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Trafficking to the Rescue?

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Since before the dawn of the #MeToo Movement, civil litigators have been confronted with imperfect legal responses to gender-based harms. Some have sought to envision innovative legal strategies. One new, increasingly successful tactic has been the deployment of federal anti-trafficking law in certain cases of domestic violence and sexual assault. In 2017, for example, victims of sexual assault filed federal civil suits under the Trafficking Victims Protection Reauthorization Act ("TVPRA") against Hollywood producer Harvey Weinstein. Plaintiffs argued that the alleged sexual assault conduct amounted to "commercial sex acts" and sex trafficking. Other plaintiffs' attorneys have similarly invoked federal trafficking law against a range of defendants, such as Olympic Taekwondo coach Jean Lopez, well-known photographer Bruce Weber, and fundamentalist leader Warren Jeffs.

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These efforts have largely succeeded, as federal district courts have signaled broader judicial acceptance of such federal trafficking claims.

This Article traces federal human trafficking law from its origins to these recent innovative cases. It demonstrates how civil litigators are turning to human trafficking statutes to overcome decades-old systemic problems with legal responses to gender-based violence. The Article then explores how the TVPRA offers unique, pragmatic advantages for a broad range of plaintiffs. Yet, it argues that this trend also involves risks, as the expanding deployment of trafficking statutes in civil cases may lead by example to constitutional challenges, disproportionate criminal penalties in certain cases, and confusion about the meaning of trafficking as a legal concept. This Article examines what these efforts may signal about the future of human trafficking law as well as the broader field of gender-based violence.

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INTRODUCTION

Harvey Weinstein's conduct was an important catalyst for the #MeToo Movement and the emergence of innovative responses, like #TimesUp.[1] But, few expected Weinstein's conduct to redefine the contours of human trafficking law. Yet, in 2017, victims[2] of sexual

[1] *See* Alix Langone, *#MeToo and Time's Up Founders Explain the Difference Between the 2 Movements — and How They're Alike*, TIME (Mar. 22, 2018, 5:21 PM ET), https://time.com/5189945/whats-the-difference-between-the-metoo-and-times-up-movements/ [https://perma.cc/H7BD-FDXY] (defining #MeToo as a movement against "sexual violence of all kinds," whereas #TimesUp is a "solution-based, action-oriented next step" focusing on "safety and equity in the workplace"); Helen Rosner, *One Year of #MeToo: A Modest Proposal to Help Combat Sexual Harassment in the Restaurant Industry*, NEW YORKER (Oct. 10, 2018), https://www.newyorker.com/culture/annals-of-gastronomy/one-year-of-metoo-a-modest-proposal-to-help-dismantle-the-restaurant-industrys-culture-of-sexual-harassment [https://perma.cc/3YUQ-EDCB] (noting that the "revelations about Harvey Weinstein . . . kick-started the cultural reckoning that became the #MeToo movement"). Tarana Burke founded the #MeToo Movement, using "Me too" to bring attention to pervasive sexual violence and harassment, especially involving women and girls of color, and actress Alyssa Milano further popularized the #MeToo hashtag online in response to Weinstein's conduct. *See* Tarana Burke, *Me Too Is a Movement, Not a Moment*, TEDWOMEN 2018 (Nov. 2018), https://www.ted.com/talks/tarana_burke_me_too_is_a_movement_not_a_moment?language=en [https://perma.cc/NXW2-K85Y]; *infra* Part II.A (regarding the origins of the #MeToo Movement).

[2] This Article uses the term "victim" rather than "survivor" because the term "victim" has legal significance. Qualifying as a "victim" under state or federal anti-trafficking law can confer important protections, including immigration status, public benefits, civil damages, and criminal restitution. *See* Amanda Peters, *Reconsidering Federal and State Obstacles to Human Trafficking Victim Status and Entitlements*, 2016 UTAH L. REV. 535, 539 ("In the human trafficking context, victims receive much more than mere attention by wearing the label [of victim]; they earn legal rights, services, benefits, and freedom from criminal charges."); *see also infra* Part I.D. Some scholars have critiqued the term "victim" as too simplistically defining individuals based on their experiences of victimization. *See, e.g.*, Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1432 (1993) ("Victimhood is a cramped identity, depending upon and reinforcing the faulty idea that a person can be reduced to a trait. The victim is helpless, decimated, pathetic, weak, and ignorant. Departing from this script may mean losing whatever entitlements and compassion victim status may afford."); Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 160 (2007) (discussing the "iconic" trafficking victim as "meek, passive objects of sexual exploitation . . . exercising no free will during their illegal entry" and suggesting that this problematic rhetoric leads to poor outcomes for

assault sued Weinstein under the Trafficking Victims Protection Reauthorization Act ("TVPRA").[3] In federal court pleadings, the plaintiffs asserted a novel argument: that Weinstein's alleged conduct amounted to "sex trafficking" because his promises of job advancement in exchange for sex were "commercial sex act[s]."[4] As a result, plaintiffs argued, Weinstein *and* his corporate backers should be found civilly liable for human trafficking.[5]

Some heralded these developments as the kickstart to a new kind of justice for victims of gender-based violence.[6] Catharine MacKinnon,

immigrant victims). Throughout the Article, the term "victim of trafficking," unless otherwise specified, refers to a victim of federal human trafficking conduct, as defined as sex trafficking under 18 U.S.C. § 1591, forced labor under 18 U.S.C. § 1589, and involuntary servitude under 18 U.S.C. § 1584. This Article also refers to "federal trafficking crimes" or "federal trafficking violations" to encompass all three statutes, unless otherwise specified. For a greater discussion of federal trafficking crimes, see *infra* Parts I.B and I.C.

[3] *See, e.g.*, Canosa v. Ziff, No. 18 Civ. 4115, 2019 WL 498865 (S.D.N.Y. Jan. 28, 2019); Noble v. Weinstein, 335 F. Supp. 3d 504 (S.D.N.Y. 2018); Civil Complaint for Damages, Loman v. Weinstein, No. 2:18-cv-07310 (C.D. Cal. Aug. 20, 2018), 2018 WL 3981202. The Trafficking Victims Protection Act ("TVPA") codified new trafficking crimes in 2000, and Congress created a civil federal remedy for trafficking violations in 2003. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 [hereinafter TVPA]; Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(a)(3)(A), 117 Stat. 2875, 2878 (2003) [hereinafter TVPRA of 2003] ("An individual who is a victim of a violation of section 1589 [forced labor], 1590 [trafficking with respect to peonage, slavery, involuntary servitude, or forced labor], or 1591 [sex trafficking of children or by force, fraud, or coercion] of this chapter may bring a civil action against the perpetrator in an appropriate district court of the United States and may recover damages and reasonable attorneys [sic] fees."). Congress then expanded civil liability for trafficking violations to third parties in 2008. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 222, 122 Stat. 5044 (2008) [hereinafter TVPRA of 2008]. See *infra* Part I.D, for a discussion of civil liability under the TVPRA. This Article refers to the "TVPRA" to reference federal civil claims brought under 18 U.S.C. § 1595(a) against a perpetrator or third party who "knowingly benefits" from trafficking conduct. The Article, in contrast, uses the term "TVPA" when referring to the definitions of federal trafficking conduct at 18 U.S.C. §§ 1584, 1589, 1591.

[4] *See, e.g.*, Complaint ¶ 51, *Noble*, 335 F. Supp. 3d 504 (S.D.N.Y. 2018) (No. 17-cv-09260), 2018 WL 7377113.

[5] *See id.* at Introduction.

[6] *See, e.g.*, Corinne Ramey, *Judge Greenlights Use of Sex-Trafficking Law in Suit Against Harvey Weinstein*, WALL ST. J. (Aug. 14, 2018, 5:56 PM ET), https://www.wsj.com/articles/judge-greenlights-use-of-sex-trafficking-law-in-suit-against-harvey-weinstein-1534283784 [https://perma.cc/J9M8-GWZK] (quoting Rebecca Ricigliano, a defense attorney at Crowell & Moring LLP, who noted, "I think this particular action brings light to a relatively underutilized statute that victims may employ more in the future"). In this Article, "gender-based violence" is defined as acts of violence or abuse motivated by gender directed against cisgender women, lesbian,

who famously pioneered legal approaches to sexual harassment, stated simply that, "This is a whole new world,"[7] pointing to the potential of the TVPRA to provide new legal remedies to victims of gender-based harms. Weinstein's attorneys, however, vehemently disagreed.[8] They argued that his conduct was "light years away" from sex trafficking and interpreting it as such is an "utter perversion of the legislative intent behind the statute."[9] They further contended that the plaintiffs threatened to "conflate everything" and to redefine a wide swath of gender-based violence — from sexual assault to domestic abuse — as trafficking.[10] This, they asserted, would have dramatic implications.[11]

The U.S. Congress passed the Trafficking Victims Protection Act ("TVPA") of 2000 with a specific focus on the transnational crime of human trafficking.[12] In particular, Congress aimed to address the growing "international sex trade" that impacted "predominantly

gay, bisexual, trans, queer, and gender non-conforming ("LGBTQ+") individuals. This Article uses the terms "gender-based violence," "gender-based harms," "interpersonal violence," and "intimate partner violence" interchangeably.

[7] Catharine A. MacKinnon, *Where #MeToo Came From, and Where It's Going*, ATLANTIC (Mar. 24, 2019), https://www.theatlantic.com/ideas/archive/2019/03/catharine-mackinnon-what-metoo-has-changed/585313/ [https://perma.cc/LLR6-X3KW] [hereinafter *Where #MeToo Came From*].

[8] *See, e.g.*, *Judge Allows Sex-Trafficking Suit Against Weinstein, Citing History of the Casting Couch*, L.A. TIMES (Aug. 14, 2018, 3:00 PM), https://www.latimes.com/business/la-fi-ct-weinstein-lawsuit-20180814-story.html [https://perma.cc/BW6K-KJFU] (quoting Weinstein's attorney who argued that his alleged conduct was "light years away" from the intent of anti-trafficking legislation to address victims locked "in a basement" and made to "have sex with people").

[9] *Id.*; *Harvey Weinstein Lawyers Argue Against Sex Trafficking Claim*, L.A. TIMES (Jan. 29, 2019, 12:10 PM), https://www.latimes.com/nation/nationnow/la-na-harvey-weinstein-lawsuit-20190129-story.html [https://perma.cc/EJW5-MEWS]; *see also* Defendant's Memorandum in Opposition to Motion to Dismiss at II, *Noble*, 335 F. Supp. 3d 504 (No. 17-cv-09260), 2018 WL 7377109 (arguing that the federal trafficking statute was meant to "prevent slavery, involuntary servitude, and human trafficking for commercial gain," not "a single, gender-based sexual incident that was not connected to a sex trafficking scheme").

[10] *See* Josh Russell, *Sex-Trafficking Suit Against Harvey Weinstein Advanced*, COURTHOUSE NEWS SERV. (Mar. 13, 2019), https://www.courthousenews.com/sex-trafficking-suit-against-harvey-weinstein-advanced/ [https://perma.cc/P3GM-R2XZ].

[11] *See* Adam Klasfeld, *Weinstein Painted as Tuxedo-Clad Pimp for Sex-Trafficking Case*, COURTHOUSE NEWS SERV. (May 2, 2018), https://www.courthousenews.com/weinstein-Cpainted-as-tuxedo-clad-pimp-for-sex-trafficking-case/ [https://perma.cc/79CP-A24Y] (quoting Phyllis Kupferstein, Harvey Weinstein's attorney, asserting: "[i]t cannot be the case that every time a woman has sex with a more powerful man in an effort to advance her career, and it doesn't go the way that she likes, that she somehow becomes a sex-trafficking victim").

[12] TVPA, *supra* note 3, § 102(a); *see also infra* Part I.B, for a discussion of the federal definition of sex trafficking.

women and girls" in the context of "prostitution, pornography, sex tourism, and other commercial sexual services."[13] The TVPA also provided new tools to combat forced labor.[14] Congress focused on labor exploitation, involving "false promises of decent working conditions at relatively good pay as nannies, maids, dancers, factory workers, restaurant workers, sales clerks, or models."[15] Despite this twofold concern with labor and sex trafficking, Congress used textually broad language, such as "commercial sex act" and "labor" or "services," leaving it to federal courts to decide the precise scope of trafficking.[16]

The Weinstein case was the first of its kind and unique in many respects.[17] Yet, it is illustrative of an emerging trend that has marked both civil and criminal cases.[18] Civil litigators, in particular, have turned to trafficking statutes to improve outcomes for victims of gender-based violence.[19] Federal courts have signaled receptivity to these new arguments and endorsed broad judicial interpretations of federal trafficking violations, including forced labor, involuntary servitude, and sex trafficking.[20] This trend, while still nascent, has deep implications

[13] TVPA, *supra* note 3, § 102(b)(2).

[14] *See infra* Part I.C.

[15] TVPA, *supra* note 3, § 102(b)(4).

[16] *See id.* § 102(b).

[17] *See* Gene Maddaus, *Judge Allows Harvey Weinstein Sex Trafficking Suit to Proceed*, VARIETY (Aug. 14, 2018, 10:32 AM PT), https://variety.com/2018/biz/news/harvey-weinstein-sex-trafficking-kadian-noble-1202904729/ [https://perma.cc/MG35-NPMP] (quoting Judge Robert Sweet, the first federal court judge to decide whether the sex trafficking suit against Weinstein could proceed, as stating that he was in "uncharted waters"). For a detailed discussion of the Weinstein civil TVPRA case, see *infra* Part III.C.

[18] *See* Julie Dahlstrom, *The Elastic Meaning(s) of Human Trafficking*, 108 CALIF. L. REV. 379, 383-84 (2020) (examining the application of U.S. federal anti-trafficking law to new actors and conduct).

[19] For a detailed discussion of incentives for civil litigators to frame conduct as trafficking, see *infra* Part I.D. This Article uses the term "civil litigation" to refer to civil claims, including tort, contract, and other claims brought in federal district court or state courts. Civil tort claims based on domestic violence and sexual assault often proceed as claims prohibiting intentional and negligent harm as well as negligent torts. *See, e.g.*, Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55, 71-72 (2006). Contract claims also may be possible in some cases. *Id.* at 72. Victims of gender-based violence may qualify for other civil benefits, including housing, employment, education, immigration, public benefits, and family law benefits, but these are not the focus of this Article.

[20] For example, in 2019, one federal court judge took note of the increasing TVPA claims "since the rise of the #MeToo movement," especially those involving the "casting couch." *See* Ardolf v. Weber, 332 F.R.D. 467, 473 (S.D.N.Y. 2019) (finding that "victims of 'casting couch' sexual abuse and assault increasingly rely on the TVPA to prosecute

for the evolving meaning of trafficking as well as for the broader field of gender-based violence.[21]

This Article considers the factors motivating this shift in both public discourse and in legal theory.[22] It demonstrates how recent federal civil litigation efforts have been successful in inspiring broad judicial interpretation of trafficking violations. Through interviews with civil litigators, it provides a rich, layered account of how plaintiffs' attorneys view the potential gains of new civil suits under the TVPRA.[23]

alleged perpetrators such as Hollywood movie mogul Harvey Weinstein"). *See infra* Parts III.B, I.C (regarding evolving judicial interpretation to apply the TVPRA to new forms of gender-based violence).

[21] Although this Article focuses on litigation efforts to deploy the TVPRA in the context of gender-based violence, legislators have also redefined gender-based crimes as trafficking to mobilize greater public condemnation and specialized prosecutorial responses. For example, in 2015, Congress redefined the purchase of sex from a child as sex trafficking under 18 U.S.C. § 1591, despite the fact that many states already criminalized the conduct as statutory rape, child sexual abuse, and related crimes. *See* Justice for Victims of Trafficking Act, Pub. L. No. 114-22, § 109, 129 Stat. 227 (2015).

[22] This Article builds upon the work of scholars who have explored how trafficking law has been applied expansively to new actors and conduct. *See, e.g.,* Janie A. Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AM. J. INT'L L. 609, 610-13 (2014) [hereinafter *Exploitation Creep*] (describing the broader use of trafficking discourse in policy, rhetoric, and law to address more varied harms, such as forced labor); Dahlstrom, *supra* note 18, at 386-88 (examining the application of federal anti-trafficking law expansively to new actors and conduct, including certain domestic violence and sexual assault conduct). Many scholars have explored the benefits, more generally, of a federal civil remedy for victims of trafficking. *See, e.g.*, Briana Beltran, *The Hidden "Benefits" of the Trafficking Victim Protection Act's Expanded Provisions for Temporary Foreign Workers*, 41 BERKELEY J. EMP. & LAB. L. 2 (forthcoming 2020) (exploring the ability of temporary workers to bring TVPRA civil suits against employers, recruiters, and other third parties); Gallant Fish, *No Rest for the Wicked: Civil Liability Against Hotels in Cases of Sex Trafficking*, 23 BUFF. HUM. RTS. L. REV. 119, 122 (2017) (examining TVPRA claims against hotels that knowingly benefit from sex trafficking); 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, 1 (2004) (examining how civil trafficking suits can be a "powerful tool in the United States for addressing the growing problem of modern-day slavery, both at national and at global levels").

[23] The author interviewed fifteen plaintiffs' attorneys, who represent victims of sexual assault and intimate partner violence in civil matters and, either personally or within their firms, have litigated civil trafficking claims. The author also interviewed two criminal attorneys involved in *United States v. Marcus*, 487 F. Supp. 2d 289 (E.D.N.Y. 2007). *Marcus* was one of the first federal district court cases to apply the TVPA to intimate, domestic relationships. See *infra* Part III.A, for a detailed discussion of *Marcus*.

It is true, of course, that gender-based torts and crimes often co-occur.[24] Trafficking can often involve intimate partner relationships.[25] A perpetrator of trafficking may engage in sexual, emotional, or physical abuse to instill fear and induce commercial sex or forced labor.[26] Trafficking, thus, can (and often does) involve overlapping crimes like assault and battery, sexual assault, and sex trafficking. This is neither unusual nor especially noteworthy.

However, this Article addresses a distinct phenomenon: the evolutionary expansion of a legal category — in this case human trafficking — in reaction to the perceived deficiencies of other existing civil and criminal legal mechanisms. Ultimately, this Article asks whether trafficking law can or should supply answers to questions raised by the real and perceived failures of existing responses to sexual assault and domestic violence.[27]

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[24] *See generally* DEP'T OF JUSTICE, HUM. TRAFFICKING TASK FORCE E-GUIDE, https://www.ovcttac.gov/taskforceguide/eguide/1-understanding-human-trafficking/12-recognizing-the-crime/ (last visited July 25, 2020) [https://perma.cc/DTX2-UCCB] (noting that conduct "may involve human trafficking" and other crimes, including domestic violence and sexual assault); HUM. TRAFFICKING LEGAL CTR., HUM. TRAFFICKING AND DOMESTIC VIOLENCE FACT SHEET 2 (Feb. 27, 2018), http://www.htlegalcenter.org/wp-content/uploads/Human-Trafficking-and-Domestic-Violence-Fact-Sheet.pdf [https://perma.cc/MPG8-X2HK] [hereinafter FACT SHEET] (remarking how the federal government "has acknowledged the link between these two crimes, recognizing that cases that initially appear to be domestic violence may mask sex or labor trafficking").

[25] *See, e.g.*, Affidavit of Karsten D. Anderson at 3, United States v. Knight, No. 1:17-cr-00166 (D.N.D. July 7, 2017) (involving a defendant who forced his girlfriend, whom he "hit," "choked," and "threatened to kill," into commercial sex); Amended Complaint ¶ 43, Shuvalova v. Cunningham, No. 10CV02159 (N.D. Cal. Jan. 11, 2011), 2011 WL 914086 (seeking civil damages from a defendant who recruited the plaintiff from an online dating site and allegedly forced her and her daughter into forced labor); FACT SHEET, *supra* note 24, at 4 (citing *Sex Trafficker Terrence "T-Rex" Yarbrough Sentenced to Serve 536 Months in Prison*, DEP'T OF JUST. (Oct. 29, 2013), https://www.justice.gov/opa/pr/sex-trafficker-terrence-t-rex-yarbrough-sentenced-serve536-months-prison [https://perma.cc/XQ3S-6YZE]) (describing a defendant, who was charged with sex trafficking, and targeted victims by telling them that he was "in love" with them).

[26] *See, e.g.*, Affidavit of Karsten D. Anderson, *supra* note 25, at 3 (describing a defendant who used physical violence to force victims to engage in commercial sex); Amended Complaint, *supra* note 25, at ¶ 43 (seeking civil damages from defendant who used physical violence and emotional abuse to make her and her daughter work); FACT SHEET, *supra* note 24, at 4 (citing *Sex Trafficker Terrence "T-Rex" Yarbrough Sentenced to Serve 536 Months in Prison*, DEP'T OF JUST. (Oct. 29, 2013), https://www.justice.gov/opa/pr/sex-trafficker-terrence-t-rex-yarbrough-sentenced-serve536-months-prison [https://perma.cc/XQ3S-6YZE]) (charging a defendant with sex trafficking who used physical violence to compel commercial sex).

[27] See *infra* Part II.B, for an examination of perceived deficiencies in existing legal responses to sexual assault and domestic violence.

It is clear that the creative deployment of trafficking statutes offers considerable gains to victims of gender-based violence, as it opens up new and important avenues for protection and prosecution.[28] Federal trafficking law allows victims to take advantage of more generous statutes of limitations, expansive third party liability, substantial damages, and widening federal criminal and civil jurisdiction.[29] In addition, civil litigators and prosecutors may benefit by deploying the moral condemnation associated with trafficking in these new contexts.[30]

The invocation of trafficking statutes can mobilize political will.[31] It can prompt action to hold perpetrators and institutions accountable, sway jurors and judges, and encourage civil settlements.[32] In addition, moves to invoke trafficking law can have powerful expressive value by offering new frames within which we can recognize gender-based harms that have historically been ignored, under prosecuted, or insufficiently recognized.[33]

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[28] *See infra* Part I.B.

[29] *See infra* Part I.D.

[30] *See* Chuang, *Exploitation Creep*, *supra* note 22, at 611 (describing the phenomenon of "exploitation creep" wherein new phenomena are labeled trafficking "enabl[ing] . . . rebranding, heightened moral condemnation and commitment to its cause"). Weinstein and his attorneys have argued that the plaintiffs' trafficking claims are an "opportunity" to "grab more headlines." *See* Priscilla DeGregory & Ruth Brown, *Weinstein Lawyers: Sex Assault Suit Is Just a 'Headline Grab*,' PAGE SIX (Jan. 29, 2019, 1:10 PM), https://pagesix.com/2019/01/29/weinstein-lawyers-sex-assault-suit-is-just-a-headline-grab [https://perma.cc/P2YX-TCX6].

[31] *See, e.g.*, Chuang, *Exploitation Creep*, *supra* note 22, at 629 ("The creep toward slavery is thus rationalized as the strategic deployment of crucial and rare political will in the service of trafficked and forced laborers who have long suffered from inadequate protections under the law."); Ramey, *supra* note 6 (quoting an attorney, who describes how creative uses of trafficking law could have a "ripple effect" in other cases).

[32] *See, e.g.*, Megan Twohey & Jodi Kantor, *Weinstein and His Accusers Reach Tentative $25 Million Deal*, N.Y. TIMES (Dec. 11, 2019), https://www.nytimes.com/2019/12/11/us/harvey-weinstein-settlement.html [https://perma.cc/VAJ7-7DMF] (reporting that Weinstein's attorneys have proposed a global $25 million settlement agreement that would settle civil suits with more than thirty actresses and former Weinstein employees). The settlement agreement was later rejected by the district court judge. Vanessa Romo, *Federal Judge Rejects Harvey Weinstein's $19 Million Settlement with Alleged Victims*, NPR (July 14, 2020), https://www.npr.org/2020/07/14/891228092/federal-judge-rejects-harvey-weinsteins-19-million-settlement-with-alleged-victi [https://perma.cc/E7P2-GNZH].

[33] *See* Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 407 (2009) ("Law has an important expressive character beyond its coercive one."); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1996) (examining the "expressive function of law" in "'making statements' as opposed to controlling behavior directly"). Some scholars question the underpinnings of expressive theory, asking whether law can effectively

Even so, the collapsing of legal definitions — or as Weinstein's attorneys phrased it, efforts to "conflate everything" — comes with potential risks.[34] The trafficking framework, itself a work-in-progress, may ultimately be ill-suited to encompass myriad new meanings. Its invocation in either the criminal or the civil realm may be a temporary, imperfect salve for the complex challenges that have traditionally imperiled sexual assault and domestic violence cases.[35]

Worse, such expansion may deflect attention from more basic, needed reforms of state civil and criminal responses to gender-based violence. In certain cases, trafficking law will trigger heightened criminal sentences and assertions of federal jurisdiction regarding gender-based crime.[36] This may be permissible — even a welcome development —in certain cases, especially involving serial offenders such as Weinstein and financier Jeffrey Epstein, but as trafficking encompasses a wider range of conduct, it may raise new concerns about proportionality and the appropriateness of federal jurisdiction across a broad range of cases. Moreover, the use of trafficking law in new civil and criminal cases risks creating judicial skepticism and sowing confusion among judges and juries that could ultimately undermine its effectiveness.[37]

express values and change behavior. *See, e.g.,* Patricia Funk, *Is There an Expressive Function of Law? An Empirical Analysis of Voting Laws with Symbolic Fines*, 9 AM. L. & ECON. REV. 135 (2007) (describing how legal academics assume certain expressive effects that remain untested or unproven by empirical analysis).

[34] *See* Russell, *supra* note 10.

[35] *See infra* Part II.B.

[36] For example, a defendant who is convicted of sex trafficking under federal law is subject to a mandatory minimum sentence of fifteen years in prison without parole and could receive up to life in prison. *See* 18 U.S.C. § 1591(b)(1) (2018); Sarah Crocker, *Stripping Agency from Top to Bottom: The Need for a Sentencing Guideline Safety Valve for Bottoms Prosecuted Under the Federal Sex Trafficking Statute*, 11 NW. U. L. REV. 753, 765 (2017) ("[T]he statutes' base offense levels combined with the typical enhancements that accompany sex trafficking convictions often put defendants into Guidelines ranges well above the mandatory minimums.").

[37] The term, "traditional," refers to archetypal trafficking cases involving forced or coerced commercial sex and forced labor for which Congress sought to address in enacting federal trafficking law. *See* TVPA pmbl.; *see also* Zoom Interview with Maurice H. Sercarz, Attorney, Sercarz & Riopelle, LLP (June 1, 2020) (notes on file with author) ("I gather that when the [sex trafficking] law was enacted it was meant to . . . provide the strength of federal prosecution . . . in order to outlaw or to punish or prevent certain conduct, and the core of conduct would be to punish the individual who sells a woman into submission in exchange for money or profit. That's the . . . archetypal [sex] trafficking crime."). Many scholars have eschewed the concept of the "iconic" or "traditional" victim as overly limiting the scope of protections for victim. *See, e.g.*, Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and*

Although there are substantial benefits to having trafficking law come to the "rescue,"[38] this Article argues that there too are consequences of deploying trafficking more broadly that should be better understood and considered when invoking trafficking law expansively. It also asserts that while trafficking may not be the perfect answer to such challenges, its invocation can provide a roadmap to fine-tune existing civil legal responses to domestic violence and sexual assault.

This Article proceeds in four parts. Part I outlines how Congress crafted federal trafficking law using expansive statutory language, which has left the door open to arguments to broaden its application. It examines how generous civil provisions in the TVPRA have provided powerful incentives to civil litigators to reframe certain conduct as trafficking.

Part II examines the historic evolution of legal responses to sexual assault and domestic violence, and the deficiencies that have compelled victims to look elsewhere for answers. It then describes generative trends, wherein civil litigators have creatively invoked other causes of action, including defamation claims, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and the TVPRA to craft new avenues for civil damages.[39]

Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act, 21 GEO. IMMIGR. L. J. (2007) (describing how pervasive myths abound, limiting the concept of victimhood and resulting in insufficient protections for immigrant victims of trafficking); Srikantiah, *supra* note 2 (arguing that poor outcomes for immigrant victims of trafficking have resulted from narrow perspectives of trafficking held by law enforcement and other administrative actors).

[38] Scholars have criticized the use of the term, "rescue," in the context of gender-based violence because it portrays the victim as "passive" or lacking in agency. *See, e.g.*, Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1712 (2010) [hereinafter *Rescuing Trafficking*] ("Purported concern for vulnerable women provides a convenient excuse for restricting women's migration — motivated at best by paternalism, at worst by a deeper antimigration agenda."); Srikantiah, *supra* note 2, at 205 (describing how "[i]mperfect [immigrant] trafficking victims who fail to meet the restrictive legal (and cultural) definition" are seen as "non-victims" and become vulnerable to deportation). Scholars also have remarked that the discourse of "rescue" promotes paternalism, as benevolent privileged actors move to "save" victims instead of promoting greater discussion about long-term, structural change. *See* Elizabeth Bernstein, *The Sexual Politics of the "New Abolitionism,"* 18 DIFFERENCES 128, 137 (2007) (arguing that "rescue" narratives about "the beneficence of the privileged rather than the empowerment of the oppressed" contribute to the prevalence of "criminal justice interventions" rather than policies to promote sustained social change).

[39] See *infra* Part II, for a discussion of how civil litigators have invoked defamation, RICO, and TVPRA claims.

Part III explores how civil litigators have asked federal courts to adopt expansive interpretations of trafficking violations under the TVPRA. It analyzes how, in turn, federal judges have begun to interpret anti-trafficking law broadly to include new gender-based harms.

Part IV concludes by examining the strategic and normative implications of this trend. It recognizes that these creative tactics by lawyers can play a powerful role in bolstering victim recovery. This trend may also have significant expressive value.[40] Nonetheless, it warns of certain risks, including new constitutional challenges, backlash, and potentially inappropriate expansions of federal jurisdiction.

I. TRAFFICKING AS A REMEDY FOR GENDER-BASED VIOLENCE

A. Human Trafficking as a Form of Gender-Based Violence

Trafficking evolved internationally and domestically largely as a discrete form of gender-based violence.[41] This was not inevitable.[42] Human trafficking historically has been deeply intertwined with concepts of border control, migration, smuggling, workers' rights, and economic rights.[43] Yet, trafficking developed in the twentieth century as

[40] *See infra* Part IV.

[41] *See, e.g.*, ALICIA PETERS, RESPONDING TO HUMAN TRAFFICKING: SEX, GENDER, AND CULTURE IN THE LAW 3 (University of Pennsylvania Press 2015) ("Although the lens of gender and sexuality has most profoundly shaped views on trafficking, it is not the only possible approach, and assumptions about violence, crime, and victimization also frame how the phenomenon is commonly understood."); Erin Corcoran, *The Construction of The Ultimate Other: Nationalism and Manifestations of Misogyny and Patriarchy in U.S. Immigration Law and Policy*, 20 GEO. J. GENDER & L. 541, 546 (2019) (remarking how U.S. legislation, including anti-trafficking law, recognized the problem of violence against women as a "structural manifestation of the historical unequal power distribution between men and women"); Sofija Voronova & Anja Radjenovic, *The Gender Dimension of Human Trafficking*, EUR. PARLIAMENTARY RES. SERV., 1, 8 (Feb. 2016), https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577950/EPRS_BRI%282016%29577950_EN.pdf [https://perma.cc/PD9G-322R] (noting how policy in the European Union "identifies violence against women as a root cause of trafficking" and recognizing that the "vulnerability to trafficking for different forms of exploitation is shaped by gender").

[42] *See* Chuang, *Exploitation Creep*, *supra* note 22, at 615 (describing how human rights advocates with alternatives approaches were sidelined as the international community moved towards a "crime-control framework").

[43] In the early twentieth century, trafficking was closely connected to international movement of persons and inextricably related to borders and sovereignty. Movement, thus, was a key component, as economic factors "[c]ombined with increased border controls in the countries of destination . . . created a desperate stream of migration from which traffickers could 'fish.'" *See id.* at 614 (citing MIKE KAY, THE MIGRATION-TRAFFICKING NEXUS: COMBATING TRAFFICKING THROUGH THE PROTECTION OF MIGRANTS'

an international phenomenon deeply — although not exclusively — connected to gender, typically to cisgender women and girls, and most commonly conceptualized as a form of violence.[44]

This framing inevitably gave rise to criminal legal responses to address it. International and domestic U.S. law incentivized state actors to penalize perpetrators and to protect or, in some cases, "rescue" victims from this egregious crime.[45] Furthermore, these actors situated trafficking law as largely a criminal enforcement matter destined to evolve alongside and in response to other forms of gender-based crime, like domestic violence and sexual assault.[46]

1. Early Efforts to Craft a Definition

Internationally, early twentieth century efforts to combat trafficking were inextricably intertwined with sex, gender, and victimization.[47] They were principally driven by "moral panic" about "white slavery," defined as the forced prostitution of white European women.[48] This discourse conceived the problem as "largely constructed around the

HUMAN RIGHTS (2003)); *see also* Benjamin S. Buckland, *More than Just Victims: The Truth About Human Trafficking*, 15 PUB. POL'Y RES. 42, 42 (2008), https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1744-540X.2008.00507.x [https://perma.cc/34FK-22QG] (defining trafficking as "the transport of persons for the purpose of exploitation").

[44] *See* THE INTER-AGENCY COORDINATION GRP. AGAINST TRAFFICKING IN PERSONS, ISSUE BRIEF NO. 4, THE GENDER DIMENSIONS OF HUMAN TRAFFICKING 1 (Sept. 2017), https://icat.network/sites/default/files/publications/documents/ICAT-IB-04-V.1.pdf [https://perma.cc/ZD3Y-AKTX] (identifying gender inequality and gender-based violence as root causes of trafficking).

[45] For a discussion of the use of the term "rescue," see discussion *supra* note 38.

[46] Many scholars have argued, instead, in favor of a labor approach to trafficking that aims to bring structural changes to the labor market rather than promote criminal legal interventions. *See, e.g.*, Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. 76, 80 (2012) (arguing that a "labor approach" is "better suited than the traditional human rights tools for addressing the institutional aspects of the labor market exploitation on which trafficking is structured").

[47] *See* ANNE T. GALLAGHER, THE INTERNATIONAL LAW OF HUMAN TRAFFICKING 13-15 (Cambridge Univ. Press 2001); *see also* Alicia Peters, *Trafficking in Meaning: Law, Victims, and the State*, COLUM. U. 1, 9 (2010), https://www.ncjrs.gov/pdffiles1/nij/grants/231589.pdf [https://perma.cc/Y648-PGZS] [hereinafter *Trafficking in Meaning*] ("Cultural norms regarding sexuality and gender are entwined with conceptions of trafficking and implementation of the law.").

[48] Early twentieth century efforts, rather than defining human trafficking, focused on "white slavery" and efforts to eradicate it. *See generally* GALLAGHER, *supra* note 47, at 13 (describing how the term "trafficking" first came into use "in the early twentieth century in connection with white slavery: a term that was initially used to refer to forcible or fraudulent recruitment to prostitution").

crude juxtaposition of dangerous, foreign men and innocent, white women."[49]

Absent from these early discussions was a more nuanced discussion of labor trafficking or the economic circumstances that might propel women (and men) to be vulnerable to exploitation.[50] In the 1970s, a growing feminist movement began to demand greater attention to women's rights and sought to solidify a vision of trafficking as largely an issue of "violence against women."[51] This movement was supported by diverse groups, including certain feminist advocates and anti-domestic violence proponents, who sought to strengthen criminal legal responses to gender-based violence.[52]

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[49] *See* Laura Lammasniemi, *Anti-White Slavery Legislation and Its Legacies in England*, 9 ANTI-TRAFFICKING REV. 64, 67 (2017), http://www.antitraffickingreview.org/index.php/atrjournal/article/view/264/253 [https://perma.cc/D4YK-JHWG].

[50] *See, e.g.*, Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 2981 n.9 (2006) ("Current discussions about human trafficking are distorted by the focus on prostitution to the exclusion of other trafficking issues."); Laura A. Hebert, *Always Victimizers, Never Victims: Engaging Men and Boys in Human Trafficking Scholarship*, 2 J. HUMAN TRAFFICKING 281, 282, 284 (2016), https://refugeeresearch.net/wp-content/uploads/2017/05/Hebert-2016-Engaging-men-and-boys-in-human-trafficking.pdf [https://perma.cc/Y37D-D7AK] (analyzing legal scholarship on human trafficking and lack of scholarly attention devoted to male victims and labor trafficking).

[51] *See* Sabrina Balgamwalla, *Trafficking in Narratives: Conceptualizing and Recasting Victims, Offenders, and Rescuers in the War on Human Trafficking*, 94 DENV. L. REV. 1, 9 (2016) ("The concept of 'female sexual slavery' began gaining traction in the 1970s as prostitution and pornography emerged as key issues in the mainstream feminist movement.").

[52] Certain feminists, sometimes referred to as "second wave" or "dominant" feminists, viewed legal institutions, including the international human rights regime, as embodying paternalistic attitudes and believed that gender neutrality operated to exclude and subordinate women. *See, e.g.*, Natalie H. Kaufman & Stefanie A. Lindquist, *Critiquing Gender-Neutral Treaty Language: The Convention on the Elimination of All Forms of Discrimination Against Women*, *in* WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 114 (Julie Peters & Andrea Wolper eds., 1995) (addressing how gender-neutral laws should be analyzed); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (Harvard Univ. Press 1987) (exploring dominant feminist theories related to sexuality and the law); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (Harvard Univ. Press 1989) (discussing the role of the state in connection to feminist theory related to sexual subordination); Robin West, *Jurisprudence and Gender [1988]*, *in* FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 201 (Katherine T. Bartlett & Roseanne Kennedy eds., 1991) (examining rights discourse in modern feminist theory and barriers to feminist jurisprudence). Some scholars have critiqued these approaches as responsible for "terrible mistakes" with "unintended consequences that are or should be contested within feminist political life." *See* JANET HALLEY, PRABHA KOTISWARAN, RACHEL REBOUCHÉ & HILA SHAMIR, GOVERNANCE FEMINISM: NOTES FROM THE FIELD xiii (2019).

These efforts culminated in 2000, when the United Nations General Assembly adopted by resolution the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children ("Trafficking Protocol").[53] The Trafficking Protocol defined "trafficking in persons" for the first time under international law.[54] Located within the Organized Crime Convention, it also solidified trafficking as an issue of organized crime and crime control, rather than human rights. In effect, the Trafficking Protocol functioned very much as an instrument of criminal law and left it to countries "[i]n appropriate cases and to the extent possible" to provide protections to victims.[55]

The definition of trafficking was notably broad and gender neutral in approach. In particular, Article 3(a) of the Trafficking Protocol defines "trafficking in persons" as:

> The recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.[56]

[53] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Trafficking Protocol].

[54] *See id.* at art. 3(a).

[55] *See id.* at art. 6(1).

[56] *Id.* at art. 3(a). By ratifying the Trafficking Protocol, countries were obligated to criminalize the "human trafficking" conduct and adopt national laws consistent with the Convention's goals. *See id.* at art. 5.

The definition included three separate elements: (1) an action,[57] (2) a means,[58] and (3) a purpose.[59] Each of these components was fairly broadly defined.[60] As a result, the Protocol definition departed significantly from prior international conventions on "white slavery" and criminal "traffic," in that it was quite expansive — some even called it a "rigor-free zone."[61]

No longer was the international community concerned only with forced prostitution, which had been a central feature of prior international efforts. Rather, the definition of trafficking applied to

[57] The "action" element involved the "recruitment, transportation, transfer, harboring or receipt of persons." *See id.* at art. 3(a). Here, this requirement deviated from earlier Conventions by failing to require transportation. *See* UNITED NATIONS OFFICE OF DRUGS & CRIMES, UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERETO 42 (2004), https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf [https://perma.cc/Z8B3-MFXA]; *see also* Jean Allain, *No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol*, 7 ALB. GOV'T L. REV. 111, 114 (2014) ("[T]his Protocol is not exclusively applicable to situations where a person is trafficked across an international border, but in fact can be trafficked internally — that is to say: the victim may be moved solely within one State, while the crime by contrast would be 'transnational in nature' if, for instance, it 'involves an organized criminal group that engages in criminal activities in more than one State.'").

[58] The "means" element was notably expansive, ranging from the "threat or use of force" to such abstract concepts as the "abuse of power or of a position of vulnerability." *See* Trafficking Protocol, *supra* note 53, at art. 3(a). This breadth responded to a desire by the drafters to recognize the diverse means that perpetrators may employ in trafficking cases. *See* U.N. OFFICE ON DRUGS AND CRIME, ISSUE PAPER: ABUSE OF A POSITION OF VULNERABILITY AND OTHER "MEANS" WITHIN THE DEFINITION OF TRAFFICKING IN PERSONS 2 (2013), https://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Issue_Paper_-_Abuse_of_a_Position_of_Vulnerability.pdf [https://perma.cc/V3FR-PKMX] [hereinafter UNODC ISSUE PAPER] ("Informal information indicates that the inclusion of a wide range of overlapping means in the definition was motivated by an intention to ensure that all the different and subtle ways by which an individual can be moved, placed or maintained in a situation of exploitation were captured.").

[59] "[F]or the purpose of exploitation" was also not meticulously defined. "Exploitation" was described as: "at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs." *See* Trafficking Protocol, *supra* note 53, at art. 3(a).

[60] *See supra* notes 57-59.

[61] *See, e.g.*, Chuang, *Exploitation Creep*, *supra* note 22, at 609 (citing Luis CdeBaca, Ambassador-at-Large, Office to Monitor and Combat Trafficking in Persons, Freedom Here & Now: Ending Modern Slavery, Remarks before the Women's Foundation of Minnesota and the Center for Integrative Leadership (May 8, 2012), https://www.unwomen-metrony.org/news-intro/2018/12/2/an-interview-with-ambassador-luis-cdebaca-on-human-trafficking [https://perma.cc/LH59-HWQ3]).

diverse — at times not fully defined and likely not fully appreciated — forms of exploitation.[62] Many scholars considered this expansive vision a positive development, in that it marked a departure from the outwardly gendered, narrow framework of the early twentieth century.[63] Even so, the broadened concept of trafficking injected some uncertainty into the development of international and domestic criminal law, as States Parties struggled to implement the Trafficking Protocol.[64]

Now, two decades after the Protocol was enacted, "the parameters around what constitutes 'trafficking' are not yet firmly established."[65] One of the many questions left open by the Trafficking Protocol was whether the definition of "trafficking in persons" could potentially encompass other forms of gender-based violence, like sexual assault or domestic violence. Although this question was not explicitly addressed in the Trafficking Protocol, it too was not definitively ruled out. As a result, the Trafficking Protocol left States Parties to grapple with and resolve it.

2. Domestic Definitions of Trafficking

The drafting of the Trafficking Protocol was closely intertwined with U.S. Congressional efforts to craft domestic legislation. In 2000, the Congress passed the TVPA, marking the first U.S. comprehensive anti-trafficking legislation.[66] Congress sought to combat trafficking through the "Three Ps": (1) prosecution of perpetrators; (2) protections of victims; and (3) prevention of trafficking globally.[67] The goal of the

[62] Anne Gallagher, *Understanding Exploitation*, 33 HARV. INT'L REV. 4, 4 (2011), https://works.bepress.com/anne_gallagher/40/ [https://perma.cc/5KVE-DCU8] ("I have no doubt that initial enthusiasm for a global agreement on trafficking would have been much less if states had fully understood that its tentacles would eventually reach directly into their factories, farms, fishing boats, and private households.").

[63] *See* Allain, *supra* note 57, at 120 ("As a result, it was left to each country to determine what type of exploitation it would seek to suppress in the context where the very term 'exploitation' was ill-understood and nowhere defined in law.").

[64] *See* UNODC ISSUE PAPER, *supra* note 58, at 1 (noting that certain questions "emerged regarding those aspects of the definition that are not elsewhere defined in international law or commonly known to the major legal systems of the world").

[65] *See id.* at 1-2 (acknowledging that concepts in the Protocol were both "not clearly understood" and "not being consistently implemented and applied").

[66] TVPA, *supra* note 3. Similar to the Trafficking Protocol, it remained "gender-neutral" but also gendered in its focus on "women and children." *See id.*

[67] *See, e.g.*, U.S. DEP'T OF STATE: OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, 3PS: PROSECUTION, PROTECTION, AND PREVENTION, https://www.state.gov/3ps-prosecution-protection-and-prevention/ [https://perma.cc/CU7J-H74V] ("The '3P'

legislation was to "combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children."[68]

Still, the vision of trafficking was not limited to traditional forms of sex slavery or forced labor. Rather, Congress apparently espoused a wide vision of the crime, which was endorsed by subsequent federal court decisions. In *United States v. Townsend*, for example, the Eleventh Circuit took note of the broad scope of the TVPA. The court found that "[b]y its plain terms" the sex trafficking statute "criminalizes trafficking in 'person[s],' not just in slaves or women from other countries."[69] Similarly, in *United States v. Estrada-Tepal*, the federal district court wrote that the TVPA "criminalizes a broad spectrum of conduct" with "expansiveness . . . a legislative goal in enacting the statute."[70]

Scholars have argued that the TVPA, thus, incorporated a degree of "messiness and ambiguity into the law, as opposed to clarity," which "left space to envision trafficking in varying, even contradictory, ways."[71] These concerns have been borne out as courts have interpreted the TVPA to apply to new actors and conduct.[72] Some scholars, however, have argued that this flexibility has been a positive feature, as it has allowed the TVPA and subsequent anti-trafficking legislation to take into account the contemporary nature of human trafficking.[73] Nonetheless, others have worried that broadening the scope of human trafficking, or "exploitation creep," will endanger the trafficking concept by sowing confusion and diluting the moral condemnation associated with the concept.[74]

paradigm — prosecution, protection, and prevention — continues to serve as the fundamental framework used around the world to combat human trafficking."). The United States has added a fourth "P" of partnership to complement other efforts. *See id.* ("[A] fourth "P" — for partnership — serves as a complementary means to achieve progress across the 3Ps and enlist all segments of society in the fight against modern slavery.").

68 22 U.S.C. § 7101(a) (2000).

69 *See* United States v. Townsend, 521 F. App'x. 904, 906 (11th Cir. 2013).

70 *See* United States v. Estrada-Tepal, 57 F. Supp. 3d 164, 169 (E.D.N.Y. 2014).

71 *See* PETERS, *supra* note 41, at 70.

72 *See* Dahlstrom, *supra* note 18, at 399-414 (arguing that the TVPA and subsequent reauthorizations have been interpreted to apply to new actors, such as websites, hotels, and certain buyers of sex).

73 *See id.* at 384 ("Many anti-trafficking advocates have viewed the expansion of human trafficking law as a welcome development that recognizes the complex, contemporary nature of the crime in applying the concept to more subtle, nuanced forms of exploitation.").

74 *See, e.g.*, Chuang, *Exploitation Creep, supra* note 22, at 611; *see also* Aziza Ahmed, *"Exploitation Creep" and Development: A Response to Janie Chuang*, 108 AM. J. INT'L. L.

B. Federal Definition(s) of Sex Trafficking

While the legislative history is replete with evidence that Congress was largely focused on "international sex slavery,"[75] Congress defined sex trafficking broadly.[76] This was due, in part, to divisive ideological battles between neo-abolitionist feminist advocates, evangelicals, and sex work proponents — each group with distinct views about the contours of "sex trafficking."[77] The resulting compromise was, no doubt, a considerable achievement in terms of building legislative consensus, but it also raised new questions.[78]

In the TVPA, Congress defined sex trafficking to include "the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial

UNBOUND 268, 271 (2015); Clifford Bob, *Re-framing Exploitation Creep to Fight Human Trafficking: A Response to Janie Chuang*, 108 AM. J. INT'L L. UNBOUND 264, 265 (2015).

[75] Anette Sikka, *Trafficking in Persons: How America Exploited the Narrative of Exploitation*, 55 TEX. INT'L. L.J. 1, 15 (2019) ("Framing prostitution in terms of human rights on the international stage provided a way to draw attention to the issue without occupying the traditional field of debate these groups had held.").

[76] Since 2000, courts have found that the statutory language of 18 U.S.C. § 1591 is broader than the purpose of eradicating international sex slavery. *See, e.g.*, United States v. Townsend, 521 F. App'x. 904 (11th Cir. 2013) (noting that the statutory language of the federal sex trafficking statute is broader than the purpose of addressing "international sex slavery and women disproportionally affected by poverty and lack of economic opportunity in their home countries"); United States v. Estrada-Tepal, 57 F. Supp. 3d 164 (E.D.N.Y. 2014) (remarking that "expansiveness was a legislative goal in enacting the [sex trafficking] statute").

[77] Neo-abolitionist and sex work proponents have different ideological approaches to sex trafficking, and these views have animated anti-trafficking scholarship. *See, e.g.*, Chuang, *Rescuing Trafficking, supra* note 38, at 1657-58 (describing how ideological debates regarding prostitution reform have shaped policy and legislative responses in the United States). Neo-abolitionist proponents view commercial sex as inherently harmful, as "the quintessential expression of patriarchal gender relations and male domination," whereas sex work proponents argue that consensual sex work should not be criminalized and must be distinguished from trafficking. *See, e.g.*, PRABHA KOTISWARAN, DANGEROUS SEX, INVISIBLE LABOR: SEX WORK AND THE LAW IN INDIA 10 (2011) ("Sex work advocates . . . are agnostic to the commodification of sex per se and . . . [t]hus, their emphasis is on protecting and promoting the rights of sex workers."); RONALD WEITZER, LEGALIZING PROSTITUTION: FROM ILLICIT VICE TO LAWFUL BUSINESS 10 (2011) (examining competing feminist viewpoints about commercial sex and describing how proponents of the sex work position perceive commercial sex as a means to "empower" marginalized populations).

[78] *See* Peters, *Trafficking in Meaning, supra* note 47, at 78-79 (noting that the domestic legal definition of trafficking was "functional yet value laden, prescriptive yet ambiguous, comprehensive yet bifurcated, and gender-neutral yet gendered and sexually-marked").

sex act."[79] By comparison, Congress separately defined the federal crime of sex trafficking more restrictively under 18 U.S.C. § 1591 to include:

> (a) 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;
> >
> > (2) knowing, or, . . . in reckless disregard of the fact, that means of force, threats of force, fraud, coercion 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, ...[80]

The elements below, while not exhaustive, remain some of the most salient in the emerging relationship between trafficking violations and other gender-based harms.

Interstate commerce. It is surprising, given popular conceptions of trafficking, that the federal sex trafficking crime does not require transportation.[81] Rather, the prohibited conduct must simply be "in or affecting interstate or foreign commerce."[82] Federal courts have interpreted this standard to require only a *de minimis* effect on interstate commerce.[83] For example, it may include as little as the use of hotels, cell phones, and condoms.[84]

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[79] 22 U.S.C. § 7102(12) (2018).

[80] The Justice for Victims of Trafficking Act of 2015 added the language of "advertises," "solicits," and "patronizes" to the statute. *See* Justice for Victims of Trafficking Act, Pub. L. No. 114-22, §§ 108, 118, 129 Stat. 227 (2015).

[81] *See* 18 U.S.C. § 1591(a) (2018).

[82] *See id.* § 1591(a)(1); 22 U.S.C. § 7101(b)(12) (2018) (finding that, in the aggregate, sex trafficking "substantially affects interstate and foreign commerce" and "has an impact on the nationwide employment network and labor market"); *see also* United States v. Walls, 784 F.3d 543, 547 (2015) ("We therefore hold that when Congress used the language 'in or affecting interstate or foreign commerce' in the TVPA, it intended to exercise its full powers under the Commerce Clause.").

[83] *See Walls*, 784 F.3d at 548 ("Congress's power to regulate . . . activities that substantially affect interstate commerce — extends to individual instances of conduct with only a *de minimis* effect on interstate commerce so long as the class of activity regulated is economic or commercial in nature."). Thus, the conduct need only cross state lines or be "[a]n act or transaction that is economic in nature" that "affects the flow of money in the stream of commerce to any degree." *See id.* at 546.

[84] According to the United States Attorney's Bulletin, the "requisite interstate commerce nexus" can be quite easily demonstrated through a range of methods, including "the use of facilities and instrumentalities of interstate commerce such as

Prohibited acts. The statute also refers to one of ten prohibited actions — "recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits."[85] None of these actions were explicitly defined, and many are susceptible to expansive interpretations.[86] For example, "entic[ing]" a victim could apply to a potentially wide range of conduct.

Commercial sex act. The defendant's conduct also must amount to a "commercial sex act."[87] While this term may bring to mind the exchange of sex for money, Congress defined the term "commercial sex act" very broadly.[88] It includes "any sex act, on account of which anything of value is given to or received by any person," including both tangible and intangible items.[89] While the term "intangible" was not explicitly defined, it has been construed quite expansively by federal district courts in other contexts to include power, reputational benefits, and job advancement.[90]

cellular telephones, internet sites, financial institutions, interstate transit systems, and hotels, or by the use of products moving in interstate commerce such as condoms, pharmaceuticals, and prostitution paraphernalia." *See* Hilary Axam & Jennifer Toritto Leonardo, *Human Trafficking: The Fundamentals*, *in* 65 UNITED STATES ATTORNEY'S BULLETIN, HUMAN TRAFFICKING 3, 7 (Nov. 2017), https://www.justice.gov/usao/page/file/1008856/download [https://perma.cc/8WY7-KWHR]; *see, e.g.*, United States v. Evans, 476 F.3d 1176, 1179 (11th Cir. 2007) (finding requisite interstate commerce nexus under section 1591 based on defendant's "use of hotels that served interstate travelers and distribution of condoms that traveled in interstate commerce").

[85] *See* 18 U.S.C. § 1591(a)(1).

[86] Indeed, the Eighth Circuit noted that "the expansive language of § 1591 'criminalizes a broad spectrum' of conduct relating to the sex trafficking of children," and this *dicta* has been used in other cases to argue in favor of expansive interpretations of the prohibited acts. *See* United States v. Jungers, 702 F.3d 1066, 1070 (8th Cir. 2013); *see, e.g.*, Canosa v. Ziff, No. 18 Civ. 4115, 2019 U.S. Dist. LEXIS 13263, at *60 (S.D.N.Y. Jan. 28, 2019) (interpreting terms in the federal trafficking statute broadly and referencing the federal district court analysis in *Noble*, wherein Judge Robert Sweet found "Weinstein's attempt to cabin Section 1591 to 'child prostitution, torture, and child pornography' [was] unpersuasive"); Noble v. Weinstein, 335 F. Supp. 3d 504, 516 (S.D.N.Y. 2018) (describing how "[b]road, expansive language is employed in Sections 1591 [sex trafficking of children or by force, fraud or coercion] and 1595 [peonage, slavery and trafficking in persons]"); United States v. Estrada-Tepal, 57 F. Supp. 3d 164, 169 (E.D.N.Y. 2014) (noting that "expansiveness was a legislative goal in enacting the [sex trafficking] statute").

[87] *See* 18 U.S.C. § 1591(a).

[88] *See id.* § 1591(e)(3).

[89] *See id.*

[90] The terms "thing of value" or "anything of value" commonly appear in federal criminal law and mean both tangible and intangible remuneration. *See, e.g.*, United States v. Townsend, 630 F.3d 1003, 1010 (11th Cir. 2011) ("The four other courts of appeals that have addressed this issue have all held that intangibles can be things of

Thus, the federal sex trafficking statute, through its broad statutory language and potentially expansive legislative intent, has invited civil litigators to craft new arguments.[91] Subsequent litigation efforts have further encouraged judges to interpret terms like "commercial sex act" and the prohibited actions broadly.[92]

C. Federal Definition(s) of Labor Trafficking

Similar questions have emerged about the scope of labor trafficking crimes. Unlike in the sex trafficking context, Congress in the TVPA did not create a federal crime called "labor trafficking." Rather, Congress established the new federal crime of forced labor to supplement the then-existing crime of involuntary servitude.[93] Prior to the enactment of the TVPA, the Thirteenth Amendment established the right to be free from involuntary servitude, and in 1948, the U.S. Congress passed 18 U.S.C. § 1584 to enforce the Amendment.[94] The involuntary servitude statute, thus, established a new criminal offense for "knowingly and willfully hold[ing] to involuntary servitude or sell[ing] into any condition of involuntary servitude, any other person for any term."[95]

While courts have consistently interpreted the Thirteenth Amendment and its enforcing statutes to apply to diverse conduct — not limited to the historical American forms of slavery — federal courts in the mid-twentieth century struggled to determine what contemporary conduct could constitute "servitude." In early cases, for example, federal courts diverged as to whether "servitude" included

value for this purpose."); United States v. Marmolejo, 89 F.3d 1185, 1191-92 (5th Cir. 1996) (holding that the "plain meaning of the statute compels our conclusion that the term 'anything of value' in § 666(a)(1)(B) includes transactions involving intangible items, such as the conjugal visits at issue in this case").

91 *See infra* Part III.C.

92 *See id.*

93 *See* 18 U.S.C. § 1589 (2018).

94 The Thirteenth Amendment to the United States Constitution prohibits involuntary servitude in any jurisdiction whether at the hands of an individual or the United States government, unless as punishment for a crime. U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."). 18 U.S.C. § 241 prohibits conspiracy to interfere with an individual's Thirteenth Amendment right to be free from "involuntary servitude," and 18 U.S.C. § 1584 makes it a federal crime to knowingly and willfully hold another person "to involuntary servitude." *See* Act of June 25, 1948, Pub. L. No. 772, 62 Stat. 683 ("An act to revise, codify, and enact into positive law, Title 18 of the United States Code, entitled 'Crimes and Criminal Procedure.'").

95 *See* 18 U.S.C. § 1584 (2018).

purely psychological coercion.[96] A circuit split, however, led to the U.S. Supreme Court decision in 1988 in *United States v. Kozminski*.[97] In *Kozminski*, the Court limited the reach of involuntary servitude to the "use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process."[98]

Congress then responded to *Kozminski* in 2000 by creating the new federal crime of forced labor to reach psychological coercion.[99] The forced labor statute, 18 U.S.C. § 1589, provided that:

> [w]hoever knowingly provides or obtains the labor or services of a person--
>
> (1) by threats of serious harm to, or physical restraint against, that person or another person;
>
> (2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or
>
> (3) by means of the abuse or threatened abuse of law or the legal process, shall be fined under this title or imprisoned not more than 20 years, or both.[100]

The statute, thus, criminalized both "labor" and "services" connected to psychological coercion.

Congress, however, failed to define "labor" or "services," leaving open whether the forced labor and involuntary servitude statutes could apply to certain types of interpersonal violence. Some scholars argued that conduct like sexual and interpersonal violence — so intrinsically

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[96] *See, e.g.*, United States v. Mussry, 726 F.2d 1448 (9th Cir. 1984) (holding that no physical element is needed to find "involuntary servitude"), *cert. denied*, *sub nom.* Singman v. United States, 469 U.S. 855 (1984), *abrogated by* United States v. Kozminski, 487 U.S. 931 (1988).

[97] *See* United States v. Kozminski, 487 U.S. 931, 938-39 (1988); United States v. Kaufman, 546 F.3d 1242, 1261 (10th Cir. 2008) (citing H.R. REP. NO. 106-939, at 101 (2000) (Conf. Rep.), *reprinted in* 2000 U.S.C.C.A.N. 1380, 1393) ("The legislative history reveals that, in enacting § 1589, Congress sought to expand *Kozminski's* limited definition of coercion under § 1584, stating that '[s]ection 1589 will provide federal prosecutors with the tools to combat severe forms of worker exploitation that do not rise to the level of involuntary servitude as defined in *Kozminski*.'").

[98] *Kozminski*, 487 U.S. at 952.

[99] *See* 18 U.S.C. § 1589 (2018); *see, e.g.*, United States v. Dann, 652 F.3d 1160, 1169 (9th Cir. 2011) ("Legislative history suggests that Congress passed this act to correct what they viewed as the Supreme Court's mistaken holding in [*Kozminski*].").

[100] 18 U.S.C. § 1589.

connected to African slavery — should be interpreted as within the reach of the Thirteenth Amendment and implementing statutes.[101] Still, Congress did not clarify if "labor" or "services" meant "work in an economic sense" or "work involving mental or physical exertion."[102] While a seemingly small distinction, interpreting "labor" or "services" to include "mental or physical exertion" could transform diverse acts — ranging from sexual assault to certain forms of domestic abuse — into forced labor.

D. Incentives to Reframe Crimes as Trafficking

The TVPRA also embodied new, generous civil remedies for victims. Victims in federal civil TVPRA matters became eligible to receive expansive civil damages, file within a ten-year statute of limitations, and recover from a broad scope of third parties. These provisions were unlike existing civil remedies for victims of sexual assault and domestic violence, which often had short statutes of limitations, insurance exclusions for intentional acts, and caps on damage awards.[103] These

[101] Congress intended the phrase "involuntary servitude" to reach beyond state action "to cover those forms of compulsory labor akin to African slavery," and many scholars have argued that sexual violence had a deep history connecting it to African slavery. *See* U.S. CONST. amend. XIII, § 1. Scholars have argued that the reach of the Thirteenth Amendment, thus, should include a broad range of gender-based harms, including sexual assault, sexual harassment in housing, violence against women, and "mail order brides." *See, e.g.*, Jane Kim, *Taking Rape Seriously: Rape as Slavery*, 35 HARV. J.L. & GENDER 263, 289 (2012) ("The Thirteenth Amendment is 'a powerful tool that enables us to see [rape] in a new light,' affording Congress with the constitutional authority to criminalize rape as a federal crime."); Aric K. Short, *Slaves for Rent: Sexual Harassment in Housing as Involuntary Servitude*, 86 NEB. L. REV. 838, 893 (2008) ("Sexual harassment in the rental context reasonably constitutes involuntary servitude under the Thirteenth Amendment."). Akhil Reed Amar and Daniel Widawsky, for example, have described how abolitionists sought to abolish sexual violence and child abuse — practices closely tied to slavery. *See* Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to Deshaney*, 105 HARV. L. REV. 1359, 1369 (1992) ("This definition [of involuntary servitude] rightly transcends mere economics; although forced labor for economic gain was one characteristic of slavery as practiced in the antebellum South, forced labor itself does not exhaust the meaning of slavery."); *see also* Neal Kumar Katyal, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 YALE L.J. 791, 792 n.7 (1993) (arguing that involuntary servitude should be interpreted to include forced prostitution).

[102] *See, e.g.*, United States v. Marcus, 487 F. Supp. 2d 289, 303-04 (E.D.N.Y. 2007) (articulating the diverse definitions of "labor" and "services" advanced by the government and the defense).

[103] See *infra* Part II.B, regarding barriers to civil recovery for victims of sexual assault and domestic violence.

generous protections, thus, encouraged litigators to bring new suits under the TVPRA.[104]

In 2003, Congress established a new civil remedy for victims of sex trafficking, forced labor, and involuntary servitude through the TVPRA.[105] This legislation allowed victims to file federal civil trafficking suits directly against the perpetrator.[106] Potential damages were quite extensive, including compensatory damages, reasonable attorney's fees, and punitive damages.[107] The TVPRA further authorized a floor of $150,000 in liquidated damages.[108]

Attorneys have confirmed that extensive damages, including liquidated damages and attorney's fees, have been a strong motivation to bring new cases under federal trafficking law.[109] One plaintiff's attorney commented that: "The damages that can be sought [under the TVPRA] and by whom they may be sought are broader than any contained in any other federal civil, constitutional, labor, or employment law statute ever."[110] Another plaintiff's attorney remarked that: "[T]he benefit of the TVPA . . . [is] there are no artificial state tort reform caps. There's no caps at all."[111] A third plaintiff's attorney

[104] *See, e.g.*, Telephone Interview with Brian Kent, Attorney, Laffey, Bucci & Kent (June 8, 2020) ("[T]he remedies that are available under the Federal Trafficking Act . . . are very favorable . . . .").

[105] 18 U.S.C. § 1595 (2018). The 2003 TVPRA permitted civil claims for violations of sections 1589, 1590, and 1591 only. *See id.*

[106] 18 U.S.C. § 1595; ALEXANDRA F. LEVY, HUM. TRAFFICKING LEGAL CTR., FEDERAL HUMAN TRAFFICKING CIVIL LITIGATION 7 (2018). Plaintiffs also often file other related claims, including claims under the Fair Labor Standards Act, state wage and hour laws, common law theories of intentional infliction of emotional distress, false imprisonment, conversion, and breach of contract. *See* 29 U.S.C. § 201 (2018); *see also* LEVY, *supra*, at 24. For a complete list of claims that may be asserted in federal trafficking cases, see *id.* at 32.

[107] *See* 18 U.S.C. § 1595; *see also* LEVY, *supra* note 106, at 7.

[108] *See* 18 U.S.C. § 2255(a) (2018) ("Any person who . . . may sue in any appropriate United States District Court and shall recover the actual damages such person sustains or liquidated damages in the amount of $150,000, and the cost of the action, including reasonable attorney's fees and other litigation costs reasonably incurred.").

[109] *See, e.g.*, Zoom Interview with Ryan Hudson, Attorney, Sharp Law (May 21, 2020) ("You have a floor of 150,000 dollars [in liquidated damages] per [TVPRA] violation. And attorney's fees under Section 1595. Those don't exist under state law claims, and they're powerful incentives to bring these claims, which is what Congress intended."); Zoom Interview with Steven Hurbis, Attorney, McKeen & Associates, P.C. (May 29, 2020) (describing that one rationale for including federal TVPRA claims was to have access to "different and more kinds of damages," including punitive damages).

[110] E-mail from David Frank, Civil Rights Attorney, Neighborhood Christian Legal Clinic, to author (May 22, 2020) (on file with author).

[111] Zoom Interview with Daniel Lipman, Attorney, Parker Lipman LLP (May 29, 2020); *see also* Zoom Interview with Jonathan Little, Attorney, Saeed & Little, LLP (May

explained that: "[I]f we win, we get attorney's fees and costs, and as long as you have a good faith case, . . . you can get over the motion to dismiss. I mean, they're in real trouble."[112]

In 2008, Congress further established broad third party liability for trafficking violations,[113] allowing victims to file civil claims against individuals or entities that "knowingly benefit[]" from a "venture" with a perpetrator of trafficking.[114] This development substantially broadened the number of potential defendants in a TVPRA civil claim, allowing plaintiffs to target new parties, including board members, sports associations, attorneys, hotels, and psychiatrists, who knew or should have known about the underlying trafficking conduct.[115]

The ability to take aim at new third parties under the TVPRA has opened up new avenues for victims to recover civil damages. One plaintiff's attorney commented: "I will say at least in the [TVPRA] cases we are pursuing, the perpetrators are judgment proof. Institutions, if you have the right institution, they have assets or they have significant

21, 2020) (highlighting how the TVPRA has "[n]o caps on damages" and has "liquidated damages clauses").

112 Zoom Interview with John Manly, Partner, Manly, Stewart & Finaldi (May 28, 2020).

113 *See* TVPRA of 2008, *supra* note 3, § 221.

114 *See* 18 U.S.C. §§ 1589, 1593A, 1595(a) (2018) ("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 in 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 attorneys [sic] fees."); *see also* Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 2009 U. CHI. LEGAL F. 247, 283 (2009) ("The 2008 amendments also expand the pool of potential defendants to include not just the direct perpetrators of the trafficking crime, but also those who "knowingly" benefited, financially or otherwise, from the trafficking activity."). Section 1595 includes three separate provisions about third party liability that have slightly different requirements, but this Article will refer to them collectively as the "knowingly benefits" provision for simplicity. *See* 18 U.S.C. §§ 1589(b), 1593A, 1595(a).

115 *See* 18 U.S.C. §§ 1589(b), 1593A, 1595(a); *see, e.g.*, Max Mitchell, *Sex Trafficking Awareness Is Increasing and So Are Civil Claims*, LEGAL INTELLIGENCER (July 22, 2019) ("[L]awsuits are now being lodged against a range of entities, including hotels, motels, taxis, massage parlors, truck stops and, in one case outlined in the Human Trafficking Legal Center's report, a doctor who prescribed drugs to a trafficker who then used those drugs to control a trafficking victim.").

insurance."[116] Another plaintiff's attorney described the significance of being able to bring third party TVPRA claims:

> [I]t's about justice. But the only way we can get civil justice is through monetary compensation. And so, you have to think about . . . what other entities are responsible . . . Because if you . . . aren't able to include the institutions in the lawsuit, you haven't really done any good.[117]

Federal district courts also have begun to signal that insurance carriers, unlike in the intentional tort setting, may have a duty to defend in TVPRA claims.[118] This trend, if sustained, provides plaintiffs with greater likelihood of recovery. It also incentivizes plaintiffs' attorneys to take on TVPRA cases. One plaintiff's attorney commented about the role of insurance coverage in TVPRA cases: "I tell clients . . . get a copy of the policy, look at it, and figure out how I am going to get coverage here. That's what it all boils down to."[119]

The TVPRA also established a ten-year statute of limitations for victims to file civil claims under the TVPRA.[120] This window is significantly longer than most relevant state civil claims, particularly in the intentional torts setting. Thus, the TVPRA allowed victims to file claims in federal court against perpetrators and third parties that would

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[116] Zoom Interview with Larkin Walsh, Partner, Sharp Law (May 21, 2020).

[117] Zoom Interview with Steven Hurbis, Attorney, McKeen & Associates, P.C. (May 29, 2020) ("[Y]ou need to be able to hold the . . . employers and the institutions, you know, accountable with . . . more traditional . . . methods, which you can't necessarily do now.").

[118] While very few TVPRA cases have moved forward involving insurance carriers, in 2019, the Federal District Court for the District of Massachusetts found that an insurance company, Peerless Indemnity Insurance Co., a Liberty Mutual Unit, had a duty to defend against TVPRA civil claims. *See* Ricchio v. Bijal, Inc., 424 F. Supp. 3d 182, 195 (D. Mass. 2019). Therein, Peerless Indemnity Insurance Co. argued that it did not have a duty to defend against the civil suit because the TVPA offenses are intentional torts and not defined as personal injuries sufficient to trigger insurance coverage. *See id.* U.S. District Court Judge F. Dennis Saylor IV disagreed, finding that: "[b]ecause the definition of personal injury under the policy includes injuries arising out of false imprisonment, and because Ricchio's injuries at least in part arose out of her false imprisonment, the answer to that question is yes." *Id.* at 192. *Ricchio* ended in a civil settlement agreement without establishing clear precedent, but the federal district court's analysis signaled that insurance carriers may have a duty to defend in TVPRA claims. *See id.*

[119] Zoom Interview with Jonathan Little, Attorney, Saeed & Little LLP (May 21, 2020).

[120] 18 U.S.C. § 1595(c). The statute of limitations for trafficking claims is ten years, unless the plaintiff was a minor when the offense occurred, in which case it is ten years after the victim turned eighteen. *See id.*

otherwise be time-barred.[121] One plaintiff's attorney noted that "statutes of limitations are a major problem — in fact, the number one problem — for a plaintiff trying to proceed under state law claims" for sexual assault victims.[122] Another plaintiff's attorney commented that the TVPRA's longer statute of limitations was exactly what "opened the door" for certain victims to bring federal civil claims against Weinstein.[123]

Also, for some litigators, the TVPRA allows victims to bring claims in federal court, a venue that may be more sympathetic than state courts for victims of gender-based violence in certain jurisdictions. One plaintiff's attorney observed how often "blue states are good, red states aren't good" for victims of sexual abuse in state civil claims.[124] For that reason, he noted, "We are always looking at federal law."[125] Another plaintiff's lawyer explained that finding a federal cause of action "just seems to open up a lot of doors."[126]

II. THE IMPULSE TO "RESCUE"

More than two decades after the passage of federal anti-trafficking law, civil litigators have invoked human trafficking law in claims against Harvey Weinstein and other alleged perpetrators of sexual assault and domestic violence. This Part examines why. It suggests that continuing inadequacies in legal remedies have propelled victims of sexual assault and domestic violence to look elsewhere for solutions. In response, creative litigators have sought to push federal trafficking law in new, and perhaps unexpected, directions.

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[121] *See, e.g.*, Telephone Interview with Arick Fudali, Managing Attorney, The Bloom Firm (June 11, 2020) ("[T]he major benefit of the TVPRA . . . is the ten-year statute of limitations. . . . [T]hat's the appeal.").

[122] Zoom Interview with Ryan Hudson, Attorney, Sharp Law LLP (May 21, 2020) ("We would probably rather proceed under state law negligence claims. . . . But unfortunately, they are typically time-barred because statute[s] of limitations for state law claims typically are two to four years."); *see also* Zoom Interview with Daniel Lipman, Attorney, Parker Lipman LLP (May 29, 2020) (describing how judges can perceive that plaintiffs' attorneys are filing TVPRA claims to get around the two year statute of limitations but using the TVPRA is not an "end run" or "trickery" because "we're using a law that's been made available to us").

[123] Zoom Interview with Stuart Mermelstein, Senior Attorney, Herman Law LLP (May 29, 2020) (explaining how "the primary benefit for us in bringing the civil [TVPRA] case [against Weinstein] was the . . . statute of limitations").

[124] Zoom Interview with Jonathan Little, Attorney, Saeed & Little LLP (May 21, 2020).

[125] *Id.*

[126] Zoom Interview with Larkin Walsh, Partner, Sharp Law (May 21, 2020).

A. Criminal Legal Reform of Responses to Gender-Based Violence

In 2017, *The New York Times* and *The New Yorker* published shocking reports about pervasive sexual abuse by media mogul Harvey Weinstein over a thirty-year period.[127] Subsequently, over eighty women emerged with allegations of sexual misconduct,[128] including eighteen allegations of rape.[129] This sparked an online movement, popularized by the #MeToo hashtag.[130] Tarana Burke first used the term "Me Too" in 2006 to show solidarity with victims of sexual assault and harassment, primarily young women of color.[131] Then, in 2017, actress Alyssa Milano adopted the #MeToo hashtag in response to chronic sexual abuse by Harvey Weinstein.[132] Among many other transformative

[127] *See, e.g.*, Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017), https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories [https://perma.cc/VAU3-HMSD]; Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html [https://perma.cc/8H8L-499J].

[128] This Article uses the term "sexual misconduct" to refer to a variety of unwanted sexual behaviors, including but not limited to sexual assault.

[129] *See, e.g.*, Sam Levin, *'Stand United': Weinstein Accusers Join Forces to Publish List of Allegations*, GUARDIAN (Nov. 7, 2019, 6:09 PM EST), https://www.theguardian.com/film/2017/nov/07/harvey-weinstein-sexual-abuse-accusers-list [https://perma.cc/B5U7-7BWB]; Janice Williams, *Harvey Weinstein Accusers: Over 80 Women Now Claim Producer Sexually Assaulted or Harassed Them*, NEWSWEEK (Oct. 30, 2017, 1:32 PM EDT), https://www.newsweek.com/harvey-weinstein-accusers-sexual-assault-harassment-696485 [https://perma.cc/3T6V-48F2].

[130] *See* Sarah Mervosh, *Domestic Violence Awareness Hasn't Caught Up with #MeToo. Here's Why*, N.Y. TIMES (Oct. 16, 2018), https://www.nytimes.com/2018/10/16/us/domestic-violence-hotline-me-too.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer [https://perma.cc/CPH3-UTLL].

[131] *See* Tarana Burke, *#MeToo Was Started for Black and Brown Women and Girls. They're Still Being Ignored*, WASH. POST (Nov. 9, 2017, 5:04 PM), https://www.washingtonpost.com/news/post-nation/wp/2017/11/09/the-waitress-who-works-in-the-diner-needs-to-know-that-the-issue-of-sexual-harassment-is-about-her-too/ [https://perma.cc/B9XT-QZGT] ("I started this work with the intention of reaching young Black and Brown girls, but fully believing in its potential to move the world."); *see also* Eugene Scott, *The Marginalized Voices of the #MeToo Movement*, WASH. POST (Dec. 7, 2017, 12:51 PM PST), https://www.washingtonpost.com/news/the-fix/wp/2017/12/07/the-marginalized-voices-of-the-metoo-movement/ [https://perma.cc/V9SK-J3YY] ("Burke sought to draw attention to the pervasiveness of sexual assault in all racial, cultural and socioeconomic backgrounds — and perhaps mainly for women such as Maria, a 26-year-old bartender from California whose boss tried to touch her during every shift.").

[132] *See, e.g.*, Scott, *supra* note 131 ("The #MeToo movement gained global attention when actress Alyssa Milano tweeted #MeToo after reading about influential Hollywood producer Harvey Weinstein's history of abuse of women.").

features, the #MeToo Movement illuminated long-standing deficiencies within criminal and civil legal responses to gender-based violence, and provided new momentum[133] to combat them.[134]

#MeToo came on the heels of decades of legal reform aimed at improving criminal legal responses to sexual assault and domestic violence.[135] A range of advocates, growing out of the women's rights movement of the 1960s and 1970s, sought to broaden criminal liability and provide new tools to criminal prosecutors.[136] In response, many states added new domestic violence crimes and revised then-existing state statutes.[137] Feminist activists also pushed for civil protection orders for victims of domestic abuse. Then, in the 1980s and 1990s, many states moved to criminalize violations of these orders, making it easier for law enforcement to take swift action.[138] As a whole, these efforts communicated broad condemnation of domestic violence and

[133] More resources have emerged to finance #MeToo claims. *See* Matthew Goldstein & Jessica Silver-Greenberg, *How the Finance Industry Is Trying to Cash in on #MeToo*, N.Y. TIMES (Jan. 28, 2018), https://www.nytimes.com/2018/01/28/business/metoo-finance-lawsuits-harassment.html [https://perma.cc/2AQV-SJVP] ("Companies that offer money to plaintiffs in anticipation of future legal settlements are racing to capitalize on sexual harassment lawsuits."); *see also* Maya Steinitz, *Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements*, 53 UC DAVIS L. REV. 1073, 1089 (2019).

[134] MacKinnon, *Where #MeToo Came From*, *supra* note 7 ("As #MeToo moves the culture beneath the law of sexual abuse, early indications are that some conventional systemic legal processes may be shifting too.").

[135] *See* LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 12 (New York Univ. Press 2012) [hereinafter A TROUBLED MARRIAGE].

[136] *See, e.g.*, JAN L. HAGAN & JUDY L. POSTMUS, U.S. DEP'T OF JUSTICE, No. 199760, VIOLENCE AGAINST WOMEN: SYNTHESIS OF RESEARCH FOR ADVOCACY ORGANIZATIONS 1 (2003) ("Since the early 1970s, advocacy organizations have worked on behalf of these [victims of domestic violence and sexual assault] . . . [and] [a]s a result of their efforts, significant changes have occurred in the availability of services, the responsiveness of service systems, and the scope of legal protections."); SUSAN SCHECHTER, THE ROOTS OF THE BATTERED WOMEN'S MOVEMENT: PERSONAL AND POLITICAL RAISED CONSCIOUSNESS, *in* WOMEN AND MALE VIOLENCE 36 (1982) ("Recognizing victims' needs for emotional and legal support and the movement's need to document and change sexist abuses in police stations and courts, rape crisis centers trained women to become legal advocates."); Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 13 (1999) ("Since the early 1970s, battered women's advocates have called upon police and prosecutors to treat domestic violence 'like any other crime.'").

[137] *See* D. KELLY WEISBERG, DOMESTIC VIOLENCE LAW 206 (2019) (describing how the crimes, carrying diverse labels, like "domestic abuse," "domestic assault," "spouse abuse," and "family violence," sought to more appropriately label the crime and assign heightened criminal penalties).

[138] *See id.* at 209 ("The rise in arrests resulted from the fact that proof of a violation of a protection orders is relatively straightforward.").

encouraged actors in the criminal legal system to take the conduct seriously.[139]

Feminist advocates also made strides in reforming criminal rape statutes.[140] Among many changes, state and federal legislatures passed rape shield laws, provided privilege to rape counseling records, and eliminated marital rape exceptions.[141] They also removed burdensome evidentiary corroboration requirements and the "reasonable mistake of fact" defense.[142] Meanwhile, prosecutorial responses to sexual assault evolved to encourage reluctant victims to participate in the criminal legal process.[143]

Still, these new criminal laws remained unevenly enforced. In 1984, the United States Attorney General's Task Force on Domestic Violence thus called for "toughening" criminal legal responses to intimate partner violence.[144] The Task Force urged state actors to treat interpersonal violence with an equal measure of seriousness as other crimes.[145] What followed were vigorous new policies aimed at domestic violence, including mandatory arrest policies and no-drop rules for prosecutors.[146] While controversial, these efforts were hailed by some

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[139] *See id.* ("[T]he enactment of domestic violence-specific offenses symbolized the recognition that the public was serious about addressing violence against women.").

[140] *See, e.g.*, Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK UNIV. L. REV. 467, 467-68 (2005) ("The rape reform movement has succeeded in lobbying for significant revisions in antiquated and gender-biased rape statutes.").

[141] *See id.* at 467.

[142] *See id.*

[143] *See, e.g.*, Aya Gruber, *A "Neo-Feminist Assessment" of Rape and Domestic Violence Law Reform*, 15 J. GENDER, RACE & JUST. 583, 593-94 (2012) ("Making the criminal process a kinder and gentler experience for rape complainants was feminists' preferred solution to the problem of victims' participatory reluctance.").

[144] *See* WILLIAM L. HART, JOHN ASHCROFT, ANN BURGESS, NEWMAN FLANAGAN, URSULA MEESE, CATHERINE MILTON, CLYDE NARRAMORE, RUBEN ORTEGA & FRANCES SEWARD, U.S. DEP'T OF JUSTICE, FAMILY VIOLENCE: ATTORNEY GENERAL'S TASK FORCE FINAL REPORT 10-43 (1984), https://files.eric.ed.gov/fulltext/ED251762.pdf [https://perma.cc/M379-Z4V6] [hereinafter FAMILY VIOLENCE REPORT]; Nadine Brozan, *Task Force Urges Action Against Family Violence,* N.Y. TIMES (Sept. 20, 1984), https://www.nytimes.com/1984/09/20/us/task-force-urges-action-against-family-violence.html [https://perma.cc/5GEV-UHVY].

[145] *See* HART ET AL., FAMILY VIOLENCE REPORT, *supra* note 144, at 8 ("A victim of family violence is no less a victim than one set upon by strangers."); Brozan, *supra* note 144 ("The legal response to family violence must be guided primarily by the nature of the abusive act, not the relationship between the victim and the abuser." (internal quotes omitted)).

[146] *See, e.g.*, LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE iv (2018) ("Those policies were driven by research (later questioned) on the impact of arrest on intimate partner violence, lawsuits brought by antiviolence advocates, funding

advocates as important to establish serious, uniform responses to gender-based crime.[147]

In 1994, the federal government took more definitive action. The Violence Against Women Act ("VAWA")[148] created new federal crimes, mandated that states recognize abuse protection orders across jurisdictions, and provided a pathway for legal immigration status for victims of domestic abuse.[149] This legislation also provided significant federal funding for "coordinated community response" models that sought to unite advocates, law enforcement, prosecutors, and community partners to combat "violence against women."[150] Moreover, VAWA established a new federal civil remedy, later struck down by the U.S. Supreme Court in *United States v. Morrison*.[151] The new federal

incentives through the Violence Against Women Act (VAWA), and the active lobbying of the antiviolence movement."); David Hirschel, Eve Buzawa, April Pattavina & Don Faggiani, *Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions?*, 98 J. CRIM. L. & CRIM. 255, 257-58 (2007) (describing how beginning in the 1970s public support grew for mandatory arrest policies, fueled by lawsuits against police departments and research from the Minneapolis domestic violence experiment).

147 In the well-known Minneapolis Domestic Violence Experiment, scholars Sherman and Berk found that recidivism related to domestic violence and property damage declined by almost one half as a result of arrest and incarceration of offenders. *See, e.g.*, DENISE A. HINES, KATHLEEN MALLEY-MORRISON & LEILA B. DUTTON, FAMILY VIOLENCE IN THE UNITED STATES: DEFINING, UNDERSTANDING, AND COMBATING ABUSE 162 (2013). Many scholars have now questioned this research. *See id.* at 162-63 ("Results from numerous studies indicate that the use of mandatory arrest does not serve as a deterrent to subsequent violence.").

148 Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified in relevant part at 42 U.S.C. § 13981) (1994), *invalidated by* United States v. Morrison, 529 U.S. 598 (2000); *see* Julie Goldscheid, *The Civil Rights Remedy of the 1994 Violence Against Women Act: Struck Down But Not Ruled Out*, 39 FAM. L. Q. 157, 157 (2005) [hereinafter *The Civil Rights Remedy*].

149 *See* Goldscheid, *The Civil Rights Remedy*, *supra* note 148, at 157-58.

150 *See* GOODMARK, A TROUBLED MARRIAGE, *supra* note 135, at 19-21 ("Where before there had been laws, now there were laws and money, and battered women's advocates hoped that the combination of the two would finally make the legal system react.").

151 United States v. Morrison, 529 U.S. 598, 619 (2000) (finding the VAWA civil remedy unconstitutional as a violation of the Commerce Clause). VAWA established a federal civil claim if: (1) the individual was the victim of a "crime of violence" as defined by the statute; and (2) the act was "gender-motivated." *See* 34 U.S.C. §12361(d)(1) (2017) (formerly cited as 42 U.S.C. § 13981(d)(1) (1994) (subsequently repealed)), *invalidated by Morrison*, 529 U.S. 598. On the heels of VAWA, the 2004 federal Crime Victims' Rights Act ushered in protections for victims during the criminal legal process, including the right to information and the right to make a victim impact statement at sentencing. *See* United States Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (effective Oct. 30, 2004) (codified at 18 U.S.C. § 3771).

remedy allowed victims of gender-motivated crime to bring new civil claims in federal court.[152]

At the same time, civil litigation by victims of sexual assault — mostly in the form of tort actions against third parties in state courts — saw "exponential growth."[153] Civil liability, primarily in the sexual assault context, broadened to include third party defendants, such as schools, employers, nursing homes, and other entities, and third party civil claims proliferated. [154] This move sought to expand potential options for civil recovery and expose new parties to greater civil liability and public scrutiny.[155]

B. Deficiencies in Criminal and Civil Mechanisms

Despite such promising developments, the results of criminal and civil legal reforms have been mixed. Outcomes in criminal sexual assault cases have not dramatically improved.[156] Annually, thousands of criminal sexual assault cases fail to proceed for diverse reasons, including poor law enforcement investigations, insufficient evidence,

[152] *See supra* note 151.

[153] *See* Bublick, *supra* note 19, at 58 ("[T]he number of civil cases being litigated by sexual assault victims has increased dramatically, perhaps exponentially, in the last thirty years."); *see also* U.S. DEP'T OF JUSTICE: OFFICE FOR VICTIMS OF CRIME, NEW DIRECTIONS FROM THE FIELD: VICTIMS' RIGHTS AND SERVICES FOR THE 21ST CENTURY 373 (Aug. 1998), https://www.ncjrs.gov/ovc_archives/directions/welcome.html [https://perma.cc/YEX9-UNZ3] ("It is primarily within the last decade that civil litigation has emerged as a meaningful option for crime victims . . . ."); Tom Lininger, *Is It Wrong To Sue For Rape?*, 57 DUKE L.J. 1557, 1568 n.47 (2008) (citing Eric Frazier, *More Women Sue After a Sexual Assault*, CHARLOTTE OBSERVER, (Feb. 21, 1999), at 1B (quoting David Beatty, director of public policy for the National Center for Victims of Crime, as observing a "growing trend" toward civil litigation in rape cases and that "at least 500 sexual assault victims nationwide a year file civil lawsuits against their assailants")); Maureen Balleza, *Many Rape Victims Finding Justice Through Civil Courts*, N.Y. TIMES (Sept. 20, 1991), https://www.nytimes.com/1991/09/20/health/many-rape-victims-finding-justice-through-civil-courts.html [https://perma.cc/2776-ARDV] (noting how the growth of civil rape litigation increased from a few suits to a "steady stream").

[154] Third parties have a duty to prevent intentional torts and must exercise reasonable precaution to prevent negligent harms. *See* Bublick, *supra* note 19, at 57 (describing increased tort litigation against "employers, businesses, schools, nursing homes, foster parents, and other entities").

[155] *See id.*

[156] *See* David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 320 (2000) ("[A] growing body of social-scientific evidence indicates that, contrary to reformers' expectations, the much-heralded evidentiary reforms have had little impact on reporting, processing, and conviction rates in rape cases.").

lack of political will, and challenges in securing victim cooperation.[157] Many prosecutors remain reluctant to prosecute "difficult" cases.[158] Both judges and juries are often slow to believe victims.[159] While domestic violence cases have been more frequently charged criminally, defendants often enter plea deals leading to milder criminal sentences, even in aggravated assault cases.[160] Moreover, critical race and feminist scholars have described the myriad ways that racism and heteronormativity — both explicit and implicit — intersect and shape who receives protection and who faces punishment.[161]

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[157] *See, e.g.*, Kim Thuy Seelinger, Helene Silverberg & Robin Mejia, The Investigation and Prosecution of Sexual Violence 1-6 (May 2011) (working paper) (on file with the University of California, Berkeley Human Rights Center), https://www.law.berkeley.edu/wp-content/uploads/2015/04/The-Investigation-and-Prosecution-of-Sexual-Violence-SV-Working-Paper.pdf [https://perma.cc/S7VV-QG78] (describing challenges during the "life-cycle" of criminal cases involving sexual violence). Law enforcement officers and prosecutors remain, in many cases, ill-equipped and insufficiently trained to investigate gender-based crimes. *See, e.g.*, THE WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION 5 (2014) ("[L]aw enforcement officers and prosecutors are not fully trained on the nature of these crimes or how best to investigate and prosecute them.").

[158] Deborah Tuerkheimer coined the term "credibility discount" to address how diverse actors — the public, gatekeepers, and perpetrators — "face a persistent skepticism regarding both their accounts of abuse and their recitations of harm." *See* Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PENN. L. REV. 399, 402 (2019) (citing Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 3 (2017)).

[159] *See id.* at 405.

[160] *See, e.g.*, Nick Keppler, *In Allegheny County, Domestic Violence Offenders Often Avoid the Most Serious Punishment*, PUBLIC SOURCE (Feb. 18, 2019), https://www.publicsource.org/allegheny-county-domestic-violence-offenders-avoid-most-serious-punishment/ [https://perma.cc/DQB5-XKWD] (showing that 773 out of 785 cases in Allegheny County, Pennsylvania, involving the domestic violence unit in 2017 ended in a plea agreement, and 80% of aggravated assault cases resulted in plea agreements to misdemeanor charges).

[161] Critical race scholars have written extensively about how individuals at the intersections of poverty, racism, and/or heterosexism face significant barriers when engaging with law enforcement and also may be disproportionately subject to arrest and punishment. *See, e.g.*, PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (2017) (describing the role of structural racism in policing and how it disproportionately negatively impacts African American communities); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 31-38 (1998) (examining how the exercise of prosecutorial discretion is shaped by implicit bias); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1274-76 (2004) (documenting the mass incarceration of African Americans in the United States). Feminist scholars too have highlighted how criminal legal interventions often failed to deliver for victims of color and LGBTQ+ individuals. *See, e.g.*, Leigh Goodmark, *Reframing Domestic Violence Law*

Civil remedies too have also often remained insufficient.[162] The *Morrison* decision struck down the VAWA civil remedy, radically circumscribing federal jurisdiction over gender-motivated claims.[163] While victims still filed civil suits in state and federal courts, these claims remained rare relative to high rates of gender-based violence.[164] Poor outcomes were common, due to both doctrinal and institutional

and Policy: An Anti-Essentialist Proposal, 31 WASH. U. J. L. & POL'Y 39, 47 (2009) (describing how gender bias task forces have shown that "while all women who experience violence find their credibility sharply questioned when they seek assistance, none face greater skepticism, if not outright hostility, than women of color"). As a result, the discourse "is racialized as white and thus fails to adequately respond to the needs of women of color who are victimized by intimate abuse." Adele M. Morrison, *Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multi-Cultural Survivor*, 39 UC DAVIS L. REV. 1061, 1064, 1068 (2006) ("Though the law is supposed to be a central player in stopping domestic violence, it has not proved to be the panacea that had been hoped, particularly for battered women of color."); *see, e.g.*, JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, QUEER IN(JUSTICE) 47, 53 (2011) (noting that recent statistics show that "law enforcement officers were the third-largest category of perpetrators of anti-LGBT violence" and "are among the most visible targets of sex policing"); EMILY WATERS, NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED INTIMATE PARTNER VIOLENCE IN 2015 (2016) (demonstrating that LGBTQ+ victims faced bias discrimination when engaging with law enforcement personnel and accessing essential services, such as shelter, and that this is "especially true for LGBTQ survivors with multiple marginalized identities, such as LGBTQ survivors of color, LGBTQ undocumented survivors, and LGBTQ+ survivors with disabilities").

[162] Many thanks to Martha Chamallas for her excellent insights and guidance to understand the complex, nuanced challenges faced by victims of domestic abuse and sexual assault in the tort context.

[163] Julie Goldscheid, *United States v. Morrison and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 CORNELL L. REV. 109, 109-112 (2000). The U.S. Supreme Court in *United States v. Morrison* found the VAWA civil remedy unconstitutional, blocking victims of gender-motivated violence from bringing such in federal court. Many scholars have viewed this decision a considerable setback for the women's rights movement. *See, e.g.*, Goldscheid, *The Civil Rights Remedy*, *supra* note 148, at 159 ("That decision was heavily criticized by civil rights advocates and others as a setback to women's rights and as one of a line of cases in which the Supreme Court set newly restrictive limits on Congress' power.").

[164] *See* Camille Carey, *Domestic Violence Torts: Righting a Civil Wrong*, 62 KAN. L. REV. 695 (2014) ("Pain and suffering, physical injuries, and even death arising out of abusive relationships are compensable through tort law, but these claims are rarely filed or discussed."); Martha Chamallas, *Will Tort Law Have its #MeToo Moment?*, 11 J. TORT L. 39, 45 (2018) (citing Email from Camille Carey, Professor of Law at Univ. of N.M. Sch. of Law, to Martha Chamallas, Robert J. Lynn Chair in Law at the Ohio State Univ., Moritz Coll. of Law (Dec. 24, 2017)) (noting that while on average more than one-third of women in the United States have experienced violence by an intimate partner in their lifetime, only 165 domestic violence tort cases were filed from 1985 to 2017, according to Professor Camille Carey).

barriers to civil recovery, especially against alleged perpetrators.[165] In the domestic violence context, victims often were unable to recover from perpetrators due to short statutes of limitations,[166] intentional acts exclusions that limit insurance coverage,[167] and the fact that many perpetrators are judgment proof.[168] Many negligence claims also failed to proceed against third parties due to the public duty doctrine, limiting civil claims against government entities.[169] In the sexual assault context, few victims successfully recovered civil damages in tort claims against the perpetrator.[170] They often confronted formidable barriers, including

[165] MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, & TORT LAW 68 (2010) [hereinafter THE MEASURE OF INJURY] ("Barriers to tort liability now take diverse doctrinal, institutional, and ideological forms that tend to avoid explicitly characterizing the harms as trivial or offering justifications of the actions of abusers.").

[166] *See* CHAMALLAS & WRIGGINS, THE MEASURE OF INJURY, *supra* note 165, at 3 (arguing that victims of domestic violence have insufficient relief in tort claims due, in part, to short statutes of limitations); Clare Dalton, *Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities*, 31 NEW ENG. L. REV. 319, 360-62 (1997); *State Civil Statutes of Limitations in Child Sexual Abuse Cases,* NCLS (May 30, 2017), https://www.ncsl.org/research/human-services/state-civil-statutes-of-limitations-in-child-sexua.aspx [https://perma.cc/S2UL-PP3H]. Short filing deadlines are particularly challenging for victims of gender-based crimes who tend to report late due to shame, stigma, or fear of reprisal. *See, e.g.*, Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 139-40 (2001) (documenting the challenges raised by short statutes of limitations for intentional torts for victims of domestic violence).

[167] *See* CHAMALLAS & WRIGGINS, THE MEASURE OF INJURY, *supra* note 165, at 73 ("[T]he most formidable barrier to tort recovery for domestic violence victims lies . . . in the law's failure to require or encourage insurers to provide adequate protection for victims of intentional harms."); Carey, *supra* note 164, at 719 ("[H]istorical developments in common law, combined with current policy restrictions in insurance coverage, reveals an environment inhospitable to domestic violence torts.").

[168] *See* Carey, *supra* note 164, at 730 ("Intentional act and family member exclusions, as supported by state regulation, operate to deny recovery to domestic violence plaintiffs, especially those suing abusers who are judgment proof or have few assets.").

[169] *See* Town of Castle Rock v. Gonzales, 545 U.S. 748, 766-68 (2005) (finding that a victim of domestic violence did not have a Fourteenth Amendment property interest in the enforcement of a civil protection order); G. Kristian Miccio, *Exiled from the Province of Care: Domestic Violence, Duty and Conceptions of State Accountability*, 37 RUTGERS L.J. 111, 117 (2005) ("The PDD [Public Duty Doctrine] functions at once as a form of immunity and as a waiver of state immunity. It is a positive and negative doctrine that protects both the state and litigants, allowing suit only in the narrowest of circumstances.").

[170] Steven Bennett Weisburd & Brian Levin, "*On the Basis of Sex": Recognizing Gender-Based Bias Crimes*, 5 STAN. L. & POL'Y REV. 21, 31 n.101 (1994) (quoting THE VIOLENCE AGAINST WOMEN ACT OF 1991: THE CIVIL RIGHTS REMEDY: A NATIONAL CALL FOR PROTECTION AGAINST VIOLENT GENDER-BASED DISCRIMINATION, S. REP. NO. 102-197, at 44 (1991)) (finding that less than one percent of victims have collected civil damages against their perpetrators).

short statutes of limitations,[171] the intentional acts exclusion from insurance,[172] and unfavorable tort doctrine.[173]

Despite these challenges, victims of sexual assault filed more civil tort claims against third parties,[174] and some victims succeeded under negligence theories.[175] Yet, plaintiffs still faced substantial obstacles. Some jurisdictions generally denied recovery, finding no duty to protect against criminal activity.[176] Plaintiffs often contended with comparative

171 *See, e.g.*, CTR. FOR JUSTICE & DEMOCRACY, N.Y. LAW SCH., THE UNINTENDED CONSEQUENCES OF STATE TORT LIMITS: CAPS ON DAMAGES AND STATUTES OF LIMITATIONS IN SEXUAL ASSAULT CASES (2019), http://centerjd.org/content/fact-sheet-state-tort-limits-sexual-assault-cases-caps-and-statutes-limitations [https://perma.cc/RM4W-3V44] [hereinafter STATE TORT LIMITS] (providing a summary of applicable state tort laws related to sexual assault and statutes of limitations demonstrating many with an "overly-restrictive statute of limitations"); Sarah M. Buel, *Access to Meaningful Remedy: Overcoming Doctrinal Obstacles in Tort Litigation Against Domestic Violence Offenders*, 83 OR. L. REV. 945, 1017 (2004) (explaining the difficulties victims of domestic violence face pursuing civil remedies due to the short statutes of limitations in most states).

172 ELLEN BUBLICK, NAT'L ONLINE RESOURCE CTR. ON VIOLENCE AGAINST WOMEN, CIVIL TORT ACTIONS FILED BY VICTIMS OF SEXUAL ASSAULT: PROMISE AND PERILS 6 (Sept. 2009), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_CivilTortActions.pdf [https://perma.cc/5MRH-RMQ8] ("Victims typically cannot seek insurance coverage in actions against a perpetrator for sexual assault because insurance policies generally do not cover intended harms.").

173 Tort defendants, for example, often successfully defend tort claims by arguing that victims failed to consent when they say "no" or engage in physical resistance. *See* Bublick, *supra* note 19, at 57 (describing "significant set of concerns and challenges presented for victims" in tort cases by "doctrines such as consent that have criminal law analogs and through other doctrines such as comparative apportionment"); Martha Chamallas, *The Elephant in the Room: Sidestepping the Affirmative Consent Debate in the Restatement (Third) of Intentional Torts to Persons,* 10 J. TORT L. 1, 20 (2017) (explaining the framework of "affirmative consent" doctrine and describing how in the current Restatement the "burden of proof is on the plaintiff to establish the absence of actual consent"). Defendants too can lean on the doctrine of apparent consent to argue that a defendant reasonably believed that the plaintiff gave her consent. *See* Merle Weiner, *Domestic Violence and the Per Se Standard of Outrage,* 54 MD. L. REV. 230 (1995) (discussing the issue of apparent consent how this and related concepts rest on "age-old notions about domestic relations").

174 *See* BUBLICK, *supra* note 172, at 6.

175 Lininger, *supra* note 153, at 1569 (examining how plaintiffs' attorneys have targeted new third parties in civil suits, leading to an increase in civil suits for sexual assault victims).

176 *See, e.g.*, Martha Chamallas, *Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases*, 14 LEWIS & CLARK L. REV. 1351, 1354 (2010) (noting a lack of consensus on whether third party defendants owe a duty of care in cases involving sexual assault and criminal attacks when "plaintiffs press negligence claims against landlords, businesses, employers, and other entities for failing to detect and remedy dangerous conditions or otherwise failing . . . to take reasonable precautions to prevent the attacks").

negligence arguments that may reduce recovery.[177] Even when plaintiffs did recover, damages awards were capped[178] in certain contexts and varied greatly.[179] Thus, victims — in the face of immense challenges and uncertainty — often chose to settle civil claims and trade their silence for whatever monetary recovery was readily available.[180]

C. Generative Trend

> Most of these institutions like the Weinstein company are so well-funded and have such incredible . . . resources. It is so important for lawyers to be continually adapting and responding to these really intensive defensive efforts and coming up with new theories — not giving up on the novel ones, pushing forward the novel ones. Even when the initial

[177] *See* Bublick, *supra* note 19, at 83 ("Although traditionally intentional tortfeasors such as rapists were not allowed to defend based on the victim's contributory fault, a few courts have permitted victim comparative-fault defenses to even the most egregious intentional torts.").

[178] Many states, for example, have capped damages against third parties, including limitations on compensatory and punitive damages. *See, e.g.*, STATE TORT LIMITS, *supra* note 171.

[179] *See, e.g.*, Univ. of S. Miss. v. Williams, 891 So. 2d 160, 175-76 (Miss. 2004) (initially awarding $800,000 to a doctoral student who was sexually assaulted by a member of her doctoral committee but remanding for new trial because the damages were too speculative); A.R.B. v. Elkin, 98 S.W.3d 99, 103-05 (Mo. Ct. App. 2003) (remanding case to calculate new damages when the trial court only awarded $100 for the cisgender male child victim and no damages for the cisgender female child victims); Kravitz v. Beech Hill Hosp., 808 A.2d 34 (N.H. 2002) (initially awarding the plaintiff $130 but later reducing to $0); Smith v. Holmes, No. 03-02-00438-CV, 2003 Tex. App. LEXIS 2509, at *1 (3d Dist. Mar. 27, 2003) (awarding $18.5 million in damages against the perpetrator of sexual assault); Kink v. Combs, 135 N.W.2d 789, 791, 798-99 (Wis. 1965) (upholding an award to the plaintiff of $12,500 against the victim's employer).

[180] Nondisclosure agreements also have proliferated, allowing defendants — both perpetrators and third parties — to settle claims silently and for abuse to continue in some cases. *See* David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165, 174 (2019) ("When a firm pays a survivor to remain silent about past abuse, it is more likely to leave in place abusers and the culture that enables them."); *see, e.g.*, Elizabeth A. Harris, *Despite #MeToo Glare, Efforts to Ban Secret Settlements Stop Short*, N.Y. TIMES (June 14, 2019), https://www.nytimes.com/2019/06/14/arts/metoo-movement-nda.html [https://perma.cc/N5NM-X6PM] ("When these men were accused of sexual abuse or harassment, they would use a legal tool that was practically magical in its power to make their problems disappear: a nondisclosure agreement.").

> reaction is, oh, that doesn't work. That doesn't apply. We've got to keep pushing forward.[181]
>
> — Plaintiff's attorney

The #MeToo Movement has brought new attention to the problem of gender-based violence in its many forms.[182] Driven by journalists who provided in-depth accounts of abuse of Weinstein and new social media accounts of victims,[183] the #MeToo Movement brought forward new accounts of sexual misconduct.[184] It also showcased continuing gaps in the legal system and bolstered the credibility of victims who stepped forward.[185] In addition, the #MeToo Movement highlighted the role of institutions — including USA Gymnastics,[186] the Weinstein

[181] Zoom Interview with Tim Hale, Partner, Nye, Stirling, Hale & Miller LLP (May 25, 2020).

[182] *See* Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U. L. REV. 1146, 1147 (2019) ("As allegations against Weinstein multiplied in the coming weeks and months, the media intensified its focus on sexual misconduct by other powerful men.").

[183] *See, e.g.*, Farrow, *supra* note 127; Swetha Kannan & Priya Krishnakumar, *A Powerful Person Has Been Accused of Misconduct at a Rate of Nearly Once Every 20 Hours Since Weinstein*, L.A. TIMES (Dec. 29, 2017), https://www.latimes.com/projects/la-na-sexual-harassment-fallout [https://perma.cc/4MQJ-LHVK]; Kantor & Twohey, *supra* note 127.

[184] *See* MacKinnon, *Where #MeToo Came From*, *supra* note 7 ("But #MeToo has been driven not by litigation but by mainstream and social media, bringing down men (and some women) as women (and some men) have risen up.").

[185] *See id.* ("This unprecedented wave of speaking out has begun to erode the two biggest barriers to ending all forms of sexual abuse in law and in life: the disbelief and the trivializing dehumanization of victims.").

[186] Carla Correa, *The #MeToo Moment: For U.S. Gymnasts, Why Did Justice Take So Long?*, N.Y. TIMES (Jan. 25, 2018), https://www.nytimes.com/2018/01/25/us/the-metoo-moment-for-us-gymnasts-olympics-nassar-justice.html [https://perma.cc/6EEM-HNEB] (describing the sentencing hearing of Larry Nassar, the former American gymnastics and Michigan State University doctor, as a "watershed moment" in the "gymnastics' 'culture of abuse'").

Corporation,[187] Miramax,[188] and Michigan State University[189] — that covered up or benefited from abuse.

In response, scholars and activists advocated for much-needed reform. Some scholars called for improvements in the existing criminal legal framework.[190] Others eschewed criminal law altogether, arguing that only restorative justice and community-based models could better respond to victims — each with unique motivations, identities, and circumstances.[191] Some scholars focused squarely on civil legal

[187] *See* Megan Twohey, *Weinstein Company Was Aware of Payouts in 2015*, N.Y. TIMES (Oct. 11, 2017), https://www.nytimes.com/2017/10/11/business/weinstein-company.html [https://perma.cc/P6HN-PVZH] (describing evidence that the board members of the Weinstein Corporation had been "grappling with Mr. Weinstein's behavior for at least two years" before the allegations became public).

[188] Several victims have filed civil suits against Miramax, alleging that the company "turned a blind-eye to the alleged abuses and some were complicit in facilitating some encounters." *See, e.g.*, Lauren del Valle, *A New Civil Lawsuit Alleges Harvey Weinstein Raped a 17-year-old in the 1990s*, CNN (May 29, 2020, 7:45 PM ET), https://www.cnn.com/2020/05/29/us/new-weinstein-rape-allegations-lawsuit/index.html [https://perma.cc/DD3S-VCLL] (describing a new civil suit by four Jane Does against Weinstein, his brother, Robert Weinstein, Miramax, and Disney, which owned Miramax for a time).

[189] *See* Caroline Kitchener & Alia Wong, *The Moral Catastrophe at Michigan State*, ATLANTIC (Sept. 12, 2018), https://www.theatlantic.com/education/archive/2018/09/the-moral-catastrophe-at-michigan-state/569776/ [https://perma.cc/8E5P-7FX2] (describing the role of Michigan State University officials who allowed the systemic sexual abuse by Larry Nassar, the former American gymnastics and Michigan State University doctor, to continue for decades).

[190] In the context of gender-based violence, many scholars readily acknowledge the deficiencies of criminal legal responses to domestic and sexual violence but view state intervention as a necessary — though imperfect — means to ensure victim safety and punish perpetrators. *See, e.g.*, Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957, 976 (2008) (proposing a sex crimes court that could not impose more than six months in jail to bypass "popular prejudice"); Stephen J. Schulhofer, *Reforming the Law of Rape*, 35 LAW & INEQ. 335 (calling for continued reform of criminal rape laws).

[191] Legal scholars have written persuasively about the need to envision restorative justice approaches to gender-based harms. *See, e.g.*, Laurie Kohn, *What's so Funny About Peace, Love, and Understanding? Restorative Justice as a New Paradigm for Domestic Violence Intervention*, 40 SETON HALL L. REV. 517, 521-22 (2010) (arguing that criminal legal interventions have not been effective and advocating for restorative justice approaches to domestic violence); Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 48 (2019) (articulating a "call for restorative justice by exploring its key components — including acknowledgement, responsibility-taking, harm repair, nonrepetition, and reintegration" in application to sexual harassment in the workplace); Lara Bazelon & Aya Gruber, *#MeToo Doesn't Always Have to Mean Prison*, N.Y. TIMES (Mar. 2, 2020), https://www.nytimes.com/2020/03/02/opinion/metoo-doesnt-always-have-to-mean-prison.html [https://perma.cc/WTE9-5DTA] (arguing that "#MeToo rightly emphasizes

remedies, ranging from civil protective orders to civil suits, as an important site for justice.[192]

Meanwhile, civil litigators, confronted with imperfect legal avenues, have, in real time, adopted new, creative strategies.[193] They have engaged in proactive, dynamic refashioning of existing civil statutes and common law remedies, many of which were not designed initially to combat sexual assault or interpersonal violence. Strategies have included the filing of new defamation, federal RICO, and anti-trafficking claims.[194]

Victims have tested the waters in many jurisdictions and, some — at least in the initial pleadings stage — have won.[195] Such efforts, while still nascent, have the potential to be broadly transformative. In

victims' healing and accountability" and that "[r]estorative justice may be a way to achieve both"). Other legal scholars have long advocated for abolitionist approach, which seeks "a long-range goal" to eliminate the criminal legal system and prisons. Angela Y. Davis, legal scholar and activist, has highlighted that "there are many versions of prison abolitionism—including those that propose to abolish punishment altogether and replace it with reconciliatory responses to criminal acts." Angela Y. Davis & Dylan Rodriguez, *The Challenge of Prison Abolition: A Conversation*, 27 SOC. JUST. 212, 215 (2000). Critical legal scholars and activists, thus, have fought to envision an abolitionist approach to gender-based violence. In 2001, Critical Resistance and INCITE! Women of Color Against Violence, for example, issued a call to "develop responses to gender violence that do not depend on a sexist, racist, classist, and homophobic criminal justice system." *Incite! - Critical Resistance Statement: Statement on Gender Violence and the Prison Industrial Complex*, INCITE! (2001), https://incite-national.org/incite-critical-resistance-statement/ [https://perma.cc/Z8MT-MPC6] ("It is also important that we develop strategies that challenges the criminal justice system and that also provide safety for survivors of sexual and domestic violence."). Moreover, feminist legal scholars have articulated abolitionist approaches to gender-based harms. *See generally* Goodmark, *supra* note 161, at 46-47 (arguing that the narrow solutions offered by the criminal legal system — including "arrest, prosecute, secure a protective order, go to a shelter, get a divorce" — fail to offer women "real choices" or honor the "diversity of women's goals").

192 *See, e.g.*, Carey, *supra* note 164164, at 696 (exploring "the many benefits offered by tort law for domestic violence plaintiffs and propose[ing] a paradigm shift in domestic violence lawyering to incorporate significantly more tort litigation"); Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 UC DAVIS L. REV. 1107, 1114 (2009) (arguing that civil protection orders to "provide for remedies that permit a multidimensional reordering of the relationship").

193 This phenomenon is not new. In the late 1990s, as criminal domestic violence and sexual assault cases failed to proceed, litigators turned to tort remedies to find "a more congenial and effective forum." Bublick, *supra* note 19, at 68. This development led to the doctrinal expansion of tort law to address both perpetrators and third parties in the sexual assault context. *See id.* at 58-67.

194 See *infra* Part.II.C.2, for more information about relevant RICO claims. For a detailed discussion of cases brought under the TVPA, see *infra* Part III.

195 *See infra* Part III.

particular, the deployment of trafficking statutes in federal civil suits has provided a new federal forum for victims to seek expansive civil damages and a mechanism to hold accountable third parties that "knowingly benefit[]" from gender-based harms. This trend has potentially dramatic and lasting implications.

1. Defamation Claims

Defamation is a common-law tort with deep roots in the law of England and the United States.[196] The underpinning of defamation law is defense against reputational attacks.[197] Yet, victims are now[198] wielding defamation suits to validate their claims of gender-based harms and win monetary damages.[199]

Leigh Corfman, for example, alleged that Alabama U.S. Senate Candidate Roy Moore sexually abused her when she was 14-years-old.[200] Far after the statute of limitations had run on applicable civil and criminal avenues, Corfman brought a defamation suit in 2018 against

[196] *See* RODNEY A. SMOLLA, LAW OF DEFAMATION § 1.2 (2d ed. 2020). For example, the Laws of Alfred the Great in the ninth century noted that public slander was "to be compensated with no lighter a penalty than the cutting off of [the slanderer's] tongue." Colin Rhys Lovell, *The "Reception" of Defamation by the Common Law*, 15 VAND. L. REV. 1051, 1053 (1962).

[197] DAVID ROLPH, REPUTATION, CELEBRITY, AND DEFAMATION LAW xxi (2008) ("Defamation proceedings constitute the principal remedy afforded by our legal system for defending an individual's reputation.").

[198] The trend towards defamation suits has been buoyed by the #MeToo Movement. *See* Julia Jacobs, *#MeToo Cases' New Legal Battleground: Defamation Lawsuits*, N.Y. TIMES (Jan. 12, 2020), https://www.nytimes.com/2020/01/12/arts/defamation-me-too.html [https://perma.cc/57VZ-P97J] (noting how some 17% (33 out of 193) of cases supported by the TIME's UP Legal Defense Fund involved defamation claims).

[199] Defamation claims have been used by both victims and alleged perpetrators to validate their version of events. *See* Jacobs, *supra* note 198 ("[U]nable to pursue justice directly, women and men on both sides of #MeToo are embracing the centuries-old tool of defamation lawsuits, opening an alternative legal battleground for accusations of sexual misconduct."); Peter S. Lubin & Patrick Austermuehle, *#MeToo Movement has Spawned a Flood of New Defamation Lawsuits*, LUBIN AUSTERMUEHLE (Mar. 15, 2020), https://www.chicagobusinesslitigationlawyerblog.com/metoo-movement-has-spawned-a-flood-of-new-defamation-lawsuits/ [https://perma.cc/L65W-G2YF] ("For many plaintiffs, suing for defamation provides them the opportunity to air the facts of what happened years ago, even if they are unable to hold the accused criminally liable.").

[200] Associated Press, *Judge Weighs Defamation Claim Against Roy Moore*, ALA. TODAY (Aug. 26, 2019), https://altoday.com/archives/30289-judge-weighs-defamation-claim-against-roy-moore [https://perma.cc/3DRU-Z57S]; *see also* Maggie Astor, *Roy Moore Sues 4 Women, Claiming Defamation and Conspiracy*, N.Y. TIMES (Apr. 30, 2018), https://www.nytimes.com/2018/04/30/us/politics/roy-moore-lawsuit.html [https://perma.cc/6L8B-TSQP].

Moore after he and his campaign denied her accusations of abuse.[201] Commenting on the defamation suit, Corfman noted that she sought, "to do what I could not do as a 14-year-old — hold Mr. Moore and those who enable him accountable."[202]

Similarly, actress Ashley Judd, one of the first women to bring allegations of sexual misconduct against Harvey Weinstein, used defamation law to keep her civil claims afloat.[203] Judd filed her complaint in Los Angeles Superior Court, alleging that in the 1990s, Weinstein invited her to a breakfast meeting and allegedly pressured her to allow him to touch her sexually in his hotel room.[204] In her civil suit against Weinstein, Judd included defamation claims.[205] She asserted that it was defamation when Weinstein's studio, Miramax, later called Judd a "nightmare to work with" who should be "avoid[ed] at all costs," and when Weinstein convinced producer Peter Jackson not to hire her.[206] While a federal judge dismissed her sexual harassment claims in 2018, he allowed the defamation claims to move forward.[207] Similar

[201] *See* Astor, *supra* note 200.

[202] Associated Press, *supra* note 200.

[203] *Ashley Judd's Sexual Harassment Claim Against Harvey Weinstein Dismissed*, BBC (Jan. 10, 2019), https://www.bbc.com/news/world-us-canada-46819044 [https://perma.cc/3B4N-AWJB] ("Ashley Judd was one of Mr. Weinstein's original accusers."); *see* Alex Dobuzinskis, *Judge Allows Ashley Judd Defamation Lawsuit Against Weinstein to Proceed*, REUTERS (Sept. 19, 2018, 4:35 PM), https://www.reuters.com/article/us-people-ashley-judd-weinstein/judge-allows-ashley-judd-defamation-lawsuit-against-weinstein-to-proceed-idUSKCN1LZ2ZX [https://perma.cc/9Q6M-9SWP]. *See generally* Eriq Gardner, *Is Hollywood's "Casting Couch" Sexual Harassment? Appeals Court Hears Ashley Judd v. Harvey Weinstein*, HOLLYWOOD REP. (May 8, 2020, 11:47 AM PT), https://www.hollywoodreporter.com/thr-esq/is-hollywoods-casting-couch-sexual-harassment-appeals-court-hears-ashley-judd-v-harvey-weinstein-1293907 [https://perma.cc/C9SU-TYNL] (describing how Judd has appealed the federal district court's decision to dismiss her sexual harassment claims against Weinstein).

[204] Order Granting Defendant's Motion to Dismiss at 1-2, Judd v. Weinstein, No. CV 18-5724 (Cal. Dist. Ct. App. Jan. 9, 2019).

[205] *Id.*

[206] *Id.* at 2.

[207] *Id.* (finding that Judd had "adequately stated a claim for defamation, intentional interference with prospective economic advantage, and violation of the [Unfair Competition Law]"); Bill Chappell, *Judge Dismisses Ashley Judd's Sexual Harassment Claim Against Harvey Weinstein*, NPR (Jan. 10, 2019, 12:54 PM ET), https://www.npr.org/2019/01/10/683993516/judge-dismisses-ashley-judds-sexual-harassment-claim-against-harvey-weinstein [https://perma.cc/FP9K-3BU4]. Judd filed a civil case against Weinstein in Los Angeles Superior Court, and the Defendant removed the case to the U.S. District Court of the Central District of California. *See* Docket, Judd v. Weinstein, No. 2:18-cv-05724 (C.D. Cal. June 28, 2018).

defamation suits have been brought by plaintiffs against President Donald Trump,[208] actor Bill Cosby,[209] and actor Johnny Depp.[210]

Despite some victories, defamation claims still face considerable legal challenges.[211] In particular, courts have deemed some victims, who have waded into the #MeToo debate, as "limited-purpose" public figures and required them to meet a heightened standard of "actual malice."[212] For example, in *Hughes v. Twenty-First Century Fox, Inc.*, Fox News guest Scottie Nell Hughes alleged that she was sexually assaulted by Fox host Charles Payne and filed a defamation suit after Fox's statements to the *National Enquirer* "mischaracteriz[ing] the nature of the sexual relationship as consensual."[213] The district court dismissed her defamation claims, finding that Hughes was a public figure who failed to demonstrate "actual malice."[214]

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[208] Summer Zervos, an "Apprentice" contestant, sued President Donald Trump for defamation after he called her a "liar" for speaking publicly about unwelcome sexual advances in 2007. Anna North, *The Summer Zervos Sexual Assault Allegations and Lawsuit Against Donald Trump, Explained*, VOX (Mar. 14, 2019, 3:09 PM), https://www.vox.com/policy-and-politics/2018/3/26/17151766/trump-lawsuit-summer-zervos-apprentice [https://perma.cc/7UQZ-E4FB] ("But Zervos is not suing Trump for sexual assault — the statute of limitations on that has passed. Instead, she's suing for defamation.").

[209] Supermodel Janice Dickinson sued Bill Cosby for defamation after his lawyer, Marty Singer, accused Dickinson of lying about a sexual assault by Cosby in 1982. Stella Chan & Eric Levenson, *Janice Dickinson Got an 'Epic' Settlement in Her Defamation Case Against Bill Cosby*, CNN (July 25, 2019, 7:00 PM ET), https://www.cnn.com/2019/07/25/us/janice-dickinson-bill-cosby/index.html [https://perma.cc/R5AH-AW6B]. In July 2019, Dickinson reached "a very large settlement" with Cosby's insurance company in the defamation suit. *Id.*

[210] *See* Lourdes Medrano, *Amber Heard Drops Defamation Suit*, COURTHOUSE NEWS (Sept. 9, 2016), https://www.courthousenews.com/amber-heard-dropsdefamation-lawsuit/ [https://perma.cc/YX87-2BUB] (describing defamation complaint filed by Amber Heard, later dropped due to a divorce settlement).

[211] *See* Mark S. Mulholland & Elizabeth S. Sy, *Victim Defamation Claims in the Era of #MeToo*, N.Y. L.J. (ONLINE) (Aug. 1, 2018, 2:30 PM), https://www.law.com/newyorklawjournal/2018/08/01/victim-defamation-claims-in-the-era-of-metoo/.

[212] These heightened pleading and evidentiary standards, especially early in the litigation, remain challenging to overcome. The Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), established a heightened standard applicable to public officials, requiring them to show that the defendant engaged in the defamatory conduct with "actual malice." *Id.* at 279-80. This standard then was extended to "limited-purpose" public figures, including "an individual [who] voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974).

[213] Hughes v. Twenty-First Century Fox, Inc., 304 F. Supp. 3d 429, 441 (S.D.N.Y. Apr. 24, 2018).

[214] *Id.* at 453.

2. RICO Claims

Victims also have explored the applicability of the federal RICO to sexual misconduct.[215] When RICO passed in 1970, it was conceived as a tool to prosecute large criminal enterprises, such as the Mafia.[216] RICO provided a civil remedy that allows for "powerful and intrusive" remedies, including the recovery of treble damages and attorneys' fees.[217] It also offered plaintiffs a generous statute of limitations.[218]

[215] 18 U.S.C. § 1964(a)-(c) (1970); *see* Peter J. Henning, *RICO Lawsuits Are Tempting, but Tread Lightly*, N.Y. TIMES (Jan. 16, 2018), https://www.nytimes.com/2018/01/16/business/dealbook/harvey-weinstein-rico.html?searchResultPosition=1 [https://perma.cc/6LBM-5UBG] (describing how "plaintiffs have an incentive to look for ways to turn their grievances into a RICO suit" and increasingly have filed creative suits under RICO seeking civil damages); Walter Pavlo, *Once Meant to Nail Mobsters, RICO Sees Resurgence in Civil Cases in 2018*, FORBES (Oct. 31, 2018, 2:12 PM), https://www.forbes.com/sites/walterpavlo/2018/10/31/once-meant-to-nail-mobsters-rico-sees-resurgence-in-civil-cases-in-2018/#61e868d72421 [https://perma.cc/MR7N-LA8N]; *see, e.g.*, Complaint at 3, Geiss v. Weinstein Co. Holdings LLC, 383 F. Supp. 3d 156 (S.D.N.Y. 2019) (No. 17 Civ. 9554), ECF No. 1 [hereinafter Geiss Complaint] (arguing that Weinstein's backers "became part of the growing 'Weinstein Sexual Enterprise,' a RICO enterprise"); Complaint at 58, Bistline v. Jeffs, No. 2:16-cv-00788 (D. Utah July 13, 2016) (arguing that the law firm of Warren Jeffs, religious prophet, engaged "in the conduct of an enterprise through a pattern of racketeering activity"); Michelle Mark, *The 6 Women Suing Harvey Weinstein are Using a Gangster Law Originally Designed to Take Down the Mafia — and Experts Warn It Won't Be Easy*, BUSINESS INSIDER (Dec. 7, 2017, 11:24 AM), https://www.businessinsider.com/weinstein-racketeering-sexual-assault-lawsuit-chances-2017-12 [https://perma.cc/73DU-F4BZ] ("Though racketeering claims can be more complicated than torts, successful suits come with significantly higher damages, Morgan Cloud, an Emory University law professor who has studied RICO, told Business Insider in an email.").

[216] RICO was enacted shortly after the Senate Committee determined that "organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy." Organized Crime Control Act of 1970, Pub. L. No. 91-452, §904(a), 84 Stat. 922-23 (1970).

[217] Section 1964(c) provides that "any person injured in his business or property by reason of a violation of section 1962 . . . may sue therefore in any appropriate United States District Court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c) (2018). The remedies are expansive, including "injunctive relief, reasonable restrictions on defendants' future activities, disgorgement of unlawful proceeds, divestiture, dissolution, reorganization, removal from positions in an entity, and appointment of court officers to administer and supervise the affairs and operations of defendants' entities and to assist courts in monitoring compliance with courts' orders and in imposing sanctions for violations of courts' order." U.S. DEP'T OF JUSTICE, CIVIL RICO: A MANUAL FOR ATTORNEYS 3 (2007), https://www.justice.gov/sites/default/files/usam/legacy/2014/10/17/civrico.pdf [https://perma.cc/S3S6-JTDN].

[218] While RICO has a four-year statute of limitations, it has a very generous accrual rule. *See* Agency Holding Corp. v. Malley-Duff & Assocs. Inc., 483 U.S. 143, 156-57 (1987) (finding that RICO established a uniform statute of limitations for civil cases).

Victims recently have turned to class action RICO claims to secure greater damages, hold third parties accountable, seek out greater publicity, and overcome statutes of limitations issues.[219] For example, in 2017, plaintiffs in *Geiss v. Weinstein Co. Holdings LLC* filed a federal civil complaint under the RICO statute against Harvey Weinstein, the Weinstein Company, and others, alleging that his sexual misconduct amounted to a "Weinstein Sexual Enterprise."[220] In particular, plaintiffs argued that Weinstein's inner circle engaged in a cover up of the harassment conduct through obstruction of justice and "multiple instances of mail and wire fraud."[221] By assisting Mr. Weinstein, they engaged in an "association in fact," which amounted to a RICO violation.[222]

RICO claims, such as in *Geiss*, however, have been slow to gain traction. While some lawyers see the Weinstein case as a "classic RICO case,"[223] many plaintiffs have failed to survive the initial pleading stage.[224] Some scholars and litigators argue that this is, in part, because judges are increasingly skeptical of RICO claims.[225] Further, the pleading standard is quite high, and it is often difficult to demonstrate

[219] *See* Mark, *supra* note 215 ("'In my opinion, the RICO claim's primary value is to bring publicity to the lawsuit,' Jeffrey Grell, a University of Minnesota law professor who has written a book on RICO, told Business Insider.").

[220] Geiss Complaint, *supra* note 215, at 3; *see also* Maya Salam, *6 Women Sue Harvey Weinstein and His Former Businesses in Proposed Class Action*, N.Y. TIMES (Dec. 6, 2017), https://www.nytimes.com/2017/12/06/business/harvey-weinstein-class-action.html [https://perma.cc/KKW5-348K] ("A lawsuit seeking class-action status was filed on Wednesday against Harvey Weinstein, Miramax, the Weinstein Company and members of its board, claiming that these entities worked to 'perpetuate and conceal Weinstein's widespread sexual harassment and assault,' a cover-up that amounts to civil racketeering.").

[221] Geiss Complaint, *supra* note 215, at 56.

[222] *See id.* at 55-59.

[223] *See, e.g.*, Mark, *supra* note 215 (quoting Steve Berman, who called the case "a classic case for RICO").

[224] *See id.*

[225] Zoom Interview with Ryan Hudson, Attorney, Sharp Law LLP (May 21, 2020) (noting that, "a lot of federal judges are hostile to civil RICO").

a qualifying injury.[226] In *Geiss,* for example, a federal judge dismissed all RICO claims against Weinstein for failure to state a claim.[227]

3. Anti-Trafficking Claims

Where defamation and RICO claims have stalled, civil anti-trafficking claims have gained momentum. Indeed, in some cases, the same plaintiffs who raised novel RICO claims have turned now to the TVPRA.[228] They have argued that certain forms of gender-based harms, may constitute federal trafficking violations, including sex trafficking, forced labor, or involuntary servitude.[229] Plaintiffs have diverse motivations for this shift.[230] Some have invoked the TVPRA to overcome statutes of limitations, implead third parties who "knowingly benefit[]" from the conduct, and seek civil damages and attorney's fees.[231] Others

[226] *See* 18 U.S.C. § 1964(c) (2018) (providing that "[a] person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor"). This requirement has been interpreted narrowly by many courts, requiring that the plaintiff show a proprietary type of damage. *See, e.g.*, Grogan v. Platt, 835 F.2d 844, 847 (11th Cir. 1988) (interpreting the term "injury" narrowly to apply to a business or property).

[227] Geiss v. Weinstein Co. Holdings LLC, 383 F. Supp. 3d 156, 162 (S.D.N.Y. 2019); *see also* Ashley Cullins, *Judge Dismisses RICO Suit Against Harvey Weinstein*, HOLLYWOOD REP. (Sept. 13, 2018, 12:11 PM), https://www.hollywoodreporter.com/thr-esq/judge-dismisses-rico-suit-harvey-weinstein-1143090 [https://perma.cc/U28S-J3TX]. Similarly, RICO claims against polygamist leader Warren Jeffs and a famed Olympic Taekwondo Coach were dismissed for failure to demonstrate a relevant injury. Gilbert v. U.S. Olympic Comm., No. 18-cv-00981, 2019 U.S. Dist. LEXIS 35921, at *76-81 (D. Colo. Mar. 6, 2019) (denying civil RICO claim for failure to identify a specific injury but allowing TVPRA claims to proceed); Bistline v. Jeffs, No. 2:16-CV-788, 2017 WL 108039, at *11 (D. Utah Jan. 11, 2017) (highlighting another failed RICO claim due to the high pleading standard); *see also* Debra Cassens Weiss, *Law Firm Accused of Enabling Polygamist Leader Warren Jeffs Can Be Sued, 10th Circuit Says*, A.B.A. J. (Mar. 18, 2019, 7:15 AM CDT), https://www.abajournal.com/news/article/law-firm-accused-of-shielding-polygamist-leader-warren-jeffs-can-be-sued-10th-circuit-says#:~:text=A%20federal%20appeals%20court%20has,rape%2C%20forced%20labor%20and%20extortion.&text=Jeffs%20was%20sentenced%20to%20life,assault%20of%20two%20child%20brides [https://perma.cc/U29K-8S8E] ("The appeals court did not allow a civil RICO claim to proceed. But it allowed further proceedings on claims for breach of fiduciary duty, fraudulent and negligent misrepresentation, and violation of the Trafficking Victims Protections Reauthorization Act.").

[228] *See supra* Part I.D, for greater discussion of the motivation of plaintiffs' attorneys and the benefits of filing under the TVPRA.

[229] *See supra* Part I.D.

[230] *See supra* Part I.D.

[231] *See, e.g.*, *Bistline*, 2017 WL 108039, at *1-2, *10 (claiming the law firm and lawyer of Warren Jeffs knowingly benefited from trafficking conduct).

have sought a federal forum, which may be friendlier to claims than state courts.[232]

For example, in *Geiss*, the same plaintiffs who alleged RICO violations filed an amended complaint to include new civil violations of the TVPRA. Therein, plaintiffs argued that Weinstein's sexual assault conduct amounted to "commercial sex acts" and thus sex trafficking.[233] On April 18, 2019, Judge Alvin Hellerstein of the Southern District of New York, allowed the TVPRA claims to proceed, relying on two prior district court decisions that applied the TVPRA to Weinstein's conduct.[234] While this new trend is still in its early stages, it has the potential to transform civil and criminal legal responses in significant ways.

III. COURTS SEEK TO RESOLVE TENSIONS

Part III examines how civil litigators have turned to the TVPRA to generate new remedies for victims of gender-based crime and how judges have signaled growing receptivity to such claims. Some federal district courts, for example, have interpreted "labor" or "services" to mean "work involving mental or physical exertion."[235] Similarly, judges have held that a "commercial sex act" includes sex in exchange for job advancement, allowing plaintiffs effectively to reframe certain sexual assault conduct as sex trafficking.[236] These federal court decisions allow civil litigators and prosecutors to re-envision new cases and conduct as human trafficking under federal law. Trafficking, for example, could now include a victim of domestic abuse, forced by her spouse to fold the laundry. Trafficking also could include a perpetrator of sexual assault who uses power or the potential to advance the career of his victim to coerce sex.

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[232] *See supra* Part I.D; *see, e.g.*, Zoom Interview with Jonathan Little, Attorney, Saeed & Little LLP (May 21, 2020) (describing the benefits to filing federal claims if state courts are not as receptive to civil tort claims).

[233] *See* Geiss v. Weinstein Co. Holdings LLC, 383 F. Supp. 3d 156, 168 (S.D.N.Y. 2019).

[234] *Id.*

[235] For example, see *infra* at Part III.A.

[236] *See infra* at Part III.C.

A. United States v. Marcus

In *United States v. Marcus*, the court considered whether the TVPA applies to an intimate, domestic relationship.[237] *Marcus* involved a BDSM[238] relationship between the defendant, Glenn Marcus, and his victim.[239] The relationship eventually became nonconsensual, and according to trial testimony, Marcus exposed the victim to increasingly severe "punishments."[240] The defendant also forced her to create a website, called "Slavespace," and work for approximately eight to nine hours per day to update pictures and online diary entries.[241] The government, in 2007 through a superseding indictment, charged Marcus with violating the federal sex trafficking and forced labor statutes.[242]

While the facts of the case were particularly unique and egregious, one of the primary questions presented was quite basic: Should the TVPA apply to intimate, domestic relationships? The trial transcript makes clear that the parties understood the far-reaching implications of any ruling.[243] During jury deliberation, the jury asked for clarification about whether sexual acts could be considered "labor" or "services."[244]

This question incited spirited debate from counsel.[245] Counsel for Marcus strenuously objected to the government's broad definition, which defined "labor and services" as acts involving mental or physical exertion.[246] He argued that this interpretation would "broaden[] the

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[237] *See* United States v. Marcus, 487 F. Supp. 2d 289, 292 (E.D.N.Y. 2007), *vacated on other grounds*, 538 F.3d 97, 99-100 (2d Cir. 2008). Many thanks to Solette Magnelli and Maurice Sercartz for sharing helpful insights with me about the *Marcus* criminal prosecution.

[238] BDSM is a sexual lifestyle involving erotic practices or roleplaying, including bondage, discipline, dominance and submission, sadomasochism, and other dynamics. *Marcus*, 583 F.3d at 98.

[239] *See generally id.* at 99 ("Marcus engaged in BDSM activities with Jodi and Joanna . . . .").

[240] *See id.* (describing these "punishments" as activities involving egregious sexual violence that was photographed and posted online).

[241] *Id.*

[242] *Id.* at 100.

[243] *See* Transcript of Trial at 1428, United States v. Marcus, 487 F. Supp. 2d 289 (E.D.N.Y. 2007) (No. 05-CR-457).

[244] *See id.* ("Your Honor, for count two, we they [sic] want clarification what constitutes acts of labor in this case. Which of the following alleged acts are to be considered? Setting up and maintaining web sites, writing diaries, posing for pictures, HTML coding, clicking ads, recruiting services of other trainees, commercial sex acts?").

[245] *See id.* at 1428-41.

[246] *Id.* at 1429.

statute beyond its intended scope."[247] He offered the example of a married couple who operate a bed and breakfast together and their relationship turns violent.[248] "[W]as the [forced labor] statute intended to punish that kind of behavior?," he asked. "I don't think so."[249]

The government disagreed, arguing that this hypothetical fit squarely within the forced labor statute:

> The point is yes, it could be a forced labor. If I said to my husband or wife, you will make breakfast every morning for me or else I'll kill you, that could be a form of forced labor. I'm sorry, that is the definition.[250]

Defense counsel commented that such a broad definition would risk labeling any BDSM relationship, regardless of consent, forced labor.[251] Even further, he argued, it would risk relabeling all rape as forced labor.[252] In response, the judge paused, seeming reluctant to adopt either definition. The government then offered a third way forward — to "not define labor at all"[253] — and the court agreed to adopt this "wait and see" approach.[254]

After a jury trial, Marcus was convicted on both counts.[255] On appeal, the defendant asked to set aside the convictions, arguing again that the TVPA should not apply to "intimate, domestic relationship[s]."[256] The court ultimately disagreed, upholding both convictions. In particular, the court remarked that the TVPA can apply to "intimate, domestic relationship[s]."[257] The court found that "the Congressional purpose and findings of the TVPA make clear the intended broad scope of the

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[247] *Id.* at 1428. Defense counsel advocated for a definition of labor that is "work of any type for which either remuneration or compensation . . . ." *Id.* at 1429.

[248] *Id.* at 1432-33.

[249] *Id.* at 1433.

[250] *Id.*

[251] *Id.* at 1437.

[252] *Id.* at 1439-40 (quoting the government attorney as asserting, "All I can say, I think technically, it is possible to bring a case based on a factual situation that looks like rape. It is technically within the law").

[253] *Id.* at 1440.

[254] *Id.* At the trial court level, the judge refused to explicitly define the term, noting that "labor" should be "understood in its common, everyday sense." *Id.* at 1441.

[255] United States v. Marcus, 628 F.3d 36, 38 (2d Cir. 2010).

[256] United States v. Marcus, 487 F. Supp. 2d. 289, 292 (E.D.N.Y. 2007).

[257] *Id.* at 301-04. The judge adopted the government's broad interpretations of both "labor" and "commercial sex act," finding that "labor" should be defined to include "an expenditure of physical or mental effort especially when fatiguing, difficult, or compulsory" and defining "services" as "useful labor that does not produce tangible commodity." *See id.*

legislation."[258] The court pointed out that, "while the legislative history does not address situations where traffickers have intimate relationships with their victims, the court's survey of the TVPA's legislative history reveals no expressed intention to preclude criminal liability in those contexts."[259] The court also adopted broad definitions of "commercial sex act" and "labor and services."[260] It thus opened the door for the TVPA to apply to other forms of gender-based violence.

B. United States v. Kaufman

In 2008, the Tenth Circuit, relying upon *Marcus*, endorsed a similarly expansive view of forced labor and involuntary servitude offenses.[261] *United States v. Kaufman* involved two defendants charged with involuntary servitude and forced labor for forcing mentally ill patients to engage in sexual acts and perform manual labor.[262] As in *Marcus*, the defendants argued that "labor" and "services" should be interpreted narrowly to include only "work in the economic sense" and exclude the nudity and sexual acts that defendants video recorded.[263]

Ultimately, the district court disagreed with this narrow framing, instructing the jury that "labor" means "the expenditure of physical or mental effort," and "services" is "conduct or performance that assists or benefits someone or something."[264] The jury then convicted the Kaufmans of two counts of forced labor and three counts of involuntary servitude, among other charges.[265] On appeal, the defendants argued that the district court plainly erred "by failing to limit the definitions of 'labor' and 'services' to 'work in an economic sense.'"[266] The Tenth

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[258] *Id.* at 301.

[259] *Id.*

[260] *See id.* at 301-04.

[261] United States v. Kaufman, 546 F.3d 1242, 1263 (10th Cir. 2008).

[262] *Id.* at 1246 (describing how federal authorities "learned that, over a period of more than fifteen years, the Kaufmans had directed the severely mentally ill residents of the Kaufman House to perform sexually explicit acts and farm labor in the nude while maintaining that these acts constituted legitimate psychotherapy for the residents' mental illnesses").

[263] *See id.* at 1260. At trial, the jury was instructed that "labor and services" were defined, as in *Marcus*, using their ordinary meaning to define "labor" as "the expenditure of physical or mental effort" and "services" as "conduct or performance that assists or benefits someone or something." *Id.*

[264] *Id.*

[265] *Id.* at 1246.

[266] *Id.* at 1247. The defendants contended that such a broad definition impermissibly "allowed them to be convicted for inducing the nudity and the sexual acts recorded on the videotapes." *Id.* at 1260.

Circuit, however, disagreed.[267] While the court acknowledged that traditional Thirteenth Amendment and involuntary servitude jurisprudence applied to "work in the economic sense," it adopted a wider construction of "labor" and "services."[268] The court, moreover, pointed to *Marcus*, to support its views that the TVPA applied to intimate relationships.[269]

C. Civil Litigators Test the Boundaries

Armed with *Marcus* and *Kaufman*, creative civil litigators have now filed civil suits, deploying the TVPRA in new ways.[270] The federal civil case against Warren Jeffs highlights this creative deployment of federal anti-trafficking statutes.[271] Jeffs, a self-proclaimed "prophet" in the Fundamentalist Church of Jesus Chris of Latter-Day Saints ("FLDS"), was infamous for sanctioning the spiritual marriage of children and using religion to hide his chronic sexual abuse of minors.[272] In 2011,

[267] *Id.* at 1261-63.

[268] *Id.* at 1261-62 (quoting Bailey v. Alabama, 219 U.S. 219, 241 (1911)).

[269] *See* United States v. Marcus, 487 F. Supp. 2d. 289, 301 (E.D.N.Y. 2007) ("While the legislative history does not address situations where traffickers have intimate relationships with their victims, the court's survey of the [Trafficking Victims Protection Act's] legislative history reveals no expressed intention to preclude criminal liability in those contexts.").

[270] *See, e.g.*, Plaintiff's Memorandum of Law in Opposition to Defendant Harvey Weinstein's Motion to Dismiss, Noble v. Weinstein, 335 F. Supp. 3d 504 (S.D.N.Y. Aug. 5, 2018) (No. 17 Civ. 9260), 2018 WL 4292552 (arguing that the TVPRA applies to a single sexual assault in exchange for job advancement); Memorandum of Law in Opposition to Defendant's Motion to Dismiss Plaintiff's Complaint, A.J. et al. v. Weber, No. 18-cv-12112 (S.D.N.Y. Mar. 15, 2019) (showcasing the creative use of TVPRA by applying it to a casting-couch sexual exploitation case).

[271] *See* Bistline v. Parker, 918 F.3d 849, 854-61 (10th Cir. 2019) (describing the civil complaint filed by plaintiffs that alleges that Jeffs and his law firm contributed to sex trafficking and forced labor when he sanctioned the sexual abuse of minors). It is important to note that not all such cases have enjoyed success. At least one court has required the plaintiffs more clearly establish a connection between the sex act and the "exchange of an item of value" to amount to a "commercial sex act." *See* Kolbek v. Twenty First Century Holiness Tabernacle Church, Inc., No. 10-CV-4124, 2013 U.S. Dist. LEXIS 180463, at *53 (W.D. Ark. Dec. 24, 2013). Despite facts quite similar to *Jeffs*, the district court in the Western District of Arkansas dismissed the federal civil TVPRA claims, finding that while the conduct fell within the ten-year statute of limitations, the sex acts did not amount to "commercial sex acts" under the TVPA. *See id.* at *22, *53-55, *55 n.17.

[272] *Bistline*, 918 F.3d at 856-57 (alleging that Jeffs used the FLDS Church and his affiliation with a local law office to "institutionalize this atrocious practice and to cloak it with the superficial trappings of legal acceptance").

Jeffs was found guilty of sex crimes and sentenced to life in prison.[273] Even so, the criminal case did little to help Jeffs' many victims. Slow to come forward due to fear of reprisals and social stigma, dozens found their civil claims barred by statutes of limitations.[274]

In 2016, thirty-one of Jeffs' victims fashioned a new legal strategy. Plaintiffs filed a federal civil suit under the TVPRA against Jeffs, his attorney, and the law firm who represented Jeffs, seeking civil damages.[275] The plaintiffs in *Bistline v. Parker* alleged that Jeffs and his law firm and attorney, Rodney Parker, coordinated with Jeffs "to create a legal framework that would shield him from the legal ramifications of child rape, forced labor, extortion, and the causing of emotional distress by separating families."[276] While this may seem like the quintessential "sex slavery" that Congress sought to address, plaintiffs still faced challenges showing that Jeffs engaged in a "commercial sex act" for sex trafficking or "labor" or "services" to establish forced labor.[277]

In 2017, the attorney defendants filed motions to dismiss.[278] Attorneys for the law firm asserted that while Jeffs allegedly committed "wrongs," "it is legally incorrect to refer to the FLDS Members as 'slaves' or 'involuntary servants.'"[279] They further asserted that the forced labor

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[273] *See, e.g.*, Warren Richey, *Prophet to Pedophile: Polygamist Warren Jeffs Sentenced to Life in Prison*, CHRISTIAN SCI. MONITOR (Aug. 9, 2011), https://www.csmonitor.com/USA/Justice/2011/0809/Prophet-to-pedophile-Polygamist-Warren-Jeffs-sentenced-to-life-in-prison [https://perma.cc/9C65-KLVW] (describing Jeffs life sentence for the sexual assault of two minors, ages twelve and fifteen).

[274] *Bistline*, 918 F.3d at 862 (holding that civil claims under other statutes were barred by the statute of limitations). A few victims were successful in bringing civil suits. *See, e.g.*, *Former Child Bride Wins $16M Lawsuit vs. FLDS*, ASSOCIATED PRESS (Sept. 6, 2017), https://www.azcentral.com/story/news/local/arizona/2017/09/06/ex-teen-bride-wins-16-million-case-against-flds/638020001/ [https://perma.cc/96T6-BBRR]. Many victims faced reprisals, ostracism, and stigma from FLDS preventing them from filing suits until the statute of limitations had expired. *See, e.g.*, Sarah Tory, *Lawsuit Sheds Light on How Jeffs Ruled FLDS*, JOURNAL (Apr. 28, 2018, 8:24 PM), https://the-journal.com/articles/1729 [https://perma.cc/HE72-9CH6] (describing how victims feared expulsion and threats, including having rocks thrown at cars and dead animals left on their porches).

[275] *See generally Bistline*, 918 F.3d at 854, 870. Plaintiffs in *Bistline* argued that "the FLDS Church in general, and Mr. Jeffs in particular, were the primary offenders who forced FLDS members to engage in labor and sexual acts" and that law partner Rodney Parker and his firm participated in a prohibited "venture" and thus benefitted financially from prohibited conduct. *See id.* at 871.

[276] *Id.* at 854.

[277] *See* discussion *supra* Parts I.B, I.C.

[278] *See generally* Motion to Dismiss and Memorandum in Support, *Bistline*, 918 F.3d 849 (No. 2:16-cv-00788).

[279] *Id.* at 15.

and involuntary servitude statutes were not intended to reach Jeffs' conduct.[280] The federal district court agreed, dismissing the plaintiff's TVPRA claims for failure to state a claim without further explanation.[281]

Then, on March 14, 2019, U.S. Circuit Judge Stephanie Seymour, writing on behalf of the three-judge panel in the Tenth Circuit, revived the TVPRA claims.[282] She adopted the plaintiff's broad definition of "labor" and "services."[283] Judge Seymour noted that, "[l]abor or services in § 1589 is not limited to work in an economic sense and extends to forced sexual acts" and that Jeffs' conduct, thus, may amount to forced labor.[284] She pointed to the fact that Jeffs "purported control over every aspect of their lives, which 'create[d] the ability to punish malcontents or recalcitrant followers with swift and horrendous punishments, including the loss of all shelter, food, medical care, cash, livelihood, and other essential support mechanisms necessary to an endurable daily existence.'"[285] The case, thus, is remarkable on two fronts — first, the broadened interpretations of "labor" and "services," and second, the application of the TVPRA to new third parties, such as lawyers, who "knowingly benefit[]" from trafficking conduct. The civil case was remanded and remains pending as of this writing.[286]

In *Gilbert v. United States Olympic Committee,* the federal district court in the District of Colorado also found that sexual abuse by a Taekwondo coach and his brother could amount to "labor" or "services" under the forced labor statute and "commercial sex acts" under the sex trafficking statute.[287] This case did not originate as a TVPRA claim.[288] Rather, it began as a civil complaint for negligence in the U.S. District of Colorado on April 25, 2018, filed by Heidi Gilbert against Taekwondo coach Jean

[280] *Id.* at 15-16 (stating that the involuntary servitude statutes "have been construed 'in a way consistent with the understanding of the Thirteenth Amendment,' which was enacted after the Civil War to abolish slavery"). Similarly, the defendants argued that the plaintiffs' allegations of forced labor are a "a far cry from either the requirements of or purpose" behind the statute, which was "passed to implement the Thirteenth Amendment against slavery or involuntary servitude." *Id.* at 16-17.

[281] *See Bistline*, 918 F.3d at 862.

[282] *See id.* at 876.

[283] *See id.* at 872 (first citing Ricchio v. McLean, 853 F.3d 553, 556 (1st Cir. 2017); and then citing United States v. Kaufman, 546 F.3d 1242, 1259-63 (10th Cir. 2008).

[284] *See id.* at 872-73.

[285] *Id.* at 871.

[286] *See* Docket, *Bistline*, 918 F.3d 849 (No. 2:16-cv-00788).

[287] *See* Gilbert v. United States Olympic Comm., No. 18-cv-00981, 2019 U.S. Dist. LEXIS 35921, at *25-27 (D. Colo. Mar. 6, 2019).

[288] *See* Complaint and Jury Demand, *Gilbert*, No. 18-cv-00981 (D. Colo. Mar. 6, 2019), ECF No. 1.

Lopez.[289] Then, on May 4, 2018, the plaintiff, along with three other named victims, filed an amended class action complaint, alleging violations of the TVPRA against Lopez, his brother, the United States Olympic Committee ("USOC") and USA Taekwondo, Inc. ("TKD"), among others.[290]

The plaintiffs argued that "over two decades of sexual abuse, exploitation, and trafficking of Team USA's Olympic Taekwondo athletes by the Olympic entities, officials, coaches, and mentors who were entrusted to protect them."[291] In particular, they alleged that the pattern of sexual abuse amounted to forced labor under 18 U.S.C. § 1589(a)(2) and "commercial sex acts" under 18 U.S.C. § 1591(a)(1).[292] Plaintiffs asserted that the USOC knowingly benefited from this conduct by engaging in a "feedback loop of sexual abuse, exploitation, and trafficking of young athletes, all so that the officials leading the USOC . . . can feed the U.S. Olympics machine, which runs on 'medals and money.'"[293]

The defendants filed a motion to dismiss, arguing that the TVPRA was not intended to reach such sexual abuse conduct.[294] On March 6, 2019, the district court denied the motion.[295] The court adopted the definition of "labor" or "services" from *Kaufman*, relying on the ordinary definition of "labor" or "services" and finding that it covered the defendants' conduct.[296] The civil case remains pending with the district court, as of this writing.[297]

Civil cases against Harvey Weinstein further raised a new, but closely related question: can a single act of sexual assault amount to sex

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289 *See Gilbert*, 2019 U.S. Dist. LEXIS 35921, at *3.

290 First Amended Class Action Complaint and Jury Demand, *Gilbert*, No. 18-cv-00981, ECF No. 6.

291 *Id.* at 5; *see also* Complaint, *supra* note 288 (filing a civil claim "relating to sexual assault, abuse, molestation, and nonconsensual sexual touching and harassment by her coach, Defendant Jean Lopez").

292 First Amended Class Action Complaint, *supra* note 290, at 72-113.

293 *Id.* at 8.

294 *See* Defendant United States Olympic Committee's Motion to Dismiss Plaintiffs' First Amended Class Action Complaint at 5, *Gilbert*, No. 18-cv-00981 (D. Colo. Mar. 6, 2019), ECF No. 58 (arguing that "[e]ven incendiary allegations such as '[t]he USOC [U.S. Olympic Committee] has long known of sexual assaults of female athletes at their training centers' are insufficient to allege any of the crimes at issue").

295 Gilbert v. United States Olympic Comm., No. 18-cv-00981, 2019 U.S. Dist. LEXIS 35921, at *3 (D. Colo. Mar. 6, 2019).

296 *See id.* at *28 ("In light of *Kaufman*, I conclude that the pay-to-play sexual acts alleged in the complaint are 'labor' or 'services' as those terms exist in the TVPA.").

297 *See* Docket, *Gilbert*, No. 18-cv-00981.

trafficking?[298] In 2017, famed movie producer, Harvey Weinstein, was accused of widespread sexual assault against prominent actresses and other individuals.[299] As public outrage grew about his conduct, victims sought justice through civil suits against Weinstein and his corporate backers.[300] Meanwhile, criminal prosecutors filed sexual assault charges against Weinstein, and he was subsequently convicted and sentenced to twenty-three years in prison.[301]

In a surprising legal twist in 2017, Kadian Noble joined other plaintiffs to file a civil complaint under the TVPRA in the Southern District of New York against Weinstein and his corporate backers.[302] The complaint argued that Weinstein "travelling in foreign commerce, recruited and enticed a young aspiring actress, . . . Kadian Noble, with the promise of a film role, . . . knowing that he would use means of force, fraud or coercion to cause her to engage in a sex act in his hotel room."[303] It further asserted that defendants, Bob Weinstein and The Weinstein Company LLC, "participated in this venture of Harvey Weinstein, knowing, or in reckless disregard of the facts, that he would use . . . force, fraud and/or coercion to engage aspiring young actresses in sexual activity."[304]

Never before had a court been asked to decide whether one act of sexual assault — wholly disconnected from a prostitution offense — amounted to sex trafficking. Judge Robert Sweet, the first to decide about the viability of the plaintiff's TVPRA arguments, remarked in pre-trial hearings that he was in "uncharted waters."[305] Weinstein's attorneys vociferously disagreed with the plaintiffs' assertions of trafficking. Counsel took note that Congress intended to "prevent

298 *See* Noble v. Weinstein, 335 F. Supp. 3d 504, 515 (S.D.N.Y. 2018).

299 *See supra* text accompanying note 1.

300 *See, e.g.*, Canosa v. Ziff, No. 1:18-cv-04115, 2019 U.S. Dist. LEXIS 13263 (S.D.N.Y. January 28, 2019); *Noble*, 335 F. Supp. 3d 504; Loman v. Weinstein, No. 2:18-cv-07310, 2018 U.S. Dist. WL 3981202 (C.D. Cal. Aug. 20, 2018); Doe v. Weinstein Co., No. 2:18-cv-03725, 2018 U.S. Dist. LEXIS 239588 (C.D. Cal. June 14, 2018).

301 *See* Jan Ransom, *Harvey Weinstein's Stunning Downfall: 23 Years in Prison*, N.Y. TIMES (Mar. 11, 2020), https://www.nytimes.com/2020/03/11/nyregion/harvey-weinstein-sentencing.html [https://perma.cc/TFK8-88EN].

302 *See, e.g.*, *Noble*, 335 F. Supp. 3d 504 (discussing Noble's complaint against Weinstein); *see also* Colin Dwyer, *Harvey Weinstein Sentenced to 23 Years in Prison for Rape and Sexual Abuse*, NPR (Mar. 11, 2020, 11:06 AM), https://www.npr.org/2020/03/11/814051801/harvey-weinstein-sentenced-to-23-years-in-prison [https://perma.cc/3DYW-8Z46].

303 Amended Complaint and Demand for Jury Trial at 1, *Noble*, 335 F. Supp. 3d 504 (No. 1:17-cv-09260).

304 *Id.*

305 *See* Maddaus, *supra* note 17.

slavery, involuntary servitude, and human trafficking for commercial gain" not "a single, gender-based sexual incident that was not connected to a sex trafficking scheme."[306]

In pleadings, Weinstein's attorneys argued that federal trafficking law should be interpreted only to proscribe economic or commercial activity, not gender-motivated activity.[307] Weinstein's attorneys pointed to *Morrison*, wherein the Supreme Court invalidated the VAWA civil remedy because Congress lacked the authority under the Commerce Clause.[308] They asserted that Congress, therefore, cannot regulate non-economic activity, including gender-based violence. For these and other reasons, Weinstein's attorneys argued that "commercial sex act" must be narrowly construed to be "economic in nature."[309]

Judge Sweet ultimately denied Harvey Weinstein's motion to dismiss, allowing the TVPRA claims to proceed. He rejected the defendant's arguments that federal trafficking violations should be limited to acts of "sex slavery" and forced prostitution.[310] In addition, the court adopted a broad interpretation of "commercial sex act."[311] To that end, the court opined that, "[t]he contention, therefore, that Noble was given nothing of value — that the expectation of a film role, of a modeling meeting, of 'his people' being 'in touch with her' had no value — does not reflect modern reality."[312]

The district court downplayed concerns that such a broad interpretation would result in application of the TVPA to consensual sex after "a free dinner and a movie."[313] In its rejection, however, Judge Sweet signaled a potentially sweeping acknowledgement of the

306 Defendant Robert Weinstein's Memorandum of Law in Support of his Motion to Dismiss Plaintiff's Amended Complaint at 3, *Noble*, 335 F. Supp. 3d 504 (No. 1:17-cv-09260).

307 *Id.* at 10.

308 *See id.*; *supra* text accompanying note 151.

309 *See* Defendant Weinstein's Memorandum of Law in Support of his Motion to Dismiss Plaintiff's Amended Complaint at 9, *Noble*, 335 F. Supp. 3d 504 (No. 1:17-cv-09260).

310 *See Noble*, 335 F. Supp. 3d at 514-15. Instead, he noted that Congressional intent should be broadly construed because "Congress noted that 'trafficking in persons is not limited to the sex industry,' and that 'traffickers lure women and girls into their networks through false promises of decent work conditions at relatively good pay as nannies, maids, dancers, factory workers, restaurant workers, sales clerks, or models.'" *Id.* at 514.

311 The court failed to limit the definition of "commercial" to mean only economic value. In particular, the court noted that "anything of value," "requir[ed] a liberal reading." *See id.* at 521.

312 *Id.*

313 *Id.* at 523.

application of federal trafficking law to domestic violence and sexual assault conduct. The court noted that, "notably absent from this hypothetical [about consensual sex] are necessary elements of force, fraud and commerce, all of which have been established here."[314] Given that most cases of interpersonal violence would have the requisite "force, fraud, or coercion," this *dicta* signaled an expansive application of the TVPA to such conduct.[315]

The implications of this ruling are uncertain. Weinstein's attorneys quickly moved to certify an interlocutory appeal, but Judge Alison Nathan denied the motion on August 5, 2019.[316] Regardless, the decision in *Noble* has already had an impact. Thus far, at least four federal courts have adopted Judge Sweet's analysis of the TVPRA in civil cases against Weinstein.[317] It has been cited positively in multiple jurisdictions in unrelated cases and encouraged new federal civil suits.[318]

For example, a little over two months after Judge Sweet's decision in *Noble*, victims of Bruce Weber, "the most powerful and influential fashion photographer in the male modeling industry," filed an anonymous civil complaint under the TVPRA.[319] As in *Noble,* Weber's attorneys filed a motion to dismiss, arguing that the sex trafficking statute "only covers 'real sex trafficking and modern-day sexual slavery.'"[320] On July 25, 2019, Judge George B. Daniels disagreed.[321] The court found in favor of the plaintiffs, allowing the TVPRA claims to proceed. In *dicta,* the court took note of the rise of TVPRA claims "since

[314] *See id.*

[315] *See id.*

[316] Opinion & Order at 1, *Noble*, 335 F. Supp. 3d 504 (No. 1:17-cv-09260), ECF No. 122 (finding that the defendant failed to demonstrate there was substantial ground for difference of opinion on how the Court resolved the question of law, specifically whether Weinstein's conduct amounted to a "commercial sex act" under the TVPA). If Weinstein settles all civil suits, he could deprive the Circuit Court of the opportunity to resolve this question or establish any definitive precedent. *See* Twohey & Kantor, *supra* note 32.

[317] *See* Canosa v. Ziff, No. 1:18-cv-04115, 2019 U.S. Dist. LEXIS 13263, at *40 (S.D.N.Y. Jan. 28, 2019); Geiss v. Weinstein Co., 383 F. Supp. 3d 156, 168 (S.D.N.Y. 2019); David v. Weinstein Co. LLC, 431 F. Supp. 3d 290, 299-300 (S.D.N.Y. 2019); Huett v. Weinstein, No. 2:18-cv-06012, 2018 WL 6314159, at *3 (C.D. Cal. Nov. 5, 2018).

[318] *See* United States v. Raniere, 384 F. Supp. 3d 282, 318 (E.D.N.Y. 2019).

[319] *See* Ardolf v. Weber, 332 F.R.D. 467, 471-72 (S.D.N.Y. 2019).

[320] *See Ardolf*, 332 F.R.D. at 473.

[321] *See id.* at 467.

the rise of the #MeToo movement" and the increasing judicial recognition that the TVPA applies to such sexual conduct.[322]

IV. IMPLICATIONS OF THE GENERATIVE TREND

A. New Remedies for Victims

> I think it is helpful to be able to . . . broaden the scope of your . . . thought process . . . and think about things out of the box. And, when you look at what . . . Weinstein was doing, . . . it was trafficking.[323]
>
> — Plaintiff's attorney

1. A New Federal Civil Remedy

This Part briefly considers the potential benefits and risks of efforts to invoke trafficking law to apply to sexual assault and domestic violence conduct.[324] The normative and strategic implications of this move, while still nascent, are significant. It is "a whole new world" for victims in a number of key respects.[325] The TVPRA may well provide certain victims with a new federal forum for civil suits — one with a relatively long statute of limitations and higher potential damage awards. [326] This means that victims, whose claims were time-barred or not otherwise recognized under existing civil remedies, may have a new venue for civil damages.[327] It also permits certain victims to target a

[322] *See id.* at 467, 473. In support of its findings, the court also heavily relied on the three district court decisions against Weinstein in civil TVPRA claims. *See id.* at 473-75 (citing Geiss v. Weinstein, 383 F. Supp. 3d 156, 167-68 (S.D.N.Y. 2019); Canosa v. Ziff, No. 1:18-cv-04115, 2019 WL 498865, at *23 (S.D.N.Y. Jan. 28, 2019); Noble v. Weinstein, 335 F. Supp. 3d 504, 515 (S.D.N.Y. 2018)).

[323] Zoom Interview with Stuart Mermelstein, Senior Attorney, Herman Law LLP (May 29, 2020).

[324] I look forward to examining these issues further in future work.

[325] MacKinnon, *Where #MeToo Came From*, *supra* note 7.

[326] *See, e.g.*, Zoom Interview with Ryan Hudson, Attorney, Sharp Law (May 21, 2020) (commenting that "statutes of limitations are reasons one through thirty [why to invoke the TVPRA] because you lose any state law claim in any state that hasn't extended in"); Rosemary Feitelberg, *Bruce Weber's Legal Team Fires Back at Model's Sexual Misconduct Claims*, WWD (Jan. 2, 2019), https://wwd.com/eye/people/bruce-webers-legal-team-fires-back-model-sexual-misconduct-claims-1202942927/ [https://perma.cc/S9YU-XUA2] (quoting Lisa Bloom, plaintiff's attorney, describing that in *Ardolf v. Weber*, "[w]e realized that this [the TVPRA] might open the courthouse door for many accusers whose claims were more than three years old and less than 10 years old").

[327] *See supra* Part I.D.

wider range of third parties who knowingly benefit from the conduct and potentially recover in new ways from insurers.[328] More broadly, the TVPRA gives these victims a new vocabulary for public discourse. Thus, the TVPRA gives new hope to certain victims, especially those who may come forward after existing statutes of limitations are exhausted, and provides greater optimism about potential civil recovery.

2. New Federal Criminal Responses

New judicial interpretations of federal trafficking law also have the potential to reverberate through the criminal legal system. By resolving ambiguities in existing federal case law, federal prosecutors may view new conduct as trafficking.[329] This has three important implications. The first is largely discursive. Prosecutors may come to see new sexual and domestic violence crimes as trafficking, instead of state crimes of assault and battery or sexual assault. Second, greater use of federal trafficking statutes may trigger the exercise of federal jurisdiction. Third, we may see new defendants subject to increased criminal penalties and mandatory minimum sentencing under trafficking statutes.[330]

In the criminal context, we see very early evidence of this shift. In 2019, federal prosecutors in the Eastern District of New York indicted Keith Raniere, an accused sex cult leader, with sex trafficking and forced labor charges.[331] Testimony at trial established that Raniere engaged in sexual abuse of women whom he induced to have sex him and other members of the cult by collecting damaging collateral. [332] In 2019,

[328] *See supra* Part I.D.

[329] *See* Zoom Interview with Larkin Walsh, Partner, Sharp Law (May 21, 2020) (describing how filing TVPRA cases can result in federal law enforcement or prosecutors taking greater interest in the case, and "however these clients can receive justice — whether it's through the civil system or the criminal justice system — is really good."). These interpretations also may trickle down quickly into state criminal courts, as each state now has a trafficking statute, many of which closely mirror their federal counterparts. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 485 (2019), https://reliefweb.int/sites/reliefweb.int/files/resources/2019-Trafficking-in-Persons-Report.pdf [https://perma.cc/3727-6552] ("All U.S. states and territories have anti-trafficking criminal statutes.").

[330] *See* 18 U.S.C. § 1591(b) (2018).

[331] Indictment ¶¶ 1, 3, 44, 46, United States v. Raniere, 384 F. Supp. 3d 282 (E.D.N.Y. 2019) (No. 1:18-cr-00204). Prosecutors also brought RICO charges, arguing that the defendant engaged in an enterprise to promote sexual abuse. *See* Complaint ¶¶ 12-14, 22, *Raniere*, 384 F. Supp. 3d 282 (No. 1:18-cr-00204).

[332] *See* Complaint *supra* note 331. This case attracted national attention, as it implicated well-known celebrities in the cult's practices of branding and torture. *See*

Raniere filed a motion to dismiss, arguing that the TVPA was never intended to apply to such conduct.[333] One of the primary questions before the district court was whether the TVPA transforms such sexual conduct into sex trafficking and forced labor.[334]

In response, the federal district court found the defendant's arguments unconvincing, citing to *Noble* and other civil TVPRA claims against Weinstein.[335] In particular, the court rejected the defendant's arguments that sex "in exchange for an increase in [] social status" was not "commercial."[336] The court noted that, "[c]ourts have consistently held that 'anything of value' encompasses more than simply monetary exchanges," looking to Judge Sweet's decision in *Noble*.[337] The court also rejected the limited construction of "labor" and "services" proffered by the defendant, citing to *Kaufman* and *Marcus*, to find that the government's theory was not overly expansive.[338] On June 19, 2019, the jury convicted Rainiere on both counts, and appeal is likely.[339]

Colin Moynihan, *Nxivm's Keith Raniere Convicted in Trial Exposing Sex Cult's Inner Workings*, N.Y. TIMES (June 19, 2018), https://www.nytimes.com/2019/06/19/nyregion/nxivm-trial-raniere.html [https://perma.cc/MZ66-RMUU].

333 Memorandum in Support of Defendant's Motion to Dismiss at 2-3, *Raniere*, 384 F. Supp. 3d 282 (No. 1:18-cr-00204).

334 *See, e.g.*, *Raniere*, 384 F. Supp. 3d at 312 (describing Raniere's argument that "the 'labor and services' that the Indictment alleges are not the kind of 'labor or services' that fall within the scope of § 1589"); *Id.* at 317 (responding to Raniere's argument that "the legislative history of § 1591 shows that its purpose is to regulate 'a class of activities that are economic in nature, more specifically, sexual exploitation for profit'").

335 *Id.* at 318. When denying his motion to dismiss, the district court relied on *Kaufman* and *Marcus* to support the finding that "labor" need not be "work in an economic sense" and may involve "physical *or mental* effort." *Id.* at 313.

336 *Raniere*, 384 F. Supp. 3d at 317-18.

337 *Id.* at 318. The Court cited to Judge Sweet's decision in the Weinstein case to show that "Congress's use of expansive language in defining commercial sex act — using such terms as 'any sex act,' anything of value,' given to or received by any person — requires a liberal reading." *Id.*

338 *Id.* at 313.

339 Jury Verdict at 3, *Raniere*, 384 F. Supp. 3d 282 (No. 1:18-cr-00204). After his conviction, eighty victims of Raniere filed an extensive federal civil complaint alleging violations of the TVPRA, RICO, and related state tort claims, and the civil case remains ongoing. Max Mitchell, *80 Victims of NXIVM Sex Slave Cult File Class Action Suit*, N.Y. L.J. (Jan. 29, 2020, 3:22 PM), https://www.law.com/newyorklawjournal/2020/01/29/80-victims-of-nxivm-sex-slave-cult-file-class-action-suit/ [https://perma.cc/R2PM-U2C7].

3. New Energy Aimed at Gender-Based Harms

Trafficking discourse can have powerful expressive value, reframing conduct to generate new public outrage and compel new action.[340] TVPRA claims can potentially shape public discourse, promote settlement, and foster positive outcomes for victims.[341] One plaintiff's attorney remarked how calling conduct trafficking, rather than sexual assault, often results in "a different connotation to it in the public eye."[342] Similarly, plaintiffs in TVPRA litigation against Weinstein have noted that generating media coverage was precisely their purpose.[343] Some plaintiffs in the Weinstein litigation commented that, "[o]ne thing is clear: to create a permanent change in the culture, we need to send a message to the powerful and wealthy individuals, companies and industries that feted their Harvey Weinsteins, instead of protecting the victims."[344] Thus, new labels of trafficking can create new, long-needed momentum and political will to address these persistent gender-based harms.

B. Risks of the "New World"

> [B]ad lawyering will inevitably lead to bad decisions, a paring back of remedies, and skepticism if not hostility from the courts to these claims.[345]
>
> — Plaintiff's attorney

Greater use of trafficking law to combat gender-based harms, however, simultaneously presents new challenges to the fields of trafficking and gender-based violence. New efforts to invoke trafficking in the domestic violence and sexual assault settings may raise new constitutional questions. As litigators rush to federal court to invoke

340 *See, e.g.*, Peters, *Trafficking in Meaning*, *supra* note 47, at 3 (arguing that ideas and interpretations of "trafficking" influence how the laws around trafficking are implemented); *see also supra* note 33 (discussing the expressive meaning of law).

341 *See, e.g.*, Zoom Interview with Steven Hurbis, Attorney, McKeen & Associates PC (May 29, 2020) (notes on file with author) (describing how "the more we could talk about this as something truly nefarious, the more people would actually pay attention" with the potential to prompt positive outcomes for victims).

342 Telephone Interview with Brian Kent, Attorney, Laffey, Bucci & Kent (June 8, 2020) (notes on file with author).

343 *See* Ashley Cullins, *The Weinstein Co. Hit with Class Action Suit from Six Women*, HOLLYWOOD REPORTER (Dec. 6, 2017), https://www.hollywoodreporter.com/thr-esq/weinstein-hit-class-action-suit-six-women-1064875 [https://perma.cc/SZT6-GU6Q].

344 *Id.*

345 E-mail from David Frank, Civil Rights Attorney, Neighborhood Christian Legal Clinic, to author (May 22, 2020) (notes on filed with author).

trafficking law, there also is potential to make bad law, expand the federal statutory framework too far, and stretch the meaning of trafficking in new and undesirable ways. Unlike efforts to define sexual harassment many decades ago, this trend has the potential to displace existing, tailored responses to gender-based violence. Also, in certain cases, it can give rise to disproportionately harsh criminal penalties — precisely at a moment when scholars and activists have called for criminal legal reform.[346] Thus, while trafficking law can generate solutions, it may also create new risks for victims and the field of trafficking itself.

1. Constitutional Questions

Expansive judicial interpretation of the TVPRA will likely raise new constitutional questions. As judges interpret federal trafficking law to apply to non-economic harms, defendants are likely to bring new constitutional challenges, seeking to invalidate the TVPRA civil remedy — in part or altogether.[347] In *Morrison*, the U.S. Supreme Court struck down the VAWA civil remedy, which provided a federal cause of action aimed at gender-motivated crime because it violated the Commerce Clause.[348] The Court found that "gender-motivated crimes of violence are not, in any sense, economic activity."[349] In particular, the Court sought to truly distinguish between "what is truly national and what is truly local," finding that "there is no better example of the police power, which the Founders undeniably left reposed in the States and denied the central government, than the suppression of violent crime and vindication of its victims."[350]

[346] *See, e.g.*, Leigh Goodmark, Opinion, *Stop Treating Domestic Violence Differently from Other Crimes*, N.Y. TIMES (July 23, 2019), https://www.nytimes.com/2019/07/23/opinion/domestic-violence-criminal-justice-reform-too.html [https://perma.cc/TF72-99KJ] (arguing that criminal responses to domestic violence "isn't preventing intimate partner violence" and "might be making it worse").

[347] *See, e.g.*, Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57, 110-16 (2002) (describing Commerce Clause jurisprudence and application in the VAWA context).

[348] United States v. Morrison, 529 U.S. 598, 627 (2000).

[349] *Id.* at 613. While the plaintiff and amici made "numerous findings regarding the serious impact that gender-motivated violence has on victims and their families," the Court ultimately rejected the "but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce" because the Court found that this "reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact . . . has substantial effects on employment, production, transit, or consumption." *Id.* at 614-15.

[350] *Id.* at 617-18.

As the TVPRA civil remedy expands more clearly to cover conduct traditionally considered local crimes, such as domestic violence and sexual assault, defendants will argue that it extends beyond Congressional authority under the Commerce Clause. These arguments have already been raised. Counsel for Weinstein, in *Noble*, pointed to *Morrison* in federal pleadings, arguing that applying the TVPRA to gender-based crimes, such as a single act of sexual assault violated the Commerce Clause.[351] As such arguments are heard on appeal, there is a risk that an appellate court or the Supreme Court could further limit the TVPRA civil remedy. Such a decision has the potential to eviscerate federal civil liability, in whole or in part — a move that could have lasting implications for a wide range of trafficking victims.

2. Discursive Dangers

The discourse of trafficking also brings challenges. It may compel action, but it also risks losing important expressive nuances. Tarana Burke, who first introduced "Me Too" to show solidarity with victims of sexual assault and harassment, when asked about bringing too many harms under one umbrella, noted that, "[Y]ou can't cover so much, and so many things. And sexual violence is wide enough."[352] Implicit in her words were concerns about the utility of distinctions amongst such diverse legal categories, and the need for discrete, tailored responses — both in discourse and in hard law.

The language of "trafficking" also can present challenges in the courtroom. While litigation efforts have been largely successful at the initial pleading stages, litigators may find it harder to convince judges and juries that new, broader conduct is trafficking at trial.[353] Also,

[351] *See supra* note 306; *see also* Defendant Robert Weinstein's Memorandum of Law in Support of his Motion to Dismiss Plaintiff's Amended Complaint at 10, Noble v. Weinstein, 335 F. Supp. 3d 504 (No. 1:17-cv-09260); Eriq Gardner, *Harvey Weinstein Wants Appeals Court to Define a "Commercial Sex Act,"* HOLLYWOOD REPORTER (Aug. 28, 2018), https://www.hollywoodreporter.com/thr-esq/harvey-weinstein-wants-appeals-court-define-a-commercial-sex-act-1137996 [https://perma.cc/E278-RXJS] (quoting Weinstein's attorneys as writing that, "[w]ithout a true economic component required, every alleged forcible sexual assault in which the victim complies with the assault in order to preserve her safety, for example, would give rise to a claim covered by the Trafficking Statute" and "that is not what the Trafficking Statute is intended to cover and, if it were, it would not withstand constitutional scrutiny").

[352] Megan Garber, *Is #MeToo Too Big?*, ATLANTIC (July 4, 2019), https://www.theatlantic.com/entertainment/archive/2018/07/is-metoo-too-big/564275/ [https://perma.cc/P2S3-W62Y].

[353] *See* Telephone Interview with Arick Fudali, Managing Attorney, The Bloom Firm (June 11, 2020) (notes on file with author) (describing how more complex TVPRA cases

trafficking law erects new evidentiary barriers, and the plaintiff must show, for example, that the sex act was "commercial" or that the defendant "entice[d]" the victim. These additional requirements may make trafficking claims still quite challenging to prove at trial.

3. Untailored Solutions

Moreover, trafficking law, as it evolves to apply to a broader variety of victims, may lose its ability to respond in a tailored, nuanced manner. Scholars have acknowledged the need for tailored responses to discrete gender-based crimes, noting the unique, individualized needs of victims of gender-based crimes.[354] There may be truly egregious cases, such as that of Harvey Weinstein or Warren Jeffs. However, as new, less stark cases fall within the scope of the trafficking statute, new questions will arise about whether the term "trafficking" — with its associated invocation of federal jurisdiction, mandatory sentencing, and expansive civil damages — is appropriate.[355]

Questions will arise. For example, if an abusive spouse tells his partner to fold the laundry, should this warrant the invocation of federal jurisdiction and mandatory minimum sentences? In contrast, states have evolved robust responses to state-level crimes, including child abuse, domestic violence, and sexual assault.[356] While these concepts are imperfect, they offer sites to create tailored responses. State responses also allow localities to create contextual, collaborative approaches, such as "multi-disciplinary teams," to engage with victims and understand their varied needs.[357] Moreover, they allow for criminal

may require that you "sort of recondition" the jury about the meaning of sex trafficking).

[354] *See* Chuang, *Exploitation Creep*, *supra* note 22, at 611 (explaining that "exploitation creep" allows anti-trafficking measures to be used in contexts not traditionally thought to be trafficking).

[355] *See, e.g.*, Zoom Interview with Maurice Sercarz, Attorney, Sercarz & Riopelle, LLP (June 1, 2020) (notes on file with author) ("You're just going further and further afield from the core elements of the crime, as they were meant to be applied in a criminal case, and you're undermining the justification for having federal prosecutors intrude into what is ordinarily a state court offense.").

[356] *See, e.g.*, MEGAN CLARKE, LISI MARTINEZ LOTZ & CAROLINA ALZURU, N.C. COAL. AGAINST DOMESTIC VIOLENCE, ENHANCING LOCAL COLLABORATION IN THE CRIMINAL JUSTICE RESPONSE TO DOMESTIC VIOLENCE AND SEXUAL ASSAULT: A CCR/SART DEVELOPMENT TOOLKIT (2013), http://nccasa.org/wp-content/uploads/2020/01/ERS-CCR-SART-Toolkit.pdf [https://perma.cc/2N5N-544N] (describing the importance of Coordinated Community Response Teams and Sexual Assault Response Teams and how they can meet the unique needs of victims within a community-based response).

[357] *See, e.g.*, DAVID E. GRUENENFELDER, JANICE R. HILL-JORDAN & PETER C. WEITZEL, INST. FOR LEGAL, LEGIS. & POL'Y STUD., MULTISITE EVALUATION OF THE MULTIDISCIPLINARY

sentencing that may allow, at least in theory, for a more nuanced balancing of factors.[358]

4. Dilution and Backlash

As trafficking law recognizes broader harms, these efforts — while beneficial to some victims — have the potential to dilute the energy, resources, and momentum to combat the core conduct that Congress sought to address. Congress passed the TVPA in 2000 with an eye to address "sex trade, slavery, and slavery-like conditions."[359] Broadening the scope of the trafficking beyond this sphere increases the law's potential to protect and prosecute in some cases, but it also may complexify or slow other efforts aimed at trafficking.[360]

Moreover, stretching the TVPRA too far can prompt a backlash by judges or legislators.[361] As one plaintiff's attorney warned, "[this] is going to lead to it being changed in some way, shape, or form. And that's probably not good for anyone."[362]As more courts are asked to decide cases, especially at the appellate level, judges may limit the TVPRA civil remedy.[363] Courts have confronted this precise question in the context

TEAM (MDT) APPROACH TO VIOLENCE AGAINST WOMEN IN ILLINOIS 153-177 (July 2013), http://www.icjia.state.il.us/assets/pdf/researchreports/mdt_report_july_2013.pdf [https://perma.cc/ZK32-N4NC] (describing findings about the impact of multidisciplinary approaches violence).

358 While these models are criticized as insufficient and needing of reform, they remain anchored in local communities and more equipped to respond to the conduct as it occurs.

359 TVPA, *supra* note 3, § 102(a)-(b).

360 Maurice Sercarz, the defense attorney in *Marcus*, noted that as you move "further and further afield from the core elements of the crime," there becomes "a real question about whether or not this results in the deployment of prosecutorial resources that's far different from the one that was intended when they drafted the legislation." Zoom Interview with Maurice Sercarz, Attorney, Sercarz & Riopelle, LLP (June 1, 2020) (notes on file with author).

361 Zoom Interview with Brett Godfrey, Attorney, Godfrey Johnson PC (June 1, 2020) (notes on file with author) ("I think it's a positive trend, but it's going to create a backlash. You know, when Civil RICO got real popular there, it was just like it woke up out of a deep slumber . . . . But since then it's gotten much, much, much tougher to make a Civil RICO claim stick."); *see also* E-mail from David Frank, Civil Rights Attorney, Neighborhood Christian Legal Clinic, to author (May 22, 2020) (on file with author) ("There will inevitably by a heavy and coordinated reaction against the TVPRA by courts, corporations, and cops of all stripes, and its most powerful aspects stripped out.").

362 Zoom Interview with Steven Hurbis, Attorney, McKeen & Associates PC (May 29, 2020) (notes on file with author).

363 *See, e.g.*, Zoom Interview with Jonathan Little, Attorney, Saeed & Little LLP (May 21, 2020) (notes on file with author) ("[I]t's going to go up on appeal, and . . . we're

of child abuse and the TVPA.[364] The Sixth Circuit, in *United States v. Toviave*, for example, found that, "[c]hild abuse is a state crime, but not a federal crime."[365] In particular, the court noted that "[o]nly by bootstrapping can this combination of two actions that are not federal crimes — child abuse and requiring children to do household chores — be read as a federal crime."[366] Thus, especially as more plaintiffs are inspired to file civil suits, courts may respond by limiting or changing the TVPRA civil remedy in some form.

C. Blueprint for Reform

As efforts to file new trafficking civil claims gain steam, one thing is certain. Civil efforts to invoke trafficking unearth a number of gaps within existing legal responses to domestic violence and sexual assault. As such, they provide us with an opportunity to remedy them.

Statute of Limitations. Civil litigators invoke the TVPRA, in part, because statutes of limitations are short. Legislators, thus, should consider extending existing statutes of limitations under state and federal civil statutes. State legislatures have already begun to do so.[367] In February 2019, New York Governor Andrew Cuomo signed into law the Child Victims Act, loosening the tight statute of limitations for state sexual assault cases, and providing victims with a one-year window in which to file previously time-barred civil claims.[368] This legislation has already had a tremendous impact. When it went into effect in August 2019, hundreds of child abuse victims filed civil suits against a range of

going to start getting a lot of bad appellate decisions."); Zoom Interview with Stuart Mermelstein, Senior Attorney, Herman Law LLP (May 29, 2020) (notes on file with author) (explaining that "you're always concerned" that the effort done "success[fully] at the district court level" will get reversed on appeal).

364 *See generally* United States v. Toviave, 761 F.3d 623 (6th Cir. 2014).

365 *Id.* at 623. The court held that while "[f]orced labor is a federal crime . . . the statute obviously does not extend to requiring one's children to do their homework, babysit on occasion, and do household chores." *Id.*

366 *Id.* In other contexts, the Supreme Court, when asked to decide the constitutionality of a potentially expansive statute, has interpreted the law narrowly to avoid unintended consequences. *See* Bond v. United States, 572 U.S. 844, 859 (2014) (narrowing the construction of the Chemical Weapons Convention Implementation Act of 1998 to avoid deciding constitutionality of statute under the Commerce Clause). Thank you to Jack Beermann and Gary Lawson for bringing this case to my attention.

367 *See, e.g.*, Associated Press, *NY Gives Sex Abuse Victims More Time to Sue, Press Charges*, U.S. NEWS & WORLD REP. (Feb. 14, 2019), https://www.usnews.com/news/best-states/new-york/articles/2019-02-14/ny-gov-cuomo-expected-to-sign-child-victims-act-into-law [https://perma.cc/7BG5-DCDB] (discussing a new law in New York that extends the statute of limitations for childhood sex abuse victims).

368 Child Victims Act, N.Y. C.P.L.R. § 214-g (2019).

defendants, including Jeffrey Epstein, the Catholic Church, the Boy Scouts, and various other institutions.[369] Eight states had new laws going into effect in 2020 to eliminate or modify the state statute of limitations in existing child sexual abuse, including Florida, Indiana, Nebraska, New Hampshire, New York, Utah, Virginia, and West Virginia.[370] Continuing statutes of limitations reform is essential and must address a broad range of victims — including both children and adults.

Third Party Liability. The move to invoke the TVPRA also highlights continued deficiencies in tort liability for victims in state and federal claims against third parties. It brings attention to the challenges in recovering from third parties and uneven outcomes in existing civil tort remedies, especially in state courts. The TVPRA allows plaintiffs to file claims against third parties who knowingly benefit from a "venture."[371] This standard, thus far, has been easier to meet and leads to more predictable outcomes for victims. It also provides an important legal vehicle against institutions that participate in or benefit from cultures of abuse. Thus, legislators should look to the TVPRA as they envision new approaches to third party liability for victims of sexual assault and domestic violence.

Insurance Coverage of Gender-based Harms. Scholars also have long critiqued existing insurance exclusions that deny coverage for intentional torts, including many domestic violence and sexual assault cases. The fact that the TVPRA may provide a basis for recovery from insurance carriers is significant. If sustained, the TVPRA can provide greater avenues for damages and strengthen calls to reevaluate existing insurance exclusions for intentional torts.[372]

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[369] *E.g.*, *Child Victims Act: Hundreds File Suits as New York Extends Statute of Limitations on Sex Abuse Cases*, DEMOCRACY NOW (Aug. 15, 2019), https://www.democracynow.org/2019/8/15/new_york_child_victims_act [https://perma.cc/9CC2-HQ6B].

[370] *See, e.g.*, THE SEAN MCILMAIL STATUTE OF LIMITATIONS RESEARCH INST. AT CHILDUSA, OVERVIEW OF NATIONAL STATUTES OF LIMITATION (SOLS) FOR CHILD SEX ABUSE: 2020 SOL REFORM LEGISLATION AND BEST CURRENT CIVIL AND CRIMINAL SOLS 3 (2020), https://childusa.org/wp-content/uploads/2020/05/8.21-2020-SOL-Summary.pdf [https://perma.cc/8PM7-3C5D] (providing summaries of the eight state statutes that went into effect in 2020 to eliminate or modify the statutes of limitations on state child sexual abuse crimes). Meanwhile, thirty states considered new bills regarding statutes of limitations reform for child sexual abuse crimes in 2020. *See id.* at 7-15.

[371] *See supra* Part I.D.

[372] *See, e.g.*, Christopher C. French, *Debunking the Myth that Insurance Coverage Is Not Available or Allowed for Intentional Torts or Damages*, 8 HASTINGS BUS. L.J. 65, 93-95 (2012) (describing the public policy reasons supporting the extension of insurance coverage for intentional torts).

CONCLUSION

Trafficking, as a legal concept, was established to fill a void that had allowed for impunity and insufficient protections for victims of "sexual slavery" and labor trafficking. The TVPA and subsequent reauthorizations sought to fill these gaps and erect a meaningful criminal and civil infrastructure to address these harms. Judges now have begun to carve out new federal jurisdiction over certain gender-based crimes. It is indeed a "new world," but it too is an uncertain one. Victims may yet benefit from this shift, but it is not without risks. Still, the trend, by showcasing deficiencies in existing criminal and legal responses, offers an important roadmap to understand existing deficiencies in state and local responses to gender-based violence. As such, it also provides us with an opportunity to remedy them.