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Pornography-Based Sex Trafficking: A Palermo Protocol Fit for the Internet Age

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Pornography-Based Sex Trafficking: A Palermo Protocol Fit for the Internet Age

ABSTRACT*

The United Nations Palermo Protocol provides an international framework for regulating human trafficking with aims of increasing perpetrator prosecution and victim rehabilitation. Signatory nations implement this resolution through domestic legislation. Discrepancies across these statutes result in dangerous jurisdictional gaps and chaotically varied law enforcement approaches. Though legal scholarship rarely addresses the topic, pornography-based sex trafficking provides a clear example of this trend. The unique digital features of the internet compound these challenges. This Note seeks to close procedural gaps and alleviate policing frustrations through a proprietary examination of the Protocol's "exploitation" definition and suggests an amendment to the Protocol that uniformly criminalizes coerced pornography across all signatory nations.

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* This Note is dedicated to my late father, brilliant attorney John Watson, who finished reading it a few days before his passing in August 2020. Beginning with this publication, may my service in the legal profession be a perpetual eulogy to the gifts he gave me: a passion for the law, years of wise counsel, and ceaseless, unconditional support. He spent his life analyzing and leveraging government systems in an effort to elevate the most vulnerable among us. I hope, in some small way, this Note does the same.

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I. INTRODUCTION

“Young, Beautiful Models Wanted: Audition to Star in a Bacardi Rum Commercial”—such was the nature of Lavont Flanders and Emerson Callum’s online promises to aspiring female performers.¹ Excited and ambitious, over thirty advertisement respondents traveled to South Florida to audition for the role and were told they would deliver scripted lines, taste test the alcohol, and participate in a commercial shoot.² Flanders and Callum instructed the women to come alone on the premise that family and romantic partners would distract from filming.³ Upon arrival, Flanders, a former law enforcement

1. See *United States v. Flanders*, 752 F.3d 1317, 1325 (11th Cir. 2014) (holding that Flanders and Callum were guilty of multiple counts of “inducing women to engage in sex trafficking through fraud and of benefitting from that scheme”).

2. See *id.* at 1326.

3. See *A Sordid Scam: Two Receive Life Sentences for Preying on Aspiring Models*, FED. BUREAU OF INVESTIGATION (Aug. 6, 2012), <https://www.fbi.gov/news/stories/a-sordid-scam> [<https://perma.cc/M4UZ-5JAV>] (archived Oct. 31, 2019) [hereinafter *A Sordid Scam*].

officer,⁴ laced rum with date-rape drugs and offered it to the unsuspecting hopefuls.⁵ Then, he drove the dazed women to a warehouse where Callum, the supposed Bacardi agent, waited.⁶

The actresses, many between the ages of eighteen and twenty-two,⁷ drifted in and out of awareness, awaking momentarily to realize Callum was raping them while Flanders filmed.⁸ The disoriented women regained full consciousness the following day, some finding themselves covered in bodily fluids and bleeding.⁹ Unknown to his victims, Flanders papered the walls of his private residence with images of the assaults, while Callum sold the videos online through his pornographic production company, “Miami Vibes Enterprises.”¹⁰ The two took great care to remove portions of the footage in which the victims were visibly unconscious.¹¹

The U.S. Federal Bureau of Investigation called Callum and Flanders “two of the worst offenders [they] [had] ever seen,” noting the pair’s expert use of internet modeling sites as “hunting grounds” for their victims.¹² In a particularly chilling observation, investigators said they were “disturbed” by the videos because the edited films believably portrayed all individuals as willing participants; however, review of the raw footage revealed the women were “drugged and often barely conscious.”¹³ This case, and others like it, highlights the undeniable connection between sex trafficking and the pornography industry, begging the question: How many of the internet’s seemingly consensual sex scenes tell different, more sinister stories in unedited form?¹⁴

Because legal scholarship rarely addresses pornography-based sex trafficking, it is necessary to establish a common vocabulary for examining the topic. For the purposes of this Note, the following definitions apply: “Coerced pornography” is nonconsensual, on-camera,

4. See *id.* (noting that Flanders was a former police officer, and he “was not stupid . . . [h]e knew how to manipulate people, and he could be charming”).

5. See *Flanders*, 752 F.3d at 1326.

6. See *id.*

7. See *A Sordid Scam*, *supra* note 3.

8. See *Flanders*, 752 F.3d at 1326.

9. See *id.*

10. See *id.*

11. See *id.*

12. See *A Sordid Scam*, *supra* note 3.

13. See *id.*

14. See Marlo Safi, *The Porn Industry and Human Trafficking Reinforce Each Other*, NAT’L REV. (Aug. 1, 2018), <https://www.nationalreview.com/2018/08/porn-human-trafficking-reinforce-each-other/> [<https://perma.cc/GN75-5EYA>] (archived Oct. 31, 2019) (“According to many survivors of sex trafficking, there is often no way to know whether a girl in a pornographic video is appearing on camera under coercive, nonconsensual, or threatening circumstances. Viewers can’t know. . . whether the ‘performer’ is being raped on camera. . . . The link between sex trafficking and porn is inseparable, and the demand for it is growing.”).

forced participation in sexual acts.¹⁵ While the definition is still evolving and rapidly expanding, “amateur pornography” is best characterized as user-generated pornographic media produced without lawful permits or actor contracts.¹⁶ Production of coerced pornography and amateur pornography can occur simultaneously and often do.¹⁷ Borrowing terms from the prostitution industry, in this context, “johns” refer to pornography consumers. “Pimps” refer to pornography-based traffickers and producers.¹⁸ “Sex trafficking” is the recruitment, transportation, transfer, harboring, or receipt of persons by improper means, including force, abduction, fraud, or coercion for an improper purpose, such as forced labor or sexual exploitation.¹⁹ “Pornography-based trafficking” is sex trafficking for the improper purpose of coerced pornography.²⁰

Internet access is approaching universal levels, and internet pornography has never been more within reach.²¹ Research shows that

15. See Catharine A. MacKinnon, *Pornography as Trafficking*, 26 MICH. J. INT'L L. 993, 995–97 (2005).

16. See generally Katrina Forrester, *Making Sense of Modern Pornography*, NEW YORKER (Sept. 21, 2016), <https://www.newyorker.com/magazine/2016/09/26/making-sense-of-modern-pornography> [<https://perma.cc/64JW-GELQ>] (archived Feb. 26, 2020).

17. Alexandra Harrison, *Nudge, Don't Thrust: The Application of Behavioral Law and Economics to America's Porn Addiction*, 19 TEX. REV. L. & POL. 337, 351 (2015) (“For all the talk of sexual liberation and women’s equality, making pornography frequently involves sex trafficking . . .”); see also Allison J. Luzwick, *Human Trafficking and Pornography: Using the Trafficking Victims Protection Act to Prosecute Trafficking for the Production of Internet Pornography*, 111 NW. U. L. REV. ONLINE 137, 141 (2017). Contra Ronald Weitzer, *The Campaign Against Sex Work in the United States: A Successful Moral Crusade*, 17 SEXUALITY RES. & SOC. POLY 399, 412 (2020) (suggesting that advocates articulating the connection between pornography and trafficking only enjoy social and political traction because of the lack of a “robust counter-narrative”—not because of their legitimacy).

18. See MacKinnon, *supra* note 15, at 994 (“Pimps are typically paid for the sexual use of the real people who are bought and sold to engage in the sex acts for money that are what most pornography is made of. The pornographers then are paid to re-pimp these people in the pornography itself, producing sexual pleasure for the consumers and immense profits for the pornographers, which both seek to repeat.”).

19. See G.A. Res. 55/25, art. 3(a), Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the U.N. Convention Against Transnational Organised Crime (Nov. 15, 2000) [hereinafter Protocol].

20. See generally MacKinnon, *supra* note 15.

21. See Amy Adler, *All Porn All the Time*, 31 N.Y.U. REV. L. & SOC. CHANGE 695, 696 (2007) (explaining that the “most prominent factor” in the mainstreaming of the adult film industry is technological innovation); ITU/UNESCO BROADBAND COMM’N FOR SUSTAINABLE DEV., THE STATE OF BROADBAND 2019: BROADBAND AS A FOUNDATION FOR SUSTAINABLE DEVELOPMENT ix, 2 (2019) [hereinafter BROADBAND REPORT] (The year 2019 marks the first time more than half of the world has internet access at 51.2 percent or 3.9 billion people, with hundreds of millions of new users coming online each year. Any slowing in the growth of internet access is explained by the difficulty of reaching individuals not yet connected and by the sheer number of individuals who already have access).

private internet access is strongly and directly tied to an individual's likelihood of viewing pornography routinely.²² The accessibility, affordability, and anonymity of the web make the endeavor all the more seductive.²³ With over half the world online, it is no small wonder that porn's annual revenues outpace Hollywood's totals.²⁴

In response to this ever-growing demand, sex trafficking supplies an inexpensive and voluminous workforce of pornographic models, ensuring market equilibrium for the booming adult film industry.²⁵ The United States, one of the world's most frequent destinations for sex trafficking, plays a robust role in stocking the internet with adult footage.²⁶ Although difficult to quantify, estimates suggest between 14,500 and 50,000 people are trafficked into the United States each year for a variety of purposes, including sex labor.²⁷ America's victims

22. See Kristian Daneback, Sven-Axel Månsson & Michael W. Ross, *Technological Advancements and Internet Sexuality: Does Private Access to the Internet Influence Online Sexual Behavior?*, 15 CYBERPSYCHOLOGY, BEHAV. & SOC. NETWORKING 386, 389 (2012) (In a study investigating the effect of private internet access on sexual behavior online, researchers found both men and women with access to a private internet-connected computer were likely to engage in online sexual behavior, including viewing pornography).

23. See Al Cooper, Irene P. McLoughlin & Kevin M. Campbell, *Sexuality in Cyberspace: Update for the 21st Century*, 3 CYBERPSYCHOLOGY & BEHAV. 521, 522 (2004) (describing the three factors that "turbocharge" online sexuality: accessibility, affordability, and anonymity).

24. See BROADBAND REPORT, *supra* note 21, at 2; *Things Are Looking Up in America's Porn Industry*, NBC NEWS (Jan. 20, 2015, 7:17AM), <https://www.nbcnews.com/business/business-news/things-are-looking-americas-porn-industry-n289431> [<https://perma.cc/5WNL-9G9N>] (archived Jan. 10, 2021) (reporting that the pornography industry is worth \$97 billion globally with roughly \$12 billion from US adult films); JULIA JENKS, MOTION PICTURE ASS'N. OF AM., THEME REPORT 5 (2017), https://www.motionpictures.org/wp-content/uploads/2018/04/MPAA-THEME-Report-2017_Final.pdf [<https://perma.cc/XE6H-WDT8>] (archived Feb. 8, 2021) (explaining that global box office totals for all films were \$40.6 billion in 2017, with \$11.1 billion from the United States and Canada).

25. See ALEXIS ARNOWITZ, GERDA THEUERMANN & ELENA TYURYKANOVA, ORG. FOR SEC. & COOPERATION IN EUR, ANALYZING THE BUSINESS MODEL OF TRAFFICKING IN HUMAN BEINGS TO BETTER PREVENT THE CRIME 25 (Ueberreuter 2010) (observing that sex trafficking is profit-driven and traffickers "look at market forces and adapt their methodology" to meet demand); MacKinnon, *supra* note 15, at 1006 ("[P]ornography both creates and fills demand for trafficked persons . . ."); see also Donna M. Hughes, *The Demand for Victims of Sex Trafficking* 5 (June 2005) [hereinafter Hughes, Demand] (unpublished report) (on file with author) ("The transnational sex trafficking of women and children is based on a balance between the supply of victims from sending countries and the demand for victims in receiving countries.").

26. See U.N. OFFICE ON DRUGS & CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS, at 73, U.N. Sales No. E.19.IV.2 (2018) [hereinafter UNODC REPORT] (analyzing North America as a "significant destination" for transregional trafficking flows).

27. See HEATHER J. CLAWSON, NICOLE DUTCH, AMY SOLOMON & LISA GOLDBLATT GRACE, U.S. DEP'T OF HEALTH & HUMAN SERVS., HUMAN TRAFFICKING INTO AND WITHIN THE UNITED STATES: A REVIEW OF THE LITERATURE 4 (2009) (explaining that methodologies for tracking the prevalence of human trafficking are underdeveloped,

are primarily sourced from East Asia and Central America.²⁸ Because of their disproportionate contributions to pornography production and lax regulatory schemes,²⁹ states like California and Florida receive victims at the highest rates.³⁰

The statistics are even more grim on a global scale. Estimates suggest between seven hundred thousand to 4 million people are trafficked each year,³¹ affecting over 160 countries and every continent.³² The United Nations (UN) reports that 95 percent of those individuals are subject to physical or sexual violence in the course of trafficking.³³ Forty-three percent are victims of commercial sexual exploitation, 98 percent of whom are women and girls.³⁴ These numbers tell a dismal story of the transnational interaction between suppliers (source and transit countries) and demanders (destination countries).

This vicious, but stable, supply-and-demand status quo is inadvertently maintained by the UN's Palermo Protocol (Protocol).³⁵ Formally known as the "Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children," this resolution sets standards for UN member states in regulating human

resulting in the varied estimates of human trafficking victim totals); *see also* Joshua T. Carback, *Cybersex Trafficking: Toward a More Effective Prosecutorial Response*, 54 CRIM. L. BULL. 64, 93 (2018) (noting that accurate human trafficking statistics are "notoriously" difficult to calculate).

28. *See* UNODC REPORT, *supra* note 26, at 73; *see also* Donna M. Hughes, *The "Natasha" Trade: Transnational Sex Trafficking*, NAT'L INST. JUST. J., Jan. 2001, at 8, 9 [hereinafter Hughes, *The "Natasha" Trade*] (noting that, prior to the collapse of the Soviet Union, Asian countries were the primary "senders" of trafficking victims. Now, former Soviet republics like Belarus, Latvia, Moldova, Russia, and Ukraine lead the world in victim supply).

29. *See* Rachel N. Busick, *Blurred Lines or Bright Line? Addressing the Demand for Sex Trafficking Under California Law*, 42 PEPP. L. REV. 333, 335 (2015) ("California has a unique relationship to pornography, which is intrinsically linked to sex trafficking.").

30. *See Hotline Statistics*, NAT'L HUM. TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/states> (last visited July 31, 2019) [<https://perma.cc/F8CT-B6ER>] (archived Feb. 26, 2020) (reporting that the National Human Trafficking Hotline received more calls from California than any other state. Florida ranked third in number of calls).

31. *See* Federico Lenzerini, *International Legal Instruments on Human Trafficking and A Victim-Oriented Approach: Which Gaps Are to Be Filled?*, 4 INTERCULTURAL HUM. RTS. L. REV. 205, 205 (2009).

32. *See Human Trafficking: Everybody's Business*, 9 INT'L ORG. FOR MIGRATION 1, 1 (2008), https://www.unglobalcompact.org/docs/news_events/Bulletin/HumanTraffic_Info.pdf [<https://perma.cc/BPW8-6CEW>] (archived Feb. 8, 2021).

33. *See id.*

34. *See id.*

35. *See, e.g.*, Protocol, *supra* note 19.

trafficking.³⁶ The Protocol’s definition of “trafficking in persons”³⁷ is the cause of controversy, with debates over whether the definition’s meaning of “exploitation” includes pornography-related abuses.³⁸ While the Protocol specifically enumerates the arguably related term “prostitution,” the resolution makes no mention of coerced adult film production.³⁹

Antipornography advocates argue that pornography is a form of prostitution, and therefore, comes within the UN “trafficking in persons” definition.⁴⁰ Proponents of a regulatorily unburdened adult film industry question the connection between sex trafficking and pornography, suggesting the fusion of the two is a clever scapegoat for “radical” views on immigration, sex work, and women’s rights at the expense of free speech liberties.⁴¹

This Note addresses the opposing approaches to porn’s role in sex trafficking, particularly relating to the pornography-as-prostitution theory and its criticism. Part II surveys transnational sex trafficking, the pornography industry’s role in encouraging it, and the current international regulatory scheme governing it. Part III analyzes the merits and weaknesses of pornography proponents’ and opponents’ approaches to sex trafficking policy. Part IV proposes the UN adopt a modified definition of “exploitation” to explicitly include “coerced pornography,” while maintaining member state sovereignty in implementation. This solution resolves the divide between pro- and antipornography advocates by preserving hard-won free speech victories, while requiring signatory nations to update their regulatory schemes to directly connect pornography to sex trafficking-based “exploitation.”

36. *See id.* art. 2.

37. *See id.* art. 3(a) (“‘Trafficking in persons’ shall mean the 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, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs . . .”).

38. *See id.*; *see also* Luzwick, *supra* note 17, at 143; MacKinnon, *supra* note 15, at 1003 (asserting that pornography is “clearly covered” under the protocol’s definition). *But see* Ronald Weitzer, *Sex Trafficking and the Sex Industry: The Need for Evidence-Based Theory and Legislation*, 101 J. CRIM. L. & CRIMINOLOGY 1337, 1342 (2011) [hereinafter Weitzer, *Trafficking*] (arguing that fusing sex trafficking to sex work is an attempt by “oppression writers” to further “discredit” and “delegitimize” sex workers).

39. *See* Protocol, *supra* note 19, art. 3(a); *see also* Robert W. Peters, Laura J. Lederer & Shane Kelly, *The Slave and the Porn Star: Sexual Trafficking & Pornography*, 5 J. HUM. RTS. & CIV. SOC. 1, 1 (2012) (“[O]ne aspect of human trafficking gets little attention—namely, the connection between pornography and trafficking (particularly sex trafficking).”).

40. *See* Luzwick, *supra* note 17; MacKinnon, *supra* note 15, at 1004.

41. *See* Weitzer, *Trafficking*, *supra* note 38, at 1342, 1348.

II. BACKGROUND

A. *The Evolution of the Pornography Industry and Its Role in Modern Life*

Once limited to adult video stores and pay-per-view, the internet has liberated pornography, elevating it to a pervasive role in modern life incomprehensible a mere three decades ago.⁴² The internet is to thank—or to blame—for the colossal quantity and vast range of free pornography now accessible at the click of a mouse or tap of a screen.⁴³ The web's digital format makes millions of images and video clips searchable, archivable, and modifiable in ways never possible with the VHS tapes and film reels of old.⁴⁴ While research of internet sexuality is in its infancy, studies show 15 percent of all internet users access one of the top five “adult” websites monthly.⁴⁵ At 1 percent of the internet's total content,⁴⁶ adult sites represent 10 percent of the top fifty most visited websites of 2019 in the United States.⁴⁷ PornHub, the industry Goliath, was outranked only by internet institutions: Google, YouTube, Facebook, Amazon, Yahoo, and Twitter, perhaps proving to be an institution of its own.⁴⁸

In its 2018 “Year in Review,” PornHub self-reported 33.5 billion visits, the equivalent of every person in Australia, Canada, and Poland visiting the site every day for a year.⁴⁹ The United States has the most daily traffic to the site, which added over 1 million hours of new video content in 2018—the equivalent of 115 years' worth if watched end-to-end.⁵⁰ The report indicates 141 million people voted for their favorite

42. See Adler, *supra* note 21, at 695.

43. See Nicola M. Döring, *The Internet's Impact on Sexuality: A Critical Review of 15 Years of Research*, 25 COMPUTERS HUM. BEHAV. 1089, 1092 (2009).

44. See *id.*

45. See William A. Fisher & Azy Barak, *Internet Pornography: A Social Psychological Perspective on Internet Sexuality*, 38 J. SEXUAL RES. 312, 312, 314 (2001) (noting that “[a]t present, research concerning experience with Internet sexuality is at an early stage of development”).

46. See Döring, *supra* note 43.

47. See *Top Websites Ranking*, SIMILARWEB (Aug. 1, 2019), <https://www.similarweb.com/top-websites/united-states> [<https://perma.cc/JCM2-4XMU>] (archived Feb. 26, 2020).

48. See *id.*

49. See *2018 Year in Review*, PORNHUB (Dec. 11, 2018), <https://www.pornhub.com/insights/2018-year-in-review> [<https://perma.cc/S4QK-4H5T>] (archived Feb. 26, 2020). *But see* Georgina Voss, *Treating It as a Normal Business: Researching the Pornography Industry*, 15 SEXUALITIES 391, 392 (2012) (acknowledging the difficulty of quantifying porn's proliferation while cautioning against trusting data reported by the pornography industry itself, suggesting estimates are often overly optimistic).

50. See *2018 Year in Review*, *supra* note 49.

pornographic videos on PornHub, surpassing voter turnout for the 2016 US presidential election by multi-millions.⁵¹

However, despite what seems to be compelling evidence of porn's world domination, many academics caution against "moral panic" and "premature pronouncements about the saturation of society" with adult content.⁵² Riddled with "conflicting statements" and "extraordinary" characterizations, inadequate industry research impacts the quality of institutional knowledge and may lead to "scientific embarrassment."⁵³ At any rate, although "the size of the market, the supply of services and the amount of people using these services are often only the result of educated guesswork . . . [the] figures seem to be substantial."⁵⁴

1. Distinctions between Professional and Amateur Pornography Production

Determining which entities produce pornography can prove to be a particularly difficult task.⁵⁵ Industry giants are obvious content aggregators, but identifying the actual filmmakers and the companies, start-ups, or stand-alone entrepreneurs they are affiliated with can be a near impossibility.⁵⁶ The lack of reliable data on this subject may be attributed to moral stigmas and legal hinderances involved in production of adult films, causing pornography producers to shy away from industry-wide research projects in favor of flying "under the radar."⁵⁷

Viewers may care little who produces their pornographic content, but filmmakers draw a rigid distinction between the shadowy realm of "amateur" pornography and the legal adult film industry.⁵⁸ The California Supreme Court's 1988 ruling in *People v. Freeman*, which determined that contractual filmed sex is not prostitution and is

51. *See id.*

52. *See* Fisher & Barak, *supra* note 45, at 315.

53. *See id.*; *see also* Voss, *supra* note 49, at 392–93 (suggesting the industry is difficult to study because examination flows from a number of vastly different academic disciplines and morality is too intertwined to yield reliable results).

54. *See* Piet Bakker & Saara Taalas, *The Irresistible Rise of Porn: The Untold Story of a Global Industry*, 1 OBSERVATORIO J. 99, 106 (2007).

55. *See id.*

56. *See id.* at 107 ("A crucial question when it comes to adult online business models, is whether the market is dominated by corporations like *Playboy* and facilitated by cable operators, ISP's [sic], and credit card companies or whether mid-sized and even smaller entrepreneurs have a substantial share of the digital porn-pie. Again, there is hardly any reliable data on this subject, also because most firm [sic] prefer to fly under the radar and don't participate in industry-wide page-count projects.")

57. *See id.*; *see also* Voss, *supra* note 49, at 394 (describing the various difficulties of studying the pornography industry, ranging from "ethical issues and stigma" to the business world's failure to recognize the industry as worthy of examination).

58. *See* Forrester, *supra* note 16.

therefore legally permissible, is critical to this division.⁵⁹ In addition to sparking tremendous growth in pornography production, the *Freeman* decision seemed to confer “a new legitimacy” upon the industry.⁶⁰ Since then, adult filmmaking took up residence in the Los Angeles San Fernando Valley, “where its professional norms and regulations have mimicked its more respectable Hollywood neighbors.”⁶¹

However, as legal pornography studios stepped into daylight, their exposure spoke a darker competing industry into existence: amateur pornography.⁶² Little data is available measuring the number of videos now produced nonprofessionally, but the fact that pornographic shoot permits fell by 95 percent in Los Angeles County between 2012 and 2015 provides some insight into amateur porn’s growing stronghold.⁶³ Further, PornHub self-reported “amateur” as the term that statistically “defined the year” in 2019, speaking to the high demand for nonprofessional content.⁶⁴ These “illicit operations” are not booking production sets, contracted actors, and professional producers like established adult film studios.⁶⁵ Instead, anyone with a camera phone can make a video without a permit, and within minutes, upload it to the internet.⁶⁶ Free of traditional pornography’s oversight,

59. See *People v. Freeman*, 758 P.2d 1128, 1131 (Cal. 1988) (en banc) (reasoning that the defendant did not engage in the requisite conduct for prostitution by hiring five pornographic actors to portray sex acts in his motion picture).

60. See Maria de Cesare, *Rxxx: Resolving the Problem of Performer Health and Safety in the Adult Film Industry*, 79 S. CAL. L. REV. 667, 674–75 (2006).

61. See Forrester, *supra* note 16.

62. See de Cesare, *supra* note 60, at 675 (“[A] cottage industry of amateur pornographers developed in Southern California, competing against many of the established adult studios . . .”).

63. See David Ng, *L.A. County Saw a 95% Drop in Porn Film Permits. With the Condom Law Defeated, The Industry Looks to Make its Return*, MORNING CALL (Nov. 15, 2016), <https://www.mcall.com/la-fi-ct-porn-condom-la-20161111-story.html> [<https://perma.cc/3UUX-476W>] (archived Feb. 19, 2020) (suggesting explanations for the steep permit drop including a measure requiring condom use on pornography sets, one of many motivations for professional pornography to go amateur); Mark A. Lemley, *Is the Sky Falling on the Content Industries?*, 9 J. TELECOMM. & HIGH TECH. L. 125, 132 (2011) (“Pornographers complain of a once-lucrative market now flooded by amateur pornography; even sex fears it can’t compete with free.”).

64. See *2019 Year in Review*, PORNHUB (Dec. 11, 2019), <https://www.pornhub.com/insights/2019-year-in-review> [<https://perma.cc/HTD5-PKJW>] (archived Feb. 19, 2020) (theorizing that “people are looking for more realistic depictions of sex” and that “[r]eal’ people vs. actors seems to be the draw”).

65. See FINAL REPORT OF THE ATTORNEY GENERAL’S COMMISSION ON PORNOGRAPHY 26–27 (Rutledge Hill Press 1986) (“[W]hen this industry is compared to the kinds of industries that produce more mainstream materials, it is still the case that the production of pornographic materials is a practice and a business that remains substantially ‘underground.’”); see also Luzwick, *supra* note 17, at 141.

66. See Kal Raustiala & Chris Sprigman, *Copyrighting Porn: A Guest Post*, FREAKONOMICS (May 5, 2010), <http://freakonomics.com/2010/05/05/copyrighting-porn-a-guest-post/> [<https://perma.cc/BK49-JGX9>] (archived Feb. 19, 2020) (discussing the falling price of pornographic production based on the fact that anyone with a camera, a bed, and “some willing amateurs is now in the business”).

the unstructured nature of amateur pornography gives rogue filmmakers significant power to autonomously determine actor recruitment practices and performer treatment standards.⁶⁷ Without accountability through regulation, the fiscal bottom line becomes the only directive, insisting that filmmakers hire inexperienced, inexpensive models.⁶⁸ As a result, amateur productions are more likely to enlist trafficking victims for their pay-per-shoot scenes.⁶⁹

Although pornography is often portrayed as the “less harmful” and “more glamorous” sector of the sex industry,⁷⁰ some suggest legitimate pornography companies stand on the shoulders of organized crime.⁷¹ These academics argue the world of adult films was built on a foundation of force—physical and otherwise—intended to coerce women into nonconsensual sex performances for the camera.⁷² At the core of this argument is the notion that many women in pornography appear on screen against their will, asserting that, as a result of desperate economic or social circumstances, pornographic models have no meaningful alternatives besides acquiescence to sexual exploitation in exchange for payment.⁷³

2. Dangers of the Pornography Industry

The abuse possible on a pornographic set takes a variety of forms, including social and economic exploitation, threats, verbal abuse,

67. See Karen Gabriel, *Power of Porn Cultures*, TRANSNAT'L INST.: STATE OF POWER 2017, <https://longreads.tni.org/stateofpower/power-of-porn-cultures> (last visited Feb. 8, 2021) [<https://perma.cc/T543-GHHF>] (archived Feb. 8, 2021) (“[T]he porn business is a highly secretive one that is sometimes underground, and often on the margins of illegality or criminality.”); see also Luzwick, *supra* note 17, at 141.

68. See Luzwick, *supra* note 17, at 141; see also *What Fuels Human Trafficking*, UNICEF USA (Jan. 13, 2017), <https://www.unicefusa.org/stories/what-fuels-human-trafficking/31692> [<https://perma.cc/TQ3X-4GPV>] (archived Feb. 19, 2020) [hereinafter *What Fuels Human Trafficking*] (suggesting that consumer demand incentivizes producers to seek inexpensive labor, putting pressure on those lowest on the supply chain to exploit workers).

69. See, e.g., Harrison, *supra* note 17, and surrounding text.

70. See *id.* at 351 (“[E]ven the glamorous side of the industry is dangerously dark.”); see also Meagan Tyler, *Harms of Production: Theorising Pornography as a Form of Prostitution*, 48 WOMEN'S STUD. INT'L F. 114, 114 (2015).

71. See MacKinnon, *supra* note 15, at 995; see also Gabriel, *supra* note 67 (reporting findings that, around the world, the business of pornography remains unregulated and unorganized, making way for the trafficking of “cheap and vulnerable labour”).

72. See MacKinnon, *supra* note 15, at 995.

73. See *id.*; see also Charlotte Alter, *Catching Johns: Inside the National Push to Arrest Men Who Buy Sex*, TIME, <https://time.com/sex-buyers-why-cops-across-the-u-s-target-men-who-buy-prostitutes/> (last visited Jan. 19, 2020) [<https://perma.cc/3HH7-9TW5>] (archived Feb. 26, 2019) (describing the experience of one sex worker as somewhere between “trafficking and having a choice”).

captivity, and sexual assault.⁷⁴ In her autobiography, *How to Make Love Like a Porn Star: A Cautionary Tale*, former adult performer Jenna Jameson details the “vicious” experiences of her time in porn, including forced sex in sand, threats of bodily cutting with broken glass, and fear of electrocution during a particularly dangerous scene.⁷⁵ Unfortunately, Jameson’s experiences as one of the world’s wealthiest and most famous pornography stars are mild compared to the underground exploits of the amateur industry.⁷⁶ Further, the mental effects of pornographic work may involve low self-esteem, depression, suicidal thoughts, posttraumatic stress disorder, and a constant fear of dissemination of the content to the model’s friends and family.⁷⁷ The psychological fall out often goes undiagnosed and untreated, only perpetuating the damage caused by the industry.⁷⁸ In the most severe cases, actresses overdose or die by suicide as a result of the mental toll.⁷⁹

Even in the absence of abuse, work as a legal pornography actor is taxing.⁸⁰ The job demands long hours, typically offers no health benefits, and requires grooming, travel, and sexually transmitted disease screening costs.⁸¹ Most actors receive payment per scene, and the amount paid is scaled based on the acts the individual is willing to perform.⁸² For example, a female performer in an all-female scene may

74. See Busick, *supra* note 29, at 339–40; see also Harrison, *supra* note 17, at 351–52 (detailing the experience of eighteen-year-old Duke University freshman Miriam Weeks during her first film shoot as a pornographic actress: “filmmakers slapped her, even after she asked them to stop, and repeatedly abused her” and “[s]he recounts being told that she was ‘fat,’ ‘a terrible feminist,’ ‘stupid, dumb, [and] a slut’”).

75. See Tyler, *supra* note 70, at 119; see also Harrison, *supra* note 17, at 352 (reporting the experience of a female victim of coerced pornography in the victim’s own words: “Snuff movies (where women actually are murdered) are real. I have seen them . . . I have seen women murdered and dismembered. I have seen men spit on their bodies, ejaculate on their faces. . . I have seen men rape a woman’s skull after filming her death.”).

76. See Katharine Sarikakis, *Making Public Policy in the Digital Age: The Sex Industry as a Political Actor*, in *THE ROUTLEDGE COMPANION TO MEDIA & GENDER* 211, 213 (Cynthia Carter, Linda Steiner & Lisa McLaughlin eds., 2014) (discussing how amateur pornographers are likely to experiment with filming for “niche” pornography genres in which “violence and degradation” are common); see also Tyler, *supra* note 70, at 119.

77. See Busick, *supra* note 29, at 340.

78. See Kaitlyn Severin, *Mental Illness Is Killing Porn Stars and the Industry Is Taking Action*, *VICE* (May 25, 2018), https://www.vice.com/en_us/article/59q955/mental-illness-is-killing-porn-stars-and-the-industry-is-taking-action [<https://perma.cc/Q834-RAKU>] (archived Feb. 7, 2020) (reporting that at least five adult performers died as a result of alleged drug overdose or suicide between November 2017 and January 2018).

79. See *id.*

80. See Forrester, *supra* note 16.

81. See *id.*

82. See Tyler, *supra* note 70, at 116.

earn \$700, while a scene with a male performer may be worth \$1,500.⁸³ Pornographic models willing to engage in more extreme sex acts could earn up to \$2,500 for a single shoot, with additional financial benefits for well-known performers.⁸⁴ Even cobbled together, the sum of these efforts is a far cry from a living wage, a contributing factor to the average eighteen-month shelf life of a female performer in the industry.⁸⁵ Some suggest that the use of sex acts for establishing a payment structure puts undue pressure on performers to consent to acts beyond their comfort for better pay.⁸⁶

B. *The Connection between Sex Trafficking and Pornography*

In its “Purpose and Findings” for the Trafficking Victims Protection Act of 2000, the U.S. Congress identified that the global “low status” of women as a gender enables sex trafficking.⁸⁷ Traffickers disproportionately target the most vulnerable of humanity—individuals affected by chronic poverty, mass displacement, lack of access to education and employment opportunities, and discrimination.⁸⁸ Pornography-based traffickers make representations to their victims of “good working conditions” as “models” in reputable industries.⁸⁹ When the victims discover the façade, the perpetrators

83. Chris Morris, *Porn’s Dirtiest Secret: What Everyone Gets Paid*, CNBC NEWS (Jan. 21, 2016 5:33 PM) <https://www.cnbc.com/2016/01/20/porns-dirtiest-secret-what-everyone-gets-paid.html> [<https://perma.cc/3ZV6-2VM2>] (archived Feb. 26, 2020).

84. *See id.*

85. *See id.* (reporting that while some pornographic stars make six figure incomes, this is far from the industry average, and suggesting that longevity—or lack thereof—in a star’s career determines earning potential); *see also* Hughes, Demand, *supra* note 25, at 10 (Traffickers can only “use a woman or girl for a limited period of time before she needs to be replaced usually because of poor physical or mental health or addiction.”); *see also* Sarikakas, *supra* note 76, at 215 (commenting on the “short career spans” of adult film performers).

86. *See* Claire Mellish, *Regulating the Porn Industry: Change from the Inside*, 24 PUB. INT. L. REP. 34, 38 (2018) (inquiring whether paying stars per scene unduly influences their willingness to perform certain acts in exchange for employment benefits).

87. *See* 22 U.S.C.A. § 7101 (West 2020).

88. *See id.*; *see also* O. O. Fayomi, *Women, Poverty, and Trafficking: A Contextual Exposition of the Nigerian Situation*, 5 J. MGMT. & SOC. SCI. 65, 70 (2009) (“The dire need to meet economic demands and escape poverty drives women and girls and may drive then [sic] to seek solace in trafficking especially in the area of sex work”); *What Fuels Human Trafficking*, *supra* note 68 (listing “[m]ass displacement, conflict, extreme poverty, lack of access to education and job opportunities, violence, and harmful social norms” among factors that make an individual more susceptible to sex trafficker predation).

89. *See* § 7101; *see also* Hughes, Demand, *supra* note 25, at 26 (explaining that victims “—usually homeless or neglected teenagers—[are] recruited for pornography with promises of glamorous careers in modeling”); Peters, Lederer & Kelly, *supra* note 39, at 7 (providing examples of the means by which traffickers coerce their victims, including a case in the Netherlands where four perpetrators kidnapped North African

often threaten physical harm to the victim or the victim's loved ones should the victim attempt to escape.⁹⁰

In addition to physical manipulation, coerced pornography functions as a convenient form of psychological control for abusers due to its digital nature.⁹¹ Traffickers assert that the internet is "forever," that it would be impossible to outrun a digital reputation, and, therefore, leaving the industry for other employment would be a fruitless effort.⁹² Further, traffickers entrap women with financial debt and drug and alcohol dependence to deter their escape.⁹³

Finally, foreign trafficking victims are typically unfamiliar with the legal processes, cultural norms, and languages spoken in the countries that they have been trafficked to,⁹⁴ making it difficult for victims to report the crimes committed against them.⁹⁵ Some victims may also be concerned that they themselves will be prosecuted for their unwilling participation in the crime, creating even less incentive to notify authorities.⁹⁶ While the Protocol calls on member states to take steps to dispel these concerns, many victims are not aware of the available legal protections.⁹⁷ When combined with fear of immigration status repercussions and retaliation by their traffickers, trafficking victims find that seeking law enforcement assistance borders on impossible.⁹⁸

C. *The United Nations Palermo Protocol*

The Palermo Protocol, responsible for regulating human trafficking,⁹⁹ is a UN resolution described as the "political will to

asylum seekers, held them in a shed, and allowed men and animals to rape them on camera); Hughes, *The "Natasha" Trade*, *supra* note 28, at 11 (reporting that an estimated 20 percent of trafficked women were recruited through advertisements).

90. *See* § 7101.

91. *See* Michelle Lillie, *The Connection Between Sex Trafficking and Pornography*, HUM. TRAFFICKING SEARCH (2014), <https://humantraffickingsearch.org/the-connection-between-sex-trafficking-and-pornography/> [<https://perma.cc/WRE8-F6ZL>] (archived Feb. 26, 2020).

92. *See id.* ("Once a film or image with the girl's face is uploaded onto the Internet, it is there forever. Traffickers know this and use it as a method of control and blackmail, letting the girls know that now they are on the Internet they can never escape the life.")

93. *See* Hughes, *Demand*, *supra* note 25, at 15.

94. *See* § 7101.

95. *See id.*

96. *See* Lenzerini, *supra* note 31, at 230 (discussing various reasons victims choose not to report their abuse to authorities).

97. *See generally* Protocol, *supra* note 19 (positing that states should take measures to increase public awareness of protections).

98. *See* § 7101.

99. *See* Protocol, *supra* note 19, pmbl.; *see also* Jean Allain, *No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol*, 7 ALB. GOV'T L. REV. 111, 113–14 (2014) ("[T]he UN originally opened the Conventions and its

answer a global challenge with a global response.”¹⁰⁰ The Protocol, the result of member state negotiations that came to be known as the “Vienna Process,”¹⁰¹ is a supplement to the UN Convention Against Transnational Organized Crime.¹⁰² In total, there are 175 parties to the Protocol, 117 of which are signatory nations.¹⁰³ As of January 2020, at least 168 countries have passed domestic legislation pursuant to the Protocol’s framework criminalizing human trafficking.¹⁰⁴ While broadly cast as a human rights concern, mounting frustration over the immigration and criminal implications of human trafficking became the true catalyst for the international legal framework.¹⁰⁵ The resolution’s definition of “trafficking in persons” is set out in Article 3(a) as:¹⁰⁶

[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 . . . includ[ing] the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs[.]¹⁰⁷

The Protocol requires three elements to establish the crime of human trafficking: (1) the trafficker’s action; (2) accomplished by means of force, fraud, or coercion; and (3) with the purpose of exploitation.¹⁰⁸ The specific language of each element is outlined below in Table 1:

Protocols for signature in Palermo, Italy, the heartland of the Sicilian mafia. Since then, the anti-trafficking protocol has come to be known as the Palermo Protocol.”)

100. See U.N. Secretary-General, *Foreword to UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERETO* (2004), <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCbook-e.pdf> [<https://perma.cc/5AW9-8ZWX>] (archived Feb. 8, 2021).

101. See Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT’L L. 437, 442 (2006).

102. See Protocol, *supra* note 19, art. 1(1).

103. See *Status of the Protocol*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en (last visited Jan. 24, 2021) [<https://perma.cc/37S3-6AJJ>] (archived Feb. 26, 2020).

104. See U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT 6* (2019).

105. See Chuang, *supra* note 101, at 446 (shedding light on the underlying motivations behind the UN’s decision to initiate drafting of the Protocol).

106. See Protocol, *supra* note 19, art. 3(a).

107. See *id.* (emphasis added).

108. See *TRAFFICKING IN PERSONS REPORT*, *supra* note 104, at 6.

Act	Means	Object
“recruitment, transportation, transfer, harbouring or receipt of person”	“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”	“the exploitation of the prostitution of others or other forms of sexual exploitation” ¹⁰⁹

A determination that an act constitutes “trafficking in persons” requires consideration of both the Protocol’s definitions and the constituent offense, which is defined by domestic legislation enacted by each signatory nation.¹¹⁰

Additionally, Article 3(b) of the Protocol provides that a trafficking victim’s “consent” to the exploitation as defined in Article 3(a) is “irrelevant” where the “means” described in Article 3(a) are used.¹¹¹ The intention behind this drafting was to prevent traffickers from using a victim’s willingness to participate in trafficking as a legal defense.¹¹² Notably, a number of member states that have adopted Article 3(a) have chosen not to include Article 3(b) in their legislative responses to the Protocol.¹¹³ Article 5 requires signatory nations to

109. See Michelle Madden Dempsey, Carolyn Hoyle & Mary Bosworth, *Defining Sex Trafficking in International and Domestic Law: Mind the Gaps*, 26 EMORY INT’L L. REV. 137, 143–44 (2012) (“As Table 1 illustrates, the Palermo Protocol defines sex trafficking according to three elements: the act committed by the purported trafficker, the means by which that act is accomplished, and the object for which the act is committed. These elements correspond to the three key areas where the Palermo Protocol definition of sex trafficking diverges from the definitions adopted by several state parties.”).

110. See *Human Trafficking*, UN OFF. DRUGS & CRIME, <https://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html> (last visited Feb. 26, 2020) [<https://perma.cc/MC6W-5K9H>] (archived Feb. 26, 2020).

111. See Protocol, *supra* note 19, art. 3(a)–(b).

112. See Chuang, *supra* note 101, at 445 (detailing the motivations for Article 3(b) during the Vienna Process).

113. See Dempsey, Hoyle & Bosworth, *supra* note 109, at 147–49 (listing countries that adopted Article 3(a) but not Article 3(b): Armenia, Azerbaijan, Bosnia and Herzegovina, Denmark, Gambia, Ghana, Macedonia, Moldova, Mozambique, Monten-

adopt legislative measures addressing Article 3 in its entirety;¹¹⁴ yet, over twenty-five countries, including the United States, have chosen to “remain silent” on the issue of victim’s consent.¹¹⁵

However, all signatories of the Protocol otherwise adhere to the requirements of Article 5 through enactment of implementing statutes. Article 5 specifically states that signatory nations must adopt “legislative and other measures” as may be necessary to establish criminal offenses for human trafficking as defined in the resolution.¹¹⁶

III. ANALYSIS

A. *The Protocol’s Merits and Weaknesses*

Some describe the Protocol as “fragile” at best, suggesting its widely contested genesis undercuts its stability.¹¹⁷ The Protocol’s “trafficking in persons” definition, of which “exploitation” is a part, was a result of two years of debate and twenty-four possible definitions taken under consideration.¹¹⁸ The most significant drafting disagreement was whether the trafficking definition should include “voluntary” prostitution among its enumerated forms of exploitation.¹¹⁹ Prostitution abolitionists argue that there is no daylight between consensual and nonconsensual prostitution.¹²⁰ Sex worker advocates suggest that voluntary prostitution is a choice, and banning it would threaten the livelihood and individual liberty of sex workers.¹²¹ The result of this tension was a convoluted attempt to appease both sides. The debaters agreed on this definition: “[e]xploitation shall include . . . the exploitation of the prostitution of

egro, Portugal, the Russian Federation, Romania, Rwanda, Saudi Arabia, Serbia, Sierra Leone, South Africa, Sweden, Thailand, Trinidad and Tobago, Turkmenistan, Ukraine, the United States, and Zambia).

114. See Protocol, *supra* note 19, art. 5(1) (Article 5 outlines directives for criminalization: “Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.”).

115. See Dempsey, Hoyle & Bosworth, *supra* note 109, at 149.

116. See Protocol, *supra* note 19, art. 5.

117. See Chuang, *supra* note 101, at 438 (discussing the Protocol’s fraught origin story).

118. See Dempsey, Hoyle & Bosworth, *supra* note 109, at 139.

119. See Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 984–85 (2001); see also Chuang, *supra* note 101, at 442 (outlining the points of contention of the Vienna Process).

120. See Chuang, *supra* note 101, at 443.

121. See *id.* at 443–44.

others or other forms of sexual exploitation.”¹²² While disputes still linger over this issue, it is widely accepted that a lack of international consensus on the definition of “trafficking in persons” and the crimes included therein weaken the force of the UN definition of “trafficking in persons.”¹²³

Discord over the Protocol’s broad policy undercurrents further its vulnerability, pitting a criminal justice approach against human rights concerns.¹²⁴ In this context, the criminal justice approach refers to the effort to combat trafficking as a crime and a border control issue.¹²⁵ At the Vienna process, human rights advocates suspected a criminal justice framework would provide an opportunity for member states to use protection of trafficking victims as a politically convenient cover for ratcheting up immigration restrictions.¹²⁶ They believed this would push labor migration further underground, leading to unintended increases in trafficking.¹²⁷ Those who favored the criminal justice approach believed international coordination of prosecution and attention to legal cooperation among countries would curb trafficking, which, in turn, would naturally address the human rights concerns.¹²⁸ The criminal justice approach ultimately won out, but human rights advocates still contend that the Vienna process, characterized by bickering over definitions and enforcement tactics, came at the expense of victims.¹²⁹

122. Protocol, *supra* note 19, art. 3(a); *see also* Gallagher, *supra* note 119, at 986 (noting that, “[a]s the debates made clear, states . . . agreed to sacrifice their individual views on prostitution to the greater goal of” member state cooperation on the issue of human trafficking).

123. *See generally* Allain, *supra* note 99 (noting a lack of consensus about the definition of “trafficking in persons”).

124. *See* Gallagher, *supra* note 119; *see also* Chuang, *supra* note 101, at 446 (detailing the various legal approaches to human trafficking proposed during the Protocol’s drafting).

125. *See* Chuang, *supra* note 101, at 446–47 (discussing contention over criminal justice versus human rights theories in the international approach to human trafficking); *see also* Allain, *supra* note 99, at 121 (commenting that the Protocol is “not an international human rights law treaty, but a transnational criminal law convention,” which supplements the 2000 UN Convention against Transnational Organized Crime).

126. *See* Chuang, *supra* note 101, at 446; Laura L. Shoaps, *Room for Improvement: Palermo Protocol and the Trafficking Victims Protection Act*, 17 LEWIS & CLARK L. REV. 931, 949 (2013) (commenting that the criminal justice framework weighs the importance of prosecution more heavily than victim protection and trafficking prevention).

127. *See* Chuang, *supra* note 101, at 446.

128. *See id.* at 448. *But see* Shoaps, *supra* note 126, at 952 (noting that while the Protocol may be implicitly reinforced by international human rights laws, the signatory nations’ implementing statutes do not reflect human rights considerations, opting instead for the explicit criminal justice-driven language of the Protocol).

129. *See* Chuang, *supra* note 101, at 446; *see also* Shoaps, *supra* note 126, at 949 (“While the Protocol pays lip service to human rights, a true commitment to the human rights approach is lacking.”).

The Protocol declares that effective action to combat trafficking in persons “requires a *comprehensive international approach*.”¹³⁰ Its stated purpose promotes “*cooperation among States Parties*” to meet the Protocol’s objectives.¹³¹ Yet, the UN itself acknowledged the pervasive inconsistencies across signatory nations’ implementing statutes, noting that “focusing on how best to achieve clarity and consistency in legislative responses” is an area in which “further work needs to be done.”¹³² Additionally, the UN identified a number of hindrances to member states attempting to adopt Protocol-compliant legislation.¹³³ These impediments included a lack of experience regarding the challenges posed by trafficking, administrative deficiencies in drafting policy, and an absence of regulatory structures to support implementation once policy is enacted.¹³⁴

Despite an international focus on sex trafficking and its role as “an increasingly important political priority,” Protocol interpretation discrepancies across signatory nations abound.¹³⁵ This is particularly true with regard to its definitions, rendering a solution to the crisis difficult to mount.¹³⁶ Few member states have transposed the Protocol’s definitions directly into their legislative schemes,¹³⁷ nor are they required to.¹³⁸ The UN has provided guidance to member states on implementing the Protocol through its 2009 Model Law Against Trafficking in Persons (Model Law). It clearly states that the definitions of the Protocol are “not mandated by the Protocol per se.”¹³⁹ Without uniformity, varying approaches to the issue yield vast

130. Protocol, *supra* note 19, pmbl. (emphasis added); *see also* Dempsey, Hoyle & Bosworth, *supra* note 109, at 140.

131. Protocol, *supra* note 19, art. 2(c) (emphasis added).

132. U.N. Conference of the Parties to the United Nations Convention Against Transnational Organized Crime, *Implementation of the Protocol To Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime: Consolidated Information Received from States for the First Reporting Cycle*, ¶ 15, 36, U.N. Doc. CTOC/COP/2005/3/Rev.2 (Aug. 25, 2008).

133. *See id.* ¶ 29.

134. *See id.* *But see* Dempsey, Hoyle & Bosworth, *supra* note 109, at 158 (providing a more cynical view, suggesting that signatory nations are underinclusive in the offenses criminalized by their implementing statutes because they prefer not to “expend the resources to assist victims or prosecute defendants whose cases would fall under” broader definitions).

135. *See* Allain, *supra* note 99, at 120.

136. *See id.*

137. *See id.* at 121.

138. *See* U.N. Off. Drugs & Crime, Model Law Against Trafficking in Persons, at 1, U.N. Doc. V.09-81990 (E) (2009), https://www.unodc.org/documents/human-trafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf [<https://perma.cc/SV9R-YPXR>] (archived Nov. 1, 2019) [hereinafter Model Law].

139. *Id.*

inconsistencies in domestic trafficking laws, impeding transnational prosecution of perpetrators and leaving victims legally unsheltered.¹⁴⁰

However, the Protocol is not without merit. For example, it is the first UN promulgation to acknowledge the “demand side” of sex trafficking.¹⁴¹ The Protocol specifically urges member states to inhibit markets that create a “need” for victims, calling on them to “adopt or strengthen legislative or other measures . . . to *discourage the demand* that fosters all forms of exploitation of persons . . . that lead[] to trafficking.”¹⁴² In this way, the Protocol empowers member states to take necessary steps to regulate the sex industry to the extent the industry “demand[s]”¹⁴³ trafficking victims.¹⁴⁴

Additionally, the Protocol marks the first instrument of universal character to approach sex trafficking from a victim-oriented perspective.¹⁴⁵ Article 6 details the role of member states in reintegrating trafficking survivors into society.¹⁴⁶ Specifically, Article 6 implores signatory nations to provide protection and assistance to victims “[i]n appropriate cases and to the extent possible under its domestic law.”¹⁴⁷ These protections include guarding victim privacy, providing them with information on legal forums through which they can confront their perpetrators in criminal proceedings, offering a range of rehabilitative services, furnishing physical protection as necessary, and presenting the possibility of pursuing monetary damages.¹⁴⁸

However, critics suggest that these provisions are too weak to pack any punch.¹⁴⁹ They say that the language of Article 6 strikes an optional, rather than obligatory tone. For example, Article 6 instructs member states to “*consider*” implementing rehabilitation strategies¹⁵⁰ and to “*endeavor*” to provide physical safeguards.¹⁵¹ The harshest opposition contends that the discretionary nature of Article 6 contravenes human rights laws, arguing that “victims of human rights

140. See Shoaps, *supra* note 126, at 949 (arguing that the framework of the protocol privileges a “remedial focus on prosecution,” which fails to “address the root causes of trafficking” at the expense of “protection of victims”); see also Allain, *supra* note 99, at 120.

141. See Hughes, Demand, *supra* note 25, at 7.

142. Protocol, *supra* note 19, art. 9(5) (emphasis added).

143. See *id.*

144. See Hughes, Demand, *supra* note 25, at 7.

145. See Lenzerini, *supra* note 31, at 211–12. But see Donna M. Hughes, *Combating Sex Trafficking, A Perpetrator-Focused Approach*, 6 U. ST. THOMAS L.J. 28, 29 (2008) (proposing a complement to the widely adopted victim-centered approaches to human trafficking through increased focus on perpetrators).

146. See Lenzerini, *supra* note 31, at 207.

147. Protocol, *supra* note 19, art. 6(1).

148. See *id.* art. 6(1)–(3).

149. See Gallagher, *supra* note 119, at 990.

150. Protocol, *supra* note 19, art. 6(3) (emphasis added).

151. *Id.* art. 6(5) (emphasis added).

violations such as trafficking should be provided with access to adequate and appropriate remedies” at the *obligation* of the member state.¹⁵² Even still, these suggestions, in combination with the mandatory charge of Article 5, represent an important step in a victim-oriented direction.

B. The Absence of Coerced Pornography from the “Exploitation” Definition

As it relates to regulating the interaction between pornography and sex trafficking, the Protocol’s influence hinges on the definition of “exploitation” in Article 3(a).¹⁵³ The Protocol vaguely defines what exploitation includes, which is relevant here: “the exploitation of the prostitution of others or other forms of sexual exploitation.”¹⁵⁴

Left to their own devices, each member state must determine which trafficking behaviors it will criminalize within the “exploitation” definition, a concept “ill-understood and nowhere defined in law.”¹⁵⁵ The resulting legislation varies greatly across member states, particularly in the case of coerced pornography.¹⁵⁶ The Model Law defines “sexual exploitation” as “the obtaining of financial or other benefits through the involvement of another person in . . . sexual services, including pornographic acts or the production of pornographic materials.”¹⁵⁷ However, most member states draft their own exploitation definitions, or alternatively, neglect to include coerced pornography in their definitions at all.¹⁵⁸ In fact, only nine of the 117 signatory nations designate coerced pornography participation as a

152. Ad Hoc Comm. on the Elaboration of a Convention Against Transnational Organized Crime, Note by the United Nations High Commissioner for Human Rights, the United Nations Children’s Fund, the United Nations High Commissioner for Refugees, and the International Organization for Migration on the Draft Protocols Concerning Migrant Smuggling and Trafficking in Persons, ¶ 7, U.N. Doc. A/AC.254/27 (Feb. 8, 2000).

153. See Protocol, *supra* note 19, art. 3(a); see also Allain, *supra* note 99, at 123 (observing that member states typically adopt the Protocol’s “means” and “methods” elements of the human trafficking definition but take significant liberty in modifying the “exploitation” component).

154. Protocol, *supra* note 19, art. 3(a).

155. Allain, *supra* note 99, at 119–20 (suggesting the Vienna Process transferred the burden of defining the Protocol’s terms onto domestic legislators, in effect, raising “more questions than it answered”).

156. See *id.* at 116 (“While the definition of ‘trafficking in persons’ has been considered in depth, that definition is somewhat moot, as despite being established at the international level, its true application takes place at the domestic level, where oftentimes unique readings of trafficking have been promulgated by various States that are a party to the Palermo Protocol.”).

157. Model Law, *supra* note 138.

158. See Allain, *supra* note 99, at 128.

form of exploitation.¹⁵⁹ As for the other 108 countries, many of their definitions are exceedingly broad, further reducing prosecutorial focus on coerced pornography.¹⁶⁰

Even within the small subdivision of signatory nations that explicitly enumerate coerced pornography, there are differences among how coercion is defined. For example, Haiti's definition of "sexual exploitation" includes "forced production of pornographic material."¹⁶¹ Moldova adopted the most specific pornography-related definition, legislating that exploitation includes "compelling [one] to . . . participate in pornographic performances, with a view to the production, distribution and any introduction into circulation of such performances."¹⁶² Meanwhile, Pakistan takes a broad approach, providing that exploitation is anything for purposes of "exploitative entertainment," including "all activities in connection with . . . sexual practices or sex."¹⁶³ These variations prove that even among the few member states that recognize coerced pornography as exploitation, gaps are evident, creating prosecutorial frustrations and providing legislative hiding places for perpetrators.¹⁶⁴

C. "Pornography" as "Prostitution" within the "Exploitation" Definition

The pornography-as-prostitution theory is a prominent, albeit contentious, approach to combatting human trafficking through the "exploitation" provision of the Protocol.¹⁶⁵ The Protocol's inclusion of "prostitution" in the definition of "exploitation" has fueled the activism of antipornography feminists.¹⁶⁶ These individuals claim pornography

159. *See id.* at 125–27, 127 n.65 (The following member states designate coerced pornography as a form of exploitation: Dominican Republic, Equatorial Guinea, Haiti, Macedonia, Mozambique, Peru, Poland, Tajikistan, and Thailand).

160. *See id.* at 128.

161. Antitrafficking Law, 2014, art. 1.1.17 (No. CL/2014-0010) (Haiti), https://www.healthpolicyproject.com/pubs/787_HaitiAntiTraffickingLawFINALEnglishFECLAF.pdf [<https://perma.cc/TCZ7-G44M>] (archived Jan. 23, 2021).

162. *See* Allain, *supra* note 99, at 123 (citing Privind Prevenirea si Combaterea Traficului de Fiinte Umane No. 241-XVI of 20 Oct. 2005 [Law No. 241 of Oct. 20, 2005, on Preventing and Combating Trafficking in Human Beings], art. 2, Dec. 9, 2005 (Mold.), https://www.legis.md/cautare/getResults?doc_id=27475&lang=ro [<https://perma.cc/49X4-EM7M>] (archived Jan. 23, 2021)).

163. *See* Prevention and Control of Human Trafficking Ordinance (2002), art. 2(f) (Pak.), <http://www.fia.gov.pk/en/law/Offences/22.pdf> [<https://perma.cc/79TB-ENUN>] (archived Jan. 20, 2021).

164. *See* Allain, *supra* note 99, at 128.

165. *See* Bedford v. Canada (2010), 102 O.R. 3d 321, ¶¶ 353–57 (Can. Ont. Sup. Ct. J.) (judge downgrading the testimony of pornography-as-prostitution theorist Dr. Melissa Farley because her "advocacy appears to have permeated her [expert] opinions," therefore, "I assign less weight to Dr. Farley's evidence.").

166. *See* Luzwick, *supra* note 17, at 143; MacKinnon, *supra* note 15, at 1003–04.

and prostitution are legally indistinguishable, and therefore, both come under the Protocol's definition of trafficking in persons.¹⁶⁷

Two of the loudest and most controversial voices in the pornography-as-prostitution movement are scholars Catharine MacKinnon and Andrea Dworkin.¹⁶⁸ Overtime, their collaborative works have fueled hotly contested debates over women's rights related to pornography.¹⁶⁹

Central to the disputes is MacKinnon and Dworkin's notion that all pornography, not just legally produced pornography, is a form of sex discrimination and/or sex trafficking.¹⁷⁰ In MacKinnon and Dworkin's oft-rebuted view, pornography production is a "form of forced sex, a practice of sexual politics," that furthers institutional gender inequality.¹⁷¹ According to MacKinnon and Dworkin, their opinions on pornography are positioned within a feminist framework aimed at analyzing the impact of pornography on the social condition and treatment of women.¹⁷² The two believe in a causal relationship between pornography and discriminatory behaviors toward women.¹⁷³

167. See Luzwick, *supra* note 17, at 143; MacKinnon, *supra* note 15, at 1003–04.

168. See MacKinnon, Catharine A., UNIV. OF MICH. LAW SCHOOL, <https://www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=camtwo> [https://perma.cc/P587-TLHP] (archived Jan. 15, 2020) [hereinafter *MacKinnon Biography*]; Andrea Dworkin: American Activist and Author, ENCYC. BRITANNICA, <https://www.britannica.com/biography/Andrea-Dworkin> [https://perma.cc/J35W-5ZSD] (archived Jan. 15, 2020) (Prior to Dworkin's death in 2005, MacKinnon and Dworkin coauthored a controversial book called *Pornography and Civil Rights: A New Day for Women's Equality* and together conceived of an ordinance that labels pornography as a form of sex discrimination. The two advocated that, within this framework, victims could sue the makers and distributors of pornography if victims could bear the burden of proof that the pornography production itself was a direct cause of the assault perpetrated against them. Later adopted by several cities, this ordinance was ultimately held unconstitutional in federal court). *But see* Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 U. VA. L. REV. 1099, 1108 (1993) (arguing that prominent law schools damage feminist ideals by giving a platform to anti-pornography advocates like MacKinnon).

169. See *MacKinnon Biography*, *supra* note 168.

170. See Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 18 (1985) [hereinafter MacKinnon, *Pornography*] ("What pornography does goes beyond its content: It eroticizes hierarchy, it sexualizes inequality. It makes dominance and submission sex. Inequality is its central dynamic; the illusion of freedom coming together with the reality of force is central to its working."); *see also* *MacKinnon Biography*, *supra* note 168 (noting Professor MacKinnon's contribution to ordinances recognizing pornography as a civil rights violation). *Contra* Weitzer, *supra* note 17, at 404 (responding to the pornography-as-prostitution argument contending that "only a few anecdotes are offered to support these sweeping claims." In rare cases where additional evidence is offered, it comes through niche non-profit groups in the form of hearsay).

171. MacKinnon, *Pornography*, *supra* note 170, at 18.

172. *See id.* at 1.

173. *See generally* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (Harv. U. Press 1989); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 176 (Harvard Univ. Press 1987) (defining "pornography"

In this view, pornography is not a healthy, harmless way of exploring fantasy, but rather, the institutionalization of male supremacy in sexual form.¹⁷⁴ As MacKinnon herself describes it, “to defend pornography as consistent with the equality of the sexes is to defend the subordination of women to men as sexual equality.”¹⁷⁵ By producing repetitive pornographic tropes for male audiences,¹⁷⁶ filmmakers inextricably solder eroticism to dominance in the social construction of what it means to be male.¹⁷⁷ Through this lens, men shape their own subjugating views of what it means to be female.¹⁷⁸

1. Applying the Pornography-as-Prostitution Theory to the Protocol

Within the pornography-as-prostitution framework, antipornography feminists work to brand pornography as a form of “exploitation” under the Protocol.¹⁷⁹ This requires some analytical acrobatics because pornography is not explicitly enumerated in the definition.¹⁸⁰ “Prostitution,” however, is.¹⁸¹ Underlying the argument is the notion that all pornography involving trafficking victims lacks consent, making the individuals victims of the pornography itself. This is supported by Article 3(b) of the Protocol, which says that a trafficking victim could never legally consent to “exploitation” if fraud,

as “the *graphic sexually explicit subordination of women* through pictures or words that also includes women dehumanized as sexual objects, things, or commodities; enjoying pain or humiliation or rape; being tied up, cut up, mutilated, bruised, or physically hurt; in postures of sexual submission or servility or display; reduced to body parts, penetrated by objects or animals, or presented in scenarios of degradation, injury, torture; shown as filthy or inferior; bleeding, bruised, or hurt in a context that makes these conditions sexual.” (emphasis added). *Contra* Strossen, *supra* note 168, at 1107 (“Encouraged by oversimplified, extremist, divisive pronouncements by feminist pro-censorship leaders, there is a widespread misperception that if you are a feminist—or a woman—you must view ‘pornography’ as misogynistic and ‘detrimental’ to women.”)

174. See MacKinnon, *Pornography*, *supra* note 170, at 18.

175. *Id.* at 19–20.

176. See *id.* at 19.

177. See *id.* at 18; Harrison, *supra* note 17, at 359 (suggesting that pornography casts women as objects for sexual pleasure, and continued exposure reinforces the notion that “dehumanization” is normal).

178. See MacKinnon, *Pornography*, *supra* note 170, at 18–19 (“Pornography participates in its audience’s eroticism through creating an accessible sexual object, the possession and consumption of which is male sexuality, as socially constructed; to be consumed and possessed as which, is female sexuality, as socially constructed; and pornography is a process that constructs it that way.”). *Contra* Strossen, *supra* note 168, at 1105 (noting that argument regarding the “*allegedly*” subordinating effect of pornography on females is one that many scholars, artists, and women generally take issue with (emphasis in original)).

179. See MacKinnon, *supra* note 15, at 1004.

180. See Protocol, *supra* note 19, art. 3(a).

181. See *id.*; see also MacKinnon, *supra* note 15, at 1004 (arguing that under the Protocol, use of “fraud,” “force,” or “coercion” must be present to prove the “trafficking in persons” criteria, which commercial pornography meets).

force, or coercion were used to accomplish the act;¹⁸² however, as previously noted, a significant number of signatory nations have opted out of adopting Article 3(b).¹⁸³

The pornography-as-prostitution argument proceeds as follows: from the victim's perspective, "pornography is indistinguishable from prostitution."¹⁸⁴ While some consumers may consider the camera a filter that separates the viewer from responsibility for the onscreen goings,¹⁸⁵ pornography-as-prostitution says the presence of a camera is a negligible detail in light of the nonconsensual sex performed in front of it.¹⁸⁶ Paying the participants and recording the acts does not absolve the acts of their criminal nature, "just as throwing money at victims of sexual abuse does not make it a job, [and] taking pictures of it does not make it freely chosen or desired."¹⁸⁷ Entirely analogous to prostitution, money is still exchanged for sex, and victims are "pimped out" on pornography websites for repeated digital service to johns around the globe.¹⁸⁸ The argument follows that creating an arbitrary legal line between prostitution, with or without a camera, poses challenges for prosecuting the offense.¹⁸⁹ These challenges are compounded by the anonymity of the internet and the "blurred jurisdictional lines" of the online universe.¹⁹⁰

This approach is strong because it operates entirely within the preexisting Protocol.¹⁹¹ The theory does not advocate adding new terms

182. Protocol, *supra* note 19, art. 3(b).

183. See Dempsey, Hoyle & Bosworth, *supra* note 109, at 147–49.

184. Luzwick, *supra* note 17, at 140; see also MacKinnon, *supra* note 15, at 999 ("[T]he pornography industry, in production, creates demand for prostitution, hence for trafficking, because it is itself a form of prostitution and trafficking."); Peters, Lederer & Kelly, *supra* note 39, at 8.

185. See Luzwick, *supra* note 17, at 140; see also MacKinnon, *supra* note 15, at 997 ("That the sexually used are transported on paper or celluloid or digitally may make the transaction seem more distanced, but it is no less real a commercial act of sex for any of the people involved.")

186. See Luzwick, *supra* note 17, at 140.

187. MacKinnon, *supra* note 15, at 996.

188. See Luzwick, *supra* note 17, at 140–41; see also 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) ("Pornographers 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."); Hughes, Demand, *supra* note 25, at 6 (stating that pimps can make between five and 20 times as much money off of the exploitation of a sex trafficking victim as they paid for her).

189. See Luzwick, *supra* note 17, at 142. *Contra* Weitzer, *supra* note 17, at 401 (arguing that the dominance of pornography-as-prostitution voices have silenced the sex industry's ability to politically advocate because any attempt brands them "pimps" and "traffickers.")

190. See Luzwick, *supra* note 17, at 142.

191. See MacKinnon, *supra* note 15, at 1004 (arguing that "pornography" fits squarely within the Protocol's "exploitation of the prostitution of others" provision).

to the Protocol's definitions.¹⁹² Instead, it urges member states to recharacterize coerced pornography as a "prostitution" offense, thereby bringing it within one of the Protocol's enumerated "exploitation" terms.¹⁹³ In a vacuum, the fact that this approach does not require amendments to the Protocol weighs in favor of its workability.

Pornography-as-prostitution academics believe coerced pornography is prosecutable under the plain language of the Protocol.¹⁹⁴ Specifically, they assert that the "trafficking in persons" definition "clearly cover[s]" pornography-based offenses.¹⁹⁵ They maintain that every time consumers exchange money for pornographic videos, the women depicted are "transported and provided for sex."¹⁹⁶ Therefore, the exchange qualifies as the "exploitation of the prostitution of others."¹⁹⁷ In this way, the pornography viewer, as with prostitution, experiences "bought sex" through exchanging money to "obtain . . . the use of a person . . . to satisfy their own sexual desire."¹⁹⁸

2. Flaws of the Pornography-as-Prostitution Approach

While its merits are commendable, the pornography-as-prostitution theory has its shortcomings.¹⁹⁹ First, pornography-as-prostitution suggests that the mere viewing of an adult film is as legally reprehensible as a "real, actual, sexual act" with a trafficking victim.²⁰⁰ If brought to its logical conclusion, this theory states that any pornography consumer would be culpable under domestic Protocol laws.²⁰¹ Considering the worldwide pervasiveness of pornography and the lack of international consensus on its legality, this model seems completely unworkable.²⁰² Further, it complicates prosecution of the "pimps" (the pornography producers) by including them in the same offense definition as the "johns" (the pornography viewers).²⁰³ Finally,

192. *See id.*

193. *See id.*; *see also* Protocol, *supra* note 19, art. 3(a).

194. *See* Luzwick, *supra* note 17, at 143.

195. *See* MacKinnon, *supra* note 15, at 1004.

196. *See id.*

197. *See* Protocol, *supra* note 19, art. 3(a); *see also* Luzwick, *supra* note 17, at 143.

198. *See* Luzwick, *supra* note 17, at 148.

199. *See generally* Weitzer, *supra* note 17 (critiquing pornography-as-prostitution theory).

200. *See* MacKinnon, *supra* note 15, at 994.

201. *See id.*

202. *See, e.g.,* Allain, *supra* note 99, at 112–13; Fisher & Barak, *supra* note 45, at 314 (noting that 15 percent of all internet users visit one of the top five pornography sites on a monthly basis).

203. *See* Alter, *supra* note 73 (discussing the separate merits and weaknesses of prosecuting johns, pimps, and prostitutes).

it minimizes the culpability and moral reprehensibility of the actual exploiters by equating them to passive, remote consumers.²⁰⁴

Further, some scholars are concerned that a correlation between trafficking and prostitution does not equate to causation, with a few critics going so far as to call the connection a “robust mythology.”²⁰⁵ These voices suggest that MacKinnon, Dworkin, and others like them fail to present “domination and exploitation” as *variables* in the sex commerce equation, opting instead to make them the equation itself.²⁰⁶ This “monolithic” approach ignores evidence-based conclusions that show there is vast variation in the motivations for and the nature of sex work.²⁰⁷ In doing so, pornography-as-prostitution fails to acknowledge the “broad constellation of work arrangements, power relations, and personal experiences among participants in sexual commerce.”²⁰⁸ Some of the stars in the “constellation” include factors like personal choice, job satisfaction, self-esteem, and geographic positioning.²⁰⁹

Disregarding the industry’s complexities in favor of a good versus bad dichotomy may demonstrate that individuals like MacKinnon and Dworkin are less interested in eliminating trafficking and more interested in weaponizing trafficking in order to abolish pornography and prostitution.²¹⁰ In the words of MacKinnon and Dworkin, “[s]ince

204. *Contra* MacKinnon, *supra* note 15, at 996–97 (discussing the irrelevance of the camera as a filter in light of the abuses being recorded by it).

205. *See* Weitzer, *Trafficking*, *supra* note 38, at 1337 (“While no one would claim that sex trafficking is fictional, many of the claims made *about* it are wholly unsubstantiated”); *see also* Weitzer, *supra* note 17, at 400 (arguing that MacKinnon and Dworkin channel hostility toward the pornography industry and brand pornography producers and consumers as ‘folk devils’ to further their “moral crusade”).

206. *See* Weitzer, *Trafficking*, *supra* note 38, at 1338; *see also* Weitzer, *supra* note 17, at 400 (stating that “moral crusaders” like MacKinnon and Dworkin disproportionately inflate some factors while ignoring others in order to build their case).

207. *See* Weitzer, *Trafficking*, *supra* note 38, at 1338; *see also* Strossen, *supra* note 168, at 1131 (arguing that the “simplistic stance” of MacKinnon, Dworkin, and other scholars like them fails to appreciate a number of positive aspects of pornography that are widely recognized by feminists, health care professionals, and sexuality experts around the world); James D. Griffith, Lea T. Adams, Christian L. Hart & Sharon Mitchell, *Why Become a Pornography Actress?*, 24 INT’L J. SEXUAL HEALTH, 165, 169 (2012) (studying 176 female pornographic actresses and finding a number of motivations for women to enter the industry. Listed in order of most frequent response to least, the results of the study produced the following reasons: “money, sex, attention, fun, being in a related industry, acquaintance, chance/confusion, creative expression, personal growth, disliked prior job, and coercion”).

208. Weitzer, *Trafficking*, *supra* note 38, at 1338; *see also* Weitzer, *supra* note 17, at 400 (citing “categorical conviction,” or the refusal to consider counterclaims or gray areas, as characteristic of moral crusaders like MacKinnon and Dworkin).

209. *See* Weitzer, *Trafficking*, *supra* note 38, at 1338; *see also* Griffith, Adams, Hart & Mitchell, *supra* note 207, at 168 (concluding that the “motivations, likes, and dislikes” of pornographic actresses are greatly varied, multi-faceted, and worthy of further study).

210. *See* Weitzer, *Trafficking*, *supra* note 38, at 1344.

prostitution creates the demand for trafficking, the sex industry in its totality must be confronted.”²¹¹ Assertions like these call MacKinnon and Dworkin’s credibility into question because this tone suggests that they feign a universally agreeable concern for human rights to disguise their actual motives: “transform[ing] the ‘anti-trafficking’ movement into a modern, worldwide moral crusade against prostitution.”²¹² Critics are wise to suggest that such radical positions with such spirited opposition should not pass muster without a healthy suspicion of ulterior motives.²¹³

The UN’s historic unwillingness to wade into the controversial regulation of prostitution further weakens this approach.²¹⁴ When member states negotiated the Protocol, the Vienna Process intentionally left the issue of prostitution to the purview of member states’ national competence.²¹⁵ Transnational cooperation to address human trafficking was a high collective priority of the convention, making way for individual state discretion on this most vigorously debated issue.²¹⁶ Some take the view that “[b]y tolerating or legalizing prostitution, the state, at least passively, is contributing to the demand for victims.”²¹⁷ Others assert that many of the nations in full compliance with the U.S. State Department’s trafficking regulation standards are also nations where prostitution is legalized,²¹⁸ suggesting increased enforcement and regulations surrounding sex work make it more difficult for perpetrators to commit sex crimes.²¹⁹

211. Farley, *supra* note 188, at 142.

212. See Weitzer, *Trafficking*, *supra* note 38, at 1344; see also Weitzer, *supra* note 17, at 2 (defining moral crusade as a movement devoted to “preserving cherished moral values by mobilizing against a particular condition or practice”).

213. See Weitzer, *Trafficking*, *supra* note 38, at 1344.

214. See *Human Trafficking FAQs*, U.N. OFF. DRUGS & CRIME, https://www.unodc.org/unodc/en/human-trafficking/faqs.html#What_types_of_industries_are_involved_with_human_trafficking (last visited Feb. 9, 2021) [<https://perma.cc/DTQ8-BPB9>] (archived Feb. 27, 2020) (discussing UNODC’s stance—or lack thereof—on prostitution).

215. See *id.*

216. See Chuang, *supra* note 101, at 438–39.

217. Hughes, Demand, *supra* note 25, at 8; see also Alter, *supra* note 73 (referencing commentary from German police stating that arresting pimps became more difficult and prostitutes were working in even worse conditions than before the 2002 legalization of poverty).

218. See Weitzer, *supra* note 17, at 410 (naming Austria, Australia, Germany, the Netherlands, New Zealand, and Switzerland among the countries who legalize prostitution and simultaneously meet human trafficking regulation requirements). *Contra* Seo-Young Cho, Axel Dreher & Eric Neumayer, *Does Legalized Prostitution Increase Human Trafficking?*, 41 *WORLD DEV.* 67, 68–69 (2013) (finding that empirical analysis across 150 countries demonstrates that countries where prostitution is legal report higher rates of inbound human trafficking).

219. See Weitzer, *supra* note 17, at 411 (concluding that the decrease in human trafficking in the Netherlands is attributable to the legalization of prostitution there).

To MacKinnon and Dworkin's credit, there is some evidence that shows "shutting down sex markets" curbs demand for trafficked prostitutes.²²⁰ For example, in 1980s London, the city closed all low-cost, short-term accommodations and arrested five influential brothel owners.²²¹ Once there was "no where to have sex," the market for prostitution was effectively eliminated, thereby eradicating the demand for trafficking victims.²²² However, abolition of prostitution involves boarding up physical structures, handcuffing actual people, and surveilling real street corners.²²³ Extending this methodology to pornography is practically impossible given the boundless characteristics of the digital realm.²²⁴ A workable solution will seek not to restrict an unrestrainable market, but to propose prosecution and law enforcement strategies fit for the realities of the internet age.²²⁵

Additionally, statistics show prosecution of prostitution disproportionately affects sex workers instead of johns and pimps.²²⁶ In fact, in the United States, arrests of perpetrators amount to less than 1 percent of total prostitution-based arrests.²²⁷ Specifically, between 2001 and 2002 in Chicago, 89 percent of commercial sex arrests were of female sex workers, 9.6 percent were of male johns, and only 0.6 percent were of pimps.²²⁸ Although the profiteers are the primary perpetrators, "they are the least arrested and prosecuted."²²⁹ This is because prosecuting johns and pimps typically requires testimony of victims, many of whom fear repercussion from their perpetrators.²³⁰ Further, victims are often assumed to have limited credibility, which weakens the impact of their testimony.²³¹ Finally, law enforcement

220. See MacKinnon, *supra* note 15, at 1003 ("Suppress the demand, and you suppress the supply and the part played in that supply by the intermediary, who is a corrupted corrupter"); Hughes, Demand, *supra* note 25, at 29.

221. See Hughes, Demand, *supra* note 25, at 35

222. *Id.*

223. See Alter, *supra* note 73 (discussing the logistics of a prostitution police sting operation for purposes of pimp and john arrests).

224. See Sarikakis, *supra* note 76, at 212–13 ("[I]t is the business model of pornography that is changing . . . The Internet operates as a gigantic, ever-expanding archive of material, some of which is 'free' at the point of delivery.").

225. See *id.*

226. See *What Fuels Human Trafficking*, *supra* note 68 (remarking that the prosecution of human traffickers is "shockingly low" for an industry that has 21 million victims globally, calling legal sanctions "minimal and rare" for offenders).

227. Hughes, Demand, *supra* note 25, at 18.

228. *Id.*; Alter, *supra* note 73 (reporting that, historically, "most jurisdictions in the U.S. have focused their energy on arresting prostituted women" to the tune of 43,000 arrests in 2010 compared to less than 19,000 arrests of pimps and johns that same year).

229. See Hughes, Demand, *supra* note 25, at 17. *Contra* Alter, *supra* note 73 (discussing the "Nordic Model," Sweden's approach to targeting pimps and johns, but not sex workers, which the government believes has reduced prostitution and trafficking).

230. See Hughes, Demand, *supra* note 25, at 19; discussion *supra* Part II.B (discussing manipulation tactics employed by traffickers to gain control over victims).

231. See Hughes, Demand, *supra* note 25, at 19.

agencies rarely have the resources to investigate every commercial sex operation, opting instead to take action only when a victim lodges a complaint—a rare occurrence considering the control that pimps maintain over victims.²³² In the absence of reform to prostitution prosecution practices, including coerced pornography in the Protocol’s “prostitution” term would produce the absurd effect of prosecuting pornographic “prostitutes” for being trafficking victims.²³³

Further, the pornography-as-prostitution approach stops short of explicitly enumerating “pornography” in the definition of “exploitation.”²³⁴ This failure exposes victims to the same prosecution issues, like jurisdictional red tape and inconsistent legislation across member states, that are present under the current Protocol.²³⁵ While well-intended, this theoretical approach yields little practical change, rendering it primarily academic.²³⁶ Widespread disagreement about the legality of prostitution make its definition just as internationally inconsistent as the current “exploitation” definition sans “coerced pornography.”²³⁷ Without uniformity in the “prostitution” definition, coerced pornography victims are no more likely to find legal shelter in this definition than in the unsatisfactory relief currently available under the Protocol.²³⁸ The pornography-as-prostitution approach does nothing to resolve this concern.²³⁹

Finally, the theory is unworkable as it is ill-suited for modernity. The approach is outdated because “prostitution,” by definition, implies an exchange of money for a sex act.²⁴⁰ In the present era, most pornography is free.²⁴¹ The world’s most frequently visited pornography sites collectively offer millions of clips—no purchase necessary.²⁴² Without monetary consideration for porn, the prostitution analogy breaks down, defeating the pornography-as-

232. *See id.*; discussion *supra* Part II.B (discussing infrequent reporting of sex crimes by victims).

233. *See, e.g., What Fuels Human Trafficking, supra* note 68 (discussing the wildly disproportionate occurrence of prostitute-focused prosecution and the negative consequences of that approach).

234. *See* MacKinnon, *supra* note 15, at 1004.

235. *See* Allain, *supra* note 99, at 112.

236. *See, e.g., id.* at 112–13, 113 n.4.

237. *See, e.g., id.*

238. *See id.*

239. *See id.*

240. *See Prostitution*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/prostitution> (last visited Feb. 9, 2021) [<https://perma.cc/9BD5-XU5W>] (archived Feb. 27, 2020) (defining “prostitution” as “the act or practice of engaging in promiscuous sexual relations especially for money”).

241. *See* Raustiala & Sprigman, *supra* note 66 (commenting that most pornography made available through content aggregators like Pornhub, YouPorn, and XVideos is free).

242. *See id.*

prostitution prosecution strategy.²⁴³ Neglecting to update the pornography-as-prostitution approach comes at the expense of restitution for trafficking victims.²⁴⁴ Advocating for the unrealistic goal of reigning in the untamable digital phenomenon that is the internet is a fruitless task that distracts from the Protocol's specific charge to provide protection and assistance to victims.²⁴⁵ A workable solution to pornography's connection to trafficking will accept this new-age reality and work within its bounds to achieve justice for victims.

D. Consequences in the Absence of International Consensus

The Protocol's own preamble admits there are a "variety of international instruments" for regulating human trafficking, but "no universal instrument that addresses all aspects" of the issue.²⁴⁶ Unfortunately, the Protocol's implementing strategy undermined its role as a "universal instrument" from the start.²⁴⁷ Because the Protocol delegates implementation to individual member states, the domestic responses to the Protocol are vastly inconsistent.²⁴⁸ These disparities yield significant challenges to prosecuting trafficking, a frustration particularly poignant in jurisdictional issues.²⁴⁹ Reconciling the Protocol with the preexisting laws of each signatory nation proves

243. *See id.*; *see also* Luzwick, *supra* note 17, at 139–48 (arguing that the pornography viewer, as with prostitution, experiences "bought sex" through exchanging money to "obtain . . . the use of a person . . . to satisfy their own sexual desire").

244. *See generally* Weitzer, *supra* note 17 (offering an impassioned critique of pornography-as-prostitution theory).

245. *See* Sarikakis, *supra* note 76, at 3 ("The pornography industry today operates *panoramicly*, through a highly sophisticated technological and financial infrastructure; it is seamlessly integrated into the macro-level global system of production, distribution, marketing and consumption of media and culture products even while it operates at the micro-level of the consumer." (emphasis added)).

246. *See* Protocol, *supra* note 19, pmb.; *see also* Dempsey, Hoyle & Bosworth, *supra* note 109, at 138 (commenting that there was broad international concern around the issue of sex trafficking prior to the Vienna Process, but no agreement about what "precisely, sex trafficking was"); Shoaps, *supra* note 126, at 935 (stating that the Protocol "can only go so far" and ultimately signatory nation legislation "plays an integral role" in combatting sex trafficking).

247. *See* Protocol, *supra* note 19, art. 5; *see also* Dempsey, Hoyle & Bosworth, *supra* note 109, at 139 (stating that the very fact that there are differences among member states implementing statutes undercuts the existence of an "international agreement" to regulate sex trafficking).

248. *See* Allain, *supra* note 99, at 112 (remarking that the Protocol is "fundamentally flawed" because in their attempts to address transnational trafficking, "[s]tates speak to each other in different languages: both literally and figuratively. Figuratively, as their jurisdictions are not truly compatible with each other; when they speak of 'trafficking,' they are mainly speaking about different things").

249. *See id.* at 139 (calling the issue of extra-territorial jurisdiction "critical" in a world of "multi-varied understanding of what constitutes trafficking in persons").

equally challenging.²⁵⁰ There are as many regulatory approaches to pornography as there are Protocol signatories, threatening the Protocol's broad applicability.²⁵¹

1. Incompatibility Across Member State Responses to the Protocol

Discrepancies across definitions in the few countries that enumerate coerced pornography, and a complete absence of enumeration across other signatory nations, lead to unique challenges in prosecuting porn-based traffickers. Chief among them is jurisdiction.²⁵² In the case of extraterritorial jurisdiction, a state is "unilaterally establishing jurisdiction" over trafficking crimes that took place beyond that state's respective borders.²⁵³ This is necessary for the prosecution of sex traffickers because trafficking crimes often inherently involve transnational movement of people.²⁵⁴ The Model Law calls for the inclusion of extraterritorial jurisdiction in trafficking legislation, insisting that the response to human trafficking must "rise above jurisdictional limitations" to "effectively suppress this crime" through bilateral and multilateral state cooperation.²⁵⁵ However, signatory nations do not universally adopt this notion.²⁵⁶

Even in cases where extraterritorial jurisdiction is available, inconsistencies in "exploitation" definitions can render prosecution impossible. To illustrate this point, consider the following facts and subsequent hypothetical: Thailand criminalizes the production, procurement, sale, export, or publishing of any form of pornography or "any other thing which is obscene" under any circumstances.²⁵⁷

250. See Dempsey, Hoyle & Bosworth, *supra* note 109, at 138–39 ("[O]ne would expect to find widespread uniformity in the definitions of trafficking found in the domestic criminal laws of state parties to the Palermo Protocol. Yet . . . significant discrepancies persist between trafficking definitions in international law and definitions adopted in the domestic criminal codes of many state parties.").

251. See *id.* at 139 (commenting that differences in member state criminal codes are to blame for debilitating a cohesive international approach to sex trafficking).

252. See Allain, *supra* note 99, at 139.

253. See *id.* at 139–40.

254. See Model Law, *supra* note 138, at 6 ("[T]rafficking in persons is a national as well as a transnational crime, where criminals work across boundaries . . .").

255. See *id.*

256. Cf. Council Directive 2011/36/EU, art. 16, 2011 O.J. (L 101) 6, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0036&from=EN> [<https://perma.cc/Y6UX-BVLV>] (archived Feb. 9, 2021) (giving twenty-eight European Union member states the power to establish jurisdiction over trafficking crimes committed outside their borders).

257. See Thai Criminal Code §287 ("Whoever . . . [f]or the purpose of trade or by trade, for public distribution or exhibition, makes, produces, possesses, brings or causes to be brought into the Kingdom, sends or causes to be sent out of the Kingdom, takes away or causes to be taken away, or circulates by any means whatever, any document, drawing, print, painting, printed matter, picture, poster, symbol, photograph, cinematograph film, noise tape, picture tape or any other thing which is obscene . . . shall

Further, Thailand includes pornography-related offenses in its trafficking definition of “exploitation.”²⁵⁸ Conversely, pornography in Denmark is decriminalized. In fact, 2019 marked the country’s fiftieth anniversary of legalizing adult content, the first country in the world to do so.²⁵⁹ Denmark does not regard coerced pornography as part of its “exploitation” definition.²⁶⁰

Suppose an individual was trafficked from Thailand to Denmark and forced to participate in pornography production. Then imagine that the Thai government seeks to invoke extraterritorial jurisdiction in order to prosecute the trafficker. Thailand’s ability to do so hinges on how “exploitation” is defined in Denmark.²⁶¹ Because Denmark legalizes pornography and does not include coerced pornography in its “exploitation” definition, Denmark would have no obligation, based on its trafficking legislation, to help with the investigation, assist the Thai victim, or allow extradition of the trafficker.²⁶² Theoretically, in this context, the act of the trafficker amounts to no more than assisting the Thai victim in finding employment within Danish borders.²⁶³ An effective solution would elevate concern for these severe human rights abuses above the administrative red tape of jurisdictional lines.

2. Reconciling the Protocol with Preexisting Domestic Legislation

Because the Protocol charges signatory nations with enacting a compliant domestic statute, each nation’s legislative response to this charge must fit within the country’s preexisting laws.²⁶⁴ In tension here is the most significant impediment to any regulation of pornography: free speech.²⁶⁵ Of the 193 UN member states, at least seventy have directly spoken to the issue of internet-based

be punished with imprisonment not exceeding three years or fined not exceeding six thousand Baht, or both.”)

258. See Allain, *supra* note 99, at 127 n.65 (designating which members states enumerate coerced pornography as a form of exploitation).

259. See *Denmark Legalized Pornography 50 Years Ago. Did the Decision Turn out as Expected?*, LOCAL (May 31, 2019), <https://www.thelocal.dk/20190531/denmark-legalized-pornography-50-years-ago-did-the-decision-turn-out-as-expected> [<https://perma.cc/4VZR-GWA2>] (archived Nov. 1, 2019).

260. Cf. Allain, *supra* note 99, at 126.

261. See *id.* at 140–41.

262. See *id.* at 141.

263. See *id.*

264. See Protocol, *supra* note 19, art. 5 (describing the member state duty outlined by Article 5 of the Protocol to adopt legislative measures as necessary to criminalize trafficking).

265. See Sarikakis, *supra* note 76, at 14 (stating that debates surrounding civil liberties and free speech remain the “core” sources of contention regarding pornography regulation).

pornography and have legislated for its legalization as a form of expression.²⁶⁶

Pornography-based free speech protections vary across member states.²⁶⁷ In South Africa, hosting a pornographic website is illegal because, by law, pornography can only be distributed from designated, licensed brick-and-mortar stores due to the difficulty of verifying a consumer's age online; however, it is permissible to produce, upload, access, and watch pornographic content.²⁶⁸ Representing a more restrictive approach, Brunei warrants pornography production only for "personal use," but broadly authorizes access to internet pornography.²⁶⁹ By contrast, New Zealand's statutory scheme is liberal, permitting unlimited access to internet pornography and allowing the sale of adult content at newsstands to anyone over eighteen and the sale of "soft core" pornography to customers of any age.²⁷⁰

These protections are accompanied by the most fierce defenders.²⁷¹ For example, in Australia, a small, but vocal, group of advocates for free porn-as-speech established their own political party called the Australian Sex Party (ASP).²⁷² Self-described as the "political response to the sexual needs of Australia in the twenty-first century," ASP exists to oppose any public policy proposals aimed at internet filtering.²⁷³ In a similar spirit, hundreds of United Kingdom sex workers and pro-pornography campaigners took to the streets following Parliament's passage of legislation banning a list of ten sex acts from online adult content filmed within the country and blocked the steps of government buildings in protest.²⁷⁴

While these efforts, intended to defend free speech protections, are noble, pro-pornography advocates are inadvertently guarding the menacing, financially-driven abuses of amateur pornography.²⁷⁵ An effective solution will bring prosecution of these "underground"

266. See *List of Pornography Laws by Region*, PROJECT GUTENBERG SELF-PUB. PRESS, http://self.gutenberg.org/articles/list_of_pornography_laws_by_region (last visited Feb. 26, 2021) [<https://perma.cc/3ZZQ-TNJU>] (archived Feb. 27, 2020).

267. See *id.*

268. See *id.*

269. See *id.*

270. See *id.*

271. See Sarikakis, *supra* note 76, at 9 (providing examples of representative bodies for adult film industry's free speech rights, including the Adult Industry Trade Association in the United Kingdom, the Free Speech Coalition in the United States, and the Eros Association in Australia).

272. See *id.* at 11.

273. See *id.*

274. See *Face-Sitting Protest Outside Parliament Against New Porn Rules*, GUARDIAN (Dec. 12, 2014), <https://www.theguardian.com/culture/2014/dec/12/face-sitting-protest-outside-parliament-against-new-porn-rules> [<https://perma.cc/BXP4-E5Z3>] (archived Feb. 27, 2020).

275. See *supra* notes 61–62 and accompanying text.

criminals within reach,²⁷⁶ while leaving the legal adult film industry undisturbed.²⁷⁷

Further resistance to the Protocol across international legal landscapes comes in the form of obscenity laws.²⁷⁸ This framework has long been a staple of the traditional approach to regulating pornography.²⁷⁹ For example,²⁸⁰ in the United States, obscenity is determined based on “community standards.”²⁸¹ If found in violation of community standards, the pornographer or content distributor could face fines or imprisonment.²⁸² Because the US “I know [obscenity] when I see it”²⁸³ test is so vague, the offense is rarely prosecuted.²⁸⁴ Conversely, Turkey leans heavily on obscenity laws to regulate pornography, using them as justification for blocking as many as 102,600 websites in 2016, with criteria for barring access including any site with “sexual keywords” in the web domain.²⁸⁵ The United Kingdom strikes a middle ground, leveraging obscenity laws to target any material whose total effect tends to “deprave and corrupt persons” having consumed it, thereby providing more specificity than the loose US definition, but stopping short of Turkey’s categorical ban.²⁸⁶

276. See *supra* notes 57–59 and accompanying text.

277. See Sarikakis, *supra* note 76, at 12 (“The pornography industry benefits from . . . the difficulties that technology and conflicting ideas about what constitutes freedom of speech impose on legislators.”); Strossen, *supra* note 168, at 1141 (providing examples of the consequences of censoring legally produced pornography, including: perpetuation of the women-as-victims narrative; damage to women’s ability to explore their own sexuality; stifling a powerful tool for pursuing women’s equality; and undermining an aspect of human sexuality that implicates human rights).

278. See Catharine A. MacKinnon, *Pornography Left and Right: A Review of Richard A. Posner, Sex and Reason and Edward De Grazia, Girls Lean Back Everywhere: The Law of Obscenity and the Assault on Genius*, 30 HARV. C.R.–C.L. L. REV. 143, 145 (1995) [hereinafter Mackinnon, *Left and Right*].

279. See MacKinnon, *supra* note 15, at 993.

280. See Sarikakis, *supra* note 76, at 15 (arguing that the consumer focus of obscenity laws makes those laws ineffective in regulating “problematic pornographic genres”).

281. See William T. Goldberg, *Two Nations: One Web: Comparative Legal Approaches to Pornographic Obscenity by the United States and the United Kingdom*, B.U. L. REV. (2010) 2121, 2121–22 (explaining that a trier of fact must gauge whether “given materials would be considered obscene by the standards of the average member of the community in which they are made available”).

282. See *id.*

283. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

284. See Weitzer, *supra* note 17, at 403.

285. See *Turkey Country Report*, FREEDOM HOUSE (2017), <https://freedomhouse.org/report/freedom-net/2017/turkey> [<https://perma.cc/D8B7-S9QQ>] (archived Feb. 27, 2020).

286. See Kevin W. Saunders, *Obscenity Laws in the United States, Canada, and Europe*, WILEY BLACKWELL ENCYCLOPEDIA GENDER & SEXUALITY STUD., Apr. 21, 2016, at 1, 2–3 (considering the United Kingdom’s obscenity law framework in the context of other international approaches).

Although obscenity laws take many forms and are enforced at different rates, they share one common characteristic: a focus on the morality of the consumer rather than the damage done to porn's victims.²⁸⁷ This posture detracts from the Protocol's intention of prioritizing victim rehabilitation and safety.²⁸⁸ Of course, prosecution of traffickers and behavior of pornography consumers are tied to victim protection.²⁸⁹ But even with an overwhelming focus on prosecution, fewer than half of the Protocol signatories have ever convicted a single perpetrator on sex trafficking charges.²⁹⁰ This alone justifies a turn from the perpetrator-centric approach, making clear an appropriate solution will give credence to the Protocol's victim-orientation.²⁹¹

Without specific enumeration of coerced pornography in the Protocol's "exploitation" definition, signatory nations' implementing statutes will fail to adequately address porn-based trafficking, perpetuating current prosecution frustrations.²⁹² Further, legal landscapes will strain against or directly oppose the Protocol, instead of supporting and supplementing it.²⁹³ If the Protocol's stated purpose is international "cooperation" made possible through a standard definition of "exploitation," why is there no uniformity among how signatory nations criminalize this offense?²⁹⁴ To resolve inconsistencies, both within and among member states, an effective solution must unify.

287. See Luzwick, *supra* note 17, at 139–40; see also MacKinnon, *supra* note 15, at 993 ("The morality of what is said and shown remains [obscenity laws] focus and concern. The injuries inflicted on real people to make the materials...are irrelevant to what is illegal about obscenity"); Mackinnon, *Left and Right*, *supra* note 278, at 145 (branding obscenity doctrine "unworkable" and "unrealistic"); *Pope v. Illinois*, 481 U.S. 497, 517 (1987) (Stevens, J., dissenting, joined by Marshall & Brennan, JJ., in relevant part) (arguing that the vagueness inherent in criminal obscenity statutes renders them constitutionally flawed).

288. See Lenzerini, *supra* note 31, at 212.

289. See Shoaps, *supra* note 126, at 949.

290. See *id.* (explaining the low conviction rates by noting that charges against traffickers are typically brought under laws designed to address non-trafficking offenses, thereby "undermining the comprehensive approach intended by the Palermo Protocol").

291. See *id.*; see also Lenzerini, *supra* note 31, at 212.

292. See *infra* note 304 and accompanying text (emphasizing the underwhelming signatory nation response to pornography-based trafficking in the absence of specific enumeration); *supra* notes 252–56 and accompanying text (illustrating the jurisdictional barriers to prosecution posed by vast discrepancies in Protocol implementation).

293. See *supra* note 275 and accompanying text (noting that free speech laws, while meritorious, give free reign to criminal amateur pornographers in contravention of the Protocol's goals); *supra* note 289 and accompanying text (discussing the way in which obscenity laws, without support from additional trafficking legislation, erode the victim-oriented intentions of the Protocol).

294. See Dempsey, Hoyle & Bosworth, *supra* note 109, at 140.

IV. SOLUTION

The merits of the Protocol justify working within its boundaries toward a solution.²⁹⁵ Although imperfect, the Protocol represents the closest the world has come to an international consensus on a global response to human trafficking.²⁹⁶ The UN has repeatedly emphasized the importance of member states collaborating to address this crisis, further underscoring the importance of the precious compromises embodied by the Protocol.²⁹⁷ Against a backdrop of heated debates, the Protocol admirably emerged from the Vienna Process as the first concerted effort to anchor transnational trafficking policy in victims' rights and rehabilitation.²⁹⁸ For these reasons, this solution honors the hard-worn compromises of the Vienna Process by supplementing the Protocol—not overturning it. The solution: to amend the Protocol to specifically enumerate “coerced pornography” as a form of “exploitation.”

A. *The Case for Specific Enumeration*

This solution is warranted by virtue of the power of specific enumeration.²⁹⁹ As discussed, the Protocol explicitly names five forms of exploitation.³⁰⁰ Of the 117 signatory nations, eighty-eight responded to the first reporting cycle of the UN's Questionnaire on the Implementation of the Protocol, a data collection device used to gauge member state progress toward Protocol-compliant trafficking legislation.³⁰¹ Here, the first reporting cycle is the most relevant cycle because it surveys domestic definitions of “exploitation.”³⁰² Of the

295. See *supra* Part III.A (discussing the strengths of the Protocol).

296. See *supra* notes 117–29 and accompanying text (discussing the debates and compromises of the Vienna Process); Dempsey, Hoyle & Bosworth, *supra* note 109, at 137 (“Whether as a result of conceptual disagreement regarding what counts as sex trafficking, political disagreement regarding what should be done about it, or simply a lack of political will, there was no internationally recognized definition of sex trafficking until [the Protocol].”).

297. See Protocol, *supra* note 19, pmb., art. 2 (the UN stating increased cohesion across member states is necessary to improving the effectiveness of the Protocol).

298. See *supra* notes 117–29 and accompanying text.

299. See Shoaps, *supra* note 126, at 950 (While the Protocol's “broad definition draws a wide variety of trafficking within its ambit,” lack of specificity comes at the expense of victims at the domestic legislation stage of implementation).

300. See Protocol, *supra* note 19, art. 3(a) (enumerating five forms of exploitation: (1) the exploitation of the prostitution of others or other forms of sexual exploitation; (2) forced labour or services; (3) slavery or practices similar to slavery; (4) servitude; or (5) the removal of organs).

301. Rep. of the Sec., U.N. Off. of Drugs & Crime, Consolidated Information Received from States for the First Reporting Cycle, at 16–21, CTOC/COP/2005/3/Rev.2 (Aug. 25, 2008) [hereinafter First Reporting Cycle].

302. See *id.* at 6.

eighty-eight respondent nations, seventy-two member states, or 81.8 percent, explicitly criminalize all five forms of exploitation enumerated in the Protocol.³⁰³ In stark contrast, a mere nine member states, or 10.2 percent, include coerced pornography in their trafficking law.³⁰⁴ Table 2 details how many respondent nations criminalize each of the forms of exploitation in their implementing statute:³⁰⁵

Form of Exploitation	Number of Respondent Nations to Criminalize	Percentage of Total Respondent Nations
“the exploitation of the prostitution of others or other forms of sexual exploitation” ³⁰⁶	86	97.7%
“forced labour or services” ³⁰⁷	82	93.2%
“slavery or practices similar to slavery” ³⁰⁸	82	93.2%
“servitude” ³⁰⁹	78	88.6%
“the removal of organs” ³¹⁰	79	89.8%
Coerced pornography* ³¹¹	9	10.2%

*Offense not enumerated in the Protocol’s “exploitation” definition

This data makes clear that enumerating a form of exploitation in the Protocol is directly tied to the likelihood of a signatory nation

303. *See id.*

304. *See* Allain, *supra* note 99, at 126–27, 127 n.65 (naming the nine member states that designate coerced pornography as a form of exploitation).

305. *See* First Reporting Cycle, *supra* note 301, at 6 (note that Nicaragua did not establish any exploitation offenses in its trafficking statute).

306. *See id.* (the only respondent countries who reported not enumerating this offense were Turkey and Nicaragua).

307. *See id.* (the only respondent countries who reported not enumerating this offense were Chad, Costa Rica, Nicaragua, Peru, Portugal, and the United Republic of Tanzania).

308. *See id.* (the only respondent countries who reported not enumerating this offense were Chad, Iceland, Kazakhstan, New Zealand, Nicaragua, Portugal, and the United Republic of Tanzania).

309. *See id.* (the only respondent countries who reported not enumerating this offense were Chad, Ecuador, Iceland, Latvia, New Zealand, Nicaragua, Peru, Portugal, Turkey, and the United Republic of Tanzania).

310. *See id.* (the only respondent countries who reported not enumerating this offense were Chad, Ecuador, France, the Niger, Peru, Portugal, Thailand, and the United Republic of Tanzania. Note that Germany deals with removal of organs in legislation specific to organ transplants).

311. *See* Allain, *supra* note 99, at 126–27, 127 n.65.

enumerating that offense in its implementing legislation.³¹² Simply put, if an offense is not enumerated in the Protocol, it is unlikely to be criminalized in the domestic implementing statute.³¹³ To ensure signatory nations have statutes under which to prosecute porn-based trafficking, coerced pornography must be specifically enumerated in the Protocol.

While “other forms of sexual exploitation” seems to be a convenient catchall for coerced pornography within the existing “exploitation” definition, the lack of specificity is problematic.³¹⁴ The shockingly low number of states that specifically criminalize coerced pornography in their domestic trafficking statutes³¹⁵ compared to the indisputable evidence of a correlation between trafficking and the pornography industry reveals a dangerous gap.³¹⁶ Existing legal frameworks, whether in the form of obscenity laws or treacherously general Protocol implementing statutes, fail to close it.³¹⁷ Specificity is necessary at the Protocol level to turn member state attention to the prosecution of this heinous offense.

Specificity is especially crucial in this context given the unique challenges that accompany prosecuting pornography-related offenses. Pornography-based traffickers have the distinct advantage of blackmailing victims with digital records and brainwashing them to believe a life of unemployment awaits beyond the pornography industry, creating a powerful structure of control.³¹⁸ The common belief among victims that they will be punished for participating in the crimes of their abusers prevents them from reporting their perpetrators and compounds the institutional advantage of pornography-based traffickers.³¹⁹ The anonymity and the hazy jurisdictional lines of the internet further insulate the trafficker from law enforcement.³²⁰ A criminal this powerful requires a directly targeted prosecutorial approach emboldened by a strong, victim-oriented statute.

312. See *supra* note 302 and accompanying text; see also First Reporting Cycle, *supra* note 301, at 6–7 (explaining that the Protocol does not define exploitation in an exhaustive way. Many respondent nations identified additional offenses beyond those enumerated in the Protocol. Very few, however, addressed coerced pornography in any way).

313. See *supra* note 301 and accompanying text.

314. See Protocol, *supra* note 19, art. 3(a).

315. See Allain, *supra* note 99, at 127 n.65.

316. See discussion *supra* Part II.B (discussing the connection between the pornography industry and sex trafficking).

317. See *supra* notes 287–91 and accompanying text (discussing the deficiencies of obscenity laws, particularly when inconsistently enforced).

318. See discussion *supra* Part II.B (discussing the manipulative tactics employed by porn-based traffickers to entrap victims in the industry).

319. See *id.*

320. See *supra* note 190 and accompanying text.

Even the jurisdictional confusion works in favor of the perpetrator.³²¹ Including coerced pornography in the “exploitation” definition squarely addresses this concern. It instructs every signatory nation to include the offense in its implementing statute,³²² which standardizes extradition policy for this crime across all borders of compliant signatory nations.³²³ Under this proposed solution, the fate of the hypothetical Thai victim trafficked to Denmark changes significantly.³²⁴ If “coerced pornography” were implemented as a form of “exploitation” across all signatory nations, including Denmark and Thailand, Denmark would be obligated to assist Thailand with investigations, provide protection to the Thai victim, and facilitate extradition of the trafficker for prosecution.³²⁵

This solution does not address every impediment that law enforcement and prosecutors face in bringing porn-based traffickers to justice. But as the situation presently stands, weak obscenity laws and general sexual exploitation statutes are the only prosecutorial weapons in the arsenal, none of which directly tie pornography to trafficking.³²⁶ Further, each of these approaches is cloaked with the seemingly impenetrable shield of free speech protections.³²⁷ While it does not do the fighting for them, at the very least, this solution gives public servants armor fit for the modern battle against internet-age trafficking. The data indisputably shows that when the Protocol speaks, signatory nations listen.³²⁸ For this reason, the Protocol should give voice to coerced pornography in the “exploitation” definition.

B. *Reconciling Other Approaches*

Taking the best parts of the “pornography-as-prostitution” approach and leaving behind its imperfections, this solution addresses coerced pornography head-on, instead of attempting to shoehorn it into

321. See discussion *supra* Part III.D.1 (discussing the jurisdictional complications under the current Protocol framework).

322. See *supra* note 152 and accompanying text.

323. See *supra* Part III.D.1.

324. See *id.*

325. See *id.*

326. See 22 U.S.C.A. § 7101 (West 2020) (finding that “existing legislation and law enforcement in the United States and other countries are inadequate to deter trafficking and bring traffickers to justice, failing to reflect the gravity of the offenses involved. No comprehensive law exists in the United States that penalizes the range of offenses involved in the trafficking scheme. Instead, even the most brutal instances of trafficking in the sex industry are often punished under laws that also apply to lesser offenses, so that traffickers typically escape deserved punishment”).

327. See discussion, *supra* Part III.D.2 (discussing the tensions between free speech protections and pornography-related offenses).

328. See *supra* note 312 and accompanying text.

the “prostitution” definition where it does not belong.³²⁹ The pornography-as-prostitution approach conflates “johns” (pornography consumers) with “pimps” (pornography-based traffickers) by inextricably tying the two together.³³⁰ Enumerating coerced pornography places blame where it belongs: on the coercers.³³¹ When culpability focuses on one criminal entity, prosecution can be clear and targeted. Further, unlike brothels in 1980s London, it is not possible to “shut down” the internet sex market.³³² Applying the same law enforcement methodology used in prostitution to porn-based trafficking fails at the expense of victims.³³³ Attempting to shove coerced pornography into “prostitution” ignores digital realities to the detriment of effective policing.³³⁴ Conversely, this solution informs prosecution strategies and operates in tune with modernity through clearly distinguishing prostitution on street corners from pornography on computer screens.³³⁵ The significant differences between the two offenses warrant enumeration of two separate forms of “exploitation” within the Protocol’s definition.

Enumerating coerced pornography also reduces obscenity laws’ focus on offenders.³³⁶ This aligns seamlessly with the Protocol’s commendable victim-oriented approach but resolves its flaws.³³⁷ As discussed, some portions of the Protocol are less “optional” than others.³³⁸ Currently, protection for victims falls within the noncompulsory “Part Two” of the Protocol.³³⁹ This portion functions as a recommendation to the member states to “consider” or “endeavor” to provide rehabilitation, legal services, and compensation to victims.³⁴⁰ Part One defines “exploitation” and other requirements for signatory nation compliance with the Protocol.³⁴¹ By specifically enumerating coerced pornography, protection for victims moves from the permissive

329. See discussion *supra* Part III.C (discussing the merits and weaknesses of the pornography-as-prostitution approach).

330. See *id.*

331. See *id.*

332. *Contra* MacKinnon, *supra* note 15, at 1003.

333. See Shoaps, *supra* note 126, at 950 (While the Protocol’s “broad definition draws a wide variety of trafficking within its ambit,” lack of specificity comes at the expense of victims at the domestic legislation stage of implementation).

334. See *supra* notes 243–45 and accompanying text.

335. See *id.*

336. See Shoaps, *supra* note 126, at 949 (explaining the low conviction rates by noting that charges against traffickers are typically brought under laws designed to address non-trafficking offenses, thereby “undermining the comprehensive approach intended by the Palermo Protocol.”).

337. See Lenzerini, *supra* note 31, at 212.

338. See Gallagher, *supra* note 119, at 990.

339. See *id.*

340. See Protocol, *supra* note 19, art. 6(3)–(5).

341. See *id.* arts. 3, 5 (requiring signatories to adopt legislation defining the “act,” “means,” and “object” of trafficking in order to comply with the Protocol).

Part Two to the obligatory Part One.³⁴² A circumstance as dire as porn-based trafficking deserves a mandated response—not an optional one.³⁴³ Therefore, coerced pornography should be enumerated in the “exploitation” definition resident to Part One of the Protocol.

C. *Potential Vulnerabilities of This Solution*

It is true that the extensive debate over the “exploitation” definition leaves the workability of this solution exposed to possible criticism. The fact that it took years of fiery deliberation for member states to agree on the five enumerated forms of exploitation calls into question the ease of introducing a new enumerated form. However, an international sense of urgency to cooperatively address widespread, statistically quantifiable, legally definable forms of human rights abuses drove member states’ ultimate agreement on the “exploitation” definition.³⁴⁴ As this Note illustrates, coerced pornography meets each of these requirements and poses the same critical concern as any currently enumerated form of exploitation.³⁴⁵

It is significant that the primary dispute of the Vienna Process was contention over whether “voluntary” prostitution should be included in “exploitation.”³⁴⁶ That fact supports this solution. Coerced pornography, by its very definition, is *involuntary*.³⁴⁷ In many countries, the law is decided on the contractual, consensual production of porn—it is legal and afforded broad free speech protections.³⁴⁸ Because of its inherently involuntary nature, enumerating coerced pornography in the “exploitation” definition in no way infringes on these liberties.³⁴⁹ In this way, this solution remains above the “voluntary prostitution” fray by distinguishing itself from prostitution and targeting coerced, rather than consensual, pornography.

Additionally, given the wide range of exploitative crimes wreaking havoc around the world, it may be difficult to justify specific enumeration for this particular offense. However, this is a crime with

342. *See id.*

343. *See* discussion *supra* Part II.A.2 (discussing with urgency the dangers of the pornography industry for trafficking victims).

344. *See* Gallagher, *supra* note 119, at 986 (discussing the priority placed on cooperation at the Vienna Process above individual member state preferences).

345. *See* discussion *supra* Part III.D (identifying consequences for victims in the absence of international consensus on the coerced pornography issue).

346. *See* Gallagher, *supra* note 119, at 984–86.

347. *See* Coerce, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/coerce> (last visited Feb. 26, 2021) [<https://perma.cc/P83K-KPUU>] (archived Feb. 27, 2020) (defining “coerce” as “to compel to an act or choice; to achieve by force or threat”).

348. *See* discussion *supra* Part III.D.2 (surveying various international approaches to porn’s legality and free speech protections).

349. *See id.*

unique features because of its digital characteristics. In the twenty years since the Vienna Process, the internet has become accessible in ways the signatory nations could not have predicted. The quantity of pornographic content and the global demand for it will only continue to grow in years to come.³⁵⁰ It is not sufficient that the Model Law addresses production of pornographic materials.³⁵¹ The Model Law states that its provisions are merely recommendations.³⁵² To place true onus on signatory nations to address this distinct new-age crime, coerced pornography needs a place in the Protocol itself.

Finally, this solution appears to regulate the pornography industry, potentially raising the red flags of free speech advocates.³⁵³ However, unlike obscenity laws, which infringe on “offensive” examples of protected speech, enumerating coerced pornography does not disturb legal pornography at all.³⁵⁴ Leaving the pornographic *content* itself completely untouched, this solution takes aim at criminal pornographic *producers* who use trafficking victims for profit.³⁵⁵ In this way, this solution actually protects the legal pornography industry by eradicating exploitative production tactics, silencing organized crime rumors, and increasing its legitimacy as an artform.³⁵⁶

V. CONCLUSION

The transnational problem of porn-based trafficking demands a transnational solution. With access to internet pornography at historic levels, the time to address this crisis is now. This proposal takes up that charge. By enumerating coerced pornography in the “exploitation” definition, this solution leverages the cooperative spirit of the Protocol and facilitates actual coordination among member states, thereby cutting jurisdictional red tape and providing legal shelter to victims. This approach honors and elevates the Protocol’s victim-oriented approach, while acknowledging the shifting realities of the internet era. It works alongside free speech liberties, instead of in contravention of them. It distinguishes “prostitution” by giving coerced pornography its own statutory prong and the prosecutorial power that comes with

350. See, e.g., Safi, *supra* note 14 (discussing the continued growth of pornography and the effects of the industry on human trafficking demands).

351. See Model Law, *supra* note 138.

352. See *id.*

353. See *supra* notes 264–77 and accompanying text (discussing the porn-related concerns of free speech advocates).

354. See *supra* notes 278–91 and accompanying text (discussing obscenity laws as a way to regulate pornographic content).

355. See discussion *supra* Part II.B (identifying the way in which pornography-based traffickers monetize their crimes).

356. See *supra* note 70–73 and accompanying text.

it. Most importantly, it provides an imperative sword to law enforcement and a meaningful shield to victims. This solution takes seriously the high and rising stakes for trafficked individuals and those who protect them. The Protocol should too.

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