

COMMERCIAL SEXUAL EXPLOITATION: HUMAN SEX TRAFFICKING & NON-CONSENSUAL PORNOGRAPHY

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I. HUMAN SEX TRAFFICKING

According to the United States (U.S.) Department of Health and Human Services, human trafficking is tied with the illegal arms industry as the second largest criminal industry in the world.¹ The Trafficking Victims Protection Act of 2000 (TVPA) defines sex trafficking as “the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act.”² Human trafficking is distinct from human smuggling, which involves consent on the part of the individual being transported,³ and is distinct from sex work. Unlike sex workers, survivors of human trafficking do not profit financially from the sexual services they perform.⁴ Severe forms of trafficking include those in which the commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not reached eighteen years of age.⁵ Indeed, human sex trafficking survivors are typically youth runaways⁶ or immigrant women and children⁷ who are held against their will in brothels or similar establishments and forced to perform sexual services to repay inflated

1. *Fact Sheet: Human Trafficking*, U.S. DEP’T OF HEALTH & HUM. SERVS. ADMIN. FOR CHILD. & FAM. (Nov. 21, 2017), <https://perma.cc/T5H3-SDDE>.

2. 22 U.S.C.A. § 7101 (West, Westlaw through Pub. L. No. 117–262).

3. *Id.* This distinction is important because “U.S. State Department guidelines treat persons who were smuggled into the United States as criminals in violation of federal immigration laws, but treat involuntarily trafficked persons as victims.” Derek Pennartz, *The Irony of the Land of the Free: How Texas Is Cleaning Up Its Human Trafficking Problem*, 12 TEX. TECH. ADMIN. L.J. 367, 371 (2011) (citing Office of the Attorney General, *The Tex. Response to Human Trafficking Rep.* to the 81st Leg., at 10 (2008)).

4. 22 U.S.C.A. § 7101(b)(2)–(4).

5. *Id.*

6. Marilyn Tobocman & Diane Citrino, *Human Trafficking in Our Backyard: What Can Lawyers Do?*, FED. LAW., Apr. 2014, at 16.

7. 22 U.S.C.A. § 7101(b)(1).

debts to their traffickers.⁸ Though the TVPA does not require that survivors be kept “under literal lock and key” in order to allege human trafficking,⁹ traffickers frequently withhold all profits and use abusive tactics and the threat of violence to keep survivors isolated and enslaved.¹⁰

Section A identifies crimes and defenses related to human sex trafficking, including attempt, facilitation, and the receipt of financial benefit from human sex trafficking. Section B discusses federal regulation of human sex trafficking.

A. CRIMES & DEFENSES RELATED TO HUMAN SEX TRAFFICKING

There are three offenses pertaining to human sex trafficking in U.S. law: attempting, facilitating, and financially benefiting. Attempt or conspiracy to commit human trafficking is a federal offense “punishable in the same manner as a completed violation.”¹¹ Facilitation, on the other hand, is generally prohibited under state statutes, which include helping, aiding, abetting, or conspiring to commit human trafficking, “regardless of whether a thing of value has been promoted to or received by the person” in the definition of facilitation.¹² Finally, a person who benefits, financially or otherwise, from human trafficking is punishable under federal law in the same manner as one who commits the trafficking.¹³ This is the case if the person who benefitted either knew or recklessly disregarded the fact that the benefit was a result of human sex trafficking.¹⁴ For each of the federal offenses, a person may not be prosecuted, tried, or punished for human trafficking unless such action is commenced not later than ten years after the cause of action arose.¹⁵ If the victim was a minor at the time of the offense,

8. *Id.* § 7101(b)(2) (describing how trafficked victims, who are “predominantly women and girls,” are trafficked into the international sex trade “often by force, fraud, or coercion” and forced into “activities related to prostitution, pornography, sex tourism, and other commercial sexual services”).

9. 165 Am. Jur. Trials 313 (originally published in 2020) (citing *Paguirigan v. Prompt Nursing Emp. Agency LLC*, 286 F. Supp. 3d 430 (E.D.N.Y. 2017)).

10. 22 U.S.C.A. § 7101(b)(2)–(4). To evaluate the impact of the Trafficking Victims Protection Reauthorization Act of 2005, compare Susan Tiefenbrun, *Updating the Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?*, 38 CASE W. RESRV. J. INT’L L. 249 (2007), with Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337 (2007). Human trafficking is not limited to sex trafficking: it also involves forced labor for domestic, agricultural, retail, and other work industries. 22 U.S.C.A. § 7101(b)(3)–(4) (“Traffickers lure women and girls into their networks through false promises of decent working conditions at relatively good pay as nannies, maids, dancers, factory workers, restaurant workers, sales clerks, or models. Traffickers also buy children from poor families and sell them into prostitution or into various types of forced or bonded labor.”).

11. 18 U.S.C.A. § 1594(a)–(b) (West, Westlaw through Pub. L. No. 117–262).

12. 165 Am. Jur. Trials 313 § 18 (originally published in 2020) (citing LA. REV. STAT. ANN. § 14:46.2).

13. 165 Am. Jur. Trials 313 (originally published in 2020) (citing 18 U.S.C.A. § 1591(a)(2); 18 U.S.C.A. § 1593(a); 18 U.S.C.A. § 1589(b)). The government challenged this interpretation of the TVPA in *United States v. Afyare*, 632 Fed. Appx. 272 (6th Cir. 2016), but it was upheld by the court.

14. *Id.*

15. 18 U.S.C.A. § 1595(c)(1) (West, Westlaw through Pub. L. No. 117–262).

prosecution may be initiated up to ten years after the victim reaches eighteen years of age, even if ten years have already passed since the cause of action arose.¹⁶

Defendants of human sex trafficking charges may assert an entrapment defense, though this is not always successful. In *U.S. v. Mikoloyck*, for instance, the defendant asserted that the government engaged in outrageous conduct, acting as a pimp and entrapping the defendant into purchasing sex from fictional children through an advertisement placed online.¹⁷ The court rejected this argument, noting that the entrapment defense requires “government inducement of the crime,” which was not met because Mikoloyck initiated contact with the undercover investigator who placed the ad without any element of persuasion or mild coercion from the government.¹⁸ Moreover, 18 U.S.C.A. § 1591 “clearly applies to those who attempt to purchase underage sex, not merely the pimps of actual exploited children.”¹⁹

Courts have invalidated two defenses relating to human sex trafficking. At the federal level, consent is not recognized as a defense in cases involving minors or where the trafficked person is an adult. In cases involving the trafficking of minors, courts have declined to accept either the consent of the minor²⁰ or the consent of a parent as a defense.²¹ In cases where the trafficking victim is an adult, that adult’s consent is likewise not a recognized defense under the Mann Act, *infra* Part I(C).²² At the state level, where the defendant is charged with attempted human sex trafficking of a minor or alleged minor under the state human trafficking statute, the existence of an actual minor is often not required to support a conviction for human trafficking of a minor.²³ This is because state facilitation statutes typically recognize two separate possible acts within the single crime of human trafficking: attempted trafficking and completed trafficking, each of which is punished identically. Thus, the statute is violated when the defendant either attempts to induce or actually induces a minor to engage in a commercial sex act, and whether the intended victim is actually a minor is irrelevant.²⁴

16. *Id.*

17. No. 09-00036-01-CR-W-GAF, 2009 WL 4798900, at *7 (W.D. Mo. Dec. 7, 2009).

18. *Id.* at *7. *See also* United States v. Strevell, 185 Fed. Appx. 841 (11th Cir. 2006) (defendant convicted under 18 U.S.C.A. §§ 1591(a) and 1594(a) even though no actual children were involved); United States v. Roberts, 174 Fed. Appx. 475 (11th Cir. 2006) (same).

19. *Mikoloyck*, 2009 WL 4798900, at *7.

20. *See, e.g.*, United States v. Key, 889 F.3d 910, 913 (7th Cir. 2018); United States v. Wardlow, 830 F.3d 817, 821 (8th Cir. 2016).

21. *See, e.g.*, United States v. King, 840 F.2d 1276, 1282 (6th Cir. 1988).

22. 18 U.S.C.A. § 2421 (West, Westlaw through Pub. L. No. 115–90); *see, e.g.*, United States v. Mi Sun Cho, 713 F.3d 716, 721 (2d Cir. 2013).

23. *See* CAL. PENAL CODE § 236.1 (West 2023); *People v. Moses*, 477 P.3d 579, 590 (2020) (noting that because the legislature made the “attempted act equally blameworthy to the completed act and [made] equal the punishment for both the attempted act and the completed act,” factual impossibility was not a viable defense).

24. *Moses*, 477 P.3d at 590; Cal. S.B. 382, Ch. 87.

In *People v. Moses*, for instance, the defendant asserted that Moses's intended victim had to be a minor in order for the defendant to be found in violation of the statute. The Supreme Court of California disagreed, finding that a defendant violated the statute if that individual attempted or succeeded in inducing a minor to participate in a sexual commercial act, because "guilt or innocence must be determined 'as if the facts were as [the defendant] perceived them.'"²⁵ If a defendant believed the target of the inducement to be a minor, the intended victim's actual age cannot be a defense.²⁶ Both committing the violation with a minor and attempting with a minor or adult result in the same punishment for the defendant.²⁷

B. FEDERAL REGULATION OF HUMAN SEX TRAFFICKING

Federal courts have recognized that the primary responsibility for policing sexual misconduct lies with the states rather than the federal government.²⁸ However, some federal regulations regarding sexualized commercial activity still exist, including the TPVA—which was most recently reauthorized as the Trafficking Victims Prevention and Protection Reauthorization Act of 2022²⁹—and the Justice for Victims of Trafficking Act of 2015, passed to give the government more tools to combat trafficking.³⁰

The TPVA is the primary federal legislation pertaining to human trafficking. The Act provides harsher penalties for human traffickers than previously existing laws in order to combat the "contemporary manifestation of slavery" and "to protect [human trafficking] victims."³¹ The Act states that it is the policy of the U.S. to deny non-humanitarian and non-trade-related foreign assistance to any government that fails to comply, or make significant efforts to comply, with the minimum standards for the elimination of trafficking set forth in the Act.³² These minimum standards require a country to prohibit trafficking and to make serious and sustained efforts to eliminate severe forms of trafficking in persons; the Act also requires countries to prescribe punishment is commensurate to particular forms of human trafficking.³³

25. See *Moses*, 477 P.3d at 592–93 (citing *People v. Reed*, 53 Cal. App. 4th 389, 396 (1996)) (emphasis in original) (internal quotations omitted).

26. *Id.*

27. *Id.*

28. See, e.g., *United States v. Wolf*, 787 F.2d 1094, 1097 (7th Cir. 1986) ("The primary responsibility for policing sexual misconduct lies with the states rather than the federal government. The Mann Act is merely a prohibition against transporting women across state lines for immoral purposes.").

29. S.3949, 117th Cong. (2022).

30. The Trafficking Victims Protection Act of 2017 provided for additional funding and increased government transparency. *Human Trafficking: Key Legislation*, DEP'T OF JUST., <https://perma.cc/4YUB-7GCQ> (last visited Mar. 4, 2023).

31. 22 U.S.C.A. § 7101 (West, Westlaw through Pub. L. No. 115–90).

32. 22 U.S.C.A. § 7107 (West, Westlaw through Pub. L. No. 115–90).

33. 22 U.S.C.A. § 7106(a) (West, Westlaw through Pub. L. No. 115–90).

The TVPA has been criticized for conditioning federal assistance for survivors of human sex trafficking upon their willingness to cooperate with the prosecution.³⁴ The TVPA has also been criticized for requiring crimes against domestic survivors of human sex trafficking to fall into the category of “severe forms of trafficking,” which requires a showing of force, fraud, or coercion in order to receive federal assistance.³⁵ In contrast, international survivors are not required to show that their trafficking was “severe” in order to receive help.³⁶

In 2018, the Department of Homeland Security officially authorized The Blue Campaign, which had been launched in 2010.³⁷ The Blue Campaign outlines a national strategy to combat human trafficking, implements training programs for federal law enforcement officers and other government agents, and requires reporting of human trafficking.³⁸ The Harvard School of Public Health conducted an evaluation of the campaign in 2021 and 2022; however, results of that evaluation have not yet been published.³⁹

The Mann Act—also known as the White-Slave Traffic Act⁴⁰—makes it a criminal offense for anyone to “knowingly transport any individual in interstate or foreign commerce . . . with intent that such individual engage in prostitution.”⁴¹ The Mann Act was amended in 1986 to prohibit transporting any person with the intent to engage in prostitution or any other illegal sexual activity.⁴² Enforcement of the Act has been upheld even in circumstances under which the individual was willingly transported to a jurisdiction in which prostitution is legal.⁴³ The Mann Act has also been used to prosecute individuals who have induced the voluntary

34. Meghan Hilborn, *How Oklahoma’s Human Trafficking Victim Defense Is Poised to Be the Boldest Stand Against Human Trafficking in the Country*, 54 TULSA L. REV. 457, 463 (2019).

35. *Id.*

36. *Id.*

37. 165 Am. Jur. Trials 313 § 5 (originally published in 2020); see also *DHS Blue Campaign, Digital Advertising*, DIST. COMM’NS GRP., <https://perma.cc/HG92-8HGV> (last visited Mar. 4, 2023).

38. *Id.*

39. *Blue Campaign Evaluation*, HARV. T.H. CHAN SCH. OF PUB. HEALTH, <https://perma.cc/R72H-3K2F> (last visited Mar. 4, 2023).

40. At least one scholar has asserted that the term “white slavery” is racist, as it implies that “that slavery of ‘white women’ was of a different, and worse, sort than ‘black’ slavery.” Nesheba Kittling, *God Bless the Child: The United States’ Response to Domestic Juvenile Prostitution*, 6 NEV. L.J. 913, 919 (2006). “White slavery came to mean the procurement, by force, deceit, or drugs, of a white woman or girl against her will, for prostitution. . . . White women were viewed as victims of prostitution, rather than willing participants While . . . black women were deemed criminals, even if they were not actually prostitutes.” *Id.* (internal quotations omitted) (citing Jo Doezeema, *Loose Women or Lost Women? The Re-emergence of the Myth of White Slavery in Contemporary Discourses of Trafficking in Women*, 18 GENDER ISSUES 23, 31 (2000), <https://perma.cc/5AVZ-YEUW>).

41. 18 U.S.C.A. § 2421 (West, Westlaw through Pub. L. No. 115–90).

42. Kittling, *supra* note 40, at 918.

43. *United States v. Pelton*, 578 F.2d 701, 712 (8th Cir. 1978) (holding that the language of the statute states that interstate transportation for the purpose of prostitution is illegal regardless of the status of prostitution in the destination state).

travel of minors to jurisdictions where the individual mistakenly believed the minor could legally consent to the encounter.⁴⁴

Federal law prohibits the transportation of minors for illegal sexual activity.⁴⁵ A defendant violates the statute if they “knowingly transport[] an individual who has not attained the age of [eighteen] years . . . with intent that the individual engage in prostitution.”⁴⁶ Ignorance of the minor’s age is not an available defense.⁴⁷ The government need not prove that a minor was actually placed at risk to sustain a conviction; only a showing of intent is necessary.⁴⁸ The dominant purpose of interstate travel need not be criminal sexual activity to support a conviction under the statute, but such criminal sexual activity must not be merely incidental to the trip.⁴⁹

Federal law prohibits the transport of any immigrant for the purpose of prostitution.⁵⁰ In addition, U.S. citizens or admitted aliens are prohibited from engaging in illicit sexual conduct, such as certain sexual acts with persons under eighteen years of age, in foreign jurisdictions.⁵¹ In April 2003, Congress passed the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), which prohibits illicit sexual conduct with minors in foreign places.⁵² The PROTECT Act, which does not require the government to prove intent,⁵³ provides that the maximum sentence for sex tourism—the practice of traveling to foreign locations for the purpose of engaging in illicit sexual

44. *Goodwin v. United States*, 869 F.3d 636, 639 (8th Cir. 2017) (holding that defendant was in violation of TEX. PENAL CODE § 43.25(b), which stipulates that an adult cannot induce sexual activity from a person under eighteen, when he arranged to meet with a seventeen-year-old from North Dakota in Texas, even though other areas of the penal code defined the age of consent to be seventeen).

45. 18 U.S.C.A. § 2423 (West, Westlaw through Pub. L. No. 115–90).

46. *Id.*

47. *United States v. Taylor*, 239 F.3d 994, 997 (9th Cir. 2001) (“If someone knowingly transports a person for the purposes of prostitution or another sex offense, the transporter assumes the risk that the victim is a minor, regardless of what the victim says or how the victim appears.”).

48. *United States v. Kelly*, 510 F.3d 433, 441 (4th Cir. 2007); *see also United States v. Tykarsky*, 446 F.3d 458, 466 (3d Cir. 2006) (concluding that Congress did not intend to require an actual minor to be placed at risk to sustain a conviction).

49. *United States v. Hayward*, 359 F.3d 631, 637 (3d Cir. 2004) (“The government must prove beyond a reasonable doubt . . . that a significant or motivating purpose of the travel across state or foreign boundaries was to have the individual transported engage in illegal sexual activity. In other words, the illegal sexual activity must not have been merely incidental to the trip.”).

50. 8 U.S.C.A. § 1328 (West, Westlaw through Pub. L. No. 115–90).

51. Illicit sexual conduct means (1) a sexual act, as defined in 18 U.S.C.A. § 2246, with a person under eighteen years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States; or (2) any commercial sex act, as defined in 18 U.S.C.A. § 1591, with a person under eighteen years of age. 18 U.S.C.A. § 2423(c), (f) (West, Westlaw through Pub. L. No. 115–90).

52. Prosecutorial Remedies and Tools against the Exploitation of Children Today Act of 2003, Pub. L. No. 108–21, 117 Stat. 650 (2003).

53. *See* 18 U.S.C.A. § 2423(c) (West, Westlaw through Pub. L. No. 115–90); *see also* H.R. Conf. Rep. No. 108–66, at 686 (2003) (“Current law requires the government to prove that the defendant traveled with the intent to engage in the illegal activity. Under this section, the government would only have to prove that the defendant engaged in illicit sexual conduct with a minor while in a foreign country.”).

activities, often with minors, outside the ambit of U.S. law—is thirty years.⁵⁴ The Act also criminalizes the activities of sex tourism operators.⁵⁵ Challenges to the PROTECT Act under the Due Process Clause⁵⁶ and the Commerce Clause⁵⁷ have been unsuccessful.

The TPVA states that no funding can be made available to “promote, support, or advocate the legalization or practice of prostitution,” and that any organization receiving funding must state in a grant application or grant agreement that “it does not promote, support, or advocate the legalization or practice of prostitution.”⁵⁸ As a result, non-governmental organizations, including sex workers’ rights organizations, were barred from receiving federal anti-trafficking funding unless they explicitly stated in grant applications that they would not promote prostitution.⁵⁹ The Supreme Court has found similar anti-prostitution statements in the grants for HIV/AIDS funding violated the First Amendment.⁶⁰ Moreover, many sex workers’ rights advocates have made it a point to note that the pursuit of rights for sex workers—who, in contrast with survivors of human trafficking, engage in their labor willingly—and anti-trafficking work are actually “mutually reinforcing and equally crucial to empowering people in the sex trade.”⁶¹

54. 18 U.S.C.A. § 2423(b)–(c) (West, Westlaw through Pub. L. No. 115–90). Prior to the PROTECT Act amendment of 18 U.S.C.A. § 2423, subsection (b) provided for maximum imprisonment of not more than fifteen years for persons traveling or conspiring to travel for the purpose of engaging in illicit sexual conduct.

55. 18 U.S.C.A. § 2423(d) (West, Westlaw through Pub. L. No. 115–90) (defining such behavior as “any United States citizen or alien admitted for permanent residence who travels in foreign commerce or resides, either temporarily or permanently, in a foreign country, and engages in any illicit sexual conduct with another person”).

56. *United States v. Clark*, 315 F. Supp. 2d 1127, 1132–33 (W.D. Wash. 2004) (determining that a crime committed against a foreign national by a U.S. citizen or resident alien creates the sufficient nexus required by the Due Process Clause of the Fifth Amendment because a citizen could reasonably expect to be hauled into court in the U.S. for illicit sexual conduct with a child in a foreign country where the eradication of trafficking in and exploitation of juvenile sex workers is a foreign policy, law enforcement, and public health policy priority for the U.S. Government).

57. *Id.* at 1135–36.

58. H.R. 2620, 108th Cong. (2003–04).

59. *Trafficking Victims Protection Reauthorization Act of 2003: Dangerous Restriction of Funding for Harm Reduction and Human Rights Programs*, URB. JUST. CTR., <https://perma.cc/HGQ8-5AKB> (last visited Mar. 8, 2023).

60. *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 221 (2013) (holding that such a policy requirement violated the First Amendment).

61. *E.g.*, Anna-Louise Crago, *Our Lives Matter: Sex Workers Unite for Health and Rights*, OPEN SOC’Y INST. 61 (2008), <https://perma.cc/PMC4-EQFF> (“[T]he [New York City Sex Worker’s P]roject’s success has prompted law enforcement officials and service providers to frequently call the Sex Workers Project and request assistance for people involved in trafficking cases.”). *See generally* DECRIMINALIZE SEX WORK, <https://perma.cc/32LS-J9SC> (last visited Feb. 26, 2023); RED UMBRELLA FUND, <https://perma.cc/CY44-KHJN> (last visited Feb. 26, 2023) (noting that “other programmes, often communicated as anti-trafficking initiatives, focus on ‘rescuing sex workers’ even when they do not want to be rescued. This approach is stigmatizing and violates the rights of sex workers. It also drives many underground and away from essential services and mutual support.”); SEX WORKERS OUTREACH PROJECT-USA, <https://perma.cc/664G-9CJZ> (last visited Feb. 26, 2023) (noting that “the presence of sex workers in social movements, the visibility of sex workers in communities of all kinds, and societal awareness of sex worker rights as fundamental to human rights in no way perpetuate

II. NON-CONSENSUAL PORNOGRAPHY

“Nonconsensual pornography,”⁶² often called “revenge porn,” refers to “the distribution of sexually graphic [photographs or videos] of individuals without their consent.”⁶³ For purposes of this Article, “non-consensual pornography” does not refer to child abuse sex material, but only to sexually explicit or nude media depicting adults that has been distributed without consent, regardless of whether the initial creation of that material was consensual. According to a 2017 study conducted by the Cyber Civil Rights Initiative, “over one in eight adult social media users has been victimized or threatened with the unauthorized distribution of private, sexually explicit images or videos, and over one in twenty adult social media users have engaged in such distribution.”⁶⁴ The same study found that nonconsensual pornography was a highly gendered phenomenon, with women being nearly twice as likely as men to be threatened with the conduct.⁶⁵

Section A describes regulation of non-consensual pornography. Section B identifies various criminal penalties for non-consensual pornography. Section C discusses civil remedies for non-consensual pornography.

A. REGULATION OF NON-CONSENSUAL PORNOGRAPHY

Although the Video Voyeurism Prevention Act of 2004 federally criminalized the “intent to capture an image of a private area of an individual without their consent, and knowingly do[ing] so under circumstances in which the individual has a reasonable expectation of privacy,”⁶⁶ there is currently no federal law regulating the distribution of nonconsensual pornography. In 2016, U.S. House Representative Jackie Speier introduced the Intimate Privacy Protection Act (IPPA), which would have made the non-consensual distribution of

violence, sexual assault, slavery and trafficking in persons. We believe that when sex work is decriminalized, and when sex workers do not suffer from stigma and discrimination, issues of abuse in the sex trade can be better identified, addressed and nullified.”)

62. “Nonconsensual Pornography” is a term preferred by victim advocates over “Revenge Porn” because, although sometimes revenge is the motivating factor behind distribution, not all nonconsensual pornography is distributed to third parties with the intent to enact revenge. *See, e.g.*, Farah Ali, Brian Conley, Heather Lewis, & Charlotte Lunday, *SEXUAL EXPLOITATION IN THE DIGITAL AGE: NON-CONSENSUAL PORNOGRAPHY AND WHAT WASHINGTON CAN DO TO STOP IT* (2015), <https://perma.cc/L62A-WLQR>.

63. Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 *WAKE FOREST L. REV.* 345, 346 (2014).

64. Mary Anne Franks, “*Revenge Porn*” *Reform: A View from the Front Lines*, 69 *FLA. L. REV.* 1251, 1261 (2017) (citing Asia A. Eaton, Holly Jacobs, & Yanet Ruvalcaba, *2017 Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration: A Summary Report*, CYBER C.R. INITIATIVE 11 (June 12, 2017), <https://perma.cc/Y3N4-TU2J>).

65. *Id.*

66. 18 U.S.C.A. § 1801 (West, Westlaw through Pub. L. No. 117–262).

sexually explicit content punishable by up to five years in prison.⁶⁷ The IPPA, however, has not been signed into law, despite bipartisan support.⁶⁸ Regulation of distribution is thus left entirely to the states, which differ with regard to the degree of criminalization. New Jersey was the first state to criminalize non-consensual pornography in 2004,⁶⁹ and as of 2022, forty-eight states criminalize non-consensual pornography.⁷⁰ Some states, such as New York, both criminalize non-consensual pornography and provide for a civil cause of action.⁷¹

B. CRIMES RELATED TO NON-CONSENSUAL PORNOGRAPHY

Of the states which criminalize non-consensual pornography, some classify the first offense as a misdemeanor,⁷² while others classify any non-consensual distribution as a felony, regardless of whether or not it is the first offense.⁷³ Some states, such as New York⁷⁴ and Vermont,⁷⁵ require that the distribution was intended to cause harm, a policy choice critiqued by victims' advocates as under-inclusive, as it fails to hold accountable those who may non-consensually share sexually explicit content for fun or for general amusement.⁷⁶ Other states, such as Illinois, do not require that the distribution was intended to cause harm, but rather only that a reasonable person would have understood the image in question to be private.⁷⁷

Individuals classified as victims under non-consensual pornography statutes are generally unable to successfully litigate their claims under other criminal laws. For example, remedies under harassment laws are typically unavailable to survivors because, although sharing non-consensual pornography online may be humiliating, such activity does not qualify as direct communication between perpetrator and victim in a way that is likely to cause annoyance or alarm, as is

67. Christian Nistáhuz, Comment, *Fifty States of Gray: A Comparative Analysis of "Revenge-Porn" Legislation Throughout the United States and Texas's Relationship Privacy Act*, 50 TEX. TECH. L. REV. 333, 362 (2018).

68. *Id.*

69. Ava Schein, Note, *When Sharing Is Not Caring: Creating an Effective Criminal Framework Free From Specific Intent Provisions to Better Achieve Justice for Victims of Revenge Pornography*, 40 CARDOZO L. REV. 1953, 1973 (2019).

70. *Nonconsensual Pornography Laws*, CYBER C.R. INITIATIVE, <https://perma.cc/XBQ7-ADF3> (last visited Mar. 4, 2023) (noting that Massachusetts and South Carolina stand alone as states without nonconsensual pornography statutes).

71. N.Y. PENAL LAW § 245.15 (West, Westlaw through L.2022, Chs. 1 to 841).

72. CYBER C.R. INITIATIVE, *supra* note 70.

73. *Id.*

74. N.Y. PENAL LAW § 245.15.

75. VT. STAT. ANN. tit. 13, § 2606 (West, Westlaw through Chs. 186 & M-19 of the Adjourned Sess. of the 2021–2022 Vt. Gen. Ass. (2022)).

76. *How do revenge porn laws work in the US?*, MCALLISTER OLIVARIUS, <https://perma.cc/N6AF-A5MW> (last visited Mar. 4, 2023).

77. 720 ILL. COMP. STAT. ANN. 5/11-23.5 (West, Westlaw through P.A. 102-1142 of the 2022 Reg. Sess.).

required by harassment laws.⁷⁸ Similarly, laws governing stalking behavior typically require that the alleged stalker engage in a “course of conduct” that is likely to cause fear.⁷⁹ Non-consensual pornography, however, is generally a singular action rather than a course of conduct, leaving prosecution under state stalking laws largely unavailable.⁸⁰

Those accused of violating states’ revenge porn statutes have challenged their prosecutions under the First Amendment with varying degrees of success. States have consistently upheld such statutes under the First Amendment.⁸¹ When confronted with such challenges, some courts uphold the state statute at issue under strict scrutiny review on the basis that requiring a reasonable expectation of privacy prevents the statute from becoming unconstitutionally broad.⁸² These courts have held that a lack of a relationship between the defendant and the alleged survivor is evidence that there was no reasonable expectation of privacy, and have dismissed criminal charges on those grounds.⁸³ Other courts have upheld their revenge porn statutes by applying intermediate scrutiny and holding that the statute is narrowly tailored and serves compelling government interests.⁸⁴

C. CIVIL REMEDIES FOR NON-CONSENSUAL PORNOGRAPHY

Because of the general dearth of opportunities for victims of non-consensual pornography to seek redress under state criminal codes, and because more than 80% of non-consensual pornographic images are “selfies,” some legal scholars advocate that copyright law be used to protect survivors.⁸⁵ Section 230 of the Communications Decency Act immunizes internet service providers from being held liable for content created by third parties and places limitations on remedies for survivors of revenge porn because it broadly protects the websites that traffic revenge porn from liability; however, it does not extend immunity to violations of copyright laws.⁸⁶ Scholars argue that copyright law makes for a particularly

78. Amanda Levendowski, Note, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 422, 432 (2014).

79. *Id.*

80. *Id.*

81. See §14:49.50 Application of Current Obscenity Standards—Revenge porn, 2 SMOLLA & NIMMER ON FREEDOM OF SPEECH (2022); see, e.g., *People v. Austin*, 155 N.E.3d 439, 459 (Ill. 2019); *State v. Katz*, 179 N.E.3d 431, 447 (Ind. 2022); *State v. VanBuren*, 214 A.3d 791, 820 (Vt. 2019), *as supplemented* (June 7, 2019); *State v. Casillas*, 952 N.W.2d 629, 646 (Minn. 2020), *cert. denied*, 142 S. Ct. 90 (2021).

82. See, e.g., *VanBuren*, 214 A.3d at 820, *as supplemented* (June 7, 2019).

83. *Id.* (dismissing the charges on the grounds that the alleged victim did not demonstrate a reasonable expectation of privacy because there was no evidence that she was in a relationship with the defendant at the time the images were sent to him).

84. See, e.g., *Katz*, 179 N.E.3d at 447 (upholding conviction and noting that, the court has “no trouble concluding the impingement created by the statute is vastly outweighed by the public health, welfare, and safety served.”); *Austin*, 155 N.E.3d at 459.

85. See, e.g., Levendowski, *supra* note 78, at 425 (noting that, “because websites are afforded a great deal of legal protection under Section 230 of the Communications Decency Act . . . tort actions against the websites that traffic in revenge porn are unlikely to succeed.”).

86. *Id.* at 427–28.

ideal solution because survivors' primary goal is typically to have the images removed from the internet as quickly as possible rather than to obtain some sort of civil penalty or monetary damages, and while copyright law may not be a perfect solution, "invocation of copyright law does not threaten to erode the protections of free speech or Section 230, nor does it shoehorn revenge porn liability into existing tort schemes or create new criminal liability."⁸⁷

Copyright law could be used to protect nonconsensual pornography victims because, "by definition, revenge porn victims did not authorize the reproduction or display of their copyrighted images."⁸⁸ Survivors willing to pursue this kind of remedy "can seek up to \$150,000 in statutory damages for each instance of willful infringement" and would likewise be entitled to the removal of any images from the internet.⁸⁹

The ramifications of non-consensual pornography extend beyond psychological harms, although such harms are not to be minimized.⁹⁰ Survivors have reported terminations of employment, expulsions from school, threats of sexual assault, solicitations of sex by strangers as a result of their newly perceived promiscuity, and general harassment and stalking.⁹¹ Copyright law is one of the creative civil remedies feminist advocates are pursuing due to the lack of federal regulation of nonconsensual pornography and the inability of state criminal codes to provide the remedy survivors typically care about most: removal of the images from online platforms.

87. *Id.* at 439.

88. *Id.* at 441.

89. *Id.* at 444–45.

90. Schein, *supra* note 69, at 1963–64 (noting psychological harms including anger, guilt, paranoia, depression, isolation, low self-esteem, feelings of worthlessness, and suicide).

91. *Id.* at 1963.