank and investment accounts, business entities, permits, website domain names, stocks, lien interests, and virtual currency (*e.g.*, Bitcoin)). Thus, it is useful to think broadly when evaluating property for forfeiture. It can include a corporate form that owns property, such as the business engaging in labor trafficking. Every asset should be analyzed, and there are multiple possible avenues to accomplish forfeiture. Pre-trial seizure or restraint should also be considered in order to divest the traffickers of control of the assets as early as possible.[16]

Substantive theories of asset forfeiture—essentially, the nexus or how the property is related to the crime (what role it played) in order to be subject to forfeiture—include proceeds, facilitating, and "involved in" property. More than one theory, and indeed whichever theories apply pursuant to the statutes, can and should be pursued at the same time in a forfeiture investigation or case. For instance, property (a vehicle or house, *e.g.*) may have been purchased with ill-gotten trafficking gains as well as used to transport or restrict movement by trafficking victims—so both proceeds and the facilitating property theories should be pursued. Unique forfeiture provisions also apply to crimes under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), so when RICO is charged, that can provide additional forfeiture options.

Beyond RICO cases, forfeiture is available either where a crime occurs that constitutes an SUA under the money laundering statutes (18 U.S.C. § 981(a)(1)(C) provides for the forfeiture of proceeds for all SUAs, and that civil authority is incorporated for criminal forfeiture through 28 U.S.C. § 2461(c)) or wherever else there is specific statutory authority for forfeiture. (There is no universal statute or common-law authority for forfeiture, so forfeiture must always be tied to a specific statute; but in the area of human trafficking, there are many options that enable this possibility. It should be kept in mind, though, that statutes and forfeiture authorities change over time, so the effective dates of each relevant statute should be considered.)

"Proceeds" is broadly read and generally pertains to any property or interest in property, real or personal, that is derived from or traceable to, directly or indirectly, the illegal activity for which the applicable statute provides forfeiture authority—essentially, starting with all money that is generated by the illicit activity and tracking where it goes. As noted above, this theory of forfeiture applies to many crimes, and the government is usually entitled to forfeit the gross proceeds of the crime, not just the net

[16] To restrain real property, which absent a higher showing, cannot be seized, notices of *lis pendens* are valuable tools. It is important to keep in mind that all assets must be evaluated before they are seized or restrained, including with respect to ownership, net equity, custodial or management, disposal, and others questions, in order to ensure that law enforcement is only pursuing properties for forfeiture consistently with its overall Asset Forfeiture Program. *See* U.S. DEP'T OF JUSTICE, ASSET FORFEITURE POLICY MANUAL [hereinafter *Policy Manual*] 23–31 (2016). Note as well that all contraband and other property illegal to possess is subject to forfeiture.

proceeds—because defendants should not be entitled to benefit by deducting the operating expenses of their illicit activities.

Directly traceable proceeds would include the money a smuggler receives from a border crossing and what labor traffickers earn through the coerced labor, and indirect proceeds would include any winnings on a lottery ticket purchased with that money from the border crossing or other illicit earnings. They also include interest on proceeds and the appreciation of art or real property. Although they can be difficult to calculate, "proceeds" can include money that traffickers avoid having to spend, for instance, by using forced labor rather than legitimately hiring employees, as part of the calculation of their earnings. One way to think about this is through a "but for" test, that is, without the criminal activity, would the defendant have this property?

"Facilitating property" refers to assets that make a crime easier to commit or harder to detect.[17] In that regard, the government must generally prove a "substantial connection" between the property at issue and the crime. This theory of forfeiture generally includes a broader category of property than proceeds, but it is available for fewer crimes. It does include Chapter 77 offenses (unless the violation pre-dated January 26, 2001), passport and visa fraud, and also drug crimes, as examples—which is increasingly relevant where traffickers use drugs and addiction as tools of coercion. In terms of the "substantial connection," there cannot be simply an incidental or fortuitous connection between the property and the crime, but the item does not need to be indispensable to the crime; so "facilitating property" includes bank accounts used to fund internet access for child exploitation crimes, houses or land where forced labor occurs (but probably not the vacation home where a domestic servant is brought for only a few days), and vehicles used to transport trafficking victims.[18]

Several of the key statutes relevant to human trafficking have their own provisions enabling, in particular, the forfeiture of specific kinds of facilitating or related property in addition to proceeds.[19] The most important provision in this regard is 18 U.S.C. § 1594, which through the Justice for Victims of Trafficking Act of 2015 ("JVTA"), enables forfeiture of property "involved in" any Chapter 77 offense, in addition to proceeds, facilitating property, and property traceable to any of that property. Thus, for criminal activity on or after May 29, 2015, the available property for forfeiture has expanded, and all notices of forfeiture should be adapted accordingly, as applicable.

Traditionally, "involved in" property has primarily been forfeitable under the money laundering statutes (18 U.S.C. §§ 1956, 1957, and 1960, under 18 U.S.C. §§ 981(a)(1)(A) and 982(a)(1)), and that capability continues to invite inclusion of money laundering charges in human trafficking cases, whether or not a Chapter 77 offense is charged. Although houses and land used for domestic servitude or forced labor may be forfeited as facilitating property under various statutes, the "involved in" coverage expands the realm of property of which trafficking defendants can be deprived. One distinction pertains to bank accounts: although assets within bank accounts can be forfeited as proceeds, and bank accounts (or, more accurately, funds from those bank accounts) can be facilitating property and subject to seizure and forfeiture in human trafficking cases under that theory, additional bank accounts and assets may be forfeitable as "involved in" the crimes that might not otherwise be directly forfeitable, so pursuing all available avenues in this regard is likely to assist in accomplishing law enforcement's goals. The "involved in" theory may apply, for instance, to the full balance of a bank account, even funds deposited into it later, if a smaller amount was funneled through it on an earlier date (subject to the "substantial

[17] *See* 18 U.S.C. § 982(a)(6)(A)(ii)(II) (2012).

[18] Typical language in this regard refers to property "used[] or intended to be used to commit or to facilitate the commission of such violation[] and any property traceable to such property." 18 U.S.C. § 1594(d)(1) (2012 & Supp. III 2015). Also see the summary of the Department of Justice's facilitating property policy. *Policy Manual*, *supra* note 16, at 71–77.

[19] *See, e.g.*, 8 U.S.C. § 1324(b) (2012).

connection" requirement again and an Eighth Amendment proportionality analysis that applies to forfeiture proceedings).

To explain that in further detail, property that is "involved in" a money laundering scheme or human trafficking crime (as of May 29, 2015) can include both "dirty" (whether by being proceeds or conventional facilitating property) and "clean" money. This constitutes the broadest theory available for most crimes, and is useful because under this theory, for instance, if improvements are made to a house that was purchased with "clean" money, but the improvements were paid from "dirty" money as part of a money laundering scheme, then the entire house can be subject to forfeiture (subject to the forfeiture not being grossly disproportionate to the crime). If a trafficker uses the books and records of her restaurant, bar, spa, or massage parlor to pay for supplies for a sex trafficking operation, that business and its business accounts (and the funds therein) are presumptively forfeitable because the business was involved in the human trafficking scheme.

Each viable theory should be included in the forfeiture notice stated in the criminal indictment or information for criminal forfeiture.[20] Criminal forfeiture is tied to the defendant, and thereby enables the pursuit of substitute property from the defendant under certain circumstances. For instance, civil forfeiture is tied to the property. A key benefit of civil forfeiture (separately from its application to assets that are not owned by a defendant in a criminal case but that play a role in crimes (and lack innocent owners, as defined in the statutes)) is that it can be used to pursue the assets of fugitives and deceased individuals. And it can be pursued even if no criminal charges or different criminal charges are filed (although each relevant crime must still be proven in the civil proceeding). Civil forfeiture may also be useful because criminal forfeiture only applies if the defendant is actually convicted of a crime enabling the specific forfeiture desired (forfeiture can also be agreed to in a plea agreement). Keep in mind that even where there are no specific assets to be recovered, law enforcement should always calculate at least the amount of illegal proceeds obtained by each defendant, respectively, and seek individualized forfeiture orders for those amounts. Subsequently, substitute property should be pursued, if applicable.

Although the precise approach depends on the facts of each case and the assets involved, criminal forfeiture should be pursued, if applicable, in every criminal case, and civil forfeiture should also be considered, depending on the ownership of the subject assets and other factors. A civil forfeiture proceeding is subject to a stay, which can be requested from the court so that it will not interfere with a pending criminal case. By whichever mechanism, however, forfeiture can be expected to enhance restitution and recovery to victims. No matter the mechanism by which assets are forfeited, they may be pursued after forfeiture by way of remission and restitution on victims' behalf.[21]

VII. Remission and Restoration

Once assets are forfeited, there are a variety of purposes for which they can be used. In human trafficking cases, as elsewhere, compensating victims is a key priority, and victims receive compensation from forfeited funds *before* money would go to law enforcement or other purposes.[22] Tools for that provision include remission and restoration, with restoration being essentially a shortcut to the remission process if there is a restitution order in the case. Notably, for Chapter 77 offenses, the JVTA explicitly directs that "[n]otwithstanding any other provision of law, the Attorney General shall transfer assets

[20] Forfeiture may also be pursued as part of administrative proceedings or in parallel (or stand-alone) civil forfeiture cases, in compliance with the applicable statutes and procedures.

[21] Guidance on all aspects of forfeiture is available through the Money Laundering and Asset Recovery Section, which has a number of resources available to assist in these efforts. The Section also has a number of resources tailored to international capabilities in this area and tools to assist, in consultation with the Office of International Affairs, when assets are located overseas.

[22] *See Policy Manual*, *supra* note 16, at 161; 28 C.F.R. § 9.9(a) (2017).

forfeited pursuant to [18 U.S.C. § 1594], or the proceeds derived from the sale thereof, to satisfy victim restitution orders arising from violations of this chapter."[23] Accordingly, when a Chapter 77 offense is charged, the abilities to provide forfeited funds to victims further expand, as described below. As mentioned above, providing *any* funds to victims can have powerful effects, and provides the central reason why these efforts should be pursued as diligently as possible. And everything that law enforcement does to trace, seize, and restrain assets early will make sure that more funds are available for victims at the end of the case.

In "remission," the Attorney General, acting through the Money Laundering and Asset Recovery Section (for assets forfeited via judicial forfeiture) or the agency that seized the funds for forfeiture (for assets forfeited via administrative forfeiture) has discretion to compensate "persons" who have suffered a "pecuniary loss" as a direct result of the offense that gave rise to the forfeiture or a "related offense."[24] "Persons" include individuals as well as estates and business entities, and "victim" is defined as "a person who has incurred a pecuniary loss as a direct result of the commission of the offense underlying a forfeiture." In turn, "pecuniary loss" is defined as "the fair market value of the property of which the victim was deprived as of the date of the occurrence of the loss."

Under the current regulations, physical injuries, torts, and property damage are not coverable by remission. Accordingly, remission for trafficking victims is often limited to a calculation of lost wages based upon a minimum-wage calculation for hours worked, which prosecutors should assist in pursuing. Past medical and counseling bills may also be covered when they are supported by documentation. (Please contact the Money Laundering and Asset Recovery Section regarding the treatment of future expenses.) Any victim, to receive remission, completes a petition for remission that is submitted to the prosecutor for processing according to the applicable procedures—and prosecutors should work to identify all potential victims and provide them with notice of the opportunity to file a petition for remission.

Once a petition for remission is submitted, remission may be granted if the provisions of 28 C.F.R. § 9.8 are satisfied and "the victim satisfactorily demonstrates that":

> (1) A pecuniary loss of a specific amount has been directly caused by the criminal offense, or related offense, that was the underlying basis for the forfeiture, and that the loss is supported by documentary evidence including invoices and receipts;
>
> (2) The pecuniary loss is the direct result of the illegal acts and is not the result of otherwise lawful acts that were committed in the course of a criminal offense;
>
> (3) The victim did not knowingly contribute to, participate in, benefit from, or act in a willfully blind manner towards the commission of the offense, or related offense, that was the underlying basis of the forfeiture;
>
> (4) The victim has not in fact been compensated for the wrongful loss of the property by the perpetrator or others; and
>
> (5) The victim does not have recourse reasonably available to other assets from which to obtain compensation for the wrongful loss of the property.[25]

Documentary evidence includes receipts, invoices, and bank records, and can include evidence gathered by the government that was not previously in the victims' possession. Petitions may be decided any time while forfeited assets remain, and anyone denied remission may request reconsideration of the

[23] 18 U.S.C. § 1594(f)(1) (Supp. III 2015).
[24] *See* 28 C.F.R. §§ 9.2, 9.8 (2017).
[25] 28 C.F.R. § 9.8(b).

denial within 10 days of receiving notification thereof. Requests for reconsideration must include new information and are considered by a different decision-maker.

Under restoration (the shortcut to the remission process when there is a restitution order in the case), the U.S. Attorney's Office consults with the seizing agency and then certifies to the Attorney General that all known victims were properly notified and are accounted for in the restitution order; that the losses described in the restitution order have been verified and reflect all sources of compensation received by the victims; that the victims do not have recourse reasonably available to obtain compensation for their losses from other assets; and that the victims essentially were not complicit in or willfully blind to the offenses.[26] Restoration is considered a shortcut to remission because the individual victims do not need each to file their own petitions (and if some assets have been forfeited judicially and some administratively, more than one petition may otherwise be required), and the process therefore generally proceeds more quickly, but it does hinge on accurate restitution orders. Again, too, the decisions on these petitions are within the Attorney General's discretion. Guidance and model documents for both remission and restoration appear at https://www.justice.gov/criminal-mlars/victims.

Ultimately, under either remission or restoration, victims are paid from the available net proceeds of assets forfeited in the case, which underscores the need for pre-seizure planning and attention to net equity thresholds in forfeiture so that particular forfeitures do not diminish the amounts ultimately available to victims. Expenses from "underwater" properties must be offset against available proceeds from other assets, and all recoveries are generally limited to what was forfeited *in that case*, so law enforcement should not hold assets longer than necessary because that may diminish the funds ultimately available for victims. Interlocutory sales and receipt of cash in lieu of forfeiting specific other assets are tools to avoid these issues. Additionally, it may be decided to discontinue forfeiture efforts if defendants will agree to provide otherwise-forfeitable funds directly to the clerk of court for payment of restitution, or otherwise, to facilitate getting funds to victims as quickly as possible. Please contact the Money Laundering and Asset Recovery Section for assistance on any of these options.

The JVTA provision directing that forfeited funds be paid to satisfy restitution orders essentially bypasses the regulatory requirements for remission and restoration and enables the coverage of losses (more closely with the provisions of the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A, *e.g.*) that might not otherwise be recoverable. Accordingly, with charges of a Chapter 77 offense and a restitution order, additional losses to the victims can be recovered from forfeited funds, including non-pecuniary losses if those are covered in the restitution order—and this can generally occur through the restoration process. Because losses in human trafficking cases are often heavily weighted towards medical and counseling bills and there is often a lack of documentation, the JVTA (when combined with a restitution order) is especially powerful: all losses covered in restitution orders of the victims of these offenses will be paid, up to whatever the value is of the forfeited funds. (Cases under the JVTA are still working their way through the system, and the amendment left some ambiguity in certain circumstances which are still to be resolved.)

Because returning assets to victims of crime is a top priority of the Asset Forfeiture Program, whichever of these procedures are applicable should be pursued—and all should be kept in mind for planning in human trafficking cases, in order to work to best facilitate this type of recovery. Additional resources to assist in this effort are available at https://www.justice.gov/criminal-mlars/publications.

VIII. Conclusion

Given the substantial criminal proceeds generated by human trafficking, it is a significant priority of law enforcement to combat this exploitation of victims for commercial sex and labor as effectively as possible. Financial investigations are central to this effort and should be increasingly utilized, both in

[26] *Policy Manual*, *supra* note 16, at 166–67.

terms of using financial documents and information to strengthen cases generally and through proactive pursuit of money laundering and other financial charges and forfeiture. Using these tools, additional assets can be made available for victim compensation, and each tool provides a significant complement to law enforcement's other efforts to combat human trafficking and facilitate recovery for victims.

ABOUT THE AUTHOR

❑ **Elizabeth G. Wright** has been a Trial Attorney in the Money Laundering and Asset Recovery Section, Criminal Division, since August 2015. She serves as a nationwide resource and coordinator for the prosecution of human trafficking cases from the financial investigations, money laundering, and forfeiture perspective. Ms. Wright manages her own large-scale investigations and cases in partnership with other offices and offers consultation and guidance to government attorneys, law enforcement officers, and others on financial investigations, money laundering, civil and criminal forfeiture, and certain victim issues in these areas. She regularly provides training on these topics and legal writing. Before joining the Section, Ms. Wright served as an Assistant United States Attorney. In her more than six years with the Department, she has prosecuted a wide array of cases, including money laundering, drug (focusing on overdose charges), fraud, immigration, and forfeiture matters. She joined the United States Attorney's Office from a private law firm, where she conducted Foreign Corrupt Practices Act, anti-money laundering and Bank Secrecy Act, and export controls work as part of an active trial and appellate litigation practice. Before joining the firm, Ms. Wright completed clerkships at the federal district court and appellate levels.

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