

The Distinction Between and Response to Human Trafficking and Smuggling

By Joe Whitley and Gus Coldebella



Introduction

In recent years, politicians have often used the terms “human trafficking” and “human smuggling” interchangeably when speaking about the challenge at the United States-Mexico border. In Donald Trump’s [2019 State of the Union address](#) he announced that “human traffickers and sex traffickers... smuggle thousands of young girls and women into the United States... to sell them into prostitution and modern-day slavery.” Similarly, approximately four months later Democratic Senator Kyrsten Sinema (D-Arizona) [called on members of Congress](#) to develop bipartisan legislation that would respond to the “human traffickers and criminal organizations preying on migrants [at the border].” In both instances these political figures conflated two distinct, yet sometimes interrelated issues: human smuggling and human trafficking. Both human smuggling and trafficking are criminal acts that should be investigated and ultimately prosecuted. However, to understand and respond to each effectively, they must be understood as distinct phenomena.

The Importance of Definitions

When discussing human trafficking and smuggling, differentiating between the two is of the utmost importance. To address the monumental problems of trafficking and smuggling, we must first define them correctly.

The most prominent feature that distinguishes these crimes from one another is coercion. Whereas human smuggling is an act a person voluntarily elects to participate in, those who fall victim to human trafficking are defrauded or forced into their position. Furthermore, while smuggling inherently implies cross-border movement, the term human trafficking does not necessarily imply any migration of victims, legal or illegal. In fact, the term trafficking could technically describe an instance in which someone is held hostage in their own home.

The [Victims of Trafficking and Violence Protection Act of 2000](#) defined trafficking as an instance in which “a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjecting to involuntary servitude, peonage, debt bondage, or slavery.” Most critically, this legislation recognized human trafficking as a prosecutable federal offense and established the Interagency Task Force to Monitor and Combat Trafficking, which organizes collective interagency action to prevent and combat domestic and international trafficking. The [Trafficking Victims Protection Reauthorization Act of 2008](#) updated this legislation to require all federal employees who have


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unaccompanied alien children to undergo training in order to identify victims of human trafficking.

In contrast, the Immigration Nationality Act characterizes a smuggler as “any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law.” Unlike victims of human trafficking, smuggled migrants choose to be smuggled. The law does not stipulate that a monetary transaction must accompany the action to be considered smuggling, but migrants often pay large sums to be smuggled. Each year smuggled migrants from Central America pay coyotes an estimated \$1.7 billion for guided illegal passage into the United States. In recent years, the number of smuggled individuals has rapidly expanded. In fiscal year 2022 (which ended on September 30), border patrol agents recorded a record 1.9 million encounters at the Southwest Land Border of persons crossing illegally. Of those, 977,000 were immediately sent back either to Mexico or their home countries under Title 42, the pandemic-era order from the CDC, while the remainder were arrested and processed under immigration law. Those arrested and processed represent a smaller number of unique individuals, since U.S. Customs and Border Protection (CBP) reports recidivism rates close to 30% for the year, mainly among those previously expelled under Title 42.

Human trafficking and smuggling must be understood as distinct issues. Referring to instances of smuggling as trafficking, as various political figures have done, leads to a failure to address the issue of smuggling with the appropriate resources.

HUMAN SMUGGLING		HUMAN TRAFFICKING
<ul style="list-style-type: none">• A PERSON VOLUNTARILY PARTICIPATES• CROSS-BORDER MOVEMENT• REQUIRES PAYMENT TO AND COOPERATION WITH COYOTES• IN FY2022, THERE WERE A RECORDED 1.9 MILLION ENCOUNTERS OF PERSONS CROSSING ILLEGALLY AT THE SOUTHWEST LAND BORDER		<ul style="list-style-type: none">• A VICTIM IS COERCED, DEFRAUDED, OR FORCED INTO THIS POSITION• VICTIMS DON'T NECESSARILY TRAVEL ACROSS BORDERS• THE VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000 RECOGNIZES HUMAN TRAFFICKING AS A PROSECUTABLE FEDERAL OFFENSE

Patterns of Human Trafficking and Smuggling

Some of the confusion between these terms originates from an inadequate reservoir of data on the quantity of human trafficking victims and smuggled migrants. The intentionally covert nature of these crimes means it is difficult to track the magnitude of their occurrences. However, it is generally understood that instances of human trafficking identified by authorities represent a small fraction of the total number of human trafficking cases in the United States. To better address these issues, more data is necessary.



Existing data suggests that human trafficking in the United States that does involve migration across international borders primarily occurs in the following two ways: either victims enter the U.S. legally on a visa and are then coerced or forced into working under illegal conditions, or victims are smuggled across the border but then held hostage and forced to perform manual labor or provide sexual services. Data published by the Department of Justice on trafficking victims assisted by Immigration and Customs Enforcement Homeland Security investigations suggests that in 2020 30.7% of victims who were foreign nationals fell into the former category and 33.7% fell into the latter.

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If a migrant's visa is connected to their work for a specific employer, they cannot leave their position without losing their legal status in the U.S. Sometimes human traffickers abuse this situation and use foreign workers' limited options against them to force them into becoming victims of human trafficking. In one instance of this offense, a wedding venue operator in

the Philippines sponsored their temporary H-2B visas so they could migrate to the United States. Once their visas expired, he persuaded them to apply fraudulently for student visas, misrepresenting that they were full time students to immigration authorities. On numerous occasions he deposited money into workers' bank accounts to indicate to federal officials that the workers had sufficient resources to support themselves while in school, and then proceeded to withdraw the deposited amounts once the workers received their visas. He then manipulated them into working under unfair conditions, warning the workers that he would inform immigration authorities of their fraudulent visas if they did not comply with his demands.

In other instances, traffickers coerce victims into overstaying their visas. From 2017 to 2020, two Americans who owned and operated nail and beauty salons in New York coerced their Vietnamese foreign national employees to overstay their visas and work for unlawful wages. Since the United States does not universally collect biometric data to confirm departures from the United States, the likelihood of enforcement officials learning of these victims is low, and yet the traffickers can use threat of immigration enforcement to continue to exploit them.

Unlike the instances described above, all of which involve some form of coercion, deception, or fraud to force individuals into servitude, human smuggling occurs when migrants voluntarily place themselves in the care of individuals to assist them in illegally entering the country. Smuggled migrants usually are permitted to leave the smuggler's supervision once they arrive in the country or reach their intended destination. Still, human smuggling can be extraordinarily dangerous. In June 2022, 53 migrants died in a tractor-trailer in Texas after being smuggled into the country and left to suffer heat exhaustion.

However, sometimes migrants who are smuggled across the border may later become victims of trafficking under the pretense of needing to pay their smuggler more money. For example, in July 2022, federal law



enforcement agents discovered 17 undocumented foreign nationals in a Texas woman's home who claimed that they had been restricted from leaving until they paid their smuggler more money or worked to pay off their debt. A Mexican cartel smuggled the trafficking victims across the U.S.-Mexico border but took their cellphones and held them hostage after their arrival.

Both human trafficking and smuggling are extraordinarily dangerous for the individuals involved. Furthermore, both actions are illegal, frequently can involve sophisticated criminal enterprises, and threaten the U.S.'s authority over its borders. It is imperative that Congress take further action to address these harmful issues.

The United States' Response So Far

Thus far, the U.S. government's responses to these issues have constituted a step in the right direction, but further work is necessary. In response to human trafficking, the Department of Homeland Security (DHS) has established the Blue Campaign, a training program that teaches professionals in the hospitality and transportation industries to identify and report potential instances of human trafficking.

Likewise, various U.S. government agencies including U.S. Immigration and Customs Enforcement's Homeland Security Investigations, CBP, U.S. Citizenship and Immigration Services, the Department of State, and the Department of Justice have joined forces to execute Operational Sentinel, a strategy to eliminate human smuggling by targeting the transnational criminal organizations that smuggle migrants across the border. According to CBP personnel, the operation intends to specifically hinder criminal organizations' ability to profit off smuggling by freezing the assets and bank accounts of known associates of these organizations and revoking smugglers' travel documents.

How to Address the Problem

To prevent these crimes from occurring in the future, the United States must prosecute both smugglers and traffickers. In the Los Angeles Declaration on Migration and Protection, countries throughout the Latin American region and the United States agreed to "combat smuggling of migrants and trafficking in persons" and "expanded collaboration to prosecute migrant smuggling and human trafficking criminal organizations." Those countries must make good on that promise. The United States should not be the only country prosecuting illegal border crossings as networks of smugglers harm every country involved.

Both trafficking and smuggling present very real threats to the security of the United States, and as such, both crimes must receive adequate attention, funding, and resources. However, it is crucial that these issues are not lumped together and treated as one issue, but rather understood as distinct, separate crimes. Conflating the two issues risks failing to properly assign smuggled migrants their fair share of responsibility for contracting to be illegally brought into the U.S., and can also further victimize migrants who have been truly trafficked. Leaders and officials must understand the distinctions to appropriately assign resources to these separate criminal actions in a way that results in meaningful enforcement.



About the Authors

Joe Whitley has had a wide-ranging career in the Department of Justice (DOJ). During the Ronald Reagan and George H.W. Bush administrations, he served as Acting Associate Attorney General, the third-ranking position at Main Justice. He was appointed by Presidents Reagan and Bush, respectively, to serve as the U.S. Attorney in the Middle and Northern Federal Districts of Georgia. Throughout his career, Mr. Whitley served under five U.S. Attorneys General and four Presidents in a number of key operational and policy positions. Earlier in his career, Mr. Whitley served as an Assistant District Attorney in the Chattahoochee Judicial Circuit in Columbus, Georgia. Mr. Whitley maintains strong professional relationships with the state and federal law enforcement community.

In 2003, Mr. Whitley was appointed by President George W. Bush as the first General Counsel of the U.S. Department of Homeland Security (DHS), the highest ranking legal official at DHS. He held that position for two years working for DHS Secretaries Tom Ridge and Michael Chertoff, before returning to private practice.

Gus Coldebella joined True Ventures as a general partner in July 2021. True Ventures is a venture capital firm based in Palo Alto and San Francisco that focuses on early-stage technology investing. Prior to his time at True, Gus was general counsel at two crypto-focused businesses: Paradigm, the investment firm, and Circle, the issuer of the USDC stablecoin. Earlier in his career, Gus served as the top lawyer at the Department of Homeland Security under Secretary Michael Chertoff, where he focused on all major security issues confronting the nation and supervised over 1,700 lawyers at DHS and its components. Gus also has decades of experience in private practice, where he counseled clients on government and internal investigations, securities and corporate governance litigation, nation-state cyber attacks, and other complex technology-driven risk issues. Gus graduated from Colgate, where he currently serves as vice-chair of its Board of Trustees, and from Cornell Law School. He is on Twitter @g_co.