ARTICLES

The Hidden "Benefits" of the Trafficking Victims Protection Act's Expanded Provisions for Temporary Foreign Workers

Briana Beltran†

Temporary foreign workers enter the United States each year by the hundreds of thousands, coming to harvest this country's produce, clean hotel rooms, and care for families. Generally laboring out of the public eye, it is not uncommon for such workers to take on significant debt just to get here. Once in the United States, they are often severely underpaid, housed in unsafe conditions, and threatened with deportation if they complain about their work conditions. The very terms of their visas allow this: employers petition the U.S. government to import temporary foreign workers to fill labor needs, and the workers are only permitted to work for the employers who filed these petitions. With such an imbalance of power, it should be no surprise that these legal systems for bringing in foreign workers often turn into illegal situations of labor trafficking.

Since 2003, exploited temporary foreign workers have had a powerful remedy available to them: filing a civil lawsuit against their employers for violations of U.S. trafficking laws. Originally passed in 2000 as a set of criminal provisions to target "trafficking in persons," including the newly-created crime of "forced labor," the Trafficking Victims Protection Act ("TVPA") was amended three years later to include a private right of action. This remedy has been particularly effective for temporary foreign workers and their advocates,

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†. Lecturer, Farmworker Legal Assistance Clinic, Cornell Law School (J.D., New York University School of Law; B.A., Stanford University). A number of individuals provided helpful comments and posed thought-provoking questions on earlier drafts of this article. I would like to thank Zohra Ahmed, Amal Bouhabib, Bridgette Carr, Julie Dahlstrom, Joey Gates, Sujata Gibson, Rachel Goldberg, Kate Griffith, Amelia Hritz, Stacie Jonas, Jaclyn Kelley-Widmer, and Cortelyou Kenney for their insights, feedback, and support. Thank you also to the editors of the *Berkeley Journal of Employment and Labor Law* for their thoughtful comments, precision, and hard work during the process of editing this article.

who have increasingly brought forced labor and other claims under the TVPA against employers. Five years later, the TVPA was further amended to allow for claims against anyone who has knowingly benefitted—financially or by receiving anything of value—from forced labor if that person participated in a "venture" that engaged in forced labor and the person knew or was in reckless disregard of that fact. Though they have been in place since 2008, these "financially benefits" provisions have received little scholarly attention and, until recently, have appeared in very few court decisions.

In this article, I highlight the ways in which U.S. trafficking laws are a useful remedy for temporary foreign workers, focusing on the "financially benefits" provisions. I present the first detailed overview of these provisions, surveying the minimal—and very recent—caselaw discussing them, taking care to focus on three definitional areas of interest: what is a "venture," what counts as "financial benefits," and what facts satisfy the knowledge requirement. My analysis indicates that the provisions have been applied very broadly to date, providing an optimistic landscape for these claims in the temporary foreign worker context. With this in mind, I argue that "financially benefits" claims are an especially powerful tool to target the wider range of actors who facilitate the exploitation of temporary foreign workers in the United States.

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I. INTRODUCTION

The word "trafficking" often evokes images of women or children forced into the sex trade.[1] This popular conception, however, overlooks a significant population of trafficking victims: victims of labor trafficking. Indeed, in the United States, the same legal framework—the Trafficking Victims Protection Act ("TVPA")—that allows for prosecution of sex traffickers also criminalizes labor trafficking.[2] Even more notably, three years after the TVPA was first passed, Congress introduced amendments that allow victims of *all* forms of trafficking to directly hold their traffickers accountable via a civil lawsuit in federal court.[3] The ability to bring civil claims in the labor trafficking context has been a useful vehicle for advocates who represent temporary foreign workers (often referred to as "guestworkers") who are victims of such practices.

The problems with temporary foreign worker programs in the United States have been well-documented by both advocacy groups[4] and scholar-

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1. As I elaborate further below, this is true in public imagination, among scholars, and even for legislators who passed the laws discussed in this article. *See infra* notes 72–76, 94, and 104 and accompanying text.

2. Technically speaking, the TVPA defines both sex trafficking and labor trafficking as a "severe form of trafficking in persons," and then separately institutes criminal provisions that target both "sex trafficking" and "forced labor." *See* Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 103(8), 114 Stat. 1464, 1470 (2000) [hereinafter "TVPA"] (defining "severe forms of trafficking in persons" as either "sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age" or "the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery"); TVPA § 112 (a)(2) (adding provisions to the U.S. Code that criminalize "sex trafficking of children or by force, fraud or coercion," codified at 18 U.S.C. § 1591, and "forced labor," codified at 18 U.S.C. § 1589). The term "severe form of trafficking in persons" has relevance to reporting and victim assistance provided pursuant to the TVPA, *see infra* notes 68–71 and accompanying text, while the criminal provisions provide the bases for prosecution of traffickers and, later, civil claims brought by victims, *see infra* notes 93, 120, and 123 and accompanying text. Throughout the article, I use "forced labor" when I refer to claims brought under that particular provision of the TVPA, 18 U.S.C. § 1589. To the extent I refer to "labor trafficking" more generally, I intend to evoke the idea of victims of trafficking that is labor-based in nature, as opposed to sex trafficking.

3. *See infra* note 93 and accompanying text. This original version of the private right of action was limited by its cross-reference to only three criminal provisions of the TVPA, *see id.*, and was later amended to cover any provision in Chapter 77 of Title 18 of the U.S. Code, *see infra* note 120.

4. *See, e.g.*, AM. UNIV. WASH. COLL. OF LAW INT'L HUMAN RIGHTS LAW CLINIC, CENTRO DE LOS DERECHOS DEL MIGRANTE, INT'L LABOR RECRUITMENT WORKING GROUP & NAT'L DOMESTIC WORKERS ALLIANCE, SHORTCHANGED: THE BIG BUSINESS BEHIND THE LOW WAGE J-1 AU PAIR PROGRAM (2018), https://cdmigrante.org/wp-content/uploads/2018/08/Shortchanged.pdf [https://perma.cc/265X-NEYL] [hereinafter SHORTCHANGED] (discussing au pairs on J-1 visas); MEREDITH B. STEWART, S. POVERTY LAW CTR., CULTURE SHOCK: THE EXPLOITATION OF J-1 CULTURAL EXCHANGE WORKERS (2014), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/j-1_report_v2_web.pdf [https://perma.cc/4PFX-AFZB] (discussing J-1 workers largely in the hospitality industry); MARY BAUER, S. POVERTY LAW CTR., CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES (2013), https://www.

practitioners.[5] The abuse of such workers tends to emerge from the toxic combination of two things. First, these programs operate in a U.S. employment-based immigration system that prohibits workers, including temporary "unskilled" low-wage workers, from working for an employer other than the one that requested their labor.[6] At the same time, many workers who enter on these visas come from impoverished backgrounds, take on debt to pay both lawful and unlawful expenses they incur before entering the United States, and are often subject to extreme isolation and unsafe conditions in their places of employment once here.[7] When the lack of visa transferability and the worker's pre-existing vulnerability combine and then collide with coercive mistreatment, such exploitation can fall within the definition of labor trafficking under U.S. law.[8] As such, the remedies provided by TVPA should be considered fertile territory for addressing the harms perpetuated by these programs. While practitioners have applauded the TVPA for its utility in the temporary foreign worker context,[9] this

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splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf [https://perma.cc/PYL9-BPW6] (discussing H-2A and H-2B programs); AM. UNIV. WASH. COLL. OF LAW IMMIGRANT JUSTICE CLINIC & CENTRO DE LOS DERECHOS DEL MIGRANTE, TAKEN FOR A RIDE: MIGRANT WORKERS IN THE U.S. FAIR AND CARNIVAL INDUSTRY (Feb. 2013), https://cdmigrante.org/wp-content/uploads/2018/02/
Taken_Ride.pdf [https://perma.cc/NF2H-EJ2M] [hereinafter TAKEN FOR A RIDE] (discussing H-2B workers in the fair and carnival industries); AM. UNIV. WASH. COLL. OF LAW INT'L HUMAN RIGHTS LAW CLINIC & CENTRO DE LOS DERECHOS DEL MIGRANTE, PICKED APART: THE HIDDEN STRUGGLES OF MIGRANT WORKER WOMEN IN THE MARYLAND CRAB INDUSTRY (2012), https://cdmigrante.org/wp-content/uploads/2018/02/
PickedApart.pdf [https://perma.cc/DCL7-PMCN] [hereinafter PICKED APART] (discussing H-2B workers in Maryland crab industry); ETAN NEWMAN, FARMWORKER JUSTICE, NO WAY TO TREAT A GUEST: WHY THE H-2A AGRICULTURAL VISA PROGRAM FAILS U.S. AND FOREIGN WORKERS (2011), https://www.farmworkerjustice.org/sites/default/files/
documents/7.2.a.6%20No%20Way%20To%20Treat%20A%20Guest%20H-2A%20Report.pdf [https://perma.cc/ZJ9Y-ZF8W] (discussing H-2A program).

5. *See, e.g.*, Briana Beltran, *134,368 Unnamed Workers: Client-Centered Representation on Behalf of H-2A Agricultural Guestworkers*, 42 N.Y.U. REV. L. & SOC. CHANGE 529 (2019); Annie Smith, *Imposing Injustice: The Prospect of Mandatory Arbitration for Guestworkers*, 40 N.Y.U. REV. L. & SOC. CHANGE 375 (2016); Janie A. Chuang, *The U.S. Au Pair Program: Labor Exploitation and the Myth of Cultural Exchange*, 36 HARV. J.L. & GENDER 269 (2013); Jennifer J. Lee, *Private Civil Remedies: A Viable Tool for Guest Worker Empowerment*, 46 LOY. L.A. L. REV. 31 (2012); Kit Johnson, *The Wonderful World of Disney Visas*, 63 FLA. L. REV. 915 (2011); Mary Lee Hall, *Defending the Rights of H-2A Farmworkers*, 27 N.C. J. INT'L L. & COM. REG. 521 (2002); Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575 (2001).

6. *See infra* note 33 and accompanying text.

7. *See infra* notes 47–61 and accompanying text.

8. *See infra* notes 230–43 and accompanying text. Importantly, temporary foreign workers are not the only kind of workers who may be the victims of labor trafficking; rather, as I highlight later, the particularly noteworthy aspect of labor trafficking in temporary foreign worker programs is that these programs are *legal* programs, providing *legal* work, and it is precisely this *legal framework* that often facilitates the trafficking itself. *See infra* note 229.

9. *See, e.g.*, Spring Miller & Stacie Jonas, *Using Anti-trafficking Laws to Advance Workers' Rights*, 2015 CLEARINGHOUSE REV. 1 (May 2015), (providing guidance from practitioners to practitioners about litigating trafficking claims with low-wage worker clients); Lee, *supra* note 5, at 50–56 (discussing various claims that can be brought by temporary foreign workers, including those under the TVPA).

positive aspect of U.S. trafficking law has often been overlooked by scholars[10] and even the legislators who enacted and amended the TVPA.[11]

Despite this lack of attention to labor trafficking, further amendments to the trafficking laws have continued to prove the TVPA's utility when it comes to temporary foreign worker programs. In 2008, Congress added provisions to the TVPA that allow for civil claims against defendants who have not just perpetrated forced labor itself, but also against those who have benefitted from forced labor.[12] In the decade-plus since then, however, these provisions—which, for ease of reference, I term the "financially benefits" provisions—have flown under the radar. There are very few court decisions addressing these provisions, and most early cases failed to provide useful substantive analysis.[13] That has slowly started to change: a pair of decisions in 2017 and a handful from 2019 have begun to shine a light on what the "financially benefits" provisions mean and what civil claimants should think about when considering bringing them.[14]

This article presents the first in-depth analysis of the "financially benefits" provisions, with an emphasis on the way in which such claims can be particularly useful in the temporary foreign worker context. I argue that these provisions provide a crucial vehicle to target the various actors who perpetuate abuses in temporary foreign worker programs. By bringing such claims, advocates can move beyond the narrative that certain employers are merely bad apples who engage in unlawful conduct and instead bring attention to the fact that these programs themselves are rotten to the core.

I begin, in Part II, by providing an overview of temporary foreign worker programs in the United States. In particular, I describe the visas these programs provide and the industries that use them. I also explain how multiple systematic factors feed into exploitation of these workers and how the abuses are often carried out by an inter-linked web of actors. In Part III, I provide an overview of the TVPA. First, I summarize the key features of the legislative framework, focusing on the TVPA's original passage in 2000 and subsequent amendments,

10. Most literature regarding trafficking and temporary foreign worker programs tends to be focused more on theory or larger-scale critiques of the regimes rather than the practicalities of addressing existing abuses, including via litigation. *See, e.g.*, Jennifer Gordon, *Regulating the Human Supply Chain*, 102 IOWA L. REV. 445 (2017) (proposing alternative methods of conceptualizing and regulating recruitment of temporary foreign workers); Britta S. Loftus, *Coordinating U.S. Law on Immigration and Human Trafficking: Lifting the Lamp to Victims*, 43 COLUM. HUM. RTS. L. REV. 143 (2011) (arguing for better coordination of U.S. immigration laws and trafficking laws in order to better serve trafficking victims); Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977 (2006) (critiquing the TVPA as unable to meet substantive goals of preventing trafficking due to the underlying failure of domestic immigration policy in the United States).

11. *See infra* notes 75, 94, and 104 and accompanying text.

12. *See infra* notes 122–26 and accompanying text. Notably, an equivalent provision had already existed in the TVPA's sex trafficking provision, having been enacted as part of the original law in 2000. *See infra* note 122 and accompanying text.

13. *See infra* notes 128–32 and accompanying text.

14. *See infra* section III(B).

including the addition of a private right of action and the "financially benefits" provisions. I then give a thorough overview of the key decisions regarding the "financially benefits" provisions. In Part IV, I connect these two threads, elaborating on the intersection of labor trafficking laws and temporary foreign worker programs. I first highlight the utility of TVPA claims in the temporary foreign worker context and illustrate some important trends in labor trafficking litigation generally. Finally, I zero in on the "financially benefits" provisions, providing takeaways from the caselaw and considering their big-picture benefits in the temporary foreign worker context.

II. TEMPORARY FOREIGN WORKER PROGRAMS

Temporary foreign workers are pervasive but often invisible in the United States. Many of them labor in sectors that are easy to ignore: harvesting produce in agricultural fields away from city centers[15] or doing domestic work in the homes of private individuals.[16] Many are not in the United States with an explicit acknowledgement that the purpose of their presence here is to work—being "trained" in the hospitality industry under the guise of a cultural exchange experience, for example.[17] Regardless of the differing specifics, there is much about the workers' situations that unites them, and some advocates have made explicit efforts to show these links.[18] Below, I provide an overview of temporary foreign worker programs and then discuss the systemic factors and range of actors that contribute to the exploitation of workers.

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15. *See, e.g.*, Smith, *supra* note 5, at 389 (describing how H-2A agricultural workers "commonly live at remote employer-owned housing," "may be many miles from their nearest neighbors and not know the name of their road or the town where they live," and often lack any independent means of transportation); *see also* Shelley Cavalieri, *The Eyes that Blind Us: The Overlooked Phenomenon of Trafficking into the Agricultural Sector*, 501 N. ILL. U. L. REV. 501, 514 (2011) ("[A]gricultural workers, whether trafficked or not, remain largely out of public sight.").

16. *See, e.g.*, Chuang, *supra* note 5, at 336 (describing isolation of au pairs on J-1 visas who "must rely on their employers for basic subsistence needs" and must limit their "mobility and exposure to the outside world [based] on employer work demands").

17. *See, e.g.*, STEWART, *supra* note 4, at 5 (summarizing "hundreds of interviews with J-1 Summer Work Travel participants and interns and trainees working across the South, primarily in the hospitality industry," and concluding that "these J-1 programs . . . have become little more than a source of cheap labor for employers").

18. *See generally* ASHWINI SUKTHANKAR, GLOBAL WORKERS JUSTICE ALLIANCE, VISAS, INC.: CORPORATE CONTROL AND POLICY INCOHERENCE IN THE U.S. TEMPORARY FOREIGN LABOR SYSTEM (2012), http://justiceinmotion.org/s/VisasInc_FINAL.pdf [https://perma.cc/9H9R-FFWV] (analyzing temporary visas and arguing they should be considered together, whether or not they are explicitly marketed as work visas, because of common features such as employer flexibility, lack of governmental oversight, and the dependence of workers' immigration status on specific employers). Global Workers Justice Alliance is now known as Justice in Motion; as a result, I refer to the organization by that name throughout the article. *See About Us – Justice in Motion*, JUSTICE IN MOTION, http://justiceinmotion.org/about-us/ [https://perma.cc/G8GQ-6ECT] (last visited Feb. 5, 2019).

A. Letters, Numbers, and Industries

Temporary foreign worker programs form a subset of the alphabet soup[19] that comprises most of the U.S. immigration system. Temporary foreign workers enter the United States on some form of lettered visa, each with its own specific rules and operating procedure. However, one overarching fact binds them all: each such worker enters the United States knowing that their purpose in the United States is to work, and that they must return home when their work concludes.[20]

The visa categories that perhaps come to mind most readily are the "unskilled" visa categories known as the H-2A and H-2B visas. Once linked under one global "H-2" category, the two split into freestanding visas to cover agricultural labor (H-2A) and non-agricultural labor (H-2B) in 1986.[21] H-2B visa holders typically work in landscaping, forestry, hospitality, or as amusement park operators.[22] While the H-2B visa has a numerical cap of 66,000 that is regularly reached, the H-2A visa is not limited and has grown to include hundreds of thousands of agricultural laborers each year.[23] Of all the temporary visa categories, H-2A and H-2B visas have received perhaps the greatest amount of scholarly focus[24] as well as attention from advocacy organizations[25] over time. This is likely due to the fact that H-2A workers, and H-2B workers in the forestry industry, qualify for legal assistance from federally-funded legal services offices,

19. *See generally* 8 U.S.C. § 1101(a)(15) (providing a lengthy list, divided by lettered subsections, of "nonimmigrant aliens").

20. *See, e.g.*, SUKTHANKAR, *supra* note 18, at 11 ("Every year, between 700,000 and 900,000 foreign citizens come to work in the United States, on visas that are structured around the expectation that these workers will eventually return to their home countries. These individuals are not 'immigrants,' arriving with the expectation that they will eventually be able to make their home here, as permanent residents or citizens. Nor are they 'undocumented,' 'unauthorized,' or 'illegal' workers, who may have a tourist visa, an expired visa, or have entered the country with no visa at all. Rather, 'guestworkers,' or 'temporary foreign workers,' are in the U.S. on visas that are explicitly designed to come to an end.").

21. *See, e.g.*, BAUER, *supra* note 4, at 5; NEWMAN, *supra* note 4, at 13; *see also* Beltran, *supra* note 5, at 534–35.

22. *See, e.g.*, SUKTHANKAR, *supra* note 18, at 17.

23. *See* Beltran, *supra* note 5, at 535–36, 591 (documenting increase in the number of H-2A visas issued by the State Department, up to 134,368 in 2016); *see also Table XVI(B), Nonimmigrant Visas Issued by Classification (Including Crewlist Visas and Border Crossing Cards), Fiscal Years 2015–2019*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2019AnnualReport/FY19AnnualReport-TableXVI-B.pdf [https://perma.cc/4BJF-RXLC] (last visited July 1, 2020) (indicating that 161,583 H-2A visas were issued in 2017, 196,409 H-2A visas were issued in 2018, and 204,801 H-2A visas were issued in 2019).

24. *See, e.g.*, Beltran, *supra* note 5 (discussing H-2A program); Smith, *supra* note 5 (discussing H-2A and H-2B programs); Lee, *supra* note 5 (discussing H-2A and H-2B programs); Hall, *supra* note 5 (discussing H-2A program); Holley, *supra* note 5 (discussing H-2A program).

25. *See, e.g.*, BAUER, *supra* note 4 (discussing H-2A and H-2B programs); TAKEN FOR A RIDE, *supra* note 4 (discussing H-2B workers in the fair and carnival industries); PICKED APART, *supra* note 4 (discussing H-2B workers in Maryland crab industry); NEWMAN, *supra* note 4 (discussing H-2A program).

unlike the majority of other nonimmigrant visa holders.[26] Because they are more easily able to obtain legal representation, their experiences of exploitation are more likely to be known by advocates and scholars.

Another general group of temporary foreign workers is composed of visa holders who engage in domestic work. The immigration system categorizes such workers differently depending on the status of the employer who petitions for the worker's visa—including A-3 for a diplomat, G-5 for an employee of international organizations, and B-1 for visitors to the United States[27]—and an entirely separate category for au pairs who enter the United States as part of the J-1 "cultural exchange" visa program operated by the State Department.[28] Still other J-1 visa holders labor in the hospitality industry, often working alongside H-2B workers or even serving as de facto replacements once the annual cap on H-2B visas is reached.[29] While not as robust as the focus on H-2A and H-2B workers, there has been an increasing degree of attention on the J-1 program.[30]

Other categories of visas exist and deserve to be considered alongside the temporary work visas already listed due to their commonalities and in the interest of worker solidarity. Indeed, some have also deservedly been the subject of scholarly critique.[31] However, I have chosen to highlight the preceding categories of visas—the H-2A, H-2B, and the cluster of domestic work-related visas (A-3, G-5, B-1, J-1)—for two reasons. First, together, they form the most significant number of visas that have given rise to civil labor trafficking claims.[32] Second,

26. *See, e.g.*, SUKTHANKAR, *supra* note 18, at 51 ("With the exception of H-2A agricultural workers and the subset of H-2B workers in forestry, temporary foreign workers are denied access to federally-funded legal services—free legal aid for low-income people in the U.S."); *see also* Beltran, *supra* note 5, at 556–59 (describing the Legal Services Corporation regulations regarding funding for services to represent H-2A workers in particular).

27. *See* SUKTHANKAR, *supra* note 18, at 21 (providing a brief description of A-3, G-5, and B-1 visas); *see also* Chuang, *supra* note 5, at 279 n.50 (noting that A-3, B-1, and G-5 visas are "available to those entering the United States to perform domestic work").

28. *See* SUKTHANKAR*, supra* note 18, at 21–22; *see also Au Pair Program*, EXCHANGE VISITOR PROGRAM, U.S. DEP'T OF STATE, https://j1visa.state.gov/programs/au-pair [https://perma.cc/ZZ6Z-FYYM] (last visited July 25, 2019).

29. *See* STEWART, *supra* note 4, at 20 (describing a group of J-1 workers who worked as housekeepers at a casino in Louisiana along with H-2B workers); *id.* at 29 (describing a group of J-1 workers who worked at a casino hotel in Mississippi, which had previously employed H-2B workers who had recently sued the casino and a subcontractor); *see also* SUKTHANKAR, *supra* note 18, at 65 (quoting Mary Bauer of the Southern Poverty Law Center as stating that "whenever the hospitality industry in the Gulf Coast hits the H-2B cap, the number of J-1 workers balloons").

30. *See, e.g.*, SHORTCHANGED, *supra* note 4; STEWART, *supra* note 4; Chuang, *supra* note 5.

31. *See, e.g.*, Johnson, *supra* note 5 (outlining the history and problematic features of the Q visa, which is currently used in large numbers by Disney to staff its parks in Florida).

32. *See* ALEXANDRA F. LEVY, THE HUMAN TRAFFICKING LEGAL CENTER, FEDERAL HUMAN TRAFFICKING CIVIL LITIGATION: 15 YEARS OF THE PRIVATE RIGHT OF ACTION 14 (2018), http://www.htlegalcenter.org/wp-content/uploads/Federal-Human-Trafficking-Civil-Litigation-1.pdf [https://perma.cc/TPL8-A6AH] (breaking down civil trafficking cases by visa type of the plaintiffs). This report highlights that fifty-seven percent of civil trafficking cases were filed by individuals who were present in the United States on a legal visa. *Id.* at 12.

they illustrate the systemic aspects of the programs that often result in exploitation of workers. I turn to these features next.

B. Programs that Bind without Guardrails

Exploitation of temporary foreign workers does not happen in a vacuum. Rather, the U.S. government has essentially set these workers up for failure because of two major problems with temporary foreign worker programs. First, the structure of these programs facilitates worker exploitation and, second, governmental enforcement agencies often turn a blind eye to mistreatment once it has occurred.

As to the first problem, the design failure of the programs arises from one of their key features: workers lack visa portability. In other words, they are only permitted to work for the employer who requested their labor and, if they leave that employer (by their choice or the employer's), they lose their immigration status along with their job.[33] Workers on temporary visas are thus not actors in a free and fair market—they cannot leave for a "better" employer if they find their work conditions unpalatable.[34] Because workers' immigration status is tied to their employer, mistreatment is all too common an experience among temporary foreign workers. The link between immigration status and the employer can create an environment in which "[w]orkers' fear of being fired and deported runs so deep that an employer may never even have to take the illegal step of articulating a threat to do so."[35] Of course, workers experiencing such mistreatment may decide to leave and return home. But such a "choice" is not really a fair one at all, given that it would be almost impossible for workers to earn as much money in their home countries as they would in the United States, even if such U.S. jobs pay less than the wages they were promised or less than the legal minimum wage.[36] Indeed, some argue that these incentives create a race

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33. *See, e.g.*, Smith, *supra* note 5, at 387 ("[A] guestworker's visa is linked to their employer and, if their job ends, the guestworker loses their immigration status . . . ."); Chuang, *supra* note 5, at 330 ("For au pairs and other . . . temporary migrant domestic workers . . . , immigration status is tied to specific recruitment agencies or employers such that leaving the agency or employer renders the worker immediately deportable . . . .").

34. *See, e.g.*, SUKTHANKAR, *supra* note 18, at 40 ("Temporary workers' visa status is tied to the employer who sponsored them, creating an artificial marketplace for their labor. These workers cannot respond to mistreatment by leaving and looking elsewhere for fair conditions.").

35. *Id.* at 47. *See also* Diana Ullman, *Forgotten in the Fields*, TEXAS OBSERVER (July 1, 2019, 11:04 PM), https://www.texasobserver.org/forgotten-in-the-fields/ [https://perma.cc/8N65-ZNCP] ("'There are so many ways to put a [temporary foreign] worker in a position where they don't feel like they can leave,' says Stacie Jonas, managing attorney for Texas RioGrande Legal Aid's human trafficking team. 'Precisely because there is no transferability, because they have documents that can be held, and because . . . they've really tried to comply with the law and they're nervous about doing anything that would break rules that might make it difficult for them to get another visa again in the future.'").

36. *See, e.g.*, Beltran, *supra* note 5, at 549–50 ("[An H-2A] worker does not realistically have the choice of going to work elsewhere if he does not like his current job. Instead, the choice is more often between staying put in the job he has now, regardless of how bad the conditions are, or going back home, where his earnings are likely significantly lower than even unlawfully low earnings in the United States."); *see also* Charlotte S. Alexander, *Explaining Peripheral Labor: A Poultry Industry Case Study*, 33

to the bottom, in which employers become accustomed to vulnerable and thus exploitable workers, and increasingly prefer them over time.[37]

Once workers have been exploited, what happens? The answer to that question reveals the second major problem with these programs. First, the programs do not provide a reporting mechanism that allows workers to complain about legal violations at their place of work, nor is there a method for the government to help mistreated workers switch employers. Should workers depart their jobs earlier than anticipated, the programs also provide them no protection against potential future immigration consequences. At the back end, there is an abdication of responsibility by the U.S. enforcement agencies that should ensure the proper treatment of temporary workers. The agencies with explicit enforcement authority over temporary visa programs, such as the U.S. Department of Labor ("DOL"), which has authority over the H-2A and H-2B programs, have shown a combination of incompetence and indifference. U.S. DOL regularly allows employers to use these programs even after they have violated the programs' terms[38] and fails to make workers whole after they are cheated of wages or otherwise experienced violations of their rights.[39] Other agencies that interface with these programs essentially let entire industries off the hook. This is what the State Department has done with respect to the J-1 "cultural exchange" program. Because the State Department has taken the position that it can only sanction *sponsors* of visa-holders, and not their direct *employers*, sponsors have no incentive to report abuses committed by employers.[40] The result of such a system is not surprising: as of 2014, not a single

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BERKELEY J. EMP. & LAB. L. 353, 377 (2012) (noting that the daily "average minimum wage for nonprofessional occupations" was $4.68 in Mexico and $8.75 in Guatemala, rendering "the options and opportunities at home significantly worse" than poor working conditions in the United States).

37. Jennifer J. Lee, *U.S. Workers Need Not Apply: Challenging Low-Wage Guest Worker Programs*, 28 STAN. L. & POL'Y REV. 1, 6 (2017) ("As more guest workers enter an industry, employers are even further able to degrade the wages and working conditions because they need not worry about recruiting U.S. workers. Employers prefer guest workers because they become accustomed to being highly productive and compliant.").

38. *See, e.g.*, Beltran, *supra* note 5, at 553–54; ("[I]t is well-documented that U.S. DOL continues to approve employers' applications to bring in H-2A workers even when they have been found to violate H-2A regulations . . . ."); *see also* Ken Bensinger, Jessica Garrison, & Jeremy Singer-Vine, *Employers Abuse Foreign Workers. U.S. Says, By All Means, Hire More.*, BUZZFEED NEWS (May 12, 2016, 3:06 PM), https://www.buzzfeednews.com/article/kenbensinger/the-pushovers [https://perma.cc/XU5A-8EBG] (summarizing investigation into how U.S. DOL "rarely kicks employers out of the [H-2A and H-2B visa] program[s], leaving thousands of workers each year exposed to mistreatment, injury, and even death").

39. *See, e.g.*, Beltran, *supra* note 5, at 554–56 (detailing limitations of resources at the Wage and Hour Division of U.S. DOL, leading to few enforcement actions against H-2A employers, and the practical hurdles H-2A workers and their representatives face when trying to participate in investigations or recover financial awards after workers have returned to their home countries).

40. *See* STEWART, *supra* note 4, at 12–13 ("Sponsors' revenue largely depends on their ability to collect fees from students from placing them with employers. . . . Therefore, it is unlikely that the sponsor will jeopardize its business relationship with the employers and open itself to sanctions by reporting employer misconduct.").

sponsor had been banned or sanctioned in eight years.[41] Governmental reports themselves have even raised concerns about the State Department's lack of oversight in the J-1 context.[42]

As this summary indicates, U.S. temporary foreign worker programs enable worker mistreatment because workers have limited mobility; when combined with a lack of oversight, these programs provide every incentive for employers to mistreat their workers in a race to the bottom. But it is not just the employers who prey on worker vulnerability. Instead, there is a wider range of actors who come together in this system. I turn to them next.

C. A Web of Exploitation

Many workers who come to the United States on temporary work visas are from impoverished backgrounds. Indeed, that is why the opportunity to work in the United States and earn relatively high wages is an alluring possibility. Unfortunately, there are a number of actors who are all too ready to exploit workers' vulnerabilities.

At the top of the relative hierarchy are the agents who help would-be employers file the paperwork with the U.S. government to import workers on temporary visas. As repeat players in the system who work with numerous employers on a regular basis, the agents are the most likely to be familiar with the regulations governing these work visas. This also means they are the most familiar with how to get around these regulations. In the context of the H-2A program, agents know that regulations aiming to ensure that U.S. workers are first recruited to fill open positions are all too easy to skirt, and simply fulfill employers' desires to hire more vulnerable and exploitable workers from impoverished backgrounds.[43] As one H-2A agent stated: "When [employers] come to me, what they want is their Mexicans."[44]

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41. SHORTCHANGED, *supra* note 4, at 7.

42. *See* STEWART, *supra* note 4, at 14 (noting that governmental reports dating back to 1990 "expressed concerns over the State Department's inadequate oversight of the J-1 program").

43. *See, e.g.*, Beltran, *supra* note 5, at 540–41 (describing employers and agents flouting H-2A program regulations regarding worker recruitment and discrimination against U.S. workers by employers); *see also* Jessica Garrison, Ken Bensinger, & Jeremy Singer-Vine, *"All You Americans Are Fired."*, BUZZFEED NEWS (Dec. 1, 2015, 5:41 PM), https://www.buzzfeed.com/jessicagarrison/all-you-americans-are-fired [https://perma.cc/BN3V-DDVQ] (summarizing investigation into H-2A and H-2B programs that demonstrates how employers "have made it all but impossible for U.S. workers to learn about job openings," "discourage[them] from applying" if they do learn about such jobs, and "treat[them] worse and pa[y them] less than foreign workers doing the same job" if they are hired). While the H-2A program requires employers to attempt to recruit U.S. workers to fill open positions and to pay a prevailing wage, two key features that are at least theoretically meant to protect U.S. workers, the J-1 program notably lacks even these protections. *See, e.g.*, STEWART, *supra* note 4, at 14–15. Moreover, employers do not have to pay payroll taxes when employing J-1 visa holders. *See id.* at 3. This demonstrates the degree to which the J-1 program incentivizes an employer race to the bottom, even among temporary foreign worker programs.

44. Garrison, Bensinger, & Singer-Vine, *supra* note 43 (quoting Linda White, a Louisiana-based H-2A agent).

While agents operate in tandem with employers on U.S. soil, an additional process occurs in sending countries. On the ground, workers find out about U.S.-based work opportunities through recruiters. In practice, recruiters vary in their degree of sophistication, from a more individualized word-of-mouth recruitment process to those carried out by formal recruitment agencies.[45] On the ground in these countries, recruiters know that they are the gatekeepers to a lucrative product—legal work, even if temporary, in the United States—and freely exploit that power by charging prospective workers exorbitant fees for the opportunity to get one of these visas.[46] Because many workers who come to the United States are from impoverished backgrounds and lack the independent means to pay such costs, they often have no option but to take out loans, frequently at high interest rates.[47] Under some visa programs, such "recruitment" or "visa" fees are prohibited, but nevertheless are common,[48] while others leave this practice entirely unregulated.[49] Indeed, the State Department has recognized that the problem of recruitment fees in temporary foreign worker programs persists even in the face of legal prohibitions.[50]

Many workers thus enter the United States already in debt. The cycle of exploitation continues once they are here, because workers are often underpaid. As a 2013 report by the Southern Poverty Law Center on the H-2A and H-2B programs documented, such "[w]age theft . . . can take various forms," including "minimum wage violations disguised by complicated piece-rate pay schemes, underreporting of hours, failure to pay overtime, and making unlawful deductions from workers' pay."[51] The report discusses an H-2B worker in the forestry industry who was paid a piece rate based on the number of bags of seedlings he planted and earned only about $2 per hour—much less than the

45. *See, e.g.*, Beltran, *supra* note 5, at 539–40 (noting the range of types of recruiters); *see also* BAUER, *supra* note 4, at 9 (demonstrating that the recruiting business is mostly unregulated and highly lucrative); SHORTCHANGED, *supra* note 4, at 7–8 (describing how recruiters of au-pairs in the J-1 program are subject to little oversight from the U.S. State Department); SUKTHANKAR, *supra* note 18, at 41–43 (describing various types of abuses perpetrated against workers by recruiters that often go under the radar).

46. *See, e.g.*, NEWMAN, *supra* note 4, at 2–3 (noting that some H-2A workers have paid as much as $11,000 to recruiters to secure temporary employment); *see also infra* note 49.

47. *See, e.g.*, Beltran, *supra* note 5, at 547–48 (summarizing common expenses incurred by H-2A workers, including unlawful fees, and the need to take on debt to pay these expenses); *see also* BAUER, *supra* note 4, at 9 ("[W]orkers, most of whom live in poverty, frequently must obtain high-interest loans to come up with the money to pay the fees. In addition, recruiters sometimes require them to leave collateral, such as the deed to their house or car, to ensure that they fulfill the terms of their individual labor contract."); STEWART, *supra* note 4, at 8 (noting that J-1 visa-holders interviewed by the Southern Poverty Law Center from Jamaica, where the minimum wage is the equivalent of $1.23 per hour, reported that their parents had to take out thousands of dollars in loans to pay recruitment fees).

48. *See, e.g.*, Smith, *supra* note 5, at 386 (discussing recruitment fees charged by H-2A and H-2B employers and their recruiters).

49. *See, e.g.*, SHORTCHANGED, *supra* note 4, at 8 (discussing recruitment fees charged to J-1 au pairs); STEWART, *supra* note 4, at 3 (same).

50. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 489 (June 2019), https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf. [https://perma.cc/54KF-T56A].

51. BAUER, *supra* note 4, at 18.

federal minimum wage.[52] The same report also discusses a tomato grower in Arkansas that failed to reimburse its H-2A workers upwards of $3,500 of "travel, visa and recruitment expenses" it was legally required to reimburse, underpaying them by more than $1 million over five years.[53] Similar impositions of recruitment-related fees and other forms of wage theft have given rise to labor trafficking claims filed in federal court in recent years.[54] Wage violations are also common in the J-1 program—a recent report on the au pair program documented that "a standard, weekly rate" given to au pairs amounted to an average hourly pay of $4.35 per hour, far below the federal minimum wage.[55]

This underpayment occurs against the backdrop of dangerous industries such as housekeeping, agriculture, forestry, and amusement park work.[56] The grueling hours that are required of temporary foreign workers add to the danger—H-2B workers in the amusement industry may work sixteen, eighteen, and even twenty-two hour shifts without breaks, contributing to the risks they already face when operating heavy equipment.[57] Moreover, access to medical treatment for injuries is far from guaranteed—not all employers of temporary foreign workers are required to carry workers' compensation insurance,[58] there are often difficulties in accessing ongoing treatment for transnational workers,[59] and employers highly discourage workers from seeking care.[60] What's more,

52. *Id.* at 18–19.

53. *Id.* at 20.

54. *See infra* notes 233–43.

55. SHORTCHANGED, *supra* note 4, at 9; *see also* STEWART, *supra* note 4, at 27 (discussing a J-1 hospitality worker who was paid a $200 stipend every other week for 40 hours of work, resulting in a violation of federal minimum wage laws).

56. *See, e.g.*, STEWART, *supra* note 4, at 17 (noting that "housekeeping work is physically debilitating," and highlighting that "[a] peer-reviewed study of injury rates in the hotel industry found that housekeepers have a higher rate of injury and sustain more severe injuries than most other service workers"); BAUER, *supra* note 4, at 25 ("Fatality rates for the agriculture and forestry industries, both of which employ large numbers of guestworkers, are seven times the national average."); TAKEN FOR A RIDE, *supra* note 4, at 30 ("OSHA . . . has documented 92 worker fatalities or catastrophes related to amusement rides since 1984.").

57. TAKEN FOR A RIDE, *supra* note 4, at 29; *see also id.* at 30 ("H-2B fair workers' long work hours, physically demanding work with large machinery and equipment, and lack of protective gear or formal training contribute to the already dangerous working conditions.").

58. *See, e.g.*, BAUER, *supra* note 4, at 25 ("Only the H-2A program requires employers to provide workers' compensation coverage throughout the United States. For H-2B workers, workers' compensation coverage depends on the laws in the state where the worker is employed.").

59. *See, e.g.*, *id.* ("Some states (for example, New Jersey) mandate that examining physicians be located in the state where an injury occurred. This means that injured workers have difficulty obtaining benefits while in other states and in their home countries. Some states require workers to appear in the state for hearings. And most states do not have clear rules permitting workers to participate by telephone in depositions and hearings before the workers' compensation body."); TAKEN FOR A RIDE, *supra* note 4, at 36 ("Some states require that non-resident workers be covered by employers' insurance policies, while others do not. Sometimes, a worker will not even be covered by workers' compensation insurance in every state in which his or her fair operates. Even when required by law in one state, states are not always able to oversee compliance by out-of-state companies.").

60. *See, e.g.*, BAUER, *supra* note 4, at 27 ("Workers who report injuries are sometimes asked to sign forms saying they are quitting. They are told that if they sign and go home, they may be allowed to come back the following year."); SUKTHANKAR, *supra* note 18, at 50 (quoting a worker advocate as noting

workers often reside in isolated settings, with little recourse available to address such mistreatment.[61]

In sum, workers' pre-existing financial precarity is compounded at almost every step along this process. As a result, it is often the case that, regardless of how little they are paid or how unpalatable their working conditions, they have no choice but to stay in an exploitative work situation to pay down their debt at home. These problematic aspects of temporary foreign worker programs emerge from an interrelated web of bad actors, all operating in the shadow of a system that overlooks, if not practically encourages, the exploitation of workers. Moreover, some of these actors are uniquely positioned—networks of recruiters and agents know the weaknesses in the system and are able to help their employer-clients by exploiting these weaknesses to their financial advantage.

In the past two decades, the United States has developed a useful legal framework for combatting these ills. Next, I provide an overview of the labor trafficking laws, before turning back to an examination of the ways in which such laws have been and can continue to be useful in the context of temporary foreign worker programs.

III. LABOR TRAFFICKING UNDER U.S. LAW

The legal framework for addressing trafficking in the United States is found in the TVPA, which was first enacted in 2000 and has been further elaborated as well as strengthened by subsequent amendments. In this section, I give an overview of the TVPA and two critical sets of amendments in order to illustrate the key concepts in the statute, before focusing on the provisions that are the specific topic of this article: those that allow victims to sue individuals who benefit, usually financially, from labor trafficking.

A. The Statutory Framework

Below, I provide some background on the framework to combat labor trafficking established by Congress. In addition to covering some important features of the law, I will also highlight some of the early academic critiques of the law. I argue that the amendments to the TVPA righted some of the problems identified in these critiques and also carry enormous potential for addressing widespread, systemic abuses in temporary foreign worker programs.

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the prevalence of "employer retaliation," and that even workers who have recovered from injury "won't be rehired, since they're now considered disabled"); *see also* TAKEN FOR A RIDE, *supra* note 4, at 36 ("Since the number and size of claims can increase the premium for an employer's workers' compensation insurance plan, employers are incentivized to limit their employees' workers' compensation claims.").

61. *See, e.g.*, SUKTHANKAR, *supra* note 18, at 48 ("H-2A farmworkers, J-1 student-workers and *au pairs*, and A-3/G-5 domestic workers usually live in housing owned or at least controlled by the employer; in addition, farmworkers are usually in remote rural locations, with little access to a support network."); *see also supra* notes 15–16.

1. The Passage of the Trafficking Victims Protection Act in 2000

Nearly two decades ago, Congress took a landmark step in addressing the problem of human trafficking by passing the Victims of Trafficking and Violence Protection Act of 2000, which was comprised of two distinct but related laws: the Violence Against Women Act ("VAWA") and the TVPA.[62] This enactment came on the heels of several years of legislative attention. Multiple competing bills were introduced in the late 1990s, each with different approaches to the problem of trafficking.[63] On the international level, there was a parallel process at the United Nations to develop a protocol regarding trafficking. This culminated in the passage of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, otherwise known as the "Palermo Protocol" or "Trafficking Protocol," also in late 2000.[64]

In passing the TVPA, Congress established a wide-ranging legal framework meant to "combat trafficking in persons," a phenomenon it described as being "a contemporary manifestation of slavery whose victims are predominantly women and children."[65] This framework was defined by what is known as the "3Ps," embodying the idea that the problem of trafficking in persons has to be combatted from multiple angles, *i.e.*, prosecution, protection, and prevention.[66]

In its substantive provisions, the TVPA carried out this 3Ps mandate by enacting several sweeping legislative changes. First, as to "prosecution," the statute centralized the criminal enforcement of trafficking in two ways. Not only did it enhance penalties for several pre-existing offenses that fall under the umbrella of trafficking, but it also created new substantive offenses, such as the forced labor offense that will be described in more detail below.[67] Beyond its criminal provisions, the TVPA engaged in "prevention" by establishing a reporting mechanism that is used to evaluate countries' commitment to anti-

62. Pub. L. No. 106-386, 114 Stat. 1464 (2000).

63. *See, e.g.*, Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 168–72 (summarizing the "flurry of legislative activity" on trafficking beginning in 1998, with some bills focusing specifically on sex trafficking and others addressing labor trafficking, among other distinctions).

64. *See* Loftus, *supra* note 10, at 151–55 (describing the history of the adoption of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children by the UN).

65. TVPA § 102(a).

66. *See, e.g.*, Loftus, *supra* note 10, at 159–60 (describing the TPVA's 3P framework); *see also* Srikantiah, *supra* note 63, at 169; *3Ps: Prosecution, Protection, and Prevention*, U.S. DEP'T OF STATE, https://www.state.gov/3ps-prosecution-protection-and-prevention/ [https://perma.cc/5QJD-2728] (last visited Dec. 3, 2018). The Palermo Protocol similarly operated within this "3Ps" framework. Loftus, *supra* note 10, at 156.

67. *See* Chacón, *supra* note 10, at 2992–93 (listing criminal offenses created by the TPVA); *see also* 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, 13 (2004) (explaining the changes to criminal provisions brought about by the TVPA, including "doubl[ing] the sentence for holding people in involuntary servitude, expand[ing] sentencing if aggravating factors are present, and criminaliz[ing] financial gain from sex trafficking when the beneficiary knows that the person is engaged in a commercial sex act because of 'force, fraud, or coercion'").

trafficking efforts on an annual basis.[68] The "protection" of victims was embodied by a new set of social welfare and other benefits introduced in the TVPA for trafficking victims in the United States. Of particular relevance to the present discussion is the creation of a new form of immigration status, T nonimmigrant status, available to victims of "severe forms of trafficking in persons" who cooperate with law enforcement investigations into the trafficking.[69] T nonimmigrant status is colloquially known as the T visa and, if granted, provides a path to permanent residency and citizenship in the United States[70] as well as a host of other benefits.[71]

Much of the early focus on the TVPA, and on the problem of trafficking in general, was on sex trafficking.[72] Some scholars have noted that this emphasis was evident from the beginning, given the link between the TVPA and VAWA,[73]

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68. *See* TVPA § 104. Annual Trafficking in Persons Reports dating back to 2001 are available on the State Department's website. *See Trafficking in Persons Report*, U.S. DEP'T OF STATE, https://www.state.gov/j/tip/rls/tiprpt/ [https://perma.cc/88GD-2T8L] (last visited Dec. 3, 2018).

69. TVPA § 107(e)(1) (amending the Immigration and Nationality Act to include the new T nonimmigrant status classification at 8 U.S.C. § 1101(a)(15)(T), which itself incorporates the definition of "severe forms of trafficking in persons" in section 103 of the TVPA, subsequently codified at 22 U.S.C. § 7102(a)(9)). The T visa is, then, another example of the "alphabet soup" of visas under U.S. immigration law. *See supra* note 19.

70. *See* Loftus, *supra* note 10, at 193 (noting that five hundred T visa holders became lawful permanent residents in 2009).

71. *See* TVPA § 107(b) (providing victims of "severe form of trafficking in persons" who are present in the United States with the same services and benefits as those given to refugees), § 107(e)(4) (providing T visa recipients with employment authorization and referrals to non-governmental organizations to "advise" the recipient regarding their "options while in the United States and the resources available to" them); *see also* Loftus, *supra* note 10, at 193 (summarizing benefits).

72. Some experts in trafficking have argued that such an approach is intentional, in that it shifts attention away from broader structural issues that might prove problematic to the interests of the United States and other states that tend to be on the receiving end of migration patterns that often turn into trafficking. *See, e.g.*, Grace Chang & Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)*, 3 STAN. J. C.R. & C.L. 317, 327–28 (2007) (noting that the United States, via its "neoliberal economic policies," in fact "creat[es] the conditions of poverty . . . that compel people to migrate," and, in placing a political and policy focus on sex trafficking as opposed to labor trafficking, "ensures that the root causes of all forms of human trafficking, and state responsibility for or complicity in these structural causes, remains unchallenged"); Janie A. Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AM. J. INT'L L. 609, 611 (2014) (arguing that "exploitation creep," a two-step process whereby "all forced labor is recast as trafficking" and then "all trafficking is labeled as slavery," serves as "a technique to protect the hegemony of a particular U.S. anti-trafficking approach—one having broad bipartisan support in U.S. politics—and to fend off competing approaches calling for labor rights and migration policy reforms that are particularly contentious in the U.S. context"); *see also* Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. 76, 129 (2012) (arguing that the "human rights approach" embodied by the TVPA, as well as other legislative frameworks worldwide, "is individualistic and victim centered; it treats trafficking as an exceptional crime and looks to legislatures and courts as the main agents of change," whereas a "labor paradigm" would be preferable because it "focuses on structural causes of power disparities[,] . . . exposes a continuum of labor commodification with trafficking at its extreme end and holds collective action, bargaining, and standard setting to be the main avenues for effecting change").

73. *See* Cavalieri, *supra* note 15, at 503 ("Thus, even from the beginning, the United States Congress understood trafficking as closely related to violence against women, as evidenced by the ways in which the bill is structured; it was not drafted to be considered along with an immigration bill or with a new set of labor standards securing rights for immigrant workers.").

and the abundant references to sex trafficking in earlier versions of the bill.[74] Indeed, the legislative record is full of references to the problem of sex trafficking and the paradigmatic "victim"—a woman or a child being sold into sex slavery.[75] The frequent association of the term "trafficking" with "sex trafficking" is also evident in the popular imagination.[76]

This early emphasis on sex trafficking had some downstream negative effects, particularly from the perspective of "non-traditional" victims of trafficking. Specifically, as some commentators have observed, the TVPA and the government agencies implementing it appeared to place a value judgment on who was and who was not an appropriate—and therefore, a "true"—trafficking "victim."[77] With the assumption that *real* trafficking victims were female or child victims of sex trafficking, it was all too common for victims of labor trafficking to be overlooked.[78] Still other criticisms centered on the argument that the TVPA was too focused on prosecution. For example, in the context of the immigration relief it created, some criticized the requirement that victims actively comply with law enforcement in order to be eligible for a T visa.[79] To that end, many

74. *See, e.g.*, Srikantiah, *supra* note 63, at 168–72 (describing the historical background leading up to the passage of the TVPA).

75. For example, the opening findings of the TVPA, despite occasional references to forced labor and labor trafficking, repeatedly emphasize sex trafficking and the victims of trafficking being primarily women and children. TVPA § 102(b)(1) ("At least 700,000 persons annually, primarily women and children, are trafficked within or across international borders. Approximately 50,000 women and children are trafficked into the United States each year."); § 102(b)(2) ("Many of these persons are trafficked into the international sex trade, often by force, fraud, or coercion."); § 102(b)(4) ("Traffickers primarily target women and girls."); *cf.* § 102(b)(3) ("Trafficking in persons is not limited to the sex industry. This growing transnational crime also includes forced labor and involves significant violations of labor, public health, and human right standards worldwide."). Some commentators have noted that this focus on women and children as victims is also true of the Palermo Protocol. *See* Chuang, *supra* note 72, at 615 ("Trafficking was framed as a crime perpetrated by criminal syndicates, unwittingly suffered mainly by innocent women and children, and best addressed by aggressive criminalization.").

76. *See, e.g.*, Cavalieri, *supra* note 15, at 505 (discussing the amount of literature, both research-based and in popular publications, devoted to the problem of sex trafficking in particular).

77. *See* Chacón, *supra* note 10, at 3022–23 (discussing how the TVPA favors the view of a totally innocent victim, thereby leaving out individuals who may have had "some volitional role" in their trafficking situation, which is becoming more common due to, among other things, the increased militarization of the U.S. border); *see generally* Srikantiah, *supra* note 63, at 187, 200–01 (extensively discussing the problem of the "iconic" trafficking victim and the various reasons behind such a viewpoint including, *inter alia*, law enforcement's limited view of trafficking victims as being victims of sex trafficking, their tendency to establish victims' credibility by evaluating victims as witnesses specifically, their assumptions that victims are supposed to be fully under the control of traffickers in order to be truly victims, and their view that that victims should fully shift "loyalty" from traffickers to law enforcement once out of the trafficking situation).

78. *See, e.g.*, Cavalieri, *supra* note 15, at 508–10 (reviewing statistics for fiscal year 2009 regarding the number of certifications by the Secretary of Health and Human Services of trafficking victims, rendering them eligible for various federal benefits, and the number of criminal prosecutions of traffickers, broken down by sex trafficking and labor trafficking, to determine that "there is roughly a 75% correspondence between a certified or eligible sex trafficked persons and charges brought against an alleged sex trafficker," on the one hand, and only an 18% correspondence in the labor trafficking context).

79. *See, e.g.*, Shannon Lack, *Civil Rights for Trafficked Persons: Recommendations for a More Effective Civil Remedy*, 26 J.L. & COM. 151, 160 (2008) ("By conditioning social services and immigration status on the victims' willingness to cooperate with the prosecution, trafficked persons become

commentators noted that, in the early years in particular, there were very few T visa approvals, especially considering the large estimated number of victims of trafficking present in the United States.[80]

Despite the overwhelming focus on sex trafficking from all sides, the TVPA, by its own terms, also took important steps to address labor trafficking. It enacted a new provision to address exploitation it termed "forced labor." As originally passed in 2000, the forced labor provision, codified at 18 U.S.C. § 1589, provided as follows:

> Whoever 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;
>
> (4) shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years for life, or both.[81]

The framing of such exploitative labor conditions as a criminal act was notable because many workers who are the victims of these conditions are excluded from traditional labor-based legal protections due to the industries in which they labor, including agriculture and domestic work.[82]

Moreover, the TVPA also represented an explicit response to the Supreme Court's decision in *United States v. Kozminski*[83] more than a decade earlier, which narrowly interpreted the pre-existing involuntary servitude provision, 18

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instruments of law enforcement as opposed to victims deserving of protection and vindication of their individual human rights."); *see also* Chacón, *supra* note 10, at 3025–26 (critiquing the requirement of having to cooperate with law enforcement on the grounds that victims of trauma may have a difficult time responding to what law enforcement deems to be a "reasonable request" for assistance, and noting it as another example of the way in which the TVPA displays a "prosecutorial bent").

80. *See, e.g.*, Srikantiah, *supra* note 63, at 178 (noting that, by February 2005, only 616 T visas had been granted, "a small fraction of both the five thousand annual T visa cap set by Congress and the 14,500 to 17,500 people that the government estimates are trafficked into the United States annually").

81. TVPA § 112(a)(2). The provision was substantively amended in 2008. The current version is discussed in more detail below. *See infra* notes 107–09 and accompanying text.

82. *See* Chang & Kim, *supra* note 72, at 337–38 (describing how domestic workers and farmworkers both comprise "large" and "sizeable" percentages of trafficking victims, respectively, and are also excluded from protections in, *inter alia*, the National Labor Relations Act, Title VII, and the Fair Labor Standards Act); *see also* Shamir, *supra* note 72, at 110 ("Workers in informal labor sectors are generally considered the most vulnerable workers. In the case of undocumented migrant workers, their vulnerability to exploitation is compounded by the underground nature of their work and, consequently, by the partial application of their law to their work relations.").

83. 487 U.S. 931 (1988).

U.S.C. § 1584.[84] Congress referenced the *Kozminski* decision in the purposes and findings section of the TVPA.[85] In doing so, it rejected the view that only legal or physical coercion should serve as the basis for finding a violation akin to involuntary servitude, and instead acknowledged that psychological and nonviolent coercion, as embodied by the prohibited "means" in two of the three sub-provisions of the TVPA's forced labor provision, could be similarly exploitative.[86]

Despite the significant breakthrough in the conceptualization of coercion and its manifestations in labor exploitation, there was a weakness in the original TVPA. As Kathleen Kim noted, the statute left the idea of "serious harm" undefined. "Serious harm" is critical because it appears in two of the three "means" sub-provisions of the forced labor provision.[87] Because it was undefined, "serious harm" was very difficult to operationalize when it came to the idea of serious harm that was not physical in nature.[88] The other key "means" by which to claim a forced labor violation, "the abuse of law or the legal process," was also undefined.[89] Such shortcomings in the forced labor provision would be remedied in 2008, along with a host of other important amendments to the TVPA, discussed in detail below.[90]

2. *Addition of the Private Right of Action in 2003*

The TVPA only included appropriations for 2001 and 2002,[91] making it necessary to pass reauthorizations of the statute in short order. These reauthorizations proved to be critical from more than just a financial

84. *See* Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L.R. 409, 423–24 (2011) (providing background on the *Kozminski* decision and explaining the Supreme Court's conclusion that, after reviewing "turn-of-the-century Thirteenth Amendment cases" and "early peonage cases," "involuntary servitude consisted solely of direct or threatened physical force or legal coercion").

85. TVPA § 107(b)(13). Congress also made one substantive change to the involuntary servitude provision: increasing the penalties for a baseline violation from ten to twenty years, and to a life sentence in the event death resulted from the underlying criminal act, or if the violation "include[d] kidnapping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill." *See id.* § 112(a)(1). This is the same penalty structure found in the forced labor provision. *See supra* note 81 and accompanying text.

86. *See* Kim, *supra* note 84, at 438–39. While Kathleen Kim analyzes the theory of coercion as a specific term of art, and I focus in the text on the forced labor provision of the TVPA, the two concepts are highly related. Indeed, "coercion," as defined in the statute, *see* TVPA § 103(2), contains the same three definitional sub-provisions as the prohibited means in the forced labor's three sub-provisions, *see* § 112(a)(2).

87. *See* Kim, *supra* note 84, at 440–41.

88. *See id.* at 441.

89. *See* TVPA §§ 103, 112 (the definitional and substantive forced labor provisions both fail to include any definition for "the abuse of law or the legal process").

90. *See infra* section III(A)(3).

91. *See* TVPA § 113.

perspective—they also made substantive changes and improvements to the legislative framework itself.[92]

The first reauthorization took place in 2003 and is significant because it introduced a private right of action allowing trafficking victims to bring a civil claim to enforce a subset of the TVPA's provisions, including the forced labor provision.[93] Notably, this addition passed with little fanfare in Congress. The legislative history contains but one reference to the private right of action, amidst a continued overwhelming focus on sex trafficking and victims who are women and children.[94]

While legislators may not have given it much attention, some commentators immediately recognized the significance and the potential of this amendment. Writing in 2004, Kathleen Kim and Kusia Hreshchyshyn identified several ways in which trafficking victims would benefit by bringing civil claims against their traffickers: they could potentially receive greater damage awards, as opposed to having to hope for restitution in criminal cases; could pursue claims in a context that contained a lower standard of proof (preponderance of the evidence) than in a criminal case; and would maintain control over their case, with the ability to ensure that traffickers are held "directly accountable to their victims."[95] They also noted that the inclusion of the private right of action represented an important policy position by Congress, one that showed that "the state [was] willing to rely on private actors to enforce the civil rights of trafficked persons who [were] not the focus of attention in the prosecutorial process."[96] As such, trafficking victims are able to not just "significantly influence interpretation of the original TVPA" as private litigants,[97] but also have a "claim to membership in the political community through enforc[ing] [their] individual civil rights" by filing civil litigation against their traffickers.[98]

By 2009, those early predictions proved true. In a subsequent publication analyzing cases filed pursuant to the private right of action, Kathleen Kim noted as follows:

> Out of thirty-one [civil] cases, twenty-three have proceeded in the absence of parallel criminal action. This increases accountability for wrongdoing and vindicates harms left unvindicated by government enforcement agencies.

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92. Though the TVPA was also amended in 2005 and 2013 via additional reauthorization acts, these amendments are not relevant to the present discussion.

93. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(a), 117 Stat. 2875, 2878 (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 a reasonable attorneys fees.").

94. *See* 149 Cong. Rec. H. 10281, 10285 (Nov. 4, 2003) (statement of Rep. Smith) ("We allow trafficking victims to sue their traffickers in U.S. courts.").

95. Kim & Hreshchyshyn, *supra* note 67, at 16–17.

96. *Id.* at 4.

97. *Id.* at 34.

98. *Id.* at 5.

> Trafficking lawsuits also increase overall deterrence by creating financial disincentives for traffickers, who are subject to both compensatory and punitive damages if found liable for trafficking.[99]

In short, the 2003 amendments drastically expanded the TVPA's reach. Building on the theoretical and definitional changes put into effect in 2000, the 2003 amendments introduced a powerful tool for workers who are often overlooked, if not outright legally excluded,[100] to take direct action to remedy exploitative labor conditions. Workers could now sue their traffickers in federal court, in and of itself an important moment for worker empowerment.[101] Along with that recognition came the additional benefits, both financial and otherwise, acknowledged by other commentators, as described above.[102] Still another change would open the door even further five years later.

3. *Modifications and Substantive Expansions in 2008*

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008[103] ("TVPRA") marked a significant substantive expansion to the existing legal framework. Yet again, legislators focused on the common trope of sex trafficking in their remarks,[104] but their actions demonstrated a wider-ranging concern for all victims of trafficking and victims' ability to directly hold traffickers accountable. Indeed, the TVPRA appears to be the first time that legislators addressed the potential for temporary workers to be victims of trafficking and designed particular tools to target this phenomenon.[105] The

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99. 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, 293 (2009). For a more recent view on the role of civil litigation in expanding the definitional view of trafficking, see Julie Dahlstrom, *The Elastic Meaning(s) of Human Trafficking*, 108 CAL. L. REV. 379, 424–25 (2020).

100. *See supra* note 82 and accompanying text.

101. *See, e.g.*, Beltran, *supra* note 5, at 574–77 (discussing potential for worker empowerment and expression of voice that exists in the filing of a civil lawsuit against employers in the context of H-2A workers specifically).

102. *See supra* notes 95–98 and accompanying text.

103. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008) [hereinafter "TVPRA"].

104. *See, e.g.*, 154 Cong. Rec. H. 10888, 10902–03 (Dec. 10, 2008) (statement of Rep. Smith) (highlighting criminal aspects of the statute and that "almost 80 percent" of "transnational victims" of trafficking are women); *id.* at 10903 (statement of Rep. Sanchez) (emphasizing "protection[s] for victims of human sex trafficking" and "child victims," among others); *see also* 154 Cong. Rec. S. 10886, 10886 (Dec. 10, 2008) (statement of Sen. Leahy) (emphasizing "women and children" as victims).

105. Whereas the findings of the TVPA in 2000 did not appear to contemplate the trafficking of workers on legal visas, instead assuming that most trafficking victims were undocumented, *see* TVPA § 102(b)(17) ("Existing laws often fail to protect victims of trafficking, and because *victims are often illegal immigrants in the destination country*, they are repeatedly punished more harshly than the traffickers themselves." (emphasis added)), the 2008 amendments contained numerous provisions that specifically targeted exploitation among temporary foreign workers. For example, the TVPRA established the use of "an information pamphlet on legal rights and resources for aliens applying for employment- or education-based nonimmigrant visas." TVPRA § 202(a)(1). This pamphlet was to be distributed, among other means, at visa interviews by consular officials, § 202(e)(1), and was specifically meant to advise such individuals of their legal rights under employment, immigration, and trafficking laws in the United States, *see* § 202(e)(2). The TVPRA also put into place specific measures meant to protect A-3 and G-5

TVPRA included numerous amendments, and I only highlight a few of the most relevant ones below, grouped into two general categories: provisions that clarified or strengthened the existing law, and those that broadened the substantive reach of potential civil claims. The "financially benefits" provisions that are the subject of this article fall into the latter category; however, their full potential can only be understood by placing them into context of the other amendments contained in the TVPRA.

The first set of clarifying changes centered on the forced labor provision, which suffered from a lack of precision in that it failed to define key terms in the "means" sub-provisions.[106] As enacted in 2008, the main forced labor provision, section 1589(a), reads as follows:

> Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means—
>
> (1) by means of force, threats of force, physical restraint, or threats of physical restraint, to that person or another person;
>
> (2) by means of serious harm or threats of serious harm to that person or another person;
>
> (3) by means of the abuse or threatened abuse of law or legal process; or
>
> (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint,
>
> shall be punished as provided in subsection (d).[107]

This updated version of section 1589(a) does two things. First, it reinforces the idea of the "means" by which a violation is committed, inserting the term "means" into the introductory language as well as each sub-provision, whereas it only appeared in two of the three sub-provisions in the original version. Second, it adds a new sub-provision regarding force and physical restraint and, in so doing, suggests that the other prohibited means in the three remaining sub-provisions are explicitly meant to encompass coercion that was *not* necessarily physical in nature.

In addition to these detailed changes, the updated section 1589 also provides definitions of the key terms in these "means" sub-provisions. Specifically, "abuse or threatened abuse of law or legal process" is defined as:

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workers, including the ability to remain in the United States during the pendency of any civil action filed against their employer under section 1595. § 203(c). It also created a new crime entitled "fraud in foreign labor contracting," *see infra* note 119 and accompanying text, which the legislative history indicates was likely to "be of particular application in cases involving employment-based immigration ('guestworker') programs," *see* 154 Cong. Rec. H. at 10904 (statement of Rep. Berman).

106. *See supra* notes 86–89 and accompanying text.

107. TVPRA § 222(b)(3) (codified at 18 U.S.C. § 1589(a)). The penalties remain largely the same, with a baseline maximum sentence of twenty years, and a life sentence for the same aggravated circumstances as in the original version, with the exception of an "attempt to commit aggravated sexual abuse," which was removed in 2008. *See id.* (codified at 18 U.S.C. § 1589(d)).

> [T]he use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.[108]

Moreover, "serious harm" was defined as:

> [A]ny harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.[109]

As Kathleen Kim noted, the introduction of these definitions, and the fact that these concepts were articulated in such a broad way, embodies a commitment to the idea that both nonphysical coercion (in the "serious harm" definition) and legal coercion (in the "abuse of law or the legal process" definition) can serve as prohibited means and thus a basis for a forced labor violation.[110] According to Kim, they also represent an analysis that takes into account all of "the particular circumstances of the trafficking victim," thus "recogniz[ing] that coercion can operate *situationally*."[111]

The other way in which the TVPRA strengthened the original provisions was to enhance the immigration protections afforded to trafficking victims, thus encouraging vulnerable individuals to come forward about the legal violations they experience. In this vein, the prosecution-focused language of the T visa, subject of earlier critique,[112] was loosened—the 2008 amendments introduced an exception to the requirement of cooperation with law enforcement, which allows an individual to remain eligible for a T visa if they are "unable to cooperate . . . due to physical or psychological trauma."[113] Moreover, the TVPRA also expanded the reach of a temporary form of quasi-immigration status known as continued presence, which allows recipients to obtain work authorization and access refugee benefits while under such status.[114] Originally applicable only to victims who, as witnesses, could help "effectuate prosecution" of trafficking crimes,[115] continued presence status could now be extended if those victims filed civil claims, allowing them "to remain in the United States until such action is concluded."[116] Such an expansion of these protections, as Kathleen Kim noted,

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108. *Id.* (codified at 18 U.S.C. § 1589(c)(1)).

109. *Id.* (codified at 18 U.S.C. § 1589(c)(2)).

110. *See* Kim, *supra* note 84, at 451; *see also* Lee, *supra* note 5, at 52 ("Amendments to the TVPA in 2008 reinforce that physical force is unnecessary for the crime of forced labor. They codify a broader concept of coercion that was discussed in both the original legislative history and several early judicial decisions.").

111. Kim, *supra* note 84, at 452–53.

112. *See supra* note 79 and accompanying text.

113. TVPRA § 201 (codified at 8 U.S.C. § 1101(a)(15)(T)(i)(III)(bb)).

114. *See* Kim, *supra* note 99, at 283–84.

115. TVPA § 107(c)(3).

116. TVPRA § 205(a) (codified at 22 U.S.C. § 7105(c)(3)(A)(iii)).

"indicates that Congress intended to increase trafficked persons' empowerment as private attorneys general," *i.e.*, individuals who bring claims via the private right of action to enforce their rights.[117]

Beyond the improvements to existing provisions, the TVPRA also greatly expanded the range of potential claims and defendants in the labor trafficking context. Some of these reflected a broader geographical scope. For example, a new provision allows for extraterritorial application of certain underlying offenses if the trafficker is a U.S. citizen or lawful permanent resident.[118] Similarly, Congress created a new criminal offense targeting fraud in foreign labor contracting, an element of which is the recruiting, solicitation, or hiring of someone outside of the United States.[119] More broadly, Congress expanded the reach of the private right of action by applying it to all "violation[s] of this chapter," *i.e.*, Chapter 77 of Title 18 of the United States Code.[120] As a result, trafficking victims could now bring civil lawsuits for, among other things, illegally holding or confiscating a passport or other immigration documents.[121]

Finally, the TVPRA introduced a means to target those who benefit from labor trafficking. Congress did so by amending two provisions and introducing a third; together I term these the "financially benefits" provisions.[122] The first amendment revised the private right of action. With the expansion explained above, the new section 1595(a) reads as follows:

> 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 fees.[123]

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117. Kim, *supra* note 99, at 284.

118. TVPRA § 223 (codified at 18 U.S.C. § 1596(a)(1)).

119. *Id.* § 222(e) (codified at 18 U.S.C. § 1351) ("Whoever knowingly and with intent to defraud recruits, solicits, or hires a person outside the United States for purposes of employment in the United States by means of materially false or fraudulent pretenses, representations or promises regarding that employment shall be fined under this title or imprisoned for not more than 5 years, or both."). Because fraud in foreign labor contracting is part of Chapter 63, not 77, of Title 18, it is not civilly actionable, even under the expanded 2008 provision discussed below. *See infra* note 120. However, its scope was expanded in other ways soon thereafter: in 2013, it was added to the list of qualifying crimes for the U visa, a form of immigration relief available to victims of certain crimes that is similar to the T visa in some respects. *See* Miller & Jonas, *supra* note 9, at 2 n.13 and accompanying text.

120. TVPRA § 221 (codified at 18 U.S.C. § 1595(a)); *see* Miller & Jonas, *supra* note 9, at 2 ("While the Act previously made a private civil action available for violations of the prohibitions against trafficking, forced labor, or child sex trafficking, the law now explicitly authorizes lawsuits based on a violation of any provision of Chapter 77 of Title 18.").

121. *See* 18 U.S.C. §§ 1592, 1597.

122. The separate statutory provision targeting sex trafficking, section 1591, already had a "financially benefits" sub-provision that was part of the original TVPA. *See* TVPA § 112(a)(2) (codified at 18 U.S.C. § 1591(a)(2)).

123. 18 U.S.C. § 1595(a).

The next such provision is an added subsection to the forced labor provision, section 1589(b):

> Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by any of the means described in subsection (a),[124] knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means, shall be punished as provided in subsection (d).[125]

Finally, Congress created a new provision, section 1593A, entitled "Benefitting financially from peonage, slavery, and trafficking in persons," which reads:

> Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in any act in violation of section 1581(a), 1592, or 1595(a), knowing or in reckless disregard of the fact that the venture has engaged in such violation, shall be fined under this title or imprisoned in the same manner as a completed violation of such section.[126]

While there are slight variations in the above provisions, it is worth pausing to highlight several commonalities. First, all three provisions use the term "venture" to refer to the unit or entity that has engaged in the trafficking violation, but that term is undefined as it relates to its appearance in these specific provisions.[127] Second, though I use the shorthand term "financially benefits" to refer to these three provisions, it is important to note that the provisions themselves in fact use broader language, including not just financial benefits, but also "anything of value" that is received by the defendant. Third, there are two knowledge requirements in the provisions: a requirement of "knowledge" itself *as to the benefits received* and a *mens rea* of recklessness or knowledge with respect to the underlying trafficking violations. Unsurprisingly, courts tend to focus on these three features of the "financially benefits" provisions. Next, I turn to a detailed discussion of such cases, outlining the meanings that courts have ascribed to these provisions.

B. A Survey of the "Financially Benefits" Case Law

Until recently, courts had given little guidance on the "financially benefits" provisions. Some early decisions highlighted the distinctions between liability under section 1589(a) and section 1589(b). For example, one court distinguished 1589(a) as imposing liability on "perpetrators" of TVPA violations, as opposed to 1589(b), which addresses those who "knowingly benefit" from acts of the

124. *See supra* note 107 and accompanying text.
125. § 1589(b).
126. § 1593A.
127. *See* §§ 1595, 1589, 1593A; *see also* TVPA § 103.

"perpetrators."[128] Another court, in the criminal context, clarified that 1589(a), unlike 1589(b), does not require the defendant to benefit financially in order to impose liability.[129] However, in the following years, courts have only dealt with fairly basic issues, holding that the 2008 amendments that introduced the "financially benefits" provisions were not retroactive,[130] or that such claims require more than merely conclusory allegations in order to survive a motion to dismiss.[131] Still other courts have found certain claims to be sufficient, but these decisions have arisen in the context of either *pro se* or defaulting defendants, and thus engage in minimal, if any, legal analysis of the provisions themselves.[132]

This lack of development changed starting with a pair of cases in 2017, and then a comparative flood of decisions in 2019. During these two periods, we see that courts have had to contend with the "financially benefits" claims in increasing detail. The resulting decisions have tackled the definition of "venture," what exactly counts as "financial benefits," and what facts can establish sufficient knowledge of the underlying forced labor claims. Below, I provide an overview of these important decisions, focusing on the developments of these concepts in the relevant cases.

1. Defining "Venture"

The first set of developments deals with the term "venture," which is left undefined in the three "financially benefits" provisions.[133] As a result, courts have devised their own approaches when considering the meaning of the term,

128. Nuñang-Tanedo v. E. Baton Rouge Parish Sch. Bd., No. SACV 10-1172-AG (MLGx), 2011 U.S. Dist. LEXIS 164138, at *39 (C.D. Cal. May 12, 2011). In this case, the court discussed the distinction between levels of liability under section 1595, cross-referencing the similar linguistic distinctions between sections 1589(a) and 1589(b). *Id.* It concluded that section 1595 does not extend liability to government entities. *Id.* at *34–40.

129. United States v. Toviave, No. 11-20259, 2013 U.S. Dist. LEXIS 16456, at *4–5 (E.D. Mich. Feb. 7, 2013).

130. Elat v. Ngoubene, 993 F. Supp. 2d 497, 522–23 (D. Md. 2014); *see id.* at 531 n.17.

131. Cabusao v. Lombardi, No. 1:14CV74-HSO-RHW, 2015 U.S. Dist. LEXIS 185609, at *10 (S.D. Miss. Jan. 30, 2015).

132. *See, e,g.*, Alabado v. French Concepts, Inc., No. CV 15-2830 FMO (AJWx), 2016 U.S. Dist. LEXIS 194389, at *17–18 (C.D. Cal. May 2, 2016) (ruling in the plaintiffs' favor on a default judgment motion as to 1589(b) claims against corporate defendants who "allegedly benefitted from the forced labor," including an LLC that was the owner of an apartment complex that "similarly benefitted from low-cost labor as a result of the landscaping and manual work of" the plaintiffs); Dlamini v. Babb, No. 1:13-CV-2699-WSD, 2014 U.S. Dist. LEXIS 156569, at *15 (N.D. Ga. Nov. 5, 2014) (granting summary judgment in favor of plaintiffs against *pro se* defendants on 1589(b) claim, stating only that the "[d]efendants violated § 1589(b) by benefitting financially from forcing Plaintiff to work at [defendant] Michael Babb's construction company and in other people's homes"); Butigan v. Al-Malki, No. 1:13cv514, 2014 U.S. Dist. LEXIS 197327, at *17 (E.D. Va. Apr. 9, 2014) ("Plaintiff shows that defendants knowingly benefited from their participation in the trafficking venture that violated the TVPRA by receiving plaintiff's labor for meager wages. Defendants' actions therefore violated 18 U.S.C. § 1593A."); *id.* at *13–14 (finding that the plaintiff established a violation of both 1589(a) and 1589(b) against defendants, though citing only to allegations that would establish an underlying 1589(a) violation and not separately to allegations that would establish a 1589(b) violation in particular).

133. *See supra* note 127 and accompanying text.

leading to two strands of overlapping interpretations. On the one hand, some courts have looked elsewhere in the TVPA, specifically, the "financially benefits" subsection of section 1591 (the sex trafficking provision), which *does* explicitly define "venture." By contrast, others have found the lack of a specifically applicable definition to be decisive and have turned to the dictionary to provide the meaning.

The former approach began in April 2017 in *Ricchio v. McLean*, a decision by the First Circuit Court of Appeals.[134] In that case, the plaintiff, Lisa Ricchio, had been enticed to drive from Maine to Massachusetts by Clark McLean, after which McLean held Ricchio against her will for several days in a motel, "physically and sexually abus[ing] [her], repeatedly raping her, starving and drugging her, and leaving her visibly haggard and bruised," all to "groom[] her for service as" a sex worker.[135] McLean had "prior commercial dealings" with the Patels, who operated the motel, which they all allegedly "wished to reinstate for profit."[136] The Patels expressed indifference to and even outright enthusiasm about what McLean was doing to Ricchio: high-fiving him, "speaking about 'getting this thing going again,'" observing him physically force her back to her motel room, and ignoring her "obvious physical deterioration."[137] The district court had dismissed Ricchio's TVPA claims against the Patels and Bijal, Inc., the entity that owned the motel. On appeal, the First Circuit reversed.[138] In so doing, the court did not hesitate when defining the term "venture" in the context of Ricchio's claims under all three "financially benefits" provisions; the entirety of the court's discussion reads as follows: "The defendants' association with McLean was a 'venture,' that is, a 'group of two or more individuals associated in fact,' [18 U.S.C.] § 1591(e)(5)."[139] The court then analyzed the financial benefits received by the Patels, as well as their knowledge of the underlying scheme,[140] but it did not say more regarding the definition of "venture" and did

134. 853 F.3d 553 (1st Cir. 2017).

135. *Id.* at 555.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 556. To be more specific, the court here is discussing "financially benefits" claims under sections 1595 and 1589(b). *See id.* However, in its subsequent discussion of the section 1593A claim, it refers back to this analysis. *See id.* at 557 ("Claim 7, under §§ 1593A and 1595(a) (which § 1593A treats as creating an independent violation): The defendants knowingly benefitted (again, by way of payment for the motel room) from participating in the venture as charged in the preceding claims that formed a predicate for civil recovery under § 1595(a)."). Also notable is that Ricchio had an additional claim under the sex trafficking provision, section 1591, but, again, the entirety of the court's discussion referenced in the text of the article is focused on sections 1595 and 1589(b), and does not mention the section 1591 claim. *See id.* at 556 (discussing Claim 1, related to sections 1595 and 1589(b), and, separately, Claim 3, which includes section 1591 and 1595 claims).

140. *Ricchio v. McLean* is notable for the fact that it concluded such sexual abuse could constitute forced labor. *See id.* ("The Patels acted, at the least, in reckless disregard of the fact that the venture included such conduct on McLean's part [obtaining forced sexual labor or services from Ricchio]. *See* 18 U.S.C. § 1589(b); *United States v. Kaufman*, 546 F.3d 1242, 1259–63 (10th Cir. 2008) (holding that 'labor or services' in § 1589 is not limited to 'work in an economic sense' and extends to forced sexual acts).").

not acknowledge that the definition it quoted came from the TVPA's sex trafficking provision.[141] On these facts, it is clear that the outcome was warranted, but the lack of explanation leading to the First Circuit's conclusion as to the meaning of "venture" is somewhat analytically unsatisfying.

Nearly two years later, in March 2019, the Tenth Circuit followed *Ricchio v. McLean*'s lead by cross-referencing the definition of "venture" in section 1591. That case related to the activity of the Fundamentalist Church of Jesus Christ of Latter-Day Saints ("FLDS") and its leader, Warren Jeffs. The specific claims on appeal in *Bistline v. Parker* related to claims against Jeffs' co-defendants that had been dismissed by the trial court.[142] The plaintiffs in *Bistline v. Parker* alleged that Jeffs' lawyers, both a law firm and a partner at the firm, worked 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."[143] The plaintiffs brought numerous claims against the attorney-defendants;[144] the TVPA claims were premised on Jeffs having engaged in the underlying forced labor violations, and the claims against the attorney-defendants thus "stem[med] from their participation in a 'venture' that benefitted financially from [Jeffs'] prohibited conduct."[145]

When analyzing the attorney-defendants' liability under section 1589(b), the Tenth Circuit began by citing to *Ricchio v. McLean*, stating: "While the term 'venture' has not been defined in the context of § 1589(b), the First Circuit recently persuasively applied the definition from another TVPRA subsection to the forced labor context," and then quoted the definition of "venture" from section 1591(e)(6).[146] After noting that the district court below had dismissed the section 1589(b) claims on the grounds that "defendants did not participate in a 'venture,'" the Tenth Circuit described the First Circuit as "the first court to elaborate on the definition of 'venture' in the context of the TVPRA."[147] It then

Several of the other cases discussed in this article—*Bistline* and *Gilbert* in particular—also sit at this intersection between underlying allegations of sexual abuse and legal claims under the TVPA's forced labor provision.

141. Ricchio v. McLean, 853 F.3d at 556.

142. Bistline v. Parker, 918 F.3d 849, 855 (10th Cir. 2019), *rev'g dismissal of claims against attorney-defendants in* Bistline v. Jeffs, No. 2:16-CV-788 TS, 2017 U.S. Dist. LEXIS 4788 (D. Utah Jan. 11, 2017).

143. *Id*. at 854.

144. *Id*. at 854–55. Specifically, they brought common law claims such as legal malpractice and breach of fiduciary duty. *See id.* at 863. This led to a lengthy decision that delved into interactions between the plaintiffs and the attorney-defendants, *see id.* at 864–69, and questions regarding the tolling of the statute of limitations, *see id.* at 878–89.

145. *Id.* at 871.

146. *Id.* at 873. The definitional sub-section for "venture" in section 1591 was re-numbered between the decision in *Ricchio v. McLean*, 853 F.3d 553 (2017), and that in *Bistline v. Parker*, 918 F.3d 849 (2019), but it is the same substantive provision. *Compare* TVPRA § 222(b)(5)(B), 222(b)(5)(E)(i) (re-numbering definition of "venture" to § 1591(e)(5)), *with* Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, § 5(1), 132 Stat. 1253, 1253 (2018) (re-numbering definition of "venture" to § 1591(e)(6)).

147. Bistline v. Parker, 918 F.3d at 873.

summarized *Ricchio v. McLean*[148] and, after a lengthy analysis of the facts underlying the section 1589(b) claims against the attorney-defendants, concluded that they were sufficiently pleaded.[149] In so doing, the Tenth Circuit did two interesting things. First, it failed to acknowledge and engage with the definition of "venture" as applied by the district court, discussed more fully below.[150] Second, in thoroughly summarizing the facts it believed were sufficient to sustain the claims, it repeatedly emphasized the attorney-defendants' involvement in a "scheme" (not "venture") with Jeffs, and highlighted the various indications that they were aware of and enabled Jeffs' conduct.[151] In other words, despite situating the question as one regarding the idea of whether there was a "venture," the decision did not directly answer that question, especially given the district court's specific holding.[152] Instead, the court cited to a statutory definition from another provision, without acknowledging its origin, and pointed to facts that related more to defendants' *knowledge* of the underlying forced labor than the *type of relationship* between the defendants and the perpetrator of the forced labor. Perhaps the attorney-client relationship between the attorney-defendants and Jeffs was enough to check the box from an analytical perspective as to "venture," but even if that is the case, it was not stated by the court in any clear way.[153] Again, as in *Ricchio v. McLean*, the outcome is certainly the right one, but the legal analysis as to this particular concept is lacking.

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148. *Id.* at 873–74.

149. *Id.* at 874–76.

150. *See infra* notes 154–63 and accompanying text.

151. Bistline v. Parker, 918 F.3d at 874–76 ("In the present case, the complaint recounts in great detail how defendants were responsible for creating the intricate scheme that both enabled forced labor and allowed the threats which enforced that labor to be effective: a scheme far surpassing the district court's limited description of merely 'help[ing] with Trust documents.' [. . .] Defendants had ample notice of the illegal activities which were taking place within the FLDS community while they were actively seeking to enforce Mr. Jeffs' control and simultaneously protecting him from any liability. [. . .] The complaint alleges that the scheme set up by defendants was designed *expressly* for the purpose of facilitating these crimes and also ensuring that defendants would personally reap ample benefits therefrom. [. . .] Plaintiffs further claim that defendants actively maintained and extended this scheme over the years. [. . .] Importantly, like in *Ricchio* [*v. McLean*], some facts alleged in the complaint here indicate defendants' 'complaisance' in response to exhibitions of TVPRA violations. [. . .] Plaintiffs contend that despite extensive knowledge of the ways Mr. Jeffs was using his power to harm plaintiffs and other similarly-situated individuals, defendants continued to use their legal expertise to uphold this scheme. [. . .] To top it off, plaintiffs allege that some of defendants' legal fees were being funded by the forced labor of children, with defendants' awareness and acquiescence. [. . .] In this case, plaintiffs allege facts supporting their claims that defendants were well aware of the crimes being committed against plaintiffs, did nothing to expose never these atrocities, tacitly approved of the conduct by constructing a scheme for the purpose of enabling it, and benefitted for years from plaintiffs' payments of a considerable amount of attorney fees.").

152. *See infra* notes 157–62 and accompanying text.

153. Notably, the dissent in *Bistline v. Parker* criticized the majority opinion on essentially these grounds, arguing that the majority operated to make the defendants "vicariously liable simply because their legal fees were paid by Jeffs with the fruits of his wrongful conduct." 918 F.3d at 894 (Briscoe, J., dissenting). The dissent indicated that the plaintiffs should have alleged "additional legal or other work that these defendants performed to support Jeffs' scheme." *Id.* at 895. In coming to this conclusion, the dissent overlooked the numerous allegations regarding the attorney-defendants' knowledge of the scheme and acquiescence to it by continuing their relationship with Jeffs, which the majority stated in a brief

The other approach, which has used the dictionary definition of "venture," actually began with the *Bistline* district court decision, *Bistline v. Jeffs*, issued in January 2017.[154] After considering and dismissing direct forced labor claims under section 1589(a) against the attorneys,[155] the district court began its section 1589(b) analysis by highlighting several allegations that would tend to establish that the attorney-defendants financially benefited from and knew of Jeffs' underlying conduct. Specifically, the district court highlighted that the attorney-defendants' legal fees were paid by the plaintiffs, either due to their pay being withheld or because they were expected to donate $1,000 per month for the fees, and also that some individual "underage workers were allegedly ordered to remodel [the individual attorney's] home in exchange for legal services"; as a result, the plaintiffs asserted that the attorney-defendants "knew of and approved the circumstances under which attorney's fees were being collected."[156]

The district court ultimately concluded that the claim should be dismissed, however, by focusing on the idea of "participating in a venture," and importing analysis from another statutory context to give that concept meaning. Thus, while the district court cited to the straightforward definition of "venture" in Black's Law Dictionary in passing—defining "'venture' . . . as 'an undertaking that involves risk,' and [one that] is typically associated with 'a speculative commercial enterprise'"[157]—the court held that the plaintiffs had "failed to adequately plead that [the attorney-d]efendants '*participat[ed]* in a venture' to provide or obtain that labor."[158] After stating that neither "participation," nor "venture" were "defined in the context of 18 U.S.C. § 1589(b),"[159] the district court, without explanation, turned to a discussion of how some courts have treated the term "participating" "[i]n the RICO context."[160] In short, the district court highlighted that, in most cases involving one RICO defendant who is a professional providing services to another RICO defendant, such provision of "professional services" is not a sufficient level of involvement to impose liability on the professional defendant.[161] Finding this RICO analysis to be persuasive in

response in a footnote. *See id.* at 876 n.10. (majority opinion). The majority was right to highlight the abundance of allegations supporting the claim, and the dissent overstated the consequences of the outcome, but this back and forth between the judges highlights the fact that the majority conflated facts getting at the other key elements of the provision—"knowledge" and financial or other "benefits"—all under the umbrella of "venture."

154. Bistline v. Jeffs, No. 2:16-CV-788 TS, 2017 U.S. Dist. LEXIS 4788, (D. Utah Jan. 11, 2017), *dismissal of claims against attorney-defendants rev'd sub nom* Bistline v. Parker, 918 F.3d 849, 855 (10th Cir. 2019).

155. *Id.* at *24–27.

156. *Id.* at *27–28.

157. *Id.*

158. *Id.* at *28.

159. *Id.* at *28–29 (alteration in original).

160. *Id.* at *29.

161. *Id.* ("In the RICO context, however, courts have rejected the idea that providing professional services equates to 'participating' in an enterprise. In RICO cases, a party is deemed to have participated only if they took part in the operation and management of the enterprise. This requires more than

the section 1589(b) context, the district court dismissed the section 1589(b) claims.[162]

While the plaintiffs had also brought RICO claims and the district court determined those claims failed for similar reasons,[163] thus perhaps explaining why the court turned to RICO caselaw, it is still unclear why this choice was justifiable. Indeed, in 2018, Congress explicitly defined the term "participation in a venture" in the context of the sex trafficking provision's "financially benefits" provision, and that new definition does not follow the RICO approach.[164] What's more, the 2018 amendment was criticized by the Department of Justice for needlessly raising the bar on prosecuting such crimes.[165] Perhaps the district court's lack of clarity on the concept of "venture" accounts for the Tenth Circuit's reversal, although the appellate decision does not explain it in this manner. In any event, one seed in the *Bistline v. Jeffs* district court decision did bear fruit later on, even if it was not on the case's direct appeal.

In March 2019, a magistrate judge issued a report and recommendation regarding various motions to dismiss that had been filed in *Gilbert v. United States Olympic Committee*.[166] That case centered on allegations made by female taekwondo athletes who were sexually abused by two individuals associated with the taekwondo community, which were allegedly ignored and covered up by the

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associating with or assisting an enterprise, even when assistance is given with the knowledge of an enterprise's illicit nature.") (citations omitted).

162. *Id.* ("Here, [the attorney-d]efendants represented the FLDS Church, assisted in the amendment of the Trust, and represented some FLDS members. [The attorney-d]efendants' alleged actions do not equate to participation in Jeffs' alleged venture to profit from forced labor. Without some indication that [the attorney-d]efendants took some action to operate or manage the venture, the fact that Jeffs allegedly misused Trust property as leverage to compel forced labor is not enough to make [the attorney-d]efendants liable under Section 1589(b). Therefore, even if the money for [the firm's] fees was obtained by Jeffs in a way that violated Section 1589(a), Plaintiffs have inadequately pleaded that [the attorney-defendants] participated in that venture, and this claim is therefore dismissed.").

163. *See id.* at *20–21.

164. The 2018 amendments defined "participation in a venture" in section 1591 as "knowingly assisting, supporting, or facilitating a violation of [1591(a)(1)]." Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, § 5(2), 132 Stat. 1253, 1255 (2018). The 2018 changes to section 1591 were aimed specifically at online advertisers who were using the Communications Decency Act as a shield against sex trafficking claims. *See* 164 Cong. Rec. H. 1290, 1291 (Feb. 27, 2018) (statement of Rep. Jackson Lee). For additional background on this dynamic between the Communications Decency Act and sex trafficking statutes, leading to the 2018 amendments, see Dahlstrom, *supra* note 99, at 406–07.

165. *See* 164 Cong. Rec. H. 1290, 1296 (Feb. 27, 2018) (statement of Rep. Lofgren).

166. Gilbert v. United States Olympic Comm., No. 18-cv-00981-CMA-MEH, 2019 U.S. Dist. LEXIS 35921 (D. Colo. Mar. 6, 2019). The parties subsequently filed objections to the report and recommendation, but the district judge affirmed and adopted the relevant portions of the magistrate's report and recommendation discussed herein. *See* Gilbert v. United States Olympic Comm., No. 18-cv-00981-CMA-MEH, 2019 U.S. Dist. LEXIS 166957, at *31–32, *46–51 (D. Colo. Sept. 27, 2019). Moreover, both the magistrate's report and recommendation and the district judge's decision have themselves been cited in subsequent cases considering such "financially benefits" claims. *See, e.g.*, M.A. v. Wyndham Hotels & Resorts, Inc., 425 F. Supp. 3d 959, 964–65, 969 (S.D. Ohio 2019) (citing to the report and recommendation for the definition of "venture" and to the district judge's decision for the definition of "benefit" when upholding a "financially benefits" claim under section 1595 in the face of a motion to dismiss).

United States Olympic Committee ("USOC") and USA Taekwondo, Inc. ("USAT"), the two governing bodies relevant to U.S. taekwondo athletes who wish to participate in the Olympic Games.[167] One of the individuals, Jean Lopez, "was the head coach of the USAT team at the 2004, 2008, 2012, and 2016 Olympics."[168] The other, his brother Steven Lopez, was "a well-known athlete on the taekwondo team who won gold medals at the 2000 and 2004 games and a bronze medal in 2008."[169] The various named plaintiffs alleged that they had been assaulted by one or both brothers, that they complained to both the USOC and the USAT, that the entities delayed an investigation into the brothers, and that executives at both organizations lied to Congress regarding the scope of the appointed investigator's budget and authority because the brothers generated "medals and money" for the entities.[170]

After concluding that "the pay-to-play sexual acts alleged in the [complaint] are 'labor' or 'services' as those terms exist in the TVPA,"[171] the *Gilbert* court engaged in a lengthy analysis of how to define "venture" in both section 1589(b) and section 1595(a).[172] Once it had rejected some of the USOC's more tenuous arguments about how to describe venture,[173] the *Gilbert* court cited to the *Bistline v. Jeffs* district court decision approvingly, and applied the definition of "venture" from Black's Law Dictionary: "'[a]n undertaking that involves risk,' especially 'a speculative commercial enterprise.'"[174] Of note, the *Gilbert* court

167. *Gilbert*, 2019 U.S. Dist. LEXIS 35921, at *3–5.

168. *Id.* at *5.

169. *Id.*

170. *Id.* at *5–13.

171. *Id.* at *28. Like *Ricchio v. McLean*, the decision in *Gilbert* is also important for this reason. *Cf. supra* note 140.

172. *Gilbert*, 2019 U.S. Dist. LEXIS 35921, at *28–37.

173. The court first addressed the USOC's argument that "venture" in these provisions should be read to mean "sex trafficking venture"; it declined to adopt that approach because the cases cited by the USOC to support that argument—particularly *United States v. Afyare*, 632 F. App'x 272 (6th Cir. 2016)—arose under the sex trafficking provision, section 1591, which, as noted previously, defines "venture" in one of its own sub-sections. *Gilbert*, 2019 U.S. Dist. LEXIS 35921, at *29–33 (discussing *Afyare*). The court then addressed an argument that the USOC "proposed only by inference": "that 'venture' in § 1589(b) means 'a forced labor venture'" because the term appears in the forced labor provision. *Id.* at *33. The court similarly declined to follow this approach, noting that, of the four cases cited by the USOC for this purpose, two did not include claims brought under section 1589(b), and, in the other two, there were *also* claims under section 1589(a), and "neither court found it necessary to perform an analysis of the sufficiency of the pleadings solely under" section 1589(b). *Id.* at *34–35 (citing Owino v. CoreCivic, Inc., No. 17-CV-1112 JLS (NLS), 2018 U.S. Dist. LEXIS 81091 (S.D. Cal. May 14, 2018), and Adhikari v. Daoud & Partners, 697 F. Supp. 2d 674 (S.D. Tex. 2009)). The court ultimately construed the USOC's argument to lead to the logical conclusion that, in order to impose liability "under § 1589(b), [the] Plaintiffs must allege it engaged in conduct that would also make it liable *as the principal* under § 1589(a)." *Id.* at *35. The court dismissed this approach because it "would render § 1589(b) redundant." *Id.* (citations omitted). Interestingly, one of the cases cited by the USOC essentially made the same point, stating that the 2008 amendments that introduced the "financial benefit" provisions "create[d] new legal consequences," because, prior to those amendments, the defendant in that case would not have been "liable because the 'financial benefit' element cause of action did not exist." Owino, 2018 U.S. Dist. LEXIS 81091, at *39.

174. *Gilbert*, 2019 U.S. Dist. LEXIS 35921, at *37 (citation omitted).

came to this conclusion on the explicit grounds that the term "venture" was not only undefined by the relevant provision of the TVPA itself, but also by the Court of Appeals in which it sits: the Tenth Circuit.[175] Ironically, it would only be literally eight days later that the Tenth Circuit would do just that in *Bistline v. Parker*. In any event, applying the principles outlined above, the *Gilbert* court determined that the section 1589(b) claims against the USAT and USOC could proceed.[176]

Despite these competing approaches, it is still possible to draw some general principles for what might count as a "venture" under the "financially benefits" provisions. In all of the cases at issue—excluding the *Bistline v. Jeffs* district court decision which, of course, was reversed on appeal—the courts determined that some sort of existing business relationship was enough to establish a "venture," although they used different definitions to reach that result.[177] More broadly, however, many courts have conflated the analysis under "venture" with that required by either the "benefits" or "knowledge" parts of the provisions. This definitional creep, while perhaps somewhat analytically frustrating, actually serves to highlight that these latter two parts of the provisions are key to these claims. I turn to a discussion of these next.

2. *What Counts as Financial Benefits?*

In contrast to the scattered approaches with "venture," the limited court decisions regarding the "financially benefits" provisions have been quite uniform in their analysis of what benefits must be shown under the provisions. Courts have concluded that income tied to a business relationship is sufficient, whether its source is the victims of forced labor, other members of the venture, or third parties. Indeed, as indicated above, it is often the case that the receipt of financial

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175. *Id.* at *36–37.

176. *Id.* at *44–46 (summarizing relationships between athletes, USAT, and USOC, and noting that "USAT does not dispute that the [complaint] alleges its relationship with Steven Lopez (a USAT athlete through the relevant periods alleged in this case) is a venture, and the heart of the allegations in the [complaint] is that the nature of the relationships among the athletes, the [national governing bodies], and the USOC is a venture"); *id.* at *58 ("First, as I have already discussed, the [complaint] plausibly states that a relationship between an athlete and the USAT is a venture. I arrive at the same conclusion when analyzing the relationship between an athlete and the USOC."). The court further illustrated its analysis by essentially putting forth a "but-for" standard: in concluding that the complaint "plausibly alleges Steven [Lopez] obtained [the plaintiff's] services in violation of the TVPA," it stated that "he was acting on behalf of the venture" with USAT when he did so; in other words, "but for the venture, Steven [Lopez] would not have obtained—nor been able to obtain—[the plaintiff's] sexual services." *Id.* at *47; *see also id.* at *58 (employing the same analysis with another plaintiff in relation to claims against the USOC).

177. In a recent decision, the Eastern District of New York considered a section 1589(b) claim, though it did so without referring to any of the cases discussed in this article. It did, however, use similar logic and terminology. In that case, the court equated the term "venture" under the provision with a "commercial enterprise"—one that, in that case, "recruit[ed] Filipino nurses to the United States to work at nursing homes." Paguirigan v. Prompt Nursing Empl. Agency LLC, No. 17-cv-1302 (NG) (JO), 2019 U.S. Dist. LEXIS 165587, at *56 (E.D.N.Y. Sept. 24, 2019). After finding that the various individuals and corporate entities involved in this scheme also had knowledge of the underlying forced labor, the court granted summary judgment in favor of the plaintiff (and all members of the class action) on her section 1589(b) claims. *Id.* at *56–58, 61.

benefits tends to be indicative of the existence of the venture itself, thus underlining the critical nature of this element.[178]

In *Ricchio v. McLean*, the First Circuit stated briefly that, by "renting space [to McLean] in which McLean obtained, among other things, forced sexual labor or services from Ricchio," the Patels had "knowingly benefited, that is, 'receiv[ed something] of value" from the forced labor.[179] The district court subsequently revisited exactly this issue on remand, ultimately denying a motion for summary judgment filed by the defendants in *Ricchio v. Bijal, Inc.* in June 2019.[180] Specifically, the district court concluded that, because McLean had paid for a motel room and the Patels "received yearly salaries and free lodging from the motel in return for their work," one could conclude "that the Patels had a financial stake in the success of the motel, and that even the renting of a single room for a short period could constitute a 'benefit.'"[181] Furthermore, the district court rejected the defendants' argument that any benefit they received was negligible, observing that "it does not appear that any such benefit must reach a particular threshold of value."[182]

In addition to these two iterations of *Ricchio*, other cases have interpreted this term expansively. The *Gilbert* court concluded that even indirect benefits as between the main perpetrator and the organizational defendants could establish liability under section 1589(b)—after explaining the funding sources and structures of the Olympic athletes, the USOC, and governing bodies including the USAT, and finding this to be a "venture,"[183] the court concluded that the "USAT benefitted from" its relationship with its athlete Steven Lopez[184] and that the USOC similarly did so when Lopez participated in the 2016 Olympics.[185]

178. Interestingly, most courts seem to overlook the fact that the "benefits" language contains a separate knowledge requirement, wholly apart from the requirement discussed in the text as to the forced labor. *See infra* section III(B)(3). All three "financially benefits" provisions require the person against whom the claim is brought to have benefitted "knowingly." *See supra* notes 123, 125, and 126 and accompanying text. However, as I discuss in the text, the focus tends to be on the existence and receipt of benefits themselves, rather the knowledge of such receipt, at least when it comes to this portion of the provisions. The exception is the *Gilbert* court's proposed four elements, which underline a separate knowledge requirement for the receipt (though also arguably adding in a superfluous requirement that the person knowingly participated in a venture, which is not required by the text of the provisions). *See infra* note 244 and accompanying text.

179. Ricchio v. McLean, 853 F.3d at 556.

180. Ricchio v. Bijal, Inc., 386 F. Supp. 3d 126, 127 (D. Mass. 2019).

181. *Id.* at 131.

182. *Id*.

183. *Gilbert*, 2019 U.S. Dist. LEXIS 35921, at *46 ("Thus, both parties assume risk in this enterprise. The athlete takes the risk of competing to obtain the direct funding and health insurance that can accompany a spot on Team USA, not to mention the endorsements that may follow. The institutions invest in an athlete with the risk that he or she may not generate the corporate sponsorships that serve as part of their funding.").

184. *Id.* at *47.

185. *Id.* at *58.

Finally, the payment of attorneys' fees to the attorney-defendants in *Bistline v. Parker* was enough to satisfy the Tenth Circuit on this point.[186]

One other recent case lends support to the approach outlined so far. In March 2019, the Northern District of California allowed "financially benefits" claims to proceed against Tesla and a manufacturer with which it had a business relationship.[187] For the purposes of this discussion, *Lesnik v. Se* is particularly interesting: the case involves workers who were present in the United States on B-1 visas,[188] and includes facts common to many temporary foreign worker cases. The claims arose out of the plaintiffs' work for a subcontractor called Vuzem, during which time the plaintiffs "help[ed] install a paint shop at a Tesla Facility in Fremont, California,"[189] under the supervision of Eisenmann, "a manufacturer of specialized paint shop equipment."[190] The plaintiffs alleged that they "were paid far below minimum wage and were forced to work extreme hours," were housed in "poor living conditions," and that Vuzem "threatened to withhold pay [and] . . . medical benefits if workers reported a job injury [or became too sick to work]; threatened to withhold visas and immigration status; threatened to file a civil suit against Lesnik while he was hospitalized; and even told Lesnik that 'this will not go well for you.'"[191]

After concluding that the allegations regarding financial and immigration-related threats, among others, were sufficient to state a forced labor claim under section 1589(a),[192] the court considered whether Tesla and Eisenmann received "any financial benefit" from the forced labor.[193] The court noted that the two companies "entered into an agreement under which Eisenmann would establish a paint shop at Tesla's facility," and later met with Vuzem to "sign[] a subsequent agreement under which Eisenmann would employ Vuzem as a subcontractor to assist the construction of the paint shop."[194] As a result, the court, again conflating the "venture" and "benefits" aspects of the provision, concluded that

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186. Bistline v. Parker, 918 F.3d at 875 ("To top it off, plaintiffs allege that some of [the attorney-] defendants' legal fees were being funded by the forced labor of children, with [the attorney-]defendants' awareness and acquiescence."); *id.* at 876 ("In this case, plaintiffs allege facts supporting their claims that [the attorney-]defendants . . . benefited for years from plaintiffs' payments of a considerable amount of attorney fees.").

187. Lesnik v. Se, 374 F. Supp. 3d 923, 954 (N.D. Cal. 2019).

188. *Id.* at 934.

189. *Id.*

190. *Id.* at 933.

191. *Id.* at 934.

192. *Id.* at 952. The court appears to walk through the section 1589(a) analysis not because any 1589(a) claims were at issue, but solely because it had to determine whether the allegations regarding the forced labor itself were sufficient for the purposes of the piggybacking that the 1589(b) claims were required to do. *See, e.g., id.* at 951 (noting that the complaint "alleges that Defendants violated 18 U.S.C. § 1589, and that this is the basis for Plaintiffs' TVPRA claim" (emphasis added)), 952 (after concluding the section 1589(a) analysis, the court stated, "The Court now discusses Tesla and Eisenmann's roles and potential liability because the TVPRA also gives rise to liability" under the "financially benefits" provisions of sections 1595(a) and 1589(b)).

193. *Id.* at 952.

194. *Id.* at 953.

"Eisenmann and Tesla benefitted 'financially' or by 'receiving anything of value' from participating in a venture that violated § 1589, because Vuzem's actions were committed to a full contract signed with Tesla and Eisenmann."[195] In other words, the contractor/subcontractor relationship was enough to be the "venture," and the revenue that flowed from those agreements counted as the "financial benefits" under section 1589(b).

In sum, the cases illustrate a clear trend that income or revenue received as a result of a business relationship between the actual perpetrators and those who benefit from forced labor can be enough to claim "financial benefits" under these provisions. Sometimes the money has come from the victims themselves, as in *Bistline v. Parker*. Other times, it has been exchanged between the business partners, one of whom is directly responsible for the forced labor, as in *Lesnik*, and even in the pair of *Ricchio* decisions, where the relationship was between a business (a motel) and a customer (McLean). And, still other times, the revenue has come from outside sources as a result of a partnership that allows all parties—victims, perpetrators, and those who benefit—to bring in money, as in *Gilbert*.

3. *Establishing Knowledge of Forced Labor*

The last of the key terms necessitating articulation in the "financially benefits" provisions is the knowledge requirement—or, specifically, what suffices to show that the defendant knew or was in reckless disregard of the underlying forced labor?[196] As expected, this element tends to be situation-specific, depending on the underlying facts of the case. Nevertheless, the courts considering these claims in detail have all concluded that the allegations in each case were sufficient to show knowledge or reckless disregard.

The First Circuit in *Ricchio v. McLean* determined that the Patels "acted, at the least, in reckless disregard" of the underlying forced labor.[197] While it does not explain the facts relevant to its conclusion in that portion of the decision, its previous reference to interactions between the Patels and McLean, including high-fiving each other and "show[ing] indifference to [the plaintiff's] obvious physical deterioration,"[198] was presumably key to the outcome.

In *Bistline v. Parker*, the Tenth Circuit documented the ways in which the attorney-defendants were abundantly aware of Jeffs' conduct. The court noted that, allegedly, the "[attorney-]defendants and Mr. Jeffs 'actively discussed [Jeffs'] illegal goals' in setting up the Reinstated Trust and that Mr. Jeffs retained

195. *Id.*

196. Section 1595(a) uses cosmetically but not substantively different phrasing: "knew or should have known." *See supra* notes 123–26 and accompanying text. In a recent case, one court has—erroneously, I believe—characterized the section 1595(a) standard as a negligence standard. *See Wyndham*, 425 F. Supp. 3d at 965. By way of reminder, the provisions also contain a second and higher knowledge requirement, as to the receipt of the benefits themselves. *See supra* note 178.

197. Ricchio v. McLean, 853 F.3d at 556.

198. *Id.* at 555; *see also supra* note 137 and accompanying text.

[the attorney-]defendants' legal counsel for the purpose of developing a scheme to 'cloak' forced labor and ritual rape of young girls 'with the superficial trappings of legal acceptance.'"[199] The attorney-defendants allegedly demonstrated their knowledge by telling the Attorney General of Utah that it would be "useless" to try to intervene with Jeffs to change his practices of marrying underage girls.[200] They also allegedly received "graphic evidence of the ceremonial rape of little girls" from the FBI and when they represented other "church members accused of sexual crimes."[201] Finally, the individual attorney-defendant allegedly "personally and knowingly utilized manual labor in exchange for legal services, through construction and remodeling work on his real estate, despite knowing that he was not actually representing the best interest of these individuals and that they would not receive the benefit of their labor."[202] Taken together, these allegations led the Tenth Circuit to conclude that there were sufficient allegations that the "[attorney-]defendants were well aware of the crimes being committed against plaintiffs," covered it up, and "tacitly approved of the conduct" by enabling it through their representation of Jeffs for many years.[203]

Numerous interactions between individuals employed by the defendant companies and the plaintiffs in *Lesnik* were enough to satisfy this knowledge requirement for the purposes of a motion to dismiss analysis. Specifically, the court referenced allegations that the paint shop equipment manufacturer, Eisenmann, had "submitted false letters to secure B-1 visas for" the plaintiffs, and that it employed managers who worked at the plaintiffs' worksites and supervisors who visited the worksite of the plaintiffs "from time to time"; together, this "direct involvement in every aspect of the events at issue" was enough to show "that Eisenmann knew or should have known of Vuzem's treatment of its employees."[204] With respect to Tesla, the court noted that the company "knew Vuzem's workers were performing construction work prohibited by their B-1 visas and knew the workers lacked state licenses that [were] necessary to perform construction work."[205] Tesla also "knew the workers' shifts were extreme" because it maintained entry and exit records of workers at its facility and transported workers to company-owned accommodations at the end of their shifts.[206] Finally, the court noted that a senior Tesla engineer "provided instructions to [one plaintiff], and Tesla maintained all job hazard forms at [its] facility."[207] As a result, the court minced no words,

199. Bistline v. Parker, 918 F.3d at 875.
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.* at 876.
204. *Lesnik*, 374 F. Supp. 3d at 953.
205. *Id.*
206. *Id.*
207. *Id.*

concluding "that Tesla knew or should have known of Vuzem's mistreatment of the workers who *spent every day at Tesla's facility*."[208]

Perhaps the most sweeping approach as to the knowledge requirement was taken in *Gilbert*. In that case, the key facts regarding the governing bodies' knowledge of the underlying forced labor centered on the USAT having initiated an investigation into the allegations in 2014, including hiring an investigator in March 2015 to specifically focus on the conduct of the Lopez brothers.[209] The court acknowledged that such "allegations support a conclusion that USAT gained knowledge that Steven [Lopez] obtained sexual services well after his conduct occurred."[210] However, the court did not find this timing issue to be fatal to the claim. It stated:

> The statute does not require that "whoever knowingly benefits" from a venture have knowledge shortly after the alleged abuse occurs, or even of the specific victim of the abuse. It creates liability simply for knowingly benefitting from a venture "which that person knew or should have known has engaged in an act in violation [of the TVPA]."[211]

On this basis, the court concluded that the plaintiff's claims against both the USAT[212] and the USOC[213] could proceed.

In all, the decisions demonstrate that the facts that might indicate that a defendant knew (or was in reckless disregard) of the underlying forced labor claim are specific to the cases themselves. Generally speaking, they range from direct observation of a victim's treatment—as the Patels had seen the victim in *Ricchio v. McLean*, and the companies' representatives had observed extreme work conditions in *Lesnik*—to being on the receiving end of reports of abuse, as in *Gilbert* or *Bistline v. Parker*. Moreover, in *Bistline v. Parker* and *Lesnik*, we also see that the defendants played some role in setting up the exploitative situation, whether that was the active involvement of the attorney-defendants in the former or the submission of false documents to secure visas by Eisenmann in the latter, and that all of these facts can be used to show awareness of the underlying forced labor.

* * *

As the above summary shows, the "financially benefits" caselaw is an actively developing area of law. A limited number of cases have been moving through the appellate pipeline while still others are being decided for the first time, and the various courts and decisions are often in dialogue with one another. And, importantly, all of these cases—again, with the exception of the district

208. *Id.* (emphasis added).

209. *Gilbert*, 2019 U.S. Dist. LEXIS 35921, at *47.

210. *Id.* at *47–48.

211. *Id.* at *48 (quoting 18 U.S.C. § 1595(a)).

212. *Id.*

213. *Id.* at *59 (citing allegations regarding the plaintiff's reporting of her abuse to USOC employees in 2006 and that a board member who later became interim CEO of USOC had knowledge of the complaints).

court decision in *Bistline v. Jeffs*, then reversed on appeal—show outcomes that are in favor of the plaintiffs bringing these claims. As such, there is enormous potential for these types of claims at the current moment. Next, I turn to a consideration of just this potential—first, by looking at the application of the labor trafficking framework to temporary foreign worker cases, and then by discussing the utility of these "financially benefits" claims in particular.

IV. LABOR TRAFFICKING AND TEMPORARY FOREIGN WORKER PROGRAMS

Despite scholarly critique of the United States' approach to trafficking,[214] and the relative lack of attention on temporary foreign workers in the legislative history,[215] the emergence of the TVPA's private right of action and the clarification of the forced labor provision have been enormously useful to such workers. Below, I expand on the intersection of U.S. labor trafficking law and temporary foreign worker programs by focusing on four key points. First, I provide a concrete summary of why TVPA claims in particular, as opposed to other labor-based claims, are useful for temporary foreign workers. Second, I illustrate how this operates in practice, discussing both the statistics as to TVPA claims brought by temporary foreign workers and some examples of current and recent cases. Then, I focus on the "financially benefits" provisions, synthesizing the above case summaries to show that they provide a useful legal landscape for these claims in the temporary foreign worker context. I close by discussing some bigger picture benefits of bringing these claims.

A. The Utility of the TVPA for Temporary Foreign Workers

Practitioners who have written about the TVPA have consistently been enthusiastic about these types of claims.[216] Thus, in addition to the intangible benefits of civil trafficking claims, as early scholars on this subject noted,[217] there are also various concrete benefits to bringing TVPA claims specifically. This is particularly true in the context of temporary foreign workers who might otherwise be pursuing more restrictive and traditional employment claims.

To begin, TVPA claims provide many advantages as compared to traditional wage claims. First, the TVPA has a ten-year statute of limitations.[218] This period is much longer than, for example, the Fair Labor Standards Act ("FLSA"), which has a baseline two-year statute of limitations for federal minimum wage and overtime claims.[219] Similarly, the TVPA's breadth means

214. *See supra* notes 77–80 and accompanying text.

215. *See supra* note 105 and accompanying text.

216. *See, e.g.*, Miller & Jonas, *supra* note 9 (providing guidance from practitioners to practitioners about litigating trafficking claims with low-wage worker clients); Lee, *supra* note 5, at 50–56 (discussing various claims that can be brought by temporary foreign workers, including under the TVPA).

217. *See supra* notes 95–98 and accompanying text.

218. *See* 18 U.S.C. § 1595(c).

219. *See* Miller & Jonas, *supra* note 9, at 4.

that a plaintiff need not surmount the various legal hurdles in establishing an employment relationship or the inapplicability of certain employment law exclusions, a common difficulty in wage cases that involve contractors or other multi-tiered operations meant to obfuscate an employer's liability.[220]

Moreover, the types of recoverable damages are quite broad. Wage damages can be recovered under the TVPA (and thus provide an easy method to do so even if it is past the FLSA statute of limitations), and punitive damages are also on the table.[221] A recent report has highlighted that both compensatory and punitive damage awards in civil trafficking cases have been quite high.[222]

Finally, considering exploitation through the lens of labor trafficking under the TVPA provides an important additional tool to individuals who lack long-term immigration status in the United States. By way of reminder, the TVPA offers immigration protections to victims of labor trafficking who cooperate with law enforcement via continued presence and the T visa, thus encouraging otherwise vulnerable victims to report their abuse.[223] This is, of course, true of all victims who lack permanent status, whether it be individuals who enter on temporary work visas or undocumented workers.

In sum, claims under the TVPA carry enormous potential for temporary foreign workers who have been the victims of labor trafficking, especially compared to more traditional routes of recovery under pre-existing employment statutes.

B. A Current View of TVPA Claims in Temporary Foreign Worker Cases

Given their utility, it should be no surprise that TVPA claims are actively in use by advocates for temporary foreign workers who have been the victims of labor trafficking. In fact, the Human Trafficking Legal Center published a report in late 2018 highlighting that nearly ninety-three percent of the civil lawsuits brought pursuant to the TVPA's private right of action have pursued forced labor claims.[224] And many of these involve temporary foreign workers: that same

220. *See, e.g.*, *id.* ("The various exemptions or exceptions to coverage under state and federal wage-and-hour laws do not apply to civil trafficking or forced labor claims . . .").

221. *See id.*, at 4; *see also* LEVY, *supra* note 32, at 24.

222. LEVY, *supra* note 32, at 24–26. Specifically, the average award in such cases reaches nearly $2 million. *Id.* at 33 (noting a total of fifty-six known cases with awards that total $108,657,807.75, which averages to $1,940,318.00 per case).

223. *See* Miller & Jonas, *supra* note 9, at 4. The availability of immigration remedies also poses a potential risk in civil litigation, however, as defendants in trafficking cases may seek discovery related to the immigration status of the plaintiff or plaintiffs, often for (arguably) improper purposes. *See id.* at 6 ("Defendants are increasingly seeking discovery on a victim's immigration status and using any related victims to attack the victim's motive and credibility.").

224. *See* LEVY, *supra* note 32, at 11 (noting a total of 299 cases filed from 2003 through October 2018, with only twenty-one of those cases involving sex trafficking claims). This stands in contrast to criminal prosecutions, which are overwhelmingly dominated by sex trafficking cases. *See, e.g.*, U.S. DEP'T OF STATE, *supra* note 50, at 485 (noting that, in 2018, the Department of Justice initiated 230 trafficking prosecutions, only seventeen of which "involved predominantly labor trafficking," as

report documents that fifty-seven percent of the cases were filed by plaintiffs who had entered into the United States on a legal visa,[225] with nearly half of the total plaintiffs in forced labor cases present in the United States on A-3/G-5, B-1/B-2, H-2A, H-2B, or J-1 visas.[226] The report's review of the industries in which forced labor plaintiffs were employed similarly shows an overlap with the most common industries employing temporary foreign workers—thirty-one percent of the civil cases were filed by domestic service workers, twelve percent by agricultural workers, and eight percent by food service and hospitality workers.[227] In a similar vein, a report issued by Polaris, the organization that runs the U.S. National Human Trafficking Hotline, documented that, from 2015 to 2017, nearly half of the callers who reported conditions of labor trafficking were present in the United States on legal visas.[228]

Indeed, the type of harm targeted by the TVPA is neatly aligned with the nature of the exploitation common in temporary foreign worker programs.[229] As a result, common fact patterns in trafficking lawsuits brought by temporary foreign workers tend to include threats that hinge on the workers' lack of stable immigration status, ranging from outright threats of deportation, to document holding, to making what are truthful statements about the legal status of temporary work visas for an improper purpose.[230] Threats tied to a worker's

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compared to 213 "involv[ing] predominantly sex trafficking," and secured a total of 526 convictions against trafficking, with twenty-five of those being "predominantly labor trafficking," and 5,019 being "predominantly sex trafficking").

225. LEVY, *supra* note 32, at 12.

226. *See id.* at 14 (A-3/G-5 accounted for twelve percent of claims, B-1/B-2 for nine percent, H-2A for nine percent, H-2B for eleven percent, and J-1 for 1.4 percent; an additional thirty percent of cases involved workers on unknown visa statuses).

227. *Id.* at 13.

228. *See* SARA CROWE, POLARIS, *Human Trafficking on Temporary Work Visas: A Data Analysis 2015–2017* 4 (2018), https://polarisproject.org/wp-content/uploads/2019/01/Human-Trafficking-on-Temporary-Work-Visas.pdf [https://perma.cc/B8DG-4AR5].

229. As some authors have noted, it is important to be precise when identifying the ways in which the TVPA is useful. Miller & Jonas, *supra* note 9, at 5 ("[T]he Act does not protect workers against all extreme forms of workplace exploitation. It prohibits a particular kind of coerced labor. A worker could be severely underpaid, subjected to extremely dangerous working conditions, or even suffer physical or sexual assaults at work but not meet the definition of forced labor or trafficking."); *see also* Ullman, *supra* note 35 ("Exploitative working conditions alone do not constitute labor trafficking; forcing a person to work against their will does."). In addition, of course, not all workers who are the victims of labor trafficking are present in the U.S. on temporary work visas—undocumented workers, legal permanent residents, and even U.S. citizens can all be the victims of labor trafficking. The TVPA has no requirement as to the immigration status, or lack thereof, in order to be a victim of trafficking. The point is simply that the types of coerced labor that are covered by and thus civilly actionable under the TVPA dovetail with much of the exploitation common in U.S. temporary foreign worker programs.

230. *See* Miller & Jonas, *supra* note 9, at 3 ("Courts continue to find that threats of deportation, even standing alone, may constitute serious harm or threatened abuse of the legal process under Section 1589. Threatened abuse of the legal process can extend to statements that traffickers argue are simply true (e.g., that the defendant must report a guest worker who leaves employment to immigration or that an undocumented worker may be deported) as long as the employer makes those threats for a purpose not intended by the law, that is, to force an individual to continue working."); *see also* Lee, *supra* note 5, at 53–54 (discussing Ramos-Madrigal v. Mendiola Forestry Service, LLC, 799 F. Supp. 2d 958 (W.D. Ark. 2011), and that court's conclusion that confiscation of personal documents, coupled with threats to report

economic vulnerability are another common feature of such cases, whether they are based on a worker's pre-existing debt incurred to pay recruitment-related expenses, or a threat to withhold pay if a worker does not comply with an employer's work-related demands.[231] These conditions all emerge from the systemic problems with these programs described above.[232]

Recent high-profile trafficking cases brought by temporary foreign workers highlight these commonalities. For example, in a series of cases brought by former H-2B workers recruited from India to the Gulf Coast to repair machinery damaged by Hurricane Katrina, the workers alleged that they were promised well-paying jobs with a company called Signal International and that they would receive green cards in the United States.[233] In order to obtain these jobs, the workers paid upwards of $20,000 in recruitment fees to recruiters and a lawyer working for Signal, causing them to take on significant debt to make those upfront payments.[234] Once in the United States, the workers lived in crowded trailers under the watch of security guards, were charged $35 per day for their housing, and learned that the promises of permanent status in the United States were false.[235] When the workers sought assistance from advocates, Signal took advantage of the workers' precarious immigration status and raided the workers' housing in an attempt to locate and privately deport the complaining workers; one worker was so distraught by this act that he attempted suicide.[236] After the workers sued Signal, the recruiter, and the lawyer in a series of lawsuits in federal courts in Alabama, Texas, and Louisiana, a subset of the workers first obtained a $14 million jury verdict in their favor in early 2015, leading to a settlement of all related cases when Signal filed for bankruptcy later that year.[237] Shortly thereafter, Signal took an unprecedented step and issued a public apology to its

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H-2B forestry workers to immigration if they left before the conclusion of their work contract, constituted "threatened abuse of the legal process," and were enough to establish that the defendants prevented the workers from leaving their place of work).

231. *See* Miller & Jonas, *supra* note 9, at 4 ("Employers' economic threats—including threats to collect an alleged debt from a worker or threats not to pay a worker unless the worker continues to labor—also may constitute threats of serious harm."); *see also* Lee, *supra* note 5, at 55 ("In a case involving professional guest workers, *Nuñang-Tanedo v. East Baton Rouge Parish School Board*, the court noted that plaintiffs, who were able to establish a claim for forced labor, 'not only wanted, but *needed* to continue working,' because of the massive debts they had accumulated in order to obtain their jobs.") (quoting Nuñang-Tanedo, 790 F. Supp. 3d at 1146).

232. *See supra* sections II(B)–II(C).

233. *See* Nigel Duara, *$20-Million Settlement Reached in Guest Worker Lawsuits*, L.A. TIMES (July 14, 2015, 7:17 PM), https://www.latimes.com/nation/la-na-ff-workers-lawsuit-20150714-story.html [https://perma.cc/X9CL-7C7P]; *see also* Press Release, S. Poverty Law Ctr., Signal International Apologizes to Hundreds of Exploited Indian Guest Workers (Sept. 29, 2015), https://www.splcenter.org/news/2015/09/29/signal-international-apologizes-hundreds-exploited-indian-guest-workers [https://perma.cc/4SQ4-BT3V].

234. *See* S. Poverty Law Ctr., *supra* note 233.

235. *See* Duara, *supra* note 233.

236. *See* S. Poverty Law Ctr., *supra* note 233.

237. *See* Duara, *supra* note 233.

workers for the mistreatment, including for the raid on the workers' housing specifically.[238]

More recently, two groups of former H-2B workers from the Philippines and former J-1 workers from Jamaica filed civil trafficking claims against a set of defendants operating various hospitality businesses in Oklahoma.[239] The group of H-2B workers filed suit in 2017, while the J-1 "cultural exchange" visa holders, motivated by the H-2B workers' actions, filed their case a year later; both sets of plaintiffs are seeking class certification.[240] This pair of Oklahoma cases exemplifies the interchangeable nature of many of these temporary foreign worker categories, with the H-2B workers laboring alongside the J-1 workers, and all workers alleging that they were underpaid by their employers, that they arrived to the United States in debt due to paying pre-departure recruitment and travel expenses, and that they feared serious harm if they left the employ of the defendants.[241] In early 2019, the federal court hearing the two cases allowed both sets of TVPA claims to proceed in the face of motions to dismiss. In the H-2B case, the court, citing to, *inter alia*, allegations regarding the plaintiffs' significant debt, defendants' false promises of free housing, and one defendant's statements that the workers could not legally work for other employers because of their visa status, concluded that the plaintiffs had alleged sufficient facts under the "serious harm" prong, the "scheme, pattern, or plan" prong, and the "abuse of law or legal process" prong of section 1589(a) to survive dismissal.[242] The court similarly relied on allegations of financial harm to allow the J-1 workers' forced labor claims to proceed.[243]

In short, civil litigation of TVPA claims with temporary foreign worker plaintiffs is an active field. With programs that all too easily lend themselves to labor trafficking fact patterns—threats regarding a worker's precarious immigration status, exploitation of a worker's debt and financial vulnerabilities, to name just two—it should be no surprise that advocates have found the TVPA's forced labor provisions to be beneficial to obtaining relief for their clients. In the

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238. *See* S. Poverty Law Ctr., *supra* note 233.

239. Press Release, Equal Justice Ctr., Second Labor Trafficking Lawsuit Against Walter and Carolyn Schumacher and Their Businesses, Filed by Former "Cross-Cultural Exchange" Workers (June 15, 2018), https://www.equaljusticecenter.org/news-events/news-archive.html/article/2018/06/15/second-labor-trafficking-lawsuit-against-walter-and-carolyn-schumacher-and-their-businesses-filed-by-former-cross-cultural-exchange-workers [https://perma.cc/48FA-2B9R].

240. *See id.*; *see also* Press Release, Legal Aid at Work, Former Holiday Inn Express, Montana Mike's Workers File Labor Trafficking Class Action (July 27, 2017), https://legalaidatwork.org/releases/former-holiday-inn-express-montana-mikes-workers-file-labor-trafficking-class-action/ [https://perma.cc/3H34-FA89].

241. *See* Equal Justice Ctr., *supra* note 239; *see also* Legal Aid at Work, *supra* note 240.

242. *See* Order, Cailao v. Hotelmacher LLC, No. 5:17-cv-00800-SLP, at 8–12 (W.D. Okla. Feb. 5, 2019) (granting in part and denying in part defendants' Motions to Dismiss and/or Strike Plaintiffs' Class Action Complaint).

243. *See* Francis v. Apex USA, Inc., No. CIV-18-583-SLP, 2019 U.S. Dist. LEXIS 34612, at *8–11 (W.D. Okla. Feb. 5, 2019).

remainder of this article, I sharpen my focus even more, turning to the ways in which the "financially benefits" provisions in particular hold enormous potential from a civil litigation perspective.

C. The Present Landscape of "Financially Benefits" Claims

TVPA claims brought under the "financially benefits" provisions are a rapidly developing area of law. That said, what are the lessons that we can draw from the cases that have been decided so far, and what might this mean for bringing such claims in temporary foreign worker cases? For the time being, there are two important threads to highlight. First, many of the approaches in the cases reflect an incoherence in how the claims are being analyzed by courts—this is particularly true with the confusion over the term "venture," but it is also evident in other ways. Second, the developments as to the remaining aspects of these provisions indicate that they can potentially be applied very broadly.

As to the first point, the case summaries above indicate the ways in which most courts have conflated several aspects of these provisions—for example, discussing the defendant's knowledge, or the receipt of financial benefits, when aiming to establish that there existed some kind of "venture." Indeed, only two of the decisions approach their analyses of the claims in an orderly way. The *Gilbert* decision stands out the most on this point—the court proposed the following four elements as establishing a "financially benefits" claim under section 1589(b):

(1) the party knowingly participated in a venture;
(2) the party knowingly benefitted from the venture;
(3) the venture has engaged in the providing or obtaining of labor or services in violation of the TVPA; and
(4) the party knew or recklessly disregarded the fact that the venture has engaged in the providing or obtaining of such services.[244]

Similarly, the *Lesnik* decision made an effort to parse out the provision as well, though not as precisely. The court there broke its analysis into two parts: first, it "address[ed] whether Tesla and Eisenmann financially benefitted from the human trafficking," and, second, it "address[ed] whether they did so knowingly."[245] In effect, this two-pronged approach is not too dissimilar from the four *Gilbert* elements, simply repackaging the elements into broader categories concerning benefits and knowledge.

The sharpest disagreement among the decisions relates to the term "venture." While some of the decisions have adopted a dictionary definition approach in light of the fact that "venture" is not defined within these particular provisions, nor across the TVPA more generally—thus defining it as "an

244. *Gilbert*, 2019 U.S. Dist. LEXIS 35921, at *37–38. Technically, these provisions do not require knowledge as to the participation in the venture, as per *Gilbert*'s proposed element 1—the scienter requirements only arise with respect to the benefits and the underlying forced labor. *See supra* notes 123, 125, 126, and accompanying text.

245. *See Lesnik*, 374 F. Supp. 3d at 952.

undertaking that involves risk," which is typically associated with "a speculative commercial enterprise"—the weight of authority is currently pushing in the other direction. At present, there are two circuit court-level decisions, *Ricchio v. McLean* and *Bistline v. Parker*, that incorporate the definition of "venture" from the sex trafficking provision into the forced labor provision: a "group of two or more individuals associated in fact."[246] Analytically, this is difficult to square: the decisions do not acknowledge that the definition is, by the TVPA's own terms, not applicable to the labor trafficking provisions, and the *Gilbert* court's careful analysis as to "venture" is fairly persuasive on this point.[247]

However, it is not unreasonable to think that the section 1591 definition should apply to the forced labor provisions as well. Most critically, all of these provisions target individuals who benefit from trafficking, whether sex trafficking or labor trafficking, and the purpose of the TVPA is to view *both* as part of the same broad phenomenon of a "severe form of trafficking in persons."[248] What's more, although the differing definitions have not led to divergent outcomes in the cases to date, it seems possible that the dictionary definition might serve as an additional hurdle for litigators. One can imagine certain more informal relationships between the perpetrator of forced labor and a person or entity that has benefitted from the forced labor that might not quite be considered "an undertaking that involves risk" or a "speculative commercial enterprise," but would easily be viewed as "a group of two or more individuals associated in fact."

In the end, it seems likely that this definitional confusion is most attributable to sloppy drafting of the law itself. At the time that the section 1591 definition was introduced with the original statute, it was the only section that had such a "financially benefits" provision, and thus the only one that even had to define the concept of "venture."[249] Congress, of course, should have realized the confusion it was creating by adding additional "financially benefits" provisions in 2008 while failing to move the definition of a key term common to all such provisions to a general definitions section, or otherwise clarifying that the definition in

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246. To be precise, the *Bistline v. Parker* decision related specifically to the forced labor provision's "financially benefits" provision in section 1589(b). *See supra* note 146 and accompanying text. By contrast, the decision in *Ricchio v. McLean* covered the "financially benefits" provision that is part of the forced labor provision, section 1589(b), as well as the "financially benefits" aspect of the private right of action in section 1595(a), and it incorporated its analysis of these two provisions when discussing the section 1593A claim. *See supra* note 139. Both of these decisions have now been cited for this proposition in subsequent cases considering section 1589(b) claims. *See* United States ex rel. Elgasim Mohamed Fadlalla v. Dyncorp Int'l LLC, 402 F. Supp. 3d 162, 196 (D. Md. Sept. 5, 2019) ("Although 'venture' is not defined in [§ 1589(b)], the TVPRA uses the term elsewhere to mean 'any group of two or more individuals associated in fact, whether or not a legal entity.'") (quoting Bistline v. Parker, 918 F.3d at 873, and citing Ricchio v. McLean, 853 F.3d at 556); *but see infra* note 250.

247. *See supra* notes 172–76 and accompanying text.

248. *See supra* note 2.

249. *See supra* note 122; *see also* TVPA § 112 (a)(2) (codifying original definition of "venture" at 18 U.S.C. § 1591(c)(3)). The definition of "venture" in the sex trafficking provision was subsequently renumbered twice, and is currently found in 18 U.S.C. § 1591(e)(6). *See supra* note 146.

section 1591 was meant to apply broadly. Whether intentional or an oversight, Congress should step in to address this problem, either by providing an alternative definition of "venture" that should be used instead of that in section 1591 or by clarifying that is the definition that applies to labor-based claims as well. Until then, advocates are on solid ground in arguing for the section 1591 definition because of the decisions in *Ricchio v. McLean* and *Bistline v. Parker*.

Apart from the confusion over the definition of venture, the other themes emerging from these cases are hopeful. This is particularly true of *Gilbert*, specifically as to issues other than the contrarian approach it took over the definition of "venture" described above.[250] First, as has been discussed previously, the court in *Gilbert* opened the door very widely with respect to the knowledge requirement. Specifically, it concluded that the "financially benefits" provisions do not require *contemporaneous* knowledge of the underlying forced labor violations—as the court reasoned, the provisions have no requirement "that 'whoever knowingly benefits' from a venture have knowledge shortly after the alleged abuse occurs, or even of the specific victim of the abuse."[251] In the context of layers of recruiters, agents, employers, and beyond, this broad reading of the knowledge requirement can be quite useful to these claims.

Second, the developments as to the "benefits" received under the statue also demonstrate the breadth of the provisions. In *Gilbert*, again, the court took an expansive view as to the "benefits" that must be received in order to establish liability. Specifically, the court highlighted that the benefits did not have to originate with the forced labor itself: in dismissing an argument put forth by the USOC that the plaintiffs' complaint "'lack[ed] any allegations tying [its] purported "benefits" to any alleged forced labor,'" the court assertively stated that "[n]othing in [the "financially benefits" provision of] § 1595(a) requires the party to benefit from the *labor or services* for liability to attach."[252] This is a very broad statement. As a result, even if, in the labor context, a defendant against whom a "financially benefits" provision is brought is likely to have received some financial benefit from the labor itself, that need not be the case under the interpretation used by the *Gilbert* court.

Relatedly, there remains one unanswered question as to this point. Recall that, despite the shorthand terminology of this article, a defendant need not receive *financial* benefits in order to be liable under these provisions. Rather, the three provisions impose liability for receiving "benefits," which can be effectuated *either* "financially" *or* "by receiving anything of value." To that end,

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250. Thus, to the extent that its discussion of "venture" is not good law anymore given the *Bistline v. Parker* outcome from the Tenth Circuit just days later, these other aspects of *Gilbert* should presumably still be safe. Notably, at least one court still considers *Gilbert* persuasive even as to the "venture" definition. *See Wyndham*, 425 F. Supp. 3d at 969 (following *Gilbert* analysis on defining "venture" even after *Bistline v. Parker* and despite otherwise extensively relying on *Ricchio v. McLean* in decision).

251. *Gilbert*, 2019 U.S. Dist. LEXIS 35921, at *48 (quoting 18 U.S.C. § 1595(a)). This statement was subsequently cited with approval by another district court considering a "financially benefits" claim. *See Wyndham*, 425 F. Supp. 3d at 964–65.

252. *Gilbert*, 2019 U.S. Dist. LEXIS 35921, at *60 (emphasis added).

what is "anything of value?" Presumably, "anything of value" is not limited to direct receipt of money alone, otherwise it would be rendered redundant. Some of the decisions hint at such wider possibilities, referring to "benefits" that are much more indirect and arguably not necessarily financial. For example, the district court, considering the section 1589(b) claim on remand in *Ricchio v. Bijal, Inc.*, concluded that the Patels' receipt of "yearly salaries and free lodging from the motel in return for their work" meant they had a "financial stake in the success of the motel" and thus McLean's rental of "a single room for a short period could constitute a 'benefit' within the meaning of the statute."[253] On the one hand, the court situates these two benefits—the salary and free housing—as "financial" because of the "financial stake" the Patels have in the motel. However, the free lodging, at the very least, may also be viewed as something "of value" that is not necessarily financial because it is not the direct exchange of money. Similarly, the individual attorney-defendant in *Bistline v. Parker* "utilized manual labor in exchange for legal services, through construction and remodeling work on his real estate."[254] While the court does not characterize such home improvement work as a non-financial "benefit" received by that defendant, it does stand in contrast to the fees paid to the firm and individual attorney[255] as, again, something that is "of value" that is not money.

In order to further elaborate on the potential breadth of "anything of value," it is worth circling back to the parallel "financially benefits" provision of section 1591, the TVPA's sex trafficking provision. Notably, there has been movement under section 1591 in particular in recent high-profile cases against Harvey Weinstein and his various film companies and business partners, arising out of his years-long pattern of abuse. In January 2019, Judge Engelmayer of the Southern District of New York allowed "financially benefits" claims under section 1591 to proceed against two companies run by Weinstein in *Canosa v. Ziff*.[256] In *Canosa*, Judge Engelmayer relied on a 2018 decision involving claims against Weinstein that had been issued by Judge Sweet, also of the Southern District of New York, to emphasize that the TVPA should be broadly interpreted, and not reach only the most extreme type of conduct most often associated with trafficking.[257] As a result, Judge Engelmayer noted that the TVPA's sex trafficking provision covers not just "caricatures of child slavery," but also "corporate-supported conduct."[258] Finding that the plaintiff in *Canosa* had sufficiently pleaded that the companies "aid[ed] and abet[ted] Weinstein's TVPA violations"[259] by using "multiple company employees to facilitate

253. Ricchio v. Bijal, Inc., 386 F. Supp. 3d at 131.

254. Bistline v. Parker, 918 F.3d at 875.

255. *See id.* at 876 (stating that the attorney-defendants "benefited for years from plaintiffs' payments of a considerable amount of attorney fees").

256. Canosa v. Ziff, 2019 U.S. Dist. LEXIS 13263, at *63–64 (S.D.N.Y. Jan. 28, 2019).

257. *See id.* at *59–61 (citing Noble v. Weinstein, 335 F. Supp. 3d 504, 515–16 (S.D.N.Y. 2018)).

258. *Id.* at *59.

259. *Id.* at *61.

Weinstein's sexual assaults and to cover them up afterwards,"[260] Judge Engelmayer then considered whether the companies "knowingly benefit[ted] from any alleged participation in a sex trafficking scheme."[261] He concluded that the plaintiff had sufficiently pleaded that the companies had so benefitted, stating:

> [B]y facilitating and covering up Weinstein's sexual assaults, [The Weinstein Company, LLC, or "TWC"] made Weinstein more likely to continue to work for TWC. While the facts developed in discovery may or may not substantiate this allegation, the [amended complaint] adequately pleads a symbiotic relationship between [TWC, The Weinstein Company Holdings, LLC] and Weinstein, in which the companies affirmatively enabled and concealed Weinstein's predations as a means of keeping him happy, productive, and employable which led the companies to achieve fame and reap financial benefits.[262]

As a result, Judge Engelmayer allowed the "financially benefits" claims under section 1591 to proceed against the companies.[263]

In all, more than ten years after the "financially benefits" provisions were enacted to target those who benefit from forced labor, court decisions have begun to illustrate the breadth with which these claims can be applied. Next, I turn to a consideration of the way that breadth can be particularly useful in the temporary foreign worker context.

D. The Potential of "Financially Benefits" Claims in the Temporary

260. *Id.* at *62.

261. *Id.* at *63.

262. *Id.* at *63–64.

263. *Id.* at *64. Admittedly, still a third judge from the Southern District of New York came out the other way on similar claims brought by other plaintiffs: in *Geiss v. Weinstein Co. Holdings LLC*, Judge Hellerstein dismissed section 1591 "financially benefits" claims against a Weinstein-run company because he concluded that the complaint did not sufficiently plead allegations relating to "[t]he controlling question" of "whether [Harvey] Weinstein provided any of those benefits"— "revenue" generated from Weinstein's films that then "flowed to TWC's officers and directors"— "to TWC *because of* TWC's facilitation of [Harvey] Weinstein's sexual misconduct." Geiss v. Weinstein Co. Holdings LLC, 383 F. Supp. 3d 156, 169 (S.D.N.Y. 2019). Judge Hellerstein wrote:

> The [complaint] does not allege that [Harvey] Weinstein secured TWC's alleged complicity in his sexual violence as a condition of his employment. In fact, [Harvey] Weinstein's employment agreements made conviction for such an offense grounds for termination. Likewise, the [complaint] does not allege that any director or officers to whom TWC paid a salary were compensated for their participation in [Harvey] Weinstein's assaults.

Id. at 170. While Judge Hellerstein referenced the differing outcome in *Canosa*, the decision did not confront it or explain why that outcome was unpersuasive. *See id.* at 169. Rather, he simply focused on the "controlling" causal question. In any event, these decisions illustrate the degree to which not just the "financially benefits" provisions under section 1591 are also an evolving area of law, but also how they are quickly developing even in this particular area of litigation involving Weinstein. *See Noble*, 335 F. Supp. 3d at 511 n.2 (summarizing litigation centered on Weinstein pending in the Southern District of New York—seven civil cases, including the three discussed in this article—as well as the criminal investigation and press accounts regarding his conduct).

Foreign Worker Context

Slowly but surely, we are seeing more "financially benefits" claims involving temporary foreign workers. On that note, the decision in *Lesnik* is particularly important: as a court case involving a high-profile company like Tesla and temporary foreign workers, it serves the dual purpose of highlighting the utility of these types of claims as well as the abusive nature of temporary foreign worker programs. In that case, the workers on B-1 visas complained of ongoing mistreatment that in many ways echoes what is common with other temporary foreign workers: underpayment, threats of deportation, and poor housing.[264] Beyond *Lesnik*, there are other cases involving such claims that have been filed still more recently, indicating the likelihood of future development in this area.[265]

With that in mind, how might the emerging body of "financially benefits" case law discussed above map onto such potential claims in the temporary foreign worker context? If the early cases are any indication, the answer would be: likely quite well. The burgeoning view that "venture"—regardless of how it is defined—can encompass existing business relationships opens the door to treating relationships between employers and recruiters or between employers and agents as a "venture." Moreover, given that an employer would generally pay either a recruiter or an agent that it hires to engage in the proscribed activity—recruiting workers in sending countries or processing the paperwork required to import workers—it should similarly be easy to establish the "financial benefits" prong of the provisions. Of course, there are instances when such relationships are not as established: for example, an employer may rely on former workers or a worker's family members to engage in recruitment, and may do so without a formal contract or fees paid from the employer to the recruiter pursuant to such an agreement. In the right circumstances, though, such an element could still be met—if workers are compelled to pay fees to the recruiter, then there would be money flowing to the recruiter as part of this process. Such a setup was sufficient for the Tenth Circuit in *Bistline v. Parker*, where the plaintiffs alleged that they "donated" money directly to pay the fees of the attorney-defendants.[266]

Apart from that, the open question of what non-financial benefits may be received—"anything of value"—presents an interesting method by which to test interpretations of this provision[267] beyond the early hints in some of the cases to date.[268] In the temporary foreign worker context, one can imagine a host of other things "of value" that someone or some entity might receive by turning a blind eye to or helping to cover up forced labor. For example, an employer who ignores

264. *See supra* notes 188–91 and accompanying text.

265. *See, e.g.*, Complaint, Janse Van Rensburg v. Hood, No. 3:19-cv-00008-DPM ¶¶ 94–95 (E.D. Ark. Jan. 14, 2019) (pleading section 1589(b) claims against a co-owner of a farm and a partnership entity based on the underlying conduct of the other co-owner of the farm).

266. *See* Bistline v. Parker, 918 F.3d at 859, 876.

267. *See supra* note 97 and accompanying text.

268. *See, e.g.*, *supra* notes 253–55 and accompanying text.

unlawful mistreatment of its workers by a supervisor might continue to be permitted by the government to import workers, which helps its bottom line. A recruiting agency or agent assisting an employer with the government's required paperwork might similarly benefit by the continued business it receives from an employer who violates the law but continues to hire them to help with the process in the future. And all parties might benefit if they are able to avoid the cost to their businesses by way of penalties imposed by a governmental investigation, including being kicked out of these programs,[269] by coercing workers into lying to investigators about their actual conditions of forced labor. Some of these tactics are common in the context of temporary foreign worker programs and echo some of what has been found to be a "benefit" in the context of section 1591.[270]

The breadth introduced by these first two aspects of the existing case law does not mean these claims can be brought with abandon, however. A litigant would still have to establish that the defendant who benefitted from forced labor knew or was at least in reckless disregard of the underlying forced labor conditions. This scienter requirement thus establishes a limiting principle—the recruiter or agent against whom claims would be brought would have to have indicia of the mistreatment of workers. It is therefore not simply a free pass to sue every agent or recruiter whenever there is an underlying legal violation. Moreover, these "financially benefits" provisions must, of course, be built on an underlying labor trafficking violation. As some practitioners have noted, the labor trafficking provisions in the TVPA target what is a very *specific* type of mistreatment.[271] The point is simply that this type of mistreatment, specific as it may be in its nature, is an all-too-common result when employers import temporary foreign workers.[272]

For this reason, these "financially benefits" claims are particularly well-suited to focusing on the abuses in temporary foreign worker programs. As an initial matter, they are a way by which advocates can target the systemic failures of the programs, because they can target the interlinked web of actors that together perpetuate the abuses of workers. As I discussed earlier in this article,[273] temporary foreign worker programs are not just characterized by bad apple employers—isolated individuals who violate the rights of their workers. Indeed, the programs appear to almost be designed[274] to facilitate worker exploitation;

269. *See supra* notes 38–42 and accompanying text.

270. *See, e.g.*, *supra* notes 261–62 and accompanying text.

271. *See supra* note 229.

272. *See supra* notes 230–31 and accompanying text (summarizing common themes in labor trafficking cases involving temporary foreign workers); *see also supra* notes 188–91 and accompanying text (summarizing allegations in *Lesnik v. Se*).

273. *See supra* sections II(B)–(C).

274. Of course, litigation of civil claims to remedy past abuses is inherently backwards-looking, and even the suggestion that Congress should act to remedy inconsistencies in the TVPA, *see supra* note 249 and accompanying text, would not do anything to directly address the problem of temporary foreign worker programs more generally. My focus on litigation as a particular remedy is not meant to imply that

the direct employers of temporary foreign workers are often enabled by the agents that help them find a way into these programs; and both employers and agents regularly turn a blind eye, at the very least, to abuses of recruiters and others who interface with the workers in the United States and in sending countries. For example, in the H-2B case referenced previously in this article,[275] the employer's agent and sending-country based recruiter were named defendants also found liable by the jury.[276] In another case, the employees of both a tobacco grower (who was the employer of the plaintiff-workers) and of the employer's H-2A agent were allegedly the individuals who most directly pressured the workers to pay unlawful recruitment fees under threat of having their visas cancelled and sent home.[277]

Beyond showing the systemic problems with these programs, "financially benefits" claims might encourage advocates to keep better track of repeat players in the system, whether agents, recruiters, or some other financial partner of the direct employer of workers. Knowing that there are potential claims against agents or recruiters, who might be more established entities than certain employers and thus against whom there may be a greater potential for financial recovery, will likely encourage advocates to do more extensive research into these entities. For example, it would likely be relevant to know how frequently an agent has been hired by employers who participate in these programs, or whether there have been governmental investigations into potential legal violations by either agents or recruiters. By bringing these claims when appropriate, or even including factual allegations regarding agents' or recruiters' practices in cases against employers where the facts are not quite strong enough to bring "financially benefits" claims against the agents or recruiters, advocates can build up a record over time regarding the various actors in these temporary foreign worker programs. As litigation unfolds, they could then get more information regarding the practices of agents and recruiters during discovery, thus adding to their institutional knowledge about these actors for the future.

From a normative perspective, the existence of these claims also holds the potential to positively shape the behavior of the actors that are higher up in the figurative food chain. Agents who know that they may face the risk of being sued

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Congress should not take even more meaningful action to remedy the systemic problems with temporary foreign worker programs more generally, such as the lack of visa portability and effective government oversight of the programs. *See supra* section II(B).

275. *See supra* notes 233–38 and accompanying text.

276. *See* Kathy Finn, *Indian Workers Win $14 Million in U.S. Labor Trafficking Case*, REUTERS (Feb. 18, 2015, 8:20 PM), https://www.reuters.com/article/us-usa-louisiana-trafficking/indian-workers-win-14-million-in-u-s-labor-trafficking-case-idUSKBN0LN03820150219 [https://perma.cc/A5MC-3GK9] ("After a four-week trial, the U.S. District Court jury ruled that Alabama-based Signal International was guilty [*sic*] of labor trafficking, fraud, racketeering and discrimination and ordered it to pay $12 million. Its co-defendants, a New Orleans lawyer and an India-based recruiter, were also found guilty [*sic*] and ordered to pay an additional $915,000 each.").

277. *See* John Cheves, *How a Scott County Tobacco Farm Allegedly Mistreated Workers from Mexico*, LEXINGTON HERALD LEADER (Aug. 8, 2015, 11:04 PM), http://www.kentucky.com/news/local/watchdog/article44614560.html [https://perma.cc/C24B-N5TC].

based on conduct of their employer-clients should thereby have an incentive to ensure that their clients are truly abiding by the law. This is particularly the case with employers who are new to the temporary foreign worker programs and thus might not be familiar with the various legal obligations they assume when they import workers, as well as with employers who are less legally sophisticated, and particularly when there is some combination of the two. Agents in such situations should take extra steps to ensure that the employers with whom they contract are paying workers properly, not charging workers unlawful or exorbitant fees, and otherwise not exploiting workers. Other red flags might include employers who do too much delegation of worker supervision or recruitment, such as using individuals to recruit workers by word of mouth at home, or allowing supervisors to effectively manage the workers on their own. With situations like these, where employers have minimal oversight of those that interface with their workers, agents should know that abuses of workers can all too easily be hidden. If agents choose not to engage in affirmative steps to ensure compliance or outright ignore indications that there are problems on the ground, then they would run the risk of litigation exposure themselves. A well-meaning agent might thus be incentivized to proactively engage with its client to ensure such violations do not occur.

In sum, utilizing these claims against a broad range of actors in the temporary foreign worker context can highlight the responsibility of individuals at all levels of these programs for the mistreatment of workers, holding them legally responsible when appropriate and potentially encouraging improved behavior when possible. Zooming out even further, one might consider whether this current landscape might present the possibility to aim even higher, targeting the companies and chains that sell the produce picked by workers, or franchise their names to businesses that directly employ the workers who are exploited. At the end of the day, they have the biggest pockets and the most leverage to push for improved working conditions industry-wide. While such an analysis is beyond the scope of this article, it is worth noting that, given where things stand at present, it certainly seems possible that there could be viable "financially benefits" claims against such purchasers and franchisers in the right circumstances. With "knowledge" being the key element and with the view that, at least according to *Gilbert*, such knowledge does not have to be contemporaneous to the violations or include specifics as to individual victims, it would seem that advocates could begin to think creatively about putting such companies on notice[278] as to the forced labor that forms the foundation on which their corporate structure stands.

278. Such notice might take the shape of workers making complaints directly to the companies, as the athletes did with the governing bodies in *Gilbert*. However, this type of direct contact might prove logistically difficult with workers who are only in the United States temporarily and who might not have direct engagement with other entities in the supply chain. For this reason, I suggest that advocates could play a role in this process, either when litigation is contemplated or after it has already commenced. Specifically, once advocates have identified viable forced labor claims against the direct employer of temporary foreign workers, they may advise the employer's business partners (e.g., purchasers or

V. Conclusion

Temporary foreign worker programs are plagued by abuses, and the mistreatment of workers in these programs is often of a nature that fits in the context of labor trafficking. The TVPA and its private right of action have already proven to be a useful tool for these workers and their advocates, highlighting the degree to which forced labor exists in these programs that are otherwise given the cover of legality in the United States. The mistreatment is often not solely attributable to the employer in whose name the workers come into the country, however. Worker exploitation also comes at the hand of recruiters and agents who work together with employers to find workers in sending countries and bring them to the United States and who overlook the unlawful treatment of workers. The amendments to the TVPA in 2008 that created liability for those who benefit from forced labor provide a unique opportunity to hold these other actors responsible for their participation in such exploitation. By bringing these claims when the circumstances warrant, advocates can not only develop this under-explored area of law, but also do it in a setting that seemingly was made for these types of claims: exploitation of temporary foreign workers in the United States.

franchisors) in writing of the forced labor violations. It might be easier to accomplish this notification process this once litigation has already commenced, as the advocate then wields more power as part of the discovery process in civil litigation. The advocate might seek discovery from business partners by, for example, sending third-party subpoenas requesting information regarding contracts and purchases (to establish the "venture" and the "benefits" received). Such discovery is likely to generate a good degree of pushback from defendants, who would be eager to preserve their business relationships, as well as from larger corporate entities, who might have concerns regarding confidentiality. As a result, advocates should think very carefully before engaging in such practices, perhaps reserving them for the strongest of claims or when there are already indications that these third parties played a role in the forced labor, rather than simply adopting a scorched earth discovery approach whenever there are hints of a forced labor claim. In addition, there is no immediate need to bring the second-tier claim if it is not yet fully developed because a "financially benefits" claim would still be subject to the ten-year statute of limitations for TVPA claims. *See* 18 U.S.C. § 1595(c)(1).