

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

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I. HUMAN SEX TRAFFICKING

According to the Office of the Attorney General for the District of Columbia, human trafficking is tied with the illegal arms industry as the second largest criminal industry in the world, behind only drug trafficking.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.⁴ Additionally, human trafficking is not limited to the sex industry, and can include various labor, health, and human rights violations.⁵ Severe forms of trafficking include those in which the commercial sex act is induced by force, fraud, or coercion, and impacts 700,000 persons annually, primarily women and children.⁶ Human sex trafficking survivors are typically youth runaways⁷ or immigrant women and children who are trafficked within or across international borders.⁸ Though the TVPA does not require that survivors be

1. *Human Trafficking Fact Sheet*, OFF. OF THE ATT’Y GEN. FOR THE DIST. OF COLUMBIA, <https://perma.cc/FF6Q-BVPC>.

2. 22 U.S.C.A. § 7102 (West, Westlaw through Pub. L. No. 118–13).

3. 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 GEN., THE TEX. RESPONSE TO HUMAN TRAFFICKING REP. TO THE 81ST LEG. 10 (2008)).

4. *Sex Work vs. Trafficking: How they are Different and Why it Matters*, YALE GLOB. HEALTH JUST. P’SHP (June 2020), <https://perma.cc/UQ3R-GWJF>.

5. 22 U.S.C.A. § 7101(b)(3) (West, Westlaw through Pub. L. No. 118–13).

6. 22 U.S.C.A. § 7101(b)(1)–(2) (West, Westlaw through Pub. L. No. 118–13).

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

8. 22 U.S.C.A. § 7101(b)(1) (West, Westlaw through Pub. L. No. 118–13).

kept “under literal lock and key” in order to allege human trafficking,⁹ traffickers frequently 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

Three Federal Statutes define human trafficking offenses: 18 U.S.C. §§ 1581-1595, which addresses peonage, slavery, forced labor, and sex trafficking; 18 U.S.C. §§ 2251-2251(a), which addresses sexual exploitation and other abuse of children; and 18 U.S.C. §§ 2422-2423, which addresses transportation for illegal sexual activity and related crimes.¹¹ Attempt and conspiracy to commit human trafficking are also federal offenses “punishable in the same manner as a completed violation.”¹² Additionally, facilitation is generally prohibited under state statutes, and includes helping, aiding, abetting, or conspiring to commit human trafficking, “regardless of whether a thing of value has been promised to or received by the person.”¹³ 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.¹⁴ This is true if the beneficiary either knew or recklessly disregarded the fact that the benefit is derived from human sex trafficking.¹⁵ For each of these 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.¹⁶ However, if the victim was a minor at the time of the offense, 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.¹⁷

Defendants facing human sex trafficking charges may assert an entrapment defense, though this is not always successful. In *United States v. Mikoloyck*, for

9. 165 AM. JUR. *Trials* 313 § 3 (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) (West, Westlaw through Pub. L. No. 118–13). 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. RES. 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).

11. *Human Trafficking Data Collection Activities, 2022*, U.S. Dep’t of Just., (Aug. 2022), <https://perma.cc/L894-KVN7>.

12. 18 U.S.C.A. § 1594(a)–(b) (West, Westlaw through Pub. L. No. 118–13).

13. 165 AM. JUR. *Trials* 313 § 18 n.1 (originally published in 2020) (citing LA. REV. STAT. ANN. § 14:46.2).

14. 165 AM. JUR. *Trials* 313 § 19 (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.

15. 165 AM. JUR. *Trials* 313 § 19.

16. 18 U.S.C.A. § 1595(c)(1) (West, Westlaw through Pub. L. No. 118–13).

17. *Id.*

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.¹⁸ The court rejected this argument, noting that an entrapment defense requires “government inducement of the crime,” which the defendant did not meet because Mikoloyck initiated contact with the undercover investigator without any persuasion or coercion from the government.¹⁹ 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.”²⁰

Courts have invalidated two human sex trafficking defenses. In cases involving the trafficking of minors, courts have declined to accept either the consent of the minor²¹ or the consent of a parent as a defense.²² In federal 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(B).²³ 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.²⁴ 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; whether the intended victim is actually a minor is irrelevant.²⁵

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.²⁶ The Supreme Court of California disagreed, finding that a defendant violates 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.’”²⁷ If a defendant believed the target of the inducement to be a minor, the intended victim’s

18. *United States v. Mikoloyck*, No. 09-00036-01-CR-W-GAF, 2009 WL 4798900, at *6 (W.D. Mo. Dec. 7, 2009).

19. *Id.* at *7. *See also* *United States v. Strevell*, 185 Fed. Appx. 841 (11th Cir. 2006) (finding defendant guilty 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).

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

21. *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).

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

23. *See, e.g.*, *United States v. Mi Sun Cho*, 713 F.3d 716, 721 (2d Cir. 2013).

24. *See* CAL. PENAL CODE § 236.1 (West, Westlaw through Ch. 1 of 2023-024 1st Ex. Sess.); *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).

25. *Moses*, 477 P.3d at 590; 2021 Ca. S.B. No. 382, Ch. 87 (2022).

26. *Moses*, 477 P.3d at 590.

27. *See Id.* at 592–93 (citing *People v. Reed*, 53 Cal. App. 4th 389, 396 (1996)) (emphasis in original) (internal quotations omitted).

actual age cannot be a defense.²⁸ Both committing the violation with a minor and attempting with either a minor or adult results in the same punishment for the defendant.²⁹

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.³⁰ However, some federal regulations regarding sexualized commercial activity still exist, including the TVPA—which was reauthorized as the Trafficking Victims Prevention and Protection Reauthorization Act of 2022³¹—and the Trafficking Victims Protection Act of 2017, passed to give the government more tools to combat trafficking.³²

The TVPA 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.”³³ 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.³⁴ 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 that is commensurate with particular forms of human trafficking.³⁵

The TVPA has been criticized for conditioning federal assistance for survivors of human sex trafficking upon their willingness to cooperate with the prosecution.³⁶ The TVPA has also been criticized for limiting federal assistance only to survivors of “severe forms of trafficking,” which requires domestic survivors to show “force, fraud, or coercion.”³⁷ In contrast, international survivors are not required to show that their trafficking was “severe” in order to receive help.³⁸

28. *Id.*

29. *Id.*

30. *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.”).

31. Trafficking Victims Prevention And Protection Reauthorization Act Of 2022, Pub. L. No. 117–384, 136 Stat 621 (2023).

32. The Trafficking Victims Protection Act of 2017 provided for additional funding and increased government transparency. *Human Trafficking: Key Legislation*, U.S. DEP’T OF JUST., <https://perma.cc/4YUB-7GCQ>.

33. 22 U.S.C.A. § 7101 (West, Westlaw through Pub. L. No. 118–13).

34. 22 U.S.C.A. § 7107 (West, Westlaw through Pub. L. No. 118–13).

35. 22 U.S.C.A. § 7106(a) (West, Westlaw through Pub. L. No. 118–13).

36. Meghan Hillborn, *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).

37. *Id.*

38. *Id.*

In 2018, the Department of Homeland Security officially authorized The Blue Campaign.³⁹ 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.⁴⁰ 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.⁴¹

The Mann Act—also known as the White-Slave Traffic Act⁴²—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.”⁴³ 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.⁴⁴ 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.⁴⁵ The Mann Act has also been used to prosecute individuals who have induced the voluntary travel of minors to jurisdictions where the individual mistakenly believed the minor could legally consent to the encounter.⁴⁶

Federal law prohibits the transportation of minors for illegal sexual activity.⁴⁷ 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.”⁴⁸ Ignorance of the minor’s age is not a valid defense.⁴⁹

39. 165 AM. JUR. *Trials* 313 § 5 (originally published in 2020); see also *Blue Campaign*, U.S. DEP’T OF HOMELAND SEC., <https://perma.cc/69CW-VCCC>.

40. *Blue Campaign*, *supra* note 39; see also 34 U.S.C.A. § 20711 (West, Westlaw through Pub. L. No. 118–13).

41. *Blue Campaign Evaluation*, HARV. T.H. CHAN SCH. OF PUB. HEALTH, <https://perma.cc/R72H-3K2F>.

42. 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. . . . While white women were viewed as victims of prostitution, rather than willing participants[,] . . . black women were deemed criminals, even if they were not actually prostitutes.” *Id.* (internal quotations omitted) (citing Jo Doezenia, *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, 25, 30 (2000)).

43. 18 U.S.C.A. § 2421 (West, Westlaw through Pub. L. No. 118–13).

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

45. *United States v. Pelton*, 578 F.2d 701, 712 (8th Cir. 1978) (holding the Mann Act criminalizes any interstate transportation for the purposes of prostitution, regardless of consent or legality in the destination state).

46. *Goodwin v. United States*, 869 F.3d 636, 639–40 (8th Cir. 2017) (holding defendant violated the Mann Act by inducing a seventeen-year-old to travel to Texas for sex, where the age of consent was seventeen, because inducing sexual activity from a minor under eighteen violated a different Texas statute).

47. 18 U.S.C.A. § 2423 (West, Westlaw through Pub. L. No. 118–13).

48. *Id.*

49. *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.”).

The government need not prove that a minor was actually placed at risk to sustain a conviction; only a showing of intent is necessary.⁵⁰ It is not necessary to prove that illegal sexual activity was the only purpose for the interstate transportation, but it must have been a significant or motivating purpose for the trip.⁵¹

Federal law prohibits the transport of any immigrant into the United States for the purpose of prostitution.⁵² Additionally, 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.⁵³ 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.⁵⁴ The PROTECT Act, which does not require the government to prove intent,⁵⁵ provides that the maximum sentence for sex tourism—the practice of traveling to foreign locations for the purpose of engaging in illicit sexual activities, often with minors, outside the ambit of U.S. law—is thirty years.⁵⁶ The Act also criminalizes the activities of sex tourism operators.⁵⁷ Challenges to the PROTECT Act under the Due Process Clause⁵⁸ and the Commerce Clause⁵⁹ have been unsuccessful.

50. *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).

51. *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.”).

52. 8 U.S.C.A. § 1328 (West, Westlaw through Pub. L. No. 118–13).

53. “‘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; (2) any commercial sex act as defined in [18 U.S.C.A. § 1591] with a person under [eighteen] years of age; or (3) production of child sexual abuse materials as defined in [18 U.S.C.A. § 2256(8)].” 18 U.S.C.A. § 2423(c), (f) (West, Westlaw through Pub. L. No. 118–13) (internal parentheses omitted).

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

55. *See* 18 U.S.C.A. § 2423(c) (West, Westlaw through Pub. L. No. 118–13); *see also* H.R. REP. NO. 108–66, at 686 (2003) (Conf. Rep.) (“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.”).

56. 18 U.S.C.A. § 2423(b)–(c) (West, Westlaw through Pub. L. No. 118–13). The PROTECT Act amendment to 18 U.S.C.A. § 2423 increased the maximum imprisonment for traveling or conspiring to travel for the purpose of illicit sexual conduct from fifteen to thirty years. Prosecutorial Remedies and Tools against the Exploitation of Children Today Act of 2003, Pub. L. No. 108–21, § 103, 117 Stat. 650, (2003).

57. 18 U.S.C.A. § 2423(d) (West, Westlaw through Pub. L. No. 118–13).

58. *United States v. Clark*, 315 F. Supp. 2d 1127, 1132–33 (W.D. Wash. 2004) (rejecting a due process challenge to extraterritorial application of the PROTECT Act where a crime was committed against a foreign national by a U.S. citizen or resident alien, thus creating the sufficient nexus required by the Due Process Clause of the Fifth Amendment).

59. *Id.* at 1135–36.

The TVPA 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.”⁶⁰ As a result, non-governmental organizations, including sex workers’ rights organizations, are barred from receiving federal anti-trafficking funding unless they explicitly state in grant applications that they will not promote prostitution.⁶¹ The Supreme Court has found that similar anti-prostitution statements in the grants for HIV/AIDS funding violated the First Amendment.⁶² Moreover, many sex workers’ rights advocates have noted that anti-trafficking work and the pursuit of rights for sex workers—who, in contrast with survivors of human trafficking, engage in their labor willingly—are actually “mutually reinforcing and equally crucial to empowering people in the sex trade.”⁶³

II. NON-CONSENSUAL PORNOGRAPHY

“Non-consensual pornography,”⁶⁴ often called “revenge porn,” refers to “the distribution of sexually graphic [photographs or videos] of individuals without

60. 22 U.S.C.A. § 7110(g)(1)–(2) (West, Westlaw through Pub. L. No. 118–13).

61. *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>.

62. *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).

63. ANNA-LOUISE CRAGO, OPEN SOC’Y INST., OUR LIVES MATTER: SEX WORKERS UNITE FOR HEALTH AND RIGHTS 58 (2008), <https://perma.cc/LM27-DU2H>; *see also* “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 violence, sexual assault, slavery and trafficking in persons. . . . [W]hen 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.” SEX WORKERS OUTREACH PROJECT-USA, <https://perma.cc/664G-9CJZ>. Anti-trafficking programs that fail to consider the perspective of legal sex workers may “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 [sex workers] underground and away from essential services and mutual support.” *Sex Workers’ Rights*, RED UMBRELLA FUND, <https://perma.cc/CY44-KHJN>. For examples of programs aimed at mutually reinforcing the rights of sex workers and combating human trafficking, *see, e.g.*, DECRIMINALIZE SEX WORK, <https://perma.cc/32LS-J9SC> (explaining that Decriminalize Sex Work is an organization that “works to improve policies related to all forms of sex work and to end the prohibition of consensual adult prostitution in the United States[, which e]vidence shows . . . will help end human trafficking, improve public health, and promote community safety”); ANNA-LOUISE CRAGO, OPEN SOC’Y INST., OUR LIVES MATTER: SEX WORKERS UNITE FOR HEALTH AND RIGHTS 58 (2008) (explaining that “the [New York City Sex Workers Project]’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.”).

64. Many victim advocates prefer the term “non-consensual pornography” over “revenge porn” because, although sometimes revenge is the motivating factor behind distribution, not all non-consensual 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>.

their consent.”⁶⁵ For purposes of this Article, “non-consensual pornography” does not refer to child sexual abuse material, but only to sexually explicit or nude media depictions of adults that have been distributed without the parties’ 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.”⁶⁶ The same study found that non-consensual pornography was a highly gendered phenomenon, with women being nearly twice as likely as men to be threatened with the conduct.⁶⁷

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

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,”⁶⁸ and, as of 2022, there is a federal law regulating the distribution of non-consensual pornography, otherwise known as “revenge porn.”⁶⁹ Section 1309 of the Violence Against Women Act Reauthorization Act of 2022, which was passed as part of the Consolidated Appropriations Act, 2022, created a new private right of action for victims of non-consensual pornography.⁷⁰ Prior to this Act, regulation of distribution was left entirely to the states, which differed in regard to the degree of criminalization. As of 2023, forty-eight states and the District of Columbia have laws prohibiting the production and distribution of non-consensual pornography, with only Massachusetts and South Carolina lacking state-level protections.⁷¹

B. CRIMES RELATED TO NON-CONSENSUAL PORNOGRAPHY

While there is no criminal offense for non-consensual pornography on the federal level, many states do regulate non-consensual pornography criminally. Of the

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

66. 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 (2017), available at <https://perma.cc/Y3N4-TU2J>).

67. *Id.*

68. 18 U.S.C.A. § 1801 (West, Westlaw through P.L. 118–13).

69. Consolidated Appropriations Act, 2022, 117 P.L. 103, 136 Stat. 930 § 1309 (2022).

70. *Id.*

71. Nonconsensual pornography (revenge porn) laws in the United States, BALLOTOPEDIA, <https://perma.cc/KLJ7-PMQG>.

states that 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 victims 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 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' non-consensual pornography 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 victim

72. *Id.*

73. *Id.*

74. N.Y. PENAL LAW § 245.15 (McKinney through L.2023, chapters 1 to 502).

75. VT. STAT. ANN. tit. 13, § 2606 (West, Westlaw through Chs. 81 (end) and M-16 (end) of the Reg. Sess. of the 2022–2023 Vt. Gen. Assemb. (2023)).

76. *How do revenge porn laws work in the US?*, McALLISTER OLIVARIUS, <https://perma.cc/N6AF-A5MW>.

77. 720 ILL. COMP. STAT. ANN. 5/11-23.5 (West, Westlaw through P.A. 103-502 of the 2023 Reg. Sess.).

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 819–20, as supplemented (June 7, 2019).

is evidence that there was no reasonable expectation of privacy, and have dismissed criminal charges on those grounds.⁸³ Other courts have upheld their non-consensual pornography 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

Notably, Section 1309 of the Violence Against Women Act Reauthorization Act of 2022 allows a private right of action for victims of non-consensual pornography to bring a federal lawsuit against the person who disclosed their image.⁸⁵ To prevail in the suit, a plaintiff must prove “that the defendant made the disclosure *knowing* that the plaintiff had not consented to the disclosure or with *reckless disregard* as to whether the plaintiff had consented to the disclosure.”⁸⁶ Under this Act, a court may award a prevailing plaintiff monetary damages and enjoin the defendant from further disclosing the image.⁸⁷

Prior to this new federal development, 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 have advocated for copyright law to be used to protect victims.⁸⁸ 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 victims of non-consensual pornography because it broadly protects the websites that traffic non-consensual pornography from liability; however, it does not extend immunity to violations of copyright laws.⁸⁹ Scholars have argued that copyright law makes for a particularly ideal solution because victims’ 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 non-consensual pornography liability into existing tort schemes or create new criminal liability.”⁹⁰

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 459–60.

85. Victoria L. Killion, Cong. Rsch. Serv., LSB10723, Federal Civil Action for Disclosure of Intimate Images: Free Speech Considerations (2022).

86. *Id.*

87. *Id.*

88. *See, e.g., Levendowski, supra* note 78, at 425–26 (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.”).

89. *Id.* at 427–28.

90. *Id.* at 439.

Copyright law could be used to protect non-consensual pornography victims because, “by definition, revenge porn victims did not authorize the reproduction or display of their copyrighted images.”⁹¹ Victims 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.⁹²

The ramifications of non-consensual pornography extend beyond psychological harms, although such harms are not to be minimized.⁹³ Victims have not only reported terminations of employment, expulsions from school, threats of sexual assault, and solicitations of sex by strangers as a result of their newly perceived promiscuity, but general harassment and stalking as well.⁹⁴ Copyright law is one of the creative civil remedies feminist advocates are pursuing due to the lack of federal regulation of non-consensual pornography and the inability of state criminal codes to provide the remedy victims typically care about most: removal of the images from online platforms.

91. *Id.* at 441.

92. *Id.* at 444–45.

93. 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, 1964 (2019) (noting psychological harms including anger, guilt, paranoia, depression, isolation, low self-esteem, feelings of worthlessness, and suicide).

94. *Id.* at 1963.