

## HUMAN TRAFFICKING AND PORNOGRAPHY: USING THE TRAFFICKING VICTIMS PROTECTION ACT TO PROSECUTE TRAFFICKING FOR THE PRODUCTION OF INTERNET PORNOGRAPHY

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**ABSTRACT**—The Trafficking Victims Protection Act of 2000 (TVPA) was passed to “combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims.”<sup>1</sup> Since the passing of the Act, federal courts have construed the statute broadly to achieve this stated purpose. One way in which the TVPA has been underutilized, however, is in prosecuting pornography cases. Pornography enjoys wide latitude under the law, protected by a vast net of First Amendment protections. While these protections may preserve freedom of speech, they do nothing to protect adult victims who are trafficked to produce online pornographic media. To provide relief for these victims and better fight all types of domestic trafficking, prosecutors should use the sex trafficking provision of the TVPA, 18 U.S.C. § 1591, to prosecute sex trafficking within the pornography industry. The pattern of victimization, other national and international human trafficking directives, plain language of the TVPA, prior cases, and broader policy goals all support the argument that the TVPA can and should be used to address the problem of trafficking adult victims for the production of porn.

### INTRODUCTION

The law has traditionally treated pornography as a question of private virtue by focusing on balancing First Amendment interests with morals regulation.<sup>2</sup> Many observers (and users) of pornography regard it as the harmless viewing of sexual acts between two consenting adults.<sup>3</sup> As a result

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<sup>1</sup> 22 U.S.C. § 7101(a) (2012) [<https://perma.cc/3PB8-4TFT>].

<sup>2</sup> See generally Amy Adler, *All Porn All the Time*, 31 N.Y.U. REV. L. & SOC. CHANGE 695 (2007) (discussing the rise and fall of obscenity law, the Supreme Court’s protection of free speech in pornography, and Congress’s focus on regulating child pornography over other types of pornography) [<https://perma.cc/W9PW-TNHK>].

<sup>3</sup> See generally Martin S. Weinberg et al., *Pornography, Normalization, and Empowerment*, 39 ARCHIVES SEX BEHAV. 1389, 1398–99 (2010) (discussing the increasingly widespread use of

of these legal and social dynamics, the porn industry enjoys minimal regulation that does little to address harmful behaviors within the industry.<sup>4</sup> When the harm involved in the production of pornography remains unknown, the assumption is that its production is a commercial venture based on free choice.<sup>5</sup> But the unfortunate reality of pornography production is that, often, the production of pornography is neither harmless nor consensual.<sup>6</sup> Rather, pornography plays a unique role in fueling the human trafficking industry by both contributing to the demand for more traditional forms of sex trafficking and creating another route to profit for traffickers who enslave victims for the production of pornographic media.<sup>7</sup>

Evidence shows that pornography increases demand for sex trafficking.<sup>8</sup> Certain types of internet pornography provide readily available sources of violent and exploitative imagery.<sup>9</sup> This imagery normalizes these acts in the minds of some users.<sup>10</sup> Additionally, those who heavily use such pornography may gradually become habituated to it, and seek to recreate those sexual acts themselves with trafficked persons to gain further satisfaction.<sup>11</sup> Pornography can also serve as advertising for trafficking by

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pornography and the way pornography shapes its users' sexual lives); Wendy McElroy, *A Feminist Defense of Pornography*, 17 FREE INQUIRY MAG., Fall 1997, at 14 (discussing pro-feminist arguments in support of posing for pornography, calling pornography acting as an “uncoerced choice that can be enriching”) [<https://perma.cc/JX6V-UW6E>].

<sup>4</sup> See generally Adler, *supra* note 2, at 695–96 (describing the prevalence and acceptance of pornography in modern society). This Essay focuses solely on the trafficking of adult victims for the production of pornography. Child pornography, and the trafficking of children for its production, is already heavily prosecuted under other state and federal statutes. *Id.* at 689–70.

<sup>5</sup> Rachel N. Busick, Note, *Blurred Lines or Bright Line? Addressing the Demand for Sex Trafficking Under California Law*, 42 PEPP. L. REV. 333, 338 (2015) [<https://perma.cc/88TT-SUF6>].

<sup>6</sup> *Id.* at 338–39, 347.

<sup>7</sup> *Id.* at 342, 347.

<sup>8</sup> *Id.* at 347–48.

<sup>9</sup> HOT GIRLS WANTED (Netflix 2015) (“In 2014, abuse porn websites averaged over 60 million combined hits per month . . . . Recent research shows that nearly 40% of online pornography depicts violence against women.”).

<sup>10</sup> See Mike Allen, Dave D’Alessio & Keri Brezgel, *A Meta-Analysis Summarizing the Effects of Pornography II: Aggression After Exposure*, 22 HUM. COMM. RES. 258, 258 (1995) (finding that consumption of material depicting violent sexual activity generates more aggression than those depicting nonviolent sexual activity); Mike Allen, Tara Emmers, Lisa Gebhardt & Mary A. Giery, *Exposure to Pornography and Acceptance of Rape Myths*, 45 J. COMM. 5, 18–22 (1995) (presenting experimental studies that show a positive correlation between consumption of violent pornography and acceptance of the rape myth (that victims are responsible for their rapes)).

<sup>11</sup> VICTOR MALAREK, THE JOHNS: SEX FOR SALE AND THE MEN WHO BUY IT 194–96 (2009) (discussing several interviews with prostitution customers who reported extensive pornography use prior to engaging in prostitution); JAN MACLEOD, MELISSA FARLEY, LYNN ANDERSON & JACQUELINE GOLDING, WOMEN’S SUPPORT PROJECT, CHALLENGING MEN’S DEMAND FOR PROSTITUTION IN SCOTLAND 16 (2008) (finding a statistically significant association between prostitute customers’ pornography use and “their use of women in prostitution”) [<https://perma.cc/AC33-28YB>]; Martin A. Monto, Focusing on the Clients of Street Prostitutes: A Creative Approach to Reducing Violence Against Women—Summary Report 4 (Oct. 30, 1999) (unpublished report) (finding that clients arrested for patronizing a prostitute “were about twice as likely to report having watched pornographic movies over the past year than the national sample”) [<https://perma.cc/6RXS-PDHY>]. Although not all persons engaging in prostitution are trafficking victims, an increase in the demand for any type of prostitution will, in turn, increase the demand for trafficked persons. BUREAU OF PUB. AFFAIRS, U.S. DEP’T OF STATE, THE LINK BETWEEN PROSTITUTION AND SEX TRAFFICKING (2004) [[138](https://perma.cc/5VM4-</a></p>
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pimps who post images of victims on websites like Backpage to promote their “products.”<sup>12</sup>

Beyond its effect on demand, the very production of pornography often relies on trafficked victims.<sup>13</sup> Through the use of force, fraud, or coercion, a major element in proving trafficking cases, pornography producers create pornographic materials of trafficked adults.<sup>14</sup> Some of this porn is created for private consumption, but much is produced for commercial distribution.<sup>15</sup> This means that porn that is bought and sold online legally may have been created illegally using trafficked persons. This problem becomes more worrying when one considers how, as technology develops, platforms like interactive pornography and virtual prostitution have blurred the lines between pornography and traditional street prostitution, creating additional unregulated areas that may contribute to trafficking.<sup>16</sup>

Because there is little regulation of the online pornography industry, much of the victimization of “actors” who are actually trafficked persons (predominantly women) goes overlooked.<sup>17</sup> Obscenity laws, the traditional legal approach to the problem, focus more on the regulation of morality than on the injuries inflicted on real people who are trafficked to make the

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<sup>12</sup> See MALAREK, *supra* note 11, at 196; see also Alastair Jamieson & Tracy Connor, *Backpage Pulls Adult Ads, Blames ‘Censorship’ After Report on Sex Trafficking, Prostitution*, NBC NEWS (Jan. 10, 2017, 5:33 AM), <http://www.nbcnews.com/news/us-news/backpage-pulls-adult-ads-blames-censorship-after-report-sex-trafficking-n705056> (discussing the use of Backpage for sex trafficking and prostitution advertisement) [<https://perma.cc/Y34Q-YUFS>].

<sup>13</sup> Donna M. Hughes, *The Demand for Victims of Sex Trafficking* 26 (June 2005) (unpublished report) (describing reports of trafficked women across the world being forced to make pornography).

<sup>14</sup> More research needs to be conducted to establish the number of adults who may have experienced force, fraud, or coercion in the production of porn. Establishing the percentage of pornography that has been created through the exploitation of trafficking victims is made challenging for data collectors by the difficulty of distinguishing between pornographic images of sex workers used as advertisement, videos of victims engaged in prostitution, live internet sex shows streamed using home webcams, and, more generally, of distinguishing between voluntary and coerced participation in such videos. Until further research is conducted, the presence of force, fraud, and coercion in pornography production can be established by the numerous firsthand accounts from victims that are available. See Hughes, *supra* note 13, at 26; *infra* notes 50, 51, and 55 and accompanying text; see also *Shocking Footage of Women Abused on the Porn Set (a California Workplace)*, LIVELEAK (Dec. 12, 2011), [http://www.liveleak.com/view?i=7df\\_1323733520&comments=1](http://www.liveleak.com/view?i=7df_1323733520&comments=1). There is also some debate about the accuracy of the reported number of victims in other forms of sex trafficking, such as prostitution. See Ronald Weitzer, *Sex Trafficking and the Sex Industry: The Need for Evidence Based Theory and Legislation*, 101 J. CRIM. L. & CRIMINOLOGY 1337, 1347–55 (2011) (discussing the large disparity between domestic and international reported numbers of sex trafficking victims) [<https://perma.cc/FST8-P8P3>]. However, regardless of the accuracy of numbers, sex trafficking cases do exist and are prosecuted by the Department of Justice under the TVPA. See *Human Trafficking Prosecution Unit (HTPU)*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/crt/human-trafficking-prosecution-unit-htpu> (last visited Mar. 2, 2017).

<sup>15</sup> Hughes, *supra* note 13, at 26.

<sup>16</sup> LINDA SMITH & CINDY COLOMA, *RENTING LACY: A STORY OF AMERICA’S PROSTITUTED CHILDREN* 55–57 (2013); see also David Cardiff, *Virtual Prostitution: New Technologies and the World’s Oldest Profession*, 18 HASTINGS COMM. & ENT L.J. 869, 870–73 (1996) (discussing new technologies used in pornography, including video on demand and interactive pornography).

<sup>17</sup> Catharine A. MacKinnon, *Pornography as Trafficking*, 26 MICH. J. INT’L L. 993, 993 (2005) [<https://perma.cc/647D-FFQD>].

material.<sup>18</sup> To truly address the pervasiveness of trafficking in the adult porn industry, it must be treated as akin to other forms of sex and labor trafficking. The federal trafficking law is currently being used in new ways to battle the widespread problem of domestic human trafficking.<sup>19</sup> Prosecutors should use the latitude given to them under the Act to prosecute trafficking that occurs for the purpose of creating internet pornography. Using the TVPA in this way will locate pornography created with trafficked persons in its proper place with other sex trafficking crimes and will provide comprehensive services to victims that are not currently available. The TVPA is the proper legal avenue for addressing trafficking in pornography for five reasons: (1) when it comes to the experience of victims, pornography is indistinguishable from other forms of sex trafficking; (2) battling trafficking within pornography is part of the larger battle against human trafficking, as recognized by other national and international laws; (3) the plain language of the TVPA indicates that it can be used to prosecute trafficking crimes in the porn industry; (4) there is precedent in case law for using the TVPA to prosecute trafficking crimes in the porn industry; and (5) doing so will accomplish the broader policy goals of the TVPA.

#### I. FOR VICTIMS, PORNOGRAPHY IS SEX TRAFFICKING

When it comes to the experiences of those who are trafficked for its production, pornography is indistinguishable from prostitution, but false distinctions, based on who is paying for the sex acts, have been used to create artificial legal lines between prostitution and pornography.<sup>20</sup> In porn, the argument goes, the buyer is not having sex with the trafficked person; (s)he is merely paying for the privilege of viewing a reproduced image of that person engaging in sexual acts.<sup>21</sup> This argument seems to treat the camera as a sort of filter—without the camera the person engaging in sexual acts is a trafficking victim, but with it the porn “actor” becomes a consenting adult. While legal commercial adult pornography certainly does exist, when trafficked persons are used in the creation of pornography it is neither consensual nor legal.<sup>22</sup> The camera does not change the nature of what makes sex trafficking a crime. Catharine MacKinnon recognized this, stating, “just as throwing money at victims of sexual abuse does not make it a job, taking pictures of it does not make it freely chosen or desired.”<sup>23</sup> Rather than a filter, the pornographic media is merely a go-between, and those who produce it are the traffickers.<sup>24</sup> Sex from one person is still

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<sup>18</sup> *Id.*

<sup>19</sup> Anders Walker, *Strange Traffic: Sex, Slavery, and the Freedom Principle*, 46 CONN. L. REV. 561, 561 (2013).

<sup>20</sup> MacKinnon, *supra* note 17, at 996–97.

<sup>21</sup> *Id.*

<sup>22</sup> Busick, *supra* note 5, at 339.

<sup>23</sup> MacKinnon, *supra* note 17, at 996.

<sup>24</sup> U.N. Secretary-General, *Victims of Crime: The Situation of Women as Victims of Crime*, ¶ 51, U.N. Doc. A/CONF.121/16 (May 17, 1985) (“[I]t is hard to make distinctions (if any should be made) between prostitution and other sexual services, including those of the pornographic media.”)

exchanged for money from another.<sup>25</sup> Additionally, like victims of other forms of sex trafficking, porn “actors” are controlled by pimps for the sexual use of buyers, leading to the same type of victimization experienced by those trafficked into prostitution.<sup>26</sup>

Pimps control trafficked persons used to produce pornography just like they control those trafficked for prostitution. As Dr. Melissa Farley has noted, “[p]ornographers are indistinguishable from other pimps. Both exploit women and girls’ economic and psychological vulnerabilities and coerce them to get into and stay in the industry.”<sup>27</sup> Additionally, although some legitimate corporations do produce pornographic materials, much of the porn that is available online is produced by illicit operations.<sup>28</sup> This amateur porn is filmed largely outside of the traditional porn industry and has little regulation or oversight.<sup>29</sup> Unlike the traditional porn industry, online, amateur porn is not created on established sets, using contracted actresses filmed by professional producers.<sup>30</sup> Instead, it can be created and uploaded by anyone with a video camera.<sup>31</sup> This gives independent film makers enormous discretion in how they recruit and treat their performers. The amateur porn medium creates an environment that is ripe for abuse by traffickers. Traffickers can use violent or nonviolent means to coerce victims into producing pornography that, to the viewer, appears consensual. In this way, just as they would in the case of prostitution, traffickers pimp the victims, by “producing sexual pleasure for the consumers” that, in turn, creates “immense profits for the pornographers.”<sup>32</sup>

For persons trafficked into pornography, the pimping culture and sexual nature of pornography create an experience of victimization that is similar or identical to that experienced by persons trafficked into prostitution.<sup>33</sup> From the viewpoint of the person depicted in the

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[<https://perma.cc/CGY4-FVAA>]; see also MacKinnon, *supra* note 17, at 997.

<sup>25</sup> MacKinnon, *supra* note 17, at 996.

<sup>26</sup> See Melissa Farley, “Renting an Organ for Ten Minutes:” *What Tricks Tell Us About Prostitution, Pornography, and Trafficking*, in *PORNOGRAPHY: DRIVING THE DEMAND FOR INTERNATIONAL SEX TRAFFICKING 4* (2007) (“Women in prostitution whose tricks or pimps made pornography of them in prostitution had significantly more severe symptoms of PTSD than did women who did not have pornography . . . made of them.”) [<https://perma.cc/7NK4-NUC6>].

<sup>27</sup> Melissa Farley, *Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly*, 18 *YALE J.L. & FEMINISM* 109, 126–27 (2006) [<https://perma.cc/MH4Y-WAZC>].

<sup>28</sup> See U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S COMMISSION ON PORNOGRAPHY: FINAL REPORT 284–85 (1986) (“[T]he production of pornographic materials is a practice and a business that remains substantially ‘underground.’”); Katrina Forrester, *Making Sense of Modern Pornography*, *NEW YORKER* (Sept. 26, 2016), <http://www.newyorker.com/magazine/2016/09/26/making-sense-of-modern-pornography> (describing that most modern pornography online is “amateur and unregulated”) [<https://perma.cc/7RT8-WTGL>]; *HOT GIRLS WANTED*, *supra* note 9 (profiling the growing amateur porn industry).

<sup>29</sup> See *supra* note 28 and accompanying text.

<sup>30</sup> See Forrester, *supra* note 28 (describing the recent decline of large pornography studio shoots in favor of “low production” films).

<sup>31</sup> *HOT GIRLS WANTED*, *supra* note 9.

<sup>32</sup> MacKinnon, *supra* note 17, at 994.

<sup>33</sup> See *id.* at 997; *HOT GIRLS WANTED*, *supra* note 9 (discussing with former amateur porn stars the ways in which they felt victimized by the industry).

pornographic materials, traffickers have sexually exploited them for profit just as they would if trafficking them for prostitution.<sup>34</sup> Additionally, traffickers often force prostituted victims to make pornography by posting pictures or videos of them online as advertisement or by profiting off of pornographic material created while they engaged in prostitution. In a 2003 survey, 49% of people “currently or recently in prostitution” reported that their traffickers made pornographic material of them while they were engaged in prostitution.<sup>35</sup> The experience of victimization may even be exacerbated by the existence of pornographic images. Victims feel as if they cannot escape their experience because the images and films exist on the internet, where anyone can view them at any time, meaning “each time [an] image is viewed, the victim is re-victimized.”<sup>36</sup> As former porn “actress” Linda Boreman put it, “every time someone watches that film, they are watching me being raped.”<sup>37</sup>

The digital age further confuses the distinction between pornography and prostitution: “False distinctions have been erected between online and offline prostitution, child and adult prostitution, indoor and outdoor prostitution, pornography and prostitution, legal and illegal prostitution, and prostitution and trafficking.”<sup>38</sup> Prostitution advertised online through pictures and videos created and posted by pimps is often “indistinguishable from pornography.”<sup>39</sup> Furthermore, internet media makes it increasingly unclear what is pornography and what is prostitution. Internet sex shows in which women are directed to perform sex acts in real time by johns participating via an internet connection do not clearly fit in either category.<sup>40</sup> Unnecessary lines dividing the sex trafficking industry create prosecutorial challenges in cases that are already difficult due to the “anonymity of the Internet,” pressures not to prosecute certain types of cases, and “blurred jurisdictional boundaries.”<sup>41</sup>

For the reasons above, persons trafficked for the production of pornography experience the same type of victimization as those trafficked for prostitution. As will be discussed below, the best way to address this issue under federal law is to use the TVPA to prosecute traffickers in the porn industry.

## II. THE LANGUAGE OF OTHER HUMAN TRAFFICKING DIRECTIVES ENCOMPASSES PORNOGRAPHY

Using the TVPA to prosecute pornography trafficking cases is in accordance with how other national and international human trafficking

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<sup>34</sup> MacKinnon, *supra* note 17, at 994.

<sup>35</sup> Melissa Farley et al., *Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder*, 2 J. TRAUMA PRAC. 33, 33, 44 (2003).

<sup>36</sup> Hughes, *supra* note 13, at 27.

<sup>37</sup> MacKinnon, *supra* note 17, at 994.

<sup>38</sup> Melissa Farley, Kenneth Franzblau & M. Alexis Kennedy, *Online Prostitution and Trafficking*, 77 ALB. L. REV. 1039–40 (2014) [<https://perma.cc/24GV-X9SJ>].

<sup>39</sup> *Id.* at 1058.

<sup>40</sup> *Id.* at 1057.

<sup>41</sup> *Id.* at 1040.

directives address pornography and trafficking. A press release announcing the presidential directive on the subject released in 2003 by the Bush Administration set forth the operative definition for human trafficking, describing it as “actions, often including use of force, fraud, or coercion, to compel someone into a situation in which he or she will be exploited for sexual purposes, which could include prostitution or *pornography*.”<sup>42</sup> In this press release, the Bush Administration plainly intended to include pornography when introducing their plan to combat human trafficking and the direction they intend take on the subject. Although President Obama did release an executive order designed to combat human trafficking, it did not address this definition.<sup>43</sup> The 2003 definition from the press release, therefore, remains operative.

The 2000 Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, was adopted by the United Nations to coordinate the domestic efforts of nations to better battle international human trafficking and to protect the rights of victims.<sup>44</sup> The first global legal instrument with an agreed upon definition, it defined “[t]rafficking in persons” as:

[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include . . . the exploitation of the prostitution of others or other forms of sexual exploitation.<sup>45</sup>

MacKinnon has argued that this definition “clearly cover[s]” pornography as part of sex trafficking.<sup>46</sup> As she has explained, women are “recruited, transported, provided, and obtained for sex acts” to produce pornography.<sup>47</sup> For these sex acts, money is given to “pornography pimps.”<sup>48</sup> MacKinnon has argued that each time the videos or images are bought or sold, the women depicted in it are “transported and provided for sex.”<sup>49</sup> Because the pornography traffickers are “intrinsicly” taking these actions to exploit the prostitution of others, pornography is “trafficking in persons” under the definition set forth in the Protocol.<sup>50</sup>

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<sup>42</sup> Press Release, The White House, Office of the Press Sec’y, Trafficking in Persons National Security Presidential Directive (Feb. 25, 2003) (emphasis added) [<https://perma.cc/CT55-998H>].

<sup>43</sup> President Obama has released one executive order on the subject of human trafficking which concerned strengthening protections against trafficking in persons in federal contracts. See Exec. Order No. 13,627, 77 Fed. Reg. 60029 (Sept. 25, 2012).

<sup>44</sup> G.A. Res. 55/25, U.N. Convention Against Transnational Organized Crime and the Protocols Thereto (Jan. 8, 2001) [<https://perma.cc/ES32-VUVD>].

<sup>45</sup> G.A. Res. 55/25, annex II, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Jan. 8, 2001).

<sup>46</sup> MacKinnon, *supra* note 17, at 1004.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

The beginning of the Palermo Protocol definition also looks very similar to the definition of sex trafficking set forth by the TVPA. The TVPA defines “sex trafficking” as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.”<sup>51</sup> The TVPA’s definition of sex trafficking differs from that of the Palermo Protocol in its departure from the term “sexual exploitation” and its focus on the trafficker’s purpose to force victims to engage in a “commercial sex act.” However, since the United States has signed and ratified the Palermo Protocol and because former President Bush’s pronouncement remains operative, these definitions can and should be used to interpret the TVPA definition.<sup>52</sup>

### III. BASED ON THE PLAIN LANGUAGE OF THE STATUTE, PORNOGRAPHY IS PROSECUTABLE AS SEX TRAFFICKING UNDER THE TVPA

Sex trafficking is governed under the TVPA by 18 U.S.C. § 1591, “Sex trafficking of children or by force, fraud, or coercion.”<sup>53</sup> In applicable part it states:

(a) Whoever knowingly—

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, or maintains by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),

knowing, or . . . in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act . . . shall be punished . . .<sup>54</sup>

Under the statute, there are three elements that must be met to prosecute a case for sex trafficking of a legal adult. First, force, fraud, or coercion must have been used in the commission of the trafficking act. Second, the trafficked person must have engaged in a commercial sex act. Third, the trafficking act must have in some way affected interstate or foreign commerce. The trafficking of persons to produce pornography is prosecutable under 18 U.S.C. § 1591 because these crimes satisfy all three elements.

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<sup>51</sup> 22 U.S.C. § 7102(9) (2012).

<sup>52</sup> The United States signed the Palermo Protocol on December 13, 2000 and ratified it on November 3, 2005. *Status of Treaties: Chapter XVIII 12.a.*, U.N. TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-a&chapter=18&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=_en) (last visited Mar. 2, 2017) [<https://perma.cc/3HSB-5RXG>].

<sup>53</sup> 18 U.S.C. § 1591 (2012).

<sup>54</sup> *Id.*



*A. Force, Fraud and Coercion are Used to Produce Pornography*

Force, fraud, and coercion are used to conscript people to produce pornographic material. While empirical data is scarce in this under-researched area, one study found that approximately one third of the victims of prostitution at a recovery house had been used in the production of pornography.<sup>55</sup> Additionally, the Freedom Youth Foundation reports that thousands of trafficked young adults are forced to make pornographic films.<sup>56</sup> First-hand accounts from survivors of the porn industry also abound.<sup>57</sup> Together, they illustrate a robust culture of force, fraud, and coercion within the porn industry.

More research is needed to determine just how many women are trafficked into pornography every year. This is a difficult undertaking because of the blurred line between pornography and other forms of sex trafficking.<sup>58</sup> Many victims are involved in multiple types of sex trafficking, including pornography. While more research would be helpful, the available stories from survivors give accounts of abuse very similar to those of trafficking victims.

“C.P.” and “Samantha” are two such survivors.<sup>59</sup>

C.P. was one of five victims who testified at a sentencing hearing for two defendants charged with sex trafficking.<sup>60</sup> The defendants had invited her to South Florida for a modeling audition.<sup>61</sup> Once she arrived she was instructed to perform an audition for a fabricated alcoholic beverage commercial.<sup>62</sup> As part of the audition, one of the defendants provided her with an alcoholic beverage laced with a common date rape drug.<sup>63</sup> When the drugs had taken effect, she was taken to another location where one

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<sup>55</sup> Hughes, *supra* note 13, at 26. In interviews with 854 people in prostitution in nine countries, 49% reported said pornography was made of them while they were in prostitution. Farley, *supra* note 35, at 44. While this statistic does not solely represent trafficking victims (since, of course, not all women engaged in prostitution are trafficked), it illustrates the integration of pornography and prostitution. This integration can then be inferred to also exist for trafficked women.

<sup>56</sup> Human Trafficking, FREEDOM YOUTH PROJECT, <http://www.freedomyouthproject.org/p/human-trafficking-facts.html> (last visited Mar. 2, 2017) [<https://perma.cc/UF67-AN49>].

<sup>57</sup> See, e.g., Christy Krumm, *Trafficking Survivor: “I Was Drugged and Forced to Do Porn,”* YOUR TANGO (Nov. 16, 2015), <http://www.yourtango.com/2012129825/i-was-drugged-and-forced-do-porn-surviving-the-sex-trade> (discussing the story of a young woman who was drugged at a job interview and trafficked) [<https://perma.cc/7W7W-K65B>]; Press Release, U.S. Att’y’s Office for the S.D. of Fla., Two Men Sentenced to Multiple Life Sentences for Enticing Women to South Florida to Engage in Commercial Sex Acts and Distributing Date Rape Pills (Feb. 17, 2012) [hereinafter South Florida Case] (detailing the repeated drugging, rape, and filming of victims in Florida) [<https://perma.cc/VNV8-D7K8>]; *Men Sentenced for Rape and Animal Porn Horror*, EXPATICA (Jan. 27, 2005), [http://www.expatica.com/be/news/Men-sentenced-for-rape-and-animal-porn-horror\\_125985.html](http://www.expatica.com/be/news/Men-sentenced-for-rape-and-animal-porn-horror_125985.html) (providing an account of four people found guilty of kidnapping three female asylum seekers and filming forced sex acts with men and animals) [<https://perma.cc/8GXX-WNJZ>].

<sup>58</sup> See Hughes, *supra* note 13, at 26.

<sup>59</sup> Not their real names.

<sup>60</sup> South Florida Case, *supra* note 57.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

defendant filmed while the other had sex with her.<sup>64</sup> The defendants then sold the videos of her and the other victims over the internet, pornography stores, and other businesses.<sup>65</sup>

Samantha found herself in the porn industry after attending what she thought was a job interview for a modeling agency in Southern California.<sup>66</sup> During the “interview,” someone slipped drugs into her drink.<sup>67</sup> A group of men then proceeded to beat and sexually assault her.<sup>68</sup> Over the course of the following months, the same group of men forced her to work in the porn industry.<sup>69</sup> They took her identification and threatened to send topless photos of her to her family and friends if she did not cooperate.<sup>70</sup> Samantha, like C.P., was videotaped in dozens of sexual encounters, all forced, which were distributed as pornography.<sup>71</sup>

These types of acts—forced drug use, withholding of identification, threatening to send lewd photos to family and friends—are the same types of force, fraud and coercion seen in other sex trafficking cases. There are “three broad categories of techniques used by . . . traffickers to exploit victims.”<sup>72</sup> The first and most rare method is kidnapping a victim and enslaving her through force or threats.<sup>73</sup> The second method is “using fraud to gain access to a victim and then providing drugs and alcohol to incapacitate them.”<sup>74</sup> The trafficker then “leverages the psychological impact” of the initial sexual assault to force the victim into other sex acts.<sup>75</sup> The third, and most common method used by domestic sex traffickers, is known as “grooming.”<sup>76</sup> This method involves traffickers exploiting the vulnerabilities of their victims, often through a romantic relationship, by convincing them that they are in love.<sup>77</sup> This relationship eventually turns violent as the pimp convinces the victim to engage in commercial sex acts out of “love” and “devotion.”<sup>78</sup> A woman may also originally consent to make pornography, but later state that she no longer wants to continue; if she is then forced to continue by physical or verbal threats, or is “impaired

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Krumm, *supra* note 57.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Stephen C. Parker & Jonathan T. Skrmetti, *Pimps Down: A Prosecutorial Perspective on Domestic Sex Trafficking*, 43 U. MEM. L. REV. 1013, 1018 (2013).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 1018–19, 1025–29.

<sup>78</sup> *Id.* at 1025–29. Additionally, the TVPA makes the withholding of identification to coerce an individual a crime in itself. 18 U.S.C. § 1592(a) (2012) makes it a crime to “knowingly destroy[], conceal[], remove[], confiscate[], or possess[] . . . any . . . actual or purported government identification document or another person” to force them into sex trafficking or restrict a trafficking victim’s “liberty to move or travel.”

by drugs and alcohol, there is likely sufficient force, fraud, or coercion to qualify as sex trafficking” under the TVPA.<sup>79</sup>

The only difference between these cases and prostitution is that the women are forced to perform sexual acts before a camera to create media that is then sold to “johns” rather than being forced to have sex with the johns directly. This difference does not affect the most important factor here—that force, fraud or coercion was used to traffic the person, whether in pornography or in prostitution. Therefore, the creation of pornography using trafficking victims satisfies the first element of 18 U.S.C. § 1591.

### B. *Pornography Is a “Commercial Sex Act”*

To prosecute an offense under the TVPA, the trafficking must also be for the purpose of enabling a “commercial sex act.” The TVPA defines a “commercial sex act” as “any sex act, on account of which anything of value is given to or received by any person.”<sup>80</sup> The most common commercial sex act prosecuted under the TVPA is prostitution.<sup>81</sup> Prostitution may be materially different from pornography for the end user—in prostitution, the john buys a sexual experience with the actual person, whereas the pornography user purchases recorded images of a sex act. The TVPA definition, however, is quite broad and can be used to encompass many types of commercial sexual activity.<sup>82</sup>

Pornography qualifies as a commercial sex act for two reasons. First, real men and women engage in real sexual acts to create pornographic material.<sup>83</sup> Money is exchanged for the performance of these acts, either to the “actors” themselves or to “managers” (who are analogous to pimps in the context of sex trafficking).<sup>84</sup> In this way, pornography production is absolutely a commercial sex act. The only difference is that it is performed before cameras. Second, as MacKinnon has demonstrated, pornography,

<sup>79</sup> Busick, *supra* note 5, at 350.

<sup>80</sup> 18 U.S.C. § 1591(e)(3) (2012).

<sup>81</sup> See Mohamed Y. Mattar, *Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later*, 19 AM. U. J. GENDER SOC. POL’Y & L. 1247, 1263 (2011) (“A commercial sex act typically means an act of prostitution.”); Rebecca L. Wharton, Note, *A New Paradigm for Human Trafficking: Shifting the Focus from Prostitution to Exploitation in the Trafficking Victims Protection Act*, 16 WM. & MARY J. WOMEN & L. 753, 754 (2010) (“Despite its alleged goal of reducing human trafficking as a whole, in reality [the TVPA] continues to concentrate on sex trafficking and anti-prostitution efforts . . .”). See generally Marisa Silenzi Cianciarulo, *What is Choice? Examining Sex Trafficking Legislation Through the Lenses of Rape Law and Prostitution*, 6 U. ST. THOMAS L.J. 54 (2008) (presenting the debate of degrees of consent in the sex trade). The crime of prostitution remains a state crime, but trafficking persons to engage in prostitution is a federal offense under the TVPA. Mattar, *supra* note 81, at 1264.

<sup>82</sup> See *United States v. Marcus*, 487 F. Supp. 2d 289, 306 (E.D.N.Y. 2007), *vacated*, 538 F.3d 97 (2d Cir. 2008), *rev’d*, 560 U.S. 258 (2010), *aff’d in part, vacated in part*, 628 F.3d 36 (2d Cir. 2010) (finding commercial sex acts include pornographic images and video) [<https://perma.cc/N4PZ-EL45>]; *State v. Russell*, No. 08-2034, 2010 WL 786207, at \*3 (Iowa Ct. App. Mar. 10, 2010) (finding commercial sex activity as defined in a state statute includes performance in strip clubs) [<https://perma.cc/SD4G-2PSS>].

<sup>83</sup> MacKinnon, *supra* note 17, at 997.

<sup>84</sup> *Id.*

like prostitution, is the experience of “bought sex.”<sup>85</sup> The purchaser exchanges an item of value (typically, money) in order to obtain from the producer the use of a person.<sup>86</sup> The buyer then uses the people (in this case, their recorded images) to satisfy their own sexual desire.<sup>87</sup> The pornographers, like pimps, receive direct monetary benefit for providing the sexual experience.<sup>88</sup> The exchange of items of value for sexual experience qualifies pornography as a commercial sex act under the TVPA, and therefore meets the second element required for prosecution of trafficking cases.

### C. Pornography Exists in Interstate Commerce

The language of the TVPA recognizes that human trafficking has an aggregate economic impact that “substantially affects interstate and foreign commerce.”<sup>89</sup> One federal appeals court has held that this statutory language itself is sufficient to satisfy the jurisdictional element of interstate commerce.<sup>90</sup> A district court followed the precedent to hold that “case-specific evidence of interstate activity is not required to sustain [a § 1591] Indictment.”<sup>91</sup>

In most other jurisdictions, however, the prosecution must provide evidence showing that the sex trafficking alleged had at least some impact on interstate commerce.<sup>92</sup> This requirement has a relatively low bar.<sup>93</sup> Pornography almost always meets this relatively low bar because, in the digital age, most pornography is purchased and viewed online. From July 2009 to July 2010, approximately 13% of web searches in the United States were for pornographic material.<sup>94</sup> Sixty-nine percent of the “pay-per-view

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<sup>85</sup> *Id.* at 999.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> 22 U.S.C. § 7101(b)(12) (2012). For a discussion on the constitutionality of the TVPA’s interstate commerce element, see generally Mattar, *supra* note 81, at 1277–80.

<sup>90</sup> See *United States v. Evans*, 476 F.3d 1176, 1179 (11th Cir. 2007) (holding purely intrastate conduct could be prosecuted under the TVPA because human trafficking in the aggregate has an effect on interstate commerce) [<https://perma.cc/V6FW-XHLX>]; see also *United States v. Carrasquillo-Penalosa*, No. 12-728(PG), 2013 WL 1490085, at \*3 (D.P.R. Apr. 10, 2013), *aff’d*, 826 F.3d 590 (1st Cir. (2016) (finding defendant’s sex trafficking conduct, when considered in the aggregate of human trafficking violations, had the ability to affect interstate commerce) [<https://perma.cc/N7WC-YK7S>].

<sup>91</sup> *United States v. Williams*, No. 12-60116-CR-RNS, 2012 WL 3242043, at \*4 n.4 (S.D. Fla. Aug. 7, 2012) [<https://perma.cc/6HJH-75GP>].

<sup>92</sup> *Parker & Skrmetti*, *supra* note 72, at 1044.

<sup>93</sup> See *United States v. Todd*, 627 F.3d 329, 333 (9th Cir. 2010) (finding sex trafficking using advertising across state lines affected interstate commerce) [<https://perma.cc/J48R-L86U>]; *Evans*, 476 F.3d at 1179 (holding traffickers using hotels that service interstate travelers affected interstate commerce); *United States v. Pipkins*, 378 F.3d 1281, 1295 (11th Cir. 2004) (finding pimps engaged in sex trafficking providing their prostitutes with condoms manufactured out of state and using pagers and phones affected interstate commerce), *vacated on other grounds*, 544 U.S. 902 (2005); *United States v. Windley*, No. CR-10-660-2-PHX-DGC, 2012 WL 2813859, at \*3 (D. Ariz. 2012) (holding use of cell phones to coordinate activities related to trafficking satisfied the interstate commerce element) [<https://perma.cc/9FUZ-C349>].

<sup>94</sup> Julie Ruvolo, *How Much of the Internet Is Actually for Porn*, FORBES (Sept. 7, 2011, 6:00 AM), <http://www.forbes.com/sites/julieruvolo/2011/09/07/how-much-of-the-internet-is-actually-for-porn/>

Internet content market” is pornography.<sup>95</sup> The pervasiveness of internet pornography means that almost any pornographic image or video posted and exchanged online affects interstate commerce in some way. *United States v. Myers* illustrates how even a single pornographic image posted online can satisfy the interstate commerce element.<sup>96</sup>

In *United States v. Myers*, the government charged two men with sex trafficking of children under § 1591(a)(1) of the TVPA, a provision that also requires the crime affect interstate commerce.<sup>97</sup> The men had advertised two underage girls for prostitution by posting images of them on Craigslist and Backpage.<sup>98</sup> At trial, the government called a customer service manager for Craigslist, who testified its websites stored data on servers in California and Arizona, and that payments made to Craigslist were transferred to company accounts in California.<sup>99</sup> An appeals court affirmed the trial court, finding that this movement of funds through accounts and servers in various states was sufficient to satisfy the interstate commerce element.<sup>100</sup>

Following this precedent, the interstate commerce element is satisfied any time pornographic material is bought or sold online, due to the interstate nature of the internet and credit card purchases. The purchase or advertisement of online pornography, therefore, meets the third and final element required for prosecution of trafficking cases under the TVPA.

#### IV. THE TVPA HAS BEEN USED TO PROSECUTE THE PRODUCTION OF PORNOGRAPHY PREVIOUSLY

Although the TVPA is not yet regularly used to prosecute pornography cases, there is some existing precedent for using the federal law in new ways. For example, in *State v. Russell*, prosecutors used a state statute with language identical to that of the TVPA to charge traffickers for selling the performance of two underage girls in a strip club.<sup>101</sup> The state statute stated that a person was guilty of sex trafficking if they “participat[ed] in a venture to recruit, harbor, transport, supply provisions, or obtain a person” for the purpose of “commercial sexual activity.”<sup>102</sup> At trial, the jury was given a very broad definition for “commercial sexual activity” which included “any sex act on behalf of which anything of value is given, promised to, or received by any person and includes, but is not

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[<https://perma.cc/UXJ7-SP3G>].

<sup>95</sup> Aldo Forgiione, *The Good, the Bad, and the Ugly: The Frontiers of Internet Law*, 9 J. INTERNET L. 1, 9 (2005). See generally *Naked Capitalism*, ECONOMIST (Sept. 26, 2015), <http://www.economist.com/news/international/21666114-internet-blew-porn-industrys-business-model-apart-its-response-holds-lessons> (discussing how the pornography industry has evolved to make money in the digital age) [<https://perma.cc/3PJP-8NLV>].

<sup>96</sup> 430 F. App’x 812, 815–16 (11th Cir. 2011) [<https://perma.cc/BX9S-YDSD>].

<sup>97</sup> *Id.* at 813.

<sup>98</sup> *Id.* at 814, 816.

<sup>99</sup> *Id.* at 815.

<sup>100</sup> *Id.* at 816–17.

<sup>101</sup> No. 08-2034, 2010 WL 786207, at \*3 (Iowa Ct. App. Mar. 10, 2010).

<sup>102</sup> Iowa Code § 710A.1(4) (2017) [<https://perma.cc/7BZ3-CA8B>].

limited to, prostitution and performance in strip clubs.”<sup>103</sup> Performance in strip clubs, like pornography, does not involve the end user having physical sex with the trafficked person. Pornography, however, goes one step beyond a stripping performance, because the trafficked person is still required to have sex, and the trafficker then profits off of that act. Therefore, if performance in strip clubs is considered a sexual activity that can be prosecuted under sex trafficking statutes, then surely pornography can be as well.

*United States v. Marcus*, in which the Eastern District of New York held that pornography was a commercial sex act, provides the best example of using the TVPA to prosecute trafficking within pornography.<sup>104</sup> In this case, the complaining witness, Jodi, became interested in bondage, dominance/discipline, submission/sadism, and masochism (BDSM) through internet chatrooms.<sup>105</sup> Shortly after she began exploring the world of BDSM, Jodi met the defendant, Glenn Marcus, in an online chat room.<sup>106</sup> After a short online relationship, in which Jodi shared with the defendant that she had previously been subjected to emotional and physical abuse, Jodi agreed to move into the apartment of Joanna, another woman who was a “slave,” of the defendant.<sup>107</sup>

Over the following months, Marcus exercised strict control over Jodi, visiting the apartment every one to two weeks and staying for a couple of days.<sup>108</sup> During these stays, he required Jodi, Joanna, and other women to engage in sexual activities with him.<sup>109</sup> Jodi and the other women had to follow strict rules, and Marcus shaved Jodi’s head, branded her with a coat hanger, denied her medical attention, prohibited her from speaking to her friends or family, and verbally abused her.<sup>110</sup> He photographed many of the BDSM activities and posted these photos on a website called Subspace.<sup>111</sup>

The defendant became increasingly violent towards Jodi. Once, when Marcus discovered that she wanted to leave, he closed her lips shut with surgical needles, beat her severely with a cane for an extended period of time, attempted to sew her vagina shut, and cut her with a knife.<sup>112</sup> At trial, the court found that at this point, when Marcus acted with increased violence because Jodi wished to leave, their relationship was no longer consensual.<sup>113</sup> Additionally, Jodi witnessed Joanna, the other “slave,” tell Marcus that she no longer wanted to serve him.<sup>114</sup> In response, Marcus

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<sup>103</sup> *Russell*, 2010 WL 786207, at \*3.

<sup>104</sup> 487 F. Supp. 2d 289 (E.D.N.Y. 2007), *vacated*, 538 F.3d 97 (2d Cir. 2008), *rev’d*, 560 U.S. 258 (2010), *aff’d in part, vacated in part*, 628 F.3d 36 (2d Cir. 2010).

<sup>105</sup> *Id.* at 292–93.

<sup>106</sup> *Id.* at 293.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 294.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 295.

<sup>113</sup> *Id.* at 295–96.

<sup>114</sup> *Id.* at 296.

threatened to send photographs and video of Joanna engaged in BDSM activities to her father and to kill her godson.<sup>115</sup> This incident convinced Jodi that if she ever attempted to leave Marcus, he would send her family pictures or harm them.<sup>116</sup>

Soon after, the defendant required Jodi to create and manage a new website called Slavespace.<sup>117</sup> Jodi worked on this website constantly, updating photographs and diary entries.<sup>118</sup> If she refused to work on the site or failed to post things quickly, the defendant would verbally and physically abuse her, photograph these punishments, and post the pictures to the site.<sup>119</sup> He collected all revenues generated by the website, several hundred dollars a month.<sup>120</sup> During the time he was making this revenue, several of the pictures on the website were of Jodi being punished in nonconsensual incidents.<sup>121</sup>

In a jury trial, Marcus was convicted under the TVPA on charges of sex trafficking and forced labor.<sup>122</sup> The sex trafficking charge was based on the fact that he had made money from posting pornographic pictures of Jodi on the website.<sup>123</sup> The defense moved for a judgment of acquittal or for new trial on several grounds.<sup>124</sup>

Before the district court, the defendant argued that he could not be found guilty of sex trafficking because the meaning of “commercial sex act” under the TVPA did not include “commercial gain [that] resulted from the depiction of sex acts rather than from the acts themselves.”<sup>125</sup> This interpretation of the term would have limited the purview of the TVPA to prostitution, thus excluding pornography.<sup>126</sup> The court disagreed with this interpretation, instead finding that “commercial sex act” has a broad definition of “any sex act, on account of which anything of value is given to or received by any person,” and this definition provided “no basis for limiting the sex acts at issue to those in which payment was made for the acts themselves.”<sup>127</sup> Therefore, the court held that there need only exist a causal relationship between the sex act and an exchange of something valuable, and, consequently, pornography was a commercial sex act for purposes of criminal liability under the TVPA.<sup>128</sup> Marcus’s sex trafficking conviction was eventually vacated on other grounds, and no superior court has ever addressed the issue of whether pornography is a commercial sex

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 297.

<sup>123</sup> *Id.* at 306.

<sup>124</sup> *Id.* at 297.

<sup>125</sup> *Id.* at 306.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 306 (citing 18 U.S.C. § 1591(c)(1) (2006)).

<sup>128</sup> *Id.* at 307.

act for purposes of prosecuting these types of cases under the TVPA.<sup>129</sup>

#### V. USING THE TVPA TO PROSECUTE PORNOGRAPHY CASES FURTHERS ITS ORIGINAL POLICY GOALS

Congress passed the TVPA with three goals in mind: prosecution, protection, and prevention.<sup>130</sup> This requires criminalizing trafficking by passing and enforcing appropriate laws (prosecution), identifying victims and providing them with comprehensive services (protection),<sup>131</sup> and reducing the demand for human trafficking, in part by raising awareness of the inhumane practices involved in the trafficking trade (prevention).<sup>132</sup> Courts have interpreted the TVPA broadly to encompass a variety of activity in order to meet these policy goals.<sup>133</sup>

One concern of proponents of the prosecutorial potential of the TVPA has been that the act has failed to effect its stated policy goals because of an insufficient number of federal prosecutions.<sup>134</sup> For example, from 2001 to 2005, the Department of Justice (DOJ) prosecuted only ninety-one trafficking cases and convicted only 140 of 248 defendants.<sup>135</sup> While the DOJ has greatly increased the number of trafficking cases filed in recent years, the new National Strategy to Combat Human Trafficking recently released by the DOJ re-emphasized the importance of new strategies to fight this complex crime.<sup>136</sup> Expanding the type of cases that are prosecuted

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<sup>129</sup> Following the district court's denial of defendant's movement for judgment of acquittal or new trial, Marcus appealed on ex post facto grounds, leading to lengthy post-conviction proceedings that eventually resulted in the Second Circuit vacating the sex trafficking conviction with respect to 18 U.S.C. § 1591. *See United States v. Marcus*, 538 F.3d 97, 101–02 (2d Cir. 2008) (vacating and remanding because, under plain error review, Marcus's convictions violated the ex post facto clause); *United States v. Marcus*, 560 U.S. 258, 266–67 (2010) (reversing and remanding because Marcus's contention implicated the Due Process Clause, and the court of appeals' standard for plain error review, as applied to Marcus's claim, was inconsistent with precedent); *United States v. Marcus*, 628 F.3d 36, 45–46 (2d Cir. 2010) (affirming forced labor conviction, but vacating sex trafficking conviction because the district court's failure to instruct the jury with respect to the TVPA's enactment date was plain error that affected substantial rights). The government elected not to retry Marcus on the sex trafficking count, and he was resentenced on the forced labor count. *United States v. Marcus*, No. 05–CR–457-ARR (E.D.N.Y. Mar. 12, 2012) (amended judgment).

<sup>130</sup> 22 U.S.C. § 7101(a) (2012) (“The purposes of this division are to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims.”); *see also* Press Release, The White House, Office of the Press Sec’y, The Obama Administration’s Record on Human Trafficking Issues (Apr. 9, 2013) (explaining the Department of State’s approach under President Obama to target trafficking, utilizing the “3P” framework of *prosecuting* traffickers, *protecting* survivors, and *preventing* victimization, which is reflected in the UN’s Palermo Protocol and the Trafficking Victims Protection Act” (emphasis added)) [<https://perma.cc/PZ7N-4834>].

<sup>131</sup> Press Release, The White House, Office of the Press Sec’y, *supra* note 130.

<sup>132</sup> *Id.*

<sup>133</sup> Jennifer A.L. Sheldon-Sherman, *The Missing “P”: Prosecution, Prevention, Protection, and Partnership in the Trafficking Victims Protection Act*, 117 PENN ST. L. REV. 443, 469 (2012) [<https://perma.cc/F2LY-8F5S>].

<sup>134</sup> *Id.* at 446.

<sup>135</sup> Kevin Shawn Hsu, Note, *Masters and Servants in America: The Ineffectiveness of Current United States Anti-Trafficking Policy in Protecting Victims of Trafficking for the Purposes of Domestic Servitude*, 14 GEO. J. ON POVERTY L. & POL’Y 489, 501 (2007).

<sup>136</sup> U.S. DEP’T OF JUSTICE, NAT’L STRATEGY TO COMBAT HUMAN TRAFFICKING 1 (2017)



under the TVPA provides another tool that can be used by the DOJ. Specifically, prosecuting pornography cases provides a fruitful way to further the policy goals of the TVPA by conveying that any type of sex trafficking is intolerable, even if it is under the guise of a legitimate business. Additionally, if these cases gain media attention, it could help to educate pornography users and the larger public about the relationship between human trafficking and the pornography industry and the harms inflicted on trafficked people whose traffickers exploit them through the creation of pornographic media.

The *Marcus* court's decision to take an expansive understanding of the term "commercial sex act" also furthered TVPA's policy goals. The court noted that the congressional findings in the TVPA recognized that "[t]he sex industry has rapidly expanded over the past several decades. It involves sexual exploitation of persons, predominantly women and girls, involving activities related to prostitution, pornography, sex tourism, and other commercial sexual services."<sup>137</sup> The congressional findings also state that there is a lack of "comprehensive law . . . that penalizes the range of offenses involved in the trafficking scheme."<sup>138</sup> The court reasoned that this finding supported the idea that construing commercial sex acts broadly focuses the factual inquiry and places the emphasis on whether an individual has been sexually exploited for profit.<sup>139</sup> The court sought to remove the emphasis from how the traffickers profited from the exploitation, finding that instead placing the emphasis on the question of exploitation is "more consistent with the statute's purpose."<sup>140</sup>

#### CONCLUSION

To battle the pervasive nature of domestic and international sex trafficking, prosecutors must take creative approaches to the problem. One such creative approach includes using the TVPA to address human trafficking within the pornography industry. The broad language of the act is designed to be applicable to any type of sex trafficking and this language facilitates the use of the statute as a tool to address the varieties of exploitation linked with human trafficking. Trafficking to create pornographic materials is intertwined with other forms of sex trafficking, and it is equally pernicious and exploitative. In the TVPA, federal prosecutors have a powerful tool to punish and deter all sex traffickers, including those who profit from pornography, and to protect all vulnerable people that are victimized by these traffickers. They should use it.

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("Between Fiscal Years (FYs) 2009 and 2016, the Department increased the number of trafficking cases filed, in comparison to the previous eight years, by 79 percent, the number of defendants charged by 71 percent, and the number of defendants convicted by 68 percent . . .") [<https://perma.cc/9UP4-VW4K>].

<sup>137</sup> *United States v. Marcus*, 487 F. Supp. 2d 289, 306–07 (E.D.N.Y. 2007) (citing 22 U.S.C. § 7101(b)(2) (2006)).

<sup>138</sup> *Id.* at 307 (citing 22 U.S.C. § 7101(b)(14)).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*