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## YALE LAW & POLICY REVIEW

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### Risky Business: Holding Hotels Accountable for Sex Trafficking

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INTRODUCTION.....	266
I. THE DANGER BEHIND CLOSED DOORS.....	269
II. THE LEGAL FRAMEWORK.....	271
<i>A. Baseline Liability: Historical Duties and Common Law.....</i>	271
<i>B. A Game Changer: The Trafficking Victims Protection Act of 2000....</i>	276
1. Criminal Liability.....	277
2. Civil Liability.....	284
<i>C. State Gap-Fillers.....</i>	286
III. TOWARD PRIVATE REGULATION.....	291
<i>A. An Insurance Primer.....</i>	292
<i>B. Act 105 Collateral Litigation.....</i>	294
<i>C. Jane Does #1-4 Case Study.....</i>	296
<i>D. 18 U.S.C. § 1595 Collateral Litigation.....</i>	299
IV. A MORE ACCOUNTABLE INDUSTRY.....	303
<i>A. All Words, What Action?.....</i>	303
<i>B. Real Solutions.....</i>	311

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CONCLUSION .....	320
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## INTRODUCTION

The modern-day sex trade is “hidden in plain sight.”<sup>1</sup> Traffickers use and exploit legitimate businesses to engage in and conceal their illegal practices. From nightclubs to travel agencies, massage parlors to car dealerships, a wide variety of industries fail to scrutinize suspicious activity or take adequate precautions,<sup>2</sup> while the most egregious actors actively solicit and benefit from “lucrative” partnerships.<sup>3</sup>

This dynamic is particularly pronounced in the hotel and motel industry. Hoteliers enable the underground commercial sex economy and allow it to flourish, be it deliberately or inadvertently.<sup>4</sup> The transient, anonymous nature of hotel guests and an institutionalized respect for their

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1. See, for example, the various groups using this language: *Hidden in Plain Sight: Understanding Federal Efforts to Stop Human Trafficking Before the H. Comm. on Homeland Sec.*, 115th Cong. 76 (2018); STEPHANIE HEPBURN & RITA J. SIMON, *TRAFFICKING AROUND THE WORLD: HIDDEN IN PLAIN SIGHT* (2013); Lindsey Jacobson, *How to Identify Human Trafficking Victims Often “Hidden in Plain Sight,”* ABC NEWS (Jan. 11, 2018), <https://abcnews.go.com/US/identify-human-trafficking-victims-hidden-plain-sight/story?id=52258660> [<https://perma.cc/52BH-C7DD>].
  2. Meredith Dank et al., *Estimating the Size and Structure of the Underground Commercial Sex Economy in Eight Major Cities*, URB. INST. JUST. POL’Y CTR. 187-89 (Feb. 2014), <https://www.ncjrs.gov/pdffiles1/nij/grants/245295.pdf> [<https://perma.cc/T5L3-DB7K>] [hereinafter NIJ Study]; see also Janice G. Raymond et al., *Sex Trafficking of Women in the United States: International and Domestic Trends*, COALITION AGAINST TRAFFICKING IN WOMEN 48 (Apr. 7, 2001), <https://www.ncjrs.gov/pdffiles1/nij/grants/187774.pdf> [<https://perma.cc/VWY7-XKER>] (noting traffickers’ involvement in various legitimate businesses, including restaurants and limousine services).
  3. NIJ Study, *supra* note 2, at 187-89 (noting bail bondsmen, nightclub owners, car dealerships, photographers, sex shops, and other retail shops that offer “special deals” and discounts to pimps and those they trafficked).
  4. *Id.* at 108 (explaining the “good business strategy” of targeting certain types of motels and establishing good relationships with their operators).

## RISKY BUSINESS

privacy create a perfect storm of conditions where trafficking and exploitation can—and do—thrive.<sup>5</sup>

To their credit, hotel chains have begun to recognize their vulnerabilities and have made strides in overcoming them through awareness programs and training-based initiatives. I argue that these improvements, however, are largely ineffective. Occasionally spurred to action by the threat of civil or criminal litigation, hotels, on the whole, have remained too complacent to this human rights violation. At the very least, the hotel industry has yet to fully rise to the occasion and harness the power it has to eradicate the problem.<sup>6</sup>

The changing national landscape and heightened media attention may quicken the industry's pace.<sup>7</sup> Despite remaining gaps in understanding the scope of the problem, as well as continued under-enforcement, sex-trafficking prosecutions are on the rise,<sup>8</sup> and new laws are regularly being

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5. *Human Trafficking in the Hotel Industry*, POLARIS PROJECT (Feb. 10, 2016), <https://polarisproject.org/blog/2016/02/10/human-trafficking-hotel-industry> [<https://perma.cc/M6KP-MB8T>].
  6. The problem is not isolated to the hotel industry. *See, e.g.*, Amy Davidson Sorkin, *The Failure to See What Jeffrey Epstein Was Doing*, NEW YORKER (Aug. 18, 2019), <https://www.newyorker.com/magazine/2019/08/26/the-failure-to-see-what-jeffrey-epstein-was-doing> [<https://perma.cc/T343-367S>].
  7. *See, e.g., id.*; Dan Barry & Jeffrey E. Singer, *The Case of Jane Doe Ponytail*, N.Y. TIMES (Oct. 16, 2018), <https://www.nytimes.com/interactive/2018/10/11/nyregion/sex-workers-massage-parlor.html> [<https://perma.cc/7W6V-HKKJ>]; Ryan Miller, *There Are Red Flags Common in Human Trafficking Cases. Here's How the Florida Spas Compare*, USA TODAY (Feb. 28, 2019), <https://www.usatoday.com/story/news/nation/2019/02/28/florida-sex-trafficking-spas-tied-robert-kraft-case-had-red-flags/2993747002> [<https://perma.cc/H6QZ-W6JB>].
  8. *See* Bureau of Justice Statistics, *Special Report: Federal Prosecution of Human Trafficking Cases, 2015*, U.S. DEP'T JUST. (June 2018), <https://www.bjs.gov/content/pub/pdf/fphtc15.pdf> [<https://perma.cc/EB6J-FZ9T>] [hereinafter BJS 2015 Special Report] (noting 43.9% increase in number of suspects prosecuted for human trafficking between 2011 and 2015); *see also* Alyssa Currier et al., *2018 Federal Human Trafficking Report*, HUM. TRAFFICKING INST. at ii (2019), <https://www.traffickingmatters.com/wp-content/uploads/2019/04/2018-Federal-Human-Trafficking-Report-Low-Res.pdf> [<https://perma.cc/8CTA-WKCZ>] [hereinafter *2018 Federal Human Trafficking Report*] (noting that

passed to expand liability and stiffen penalties.<sup>9</sup> Hotels are not yet the target of criminal prosecutions, but the industry is already bracing for an enforcement shift, taking note of costly civil lawsuits nationwide and calling on the legal industry for strategic advice.<sup>10</sup>

Insurance companies can reinforce this movement. Manipulating or withholding commercial insurance coverage from hotels leaves them financially vulnerable.<sup>11</sup> Tying financial responsibility, via loss of insurance or increased policy premiums, directly to sex-trafficking activities will make it more difficult for hotels to turn a blind eye. It may even create a proactive movement within the industry, causing establishments to take concrete steps towards eradicating sex trafficking.

This Note has four parts. Part I addresses the problem of sex trafficking in hotels and why it is important to include the hospitality industry in any real solution. Part II surveys the legal framework underpinning sex-trafficking liability. Section II.A demonstrates how the longstanding common-law duty of innkeepers, as well as the contemporary regulatory regime, charges hoteliers with legal obligations to their guests—and makes the industry particularly vulnerable. Section II.B explains the criminal and civil sanctions available against individuals and corporate entities under the Trafficking Victims Protection Act of 2000 (TVPA), the crux of the federal regime. These sections also discuss the limits of the TVPA, both in terms of coverage gaps and practical enforcement challenges. Section II.C then turns to the TVPA's state

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number of sex-trafficking prosecutions charged by the federal government each year has greatly increased).

9. *Human Trafficking Enactment Database*, NAT'L CONF. ST. LEGISLATURES (2018), <http://www.ncsl.org/research/civil-and-criminal-justice/human-trafficking-enactment-database.aspx> [<https://perma.cc/AQ6X-9K9T>].
10. *See, e.g.*, Bethany K. Biesenthal et al., *White Paper: Human Trafficking in the Hospitality Industry: What Industry Participants Should Do to Protect Themselves and Their Customers*, JONES DAY (May 2019), <https://www.jonesday.com/en/insights/2019/05/human-trafficking-in-the-hospitality-industry> [<https://perma.cc/X2P8-6CKA>].
11. *See* Karen Wigle Weiss, *Unpacking Human Trafficking: A Survey of State Laws Targeting Human Trafficking in the Hospitality Industry*, ECPAT-USA 7 (May 2019), <https://www.ahla.com/sites/default/files/Unpacking%20Human%20Trafficking-v4.pdf> [<https://perma.cc/S2VZ-UPW5>] (committing to semi-annual survey to unpack “all the applicable [human trafficking-related] state laws currently in effect” and “keep up with the constantly changing laws”).

## RISKY BUSINESS

counterparts and highlights recent lawsuits against hotels that have operationalized the relevant state statutes.

Part III canvases the collateral litigation between hotels and their insurance providers spawned by the state and federal lawsuits. Section III.A provides a primer on hotel insurance coverage. Sections III.B-D illustrate the specific claims insurance companies have made in response to their insureds' attempts to seek defense coverage or indemnification, and how courts have ruled.

Finally, Part IV outlines the hotel industry's reaction to the recent litigation, as well as its inadequate attempts to eradicate sex trafficking through self-regulation. Because both public law remedies and voluntary compliance are inadequate to combat sex trafficking, Section IV.B offers a new solution: a public-private regulatory regime where commercial insurers use their market power to shape the hospitality industry's response to sex trafficking. Through private regulation, insurance companies can—and should—wield their economic power to force hotels to police sex trafficking on their premises.

### I. THE DANGER BEHIND CLOSED DOORS

Statistics are hard to come by in the underground world of sex trafficking, which operates in the shadows and preys on vulnerable populations less willing or able than most to identify themselves as victims.<sup>12</sup> Despite these limitations,<sup>13</sup> it is clear that the scope of the problem is monumental. The National Institute of Justice (NIJ) estimated that the 2007 sex-trafficking economy in eight major U.S. cities ranged from \$39.9 to \$290 million.<sup>14</sup> In Atlanta and Miami, the illicit market for sex was larger than that for drugs and guns combined.<sup>15</sup>

Such a profitable “trade” would be impossible without hotels. Sixty-seven percent of the sex workers interviewed in the NIJ study indicated

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12. VIRGINIA M. KENDALL & T. MARKUS FUNK, CHILD EXPLOITATION AND TRAFFICKING: EXAMINING GLOBAL ENFORCEMENT AND SUPPLY CHAIN CHALLENGES AND U.S. RESPONSES 31-35 (2d ed. 2017).

13. *2017 Statistics from the National Human Trafficking Hotline and BeFree Textline*, POLARIS PROJECT, <https://polarisproject.org/sites/default/files/2017NHTHStats%20%281%29.pdf> [https://perma.cc/9UQA-L32R] (noting difficulties with underreporting).

14. NIJ Study, *supra* note 2, at 2.

15. *Id.* at 22 tbl.3.1.

that they traded sex acts in hotel or motel rooms.<sup>16</sup> Between December 2007 and December 31, 2017, the National Human Trafficking Hotline recorded 3,596 cases of human trafficking involving a hotel or motel.<sup>17</sup> Its 2016 Data Report, the most recently published, indicated that hotel/motel-based sex trafficking had the highest percentage of cases according to venue.<sup>18</sup> Furthermore, seventy-five percent of survivors in the Polaris Project's July 2018 survey reported coming into contact with hotels at some point during their period of victimization.<sup>19</sup> Even one attorney for the hospitality industry has estimated that eight out of ten human-trafficking arrests occur at or around hotels.<sup>20</sup>

Justice Scalia illuminated this issue in his dissent in *City of Los Angeles v. Patel*.<sup>21</sup> He considered "the private pain and public costs" imposed by trafficking as "beyond contention," and recognized that "motels provide an obvious haven for those who trade in human misery."<sup>22</sup> Scalia cited an example of motel owners in San Diego who were indicted for collaborating with members of the Crips street gang in prostituting underage girls.<sup>23</sup> The motel owners had "set aside rooms apart from the rest of their legitimate customers where girls and women were housed, charged the gang

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16. *Id.* at 225.

17. *On-Ramps, Intersections, and Exit Routes: A Roadmap for Systems and Industries to Prevent and Disrupt Human Trafficking*, POLARIS PROJECT 16 (July 2018), <https://polarisproject.org/sites/default/files/A%20Roadmap%20for%20Systems%20and%20Industries%20to%20Prevent%20and%20Disrupt%20Human%20Trafficking%20-%20Hotels%20and%20Motels.pdf> [https://perma.cc/4YWD-7Y6Q].

18. *2016 National Hotline Annual Report*, NAT'L HUM. TRAFFICKING HOTLINE 5 (May 8, 2017), <https://humantraffickinghotline.org/sites/default/files/2016%20National%20Report.pdf> [https://perma.cc/N79Z-CXF6].

19. *On-Ramps, Intersections, and Exit Routes*, *supra* note 17, at 16.

20. See Rich Keating, *Human Trafficking: What It Is and How It Impacts the Hospitality Industry*, Address at the AHIA Conference, Washington, D.C. (Spring 2013), [http://www.ahiatorneys.org/aws/AHIA/asset\\_manager/get\\_file/92983](http://www.ahiatorneys.org/aws/AHIA/asset_manager/get_file/92983) [https://perma.cc/X5DG-YQ3M].

21. 135 S. Ct. 2443 (2015).

22. *Id.* at 2461 (Scalia, J., dissenting).

23. *Id.* at 2461-62 (Scalia, J., dissenting).

## RISKY BUSINESS

members/pimps a higher rate for the rooms where ‘dates’ or ‘tricks’ took place, and warned the gang members of inquiries by law enforcement.”<sup>24</sup>

In examples like these, hoteliers tasked with providing a duty of care to their guests purposely abdicate their responsibilities. But the complicity is not always this conspicuous. Even hoteliers that ignore the prostitution occurring within their establishments cause tremendous damage merely by “[o]ffering privacy and anonymity on the cheap” and serving as a “particularly attractive site for criminal activity.”<sup>25</sup> Given the legal obligations of hotels to their guests, there can be no such thing as passive—or fully innocent—actors.

## II. THE LEGAL FRAMEWORK

### *A. Baseline Liability: Historical Duties and Common Law*

American innkeeping and the corresponding duties of innkeepers have roots in English common law,<sup>26</sup> but such obligations date back even further. In ancient Roman law, innkeepers “were put under a peculiar responsibility, and made liable for all losses not arising from inevitable casualty, or overwhelming force.”<sup>27</sup> During the Middle Ages, England’s Statute of Winchester imposed strict liability on innkeepers, making hosts liable for their guests’ behavior.<sup>28</sup> Fourteenth-century London ordinances “specified that innkeepers must be good and sufficient people.”<sup>29</sup> In the

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24. *Id.* at 2462 (Scalia, J., dissenting) (citing Kamala D. Harris, *The State of Human Trafficking in California*, CAL. JUST. DEP’T 25 (2012), <https://oag.ca.gov/sites/all/files/agweb/pdfs/ht/human-trafficking-2012.pdf> [<https://perma.cc/K73T-JWVA>]); *see also* NIJ Study, *supra* note 2, at 188 (trafficker explaining actions of a hotel that “showed [him] love” by allowing him to “stay there in an unregistered room”).

25. *Patel*, 135 S. Ct. at 2457 (Scalia, J., dissenting) (internal citations omitted).

26. *See, e.g.*, *Darby v. Compagnie Nationale Air France*, 753 N.E.2d 160, 162 (N.Y. 2001) (noting the development of innkeeper’s duties over the course of centuries).

27. J. STORY, COMMENTARIES ON THE LAW OF BAILMENTS § 458, at 389 (7th ed. 1863) [hereinafter J. STORY, COMMENTARIES].

28. David S. Bogen, *The Innkeeper’s Tale: The Legal Development of a Public Calling*, 1996 UTAH L. REV. 51, 60 (1996).

29. *Id.* at 61. They also had to “warn their guests of the city’s law against carrying arms.” *Id.*

nineteenth century, Justice Story recognized that “the doctrines thus asserted in the Roman law, in respect to innkeepers, seem to have been generally incorporated into the jurisprudence of Continental Europe,”<sup>30</sup> including Spain, France, Scotland, and “probably in that of every other nation, whose jurisprudence had its origin in the Roman law.”<sup>31</sup>

Innkeepers, as a kind of “public servants,”<sup>32</sup> were bound to treat their guests with “uncommon care.”<sup>33</sup> Their inns were subject to comprehensive regulation—including frequent, warrantless searches—in eighteenth-century America because of the “extraordinary temptation to fraud, or danger of plunder.”<sup>34</sup> Public policy justified the intrusions, as travelers were “obliged to rely almost implicitly on the good faith of innholders, whose education and morals are none of the best, and who might have frequent opportunities of associating with ruffians and pilferers.”<sup>35</sup>

As Justice Scalia indicated in *City of Los Angeles v. Patel*, today’s hotels and motels face temptations similar to their commercial forebears. Their “unique public role”<sup>36</sup> has continued to subject them to “unique public duties”<sup>37</sup> derived from the common law and now often imposed by regulatory schemes. Modern-day innkeepers and hotel owners are tasked with at least a reasonable duty of care for their guests’ safety, comfort, and convenience.<sup>38</sup> Hoteliers in some jurisdictions “owe their guests a heightened duty of care exceeding that which business inviters owe their invitees.”<sup>39</sup> Under the Restatement (Second) of Torts, this elevated

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30. J. STORY, COMMENTARIES § 467, *supra* note 27, at 399.

31. *Id.*

32. *Rex v. Ivens*, 7 Car. & P. 213, 173 Eng. Rep. 94 (1835).

33. J. STORY, COMMENTARIES § 470, *supra* note 27, at 401.

34. *Id.* § 464, at 396.

35. *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2459 (Scalia, J., dissenting) (quoting J. STORY, COMMENTARIES ON THE LAW OF BAILMENTS §471, at 498 (5th ed. 1851)).

36. *Id.*

37. *Id.*

38. *See, e.g.*, *Young-Gibson v. Patel*, 957 F. Supp. 2d 269, 272-73 (W.D.N.Y. 2013); *Bell v. Daugherty*, 200 N.W. 708, 709 (Iowa 1924); *see also* 40A AM. JUR. 2D *Hotels, Motels, Etc.* § 70 (2019).

39. *Jarmak v. Ramos*, No. 6:10-cv-00048, 2011 U.S. Dist. LEXIS 107031, at \*4-5 (W.D. Va. Sept. 21, 2011); *see* RESTATEMENT (SECOND) OF TORTS § 314A (AM. LAW INST. 1965) (“Special Relations Giving Rise to Duty to Aid or Protect”);

## RISKY BUSINESS

duty requires innkeepers to “take reasonable action” to protect their guests against an “unreasonable risk of physical harm,” to render aid if they know or have reason to know a guest is ill or injured, and even to “care for them until they can be cared for by others.”<sup>40</sup>

Local, state, and federal statutes and regulations have supplemented the hoteliers’ common-law duty, but they have not supplanted it.<sup>41</sup> These various sources of liability allow for a multiplicity of suits and provide an effective, hybrid arsenal with which plaintiffs can maximize pressure. For instance, the Los Angeles City Attorney’s Office has incorporated the old common-law theory of public nuisance into a new regulatory regime in its Citywide Nuisance Abatement Program. In August 2017, the L.A. City Attorney’s Office reached a settlement with the owner of a local Motel 6 in Sylmar, California for the rampant sex trafficking and other criminal activity on premises.<sup>42</sup> The terms of the agreement committed the motel owner to “maintain[ing] a broad array of physical and managerial improvements for public safety”<sup>43</sup> and also required Motel 6 “to pay

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*see also* *Banks v. Hyatt Corp.*, 722 F.2d 214, 221 (5th Cir. 1984) (explaining § 314A’s exception to the general rule that there is no affirmative duty to act); *Kveragas v. Scottish Inns, Inc.*, 733 F.2d 409, 412 (6th Cir. 1984) (“The common law has long recognized the special legal relationship between innkeepers and registered guests.”).

40. RESTATEMENT (SECOND) OF TORTS § 314A (AM. LAW INST. 1965); *see also* *Trask-Morton v. Motel 6 Operating Ltd. P’ship*, 534 F.3d 672, 680-81 (7th Cir. 2008) (“Under Indiana law, an innkeeper owes a duty to his guests to render aid after he knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.”).
41. *See, e.g., Verdugo v. Target Corp.*, 770 F.3d 1203, 1214 (9th Cir. 2014) (“[A]s a general rule, unless expressly provided, statutes should not be interpreted to alter the common law, and should be construed to avoid conflict with common law rules.” (citations omitted)); *Copeland v. Lodge Enters., Inc.*, 4 P.3d 695, 700 (Okla. 2000) (“An innkeeper in Oklahoma continues to have a status-based, common-law duty of care to a guest. This duty remains unaltered by inspection and licensing statutes enacted under the police power of the state.”).
42. Anne Teigen, *Prosecuting Human Traffickers: Recent Legislative Enactments*, NAT’L CONF. STATE LEGISLATURES 7 (Sept. 2018), [http://www.ncsl.org/Portals/1/HTML\\_LargeReports/Prosecuting\\_Traffickers\\_091818\\_32767.pdf](http://www.ncsl.org/Portals/1/HTML_LargeReports/Prosecuting_Traffickers_091818_32767.pdf) [<https://perma.cc/GY6J-ZSPS>].
43. *L.A. City Attorney Mike Feuer Secures Settlement with the Owner of Motel 6 to Curb Rampant Drug, Prostitution at Sylmar Location; Owner of Motel Chain to*

\$250,000 to fund a new City Attorney program to detect, deter and prevent human trafficking in and around Los Angeles County.”<sup>44</sup>

Although modern-day hoteliers have moved away from their traditional role as quasi-public servants and have fully embraced the corporate world,<sup>45</sup> the hospitality industry remains inextricably linked to—and defined by—its public-facing roots. A discriminatory hotel served as a catalyst for change during the Civil Rights Movement in the 1960s,<sup>46</sup> and hotels, as public accommodations, have now been placed under the purview of the U.S. Constitution. In addition to Fourteenth Amendment discrimination concerns, hotels frequently encounter Fourth Amendment issues as well. During the eighteenth century, the balance between protecting the privacy of guests and protecting the public tipped in favor of law enforcement raids of inns.<sup>47</sup> Today’s answer is more complex: Our modern culture has a deep respect for privacy, but until what point?<sup>48</sup>

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*Also Pay \$250k for New Anti-Human Trafficking Program*, L.A. CITY ATT’Y MIKE FEUER (Aug. 31, 2017), <https://www.lacityattorney.org/single-post/2017/08/31/LA-City-Attorney-Mike-Feuer-Secures-Settlement-with-the-Owner-of-Motel-6-to-Curb-Rampant-Drug-Prostitution-at-Sylmar-Location-Owner-of-Motel-Chain-to-Also-Pay-250k-for-New-Anti-Human-Trafficking-Program> [<https://perma.cc/8SD8-G9KG>] (canvassing changes agreed to as part of settlement).

44. *Id.*

45. *See, e.g., Economic Impact of the US Hotel Industry*, OXFORD ECON. 4 (June 30, 2016), [https://www.ahla.com/sites/default/files/Economic%20Impact%20Study%20%28Oxford%29\\_0.pdf](https://www.ahla.com/sites/default/files/Economic%20Impact%20Study%20%28Oxford%29_0.pdf) [<https://perma.cc/RTG9-JLYN>] (estimating that the hotel industry supported \$1.1 trillion of economic output in 2015 in a study funded by the hotel industry’s advocacy and lobbying group, AHLA).

46. *See* 42 U.S.C. § 2000a(a), (b)(1) (2018) (prohibiting discrimination on the ground of race, color, religion or national origin in establishments providing lodging to transient guests); *Heart of Atlanta Motel, Inc., v. United States*, 379 U.S. 241, 247 (1964) (holding the hotel liable for discrimination based on race); *see also* Americans with Disabilities Act, 42 U.S.C. § 12182(a) (“No individual shall be discriminated against on the basis of disability in . . . any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”).

47. *See supra* notes 34-35 and accompanying text.

48. *See* KENDALL & FUNK, *supra* note 12, at 36 (“In a society increasingly self-conscious about questioning personal relationships or interfering in other’s business, this level of tolerance has the reverse effect of enabling the

## RISKY BUSINESS

In 2015, the Supreme Court weighed in on the debate, expanding constitutional privacy protections to twenty-first-century innkeepers and their guests. In *City of Los Angeles v. Patel*, the Court's latest word on the issue, hotel operators brought a Fourth Amendment challenge against a Los Angeles Municipal Code (LAMC) provision, which required them to gather and maintain certain information about guests and make such information available to LAPD Officers "on demand" and without a warrant. If the owners did not immediately comply with law enforcement, they could face jail time.

Over a strenuous dissent by Justice Scalia, the *Patel* Court held the ordinance facially unconstitutional under the Fourth Amendment because it penalized the operators "for declining to turn over their records without affording them any opportunity for precompliance review."<sup>49</sup> Despite fractures along other lines, the Court unanimously recognized that trafficking activities would constitute "exigent circumstances," thus allowing police to dispose of the warrant requirement prior to search.<sup>50</sup>

For victims, however, this concession may provide little comfort. Indeed, as Justice Scalia noted, "[t]he whole reason criminals use motel rooms in the first place is that they offer privacy and secrecy, so that police will never come to discover these exigencies."<sup>51</sup> The recordkeeping requirement, combined with warrantless inspections, would deter criminals, who "never know when law enforcement might drop by to inspect."<sup>52</sup> Permitting warrantless inspections would thwart the use of motel rooms for privacy and secrecy, and the exigencies occurring behind the walls would finally see the light of day—there would be no time "for

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traffickers to operate with impunity in even the most advanced communities."); see also Camila Domonoske, *Motel 6 Agrees to Pay Millions After Giving Guest Lists to Immigration Authorities*, NPR (Nov. 6, 2018 3:57 PM EST), <https://www.npr.org/2018/11/06/664737581/motel-6-agrees-to-pay-millions-after-giving-guest-lists-to-immigration-authoriti> [<https://perma.cc/MTA3-EBQD>] (discussing a \$7.6 million settlement when multiple Motel 6 locations turned over their entire guest registries to ICE on a daily basis, which allegedly violated consumer privacy rights and discriminated on the basis of race by targeting Latinos).

49. *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2447 (2015).

50. *Id.* at 2454.

51. *Id.* at 2461 (Scalia, J., dissenting).

52. *Id.* at 2462 (Scalia, J., dissenting).

making fraudulent entries in their guest register.”<sup>53</sup> To avoid the *Patel* problem, hotel operators should thus be incentivized to consent to random spot checks through private regulation.

*B. A Game Changer: The Trafficking Victims Protection Act of 2000*

At the turn of the twenty-first century, the United Nations adopted a “Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime,” today most commonly referred to as the Palermo Protocol.<sup>54</sup> The Palermo Protocol provides an international definition of what constitutes “trafficking in persons” in order to facilitate transnational cooperation in investigating and prosecuting these cases.<sup>55</sup> Now signed by 117 countries,<sup>56</sup> it has revolutionized the way nations deal with human trafficking.

In order to help implement the Palermo Protocol and close gaps in domestic law, Congress passed the Trafficking Victims Protection Act of 2000 (TVPA). The bipartisan law (Public Law 106-386) was signed by President Clinton on October 28, 2000, and was reauthorized in 2003, 2005, 2008, and 2013.<sup>57</sup> The statutory scheme approaches trafficking in three ways—prevention of sex trafficking, protection of victims, and prosecution of offenders<sup>58</sup>—and provides the main legal framework for prosecuting traffickers and their conspirators criminally and civilly.<sup>59</sup>

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53. *Id.*

54. 2237 U.N.T.S. 319.

55. KENDALL & FUNK, *supra* note 12, at 144.

56. 2237 U.N.T.S. 319.

57. *Summary of the Trafficking Victims Protection Act (TVPA) and Reauthorizations FY 2017*, ALLIANCE TO END SLAVERY & TRAFFICKING (Jan. 11, 2017, 8:40 AM), <https://endslaveryandtrafficking.org/summary-trafficking-victims-protection-act-tvpa-reauthorizations-fy-2017-2> [<https://perma.cc/3X39-KZ2N>]. For simplicity, I will hereinafter refer to the most-up-to-date law, incorporating all amendments since 2000, as the “TVPA.”

58. KENDALL & FUNK, *supra* note 12, at 119.

59. See William M. Sullivan & Fabio Leonardi, *Alert: Prosecuting Corporations that Benefit Financially from Human Trafficking*, PILLSBURY WINTHROP SHAW PITTMAN LLP 3 (July 24, 2019), <https://www.pillsburylaw.com/print/content/25738/prosecuting-corporations-that-benefit-financially-from->

## 1. Criminal Liability

Section 1591 of the TVPA criminalizes “sex trafficking”—broadly defined as causing a person to engage in a “commercial sex act”<sup>60</sup>—in two primary ways. First, the statute targets the offender who knowingly “recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits” a person by means of “force, threats of force, fraud, coercion” (or a combination thereof), while knowing or recklessly disregarding the fact that such means have been used to cause the person to engage in a commercial sex act.<sup>61</sup> Critically, no such means are required if the victim, the person caused to engage in the commercial sex act, “has not attained the age of 18 years.”<sup>62</sup> Alternatively, anyone who “benefits, financially or by receiving anything of value, from participation in a [sex trafficking] venture,” while knowing or recklessly disregarding that such means of force, threat, fraud, or coercion have been used against a victim, can be found guilty of sex trafficking under § 1591(a)(2).

Both hotels and their employees can be criminally punished for keeping a victim pre- or post-transport (e.g., “harboring”); unlike smuggling, transport is not a necessary condition for a human-trafficking prosecution.<sup>63</sup> Furthermore, under § 1591(a)(1), it is sufficient that the employee knowingly “harbored” the victim by renting a room to the trafficker while knowing or recklessly disregarding that “means” of force, threats of force, fraud, or coercion were being used against the victim—a hotel employee need not personally use those means against the victim.<sup>64</sup> And if the employee had a “reasonable opportunity” to observe a minor

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human-trafficking.pdf [https://perma.cc/5TLL-PBDE] (discussing amendments, like 2018’s FOSTA, that have strengthened the TVPA).

60. 18 U.S.C. § 1591(e)(3) (2018) (“The term ‘commercial sex act’ means any sex act, on account of which anything of value is given to or received by any person.”).
61. *Id.* § 1591(a)(1). “Reckless disregard” is an insufficient mens rea for the act of advertising though. *Id.*
62. *Id.* § 1591(a).
63. KENDALL & FUNK, *supra* note 12, at 39.
64. 18 U.S.C. § 1595(a); see Shea M. Rhodes, *Sex Trafficking and the Hotel Industry: Criminal and Civil Liability for Hotels and their Employees*, VILL. L. INST. TO ADDRESS COM. SEXUAL EXPLOITATION 4 (2015), [http://cseinstitute.org/wp-content/uploads/2015/06/Hotel\\_Policy\\_Paper-1.pdf](http://cseinstitute.org/wp-content/uploads/2015/06/Hotel_Policy_Paper-1.pdf) [https://perma.cc/4KL2-5CCN].

victim, that employee can be held strictly liable; the employee will be guilty of sex trafficking merely by virtue of having “harbored” the victim by renting out the hotel room where the commercial sex act occurs.<sup>65</sup>

“Harboring,” however, can only go so far. In most cases, even if the “harboring” is uncovered and criminally charged, which is already rare, prosecutors have to contend with mens rea defenses. Many hotel operators or mid-level managers naively (albeit genuinely) believe trafficking is not occurring on their premises.<sup>66</sup> Or, they may confuse prostitution with sex trafficking and are thereby reluctant to interfere with what they consider to be voluntary choices of adult women.<sup>67</sup> Thus, these individuals will argue that they lack the requisite mens rea for criminal liability. In many scenarios, this defense will be successful. Even if the owners *should have known* about the trafficking, this negligently culpable mental state will not meet the higher level of culpability required by the TVPA’s criminal provisions—knowing with respect to the trafficking act, and knowing or recklessly disregarding the means used (at least with respect to those victims over the age of eighteen).<sup>68</sup>

But the high mens rea burden could be eased in some cases by using the doctrine of willful blindness, considered a substitute for knowledge in all federal courts.<sup>69</sup> Willful blindness describes the mental state of someone seeking to avoid liability by intentionally keeping himself unaware of information that would otherwise render him liable.<sup>70</sup> Using

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65. 18 U.S.C. § 1591(c); Rhodes, *supra* note 64, at 4.

66. See, e.g., Giovanna L.C. Cavagnaro, *Sex Trafficking: The Hospitality Industry’s Role and Responsibility*, CORNELL U. SCH. HOTEL ADMIN. app. I (2017) (compiling comments left by hotel survey respondents).

67. For instance, after an enlightening conversation with a manager at the Fairmont Miramar in Santa Monica, California, it became clear to me that an incorrect view of what constitutes sex trafficking leads to completely discounting—and inadvertently avoiding—the issue; this oversight stems not from bad faith but from misinformation.

68. See 18 U.S.C. § 1591(a).

69. *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 n.9 (2011) (citing cases in all federal circuits recognizing the “willful blindness” doctrine).

70. Although the precise definition is somewhat unclear, it generally exists if a person (1) is aware of a high probability of the existence of the fact in question and (2) either takes deliberate action to avoid confirming the fact or purposely fails to investigate in order to avoid confirmation of the fact. *Id.* at 769.

## RISKY BUSINESS

this doctrine, the government can meet its burden of proving knowledge under the TVPA by, instead, proving a defendant's "deliberate" failure to inquire.<sup>71</sup> Through an expansive application of willful blindness,<sup>72</sup> managers and employees of a motel where sex trafficking occurs can arguably be considered willfully ignorant without a showing that they either could inquire (or inquire effectively), or had a duty to inquire.

Whether or not the government will pursue this approach remains to be seen; in many instances, the government will devote its limited resources to investigating and prosecuting the cases where proving the defendants' guilty mind is easier. Take, for instance, the case of Kanubhai Patel, the former owner of the Riviera Motel in New Orleans, Louisiana. Patel was indicted under 18 U.S.C. § 1591(a)(2)—the TVPA's "profiteering" section—and § 1591(b)(1) for "knowingly benefit[ing] financially" from his participation in a sex-trafficking venture.<sup>73</sup> In his managerial role, Patel regularly rented rooms to individuals charged as sex-trafficking co-conspirators, "knowing they were pimps who forced and coerced women to engage in prostitution."<sup>74</sup> He would charge them higher rates than other guests and open the motel's gate to allow the women to bring customers back to their rooms.<sup>75</sup>

Moreover, Patel learned of brutal beatings of the women and saw the aftermath in the motel rooms—the broken toilet and sink, as well as the blood on the walls—but agreed not to call the police after his co-conspirator reimbursed him for the damage.<sup>76</sup> Patel also knew that the

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71. *See id.*; *see also* United States v. Heredia, 483 F.3d 913, 918 n.4 (9th Cir. 2007) ("A willfully blind defendant is one who took *deliberate* actions to avoid confirming suspicions of criminality.").

72. *See, e.g., Heredia*, 483 F.3d at 928 (Kleinfeld, J., concurring) ("The majority converts the statutory element that the possession be 'knowing' into something much less—a requirement that the defendant be suspicious and deliberately avoid investigating . . . . The majority seems to mean that if someone can investigate, they must.").

73. *See* Second Superseding Indictment at 5, United States v. Robinson et al., No. 2:13-CR-00286-SSV-JVM (E.D. La. Oct. 3, 2014).

74. *Louisiana Motel Owner Pleads Guilty in Sex Trafficking Case*, U.S. DEP'T JUST. (July 1, 2015), <https://www.justice.gov/opa/pr/louisiana-motel-owner-pleads-guilty-sex-trafficking-case> [<https://perma.cc/C9AD-WDP8>].

75. *Id.*; *see* Factual Basis, *Robinson*, No. 2:13-CR-00286-SSV-JVM (E.D. La. July 1, 2015).

76. *Louisiana Motel Owner Pleads Guilty in Sex Trafficking Case*, *supra* note 74.

pimps would take the women's identification cards and rent hotel rooms in their names, but he did not report the traffickers to the police.<sup>77</sup> Although the evidence of the requisite mens rea appeared strong enough to support a § 1591 conviction, Patel was allowed to plead guilty to one count of benefitting financially from peonage, slavery, and trafficking in persons, in violation of 18 U.S.C. § 1593A.<sup>78</sup>

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Hotels as entities can be held criminally liable for sex trafficking in two primary ways. First, a corporation can be held vicariously liable for acts its employees commit in violation of § 1591(a)(1) if the employees were acting as agents of the hotel. Applying the test for vicarious liability,<sup>79</sup> renting a room is within the scope of a hotel employee's position, and the hotel receives a financial benefit from that room rental. Arguably, then, the hotel could be criminally liable by imputation as long as its employee either knew or recklessly disregarded that a § 1591(a)(1) violation was occurring.<sup>80</sup>

Second, a hotel can be prosecuted under § 1591(a)(2) if it knowingly received a financial benefit from participation in a venture that violates § 1591(a)(1). By renting a room to a trafficker under criminal circumstances (as defined by § 1591(a)(1)), the hotel is "effectively participating in a trafficking venture in criminal violation of [§] 1591(a)(2)."<sup>81</sup>

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77. *Id.*

78. See Plea Agreement, *Robinson*, No. 2:13-CR-00286-SSV-JVM (E.D. La. July 1, 2015). He was ultimately sentenced to five years of probation and a \$10,000 fine. *Remaining Defendants Sentenced for Roles in Sex Trafficking Scheme*, U.S. DEP'T JUST. (July 13, 2016), <https://www.justice.gov/usao-edla/pr/remaining-defendants-sentenced-roles-sex-trafficking-scheme> [<https://perma.cc/X5BY-VWQH>]. According to DOJ, § 1593A is usually inappropriate to charge because §§ 1589 and 1591 "include identical benefitting provisions and carry higher penalties." Benjamin J. Hawk et al., *Chapter 77 and Beyond: Charging Strategies in Human Trafficking Cases*, 65 U.S. ATT'Y'S BULL., at 45, 48 (Nov. 2017). Thus, § 1593A may be used to resolve a case pre-indictment or pre-trial and obtain restitution. *Id.*

79. The test for attributing criminal liability to a corporation is "whether the agent is performing acts of the kind which he is authorized to perform, and those acts are motivated—at least in part—by an intent to benefit the corporation." *United States v. Potter*, 463 F.3d 9, 25 (1st Cir. 2006).

80. See Rhodes, *supra* note 64, at 4 n.11.

81. *Id.* at 5.

## RISKY BUSINESS

Some of the challenges with holding hotels criminally responsible mirror the general difficulties with corporate criminal liability, such as who should be blamed in global hotel chains that employ hundreds of thousands of agents.<sup>82</sup> Criminal liability may sufficiently deter low-level on-site employees or mid-level managers who take bribes from traffickers, but such conduct would qualify for individual liability through conspiracy<sup>83</sup> (or the substantive crime of trafficking).<sup>84</sup>

For larger hotels, the government's goal in prosecution might be primarily financial—to extract a large fine or restitution. Similar to the white-collar prosecutions after the 2008 recession, federal prosecutors are well positioned to leverage reputational harm and stock market shocks that accompany a corporate indictment in order to negotiate with a large, publicly traded hotel chain. And as in the white-collar sphere, a hotel chain might request a non-prosecution agreement or a deferred-prosecution agreement in exchange for paying a hefty fine, implementing internal reforms, and hiring a monitor to ensure compliance. Though this sort of deal would mitigate the negative press coverage and many collateral consequences that would otherwise accompany an indictment, we should question whether the failure to publicly shame a corporation that permits human rights violations is the correct response. A publicized indictment may be a worthy deterrent for other chains to stamp out misconduct more aggressively. Furthermore, subjecting a hotel to what effectively amounts to a monetary penalty and increased regulation begins to bridge the criminal-civil divide.

Nevertheless, the reality is that financial institutions look significantly different than even publicly traded hotels. Much like the fast food industry, the hotel industry is heavily franchised.<sup>85</sup> The “flag” or “brand”—Choice,

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82. For more background on corporate criminal liability, see generally *United States v. Dotterweich*, 320 U.S. 277, 281 (1943); DANIEL C. RICHMAN, KATE STITH & BILL STUNTZ, *DEFINING FEDERAL CRIMES* (2d ed. 2019); and BRANDON L. GARRETT, *TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS* (2014).

83. *See* 18 U.S.C. § 1594(c).

84. An additional problem prevalent in corporate criminal liability exists: High-level managers point the blame downward while claiming ignorance, and low-level employees argue their commands were coming from the top.

85. Ellen Meyer, *The Origins and Growth of Franchising in the Hotel Industry*, *LODGING MAG.* (Apr. 10, 2018), <https://lodgingmagazine.com/the-origins-and-growth-of-franchising-in-the-hotel-industry/> [<https://perma.cc/CU7Q->

IHG, or Marriott, for instance—is at the top of the pyramid.<sup>86</sup> That brand contracts with a hotel owner to own and operate his hotel under its brand name.<sup>87</sup> That owner may then run the hotel or he may hire a separate management company; it is thus common for multiple companies to be sandwiched between the deep-pocketed brand and any on-the-ground criminal activity.

The brand protects itself by claiming it has no operational control at a particular facility and that even though the employees are wearing their uniforms, they are not actually “employees” of the brand. Perhaps more importantly, the flag will point to its “brand standards.”<sup>88</sup> Management agreements will include similar provisions explicitly stating that the management company is to operate the hotel in accordance with the brand standards, one of which is to make sure no crimes are committed there. The savviest brands have already begun to include a specific prohibition against human trafficking.<sup>89</sup>

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LPUA]. For background information, I drew on conversations I had with industry experts as well.

86. *Our Brands*, CHOICE HOTELS (2019), <https://choicehotelsdevelopment.com/brand-portfolio/> [<https://perma.cc/MCL5-K6EE>]; *Our Brands*, IHG (2019), <https://choicehotelsdevelopment.com/brand-portfolio/> [<https://perma.cc/2RDV-EFXU>]; *Explore Our Brands*, MARRIOTT BONVOY (2019), <https://www.marriott.com/marriott-brands.mi> [<https://perma.cc/B45K-T8TN>].
87. Deciding on a brand is considered one of the most important choices for building a hotel. See, e.g., Larry Mogelonsky, *Finding Your Flag*, HOSPITALITYNET (March 17, 2017), <https://www.hospitalitynet.org/opinion/4081647.html> [<https://perma.cc/5DTT-J4GP>].
88. Enforcement of and compliance with brand standards also varies tremendously among the flags. See, e.g., Chekitan Dev et al., *Hotel Brand Standards: How to Pick the Right Amenities for Your Property*, 17 CORNELL HOSPITALITY RES. BRIEF 3 (2017); Graeme Dickson, *The Importance of Brand Standards*, INSIGHTS (Dec. 8, 2016), <https://insights.ehotelier.com/insights/2016/08/12/importance-brand-standards/> [<https://perma.cc/LM2T-NJDX>].
89. See, e.g., *No Vacancy for Child Sex Traffickers Impact Report: The Efficacy of ECPAT-USA’s Work to Prevent and Disrupt the Commercial Sexual Exploitation of Children in Hotels*, ECPAT-USA 10 (2017), [https://static1.squarespace.com/static/594970e91b631b3571be12e2/t/59c9b6bfb07869cc5d792b8c/1506391761747/NoVacany\\_Report.pdf](https://static1.squarespace.com/static/594970e91b631b3571be12e2/t/59c9b6bfb07869cc5d792b8c/1506391761747/NoVacany_Report.pdf)

## RISKY BUSINESS

Despite these multiple layers of insulation, corporate criminal liability has worked in some cases. For example, in *United States v. Singh*,<sup>90</sup> a privately held motel was prosecuted for prostitution and money laundering offenses under the Mann Act because prosecutors were unable to convict the individual who was president of the corporation. The corporation was considered the actual target's "alter-ego." This case demonstrates that these prosecutions might be successful where an owner who has engaged in wrongful conduct himself is closely aligned with the corporate entity.

Even if the corporation is not the target's "alter-ego," it may be beneficial to indict a hotel operator and the entity that owns the hotel, either for conspiracy or financial purposes, or both. For instance, in October 2017, Faizal Bhimani, a hotel operator in Pennsylvania, was indicted on one count of sex trafficking by force and coercion,<sup>91</sup> as well as one count of sex trafficking by force and coercion conspiracy.<sup>92</sup> The indictment also charged Om Sri Sai, Inc., the entity that owns the hotel, with the same crimes.<sup>93</sup> Importantly, the government provided a forfeiture allegation under § 1594(d), which included all of the defendants' assets, including the hotel's liquor license and real property.<sup>94</sup>

Overall, though, federal law enforcement is missing the opportunity to hold hotels criminally responsible under the TVPA for what goes on behind closed doors. In 2018, 383 criminal sex trafficking cases identified the location where a commercial sex act took place; of those, "81.5% (312) involved a victim who was exploited for sex at a hotel."<sup>95</sup> Specific hotels were named in 174 criminal cases, and the top five offenders were "small-

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[<https://perma.cc/8B33-5MQJ>] [hereinafter *No Vacancy Report*] (noting that, "as a brand standard, Hyatt International mandates that all hotels take human trafficking training").

90. 518 F.3d 236 (4th Cir. 2008).

91. 18 U.S.C. §§ 1591(a)(1), (a)(2), (b)(1).

92. *Id.* § 1594(c). See Indictment at 1-3, *United States v. Bhimani*, No. 3:17-CR-00324-ARC (M.D. Pa. Oct. 24, 2017); *Bartonsville Man and Hotel Charged With Sex and Drug Trafficking*, U.S. DEP'T JUST. (Oct. 26, 2017), <https://www.justice.gov/usao-mdpa/pr/bartonsville-man-and-hotel-charged-sex-and-drug-trafficking> [<https://perma.cc/DMU9-JZ7F>].

93. Indictment at 1-3, *Bhimani*, No. 3:17-CR-00324-ARC.

94. *Id.* at 6.

95. *2018 Federal Human Trafficking Report*, *supra* note 8, at iv.

chain hotels or hotels not part of a chain (62), Super 8 (31), Motel 6 (29), Red Roof Inn (20), and Days Inn (19).<sup>96</sup> Yet of the 1,217 criminal defendants in federal human trafficking cases in 2018, only two were entities—and only one entity was a hotel in a sex-trafficking case.<sup>97</sup>

## 2. Civil Liability

With limited governmental resources and a higher burden of proof on the criminal side, a civil remedy can pick up the slack in holding traffickers accountable for their actions.<sup>98</sup> Civil remedies can be more effective and more flexible—victims who bring civil suits “may fully participate in the proceedings if they so choose”<sup>99</sup> and may opt for strength in numbers, bringing class actions against their traffickers.<sup>100</sup>

Under 18 U.S.C. § 1595, any trafficking victim can bring a civil action against the perpetrator, or against whomever “knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or *should have known* has engaged in an act in violation of this chapter.”<sup>101</sup> Thus, a hotel can be held liable to a victim for civil damages—compensatory and punitive<sup>102</sup>—if it should have

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96. *Id.*

97. *Id.* at 16; *see also id.* at iv (noting that the federal government did not initiate any “new prosecutions against entity defendants in 2018”).

98. Of the 355 suspects investigated for TVPA offenses whom U.S. attorneys declined to prosecute in 2015, 64.2% were declined due to insufficient evidence, by far the most common reason. BJS 2015 Special Report, *supra* note 8, at 7 tbl. 4. That the matter was subject to the authority of another jurisdiction (13.8%) or a prioritization of federal resources (9%) were the next most common reasons. *Id.*

99. *2018 Federal Human Trafficking Report, supra* note 8, at 50.

100. *Id.* at 50-51 (noting that 19 of the 91 active civil human trafficking cases in 2018 were class actions).

101. 18 U.S.C. § 1595(a) (2018) (emphasis added).

102. *See* Ditullio v. Boehm, 662 F.3d 1091, 1094 (9th Cir. 2011) (holding that “the TVPA permits recovery of punitive damages because [§ 1595] creates a cause of action that sounds in tort and punitive damages are available in tort actions under the common law”); Francisco v. Susano, 2013 WL 2302691, at \*4-6 (10th Cir. May 28, 2013) (holding that § 1595 allows trafficking victims to recover compensatory and punitive damages).

## RISKY BUSINESS

known it was renting a room to a trafficker for the purpose of a commercial sex act.<sup>103</sup>

Indeed, civil human trafficking suits against entities in 2018 were much more common than criminal prosecutions of entities: Of the 390 defendants in active civil cases, 43.8% (171) were entities, compared to less than 1% (2) in active criminal cases.<sup>104</sup>

The first civil TVPA suit against the hospitality industry by a sex-trafficking victim was filed in March 2019.<sup>105</sup> M.A., an Ohio resident, brought one cause of action under § 1595. She alleged that all defendants—including Wyndham, IHG, and Choice brand hotels<sup>106</sup>—“knowingly benefited from participating in a venture which they knew was engaged in illegal sex trafficking” in violation of §1591(a)(2).<sup>107</sup> Her complaint described the means by which the defendants engaged “in acts and omissions that were intended to support, facilitate, harbor, and otherwise further the trafficker’s sale and victimization of the Plaintiff for commercial sexual exploitation,”<sup>108</sup> as well as the “obvious” warning signs that went unnoticed.<sup>109</sup>

M.A.’s attorneys presented her case with a keen awareness they were breaking new ground. They embraced the role, opening with a dramatic history and condemnation of hotels’ complicity in sex-trafficking

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103. *See Rhodes, supra* note 64, at 4; *see also Biesenthal et al., supra* note 10 (“Counsel representing individual plaintiffs in private actions under the TVPRA regard the statute as opening the door to large damage awards against corporate entities, including hospitality locations where trafficking is alleged to have occurred.”).

104. *2018 Federal Human Trafficking Report, supra* note 8, at 55. The comparison is not entirely analogous, though, because unlike in the criminal context—where the overwhelming majority of all active cases in 2018 were *sex* trafficking (645 out of 680), *see id.* at 6, the reverse was true in civil suits (where 80 out of 91 total active suits were *labor* trafficking), *see id.* at 50.

105. Complaint, *M.A. v. Wyndham Hotels & Resorts*, No. 2:19-CV-00849-ALM-EPD (S.D. Ohio March 8, 2019).

106. *Id.* at 21. To support her claim, throughout the complaint, she referred to Wyndham and the local properties (Days Inn by Wyndham) as “alter egos, representatives, agents, or co-conspirators.” Additionally, she alleged an agency relationship between IHG and Defendant Crown Plaza. *Id.*

107. *Id.* at 35, ¶ 107.

108. *Id.*

109. *Id.* at 19, ¶ 55.

ventures.<sup>110</sup> The complaint canvassed the actions taken by governmental and non-governmental organizations to combat the crime, but concluded that “[t]he complicity of the hospitality industry is essential to the perpetuation of human trafficking, allowing traffickers to remain transient, collect profits, and evade detection.”<sup>111</sup>

However, if this is the first civil suit against hotels almost two decades after the TVPA was first passed—and there is no guarantee of ultimate success given the franchised nature of the hotel industry<sup>112</sup>—we cannot solely rely on federal litigation. We need further pressure points to create the change.

### C. State Gap-Fillers

Even if sex-trafficking violations *should* be made a federal case given their gravity and complexity, realistically, the federal criminal justice system cannot effectively prosecute every such incident in the United States.<sup>113</sup> The federal government has therefore sought to partner with and train local and state governments to improve their ability to combat the crime.<sup>114</sup>

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110. *Id.* at 3, ¶ 1.

111. *Id.*

112. M.A.’s attorneys refer to “hotel and hotel brands” throughout the complaint, demonstrating an understanding of how the hospitality branding structure complicates the litigation. *See, e.g., id.* at 5, 7, 9, 16-17, 26.

113. Amy Pharell et al., *Identifying Challenges to Improve the Investigation and Prosecution of State and Local Human Trafficking Cases*, URB. INST. JUST. POL’Y CTR. 2 (2012), [https://www.urban.org/research/publication/identifying-challenges-improve-investigation-and-prosecution-state-and-local-human-trafficking-cases/view/full\\_report](https://www.urban.org/research/publication/identifying-challenges-improve-investigation-and-prosecution-state-and-local-human-trafficking-cases/view/full_report) [<https://perma.cc/VZ4Y-R7A6>].

114. *See, e.g., id.* at 3; *Federal Strategic Action Plan on Services for Victims of Human Trafficking in the United States, 2013-2017*, PRESIDENT’S INTERAGENCY TASK FORCE TO MONITOR & COMBAT TRAFFICKING IN PERSONS (Jan. 2014), <https://www.ovc.gov/pubs/FederalHumanTraffickingStrategicPlan.pdf> [<https://perma.cc/N52F-Q3RS>] (noting that the task force’s first goal is to “align efforts” by “promot[ing] a strategic, coordinated approach to the provision of services for victims of human trafficking at the federal, regional, state, territorial, tribal, and local levels”).

## RISKY BUSINESS

Meanwhile, state legislatures have enacted their own sex-trafficking statutes modeled after the TVPA's federal proscriptions.<sup>115</sup> Indeed, many states have gone beyond the TVPA to fill the gaps in both civil and criminal liability and widen the liability net.<sup>116</sup> Notably, numerous legislatures have targeted the hospitality industry through signage requirements.<sup>117</sup> Thus, hotel chains are already, in theory, subject to liability under our criminal law and civil laws, both federal and local.

Groundbreaking lawsuits have capitalized on this legal exposure and are now testing the limits of these state statutes; in doing so, they have raised alarm bells in the hotel industry.<sup>118</sup> For instance, Texas's human trafficking code, Texas Civil Practice & Remedies Code § 98.002,<sup>119</sup> was enacted in 2009 and has recently started to gain traction and publicity.<sup>120</sup>

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115. See *A Look Back: Building a Human Trafficking Legal Framework*, POLARIS PROJECT (2014), <https://polarisproject.org/sites/default/files/2014-Look-Back.pdf> [<https://perma.cc/L9YG-R9U9>]; *Human Trafficking Enactment Database*, *supra* note 9.

116. See, e.g., Teigen, *supra* note 42, at 5 (“In South Carolina, a person who uses his or her business in a way that participates in human trafficking can be imprisoned for 10 years in addition to penalties for each trafficking violation.”); see also Sullivan & Leonardi, *supra* note 59 (noting that “virtually every state has enacted some form of anti-human trafficking legislation creating criminal and civil liability for corporations that benefit from labor and sexual exploitation”).

117. See, e.g., ALA. CODE § 13A-6-170 (2019) (“Posting of National Human Trafficking Resource Center Hotline in certain establishments”); ARK. CODE ANN. § 12-19-102 (2019) (“Posting information about the National Human Trafficking Resource Center Hotline”); OHIO REV. CODE ANN. § 5502.63(B)(1) (West 2019) (“[P]oster providing information regarding national human trafficking resource center hotline”); see generally *Compendium of Human Trafficking Awareness Poster State Laws: A Resource Guide*, U.S. DEP’T TRANSP. (Feb. 10, 2014), [https://www.transportation.gov/sites/dot.gov/files/pictures/HT\\_Awareness\\_Poster\\_Laws.pdf](https://www.transportation.gov/sites/dot.gov/files/pictures/HT_Awareness_Poster_Laws.pdf) [<https://perma.cc/Y6M8-L5ZW>]; Weiss, *supra* note 11.

118. See, e.g., Louise Esola, *The Hospitality Industry’s Lurking Liability*, BUS. INS. (Aug. 7, 2017, 12:00 AM), <https://www.businessinsurance.com/article/20170807/NEWS06/912314912/Sex-trafficking-hospitality-industry-lurking-liability> [<https://perma.cc/VL2C-SDR5>].

119. See TEX. CIV. PRAC. & REM. CODE ANN. § 98.002(a) (West 2018).

120. See Paul Cannon, *Are Texas Trial Lawyers the Next Step in Battling Human Trafficking?*, SIMMONS & FLETCHER, P.C. (Apr. 22, 2019),

On January 23, 2018, a Jane Doe victim filed suit in Harris County, Texas against hotels, truck stops, and Backpage.com.<sup>121</sup> She accused the “Hotel Defendants”<sup>122</sup> of fostering “Hotbeds of Sexual Exploitation,” and her complaint described how “Human Trafficking and the Sexual Exploitation of Minors is a Rampant and Known Problem in the Hotel Industry.”<sup>123</sup> She documented the specific red flags concerning her trafficking and alleged that the Defendants turned a blind eye, “refus[ing] to take any steps to alert the authorities, properly intervene in the situation, or take reasonable security steps to improve awareness of sex trafficking and/or prevent the sexual exploitation of minors at their properties.”<sup>124</sup> In addition to section 98.002 violations, Jane Doe included causes of action against the Hotel Defendants for negligence<sup>125</sup> and gross negligence,<sup>126</sup> as well as common-law aiding and abetting.<sup>127</sup> The lawsuit made national news for its wide-ranging implications.<sup>128</sup>

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<https://www.simmonsandfletcher.com/blog/texas-trial-lawyers-next-step-battling-human-trafficking/> [<https://perma.cc/V3EV-TM6A>].

121. Plaintiff’s Original Petition at 59, 71, 76, Jane Doe #1 v. Backpage.com, No. 201804501-7 (Tex. Dist. Ct. Jan. 23, 2018).
122. The “Hotel Defendants” include Choice Hotels International, Inc. D/B/A Quality Inn; Rutik, LLC, D/B/A Palace Inn; Hyatt Hotels Corporation; and Balaji Hotels, Inc. D/B/A Symphony Inn. *Id.* at 16.
123. *Id.* at 55.
124. *Id.*
125. *Id.* at 76.
126. *Id.* at 78.
127. *Id.* at 77.
128. See Susan Hogan et al., *Lawsuits Accuse Hotels, Truck Stops of Turning Blind Eye to Sex Trafficking*, NBC4 WASH. (May 1, 2018, 7:05 PM), <https://www.nbcwashington.com/news/local/Lawsuits-Accuse-Hotels-Truck-Stops-of-Turning-Blind-Eye-to-Sex-Trafficking-481290921.html> [<https://perma.cc/U27J-57B9>]; Pillsbury Winthrop Shaw Pittman LLP, *Human Trafficking Raises Corporate Liability Concerns for the Hospitality Industry*, LEXOLOGY (Feb. 5, 2018), <https://www.lexology.com/library/detail.aspx?g=80aac912-598f-4526-94ee-003461fd544f> [<https://perma.cc/XUU2-CHX7>]. Though the trial had been set for April 1, 2019 (according to the docket), the court granted Plaintiff’s Notice of Non-Suit Without Prejudice on November 9, 2018. Order on Plaintiff’s Notice of Non-Suit Without Prejudice 2, Jane Doe #1 v. Backpage.com, No. 201804501-7 (Tex. Dist. Ct. Nov. 9, 2018).

## RISKY BUSINESS

Less than six weeks later in that same county, Janiece Charlez filed suit against Plainfield Inn, its owners and operators (Virani & Manav, LLC), and two directors and members of the LLC, on behalf of her deceased twenty-one-year-old daughter, Natalie Fisher, who had been trafficked there.<sup>129</sup> The plaintiff alleged that the defendants knowingly benefitted from the human trafficking of Natalie, who was found “brutally murdered and dumped on the side of the road less than 10 miles from the Plainfield Inn.”<sup>130</sup> Under Texas’s Survival Statutes,<sup>131</sup> Charlez sought actual and exemplary damages for violations of section 98.002.

In September 2014, the Pennsylvania General Assembly enacted Act 105, comprehensive anti-trafficking legislation that created a far-reaching civil cause of action against providers of public goods or services that knowingly profited from the victim’s sex trade.<sup>132</sup> On March 10, 2017, the lawyers of M.B., a seventeen-year-old girl, filed a civil suit under Act 105 against Roosevelt Inn, a motel in Northeast Philadelphia. The lawsuit also named as defendants the motel’s owner, UFVS Management Co., which manages about forty commercial properties, and the motel’s resident manager, Yagna Patel.<sup>133</sup> According to her lawyer, M.B. was “sold into sexual slavery” at the Roosevelt Motel when she was just fourteen years

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129. Plaintiff’s Original Petition and Request for Disclosure, *Janiece Charlez v. Plainfield Inn*, No. 201815356-7 (Tex. Dist. Ct. Mar. 8, 2018).

130. *Id.* at 3.

131. TEX. CIV. PRAC. & REM. CODE ANN. § 71.021 (West 2018).

132. *See* 18 PA. CONS. STAT. § 3051(b)(1) (2014); *see also id.* §§ 3001-3072; *New PA Human Trafficking Statute, Act 105, Provides Civil Remedy for Victims of Human Trafficking*, VILL. L. INST. TO ADDRESS COM. SEXUAL EXPLOITATION (June 23, 2015), <https://cseinstitute.org/new-pa-human-trafficking-statute-act-105-provides-civil-remedy-victims-human-trafficking/> [<https://perma.cc/37LR-GLBX>].

133. Court Docket, *M.B. v. Roosevelt Inn*, No. 170300712 (Phila. Ct. Com. Pl. Mar. 09, 2017); Joseph A. Slobodzian, *First of Kind Lawsuit Accuses N.E. Philly Hotel of Accommodating Sex Trafficking*, PHILA. INQUIRER (Mar. 10, 2017, 5:27 PM), <http://www2.philly.com/philly/news/crime/First-of-kind-lawsuit-accuses-NE-Phila-hotel-of-accomodating-sex-trafficking.html> [<https://perma.cc/3WVH-3Q9C>].

old.<sup>134</sup> During 2013 and 2014, M.B. spent weeks or months living at the motel, was barred from leaving, and was forced to commit sex acts with about 1,000 men “double, triple and quadruple her age.”<sup>135</sup> The complaint alleged negligence under Act 105, in addition to common-law negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress.<sup>136</sup>

Patel, the motel owner, has publicly responded to the allegations, claiming, “We just rent the room and that’s all we can do.”<sup>137</sup> He added that “if we think a lot of people are having a party in the room, we kick them out.”<sup>138</sup> But through the lawsuit, M.B. and her lawyer hope to challenge that common refrain—and eliminate it as a legal defense:

I think the message is pretty clear and that is, if you’re going to run this type of business, make sure you have some idea of what’s occurring in your hallways and, if you know of this type of illegal activity, particularly involving children, you better do something about it.<sup>139</sup>

Indeed, prosecutors were aware that the Roosevelt Inn had been a hotbed of prostitution and human trafficking; they even referred to the motel as Philadelphia’s “epicenter of human trafficking.”<sup>140</sup> Law enforcement had investigated and prosecuted numerous crimes on the motel’s premises over the years, making it harder to credit Patel’s defense that he was unaware of any minors being abused or used in prostitution at

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134. *Nadeem Bezar Comments On Human Trafficking Case On Canada CBC Radio*, KLINE & SPECTER, PC (Mar. 24, 2017), <https://www.klinespecter.com/nadeem-bezar-comments-on-human-trafficking-case-on-canana-cbc-radio.html> [<https://perma.cc/S38R-TJ2W>] [hereinafter *Bezar Comments*].

135. Slobodzian, *supra* note 133.

136. Amended Complaint at ¶¶ 72-111, *M.B. v. Roosevelt Inn*, No. 170300712 (Phila. Ct. Com. Pl. Sept. 5, 2017); see *Report on Commercial Sexual Exploitation in Pennsylvania*, VILL. L. INST. TO ADDRESS COM. SEXUAL EXPLOITATION 16 (Spring 2018), <https://cseinstitute.org/wp-content/uploads/2018/05/2018-report-final-B-2.pdf> [<https://perma.cc/2KW6-6285>].

137. Slobodzian, *supra* note 133.

138. *Id.*

139. *Bezar Comments*, *supra* note 134.

140. Slobodzian, *supra* note 133.

## RISKY BUSINESS

the motel.<sup>141</sup> Given the systemic problems and criminal history on-site, police records will likely be a key aspect of the case, undermining or bolstering Patel's mens rea-related claims. And, indeed, the presiding judge ordered discovery from the Township Police Department.<sup>142</sup> The litigation is ongoing; the case is currently listed for a settlement conference, with a projected trial date of April 6, 2020.<sup>143</sup>

Although the tide may be turning towards harnessing civil remedies in both state and federal court, the question now is whether these lawsuits are sufficient to shift the incentives of the hotel industry, or if there is still a better solution.

### III. TOWARD PRIVATE REGULATION

Because defending against sex-trafficking claims is costly for hotels, it is unsurprising that these civil lawsuits spawn third-party insurance coverage disputes. Pursuing impact litigation against hotels—be it by a City Attorney's Office, a State Attorney General's Office, private plaintiffs, or the federal government—adds uncertainty. Not only do the lawsuits directly pressure the corporate entities, but they also burden their commercial insurers, who neither want to pay the expenses of protracted litigation nor be held liable for massive claims. Insurers therefore have sought declaratory judgments under 28 U.S.C. § 2201 that they have no duty to defend or indemnify their insured due to policy exclusions or public policy reasons<sup>144</sup>— a course of action that is only becoming more common.<sup>145</sup> Ultimately, we should use the threat and unpredictability of

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141. *Id.*

142. Judge Butchart directed the discovery sought in defendants' subpoena on November 6, 2018. The Police Department must hand over all records, "including but not limited to records involving prostitution, solicitation, human trafficking and/or any other criminal activity, from 2012 to the present" relating to another defendant, the incarcerated Abdul Lopez, who was joined by the defendants. Court Docket, *Roosevelt Inn*, *supra* note 133.

143. *See id.*

144. Complaint at 1, *Nationwide Mut. Ins. Co. v. UFVS Mgmt. Co.*, No. 2:18-CV-03171-CDJ (E.D. Pa. July 25, 2018) (seeking a declaratory judgment under 28 U.S.C. § 2201 for coverage obligations arising out of the *M.B. v. Roosevelt Inn* litigation).

145. *See, e.g., Travelers Prop. Cas. Co. of Am. v. Vill. Voice Media Holdings*, No. 17-CV-3994, 2017 WL 4932856 (D. Ariz. Oct. 30, 2017).

sex-trafficking litigation to pressure insurers into making wholesale changes in their hotel policy coverage.<sup>146</sup>

*A. An Insurance Primer*

At common law, liability insurance was thought to violate public policy.<sup>147</sup> Such coverage can perpetuate the problem of “moral hazard,” the idea that insurance tends to “reduce the insured’s incentives to prevent harm.”<sup>148</sup> By transferring the risk to the insurer and diluting the actions of the insured, liability insurance might ultimately lead to underdeterrence of the social harm we sought to reduce in the first place. At the same time, however, once an insurer assumes the liability risk, it develops a financial incentive to minimize that risk through loss prevention, which would lower payouts under the policy and maximize profits.<sup>149</sup>

Hotels are typically insured under commercial general liability (CGL) policies, which protect them from various forms of liability and property risks.<sup>150</sup> Although the contracting parties agree to the specific terms, a standard CGL policy often provides coverage for “bodily injury” or “property damage” caused by an “occurrence” or “accident” as defined by the policy. Insurers generally have no duty to defend their insured where there is no “occurrence” within the policy’s definition of that term.<sup>151</sup> Moreover, intentional acts usually do not constitute an “occurrence” or an “accident.”<sup>152</sup> The recent coverage disputes arising out of trafficking cases

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146. In many respects, I envision what Professor John Rappaport suggests in his article regarding police liability insurance, though more research needs to be done to tailor solutions to the hotel industry. See John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539 (2017).

147. *Id.*, at 1553-54; Kenneth S. Abraham, *Environmental Liability and the Limits of Insurance*, 88 COLUM. L. REV. 942, 947 (1988).

148. Rappaport, *supra* note 146, at 1553-54.

149. *Id.* at 1543-44.

150. *Commercial General Liability (C.G.L. or CGL)*, BOUVIER LAW DICTIONARY (2012).

151. 14 COUCH ON INSURANCE § 201:18 (3d ed. 2018) (Exclusion as to Intentional Acts); *id.* § 201:6 (Occurrence or Accident).

152. *Id.* § 201:6.

## RISKY BUSINESS

have focused on the “bodily injury” provision of CGL policies, which often include an “assault or battery exclusion” as well.<sup>153</sup>

A “primary”<sup>154</sup> CGL policy will provide some form of defense coverage to the policyholder, be it a “direct obligation to defend potentially covered third-party claims brought against the insured” or “an obligation to pay for or reimburse the costs of such defense.”<sup>155</sup> Significantly, these policies may “provide defense coverage in addition to the limits of liability available under the policy for indemnity purposes.”<sup>156</sup> In these circumstances, insurers would “be required to continue to provide defense coverage even though the amounts expended in defense might exceed the policies’ indemnity limits.”<sup>157</sup> Thus, primary insurers may have a strong incentive to settle cases.

Often, businesses have layers of coverage, and a hotel will not rely solely on a single CGL policy to satisfy all of its insurance needs.<sup>158</sup> In addition to “primary” insurance, hotels might have umbrella or excess liability policies, which attach “only after exhaustion of a specified amount of primary coverage or self-insured retention.”<sup>159</sup> Umbrella policies are valuable for the insured in that they “remove the insured’s burden of deciding among potential risks that could remain uncovered by the terms of the policy.”<sup>160</sup> For that same reason, they are costly for those insurers

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153. 43 AM. JUR. 2D *Insurance* § 673 (2018) (Specific Exclusion of Coverage for assault and battery).

154. In contrast to policies subject to self-insured retentions, discussed *infra* note 214, “primary” insurance “refers to coverage “that attaches at the first dollar of the policyholder’s loss or liability.” Policies containing deductibles can be “primary” insurance so long as “the insurer’s obligations to the policyholder arise at the first instance of loss or liability.” INSURANCE COVERAGE DISPUTES (LJP) § 1.03.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* (noting that commercial policyholders “frequently have complex insurance coverage programs involving multiple insurers and coverages”).

159. Excess insurance (sometimes referred to as “pure excess”) and umbrella insurance policies (considered a form of excess insurance) both provide additional coverage over and above primary insurance, but they operate in different ways. Thomas S. Novak, *The Defense Obligation of Excess and Umbrella Liability Insurance Policies*, THE BRIEF, Fall 2006, at 12, 12.

160. *Id.* at 13.

that are unaware of the scope of their potential obligations, including defense coverage for sex-trafficking litigation.

As with other contracts, insurance contracts that are inconsistent with public policy or have terms that promote, encourage, or effectuate a violation of the law are considered illegal and void.<sup>161</sup> A state's public policy is reflected in its constitution, statutes, and judicial decisions.<sup>162</sup> Because all states have human trafficking laws,<sup>163</sup> in every state, policies that are seen as "encouraging" trafficking violations will be unenforceable. In practice, however, the analysis can become quite complicated, turning on the specific policy exclusions, plan language, and underlying claims at issue.

### *B. Act 105 Collateral Litigation*

*E.B. v. Motel 6 Operating L.P.*, an Act 105-related case out of Pennsylvania, provides a detailed study of insurance-driven collateral litigation.<sup>164</sup> Similar to M.B.'s lawsuit against Roosevelt Inn, this plaintiff, a victim of sex trafficking in 2014, sued Motel 6, Neshaminy Inn, and the management services companies, including Motel Management Services (MMS), which owned, operated, and maintained the Neshaminy Inn.<sup>165</sup> E.B. alleged negligent violation of Act 105, negligence, and intentional infliction of emotional distress.<sup>166</sup> Specifically, the complaint alleged that MMS "knew or should have known that E.B. was a victim of human trafficking and that MMS individually or through its employees, agents or servants failed to report the activities to authorities and/or to intervene, disrupt or

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161. 7 STEVEN PLITT ET AL., *COUCH ON INSURANCE* § 101:11 (3d ed. 2018) (Public policy considerations). Therefore, provisions and policies that exclude from coverage "violations of law" or "criminal acts" have been deemed valid. *Id.* § 103:40 (Generally Criminal Acts; Violations of Law).

162. 43 AM. JUR. 2D *Insurance* § 276 (2018) (Basis of public policy).

163. *See supra* note 115.

164. *E.B. v. Motel 6 Operating L.P.*, No. 170500487 (Phila. Ct. Com. Pl. May 2, 2017); *see supra* note 132.

165. Complaint at ¶¶ 4-5, 15, *E.B. v. Motel 6*, No. 170500487.

166. *Id.* at ¶¶ 9-16. *See id.* at ¶¶ 52-58. E.B. also sought \$50,000 in compensatory and punitive damages. *Id.* at ¶ 69.

## RISKY BUSINESS

otherwise stop the human trafficking of E.B.”<sup>167</sup> MMS sought over \$75,000 in coverage for this underlying action, but its insurance providers fought back.

MMS was insured by First Financial Insurance Company (FFIC) through September 1, 2014, and by Nautilus Insurance Company thereafter. After FFIC brought suit for a declaratory action against MMS,<sup>168</sup> the parties settled, stipulating that the “occurrences” for which the plaintiff sought damages against MMS took place after the expiration of the FFIC policy.<sup>169</sup>

Like FFIC, Nautilus also filed suit under 28 U.S.C. § 2201 requesting a declaration of its coverage obligations. It argued that the claim in E.B.’s underlying action against MMS was for assault and therefore excluded from coverage by its own policy’s assault and battery exception. Furthermore, Nautilus argued that, as a matter of public policy, there can be no duty to defend or indemnify an insured for allegations of human trafficking. Ultimately, Nautilus prevailed on both grounds.

Beginning on September 1, 2014, MMS was covered by a standard CGL policy, under which Nautilus would “pay those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies.”<sup>170</sup> Nautilus, however, would “have no duty to defend the insured against any ‘suit’ seeking damages for ‘bodily injury’ or ‘property damage’ to which this insurance does not apply.”<sup>171</sup> The central question, therefore, turned on how the policy delimited “bodily injury.” The policy applied to “bodily injury” only if it was caused by an “occurrence,” defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”<sup>172</sup> Bodily injury that was “[a]ctual or alleged assault

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167. Complaint at 3, *Nautilus Ins. Co. v. Motel Mgmt. Servs., Inc.*, No. 2:17-CV-04491-TJS (E.D. Pa. Oct. 10, 2017).

168. Complaint at 2, *First Fin. Ins. Co. v. Motel Mgmt. Servs. Inc.*, No. 2:17-CV-04369-TJS (E.D. Pa. Oct. 2, 2017).

169. Order of Dismissal, *First Fin. Ins. Co.*, No. 2:17-CV-04369-TJS (E.D. Pa. Nov. 2, 2017); Settlement Stipulation at 1, *id.*

170. *Nautilus Ins. Co. v. Motel Mgmt. Servs., Inc.*, 320 F. Supp. 3d 636, 640 (E.D. Pa. 2018).

171. *Id.*

172. *Id.*

or battery,” “[r]egardless of culpability or intent of any person” was excluded from coverage under the “All Assault or Battery Exclusion.”<sup>173</sup>

In assessing Nautilus’s motion for judgment on the pleadings, the district court reviewed the claims made by E.B. and compared their statutory definitions with the policy’s language. As defined by the policy terms, “assault and battery” included “negligent conduct on the part of the insured or its employees that directly harms another person, whether through negligent failure to prevent an assault, negligence related to an actual or threatened assault, or negligence resulting in battery.”<sup>174</sup> Therefore, even “assuming MMS breached its duty to E.B. in negligently failing to report the sex trafficking occurring on its premises,” the claims arising from such conduct were excluded from coverage by the “All Assault or Battery Exclusion.”<sup>175</sup> Moreover, because financially benefiting from human sex trafficking is criminalized under the Pennsylvania Human Trafficking Law, public policy precluded coverage as well.<sup>176</sup>

### *C. Jane Does #1-4 Case Study*

Although Nautilus won its arguments, the outcome of each case is idiosyncratic, and highly dependent on the particular policy and jurisdiction. A Federal District Court in Maryland, for instance, recently ruled against an insurance provider, Millers Capital Insurance Company, at the summary judgment stage.<sup>177</sup> There were four underlying cases at issue. On February 21 and 22, 2017, Jane Does #1-4 filed individual lawsuits in the Circuit Court of Wicomico County, Maryland related to a November 2014 human-trafficking bust.<sup>178</sup> All victims filed suit against Choice Hotels

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173. *Id.*

174. *Id.* at 643.

175. *Id.*

176. *Id.*

177. *See* Millers Capital Ins. Co. v. Vasant, No. 18-CV-00553-RDB, 2018 WL 5295899 (D. Md. Oct. 25, 2018).

178. The associated docket numbers are C-22-CV-17-000071; C-22-CV-17-000072; C-22-CV-17-000073; and C-22-CV-17-000074. Though I could not find the complaints, news outlets reported that the victims accused America’s Best Value Inn in Salisbury, Maryland “of knowing that the they had been held there against their will and were forced to perform sex acts with men who had been seen — by hotel staff and by customers writing reviews of the establishment on travel websites, reporting obvious signs of

## RISKY BUSINESS

and Vasu, Inc., among others,<sup>179</sup> for injuries sustained after suffering various forms of abuse by a human-trafficking and prostitution ring.<sup>180</sup>

The majority of the alleged abuse took place at America's Best Value Inn, but for a short period of time, the perpetrators used Econo Lodge, owned by Vasu, Inc. and franchised by Choice Hotel, to conduct their operations.<sup>181</sup> The Jane Doe plaintiffs alleged that "they were moved to an Econo Lodge franchised by Choice Hotel and held against their will until they were moved again."<sup>182</sup> While held captive, they were "forced to pose for provocative pictures that were posted on a website soliciting prostitution, they were forced to perform sexual intercourse as prostitutes, and they were forced to perform sexual acts on the perpetrators, often drugged."<sup>183</sup> The plaintiffs' claims against Vasu, Inc. and Choice Hotels in particular included "negligence (premises liability), negligent training/supervision, and *respondeat superior* on the ground that the Econo Lodge failed to properly monitor and secure the hotel premises, ignored signs of criminal activity, and failed to investigate complaints regarding criminal activity."<sup>184</sup>

Millers Capital Insurance Company became involved in the litigation because it was the insurance provider of defendants Vasu, Inc. and Choice Hotels.<sup>185</sup> Millers Capital filed suit seeking a declaration it had no duty to defend or indemnify the defendants as a result of the underlying Jane Doe

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trafficking — in and around the hotel." Esola, *supra* note 118. See also Jeremy Cox, *Human-trafficking Victims Sue Salisbury Hotel*, DELMARVA NOW (Feb. 27, 2017 2:34 PM), <https://www.delmarvanow.com/story/news/local/maryland/2017/02/24/human-trafficking-victims-sue-hotel/98347930/> [<https://perma.cc/FB3G-JRTQ>] (documenting the underlying conduct).

179. The suits also name as defendants Subh Properties LLC, the hotel's local owner, and Vantage Hospitality Group, the parent company of the America's Best Value Inn Brand. See Cox, *supra* note 178.

180. Complaint at 5, *Millers Capital Ins. Co. v. Vasant*, No. 18-CV-00553-MJG (D. Md. Feb. 23, 2018).

181. *Millers Capital Ins. Co.*, 2018 WL 5295899, at \*2, \*4.

182. *Id.* at \*2.

183. *Id.*

184. Complaint at 5, *Millers Capital Ins. Co.*, No. 18-CV-00553-MJG.

185. Because defendant Choice Hotel is a franchisor of the named insureds, it is named as an "additional insured" under the Policy. *Millers Capital Ins. Co.*, 2018 WL 5295899, at \*1.

actions.<sup>186</sup> The defendants had taken out a CGL policy, under which Millers Capital had a “duty to defend the insured against any suit seeking bodily injury and property damages liability as well as personal and advertising injury liability, within stated limits and exclusions.”<sup>187</sup> One of the stated limits was the “Abuse or Molestation Exclusion.”<sup>188</sup> Millers Capital denied its duty to defend its insureds in the underlying cases “based solely on the Abuse or Molestation Endorsement in its insurance policy.”<sup>189</sup> As explained by the court, this endorsement modified the CGL coverage by adding an exclusion to the standard “bodily injury and property damage” and “personal advertising injury” coverage provisions: The policy did not cover those injuries or damages “arising out of the actual or threatened abuse or molestation by anyone of any person while in the care, custody or control of any insured.”<sup>190</sup>

After reviewing the policy in light of Maryland precedent and evaluating the specific circumstances of the case, the court denied Millers Capital’s motion because the endorsement, its sole ground for excluding coverage, did not apply. It was “evident that none of the Defendant Insureds or their employees had the abuse victims under their care, custody, or control.”<sup>191</sup> Rather, the testimony showed that the “wrongdoers actively prevented Econo Lodge from knowing about the victims, deliberately keeping them hidden.”<sup>192</sup> Because there was no evidence “that the hotel was ever aware of the victims being on its premises,” the hotel could not have had the Jane Doe victims “under its ‘care, custody or control.’”<sup>193</sup> The court therefore ruled that Millers Capital had the duty to defend “all insured Defendants” in the four underlying lawsuits and to reimburse Choice Hotels for the defense costs already incurred, as well as

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186. Complaint at 2, *Millers Capital Ins. Co.*, No. 18-CV-00553-MJG.

187. *Millers Capital Ins. Co.*, 2018 WL 5295899, at \*1 (internal quotation marks omitted).

188. Complaint at 5, *Millers Capital Ins. Co.*, No. 18-CV-00553-MJG.

189. *Millers Capital Ins. Co.*, 2018 WL 5295899, at \*1.

190. *Id.* at \*1-2.

191. *Id.* at \*1.

192. *Id.* at \*7.

193. *Id.*

**RISKY BUSINESS**

the attorney's fees and costs spent pursuing and defending the collateral action.<sup>194</sup>

*D. 18 U.S.C. § 1595 Collateral Litigation*

Insurance companies are clearly starting to take a stand against those that facilitate human trafficking—perhaps out of social responsibility, or perhaps to avoid a massive expense.<sup>195</sup>

Within ninety days of M.A.'s § 1595 complaint filing in federal court, the relevant insurers of the defendant hotels— Nationwide Insurance Company and American Family Mutual Insurance Company—had moved to intervene as plaintiffs.<sup>196</sup> At stake was \$11,000,000 in coverage from CGL and commercial umbrella policies,<sup>197</sup> and each insurer sought a declaratory judgment on the “purported duty to defend and indemnify” the defendants under them.<sup>198</sup> Nationwide further requested participation in “the development of the factual record.”<sup>199</sup> It argued that its “substantial legal interest” (i.e., potential responsibility for indemnifying the

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194. *Id.* When the court issued this opinion on October 25, 2018, the four underlying cases, which were consolidated on March 8, 2018, had already settled. According to the Wicomico Circuit Court docket sheet, the claims against Choice Hotels were dismissed on August 13, 2018, and the cases were officially closed on August 24, 2018.

195. The litigation in *Millers Capital Insurance Co.*, see *supra* text accompanying note 194, was expensive. Choice Hotels requested \$204,428.27 in costs and attorneys' fees. Accounting of Attorneys' Fees and Costs at 1, *Millers Capital Ins. Co.*, No. 18-CV-00553-RDB (D. Md. Nov. 6, 2018). Defendants Vasant, Patel, and Vasu, Inc. requested attorneys' fees of \$38,970. Motion for Attorneys' Fees at 2, *Millers Capital Ins. Co.*, No. 18-CV-00553-RDB (D. Md. Nov. 8, 2018).

196. They moved either as of right under Federal Rule of Civil Procedure 24(a) or, in the alternative, permissively under Federal Rule of Civil Procedure 24(b). American Family Insurance Company's Motion for Leave to Intervene at 1, *M.A. v. Wyndham Hotels & Resorts*, No. 2:19-CV-00849-ALM-EPD (S.D. Ohio June 5, 2019) [hereinafter American Family Motion]; Nationwide Motion to Intervene at 1, *M.A. v. Wyndham Hotels & Resorts*, No. 2:19-CV-00849-ALM-EPD (S.D. Ohio June 6, 2019) [hereinafter Nationwide Motion].

197. Nationwide Motion at 6.

198. *Id.* at 5; see American Family Motion at 2.

199. Nationwide Motion at 8.

defendants)<sup>200</sup> would be impaired absent intervention. Not only would the insurers face “collateral estoppel on issues of fact decided in this case in the event of a supplemental proceeding to collect a judgment against the insured(s) under the Policy,” but they would also face additional “expense interests.”<sup>201</sup> For instance, depositions and written discovery might be duplicative if all claims and interests were not consolidated in the same suit.<sup>202</sup>

The question of coverage responsibility under the Nationwide and American Family Insurance policies is still uncertain—and will be until a declaratory judgment is issued, despite the built-in policy exclusions. According to Nationwide, because certain claims made by M.A.—including that the defendants acted intentionally or with “willful blindness” and “knowingly benefited” from the trafficking activities—require further factual development,<sup>203</sup> both the victim-plaintiff and the defendant-hotels are aligned in their motivation “to characterize any such potential damage in a light that will maximize the potential for coverage.”<sup>204</sup> Only the insurance companies have an “interest in properly characterizing any non-covered or excluded conduct or damage as such.”<sup>205</sup>

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Insurers have a great incentive to rewrite their policies in accordance with the most recent state laws to avoid gray areas and, ultimately, a duty to defend or indemnify these underlying actions. Although insurance companies are notoriously reactive, several aspects of the sex-trafficking litigation should spur them to action. First, insurance companies like

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200. *Id.* at 9; *see also id.* at 10 (“If the Plaintiff is successful in her claims against Columbus, Nationwide could be liable under the Policy. If IHC is found liable to the Plaintiff, it too may claim indemnity under the Policy.”).

201. *Id.* at 11. American Family Insurance likewise argued that “under Ohio law, collateral estoppel may apply to an insurer who denies defense and/or indemnity to a potential insured and who chooses not to intervene.” American Family Motion at 4 (citing *Mesa Underwriters Specialty Ins. Co. v. Secret’s Gentleman’s Club*, 751 F. App’x 715, 729-30 (6th Cir. 2018)).

202. Nationwide Motion at 11; American Family Motion at 7 (noting the relevant considerations of “judicial economy and lack of overlapping discovery for the original parties” with respect to permissive intervention).

203. Nationwide Motion at 12.

204. *Id.*

205. *Id.*

## RISKY BUSINESS

predictability.<sup>206</sup> Thus far, the litigation is new and unsettled. Faced with “excessive uncertainties,” the insurance industry cannot properly diversify the risks and price their hotel policies among their portfolio.<sup>207</sup> Because of the unpredictable outcomes, insurance companies (and the hotels themselves) will prefer settling these cases to paying more money in protracted litigation.<sup>208</sup>

Second, “insurers want the law to be nonretroactive,” meaning they have “strong incentives to prevent unforeseeable payouts that were not priced into the premiums they previously collected.”<sup>209</sup> But this is precisely what is happening now: Many of the new TVPA claims arose from incidents that happened years ago, when the insureds had yet to sign the Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism<sup>210</sup> (and before insurers themselves were aware of the threat of sex-trafficking liability). Thus, by undermining expectations, the trailblazing lawsuits may cause the insurance companies to re-evaluate the policies and exclusions used today, as well as what other tools they “can use to protect themselves from catastrophic retroactive liability.”<sup>211</sup>

Moreover, there may come a time when the insurance industry finds that protecting itself from these claims is a business necessity. Take, for instance, the now-infamous (and omnipresent) asbestos litigation.<sup>212</sup> When asbestos exposure was first occurring, no one was aware of the risks. The insurance policies that existed back then did not exclude

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206. Rappaport, *supra* note 146, at 1609 (“What insurers care about most is not necessarily that liability exposure is limited, but that it’s predictable.”); see Robert Kneuper & Bruce Yandle, *Auto Insurers and the Air Bag*, 61 J. RISK & INS. 107 (1994) (describing how auto insurers lobbied for air bags because they protect against the types of injuries that result in the most unpredictable damage awards).

207. See Abraham, *supra* note 147, at 947.

208. Because many insist on signing confidential agreements, however, it is difficult to estimate the number of cases disposed of in this way.

209. Rappaport, *supra* note 146, at 1609 (emphasis omitted).

210. See *infra* notes 221-226.

211. Rappaport, *supra* note 146, at 1610.

212. See Rand Inst. for Civil Justice, *Asbestos Litigation*, RAND CORP. (2019), <https://www.rand.org/topics/asbestos-litigation.html> [<https://perma.cc/FJ5H-FPJX>].

asbestos exposure. Now, however, it will be nearly impossible to find a contract that does not have an asbestos exclusion.<sup>213</sup>

In the sex-trafficking context, too, the insurance industry will respond to the threat only when lawsuits reach a critical mass. Though part of its reaction will focus on how to best avoid covering these costly claims, insurance companies must simultaneously ensure that their customers—the insured hotels—do not go bankrupt themselves. If insurance carriers refuse to defend the hotel operators and owners *ex ante*, they should force their insureds either to agree to self-insure or to a steep “self-insured retention.”<sup>214</sup> And if third-party facilitators such as hotel management companies are left to dispute sex-trafficking charges without the financial cushion of primary insurance, the hospitality industry might then step up

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213. Michael J. Pinto & Alexander Mueller, *Asbestos Claims and Unavailability Exclusion*, INT’L L. OFF. (May 30, 2017), <https://www.internationallawoffice.com/Newsletters/Insurance/USA/Mendes-Mount-LLP/Asbestos-claims-and-unavailability-exclusion> [https://perma.cc/JT9Z-AHFF] (noting that coverage for asbestos-related injuries claims became generally unavailable after 1985). Courts have broadly interpreted the asbestos exclusions. *See, e.g., An Exclusion Insurers Can Rely Upon In Asbestos Coverage Litigation?*, CLAIMS J. (May 9, 2007), <https://www.claimsjournal.com/news/national/2007/05/09/79585.htm> [https://perma.cc/DB4G-P9EM] (discussing case involving “asbestosis”); Kent Holland, *Asbestos Damages Excluded under Condo Association’s Property Policy*, IRMI EXPERT COMMENT. (January 2012), <https://www.irmi.com/articles/expert-commentary/asbestos-damages-excluded-under-property-policy>; Judy Greenwald, *Asbestos Exclusion Shields Travelers Unit From Liability*, BUS. INS. (Apr. 24, 2017), <https://www.businessinsurance.com/article/00010101/NEWS06/912313048/Asbestos-exclusion-shields-Travelers-unit-from-liability> [https://perma.cc/C5QP-EE2Y].
214. Among the many forms of self-insurance, the “self-insured retention” is the most common. Mark W. Flory & Angela Lui Walsh, *Know Thy Self-Insurance (and Thy Primary and Excess Insurance)*, TORT & INS. L.J., Summer 2001, at 1005. A self-insured retention (SIR) is a “[a] dollar amount specified in a liability insurance policy that must be paid by the insured before the insurance policy will respond to a loss.” *Self-Insured Retention*, IRMI (2019), <https://www.irmi.com/term/insurance-definitions/self-insured-retention> [https://perma.cc/93X7-4XSQ]; *see also* Zeke N. Katz, *A Primer on Self-Insured Retentions*, 28 IDC Q., no. 1, 2018, at 1 (“Importantly, until the amount of the SIR has been reached, the insurer is not compelled to defend the insured and the insured is responsible for all of its own settlement decisions and costs of defense, if any.”).

## RISKY BUSINESS

and start learning about this tremendously misunderstood crime. Hotels will be incentivized to be proactive in eliminating misconduct and to err on the side of caution. This is especially true for many small chains or franchisees, for which the out-of-pocket litigation costs may be prohibitive.

Regardless of the precise route, the insurance industry can (and should) capitalize on hotels' exposure by drafting policies to exclude trafficking claims within each jurisdiction and forcing hotels to self-insure, either partly or in full. Not only would restricting coverage conserve resources for insurance providers, but it would also lead to greater self-policing and reporting within the hotel industry.

### IV. A MORE ACCOUNTABLE INDUSTRY

#### *A. All Words, What Action?*

For now, accountability to victims of sex trafficking is sorely lacking. Hotels are attempting to avoid litigation by rooting out the underlying criminal conduct, a lofty goal, but perhaps a naïve one, given the complex dynamics at work in this area.<sup>215</sup> The hospitality industry's weapon of choice is education, but it may not be powerful enough.

Indeed, education is a critical first step to combatting trafficking, and a number of hotels have already implemented training programs.<sup>216</sup> The Department of Homeland Security launched a "Blue Campaign" to guide hotels and their various sectors in identifying signs of trafficking,<sup>217</sup> and individual states are debating legislation that would require hotels to join the fight in various ways.<sup>218</sup> The American Hotel and Lodging Association

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215. See KENDALL & FUNK, *supra* note 12, at 29-36; see also Jessica Weiss, *Florida Sex Trafficking Bust Sheds Light On Victims' Needs*, WLRN (March 3, 2019), <https://www.wlrn.org/post/florida-sex-trafficking-bust-sheds-light-victims-needs> [<https://perma.cc/PZX6-D7Z4>] (discussing challenges of getting victims to talk, including a "trauma coercive attachment" to their traffickers).

216. See, e.g., Cavagnaro, *supra* note 66, at app. V (Hotel Chain Company Actions); *infra* notes 235-243 and accompanying text.

217. *Blue Campaign: Human Trafficking and the Hospitality Industry*, U.S. DEP'T HOMELAND SECURITY (Oct. 30, 2018), <https://www.dhs.gov/blue-campaign/hospitalityindustry> [<https://perma.cc/7Q29-JMM6>].

218. E.g., Brian Bossetta, *Bill Seeks to Enlist New York Hotels to Help Fight Sex Trafficking*, N.Y. TIMES (April 16, 2017),

has produced an online training course for its members,<sup>219</sup> and various state associations have also developed region-specific training.<sup>220</sup>

It is encouraging that this push for change has come from the industry itself. For instance, the Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism (“The Code”) is a voluntary, industry-driven set of business principles to prevent child sex tourism and the trafficking of children.<sup>221</sup> Created in 1996 as a practical tool for the tourism industry, The Code provides support to private sector businesses worldwide in developing responsible tourism or corporate social responsibility policies.<sup>222</sup> Companies that sign The Code commit to taking “six essential steps to help protect children”: (1) establishing a policy and procedures against the sexual exploitation of children; (2) training employees; (3) including a zero-tolerance clause in contracts; (4) providing information to travelers; (5) supporting, collaborating and engaging stakeholders; and (6) reporting annually on implementation.<sup>223</sup>

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<https://www.nytimes.com/2017/04/16/nyregion/bill-seeks-to-enlist-new-york-hotels-to-help-fight-sex-trafficking.html> [https://perma.cc/Y9XA-5SF7].

219. *Human Trafficking Prevention*, AM. HOTEL & LODGING ASS’N (2018), <https://www.ahla.com/issues/human-trafficking> [https://perma.cc/V8JK-SBF7].
220. *See, e.g., Businesses Ending Slavery & Trafficking*, WASH. HOSPITALITY ASS’N (Mar. 29, 2017), <https://wahospitality.org/blog/businesses-ending-slavery-trafficking/> (discussing partnership between non-profit BEST and the Washington Hospitality Association Education to help prevent and report local human trafficking); *Combatting Human Trafficking in Oklahoma*, OKLA. HOTEL & LODGING ASS’N (2018), [https://www.oklahomahotels.org/news\\_manager.php?page=16006](https://www.oklahomahotels.org/news_manager.php?page=16006) [https://perma.cc/9WRF-FF6Y]; *see generally* Cavagnaro, *supra* note 66, at app. VI (State Specific Hotel Industry Actions).
221. *The Tourism Child-Protection Code of Conduct*, ECPAT-USA (2017), <https://www.ecpatusa.org/code/> [https://perma.cc/PR5Q-5P9X].
222. *Child Protection as CSR*, THE CODE (2018), <http://www.thecode.org/csec/child-protection-as-corporate-social-responsibility/> [https://perma.cc/5TZ3-CDJY]; Steering Comm. on Code of Conduct, *Background and Implementation Examples*, ECPAT INT’L (2003), [https://www.ecpat.org/wp-content/uploads/2016/04/Code\\_of\\_Conduct\\_ENG.pdf](https://www.ecpat.org/wp-content/uploads/2016/04/Code_of_Conduct_ENG.pdf) [https://perma.cc/7CBC-M58W].
223. *About The Code*, THE CODE (2018), <http://www.thecode.org/about/> [https://perma.cc/7WH8-ZJL6].

## RISKY BUSINESS

In the past two decades, The Code has increased in prominence and reach; its impact is not limited to child victims. The Code has been acknowledged as an example of “best practices” by U.N. organizations and incorporated into the overarching tourism policy of numerous governments and organizations.<sup>224</sup> Over 360 companies worldwide have become members of The Code,<sup>225</sup> and their adherence to its six criteria can be tracked online.<sup>226</sup>

ECPAT-USA, the leading anti-child-trafficking non-profit organization in the United States, brought The Code to North America in 2004.<sup>227</sup> Carlson Hotels was the first company to sign in the United States—at the 2004 launch<sup>228</sup>—but not all U.S.-based chains were as quick to subscribe.<sup>229</sup> Hilton Worldwide signed in April of 2011,<sup>230</sup> and when Wyndham Worldwide joined later that year, it was just the fifth U.S.

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224. *Id.*

225. THE CODE (2019), <http://www.thecode.org/> [<https://perma.cc/6RF6-UU9V>]; see also *The Code Brochure*, THE CODE (2019), [http://www.thecode.org/wp-content/uploads/2015/11/The-Code\\_Brochure\\_ENG.pdf](http://www.thecode.org/wp-content/uploads/2015/11/The-Code_Brochure_ENG.pdf) [<https://perma.cc/4MQ9-2HWA>] (explaining membership fees based on company’s total annual revenue and that membership provides access to member portal, online training, and implementation support).

226. *Members of the Code*, THE CODE (2018), <http://www.thecode.org/who-have-signed> [<https://perma.cc/A743-XYLZ>] (tracking adherence to the six criteria).

227. *Mission*, ECPAT-USA (2019), <https://www.ecpatusa.org/mission> [<https://perma.cc/D9D8-CTZU>]; *No Vacancy Report*, *supra* note 89, at 7.

228. *No Vacancy Report*, *supra* note 89, at 7.

229. This may be a problem of denial—hotels do not think this is occurring in the United States. See 145 CONG REC. H2956 (daily ed. May 23, 2016) (statement of Rep. Yoho). (“There is an acronym called NIMBY, not in my backyard. People don’t think this happens. No, it happens in our own backyards. It happens here at home. It happens in your State, in your county, and more than likely it happens in your town.”); Cavagnaro, *supra* note 67, at 42 (referring to the “not in my hotel phenomenon”).

230. *Hilton Worldwide Signs Tourism Code of Conduct, Joins ECPAT-USA in Fight Against Child Trafficking in the Travel Sector*, HILTON WORLDWIDE (Apr. 14, 2011), <http://newsroom.hilton.com/corporate/news/hilton-worldwide-signs-tourism-code-of-conduct-joins-ecpatusa-in-fight-against-child-trafficking-in-the-travel-sector> [<https://perma.cc/7XL2-MZWJ>].

company to do so (out of more than 1,000 members worldwide).<sup>231</sup> Though parts of the AccorHotels Group joined The Code as early as 2006,<sup>232</sup> the U.S. was the 38<sup>th</sup> country in its network to sign — in January 2016.<sup>233</sup> Marriott only became a member in January 2018.<sup>234</sup>

Besides signing The Code, hotel chains have collaborated with non-profit organizations and supported human-trafficking survivors—adults and children—in various ways. In 2012, Hyatt joined with Polaris to create a global training program on human trafficking for managers and line staff.<sup>235</sup> Touting its “aggressive stance on identifying and working to

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231. Michelle Guelbart, *Wyndham Worldwide signs the Tourism Child-Protection Code of Conduct*, ETURBONEWS (Dec. 31, 2011), <https://www.eturbonews.com/52977/wyndham-worldwide-signs-tourism-child-protection-code-conduct> [<https://perma.cc/6SMB-T2H5>]; see also *Real Hospitality Group Signs Code of Conduct to Protect Children from Sexual Exploitation*, ETURBONEWS (July 11, 2012), <https://www.eturbonews.com/58790/real-hospitality-group-signs-code-conduct-protect-children-sexua> [<https://perma.cc/V32F-7B7J>] (becoming the first hotel management group to sign in 2012); *On Human Rights Day, Hyatt Reinforces Commitment to Protect Children and Help Them Live Free from Exploitation*, HYATT HOTELS CORP. (Dec. 10, 2015), <https://newsroom.hyatt.com/121015On-Human-Rights-Day-Hyatt-Reinforces-Commitment-To-Protect-Children-And-Help-Them-Live-Free-From-Exploitation> [<https://perma.cc/4L9H-6P8M>] (announcing intention to sign); *Sonesta Partners with ECPAT to End Exploitation of Children*, SONESTA INT’L HOTELS CORP. (Aug. 22, 2016), <https://blog.sonesta.com/2016/08/22/sonesta-partners-with-ecpat-to-end-exploitation-of-children/> [<https://perma.cc/F8A3-UZ4J>] (signing The Code).
232. *Member Information: AccorHotels HQ*, THE CODE (2018), <http://thecode.force.com/apex/publicprofile2?id=0019000000GxgFgAAJ> [<https://perma.cc/2268-RWBT>].
233. *AccorHotels Signs The Code in the U.S. in Order to Combat Child Abuse and Trafficking*, ACCOR (Feb. 1, 2016), <http://press.accorhotels.group/north-central-america-and-caribbean/accorhotels-signs-the-code-in-the-u-s-tocombat-child-abuse-and-trafficking/> [<https://perma.cc/5NTW-XYNF>].
234. *ECPAT-USA and Marriott International Announce New Partnership to Protect Children from Trafficking*, ECPAT-USA (Jan. 29, 2018), <https://www.ecpatusa.org/blog/2018/1/29/ecpat-usa-and-marriott-international-announce-new-partnership> [<https://perma.cc/G4G2-VFWW>].
235. *See Hyatt Honors Human Rights Day By Launching Global Training Program To Combat Human Trafficking*, Hyatt (Dec. 12, 2012), <https://newsroom.hyatt.com/2012-12-10-hyatt-honors-human-rights-day->

## RISKY BUSINESS

prevent human trafficking,” including sex and labor trafficking of adults and children,<sup>236</sup> Hyatt also developed the International Tourism Partnership’s Position Statement on Human Trafficking and provides hospitality skills training to human-trafficking survivors through the Youth Career Initiative.<sup>237</sup> Hilton partnered with the Global Fund for Children in April 2014 to create the Hilton Worldwide Anti-Trafficking Fund, which supports “innovative grassroots organizations working every day to help children who have been or are at risk of being trafficked.”<sup>238</sup> It was the first hospitality company to join the Global Business Initiative on Human Rights in 2016<sup>239</sup> and a founding member of the UK Stop Slavery Hotel Industry Network.<sup>240</sup> Not to be left behind, in November 2017, Marriott International announced plans to train 100% of personnel in human trafficking awareness by 2025, as well as to provide additional training on responsible sourcing and recruitment policies and practices.<sup>241</sup> After

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by-launching-global-training-program-to-combat-human-trafficking  
[<https://perma.cc/7ZV4-ZNS2>].

236. *Hyatt Thrive: Human Rights*, HYATT (2017), <https://thrive.hyatt.com/en/thrive/human-rights.html> [<https://perma.cc/P9QB-PZG8>].
237. *See Sleep Tight: What Hotels are Doing to Fight Human Trafficking*, INTERNATIONELLE: GLOBAL PERSPS. (Jan. 12, 2018), <http://www.internationale.org/hotels-against-trafficking/> [<https://perma.cc/AF9V-KY26>].
238. *Hilton Worldwide and The Global Fund for Children Partner to Protect Children from Trafficking*, HILTON WORLDWIDE (Apr. 9, 2014), <http://newsroom.hilton.com/corporate/news/hilton-worldwide-and-the-global-fund-for-children-partner-to-protect-children-from-trafficking-> [<https://perma.cc/TZ9U-8BLB>].
239. *Hilton Slavery and Human Trafficking Statement: Financial Year 2016*, HILTON WORLDWIDE (April 2017), <http://ir.hilton.com/~media/Files/H/Hilton-Worldwide-IR-V3/committee-composition/slavery-and-trafficking-statement-2017-v1.pdf> [<https://perma.cc/WN7Y-64RD>].
240. *Sleep Tight*, *supra* note 237.
241. *Marriott International Unveils Global Sustainability and Social Impact Commitments to Deliver Positive Change*, MARRIOTT INT’L (Nov. 1, 2017), <https://news.marriott.com/news/2017/11/01/marriott-international-unveils-global-sustainability-and-social-impact-commitments-to-deliver-positive-change> [<https://perma.cc/2M9Y-ELJR>].

partnering with ECPAT-USA in January 2018,<sup>242</sup> Marriott gives its Rewards members the option of donating their loyalty points to the organization.<sup>243</sup>

Admirable as all these “shining exemplary initiatives”<sup>244</sup> are, a cynic could write them off as self-interested marketing ploys. The policies serve as fodder for flashy press releases and positive PR—an easy way to improve reputation by demonstrating good corporate governance and ethical responsibility.<sup>245</sup> In fact, many business-oriented or investor-focused articles have recognized these initiatives as signals of corporate social responsibility.<sup>246</sup> Jones Day has advised corporations that “taking a proactive approach to compliance with state and federal anti-trafficking laws is not only responsible, good governance,” but also good for business.<sup>247</sup> Increasing efforts to combat sex trafficking to respond to socially conscious consumers is not a new strategy, or one limited to this issue. In fact, corporations are now often pressured to act on hot-button

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242. See Elliott Mest, *Marriott, ECPAT-USA Partner to Counter Human Trafficking in Hotels*, HOTEL MGMT. (Jan. 30, 2018), <https://www.hotelmanagement.net/operate/marriott-ecpat-usa-partner-to-counter-human-trafficking-hotels> [<https://perma.cc/5WRL-EN3N>].

243. *Marriott Rewards Members Can Now Give Points to Support ECPAT-USA*, ECPAT-USA (Dec. 11, 2017), <https://www.ecpatusa.org/blog/2017/12/11/marriott-rewards-members-can-now-give-points-to-support-ecpat-usa> [<https://perma.cc/UY5Z-7ANY>].

244. *Sleep Tight*, *supra* note 237.

245. I do not imply that the board members and those in charge of these initiatives do not deeply believe in the cause. In fact, the number one reason cited in the 2013 member survey for joining The Code was “because it was the right thing to do.” *About The Code*, *supra* note 223.

246. See, e.g., Jeri Clausing, *Citizen Hotelier: Companies Embrace Social Responsibility*, TRAVEL WEEKLY (Oct. 17, 2018), <https://www.travelweekly.com/Travel-News/Hotel-News/Citizen-hotelier-Companies-embrace-social-responsibility> [<https://perma.cc/B2TA-9J8H>] (“Corporate citizenship is now a CEO-level strategy and critical to a company’s bottom line.”).

247. Biesenthal et. al, *supra* note 10, at 4 n.57 (citing a recent marketing survey in which 87% of Americans “would purchase a product because that company advocated for an issue that they care about,” and 76% “would refuse to purchase a company’s product or services upon learning that it supported an issue contrary to their beliefs”).

## RISKY BUSINESS

issues where the government will not, as consumers vote with their pocketbooks.<sup>248</sup>

At bottom, these efforts are all “carrots”; hotels are rewarded with enhanced status as they attempt to out-do-good one another. Admittedly, in the process, others reap substantial benefits as well. Hotels have the platform and financial resources to create meaningful change by signing onto initiatives, pledging support for the cause, and raising basic awareness of the issue.

But in the race to win the praise of the public, the sex-trafficking victims—already drawn from vulnerable populations<sup>249</sup>—are deprioritized; their needs are subordinated to the economic concerns of the business. This failure is exemplified by yet another high-profile case in which a victim, K.R., filed suit against the Quality Inn in Dothan, Alabama and its parent company, Choice Hotels. She alleged that the defendants “conspired, enabled and/or otherwise worked together in a sex trafficking venture in which K.R. was victimized when she was just 17 years old,” in violation of both common law and Alabama’s anti-human trafficking statute.<sup>250</sup>

The victim chose to sue Choice Hotels because of the overall role of the hotel industry in sex trafficking, as well as the specific chain’s actions—or lack thereof—in other sex-trafficking cases.<sup>251</sup> According to K.R., after a child was raped and killed at a Comfort Inn, another Choice Hotels brand, in November 2009, Choice Hotels could have taken action, but it

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248. *Why More Corporate Agendas Are Reflecting Social Issues*, INS. J. (March 2, 2018), <https://www.insurancejournal.com/news/national/2018/03/02/482235.htm?print> [<https://perma.cc/8E69-L5ME>].

249. *See, e.g.*, Miller, *supra* note 7 (“No matter which different form it is, traffickers groom their victims. They’re looking for vulnerable people.”).

250. Complaint at ¶ 1, K.R. v. Backpage.com, No. 38-CV-2017-900041.00 (Houston Cty. Ct. Jan. 25, 2017) (bringing suit under ALA. CODE § 13A-6-157 et. seq.). The action was removed to federal court on May 5, 2017 before being sent back to the Houston County Circuit Court on August 18, 2017. *See* K.R. v. Backpage.com, No. 1:17-CV-00299-WKW-DAB (M.D. Ala. May 5, 2017).

251. Roy S. Johnson, *Alabama Sex Trafficking Survivor Sues Backpage.com, Choice Hotels, Dothan Hotel Owner*, AL.COM (Jan. 26, 2017), [https://www.al.com/news/birmingham/index.ssf/2017/01/sex\\_trafficking\\_survivor\\_files.html](https://www.al.com/news/birmingham/index.ssf/2017/01/sex_trafficking_survivor_files.html) [<https://perma.cc/BS6D-PATD>].

“repeatedly failed to make reasonable efforts to stop these crimes.”<sup>252</sup> Choice Hotels partnered with ECPAT-USA the following year to develop a training module to educate management and staff in the prevention of sex trafficking. However, it “did not require its employees to complete this training,” and it waited until April 29, 2015 to sign The Code.<sup>253</sup> K.R. contended that the Dothan Quality Inn, like its parent company, failed to act on numerous “open and obvious” red flags that should have alerted hotel employees to the illegal activity of K.R.’s trafficker.<sup>254</sup>

In her own complaint under the TVPA, M.A. cites K.R.’s case as indicative of the hotel defendants’ “same entrenched, pervasive willful blindness to sex trafficking”—both before and after their adoption of The Code—that facilitated her own sex trafficking.<sup>255</sup> Choice Hotels, for instance, “chose not to invest the time to implement and execute the anti-trafficking program. Instead, the only steps they took were to advertise to the public that they had implemented human trafficking policies.”<sup>256</sup> Similarly, Wyndham Worldwide Corporation signed The Code in 2011, but M.A. alleged that this, too, was mere lip service:

[A]s evidenced by the widespread sex trafficking which continued to occur at Defendant Wyndham’s branded properties, Defendant Wyndham did not practice what it preached. Defendant Wyndham’s adoption of the Code appears to have been nothing more than a strategic maneuver through which it sought a shield against liability but not a sword against human trafficking.<sup>257</sup>

These lawsuits, like many others, condemned the hotels and sought to hold them liable for turning a blind eye or ignoring obvious red flags. Though the recent, press-grabbing litigation out of Pennsylvania,

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252. Amended Complaint at ¶ 34, *K.R. v. Backpage.com*, No. 38-CV-2017-900041.00 (Houston Cty. Ct. Apr. 7, 2017); *see Johnson, supra* note 251.

253. *Id.* ¶ 35, *K.R. v. Backpage.com*, No. 38-CV-2017-900041.00.

254. *Id.* ¶ 36; *see Johnson, supra* note 251.

255. Complaint at 28 ¶86, *M.A. v. Wyndham Hotels & Resorts*, No. 2:19-CV-00849-ALM-EPD (S.D. Ohio March 8, 2019).

256. *Id.* at 30 ¶ 91.

257. *Id.* at 20-21 ¶ 63. Ironically, Polaris counts Wyndham’s signing the pledge as a one of its “successes” on its website. *Successes: Wyndham Group Partnership*, POLARIS PROJECT (2019), <https://polarisproject.org/successes/wyndham-hotel-group-partnership> [<https://perma.cc/PL2P-MKNZ>].

## RISKY BUSINESS

Maryland, Alabama, and Texas has been met with concern from the hotel industry, most of the commentary and suggestions for protecting against civil (and criminal) liability emphasize training.<sup>258</sup> For instance, the director and founder of Businesses Ending Slavery and Trafficking published an article about the *E.B. v. Motel 6* case and the favorable Nautilus Insurance ruling. It, too, prioritized training:

This court ruling and its resulting denial of insurance coverage should be setting off alarm bells across the hospitality industry that it's time to implement comprehensive human trafficking awareness training programs for employees to help hotels address all forms of commercial sexual exploitation. This is an essential step that hotel owners and management groups can take to reduce their liability and protect their assets.<sup>259</sup>

The problem with this approach is that training, while a necessary condition, is itself insufficient to rid the hotel industry of trafficking.

### *B. Real Solutions*

The most promising way to disrupt sex traffickers' reliance on hotels—and to force hotels to practice what they preach—is through insurance coverage. Yet this particular approach is often overlooked, even by “neutral” third parties. Hotels have an obvious disincentive in proposing this solution, but NGOs and other non-profits with less of a financial interest have also shied away from suggesting a negative form of liability for hotels.<sup>260</sup> For instance, ECPAT-USA's “No Vacancy” Report,

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258. See, e.g., Jacy Gomez, *How The Hospitality Industry Can Fight Human Trafficking*, INV. BUS. DAILY (Feb. 6, 2018), <https://www.investors.com/politics/commentary/how-the-hospitality-industry-can-fight-human-trafficking/> [<https://perma.cc/6Z2T-NTBj>]; Esola, *supra* note 118; *Sleep Tight*, *supra* note 237.

259. Mar Brettmann, *Motel Management Company Denied Insurance Coverage for Sex Trafficking Lawsuit, Showing a Bigger Need for Employee Training*, LODGING MAG. (June 14, 2018), <http://lodgingmagazine.com/motel-management-company-denied-insurance-coverage-for-sex-trafficking-lawsuit-showing-a-bigger-need-for-employee-training/> [<https://perma.cc/EGQ8-WVD5>].

260. There is a possibility that these third parties are receiving significant financial support from their hotel partners such that they do, in fact, have a reason to not propose this course of action.

which documents the efficacy of ECPAT-USA's work in preventing and disrupting the commercial sexual exploitation of children in hotels, says nothing about insurance or this type of market-based solution.<sup>261</sup> Instead, the report focuses on training.

But as indicated by the latest lawsuits, especially those with repeat defendants like Choice Hotels, training is not the antidote to human trafficking. Training can be incomplete; its lessons need not be acted upon. Even companies that have joined The Code are not at full compliance with training or reporting.<sup>262</sup> Because industry fear intensifies when a lawsuit commences, we must capitalize on the legal shockwaves, and their financial consequences, to spur hotels to action.

Although education is essential to identifying the underlying trafficking conduct,<sup>263</sup> the industry should not stop there. It should take affirmative steps, above and beyond training, to prevent sex trafficking. As with The Code, some of this movement could be industry-driven. Hotels could install more surveillance cameras and eliminate cash transactions; they could insist on regular housekeeping entry into rooms, better monitor their guest registries for repeated suspicious usage through spreadsheets, and encourage reporting to hotlines (or police) at the first warning signs.<sup>264</sup> To better oversee on-site management (and avoid problems with self-reporting), the parent company's executives or legal team could "put a

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261. *No Vacancy Report*, *supra* note 89.

262. The Code's "Top Members" are inconsistent. *See, e.g., Member Information: Hilton Worldwide*, THE CODE (2018), <http://thecode.force.com/publicprofile2?id=0019000000GxgQIAAZ&lan> [<https://perma.cc/9PHA-P8T6>] (0% in 2011 and 2012; 83% in 2013 and 2014, with "training" as the missing criteria; 100% in 2015; 33% in 2016; 100% in 2017; 33% in 2018).

263. Indeed, before any significant change can occur, various types of hotel staff must learn and internalize the red flags. *See Blue Campaign Hospitality Toolkit*, *supra* note 217 (suggesting specific tips).

264. Bradley Myles, *Combating Human Trafficking in the Hotel Industry*, HUFFINGTON POST (Dec. 6, 2017), [https://www.huffingtonpost.com/bradley-myles/combating-human-trafficking-in-the-hotel-industry\\_b\\_7840754.html](https://www.huffingtonpost.com/bradley-myles/combating-human-trafficking-in-the-hotel-industry_b_7840754.html) [<https://perma.cc/CV89-NFGP>]. *But see* Sandra Song, *When Anti-Sex Trafficking Policies Like the Marriott's Do More Harm Than Good*, PAPER (Jan. 30, 2019), <https://www.papermag.com/marriott-hotels-sex-trafficking-training-2627520121.html?rebelltitem=13#rebelltitem13> [<https://perma.cc/P38T-CE9U>].

## RISKY BUSINESS

crime grid” on their individual franchises by making open records requests of all police reports alleged to have occurred at the properties.<sup>265</sup>

Such vigilant self-regulation, however, might seem superfluous—an unnecessary cost to the company when corporate executives perhaps know sex trafficking occurs, just not in *their* hotels.<sup>266</sup> Whether the motivation for inaction is “limitless corporate greed”<sup>267</sup> or something less sinister such as lack of foresight,<sup>268</sup> there is much headway to be made. Perhaps hoteliers still do not recognize the potential ways they are at risk of being held liable. They might believe (and reasonably at this point) that prosecution is a nearly nonexistent risk, or that their insurance would take care of the claims regardless.<sup>269</sup>

But hotel owners will react if demands are made in their insurance policy, if every month they have to pay a higher premium because of their sex-trafficking risk factors—if the costs of their inaction are made plain in their bottom lines. To fully ensure an adequate level of diligence and compliance, insurance companies should use all the tools at their disposal to create a workable and easy-to-implement system that adequately translates economic profitability into the value of human life.

I envision the insurance industry acting as the primary external regulators of hotels by categorizing, critiquing, and policing the businesses’ conduct. This system would resemble the State Department’s Trafficking in Persons (TIP) reporting, where countries are evaluated “on the extent of governments’ efforts to meet the TVPA’s minimum standards

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265. Elaine Pofeldt, *A Duty to Deter Human Trafficking*, MPI (Sept. 21, 2018), [https://www.mpiweb.org/blog/article/a-duty-to-deter-human-trafficking?utm\\_medium=email&utm\\_source=multiview.com&utm\\_campaign=news+brief](https://www.mpiweb.org/blog/article/a-duty-to-deter-human-trafficking?utm_medium=email&utm_source=multiview.com&utm_campaign=news+brief) [<https://perma.cc/W379-8GXF>] (recommending hiring off-duty officers to protect the property).

266. *See supra* note 229 (noting the prevalence of the “not in my hotel” phenomenon).

267. Complaint at 17 ¶ 48, *M.A. v. Wyndham Hotels & Resorts*, No. 2:19-CV-00849-ALM-EPD (S.D. Ohio March 8, 2019).

268. *E.g.*, Casey Gale, *The Importance of Keeping Hotel Insurance Updated*, *LODGING MAG.* (Apr. 17, 2017), <https://lodgingmagazine.com/the-importance-of-keeping-hotel-insurance-updated/> [<https://perma.cc/LA2P-S8PB>].

269. *The Law and Liability of Hotels*, STIMMEL L. (2019), <https://www.stimmel-law.com/en/articles/law-and-liability-hotels> [<https://perma.cc/H83J-FTCK>] (advising the “wise hotel keeper to make sure that the premises are as ‘crime proof’ as possible” and to carry “adequate insurance”).

for the elimination of human trafficking.”<sup>270</sup> Countries are rated annually on a scale of Tier 1 (the highest score) to Tier 3 (the lowest).<sup>271</sup> Tier 3 countries may be subject to certain restrictions on U.S. government assistance, including withheld funding for non-humanitarian, non-trade-related foreign assistance.<sup>272</sup>

For better or worse, TIP’s classification system, and corresponding funding restrictions, are powerful anti-trafficking incentives for countries. The insurance industry could similarly induce hotels to adopt beneficial policies and practices by tying trafficking risk factors directly to the cost of a hotel’s CGL policy. As with auto insurance, certain groups affect the cost of a premium; younger male drivers, for instance, are riskier as a group. Likewise, a Choice Hotels franchisee, having been embroiled in several lawsuits already, may be a prime target for an increased insurance premium. Its prior history can be analogized to “points” on a driving record, and its position in a “higher risk” bracket may have additional conditions attached, such as unannounced, third-party checks of the premises—what Justice Scalia envisioned in *Patel*.

Insurance companies should incorporate the risk of sex trafficking on premises into their overall valuation assessments, creating something like an actuarial table.<sup>273</sup> Instead of life expectancy probability, the table would

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270. *2019 Trafficking in Persons Report*, U.S. ST. DEP’T 35 (June 2019), <https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf> [<https://perma.cc/X2LJ-ABQS>]. The TVPA’s minimum standards are “generally consistent with the Palermo Protocol.” *Id.*

271. *Id.* at 36. Tier 1 governments “fully meet the TVPA’s minimum standards for the elimination of trafficking.” *Id.* at 36. Tier 3 is reserved for “governments of countries that do not fully meet the TVPA’s minimum standards and are not making significant efforts to do so.” *Id.* at 37.

272. *Id.* The President may also “withhold funding for government official or employee participation in educational and cultural exchange programs for certain Tier 3 countries” and “instruct the U.S. Executive Director of each multilateral development bank and the International Monetary Fund to vote against and use his or her best efforts to deny any loans or other uses of the institutions’ funds to a designated Tier 3 country for most purposes (except for humanitarian, trade-related, and certain development-related assistance).” *Id.*

273. *Cf.* David B. Atkinson, *Table Development*, SOC’Y OF ACTUARIES 6 (Feb. 2018), <https://www.soa.org/globalassets/assets/files/research/table-development.pdf> (documenting “the process of creating experienced-based tables” [<https://perma.cc/439X-HA2U>]; *Actuarial Life Table: 2016 Period Life*

## RISKY BUSINESS

compare and incorporate a hotel's geographic location, its extended-stay policies, most used payment methods, and prior criminal incidents at the establishment (among other relevant risk factors) to price out coverage. Insurers would identify the most effective deterrence mechanisms *ex ante*. The table's informational input would be drawn from third-party produced compliance reports to ensure accuracy and reliability. If an incident at a hotel gives rise to liability, these reports will help insurance companies gauge whether or not to indemnify the hotel. If the company chooses not to indemnify the hotel under a particular policy, both parties could seek to introduce the reports into evidence in the collateral litigation (or motions to intervene) for the court to consider. Or, if an insurance company agrees to indemnify the hotel but, pursuant to the point system proposed above, plans to increase the hotel's policy rate, the hotel could utilize the report as a kind of good-faith defense or negotiation tool to prevent the insurance spike.

The insurance industry can create such a system, though the political motivation has not yet coalesced behind its application to the sex-trafficking context.<sup>274</sup> Although more research needs to be done, I suspect the insurance industry's financial incentive is not significant enough for such a change, unlike in asbestos litigation or in the police fatality context, where a police shooting can bankrupt a municipality.<sup>275</sup> This passivity is unfortunate because a comprehensive regime shift, in which the insurance industry transforms the power dynamic of CGL contracting, would be consequential for the hotel industry.

Even if the progress made in the policing context is not on the immediate horizon for sex trafficking in the hotel industry, similar potential exists. Insurance companies already rely on underwriters, who analyze and evaluate an applicant's risks—and recommend a price to offer for coverage, if at all—using specific guidelines set by the companies,

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*Table*, SOC. SECURITY ADMIN. (2019), <https://www.ssa.gov/oact/STATS/table4c6.html>.

274. A search for “hotel” on the National Association of Insurance Commissioner website only pulls up venues for past and future insurance conferences—there is nothing policy-related about sex trafficking. Similarly, when I reached out to insurance brokers in the hospitality industry, I received a standard response that sex trafficking was not on their radar.

275. Bankrupting an insured is not good business for the insurance company.

specialized software, and actuarial data.<sup>276</sup> The underwriting process is “closely linked to rating, or price setting” and together, they serve to discourage risky behavior by the insureds.<sup>277</sup> The insurer can use “differentiated premiums” to charge higher rates to riskier hotels, identified as such through either “experience rating” (based on “loss history”) or “feature rating” (based on the “presence of traits correlated with riskiness”).<sup>278</sup>

Moreover, the insurance companies themselves already “engage in loss prevention by helping an insured identify and implement techniques for reducing the risk of loss.”<sup>279</sup> As part of their risk management services, insurers publish newsletters and guidance, offer toolkits and training programs, and employ industry experts and industry data to help their commercial insureds craft individualized risk-reduction plans.<sup>280</sup> In the environmental arena, for instance, liability insurers make “on-site visits and instruct policyholders on how to avoid costly damages” and “[p]ollution insurance underwriters send engineers to the sites to examine how landfills are engineered and built, and how waste is disposed.”<sup>281</sup> In effect, the insurers implement “private safety codes” for policyholders to comply with that are “managed and audited by third parties such as

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276. See, e.g., *Insurance Underwriters: What They Do*, U.S. BUREAU LAB. STATS. (Sept. 4, 2019), <https://www.bls.gov/ooh/business-and-financial/insurance-underwriters.htm#tab-2> [<https://perma.cc/D9CE-2FU8>]; *Insurance Underwriter*, INVESTOPEDIA (Apr. 26, 2019), <https://www.investopedia.com/terms/i/insurance-underwriter.asp> [<https://perma.cc/JD6R-WM6V>].

277. Rappaport, *supra* note 146, at 1554.

278. *Id.* at 1555.

279. Rappaport, *supra* note 146, at 1554 (emphasis omitted); see also *Risk Control Services*, LIBERTY MUTUAL INS. (2019), <https://business.libertymutualgroup.com/business-insurance/risk-control> [<https://perma.cc/F3ZM-BPD3>]; *Risk Control*, TRAVELERS (2019), <https://www.travelers.com/risk-control> [<https://perma.cc/QD38-BAW6>].

280. Rappaport, *supra* note 146, at 1554; see Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 211 (2012) (discussing examples in the context of workers' compensation insurers, products liability insurers, and environmental liability insurers).

281. Ben-Shahar & Logue, *supra* note 280, at 211.

## RISKY BUSINESS

accreditation agencies.”<sup>282</sup> These standards often exceed the stringency required by government regulators.<sup>283</sup> The same on-site monitoring and individualized instructions could be utilized in the sex-trafficking industry, and an insurer could ultimately deny coverage, cancel it, or refuse to renew a policy unless the insured adopts certain loss prevention measures.<sup>284</sup>

An effective auditing system, either on an as-needed or regular basis, is critical to implementing these loss prevention efforts as well.<sup>285</sup> Insurance companies could, for example, set up an undercover investigation system applicable to a range of hotels broader than just those with a bad track record.<sup>286</sup> As consumers seeking to lower the insurance premiums calculated by underwriters, hotels could affirmatively hire external consultants to investigate their policies and procedures,<sup>287</sup> implement safeguards against sex trafficking,<sup>288</sup> and regularly produce

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282. Rappaport, *supra* note 146, at 1554; Ben-Shahar & Logue, *supra* note 280, at 211.

283. Ben-Shahar & Logue, *supra* note 280, at 211 (“In the area of residential home-safety and construction standards, property insurers develop building code ratings that push for stricter standards for builders and stricter enforcement by localities.”).

284. *Cf.* Rappaport, *supra* note 146, at 1586 (“Theoretically, there is no limit to the forms and combinations of loss-prevention initiatives insurers might develop.”).

285. *Id.* at 1582-83 (recounting interviews with insurance agencies about their audits); *see also* Ben-Shahar & Logue, *supra* note 280, at 236 (“Monitoring is often done more effectively by insurers that develop regulatory practices and technologies that the government lacks.”).

286. Rappaport, *supra* note 146, at 1583 (describing how one insurance pool “sends personnel to patronize ‘cop bars,’ listen, and observe”).

287. This would be analogous to discounts offered by municipality insurers to police departments accredited by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA). *See* Rappaport, *supra* note 146, at 1584 n.257 (quoting police executives and commercial insurers reporting discounts of 16-33%); *Risk Management, Liability Insurance, and CALEA Accreditation*, CALEA, <http://www.calea.org/content/risk-management-liability-insurance-and-caleaaccreditation> [https://perma.cc/DT9S-SMH5] (maintaining “list of liability insurance providers known . . . to offer some type of financial incentive to CALEA accredited agencies”).

288. *See, e.g.*, Ben-Shahar & Logue, *supra* note 280, at 212 (describing insurers that provide substantial premium discounts to auto owners who install

comprehensive compliance reports. In certain circumstances, including for motels in high-risk locations, insurance companies might mandate that hotels hire a corporate compliance monitor in order to lower their premiums (or gain coverage in the first place).<sup>289</sup> The upshot is that insurance companies, not the hotels, wield the ultimate power through price setting.

Changing this power dynamic will not be simple. Like the municipal liability market, CGL and umbrella policies for hotels exist in a “soft insurance market,” where “insurers tend to be more lax about underwriting, and less forceful about loss prevention, as they compete for premium dollars and market share.”<sup>290</sup> Add this competitive environment to the reality that the most problematic hotels tend to be “lower end.”<sup>291</sup> Although possibly known to law enforcement as hotbeds of trafficking, these hotels—like the Motel 6 in Sylmar—are difficult for market insurance to regulate effectively because it is “not cost-effective for insurers to individualize loss prevention or engage in the monitoring necessary to link premiums to care.”<sup>292</sup> For this problematic market segment, where myriad insurance brokers compete for one fairly standard commercial policy, the hotels currently wield the power. A bigger profile (i.e., multiple hotels under the same owner) would be needed for an

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LoJack in their vehicles); *id.* at 211 (“[E]nvironmental liability insurers require, or offer significant premium discounts for, compliance with private environmental safety codes that are managed and audited by third parties and that are stricter than government environmental regulation.”).

289. This is a tactic often used by DOJ in deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) with companies. DPAs and NPAs usually require the appointment of outside monitors to ensure the corporation is complying with the terms of the agreement. Christie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679 (2009). See generally DEFINING FEDERAL CRIMES, *supra* note 82, at 817-23 (discussing DPAs/NPAs and the use of corporate monitors).

290. Rappaport, *supra* note 146, at 1598-99.

291. NIJ Study, *supra* note 2, at 108 (“The higher-end places I think are more interested in keeping a clean atmosphere. Whereas the lower end places, if you were to remove all prostitution from their place they would go broke. That is their main customer.”).

292. Rappaport, *supra* note 146, at 1610-11 n.410 (noting that because “commodity clients” pay relatively small premiums, “it is often infeasible for insurers to discount rates enough to compensate for the expenses of loss prevention”).

## RISKY BUSINESS

insurer—or its underwriter—to become actively involved in monitoring and investigating operations and procedures. Thus, for now, self-insured retentions (SIRs) may be critical to keeping hotels’ “skin in the game.”<sup>293</sup> But because of the power retained by hotels, which have plentiful options for coverage, a regulatory mandate may be necessary to ensure that SIRs are written into the insurance policies.<sup>294</sup>

Any private system between the hotels and their insurance companies that is set up to establish anti-trafficking norms should be reinforced with government actors. Take, for instance, the explosion of prosecutions under the Foreign Corrupt Practices Act (FCPA) in the last fifteen years.<sup>295</sup> The DOJ has become the global enforcer of anti-bribery norms (not without criticism),<sup>296</sup> and its deployment of the FCPA has ensured that companies worldwide comply with U.S. values and business practices. With the huge fines imposed as part of settlement agreements,<sup>297</sup> multinational corporations have taken on the costs of internal investigations, hiring law firms to root out misconduct and avoid indictment. The incentive to disclose and cooperate is magnified because, in general, insurance policies do not cover FCPA claims, just as they would not cover sex-trafficking claims.<sup>298</sup> Similarly, if prosecutors and private plaintiffs more regularly

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293. *Cf. id.* at 1590 (“Many experts [the author] interviewed stressed the importance of deductibles and self-insured retentions in managing moral hazard. They require all municipalities to retain some risk through one of these mechanisms.”).

294. *Cf. Rappaport, supra* note 146, at 1612 (“Insurance regulators could consider banning firstdollar police liability policies or requiring a substantial deductible or retention as a regulatory default rule.”).

295. Rachel Brewster & Samuel W. Buell, *The Market for Global Anticorruption Enforcement*, 80 L. & CONTEMP. PROBS. 193, 193 (2017) (noting that between FCPA’s enactment in 1977 through 2000, DOJ pursued 52 enforcement actions, compared to the 379 cases initiated between 2001 and 2015); see Brandon Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775 (2011).

296. See, e.g., Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229 (1997); see also Karen E. Woody, *No Smoke and No Fire: The Rise of Internal Controls Absent Anti-Bribery Violations in FCPA Enforcement*, 38 CARDOZO L. REV. 1727 (2017).

297. See generally *Foreign Corrupt Practices Act Clearinghouse*, STAN. L. SCH. (June 30, 2019), [fcpa.stanford.edu](https://fcpa.stanford.edu) [<https://perma.cc/592P-DJAC>].

298. Sergio F. Oehninger & Geoffrey B. Fehling, *A Primer on Insurance Coverage for FCPA Claims and Investigations*, HUNTON ANDREWS KURTH LLP (Aug. 2017),

begin to use the TVPA's restitution and fine provisions, hotels have a greater financial incentive to enlist third parties (including law firms) to act as private investigators even before they are targeted by the government. When charges are brought, a self-reporting hotel that seeks help will be treated better and with more leniency.<sup>299</sup>

Public accountability should serve as an additional pressure point. If government regulators reach settlements with corporate actors, those agreements should be publicized. Whether or not corporations cooperate and comply with the settlement terms<sup>300</sup> would factor into consumers' market decisions, at least for the patrons who prioritize socially responsible hotels.<sup>301</sup> Especially for a crime that is already so difficult to police, it is critical to develop a synergistic regulatory scheme among private interests and public actors that imposes the greatest oversight of hotels and exploits all economic liabilities.

#### CONCLUSION

Hotels must put their money where their juridical mouth is. Their appeal as human-trafficking harbors should hold them to a higher standard—an increased responsibility to guard against the crime. But insurance companies are the yet unrecognized torchbearers for real change. They have a wealth of options, which can be used creatively and

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<https://s3.amazonaws.com/documents.lexology.com/e39051d3-4342-4178-8518-aa9dfd7b5947.pdf> [https://perma.cc/3R7X-BDB9]; Evan Bundschuh, *Will your D&O policy respond to FCPA enforcement?*, FCPA BLOG (Jan. 8, 2019), <http://www.fcablog.com/blog/2019/1/8/will-your-do-policy-respond-to-fcpa-enforcement.html> [https://perma.cc/E68C-YY7M].

299. Who will cover the potentially huge costs of the investigation—the hotel corporation or the insurance company—would need to be negotiated and written into the insurance policy, lest it spawn further collateral litigation.
300. Admittedly, this is a big “if,” if we are to judge by NPAs and DPAs in the corporate compliance context. Brandon L. Garrett, *The Rise of Bank Prosecutions*, 101 YALE L.J. F. 33, 43 (2016) (“We know little about how the compliance terms of prosecution agreements are being implemented, since the process is rarely described publicly by companies or prosecutors, and the reports of independent monitors who are sometimes tasked with supervising compliance are typically not made public.”).
301. See Rappaport, *supra* note 146, at 1603-07 (discussing how publicized premiums should facilitate democratic accountability and political oversight of police).

## RISKY BUSINESS

effectively in conjunction with public sentiment and government enforcement, in the fight to end sex trafficking. Insurers are well equipped to rein in wayward hotel owners through the tools they use on a regular basis across industries, including underwriting analysis, rating systems, differentiated premiums, SIRs, loss-prevention techniques, and audits.

But before we enlist the help of the insurance companies—and tap into their influence—we must impress upon them their own power and vulnerabilities in the sex-trafficking context. Like hotels, they too, must be spurred to action. Even if a widespread overhaul in hospitality liability insurance is too great a shift for such a reactive business, out of self-preservation, the industry cannot ignore the lawsuits coming down the pike.

I hope this Note has planted the seeds for dialogue and encourages insurers to proactively develop socially beneficial policies. By acknowledging and anticipating the costly litigation, insurance companies can capitalize on the opportunity to “convert rising liability risk to actionable events.”<sup>302</sup> Not only would they protect their own bottom lines, but they would also decrease the incidence of sex trafficking in hotels. As the recent lawsuits teach us, we must embrace and leverage every little bit of financial pressure: Even for combatting human rights violations, money talks.

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302. *Id.* at 1607.