

## INHOSPITABLE: THIRD PARTY LIABILITY FOR SEX TRAFFICKING IN THE HOSPITALITY SECTOR

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*The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 provides a civil remedy that permits human trafficking survivors to recover damages from third parties that benefitted from the survivor's exploitation. This provision is particularly useful for sex trafficking survivors who wish to bring charges against hotels that enabled and profited from their trafficking. However, a district court split has created a discrepancy in the application of this civil protection for survivors against third-party organizations.*

*Courts have applied two approaches to the civil remedy, which requires the third party to (1) knowingly benefit financially or receive something of value, (2) know or should have known about the nature of the venture, and (3) participate in the venture. Approach I courts have imported standards from the criminal equivalent of the civil remedy and require survivors to prove the underlying criminal case before recovering civilly. In contrast, courts applying Approach II use a negligence standard and view the civil remedy as a standalone claim.*

*This Comment argues that Approach II is the proper interpretation of the civil statute because conflating the criminal standard is contrary to legislative intent and the plain meaning of the statute. Furthermore, Approach II's broad scope is essential for survivors to truly utilize and benefit from the civil remedy, which*

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*provides greater access to damages than state and tort alternatives. Finally, this Comment concludes with a proposed amendment to the civil statute to alleviate inconsistency in its application and further deter sex trafficking in the hospitality sector.*

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## INTRODUCTION

In response to the growing issue of sex trafficking in the United States, Congress created a civil remedy, the Trafficking Victims Protection Act<sup>1</sup> (“TVPA”), to provide survivors of sex trafficking<sup>2</sup> with the ability to recover damages from third parties.<sup>3</sup> The civil remedy, 18 U.S.C. § 1595(a), allows sex-trafficking survivors to sue their traffickers and entities, such as the hotels out of which they were trafficked.<sup>4</sup> In conjunction with the civil statute, there is a criminal counterpart that criminalizes sex trafficking generally.<sup>5</sup> The criminal statute, 18 U.S.C. § 1591, while partially mirroring the civil statute, contains several key differences: the mens-rea standard is “knowingly” and it defines several terms that are not defined in the civil statute.<sup>6</sup> Accordingly, as plaintiffs have brought cases under the civil provision, a clear split has emerged in district courts regarding the interpretation of the civil remedy.<sup>7</sup> Courts have applied two approaches to the civil remedy: courts using Approach I import standards from the criminal equivalent, while Approach II courts view the civil remedy as entirely separate from the criminal provision. In practice, courts using Approach I interpret the statute narrowly while Approach II courts apply the statute broadly.

This Comment argues that Approach II is the proper interpretation of the civil remedy because a broad application best adheres to the statute’s plain meaning and congressional intent to benefit sex trafficking survivors. Part I provides an overview of sex trafficking in

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1. 18 U.S.C. § 1595.

2. This Comment uses “survivor” to refer to individuals who are no longer subject to sex trafficking and “victim” to describe people who are still experiencing sex trafficking.

3. *Id.* See generally H.R. REP. NO. 110-430 (2007) (explaining that Congress has an interest in limiting human trafficking in the United States).

4. § 1595; see also BETHANY BIESENTHAL ET AL., JONES DAY, HUMAN TRAFFICKING IN THE HOSPITALITY INDUSTRY: WHAT INDUSTRY PARTICIPANTS SHOULD DO TO PROTECT THEMSELVES AND THEIR CUSTOMERS 1 (2019), <https://www.jdsupra.com/legalnews/human-trafficking-in-the-hospitality-18413> [https://perma.cc/23QV-8ZJA] (explaining that the amendments to the TVPA allow survivors to sue corporate entities that knowingly benefited from the trafficking).

5. 18 U.S.C. § 1591.

6. Compare *id.* (defining “participation in a venture” as “knowingly assisting, supporting, or facilitating a violation” and “venture” as “any group of two or more individuals associated in fact, whether or not a legal entity”), with 18 U.S.C. § 1595(a) (not defining “participation in a venture” or “venture”).

7. *A.B. v. Marriott Int’l, Inc.*, 455 F. Supp. 3d 171, 183 (E.D. Pa. 2020).

the hospitality sector and the evolution of federal legislation that created the civil remedy for survivors. This Part also describes the two federal court approaches to the civil remedy. Part II argues that Approach I's requirement of participation in the sex trafficking venture, imposition of a high mens rea, and application of criminal provisions to the civil statute ignores the statute's plain meaning and Congress's intent to protect survivors. Part II concludes with a discussion of how the broad reading of the statute benefits survivors by increasing access to damages and broadening theories of liability and suggests updated statutory language to address current inconsistencies.

## I. BACKGROUND

This Part defines "sex trafficking" and its elements, followed by an introduction to the manifestation of sex trafficking in the hospitality sector. It will first discuss the (1) logistics, (2) indicators, and (3) monetary benefits of sex trafficking in the hospitality sector. The Part will then explain the hospitality industry's response to sex trafficking.

### A. *Sex Trafficking in the Hospitality Sector*

Sex trafficking is a form of human trafficking and makes up about fifty percent of global human trafficking.<sup>8</sup> Traffickers use (1) force, (2) fraud, or (3) coercion (4) to induce commercial sex acts.<sup>9</sup> Force includes physical or sexual abuse, restricting a victim's movement, monitoring a victim's communication with others, and removing a

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8. John Cotton Richmond, *Human Trafficking: Understanding the Law and Deconstructing Myths*, 60 ST. LOUIS U. L.J. 1, 25 (2015); UNITED NATIONS OFF. ON DRUGS AND CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS 2020 11 (2020), [https://www.unodc.org/documents/data-and-analysis/tip/2021/GLOTiP\\_2020\\_15jan\\_web.pdf](https://www.unodc.org/documents/data-and-analysis/tip/2021/GLOTiP_2020_15jan_web.pdf) [<https://perma.cc/CPL3-BVV5>] [hereinafter 2020 GLOBAL REPORT ON TRAFFICKING IN PERSONS]. This Comment uses "human trafficking" to refer broadly to sex trafficking and forced labor. See U.S. DEP'T OF STATE, UNDERSTANDING HUMAN TRAFFICKING (Oct. 1, 2021), <https://www.state.gov/what-is-trafficking-in-persons> [<https://perma.cc/F5J8-AEKC>] (describing the distinction between the broad umbrella of human trafficking and the concepts of sex trafficking and forced labor). The term "sex trafficking" is used in accordance with the definition of 18 U.S.C. § 1591(a).

9. 18 U.S.C. § 1591(a); 22 U.S.C. § 7102(11); *What Is Human Trafficking?*, DEP'T OF HOMELAND SEC., <https://www.dhs.gov/blue-campaign/what-human-trafficking> [<https://perma.cc/236C-SKTM>]. Force, fraud, or coercion are not elements of sex trafficking when a minor is involved in commercial sex acts. § 1591(a).

victim's autonomy over his or her reproductive health.<sup>10</sup> Fraud applies when a trafficker disingenuously makes promises of a "better life" to the victim, acting as a significant other or provider for the victim.<sup>11</sup> Coercive behavior can involve threats of harm to the victim or a third party, the threat of use of the legal process against the victim, as well as acts that lead the victim to believe harm will result from a refusal to comply with the trafficker's desires.<sup>12</sup> Finally, commercial sex acts can encompass any sexual act given in exchange for anything of value and usually refer to prostitution.<sup>13</sup>

The sex trafficking definition is typically analyzed through a framework of "acts," "means," and "purpose."<sup>14</sup> The "acts" element is met when a trafficker "recruits, harbors, transports, provides, obtains, patronizes, or solicits another person to engage in commercial sex."<sup>15</sup> The "means" of sex trafficking is present when a trafficker uses force, fraud, or coercion to induce a person to perform sex acts.<sup>16</sup> Finally, the "purpose" element is met when a commercial sex act occurs.<sup>17</sup> Due to the broad definition of sex trafficking, it occurs in a variety of situations, including within the hospitality sector.

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10. *Hotel/Motel-Based*, NAT'L HUM. TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/sex-trafficking-venuesindustries/hotelmotel-based> [<https://perma.cc/M6S5-EG63>] [hereinafter *Hotel/Motel-Based*].

11. *Id.*

12. See Gallant Fish, *No Rest for the Wicked: Civil Liability Against Hotels in Cases of Sex Trafficking*, 23 BUFF. HUM. RTS. L. REV. 119, 126 (2017) (explaining varying forms of coercion such as threatening the victim with deportation); see also *Hotel/Motel-Based*, *supra* note 10 (listing coercive behavior such as confiscating identification documents and threatening deportation); U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 27 (2021), <https://www.state.gov/reports/2021-trafficking-in-persons-report> [<https://perma.cc/NL8M-8L3R>] [hereinafter 2021 TRAFFICKING IN PERSONS REPORT] (providing that psychosocial and reputational harm as well as debt manipulation can be considered coercion).

13. § 1591(e)(3); 22 U.S.C. § 7102(4); see U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 7 (2015), <https://2009-2017.state.gov/documents/organization/245365.pdf> [<https://perma.cc/NUP6-RZB6>] (associating "commercial sex act" with "prostitution").

14. 2021 TRAFFICKING IN PERSONS REPORT, *supra* note 12, at 26–27.

15. *Id.* at 26.

16. *Id.* There is no "means" requirement for sex trafficking of children. 18 U.S.C. § 1591.

17. 2021 TRAFFICKING IN PERSONS REPORT, *supra* note 12, at 27.

Traffickers often use the hospitality industry to exploit their victims, due in part to the accessibility and anonymity the industry provides.<sup>18</sup> Many survivors have indicated that they interacted with hotels<sup>19</sup> while being trafficked: seventy-five percent of survivors of human trafficking reported that they went to a hotel during the time they were trafficked.<sup>20</sup> Furthermore, from December 2007 to December 2017, the National Human Trafficking Hotline recorded 3,596 cases of human trafficking involving a hotel or motel.<sup>21</sup> Sex trafficking occurs in a wide variety of establishments in the hospitality sector, from five-star hotels to rooms rented by the hour.<sup>22</sup> The hospitality industry is attractive to traffickers because of buyer accessibility, the anonymity of cash payments, and the traffickers' freedom from maintaining facilities.<sup>23</sup> Hotel use gives traffickers the ability to move around in an attempt to evade law enforcement.<sup>24</sup> Automation in operations and revenue streams in hotels also make the hospitality sector attractive

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18. See HUM. TRAFFICKING INST., 2020 FEDERAL HUMAN TRAFFICKING REPORT 54 (2020), <https://www.traffickinginstitute.org/2020-federal-human-trafficking-report> [<https://perma.cc/2BPL-77TU>] [hereinafter 2020 FEDERAL HUMAN TRAFFICKING REPORT] (stating that hotels were the most common place for sex trafficking to occur in 2020). In 2020, seventy-seven percent of active sex trafficking cases involving a sex act occurred at a hotel; see also Kate Santich & Krista Torralva, *Advocates: 'Special Interests' Trying to Gut Human Trafficking Bill*, ORLANDO SENTINEL (Feb. 5, 2018), <https://www.orlandosentinel.com/news/os-human-trafficking-bill-hotels-exempt-20180205-story,amp.html> [<https://perma.cc/737T-JMZX>] (“Anyone involved in fighting human trafficking will tell you hotels and motels are ground zero in the battle against [human trafficking].” (quoting Lisa Haba, former prosecutor and now an advocate for survivors and partner at the Haba Law Firm)).

19. This Comment uses “hotels” to refer generally to the hospitality sector. For a discussion of civil liability for platforms such as Airbnb, see, for example, Stephanie Román Cabán, *Human Trafficking in the Age of the New Sharing Economy: Why Victims Should Be Able to Pursue Civil Remedies Against Airbnb Through the Traditional Tort Framework*, 30 J. TRANSNAT'L L. & POL'Y 181, 195–203 (2021).

20. POLARIS PROJECT, ON-RAMPS, INTERSECTIONS, AND EXIT ROUTES: A ROADMAP FOR SYSTEMS AND INDUSTRIES TO PREVENT AND DISRUPT HUMAN TRAFFICKING 67 (2018), <https://polarisproject.org/wp-content/uploads/2018/08/A-Roadmap-for-Systems-and-Industries-to-Prevent-and-Disrupt-Human-Trafficking.pdf> [<https://perma.cc/FP-U2-TBLM>].

21. *Id.* at 69.

22. Belinda Luscombe, *How to Spot a Sex Trafficking Victim at a Hotel*, TIME (Oct. 28, 2014), <https://time.com/3525640/sex-trafficking-victim-prostitution-hotel> [<https://perma.cc/9QX7-LQGP>].

23. *Id.*

24. See *id.* (“Traffickers like to use hotels to ply their trade, since they can get in and make some money and then move on before they attract too much attention.”).

because automatic check-ins and third-party reservation systems allow traffickers to keep their identities private.<sup>25</sup>

Sex trafficking involves various methods designed to recruit and control victims.<sup>26</sup> Traffickers in the hospitality industry using these methods are often called “pimps.”<sup>27</sup> Pimps pose as intimate partners, caretakers, or father-figures to create a bond and sense of family for the purpose of maintaining an exploitive relationship with the victim.<sup>28</sup> In addition to individual enterprises run by pimps, sex-trafficking operations can also be run out of hotels as escort services using a business manager who organizes dates between customers and victims, subsequently compelling victims to perform commercial sex acts.<sup>29</sup>

Due to the prevalence of sex trafficking in the hospitality sector, hotels are uniquely positioned to recognize and prevent sex trafficking.<sup>30</sup> Because of their proximity to hotel guests and potential victims of trafficking, staff in the hospitality sector may have either actual knowledge of a sex trafficking venture occurring in the hotel or constructive knowledge resulting from subtle signs of sex trafficking.<sup>31</sup> Victims interact with hotel staff in various ways, including “in-calls” and “out-calls.”<sup>32</sup> “In-calls” occur when customers come to the hotel where the victim is being held.<sup>33</sup> During the check-in process, common signs of trafficking include women without suitcases accompanied by older men,<sup>34</sup> the use of cash or prepaid cards for payment, or women without

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25. Sowon Kim et al., *Human Trafficking and the Hotel Industry: How to Prevent It*, *EHL Insights*, <https://hospitalityinsights.ehl.edu/human-trafficking-hospitality-industry> [<https://perma.cc/3EK5-PEPM>].

26. Mary Graw Leary, *Dear John, You Are a Human Trafficker*, 68 S.C. L. REV. 415, 432–33 (2017) (explaining that trafficking can be organized by large and small criminal enterprises as well as individuals or families).

27. *Hotel/Motel-Based*, *supra* note 10.

28. *Id.*

29. *Id.*

30. See *A.B. v. Marriott Int’l, Inc.*, 455 F. Supp. 3d 171, 182 (E.D. Pa. 2020) (explaining that businesses in the hospitality sector may have more knowledge than “car rental or airplane businesses, or even lawyers or accountants, who may be paid from the trafficking proceeds”).

31. *Id.* at 182.

32. POLARIS PROJECT, HUMAN TRAFFICKING IN HOTELS AND MOTELS: VICTIM AND LOCATION INDICATORS 1, <https://ncjtc-static.fvtc.edu/Resources/RS00002856.pdf> [<https://perma.cc/GN9M-CS2C>].

33. *Id.*

34. Lauren R. Shapiro, *Corporate Liability of Hotels: Criminal Sanctions for Online Sex Trafficking*, 24 J. INTERNET L. 3, 6 (2021); see Fish, *supra* note 12, at 119–20 (stating that

identification.<sup>35</sup> During the stay at the hotel, multiple requests for extra linens, the refusal of cleaning services, large numbers of “sexually related” items in the room such as condoms, as well as large numbers of men congregating outside of a room, are additional signs hotel staff can recognize as potential sex trafficking.<sup>36</sup> “Out-calls” require victims to travel to hotel rooms rented by customers,<sup>37</sup> allowing front desk staff to observe victims as they leave and enter the hotel. Victims may exhibit signs of abuse, malnourishment, fatigue, and poor hygiene.<sup>38</sup> Victims are also often accompanied by their traffickers when they leave the hotel room.<sup>39</sup>

Irrespective of its cognizance of the matter, the hospitality sector profits from sex trafficking.<sup>40</sup> Although precise data on the total revenue the hospitality sector receives from sex trafficking is unavailable, human trafficking as a whole generates an estimated \$150 billion globally each year,<sup>41</sup> and about fifty percent of trafficking victims are trafficked for sexual exploitation.<sup>42</sup> Due to the amount of money involved and the number of survivors who have reported their interactions with hotels, the hospitality sector is in a position to profit heavily from sex trafficking ventures. Hotels receive revenue when individuals patronize their establishment either to travel to a

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hotel staff might be aware of sex trafficking and look the other way when there are clear signs of sex trafficking).

35. Shapiro, *supra* note 34, at 6.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. See Fish, *supra* note 12, at 156 (providing that hotels benefit from sex trafficking by renting rooms to traffickers); Jonathan Todres, *The Private Sector's Pivotal Role in Combating Human Trafficking*, 3 CAL. L. REV. CIR. 80, 89 (2012) (arguing that “tourism-related” businesses profit from sex trafficking when travelers visit to engage in commercial sex with victims).

41. 2021 TRAFFICKING IN PERSONS REPORT, *supra* note 12, at 36. In addition to other factors, the accuracy of human trafficking data is limited by the fact that members of the transgender community, particularly BIPOC trans women and girls, are often excluded from discussions about human trafficking and routinely absent from data reporting. Abby Leonard, *BIPOC Trans Women and Girls: The Missing Narrative in Human Trafficking*, HUMAN TRAFFICKING SEARCH (Dec. 8, 2021), <https://humantraffickingsearch.org/bipoc-trans-women-and-girls-the-missing-narrative-in-human-trafficking> [<https://perma.cc/5HSA-T5QA>].

42. See 2020 GLOBAL REPORT ON TRAFFICKING IN PERSONS, *supra* note 8, at 11 (stating that the other fifty percent constitutes victims of forced labor or criminal activity).

destination for the commercial sex industry<sup>43</sup> or to rent rooms to have sex.<sup>44</sup> Therefore, the hospitality sector profits when rooms are rented to exploit victims of sex trafficking.<sup>45</sup>

Due to the prevalence of sex trafficking in the hospitality sector, the unique position of hotel staff to recognize sex trafficking, and the amount of money involved in the sex trafficking industry, activist groups work to bring awareness to members of the hospitality sector.<sup>46</sup> Organizations specializing in ending the sexual exploitation of children, such as End Child Prostitution in Asian Tourism (“ECPAT”) and The Code of Conduct for the Protection of Children Against Sexual Exploitation in Travel and Tourism (“The Code”), work with the hospitality sector to educate employees on ways to identify and address sex trafficking of children in their hotel.<sup>47</sup> Additionally, members of the hospitality sector have created programs to enhance victim protections in their hotels. For example, the American Hotel and Lodging Association has created an online training course for staff in member hotels.<sup>48</sup> Hotels have also partnered with non-profit organizations to support the fight against human trafficking, developing training programs for staff and raising funds to support various nonprofits.<sup>49</sup>

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43. Todres, *supra* 40, at 89.

44. See Fish, *supra* note 12, at 120–21 (asserting that hotels receive increased revenue by renting rooms for sex); see also Hanh Diep, *We Pay—the Economic Manipulation of International and Domestic Laws to Sustain Sex Trafficking*, 2 LOY. U. CHI. INT’L L. REV. 309, 314 (2005) (“[B]usinesses such as international hotel chains, airline companies, and the tourist industry benefit greatly from the sex industry.”).

45. See Fish, *supra* note 12, at 156 (explaining that hotels profit from the money generated by sex trafficking in the hotel).

46. Luscombe, *supra* note 22.

47. ECPAT INT’L, SUMMARY PAPER ON SEXUAL EXPLOITATION OF CHILDREN IN TRAVEL AND TOURISM 1 (2020), <https://www.ecpat.org/wp-content/uploads/2020/12/ECPAT-Summary-paper-on-Sexual-Exploitation-of-Children-in-Travel-and-Tourism-2020.pdf> [<https://perma.cc/TU2X-FUAM>]. ECPAT consists of organizations, including hotels, which work to end the sexual exploitation of children. *Id.* The Code works to end the sexual exploitation of children by engaging with the “travel and tourism industry at large.” *Id.* at 12.

48. *No Room for Trafficking*, AM. HOTEL & LODGING ASS’N, <https://www.ahla.com/issues/human-trafficking> [<https://perma.cc/UJ4C-ZNA2>] (providing resources, including on-demand, free training, and reports explaining human trafficking).

49. See Rachel Rothberg, *Risky Business: Holding Hotels Accountable for Sex Trafficking*, 38 YALE L. & POL’Y REV. 265, 307 (2019) (stating that Hyatt partnered with Polaris to create a human trafficking training and that Marriott allows rewards members to donate their loyalty points to ECPAT).

These efforts, however, have been criticized as self-serving marketing ploys used to bolster public opinion of the hotel brand.<sup>50</sup> In fact, despite the steps hotels have taken to prevent sex trafficking in hotels, it remains prevalent in part because it is difficult to enforce corporate liability.<sup>51</sup> Much of the hospitality industry is franchised, resulting in large brands contracting with a hotel owner who operates the hotel under a brand name.<sup>52</sup> The owner subsequently manages the hotel or hires a management company, protecting the large brand from having “operational control” of the hotel.<sup>53</sup> The ability to distance itself from the trafficking, therefore, helps protect the corporate brand from liability for sex trafficking.<sup>54</sup> Additionally, survivors of sex trafficking are frustrated with the lack of protections enacted by hotels, alleging that “[h]uman traffickers have capitalized on the hospitality industry’s refusal to adopt and implement industry-wide standards and anti-trafficking policies and procedures.”<sup>55</sup> Because sex trafficking in the hospitality sector and beyond is a grave issue in the United States and the sector alone is not equipped to address the scope of the problem, Congress enacted legislation to reduce the prevalence of sex trafficking.

#### B. *Civil Cause of Action for Third Party Liability*

Congress created and has subsequently amended the civil remedy for survivors of human trafficking. The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008<sup>56</sup> (“TVPRA”) expanded the civil remedy and created a provision that

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50. See *id.* at 308 (arguing that hotels participate in these initiatives for positive press about their ethical responsibility); see also Complaint ¶ 86, *M.A. v. Wyndham Hotels & Resorts, Inc.*, 425 F. Supp. 3d 959 (S.D. Ohio 2019) (No. 19-CV-00849) (alleging that Choice Hotels turned a blind eye to the plaintiff’s sex trafficking “both before and after adopting the Code”).

51. Rothberg, *supra* note 49, at 281.

52. *Id.* at 281–82.

53. *Id.* at 282 (explaining that the hotel brand will attempt to evade liability by claiming that the hotel employees were not employees of the brand and that the hotel was not being managed by the “brand standards,” which require the premises to be crime-free).

54. *Id.*

55. Andrew Welsh-Huggins, *Human Trafficking Lawsuits Allege Hotels Ignored Problem*, AP NEWS (Dec. 19, 2019), <https://apnews.com/article/5c9ab8de02d2c7ad00b629f5f0c9c3d5>.

56. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, sec. 221, § 1595(a), 122 Stat. 5067 (codified as amended in scattered sections of 18 U.S.C.).

allows survivors to recover from third parties. The remedy applies to third parties who (1) knowingly benefited financially or received something of value, (2) knew or should have known about the nature of the venture, and (3) participated in the venture. The criminal equivalent of the statute criminalizes sex trafficking using similar factors.

1. *Trafficking Victims Protection Act of 2000 and subsequent reauthorizations*

In an effort to abolish human trafficking in the United States and recognizing the expansion of sex trafficking, particularly of women and girls, the United States enacted the Trafficking Victims Protection Act of 2000 (“TVPA”), 18 U.S.C. § 1591.<sup>57</sup> The TVPA was the first far-reaching law to penalize a broad spectrum of human trafficking offenses in the United States,<sup>58</sup> focusing on (1) prosecuting perpetrators, (2) protecting survivors, and (3) preventing trafficking internationally.<sup>59</sup> Focusing on forced labor and sex trafficking, the TVPA created new crimes of trafficking and enhanced penalties for existing crimes relating to human trafficking.<sup>60</sup> The TVPA was initially criticized for its focus on the prosecution of traffickers, not on victim protections; however, subsequent reauthorizations have shifted the legislation towards a more victim-centered approach.<sup>61</sup>

The Trafficking Victims Protection Reauthorization Act of 2003<sup>62</sup> created a civil cause of action, 18 U.S.C. § 1595(a), that allows human trafficking survivors to sue their traffickers for forced labor and sex

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57. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of 22 U.S.C.).

58. ALEXANDRA F. LEVY, HUM. TRAFFICKING LEGAL CTR., FEDERAL HUMAN TRAFFICKING CIVIL LITIGATION: 15 YEARS OF THE PRIVATE RIGHT OF ACTION 7 (2018), <https://www.hlegalcenter.org/wp-content/uploads/Federal-Human-Trafficking-Civil-Litigation-1.pdf> [<https://perma.cc/RC8Q-HLEF>]. The TVPA and its progeny target forced or coerced commercial sexual activity and do not address commercial sex generally. *See* 18 U.S.C. §§ 1591(a), 1595(a) (recognizing force, fraud, or coercion as an element of sex trafficking); *see also Sex Trafficking vs. Sex Work: What You Need to Know*, HUM. TRAFFICKING SEARCH (July 25, 2017), <https://humantraffickingsearch.org/2017725sex-trafficking-vs-sex-work-what-you-need-to-know> [<https://perma.cc/UE7Q-G3TB>] (explaining that sex work entails a willing engagement in commercial sex).

59. *3Ps: Prosecution, Protection, and Prevention*, U.S. DEP’T OF STATE, <https://www.state.gov/3ps-prosecution-protection-and-prevention> [<https://perma.cc/8LWT-K7TD>].

60. Trafficking Victims Protection Act of 2000 § 102(b)(4).

61. *See* Fish, *supra* note 12, at 120 (arguing that the TVPA focused on prosecuting perpetrators of forced labor and sex trafficking).

62. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, sec. 4, § 1595, 117 Stat. 2875, 2878 (codified as amended at 18 U.S.C. § 1595).

trafficking.<sup>63</sup> This provision allowed survivors to recover damages and attorneys' fees in federal court.<sup>64</sup> Congress then expanded this limited cause of action in the TVPRA, changing the civil cause of action in § 1595(a) in three key ways.<sup>65</sup> First, Congress expanded the cause of action against anyone who benefited from a chapter seventy-seven violation.<sup>66</sup> The TVPRA amended § 1595 by striking the phrase "section 1589, 1590, or 1591" and inserting "violation of this chapter," thereby broadening liability.<sup>67</sup> Second, the TVPRA added facilitator liability to § 1595(a), including entities that profited from the survivor's exploitation.<sup>68</sup> This expansion allows survivors to sue not only their traffickers but also those who facilitated the trafficking.<sup>69</sup> Third, the TVPRA added a ten-year statute of limitations,<sup>70</sup> increasing the amount of time for survivors to bring suit.<sup>71</sup>

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63. See 18 U.S.C. § 1595 (2007) (allowing recovery for violations of "section[s] 1589, 1590, or 1591"). Section 1589 of 18 U.S.C. imposes criminal liability for forced labor, 18 U.S.C. § 1590 for trafficking with respect to peonage, slavery, involuntary servitude, or forced labor, and 18 U.S.C. § 1591 for sex trafficking of children or by force, fraud, or coercion. 18 U.S.C. §§ 1589, 1590, 1591.

64. 18 U.S.C. § 1595.

65. *Id.*; CONG. RSCH. SERV., R40190, THE WILLIAM WILBERFORCE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2008 (P.L. 110-457): CRIMINAL LAW PROVISIONS 15 (2009) [hereinafter TVPRA CRIMINAL LAW PROVISIONS].

66. TVPRA CRIMINAL LAW PROVISIONS, *supra* note 65, at 15–16. Chapter 77 of Title 18 of the United States Code pertains to "Peonage, Slavery, and Trafficking in Persons."

67. William Wilberforce Trafficking Victims Protection Reauthorization Act § 1595(a). Prior to the TVPRA, the causes of action were 18 U.S.C. § 1589 (forced labor), § 1590 (peonage-related trafficking), § 1591 (sex trafficking of children or by force, fraud, or coercion). *Id.* § 221, 122 Stat. at 5067.

68. 18 U.S.C. § 1595(a).

69. *Id.*

70. § 1595(c) (providing that the statute of limitations is either ten years after the cause of action arose or ten years after the survivor turns eighteen if he or she was a minor during the trafficking).

71. See TVPRA CRIMINAL LAW PROVISIONS at 16, *supra* note 65, at 16–17 (explaining that the TVPA did not include a statute of limitations, so courts had to resort to analogous state or federal civil statutes of limitation, which were often under ten years).

2. *Section 1595(a): The civil remedy*

The TVPRA's civil remedy allows survivors to sue third parties that benefited from their trafficking.<sup>72</sup> The statute states:

An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (*or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter*) in an appropriate district court of the United States and may recover damages and reasonable attorney[']s fees.<sup>73</sup>

Therefore, to state a claim under § 1595(a), the plaintiff must allege that the entity (1) knowingly benefited financially or received something of value, (2) participated in the venture, and (3) knew or should have known about the nature of the venture.<sup>74</sup> This statute “opened the door for liability against facilitators who did not directly traffic the victim[] but benefited from what the facilitator should have known was a trafficking venture.”<sup>75</sup>

However, only a small number of survivors have brought cases against hotels under this provision, as most § 1595(a) cases are not brought for sex trafficking, criminal cases overshadow civil protections, and cases against corporations are complicated.<sup>76</sup> In practice, most cases filed under § 1595(a) are allegations of forced labor, not sex trafficking.<sup>77</sup> Sex trafficking cases remain a small percentage of civil cases: as of 2018, less than nine percent of federal civil human trafficking cases involved sex trafficking.<sup>78</sup> Furthermore, only about a quarter of the civil sex trafficking cases resulted in a public settlement

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72. See § 1595(a) (“An individual who is a victim of a violation of this chapter may bring a civil action against . . . whoever knowingly benefits, financially or by receiving anything of value . . .”).

73. *Id.* (emphasis added).

74. *Id.*

75. See Fish, *supra* note 12, at 138.

76. See *id.* at 149 (stating that as of 2017, only one case, *Ricchio v. McLean*, 853 F.3d 553 (1st Cir. 2017), *remanded*, *Ricchio v. Bijal, Inc.*, 386 F. Supp. 3d 126 (D. Mass. 2019), had been brought against a hotel under 18 U.S.C. § 1595(a)); see also *A.B. v. Marriott Int'l, Inc.*, 455 F. Supp. 3d 171, 183 (E.D. Pa. 2020) (describing the “limited number of opinions” relating to 18 U.S.C. § 1595); David Bouchard, *What Court Split on Sex Trafficking Means for Hotels, Victims*, LAW360 (June 1, 2020), <https://www.law360.com/articles/1277494/what-court-split-on-sex-trafficking-means-for-hotels-victims> (“[T]he case law concerning Section 1595(a) beneficiary claims is in its infancy . . .”).

77. LEVY, *supra* note 58, at 13 (explaining that about ninety-one percent of cases brought under the TVPRA are forced labor cases).

78. *Id.* at 13, 15.

or judgment.<sup>79</sup> Additionally, the small number of federal civil sex trafficking cases can be explained by the large volume of federal criminal sex trafficking cases since survivors whose cases are prosecuted in criminal court are less likely to file civil cases.<sup>80</sup> Furthermore, courts have commented on the difficulty for survivors to hold parent companies, corporate affiliates, or hotel franchisors liable under § 1595(a).<sup>81</sup> Section 1595(a) only applies to single acts,<sup>82</sup> requiring participation in “a venture which that person knew or should have known *has* engaged in *an* act.”<sup>83</sup> Therefore, courts have found that it is not enough for parent companies, corporate affiliates, or hotel franchisors to be generally aware that sex trafficking occurs at their hotel, stating that these actors must have knowledge of the specific act.<sup>84</sup> This limits liability by barring recovery from parent companies, which likely are unaware of a specific sex trafficking venture in one of their hotels. Narrowing theories of liability may limit cases where survivors do not have sufficient evidence to bring against an individual hotel but would be able to show that the parent company has a pattern of violations of § 1595(a).

The number of cases brought under § 1595(a) is increasing: seven suits were filed in 2018 and forty-three suits were filed in 2019.<sup>85</sup> This upward trend continued in 2020 with ninety-one civil lawsuits involving sex trafficking.<sup>86</sup> However, despite the increase in civil cases,

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79. *Id.* at 15.

80. *See id.* (finding that victims of sex trafficking are less likely to pursue civil cases because of the greater attention criminal prosecutors show to sex-related trafficking cases and the availability of criminal restitution, obviating the need to independently seek civil damages). *See generally* Lara Bazelon & Bruce A. Green, *Victims’ Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 293, 294–95 (2020) (explaining that the criminal justice system can re-traumatize and re-harm survivors).

81. *See* A.B. v. Hilton Worldwide Holdings Inc., 484 F. Supp. 3d 921, 938–39 (D. Or. 2020) (stating that the plaintiff failed to allege facts to prove that the parent company, corporate affiliate, or hotel franchisor knew or should have known of her trafficking); *see also* S.J. v. Choice Hotels Int’l, Inc., 473 F. Supp. 3d 147, 154 (E.D.N.Y. 2020) (concluding that franchisors are liable because they generally understood sex trafficking that occurs on their “franchisees’ properties unjustifiably bridges the scienter gap between ‘should have known’ and ‘might have been able to guess’”).

82. *See* *Hilton Worldwide*, 484 F. Supp. 3d at 938 (citing *S.J.*, 473 F. Supp. 3d at 154).

83. 18 U.S.C. § 1595(a) (emphasis added).

84. *S.J.*, 473 F. Supp. 3d at 154.

85. KYLEIGH FEEHS & ALYSSA CURRIER, 2019 FEDERAL HUMAN TRAFFICKING REPORT 13 (2020), [https://web.archive.org/web/20201109065332/https://traffickinginstitute.org/wp-content/uploads/2020/05/2019-Federal-Human-Trafficking-Report\\_Low-Res.pdf](https://web.archive.org/web/20201109065332/https://traffickinginstitute.org/wp-content/uploads/2020/05/2019-Federal-Human-Trafficking-Report_Low-Res.pdf).

86. 2020 FEDERAL HUMAN TRAFFICKING REPORT, *supra* note 18, at 4.

enforcement of the TVPRA against criminal defendants, such as corporations and hotels, remains low.<sup>87</sup>

3. *Section 1591: The criminal remedy*

Section 1591 of 18 U.S.C., the criminal counterpart to 18 U.S.C. § 1595(a), criminalizes sex trafficking,<sup>88</sup> defining it as causing a person to engage in a commercial sex act.<sup>89</sup> The statute states:

Whoever knowingly – (1) in or affecting interstate or foreign commerce, . . . recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or (2) *benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1)*, knowing, or, . . . in reckless disregard of the fact, that means of force, threats of force, fraud, coercion . . . , or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).<sup>90</sup>

To state a claim under § 1591(a), the defendant must have (1) benefited financially or received something of value, (2) known or recklessly disregarded the use or threats of force, fraud, coercion that were used to cause the person to engage in a commercial sex act, and (3) participated in the venture.<sup>91</sup> Further, the statute defines two terms that are not explained in the civil statute: “participation in a venture” and “venture.” Section 1591(a) defines “participation in a venture” as “knowingly assisting, supporting, or facilitating a violation of subsection (a)(1).”<sup>92</sup> Additionally, the term “venture” is described as “any group of two or more individuals associated in fact, whether or not a legal entity.”<sup>93</sup>

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87. *See id.* at 24 (noting that prosecutors did not charge any entities in 2020). The increase in sex trafficking cases resulted from the increased prosecution of child-only sex trafficking cases. *Id.* at 21. Adult sex trafficking cases have declined in the same period. *Id.* Additionally, the increase in new cases can also be attributed to the federal government’s decision to charge fewer “multi-defendant” cases. *Id.* at 73.

88. 18 U.S.C. § 1591(a).

89. *Id.* § 1591(e)(3).

90. *Id.* § 1591(a) (emphasis added).

91. *Id.*

92. *Id.* § 1591(e)(4).

93. *Id.* § 1591(e)(6).

### C. District Court Split

As discussed in Section I.B.2, to civilly recover, survivors of sex trafficking must show that the third party (1) knowingly benefited financially, (2) knew or should have known about the nature of the venture, and (3) participated in that venture.<sup>94</sup> However, there is an emerging split in district courts regarding the proper interpretation of § 1595(a)'s civil remedy and how broadly courts should apply its provisions to survivors.<sup>95</sup> This Section will first introduce the case that identified the split. It will then describe the two approaches that courts have used to analyze § 1595(a)'s civil remedy.

#### 1. *A.B. v. Marriott International, Inc. and the identification of a district court split*

Plaintiff A.B., a survivor of sex trafficking, used the civil statute to sue Marriott, the owner of hotels where she was forced to perform sex acts.<sup>96</sup> The facts of *A.B. v. Marriott International, Inc.*<sup>97</sup> are similar to the warning signs of sex trafficking in hotels discussed in Section I.A.<sup>98</sup>: the plaintiff did not have a phone or identification, the rooms were strewn with “sex paraphernalia,” and the staff noticed her injuries.<sup>99</sup> Accordingly, plaintiff A.B. sought civil recourse under § 1595(a), alleging that Marriott knew or should have known about her trafficking due to her trafficker's use of the hotel, the traffic of men visiting her room in the hotel, her trafficker checking her into the hotel without accompanying her to the room, her lack of luggage, and her prominent bodily injury and bruising.<sup>100</sup>

*A.B.* judge Mark A. Kearney identified the split in the interpretation of § 1595(a): the United States District Court for the Northern District of Georgia created “Approach I,” and the United States District Courts for the Southern District of Ohio and the Western District of Washington adopted “Approach II.”<sup>101</sup> Reviewing the similarities and

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94. *Id.* § 1595(a); *supra* Section I.B.2.

95. *A.B. v. Marriott Int'l, Inc.*, 455 F. Supp. 3d 171, 183 (E.D. Pa. 2020).

96. *Id.* at 174–75.

97. *Id.* at 171.

98. *See supra* Section I.A.

99. *A.B.*, 455 F. Supp. 3d at 175.

100. *Id.* at 178.

101. *Id.* at 183. The district court approaches have been renamed to “Approach I” and “Approach II” for clarity. These labels were not used by the *A.B.* court to discuss the split. *Id.* at 182–88.

disparities between the approaches,<sup>102</sup> the *A.B.* court held that the facts presented were sufficient to satisfy Marriott's constructive knowledge of A.B.'s trafficking under § 1595(a) and A.B.'s complaint withstood Marriott's motion to dismiss.<sup>103</sup> *A.B.* followed Approach II, disagreeing with the high mens rea imposed by the Northern District of Georgia's Approach I, which Judge Kearney believed was contrary to congressional intent.<sup>104</sup>

## 2. Approach I

Approach I, used by the United States District Court for the Northern District of Georgia,<sup>105</sup> interprets the civil statute narrowly by requiring survivors to first prove the criminal offense under § 1591(a) before they can recover civil damages under the statute.<sup>106</sup> This approach requires the third party to participate in the sex trafficking, have actual knowledge that the venture was sex trafficking, and imposes the criminal definition of "participation in a venture" to the civil remedy.

First, Approach I requires the defendant to participate in sex trafficking to meet the element of knowingly benefited financially.<sup>107</sup> Under this interpretation, third parties that receive money generated by sex trafficking are not liable simply because they turned a "blind eye to the source of their financial sponsorship," requiring the party to

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102. *Id.* at 183–88. In *A.B.*, the defendant, Marriott International ("Marriott"), cited cases from the Northern District of Georgia that narrowly construed the civil remedy (Approach I), while the plaintiff relied on a broad interpretation of the statute from the Southern District of Ohio and the Western District of Washington (Approach II). *Id.* at 183.

103. *Id.* at 201.

104. *Id.* at 188.

105. *E.g.*, *Doe 1 v. Red Roof Inns, Inc.*, No. 19-3840, 2020 WL 1872335 (N.D. Ga. Apr. 13, 2020) (granting the hotel's motion to dismiss because the plaintiff failed to show that the defendants had actual knowledge of plaintiff's trafficking in their hotel), *aff'd*, 21 F.4th 714 (11th Cir. 2021).

106. *E.g.*, *A.B.*, 455 F. Supp. 3d at 188 (interpreting the holding in *Noble v. Weinstein*, 335 F. Supp. 3d 504, 524 (S.D.N.Y. 2018) to require survivors to prove that the defendant is criminally liable to recover).

107. *United States v. Afyare*, 632 F. App'x 272, 286 (6th Cir. 2016). The *Afyare* court conducted an analysis of § 1591(a). *Id.* at 274. However, the *Doe* court used the *Afyare* reasoning in its analysis of a claim brought under § 1595(a). *Doe 1*, 2020 WL 1872335, at \*3; *see also* 18 U.S.C. § 1595(a) ("[W]hoever knowingly benefits financially or by receiving anything of value from participation in a venture.").

understand that their profit is the result of sex trafficking.<sup>108</sup> Therefore, simple association with the trafficking venture is not sufficient, and Approach I requires direct participation in the venture.<sup>109</sup>

Second, to satisfy the requisite knowledge element, Approach I requires the hotel to have actual knowledge that the venture engaged in was sex trafficking.<sup>110</sup> Applying Approach I, in *Doe 1 v. Red Roof Inns, Inc.*,<sup>111</sup> the court required the plaintiff to allege that the defendant knew of the assistance, support, or facilitation of trafficking and that the defendant knew the plaintiff was subject to force or a minor.<sup>112</sup> This standard is akin to the mens rea of knowingly because it requires parties to be aware that their conduct is “of that nature or that such circumstances exist.”<sup>113</sup> Approach I therefore effectively requires the defendant to be aware that the trafficking was occurring because a general idea that trafficking might be occurring is insufficient to meet the knowingly standard.<sup>114</sup>

Third, Approach I imposes the criminal statute’s<sup>115</sup> definition of “participation in a venture” onto the civil statute.<sup>116</sup> Section 1591(e)(4) defines “participation in a venture” as “knowingly assisting, supporting, or facilitating a violation of subsection (a)(1).”<sup>117</sup> Courts then separately analyze “participation” and “venture.” Approach I interprets “participation” as an overt act wherein mere membership in the venture is insufficient if the defendant is ignorant of or does not

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108. *Afyare*, 632 F. App’x at 286; *see also Doe 1*, 2020 WL 1872335, at \*3 (requiring knowledge of the “benefit received from trafficking”).

109. *Doe 1*, 2020 WL 1872335, at \*3 (citing *Noble v. Weinstein*, 335 F. Supp. 3d 504, 524 (S.D.N.Y. 2018)).

110. *Id.*

111. No. 19-3840, 2020 WL 1872335 (N.D. Ga. Apr. 13, 2020).

112. *Id.*

113. MODEL PENAL CODE § 2.02(2)(b)(i) (AM. L. INST. 2021); *see also Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011) (explaining the doctrine of willful blindness in which the defendant must believe that there is a “high probability that a fact exists” and take deliberate actions for the purpose of not learning the fact). Willful blindness has a higher knowledge standard than recklessness and negligence and therefore can be used to prove a mens rea of knowingly. *Id.* at 766.

114. *Doe 1*, 2020 WL 1872335, at \*3.

115. 18 U.S.C. § 1591(e)(4).

116. *A.B. v. Marriott Int’l, Inc.*, 455 F. Supp. 3d 171, 188 (E.D. Pa. 2020); *Doe 1*, 2020 WL 1872335, at \*3.

117. § 1591(e)(4).

commit an act to further the venture's sex trafficking activities.<sup>118</sup> The *Doe* court relied on the court's interpretation of participation in *United States v. Afyare*<sup>119</sup> that refuted the idea of "guilt by association" and required greater participation than membership in a venture.<sup>120</sup> Therefore, to fulfill the "venture" element, Approach I requires the plaintiff to allege specific conduct that furthered a sex trafficking venture.<sup>121</sup> The Sixth Circuit in *Afyare* found that "venture" in the context of § 1591(a)(2) specifies sex trafficking, requiring conduct to further a sex trafficking venture.<sup>122</sup>

### 3. Approach II

In contrast to Approach I, Approach II views the civil remedy in § 1595(a) as a standalone claim, allowing survivors to recover civilly from defendants that did not commit the underlying criminal offense.<sup>123</sup> Courts adopting this approach have cited the broad liability intended by Congress to explain their reasoning.<sup>124</sup> Approach II (1) does not require the third party to actually participate in the sex trafficking venture, (2) does not require actual knowledge that the venture is sex trafficking, and (3) does not apply the criminal definition of participation in a venture to the civil remedy.

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118. *Noble v. Weinstein*, 335 F. Supp. 3d 504, 524 (S.D.N.Y. 2018). The *Noble* decision analyzes 18 U.S.C. § 1591(a). *Id.* at 510. However, the *Doe I* court used the *Noble* analysis to review a claim brought under 18 U.S.C. 1595(a). *Doe I*, 2020 WL 1872335, at \*3; *see also* *United States v. Afyare*, 632 F. App'x 272, 286 (6th Cir. 2016) (stating that "mere negative acquiescence" is not punished).

119. 632 F. App'x 272 (6th Cir. 2016).

120. *Doe I*, 2020 WL 1872335, at \*3 (citing *Afyare*, 632 F. App'x at 286); *Afyare*, 632 F. App'x at 285 ("The defendant's mere membership in the venture is insufficient if he is ignorant of the venture's sex trafficking activities (and the means and methods thereof). That is, the government does not argue guilt by association, nor could it.").

121. *Noble*, 335 F. Supp. 3d at 524.

122. *Afyare*, 632 F. App'x at 284–85.

123. *A.B. v. Marriott Int'l, Inc.*, 455 F. Supp. 3d 171, 188 (E.D. Pa. 2020); 18 U.S.C. § 1595(a) (stating that the plaintiff must be "a victim" of the chapter, requiring survivors to have been trafficked to civilly recover). Therefore, plaintiffs must be survivors of sex trafficking to bring a claim under 18 U.S.C. § 1595(a). However, the survivors can bring claims against multiple defendants, including those that facilitated their trafficking even though they did not directly participate. § 1595(a).

124. *A.B.*, 455 F. Supp. 3d at 188; *M.A. v. Wyndham Hotels & Resorts, Inc.*, 425 F. Supp. 3d 959, 964 (S.D. Ohio 2019).

First, Approach II does not require the third party to have actual knowledge of sex trafficking.<sup>125</sup> The element of “knowingly benefited financially” is automatically met when there is a financial benefit to the hotel due to a relationship with the trafficker, such as payment for the use of a hotel room.<sup>126</sup> Liability for third parties can attach even when the third party does not benefit directly from the money affiliated with trafficking services. For example, even if the trafficker did not pay for the hotel room with the proceeds from the trafficking, the hotel is still liable based on the payment for the room.<sup>127</sup> Courts have interpreted this element as the actual receipt of a benefit, not the promise of a future benefit.<sup>128</sup>

Second, courts following Approach II use a negligence standard and do not require the third party to have actual knowledge of participation in sex trafficking.<sup>129</sup> This interpretation relies heavily on the inclusion of “should have known” in the statute, which courts have analyzed as a negligence standard.<sup>130</sup> “Should have known” invokes a mens rea of negligence, under which a party should be aware of a substantial and unjustifiable risk that the material element exists or will result.<sup>131</sup> Therefore, if the hotel was put on notice of any of the signs of sex trafficking,<sup>132</sup> it could be held liable.

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125. See *M.A.*, 425 F. Supp. 3d at 964–66 (not requiring the plaintiff to prove that defendants received the benefit because of their facilitation of the trafficker’s activities).

126. See *Gilbert v. U.S. Olympic Comm.*, 423 F. Supp. 3d 1112, 1137 (D. Colo. 2019) (providing that a party does not need to assist the trafficker in “obtaining . . . services to be civilly liable”); see also *M.A.*, 425 F. Supp. 3d at 965–66 (holding that the defendant financially benefited by renting a room). For example, this approach does not require the trafficker to pay off the hotel for turning a blind eye to the trafficking because payment for the room is sufficient to meet the standard. See *Gilbert*, 423 F. Supp. 3d at 1137 (stating that 18 U.S.C. § 1595 does not require the defendant to be involved in the prohibited acts).

127. *M.A.*, 425 F. Supp. 3d at 964–65 (citing *Gilbert*, 423 F. Supp. 3d at 1137).

128. See *Corradino v. Liquidnet Holdings Inc.*, No. 19 CIV. 10434 (LGS), 2021 WL 2853362, at \*4 (S.D.N.Y. July 8, 2021) (citing *Geiss v. Weinstein Co. Holdings LLC*, 383 F. Supp. 3d 156, 169 (S.D.N.Y. 2019)) (requiring the receipt of a benefit); see also *M.A.*, 425 F. Supp. 3d at 964–65 (providing that the defendant “received a benefit” in *Gilbert*, 423 F. Supp. 3d at 1139).

129. *M.A.*, 425 F. Supp. 3d at 970.

130. *Id.* at 965.

131. *Id.* (not requiring actual knowledge or knowledge through willful blindness); MODEL PENAL CODE § 2.02(a), (d) (AM. L. INST. 2021).

132. See *supra* Section II.A.2.

Third, Approach II does not apply the definition of “participation in a venture” from the criminal provision<sup>133</sup> to § 1595(a)’s civil remedy.<sup>134</sup> Under this approach, participation does not require a member of the venture to have committed overt acts in furtherance of a forced sex act for that member to be civilly liable.<sup>135</sup> Instead, participation only requires a showing of a “continuous business relationship between the trafficker and the [defendant] such that it would appear that the trafficker and the [defendant] have established a pattern of conduct or could be said to have a tacit agreement.”<sup>136</sup> Further, Approach II does not require the venture itself to specifically be sex trafficking.<sup>137</sup> Courts impose liability whenever the fact finder concludes that the business “benefitted from participating in a venture it knew or should have known engaged in trafficking.”<sup>138</sup>

#### D. Tools of Interpretation

The likelihood of recovery for survivors under either approach differs significantly. Approach I narrowly applies § 1595(a), requiring survivors to prove that the hotel knew they were being sex trafficked. Approach II, however, imposes a lower standard, applying the statute broadly to defendants who *should have known* that sex trafficking was occurring. Due to the serious consequences of the statute’s application for survivors’ recovery of damages, it is necessary to describe the framework for the tools of interpretation used to analyze § 1595(a).<sup>139</sup> This Section will provide a brief background on the tools used in Part II to analyze the proper interpretation of § 1595(a).

##### 1. Plain meaning

Federal courts typically begin their statutory analysis with the ordinary meaning of the text.<sup>140</sup> Using this “plain meaning” rule, courts

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133. 18 U.S.C. § 1591(e)(4) (defining participation in a venture as “knowingly assisting, supporting, or facilitating a violation of subsection (a)(1)”).

134. *M.A.*, 425 F. Supp. 3d at 968–70.

135. *Gilbert v. U.S. Olympic Comm.*, 423 F. Supp. 3d 1112, 1137–38 (D. Colo. 2019).

136. *M.A.*, 425 F. Supp. 3d at 970.

137. *Jean-Charles v. Perlitz*, 937 F. Supp. 2d 276, 288 (D. Conn. 2013).

138. *A.B. v. Marriott Int’l, Inc.*, 455 F. Supp. 3d 171, 182 (E.D. Pa. 2020).

139. Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 15 (2003); Mark DeForrest, *Taming a Dragon: Legislative History in Legal Analysis*, 39 U. DAYTON L. REV. 37, 41 (2013).

140. Mullins, *supra* note 139, at 6.

only examine the text to determine whether the language alone is unambiguous.<sup>141</sup> When following this rule, courts do not examine the overall purpose of the statute or any surrounding material, including the statute's title, preamble, or legislative history<sup>142</sup> because the tool's purpose is to apply the exact terms of the statute.<sup>143</sup> However, even where the language may be clear, statutory interpretation does not preclude examining "persuasive evidence" to determine the statute's meaning, which can include material in addition to the statute's text such as typical congressional use of a phrase.<sup>144</sup> While there are numerous tools of statutory interpretation used to discern the plain meaning of a statute, this Comment focuses on four tools: (1) the remedial purpose canon, (2) giving meaning to every word, (3) the presumption that the same words have an identical meaning, and (4) examining the placement and purpose of a word in the statute.

The first tool is the remedial purpose canon, which states that courts should liberally construe remedial statutes in favor of the "target class for whom the statutes were designed."<sup>145</sup> The Supreme Court has utilized this canon to support broad interpretations of federal legislation relating to public health, worker benefits and compensation, and gender discrimination.<sup>146</sup> The second tool of statutory interpretation emphasizes the need to examine each word in a statute. The Supreme Court has held that it is necessary to "give

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141. *Id.* at 7.

142. Arthur W. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1299–300 (1975).

143. *King v. Burwell*, 576 U.S. 473, 486 (2015).

144. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *Watt v. Alaska*, 451 U.S. 259, 265–66 (1981) (quoting *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928) ("If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice, it would be arbitrary to refuse to consider that fact when we come to interpret a statute.")).

145. Matthew H. Walker, *Discrimination Based on National Origin and Ancestry: How the Goals of Equality Have Failed to Address the Pervasive Stereotyping of the Appalachian Tradition*, 38 U. DAYTON L. REV. 335, 355 (2013); *Peyton v. Rowe*, 391 U.S. 54, 64–66 (1968); *see also Ne. Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268 (1977) ("The language . . . is broad and suggests that we should take an expansive view of the extended coverage. Indeed, such a construction is appropriate for this remedial legislation.").

146. Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENV'T L. REV. 199, 201 (1996).

effect” to every word in a statute.<sup>147</sup> This canon of construction evaluates each word and does not read any words as superfluous.<sup>148</sup> The third tool of statutory interpretation is the presumption that the exact words used in different parts of the same legislation have the same meaning.<sup>149</sup> However, this presumption does not apply when the words are clearly not intended to have the same meaning.<sup>150</sup> For example, this presumption does not apply when the conditions differ or the scope of the legislature’s power is broader for one use instead of another.<sup>151</sup> This presumption is flexible and does not apply when there is a clear intent that the same word has a different meaning when used in the same act.<sup>152</sup> The fourth tool of statutory interpretation is the “placement and purpose” of a word in a statute when its meaning is unclear.<sup>153</sup> For instance, the word’s ordinary meaning may not apply when Congress intended for the word to have a different definition because the word’s meaning depends on context.<sup>154</sup>

## 2. *Congressional intent and legislative history*

When a statute’s plain meaning is unclear, courts look outside the statutory language,<sup>155</sup> examining legislative history to “accurately reflect[] congressional intent.”<sup>156</sup> Legislative history includes materials leading to the enactment of the statute, such as hearings, committee

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147. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *United States v. Menasche*, 348 U.S. 528, 538–39 (1955)).

148. *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

149. *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932).

150. *Id.*

151. *Id.*

152. *Id.* (“But the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent. Where the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different . . . the meaning well may vary to meet the purposes of the law.”).

153. *Holloway v. United States*, 526 U.S. 1, 6 (1999).

154. *See, e.g., King v. St. Vincent’s Hosp.*, 502 U.S. 215, 221 (1991) (stating that the meaning of statutory language depends on context).

155. *Mullins*, *supra* note 139, at 9 (“If the statutory text is not deemed to be clear and unambiguous, or is deemed to lack ‘plain meaning,’ then a court must go further. Many courts have described this aspect of statutory interpretation in terms of discerning or finding the ‘legislative intention’ or ‘intent.’”).

156. Brian G. Slocum, *Canons, the Plenary Power Doctrine, and Immigration Law*, 34 FLA. ST. U. L. REV. 363, 405 (2007).

reports, and floor debates.<sup>157</sup> These documents are helpful to courts to determine the purpose of a statute and evaluate statutory interpretations.<sup>158</sup>

## II. ANALYZING COURT USAGE OF 18 U.S.C. § 1595(A): APPROACH II FOLLOWS THE PLAIN MEANING AND REFLECTS CONGRESSIONAL INTENT, THEREBY PROPERLY FOCUSING ON THE SURVIVOR

As shown in Part I, the two approaches vary in scope, demonstrating the importance of this analysis for survivors' access to damages. Analyzing the three elements of the civil statute, this Part demonstrates that Approach II best conforms to the plain meaning of the statute and congressional intent because Approach I inappropriately conflates the civil and criminal remedies. Further, this Part shows that Approach II adheres to § 1595(a)'s purpose of broadly protecting survivors of sex trafficking.

### A. *Approach I's Conflation of the Criminal Remedy*

This Section utilizes the plain meaning of the statute, congressional intent, and legislative history discussed above to analyze § 1595(a) from a novel perspective. The analysis then focuses on the three elements of the civil statute: whether the defendant (1) knowingly benefited financially or received something of value, (2) knew or should have known about the nature of the venture, and (3) participated in the venture.<sup>159</sup> Approach II more accurately reflects the plain meaning and legislative intent, and § 1595(a) should be interpreted broadly to hold the hospitality industry accountable. Therefore, courts should follow Approach II and apply § 1595(a) such that (1) participation in sex trafficking is not required to knowingly benefit financially, (2) the mens rea is negligence, not actual knowledge of the sex trafficking venture, and (3) the criminal statute's definition of "participation in a venture" does not apply to § 1595(a).

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157. *Legislative History*, BLACK'S LAW DICTIONARY (11th ed. 2019); Stephanie J. Talbert, *Legislative History: A (Sometimes) Persuasive Tool for Federal Practitioners*, FED. LAW. 62, 64 (2018), <https://www.fedbar.org/wp-content/uploads/2018/01/Leg-Hist-pdf-1.pdf> [<https://perma.cc/6JBE-ZRBD>].

158. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538 (1947); DeForrest, *supra* note 139, at 40–42.

159. 18 U.S.C. § 1595(a).

1. *Participation in sex trafficking is not required to knowingly benefit financially*

First, the plain language of “whoever knowingly benefits” implies that actual participation in sex trafficking is unnecessary. Contrary to Approach I, the statutory language requires that the defendant knowingly benefitted financially, not that the perpetrator compensated the defendant for sex trafficking.<sup>160</sup> Approach I, by requiring a causal relationship between affirmative conduct furthering the sex-trafficking venture and receipt of a benefit,<sup>161</sup> adds a link between the benefit and the sex trafficking that is not present in the language of § 1595.<sup>162</sup>

Furthermore, looking beyond the plain language of “whoever knowingly benefits,” § 1595(a) also states that a civil action may be brought against anyone who “receiv[es] anything of value.”<sup>163</sup> This language does not require a mental state, just the receipt of a benefit, and therefore supports the conclusion that “whoever knowingly benefits” does not require actual participation in sex trafficking.<sup>164</sup> By including “should have known,” Congress intended liability to attach solely based on the receipt of money, rather than the exchange of services.<sup>165</sup> This element is therefore met when a hotel receives money for renting a room and finding that benefits received in exchange for participation in sex trafficking are necessary to “knowingly benefit[ ]

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160. See *H.H. v. G6 Hosp., LLC*, No. 19-CV-755, 2019 WL 6682152, at \*2 (S.D. Ohio Dec. 6, 2019) (stating that § 1595(a) does not require a “causal relationship” between renting the hotel room and sex trafficking).

161. See *Geiss v. Weinstein Co. Holdings LLC*, 383 F. Supp. 3d 156, 169 & n.5 (S.D.N.Y. 2019) (“Apart from the constructive knowledge provision, the operative language of the TVPA civil remedy and underlying criminal statute are identical. I therefore consider the ‘benefits’ element to have the same content in both provisions.”).

162. See *Gilbert v. U.S. Olympic Comm.*, 423 F. Supp. 3d 1112, 1137 (D. Colo. 2019) (explaining that the plain language of 18 U.S.C. § 1595(a) does not tie the defendant’s benefit to participation in sex trafficking).

163. § 1595(a).

164. *Id.*

165. See *A.B. v. Hilton Worldwide Holdings Inc.*, 484 F. Supp. 3d 921, 936–37 (D. Or. 2020) (explaining that requiring knowledge of the benefit imposes an “actual knowledge” standard that Congress did not intend because it included “should have known”).

financially” changes the mental state “Congress intended for its civil cause of action.”<sup>166</sup>

2. *Actual knowledge of the sex trafficking venture is an unnecessarily high mens rea*

Next, the civil remedy of § 1595(a) does not require actual knowledge that the venture participated in was sex trafficking; it only requires the survivor to allege constructive knowledge. Relying on the statute’s plain language, constructive knowledge depends on the “should have known” language in § 1595(a).<sup>167</sup> The language of the criminal and civil statutes differ: § 1595(a), the civil provision, uses “should have known,” while § 1591, the criminal provision, does not.<sup>168</sup> Furthermore, the Supreme Court has interpreted “should have known” to be a negligence standard.<sup>169</sup> Therefore, the plain text of § 1595(a) clarifies that the standard is a negligence standard of constructive knowledge, and actual knowledge is not required.<sup>170</sup>

Next, construing the mens rea liberally is consistent with congressional intent to enhance protection for trafficking survivors. Both approaches have recognized that § 1595(a) is remedial.<sup>171</sup> However, by using § 1591’s standard, which requires knowledge of a sex trafficking venture, Approach I does not apply the statute in a broad, remedial manner.<sup>172</sup> Approach I’s interpretation of the statute

166. *Id.* at 936. The use of “should have known” is commonly interpreted as a negligence standard. *See supra* Section I.C.3 (clarifying how “negligently” is analyzed). Requiring an actual knowledge standard, which equates to knowingly, is a much higher bar than negligence and using this standard is therefore contrary to congressional intent. *See supra* Section I.C.2. (analyzing the interpretation of “knowingly”).

167. 18 U.S.C. §§ 1591, 1595. Section 1591 of 18 U.S.C. uses a mens rea of knowingly, and by including the “should have known” language in section 18 U.S.C. § 1595(a), Congress intended a lower standard. *See Fish, supra* note 12, at 158 (arguing that Congress intended to use a negligence standard using “should have known”).

168. §§ 1591, 1595; *see also* S.J. v. Choice Hotels Int’l, Inc., 473 F. Supp. 3d 147, 153 (E.D.N.Y. 2020) (stating that these interpretations highlight the inherent differences between civil and criminal liability).

169. Burlington Indus. v. Ellerth, 524 U.S. 742, 759 (1998) (holding that an employer was negligent by not recognizing and stopping sexual harassment).

170. M.A. v. Wyndham Hotels & Resorts, Inc., 425 F. Supp. 3d 959, 965–66 (S.D. Ohio 2019).

171. A.B. v. Marriott Int’l, Inc., 455 F. Supp. 3d 171, 188 (E.D. Pa. 2020); *see* Noble v. Weinstein, 335 F. Supp. 3d 504, 515–16 (S.D.N.Y. 2018) (explaining that the statutes should be interpreted broadly because they are remedial provisions).

172. 18 U.S.C. § 1591(a). Note that 18 U.S.C. § 1591(a)(2) uses “reckless disregard” to apply to the requirement “that means of force, threats of force, fraud, coercion

is too narrow, and relying on § 1591's standard requiring actual knowledge of sex trafficking ignores the "knew or should have known" language in § 1595(a). Because both approaches agree that the statute is remedial, imposing a mens rea of knowingly ignores the broad "should have known" language designed by Congress to hold third parties liable.<sup>173</sup>

Furthermore, Congress expressly included "should have known" in § 1595(a), so importing a stricter mens rea ignores congressional intent. First, the stated purpose of the TVPA is to (1) combat trafficking in persons, (2) ensure the prosecution of traffickers, and (3) protect survivors of trafficking.<sup>174</sup> Congress's continued amendments to the TVPA reflect its intent to provide greater protection and restoration to survivors.<sup>175</sup> The 2003 reauthorization amended and expanded the TVPA for the purpose of "enhancing provisions on prevention of trafficking, protection of victims of trafficking, and prosecution of traffickers."<sup>176</sup> The House Report for the TVPRA reiterates Congress's intent to protect survivors by stating that the TVPRA "directly confronts the issue of trafficking for sexual exploitation."<sup>177</sup> Therefore, Congress has evinced clear intent to protect survivors and hold traffickers liable.<sup>178</sup>

Requiring victims first to prove third-party defendants, such as hotels, are criminally liable before being able to recover civilly imposes a high bar that Congress did not intend. Imposing this higher mens rea requires the survivor of sex trafficking to first prove the defendant's criminal violation of 18 U.S.C. § 1591(a)(2) before recovering under

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described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act." *Id.* § 1591(a)(2). The mens rea of "reckless disregard" does not lessen the requirement of "actual knowledge" for the participation in the venture. *Id.*; see also *M.A.*, 425 F. Supp. 3d at 970 ("It does not lessen the scienter requirement of actual knowledge as to participation or the venture's true ends.").

173. *A.B.*, 455 F. Supp. 3d at 188; *Noble*, 335 F. Supp. 3d at 515–16.

174. H.R. REP. NO. 106-487, pt. 1, at 1, 15 (1999).

175. Fish, *supra* note 12, at 138.

176. H.R. REP. NO. 108-264, pt. 1, at 8 (2003).

177. H.R. REP. NO. 110-430, at 34 (2007).

178. See Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat. 227, § 108(a)(3)(B) (lowering the standard for criminal liability under 18 U.S.C. § 1591 from knowledge to either knowledge or reckless disregard).

the civil statute.<sup>179</sup> Therefore, defendants do not need to have committed an underlying criminal sex trafficking offense under § 1591 to be civilly liable.<sup>180</sup>

3. *18 U.S.C. § 1591(e)(4)'s definition of "participation in a venture" does not apply to 18 U.S.C. § 1595(a)*

Finally, imposing the "participation in a venture" definition from 18 U.S.C. § 1591(e)(4), the criminal liability subsection of the TVPRA, on the civil liability provision codified at 18 U.S.C. § 1595(a), is inconsistent with the statute's plain language and legislative history and improperly expands the criminal definition beyond its scope.

First, examining the statute's plain language, § 1591's definition is limited to the criminal statute. Section 1591(e)(4) defines "participation in a venture" as "knowingly assisting, supporting, or facilitating a violation of subsection (a)(1)."<sup>181</sup> However, § 1591(e) limits application to "this section."<sup>182</sup> By stating the definition only applies to "this section," i.e., § 1591,<sup>183</sup> the plain language limits its application to the criminal provision. Therefore, even though § 1595(a) does not include a definition of "participation in a venture," § 1591(e)'s definition should not be applied due to its limited scope.<sup>184</sup>

Next, applying § 1591's definition to § 1595(a) expands the criminal definition beyond its scope. Applying the definition of "participation in a venture" in § 1591(e)(4) to the civil liability in § 1595(a) voids the "should have known" language in the civil remedy.<sup>185</sup> This violates the "cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."<sup>186</sup>

179. *A.B. v. Marriott Int'l, Inc.*, 455 F. Supp. 3d 171, 188 (E.D. Pa. 2020). *But see* 18 U.S.C. § 1595(a) (stating that the plaintiff must be "a victim" of the chapter, requiring survivors to have been trafficked to recover).

180. TVPRA CRIMINAL LAW PROVISIONS, *supra* note 65, at 16 (the amendments to the TVPA "create[] civil liability both for those who face criminal liability for their profiteering and those who do not").

181. 18 U.S.C. § 1591(e)(4).

182. *Id.* § 1591(e).

183. *Id.*

184. *Id.* § 1595(a).

185. *Id.* § 1591(e).

186. *Duncan v. Walker*, 121 S. Ct. 2120, 2125 (2001) (stating that the Court is "reluctan[t] to treat statutory terms as surplusage" (alteration in original)); *M.A. v. Wyndham Hotels & Resorts, Inc.*, 425 F. Supp. 3d 959, 969 (S.D. Ohio 2019) (citing *TRW Inc. v. Andrews*, 122 S. Ct. 441, 449 (2001)).

Using this canon of construction, Congress purposely included the “should have known” language.<sup>187</sup> Furthermore, the “presumption that identical words used in different parts of the same act are intended to have the same meaning” does not support importing the § 1591(e)(4) definition to § 1595(a).<sup>188</sup> Both the criminal and civil statutes use “participation in a venture,” but only § 1591 defines the phrase.<sup>189</sup> The presumption that the identical words have the same meaning is not applicable when there is “such variation in the connection in which the words are used.”<sup>190</sup> Therefore, by not defining “participation in a venture,”<sup>191</sup> the connection between the provisions is attenuated, and § 1595(a) does not use the same definition provided in § 1591(e).

Approach I uses another tool of statutory interpretation that relies on the *Afyare* statutory analysis: when interpreting a statute, courts will “consider not only the bare meaning of the critical word or phrase but also its placement and purpose in the statutory scheme.”<sup>192</sup> The *Afyare* analysis concluded that “venture” in § 1591(a)(2) is a sex trafficking venture, relying on its “placement and purpose” in § 1591.<sup>193</sup> The *Gilbert v. United States Olympic Committee*<sup>194</sup> court rejected this argument, stating that the definition of venture in § 1591 could not be applied to the definition in the § 1589 forced labor statute.<sup>195</sup> Approach II found that imposing § 1591(e)(4)’s definition to § 1595(a) is a “restrictive reading” that Congress did not intend.<sup>196</sup> Following congressional intent of a broad reading of the statute, applying the § 1591(e)(4) definition outside of its placement and purpose in § 1591 is inappropriate.

Next, the legislative history of the TVPRA demonstrates that § 1591’s definition does not apply to § 1595(a). Congress created the private right of action with the understanding that it is essential to set clear standards for the application and implementation of civil violations.<sup>197</sup>

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187. *M.A.*, 425 F. Supp. 3d at 969.

188. *Id.* (citing *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932)).

189. 18 U.S.C. §§ 1591(e)(4), 1595.

190. *M.A.*, 425 F. Supp. 3d at 969 (citing *Atl. Cleaners*, 286 U.S. at 433).

191. 18 U.S.C. § 1595(a).

192. *United States v. Afyare*, 632 F. App’x 272, 284 (6th Cir. 2016) (citing *Holloway v. United States*, 526 U.S. 1, 6 (1999)).

193. *Id.* at 284–85.

194. 423 F. Supp. 3d 1112 (D. Colo. 2019).

195. *Id.* at 1138.

196. *A.B. v. Marriott Int’l, Inc.*, 455 F. Supp. 3d 171, 188 (E.D. Pa. 2020).

197. H.R. REP. NO. 108-264, pt.2, at 16 (2003).

Congress has further stated that “statutory schemes establish different elements for civil and criminal violations.”<sup>198</sup> This demonstrates congressional attention to the differences in civil and criminal remedies in the drafting process.<sup>199</sup> Therefore, had Congress intended to use the same standards in the criminal and civil statutes, it would have done so.

Since the § 1591 definition of participation in a venture does not apply to § 1595(a), courts should follow Approach II to find that participation does not require a member of the venture to commit acts or require actual knowledge of participation in sex trafficking. Participation does not require a member of a venture to have committed overt acts in furtherance of obtaining forced labor or services for that member to be civilly liable.<sup>200</sup> It also does not require actual knowledge of participation in sex trafficking: as applied in Approach II, the survivors must simply show a continuous business relationship such that the trafficker and hotel have a pattern of conduct.<sup>201</sup>

### *B. Survivor Implications*

Interpreting the civil remedy broadly is necessary to ensure justice for survivors.<sup>202</sup> This Section explains how survivors benefit from using Approach II’s methodology to interpret § 1595(a).

#### *1. Access to damages*

First, the ability to use a federal civil remedy provides survivors additional avenues to justice, including damages. While there are other ways survivors can recover, such as state and tort laws, § 1595(a) is the most holistic theory of liability for survivors of sex trafficking.<sup>203</sup> Trafficking survivors can seek a complete remedy using the TVPRA

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198. *Id.*

199. *Compare* 18 U.S.C. § 1593(a) (directing the defendant to pay the full amount of the victim’s losses in a criminal case), *with* 18 U.S.C. § 1595(a) (allowing survivors to recover damages and attorneys’ fees from the perpetrator or third-party in a civil case).

200. *Gilbert*, 423 F. Supp. 3d at 1138.

201. *M.A. v. Wyndham Hotels & Resorts, Inc.*, 425 F. Supp. 3d 959, 970 (S.D. Ohio 2019).

202. *See supra* Section II.A.

203. *Fish*, *supra* note 12, at 145.

rather than the “piecemeal approach” required by tort law.<sup>204</sup> Additionally, the TVPRA has a ten-year statute of limitations, which is longer than many state statutes and increases the ability for survivors to recover.<sup>205</sup> Finally, using a federal cause of action allows survivors to bring claims in federal court, which may be more sympathetic than state courts.<sup>206</sup>

The civil remedy also provides a victim-centered approach to justice by providing restitution to survivors in the form of compensatory, punitive, and pecuniary damages.<sup>207</sup> The TVPRA allows survivors to “recover damages and reasonable attorneys['] fees”<sup>208</sup> and authorizes \$150,000 in actual and liquidated damages.<sup>209</sup> This provision has been interpreted to allow punitive damages, increasing protection for survivors and maximizing the punishment of traffickers.<sup>210</sup> The Tenth Circuit also confirmed the availability of compensatory damages under the TVPRA, stating that “case law consistently reflects the propriety of providing the traditional tort remedy of damages for emotional distress caused by outrageous conduct.”<sup>211</sup> The provision of these damages is essential, as demonstrated by the lack of a survivor-focused approach in criminal cases.<sup>212</sup> Restitution is “easily forgotten” in criminal cases where prosecutors focus on the incarceration of the trafficker, so a civil remedy provides a necessary alternative avenue to justice for survivors.<sup>213</sup> Indeed, although the TVPA requires mandatory

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204. Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN'S L.J. 1, 34 (2004).

205. Julie Dahlstrom, *Trafficking to the Rescue?*, 54 U.C. DAVIS L. REV. 1, 27 (2020).

206. *Id.* at 28.

207. Kim & Hreshchyshyn, *supra* note 204, at 16.

208. 18 U.S.C. § 1595.

209. *Id.* § 2255(a).

210. *Ditullio v. Boehm*, 662 F.3d 1091, 1098 (9th Cir. 2011) (“[P]ermitting punitive damages is consistent with Congress’s purposes in enacting the TVPA, which include increased protection for victims of trafficking and punishment of traffickers. We therefore hold that punitive damages are available under 18 U.S.C. § 1595.”).

211. *Francisco v. Susano*, 525 F. App’x 828, 835 (10th Cir. 2013); *see Ross v. Jenkins*, 325 F. Supp. 3d 1141, 1173 (D. Kan. 2018) (providing that courts have awarded compensatory damages for emotional distress).

212. Theodore R. Sangalis, Comment, *Elusive Empowerment: Compensating the Sex Trafficked Person Under the Trafficking Victims Protection Act*, 80 FORDHAM L. REV. 403, 405 (2011).

213. Kim & Hreshchyshyn, *supra* note 204, at 16; *see also Sangalis, supra* note 212, at 405–06 (arguing that restitution in criminal cases for sex trafficking survivors has either been not ordered, not collected, or inadequate).

restitution in criminal cases,<sup>214</sup> survivors of trafficking rarely receive any money.<sup>215</sup>

Moreover, allowing survivors to sue third parties increases the likelihood of recovery by creating an additional responsible party who can be ordered to pay damages.<sup>216</sup> Holding third parties liable creates the potential for additional sources of damage payments where the trafficker's assets are difficult to locate,<sup>217</sup> allowing survivors to recover when they otherwise might not have been able to.

## 2. *Expanding recovery by including forced labor and gender-based violence*

In addition to providing the opportunity for damages, § 1595 also allows for (1) multiple avenues of recovery for survivors of sex trafficking and (2) recovery for survivors of gender-based violence. Although this Comment focuses on survivors of sex trafficking, due to the evolution of human trafficking legislation, survivors can bring charges against the hospitality sector for both sex trafficking and forced labor under § 1595.<sup>218</sup> In *Ricchio v. McLean*,<sup>219</sup> the plaintiff successfully used this litigation strategy to argue that hotel owners “harbored” her at the hotel for her trafficker to “obtain[] her sexual labor or services.”<sup>220</sup> Section 1595 therefore expands liability, allowing for multiple avenues for recovery. The language of § 1595 enables survivors to recover from persons or entities that “knew or should have known has engaged in an *act in violation of this*

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214. 18 U.S.C. § 1593.

215. CASSONDR A JO MURPHY, HUMAN TRAFFICKING INSTITUTE, HUMAN TRAFFICKING RESTITUTION RESOURCE GUIDE 5 (2018), [https://lawsdocbox.com/Legal\\_Issues/116748334-Restitution-resource-guide.html](https://lawsdocbox.com/Legal_Issues/116748334-Restitution-resource-guide.html) (“[R]estitution is mandatory in all human trafficking cases; however, in practice, victims rarely receive a dollar of the amount they are entitled to by law.”). The lack of restitution payments can be attributed to judgment-proof defendants and inadequate staffing resources for restitution collection. Sydney Reed, *The Current State of Restitution for Survivors of Human Trafficking*, HUMAN TRAFFICKING INSTITUTE (Dec. 30, 2021), <https://traffickinginstitute.org/the-current-state-of-restitution-for-survivors-of-human-trafficking> [<https://perma.cc/32F9-8EMF>].

216. Fish, *supra* note 12, at 147.

217. Kim & Hreshchyshyn, *supra* note 204, at 16–17.

218. See *United States v. Kaufman*, 546 F.3d 1242, 1259–63 (10th Cir. 2008) (“[F]orced labor statutes apply to coerced acts other than ‘work in an economic sense.’”); *Ricchio v. McLean*, 853 F.3d 553, 556 (1st Cir. 2017).

219. 853 F.3d 553 (1st Cir. 2017).

220. *Id.* at 556.

*chapter.*<sup>221</sup> This, therefore, allows survivors of sex trafficking to pursue multiple avenues of recovery, including liability for forced labor.<sup>222</sup>

Furthermore, in an effort to benefit from the TVPRA's civil remedy, plaintiffs have successfully reframed crimes of gender-based violence, such as sexual assault, as human trafficking.<sup>223</sup> Strategic litigation has allowed for the reframing of abusive relationships as forced labor, providing an additional opportunity for survivors to recover under § 1595.<sup>224</sup> Federal courts have been receptive to these arguments, allowing for broad language defining the scope of human trafficking.<sup>225</sup>

3. *Bars to recovery: expanding liability within 18 U.S.C. § 1595(a)*

While § 1595(a) provides broad relief to survivors that would otherwise be inaccessible, clarifying the scope of liability will strengthen the statute. Section 1595(a) is singular: “participation in a venture which that person knew or should have known *has* engaged in an act,”<sup>226</sup> making it nearly impossible for survivors to sue parent companies, corporate affiliates, or hotel franchisors.<sup>227</sup> Due to this singular language, courts have been hesitant to allow survivors to hold the entities that own or manage the hotels liable unless the entities had the “requisite knowledge” that sex trafficking occurred in the hotel.<sup>228</sup> This heightens the statute's mens rea so that willful blindness of sex trafficking ventures within the hotel chain does not satisfy the mens

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221. 18 U.S.C. § 1595(a) (emphasis added).

222. *See id.* § 1589 (criminalizing forced labor).

223. *E.g.*, Julie Dahlstrom, *The Elastic Meaning(s) of Human Trafficking*, 108 CAL. L. REV. 379, 415 (2020); *Noble v. Weinstein*, 335 F. Supp. 3d 504, 520–21 (S.D.N.Y. 2018) (finding that a “[c]ommercial sex act” occurred because the sexual assault was accompanied by the “expectation of a film role, of a modeling meeting”).

224. *See, e.g.*, HUM. TRAFFICKING LEGAL CTR., HUMAN TRAFFICKING AND DOMESTIC VIOLENCE FACT SHEET 4–5 (2018), <https://www.htlegalcenter.org/wp-content/uploads/Human-Trafficking-and-Domestic-Violence-Fact-Sheet.pdf> [<https://perma.cc/5XAT-3RZM>] (explaining that survivors have used a theory of forced labor to recover from traffickers who promised a relationship or marriage that devolved into forced labor).

225. Dahlstrom, *supra* note 223, at 6.

226. 18 U.S.C. § 1595 (emphasis added).

227. *A.B. v. Hilton Worldwide Holdings Inc.*, 484 F. Supp. 3d 921, 938–39 (D. Or. 2020); Section I.B.2.

228. *S.J. v. Choice Hotels Int'l, Inc.*, 473 F. Supp. 3d 147, 154 (E.D.N.Y. 2020).

rea under the TVPRA for hotel franchisors.<sup>229</sup> This results in survivors suing individual hotels rather than the parent companies, limiting survivors' ability to recover damages.<sup>230</sup>

Amending § 1595(a) to alleviate confusion about the application of the statute could broaden liability, as is Congress's intent,<sup>231</sup> by making ventures plural and allowing survivors to recover damages from parent companies, corporate affiliates, or hotel franchisors who participated in ventures that the company should have known have engaged in acts. The altered statute would read: "participation *in one or more ventures* which that person knew or should have known engaged in . . . an act."<sup>232</sup> The amended statute would allow survivors to recover from parent companies that demonstrate that they should have known about sex trafficking in their hotels. Clearly, due to the existence of training for hotel staff, many parent companies are already aware that sex trafficking occurs in their establishments.<sup>233</sup> Therefore, clarifying the scope of the statute could increase survivors' likelihood of recovery.

#### CONCLUSION

Since 2008, federal law has provided sex trafficking survivors with the opportunity to recover damages from third parties.<sup>234</sup> However, federal courts have disagreed on the proper interpretation of this statute.<sup>235</sup> Due to the severity and frequency of sex trafficking in the United States, courts must abide by the plain language and congressional intent to protect survivors of sex trafficking and read the civil statute broadly. Requiring participation in the sex trafficking venture, imposing a mens rea of knowingly, and importing the criminal provisions from 18 U.S.C. § 1591 imposes an unintentionally high bar for recovery. The civil remedy must be treated as a standalone

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229. *See id.* at 154 (noting that franchisors cannot be held liable "because they were generally aware that sex trafficking sometimes occurred on their franchisees' properties").

230. *See Hilton Worldwide*, 484 F. Supp. 3d at 938–39 (stating that the plaintiff failed to allege facts to prove that the parent company, corporate affiliate, or hotel franchisor knew or should have known of her trafficking). However, this does not completely bar survivors' recovery from owners or franchisors: other statutes, contracts, or common law may create liability for a failure to train hotel staff on signs of sex trafficking. *S.J.*, 473 F. Supp. 3d at 154.

231. *See supra* Section II.A.2.

232. Altering the language of 18 U.S.C. § 1595(a).

233. *See supra* Section I.A.

234. § 1595(a).

235. *A.B. v. Marriott Int'l, Inc.*, 455 F. Supp. 3d 171, 183 (E.D. Pa. 2020).

claim to remain accessible and retain the purpose of the TVPRA: to enhance provisions to prevent trafficking, protect survivors of trafficking, and prosecute traffickers.<sup>236</sup>

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236. H.R. REP. NO. 108-264, pt.1, at 9 (2003).