

3-1-2022

Trafficking Without Borders: Why It Is Time for the Law to Properly Address Cybersex Trafficking in the Livestreaming Context

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Trafficking Without Borders: Why It Is Time for the Law to Properly Address Cybersex Trafficking in the Livestreaming Context

Cover Page Footnote

J.D., The Catholic University of America, Columbus School of Law, expected May 2022. The author would like to thank Senior Associate Dean Mary Graw Leary for her guidance and expertise and the staff and editors of the *Catholic University Law Review* for their work on preparing this Comment for publication.

TRAFFICKING WITHOUT BORDERS: WHY IT IS TIME FOR THE LAW TO PROPERLY ADDRESS CYBERSEX TRAFFICKING IN THE LIVESTREAMING CONTEXT

Jesse Raines⁺

This Comment assesses the impact, and growing prevalence, of cybersex trafficking: A relatively novel form of human trafficking conducted via livestream over the internet. In particular, this Comment focuses on the differences between the statutes that criminalize sex trafficking and child pornography and how these statutes operate both domestically and internationally. This Comment argues that the Trafficking Victims Protection Act of 2000 should be amended in order for the modern crime of cybersex trafficking to fall under the statute's ambit and to aid in prosecution efforts.

⁺ J.D., The Catholic University of America, Columbus School of Law, expected May 2022. The author would like to thank Senior Associate Dean Mary Graw Leary for her guidance and expertise and the staff and editors of the *Catholic University Law Review* for their work on preparing this Comment for publication.

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INTRODUCTION

When Kim¹ was twelve years old, she became a sex trafficking victim.² Growing up in the Philippines, much of her life was spent in extreme poverty.³ When a seemingly friendly neighbor promised Kim a job in Manila that would allow her to help her parents and help pay for her siblings’ education, she accepted, and her parents allowed her to leave.⁴ Only a few months after arriving in Manila did the sexual abuse begin. Her neighbor first took a nude picture of Kim. Soon, this escalated into forcing Kim to pose naked in front of a webcam.⁵ Kim’s horrific ordeal was livestreamed over the internet for paying abusers from around the world to both observe and pay to sexually abuse her.⁶ This is cybersex trafficking, where the live sexual abuse of children is streamed via the internet to paying abusers that record, order, or direct the abuse of the child in

1. “Kim” is a pseudonym.

2. *Kim thought nothing was wrong. But that was about to change*, INT’L JUST. MISSION, <https://www.ijm.org/stories/kim> (last visited Oct. 22, 2021).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

real time.⁷ This was not a one-time trauma. Kim's unrelenting abuse persisted for three years until she was fifteen years old.⁸

Living in the Philippines, Joy⁹ was only ten years old when she was first abused.¹⁰ At the age of eight her parents separated, leaving Joy to stay with relatives and neighbors.¹¹ When a woman that Joy trusted invited her to her house, Joy accepted.¹² But immediately something felt wrong. Like Kim before her, Joy's abuse began by being told to take off her clothes, along with some of her friends, and pose as the woman took photos of them.¹³ Eventually, this led to livestreaming the abuse, available to anyone with an internet connection. Joy's exploitation lasted seven long years.¹⁴

I. THE REALITY OF LIVESTREAMING ABUSE, AND THE EFFECT OF THE INTERNET AND COVID-19

Sadly, the experiences of Kim and Joy are all too common, especially in the Philippines.¹⁵ This particular form of exploitation is a relatively new phenomenon. Referred to generically as either sex trafficking, livestreaming abuse, or cybersex trafficking, this form of abuse allows minors to be sold all over the globe with a markedly decreased risk to the viewing offender on the other side of the screen.¹⁶ Such livestreaming occurs when a minor is forced in front of a webcam to either engage in sexual acts or to be sexually abused by the trafficker in real time, often at the direction of the paying customer half a world away.¹⁷

In general, technology, and the internet in particular, has increasingly become the main apparatus by which minors are trafficked and exploited.¹⁸ This is not only because the minors can be livestreamed to abusers, but also because it both

7. *Id.*; *Cybersex Trafficking FAQs*, INT'L JUST. MISSION, <https://ijmstoragelive.blob.core.windows.net/ijmna/documents/Cybersex-Trafficking-FAQs.pdf> (last visited Sept. 14, 2021).

8. *Kim thought nothing was wrong. But that was about to change*, INT'L JUST. MISSION, <https://www.ijm.org/stories/kim> (last visited Oct. 22, 2021).

9. "Joy" is a pseudonym.

10. *Joy says, "We were left with no choice but to follow her instructions,"* INT'L JUST. MISSION, <https://www.ijm.org/stories/joy> (last visited Oct. 22, 2021).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *See e.g., Marj Was Trafficked from Her Own Neighborhood*, INT'L JUST. MISSION, <https://www.ijm.org/stories/marj> (last visited Oct. 22, 2021) (telling the story of a young girl named Marj—a pseudonym—who was trafficked by some of her friends and whose abuse also escalated to livestreamed abuse and lasted for three years).

16. INT'L CTR. FOR MISSING & EXPLOITED CHILD., *Studies in Child Protection: Technology-Facilitated Child Sex Trafficking*, 9, 14–15 (2018), https://www.icmec.org/wp-content/uploads/2018/12/Technology-Facilitated-Child-Sex-Trafficking_final_11-30-18.pdf.

17. *Id.* at 16 n.164.

18. *Id.* at 1.

allows for advertising the minors for purchase and for grooming the children to lure them away from safety.¹⁹ The internet is an attractive tool for traffickers because of its unregulated nature, the anonymity it provides, and the fact that it is readily accessible by an ever-increasing proportion of the population.²⁰

The COVID-19 pandemic has not helped this precipitous situation.²¹ The world's population has been forced indoors which allows more opportunity for online traffickers to groom their victims as children spend more time online, as well as keeping the virtual abusers online, which increases the demand for cybersex trafficking.²² School shutdowns are likely only to exacerbate this problem.²³ Such events and circumstances have led to a growing concern of a spike in this form of trafficking in global hotspots, such as the Philippines.²⁴

II. THE PROBLEM: THE PHILIPPINES AND THE UNITED STATES – SAME CASE, DIFFERENT TREATMENT

In 2019, police officers in the city of Lapu-Lapu, Philippines arrested a twenty-five year old female trafficker who was livestreaming the abuse of her then twelve-year-old female cousin for a paying “customer” abroad.²⁵ The trafficker in that case was charged under Filipino statutes for violating the Anti-

19. *Id.* at 14–17.

20. *Id.* at 1.

21. See *Why Children are at Risk of Sexual Exploitation During COVID-19*, ECPAT INT'L (Apr. 7, 2020), https://ecpat.exposure.co/covid19?utm_source=Website&utm_campaign=Hero (noting that as COVID-19 has spread throughout the world it has devastated families, economies, and health systems and traffickers are looking to take advantage of the chaos for their own benefit); U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *Trafficking in Persons Report 2, 7* (2021).

22. *Id.*; Paolo Romero, *Senator warns of possible surge in child cybersex traffic*, PHIL. STAR (Apr. 13, 2020, 12:00 AM), <https://www.philstar.com/headlines/2020/04/13/2006955/senator-warns-possible-surge-child-cybersex-traffic>; see also *Children may be at greater risk of grooming during coronavirus pandemic as IWF braces for spike in public reports*, INTERNET WATCH FOUND. (Mar. 20, 2020), <https://www.iwf.org.uk/news/children-may-be-at-greater-risk-of-grooming-during-coronavirus-pandemic-as-iwf-braces-for>.

23. See INTERNET WATCH FOUND., *supra* note 22.

24. See Nanchanok Wongsamuth & Matt Blomberg, *Coronavirus fuels cybersex trafficking fears for children in Southeast Asia*, REUTERS (Mar. 26, 2020), https://www.reuters.com/article/health-coronavirus-trafficking-idUSL8N2BI0P9?fbclid=IwAR3tfU_DBVSNw_Rwyt5QDa0FcMYCxaIweDFJYlhQ0VNM7IemtzfonDjuRNM (noting that activists are concerned about a dramatic increase in cybersex trafficking in the Philippines, considered “the epicenter” of such exploitation); U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *Trafficking in Persons Report 458* (2021) (stating that “[r]eports cited a nearly 265 percent increase in unconfirmed reports of online child sexual abuse during the pandemic”). See also Michael Sullivan, *Child Sex Abuse Livestreams Increase During Coronavirus Lockdowns*, NPR (Apr. 8, 2020, 11:58 AM), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/08/828827926/child-sex-abuse-livestreams-increase-during-coronavirus-lockdowns> (warning that online abuse in Southeast Asia is on the rise as schools close and countries are in various stages of lockdown).

25. PHIL. DEP'T OF JUST., *Cops Arrest Online Sex Trafficker in Lapu-Lapu City Amid COVID-19 Lockdown* (Apr. 16, 2020), https://www.doj.gov.ph/news_article.html?newsid=657.

Trafficking in Persons Act, Anti-Child Abuse Law, and Anti-Child Pornography Act in relation to Cybercrime Prevention Act.²⁶ Most importantly, among the statutes under which the trafficker was charged, Philippine law properly recognized the trafficker's actions as human sex trafficking and charged her as such. This particular case against the trafficker began with a referral from the U.S. Federal Bureau of Investigation (FBI) to the Philippine Internet Crimes Against Children Center (PICACC).²⁷ The FBI had been investigating a man based in the United States named Alan Dennis Wolff.²⁸ Mr. Wolff directed the trafficker to livestream the abuse of her twelve-year-old cousin in exchange of payment.²⁹

On the other side of the Pacific Ocean, Mr. Wolff was indicted in 2019 on charges of sexually exploiting children under 18 U.S.C. § 2251.³⁰ This statute governs the criminal offence of child pornography.³¹ From 2013 to 2019, Mr. Wolff allegedly, in addition to the livestreaming abuse for which he paid the trafficker in the Philippines, used social media to correspond with minor girls, some as young as thirteen-years old.³² Mr. Wolff had physically traveled to the Philippines at least three times before.³³ Notably absent from the charges levelled against Mr. Wolff was a charge under the United States Federal law criminalizing sex trafficking of minors.³⁴ This is because the law in the United States does not respond to these cases as it should. This inadequate response to the problem has left prosecutors charging these individuals under child pornography statutes, which does not capture the full harm of the crime. The unique nature of the crime, the transnational jurisdictional obstacles, and the fact that the law has not kept pace with advancing technology has only exacerbated these problems. The answer to overcoming these obstacles is to amend the current relevant trafficking laws.

26. *Id.*; Anti-Trafficking in Persons Act of 2003, Rep. Act No. 9208, § 1 (May 26, 2003), as amended by Rep. Act No. 10364 (Feb. 6, 2013) (Phil.); Special Protection of Children Against Abuse, Exploitation and Discrimination Act, Rep. Act No. 7610 (June 17, 1992) (Phil.); Anti-Child Pornography Act of 2009, Rep. Act No. 9775 (Nov. 17, 2009) (Phil.), in relation to Cybercrime Prevention Act of 2012, Rep. Act No. 10175 (Sept. 12, 2012) (Phil.). The trafficker has since pled guilty to trafficking crimes and been sentenced to seventeen years in prison. *Online sex trafficker sentenced to 17 years in Lapu-Lapu City*, RAPPLER (July 31, 2020, 6:40 PM), <https://www.rappler.com/nation/online-sex-trafficker-sentenced-to-17-years-in-lapu-lapu-city>.

27. PHIL. DEP'T OF JUST., *supra* note 25.

28. *Id.*

29. *Id.*

30. U.S. ATT'YS OFF., DIST. MINN., *Ramsey County Man Indicted For Sexually Exploiting Children In The Philippines* (May 7, 2019), <https://www.justice.gov/usao-mn/pr/ramsey-county-man-indicted-sexually-exploiting-children-philippines>. See 18 U.S.C. § 2251.

31. See 18 U.S.C. § 2251.

32. U.S. ATT'YS OFF., DIST. MINN., *supra* note 30.

33. U.S. ATT'YS OFF., DIST. MINN., *supra* note 30.

34. See generally 18 U.S.C. § 1591. Section 1591 is not included in the list of charges against Mr. Wolff. U.S. ATT'YS OFF., DIST. MINN., *supra* note 30.

III. THIS COMMENT'S SCOPE AND ROADMAP

This prosecutorial oddity is not as rare as might be expected.³⁵ The problem with prosecuting and punishing these overseas virtual abusers in the way that the United States does is that it does not properly recognize the culpability with which these virtual abusers act.³⁶ The conduct of individuals such as Mr. Wolff is more analogous to the context of sex trafficking than of producing child pornography.³⁷ While the virtual abusers are not physically present with the child who has undoubtedly been trafficked, it does not follow that such offenders should be charged only under statutes carrying lesser sentences, such as child pornography statutes, simply because they physically separate themselves from the trafficked victim with a screen.³⁸

This Comment will begin by looking at the prior law as it relates to these areas in order to assess the issue as it is relevant today. Section IV, Part A will assess the current issue of cybersex trafficking as it exists in general and globally. Section IV, Part B will focus on the Philippines first by examining the scope and prevalence of the issue and how the government is set up and equipped to combat the illicit trafficking. Section IV, Part C will look at the countervailing situation in the United States with a focus on both the relevant human trafficking and child pornography statutes. Section IV will also look briefly at the issue and statutes concerning “child sex tourism” and will then assess the difference in the sentencing between the statutory schemes.

35. See e.g., U.S. ATT'YS OFF., N. DIST. IOWA, *Cedar Rapids Man Pleads Guilty to Sexual Exploitation of Children* (Feb. 4, 2020), <https://www.justice.gov/usao-ndia/pr/cedar-rapids-man-pleads-guilty-sexual-exploitation-children>. William Meyer was also charged, and then convicted of one count of sexual exploitation of children (under 18 U.S.C. § 2251). *Id.*; see 18 U.S.C. § 2251. From 2012 to 2019, Mr. Meyer “persuaded, induced, or enticed . . . minors to engage in sexually explicit conduct . . . for the purpose of transmitting live visual depictions of this conduct.” *Id.* The livestreaming of abuse included minors in the Philippines. *Id.*; see also, U.S. DEP'T OF JUST., *Kansas Man Sentenced for Producing Child Pornography* (Aug. 8, 2019), <https://www.justice.gov/opa/pr/kansas-man-sentenced-producing-child-pornography>. (A man was charged in 2016 and pleaded guilty to three counts of producing child pornography after admitting to “produc[ing] child pornography of an 8-year-old girl in the Philippines by communicating on Skype with the child’s mother and directing the mother to expose the child’s genitals and live-stream it on web camera”).

36. For the sake of clarity, and because this crime involves multiple parties, this article employs the terms “abusers” and “virtual abusers.” Such distinction does not imply a distance or removal from the crime that is not actually there.

37. See Zach Buchanan, *Offenders Without Borders: How Technology Is Globalizing Child Sex Trafficking*, HUMAN TRAFFICKING INST., <https://www.traffickingmatters.com/offenders-without-borders-how-technology-is-globalizing-child-sex-trafficking/> (last visited Oct. 5, 2021). This article will use the term child pornography as it is the current legal definition of this conduct. However, legislation currently pending before Congress seeks to amend references in federal statutes from “child pornography” to “child sexual abuse material.” Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2020 (EARN IT Act), S. 3398, 116th Cong. § 6 (2020).

38. Buchanan, *supra* note 37.

Section V of this comment will analyze the various statutory schemes. Section VI will propose and comment on updates that can be made to the statutes to include coverage of this kind of cybersex trafficking crime.

IV. PRIOR LAW

A. *The Rise of Cybersex Trafficking*

By one conservative estimate, approximately one million children under the age of eighteen are victims of forced sex trafficking.³⁹ Other estimates, including by UNICEF, can be as high as 1.8 million children, and even this figure does not include victims of cybersex trafficking.⁴⁰ Profits for the traffickers of children in such criminal enterprises can be huge. The International Justice Mission (IJM) estimates that the human trafficking industry generates \$150 billion annually, and that two-thirds of this figure originate from commercial sex exploitation.⁴¹ One trafficked child can generate hundreds of thousands of dollars of profit each day.⁴² The younger the child and the more abusive the show, the more the viewer pays.⁴³ Other allures and incentives are the ease with which such an operation can be set up and the low chance of detection that technology brings.⁴⁴ All a would-be trafficker needs is an internet connection and a webcam.⁴⁵

Child sex traffickers themselves are often close family or relatives, as well as acquaintances.⁴⁶ According to one report, almost half of all child sex trafficking cases originate with a family member, almost four-times the prevalence as

39. IJM CASEWORK SERIES, *Sex Trafficking*, INT'L JUST. MISSION (2019), https://www.ijm.org/documents/IJM-2019-Casework_FactSheets_SexTrafficking.pdf; INT'L CTR. FOR MISSING & EXPLOITED CHILD., *supra* note 16, at 2. *See also* Tim Swarens, *Who buys a trafficked child for sex? Otherwise ordinary men*, USA TODAY (Jan. 30, 2018, 3:47 PM), <https://www.usatoday.com/story/opinion/nation-now/2018/01/30/sex-trafficking-column/1073459001/>.

40. Wongsamuth & Blomberg, *supra* note 24.

41. IJM CASEWORK SERIES, *supra* note 39.

42. INT'L CTR. FOR MISSING & EXPLOITED CHILD., *supra* note 16, at 2.

43. IJM CASEWORK SERIES, *Cybersex Trafficking*, INT'L JUST. MISSION (2019), https://www.ijm.org/documents/IJM_2019_Casework_FactSheets_CSEC.pdf; *See also* Sunshine de Leon, *Cyber-sex trafficking: A 21st century scourge*, CNN (July 18, 2013, 7:58 AM), <https://www.cnn.com/2013/07/17/world/asia/philippines-cybersex-trafficking/index.html> (describing how viewers who direct the abuse of their victim over livestream will pay up to fifty-six dollars per minute).

44. INT'L CTR. FOR MISSING & EXPLOITED CHILD., *supra* note 16, at 2.

45. *Id.* at 17.

46. *Id.* at 2; U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *Trafficking in Persons Report 457* (2021). *See e.g.* M G Martin, *Girls as young as five rescued from cybersex den in Lapu-Lapu City*, PHIL. LIFESTYLE NEWS (Mar. 24, 2018), <https://philippineslifestyle.com/girls-rescued-cybersex-den-lapu-lapu-city/> (describing how a mother was caught offering to sexually abuse her own minor daughter over a livestream).

compared to adult sex trafficking.⁴⁷ Such facilitators might justify the abuse as a means to provide for the family as a whole.⁴⁸

Under the umbrella of sex trafficking is cybersex trafficking. Cybersex trafficking is a form of the online sexual exploitation of children (OSEC), which includes acts of a sexually exploitative nature against children over the internet.⁴⁹ As such, crimes within the OSEC context can take many forms as the categories of child sexual abuse material (CSAM) vary.⁵⁰ CSAM can include photos, videos, live-streaming of abuse, and other forms too.⁵¹ One definition of livestreaming such abuse includes instances where the abuse is “transmitted to a viewer[] in real time through ‘streaming’ over the internet.”⁵² The key is that the abuse is transmitted to the viewer in real time.⁵³ Through this particular medium, the viewer is able to direct the abuse while it is occurring, thus taking an active part in the crime.⁵⁴

The rise in cybersex trafficking is due in no small part to the increased safeguards and anonymity that crimes of this nature bring for offenders. Indeed, “technology is taking slavery into a darker corner of the world where law enforcement techniques and capabilities are not as strong as they are offline.”⁵⁵ Relative to in-person trafficking, OSEC crimes are low-risk.⁵⁶ The increase in access to, and use of, forms of payment such as cryptocurrencies adds an additional layer of anonymity to an already difficult-to-trace crime.⁵⁷

Generally speaking, prevalence estimates are hard to come by because the same aforementioned hurdles apply in the monitoring context. Still, between the years of 2010 and 2015, the National Center for Missing and Exploited

47. INT’L CTR. FOR MISSING & EXPLOITED CHILD., *supra* note 16, at 2.

48. *E4J University Module Series: Cybercrime: Online child sexual exploitation and abuse*, UNODC: THE DOHA DECLARATION (February 2020), <https://www.unodc.org/e4j/en/cybercrime/module-12/key-issues/online-child-sexual-exploitation-and-abuse.html>.

49. INT’L CTR. FOR MISSING & EXPLOITED CHILD., *supra* note 16, at 4.

50. See ECPAT INT’L, *Trends in Online Child Sexual Abuse Material*, 5 (2018), <https://www.ecpat.org/wp-content/uploads/2018/07/ECPAT-International-Report-Trends-in-Online-Child-Sexual-Abuse-Material-2018.pdf> (suggesting that data shows that CSAM crimes are on the rise).

51. INT’L CTR. FOR MISSING & EXPLOITED CHILD., *supra* note 16, at 4–5; INT’L JUST. MISSION, *Online Sexual Exploitation of Children in the Philippines: Analysis and Recommendations for Governments, Industry, and Civil Society*, 15 (2020), https://www.ijm.org/documents/Final-Public-Full-Report-5_20_2020.pdf.

52. INT’L JUST. MISSION, *supra* note 51, at 7.

53. *Id.*

54. *Id.* See John Tanagho, *Online Sexual Exploitation of Children: Hidden in Plain Sight*, INT’L JUST. MISSION, <https://www.ijm.org/stories/online-sexual-exploitation-of-children-hidden-in-plain-sight> (last visited Sept. 14, 2021) (describing that it is this active role that the viewer can play that distinguishes this kind of trafficking from other kinds).

55. INT’L CTR. FOR MISSING & EXPLOITED CHILD., *supra* note 16, at 2 (internal quotations and citations omitted).

56. *Id.*

57. *Id.* at 6.

Children revealed that “reports of online child sex trafficking had increased by more than 800 percent and this increase is believed to be directly correlated to the increased use of the internet to sell children for sex.”⁵⁸ One illustration of the prevalence of cybersex trafficking was an investigation conducted by Terre Des Hommes.⁵⁹ The group first created a computer generated ten-year old Filipina girl named “Sweetie.”⁶⁰ The group then monitored nineteen chatrooms and other platforms to solicit buyers for the fictitious child.⁶¹ Over the course of ten-weeks, “Sweetie” was propositioned by approximately 20,000 men.⁶²

B. Philippines

1. OSEC in the Philippines

OSEC in the livestreaming context is far from distinctive to any country. However, this Comment focuses on the Philippines because of its role as a global hotspot for this kind of abuse.⁶³ According to global law enforcement data, the Philippines is the largest source of OSEC cases.⁶⁴ Numerous factors play a part in making the Philippines such a hub, including the fact that the Philippines has high levels of poverty, inexpensive internet access, a high level of English language proficiency, and an established commercial sex trade infrastructure.⁶⁵

In the Philippines, cybersex trafficking in the livestreaming context is often multi-faceted and includes a number of parties. Typically, an OSEC case is a transnational crime with the young victim located in the Philippines and the purchaser located in another country, often a developed Western nation.⁶⁶ Then

58. *Id.* at 10–11 (internal quotations omitted).

59. *Press Release: Tens of thousands of child victims in international online sex crimes case disclosed by Terre des Hommes*, TERRE DES HOMMES (Nov. 4, 2013), <https://www.terredeshommes.org/wp-content/uploads/2013/11/PR-Webcam-Child-Sex-Tourism-TDH-NL-04.11.2013.pdf>.

60. INT’L CTR. FOR MISSING & EXPLOITED CHILD., *supra* note 16, at 11; ECPAT INT’L, *supra* note 50, at 10.

61. INT’L CTR. FOR MISSING & EXPLOITED CHILD., *supra* note 16, at 11 (noting that the FBI estimates that there are 40,000 such chatrooms).

62. INT’L CTR. FOR MISSING & EXPLOITED CHILD., *supra* note 16, at 11; ECPAT INT’L, *supra* note 50, at 10.

63. INT’L JUST. MISSION, *supra* note 51, at 16 (defining OSEC as “the production, for the purpose of online publication or transmission, of visual depictions (e.g., photos, videos, live streaming) of the sexual abuse or exploitation of a minor for a third party who is not in the physical presence of the victim, in exchange for compensation”).

64. *Id.* at 60. The U.S. Federal Bureau of Investigation is one of the agencies that shared its data on OSEC cases. *Id.* “The Philippines received more than eight times as many referrals as any other country identified” between the years of 2010 and 2017. *Id.*

65. Sunshine de Leon, *supra* note 43; INT’L JUST. MISSION, *supra* note 51, at 17. Other factors cited include “a robust money remittance infrastructure,” and a population who is technologically literate due to its widespread use and availability. INT’L JUST. MISSION, *supra* note 51, at 17. *See also* UNODC, *supra* note 48.

66. Kristin Owen et al., *Online Sexual Exploitation of Children in the Philippines*, INT’L JUST. MISSION, 11 (2018), <https://www.ijm.org/documents/studies/Philippines-OSEC->

there is the initial trafficker who will exploit the child at the direction of the purchaser.⁶⁷ Child sexual exploitation material can take many forms but one of the most common forms in the Philippines is for the purchaser to direct the abuse over a livestream using electronic service providers or social media.⁶⁸ This category of cases constitutes the majority of cases that are investigated by the Philippine government.⁶⁹

Many of the crimes are carried out by family or relatives who earn somewhere in the vicinity of \$100 per broadcast, which can be a significant sum for individuals in a country where a fifth of its 105 million population live in poverty and earn less than \$2,000 a year.⁷⁰ The U.S. State Department noted in their 2020 Trafficking in Persons Report that the “Philippines is one of the largest known sources of online sexual exploitation of children . . . [where] [t]he traffickers are often parents or close relatives.”⁷¹ In the Philippines, one report found that forty-one percent of the persons who facilitated the online abuse of children were the biological parents, while other relatives carried out a further forty-two percent.⁷²

This crime affects young children on a huge scale. One organization that works with the Filipino government to combat child sex trafficking reported that forty-seven percent of the rescued victims of cybersex trafficking were twelve-years old or younger.⁷³ The youngest rescued victim was a two-month old baby.⁷⁴

Criminal-Justice-System-Baseline-Assessment.pdf. See also INT’L CTR. FOR MISSING & EXPLOITED CHILD., *supra* note 16, at 17. The International Center for Missing and Exploited Children describes this kind of cybersex trafficking as illuminating

one of the darkest corners of the Internet, where pedophiles in the U.S., Canada, Europe and Australia pay facilitators on the other side of the world to sexually abuse children, even babies, directing their moves through online livestreaming services. Parents in poor areas sometimes exploit their own children, forcing them to perform sexual acts in front of webcams.

Id. (internal citations and quotations omitted). See, e.g., *Five Children Rescued from Trafficking in Multiple Operations*, INT’L JUST. MISSION, <https://www.ijm.org/news/five-children-rescued-from-trafficking-in-multiple-operations> (last visited Sept. 18, 2021).

67. Owen et al., *supra* note 66, at 11.

68. *Id.*

69. *Id.*

70. Wongsamuth & Blomberg, *supra* note 24; Matt Blomberg, *Global taskforce tackles cybersex child trafficking in the Philippines*, REUTERS (Apr. 15, 2019, 9:12 AM), <https://www.reuters.com/article/us-philippines-trafficking-children/global-taskforce-tackles-cybersex-child-trafficking-in-the-philippines-idUSKCN1RR1D1>.

71. U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., Trafficking in Persons Report 409 (2020).

72. INT’L JUST. MISSION, *supra* note 51, at 51. See also U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., Trafficking in Persons Report 30–31 (2021).

73. IJM CASEWORK SERIES, *Cybersex Trafficking*, INT’L JUST. MISSION (2019), https://www.ijm.org/documents/IJM_2019_Casework_FactSheets_CSEC.pdf.

74. *Id.*

OSEC is a complicated—and often hidden—crime and measuring its prevalence can be particularly difficult.⁷⁵ Even with the limited information available, however, the FBI has previously said that this new form of trafficking is increasingly becoming an “epidemic,” and “that at any given moment, 750,000 child predators are online.”⁷⁶ One indicator of the prevalence of cybersex trafficking is from reports collected by the National Center for Missing and Exploited Children, that collects these “cybertips.”⁷⁷ Since the pandemic, the number of reports have more than doubled year-on-year, from 983,734 reports in March 2019 to 2,027,520 reports in March 2020.⁷⁸ This increase is not confined to the United States, with tiplines around the world reporting a “consistent and continual increase” in case numbers every year.⁷⁹

A new prevalence study compiled by IJM attempts to assess the prevalence of cybersex trafficking in the Philippines despite these entrenched difficulties.⁸⁰ One difficulty that leads to the underreporting of accurate figures is that many internet service providers do not monitor the data streams for child sexual exploitation material in the livestreaming context.⁸¹ Furthermore, common methods of detecting this crime focus on tracking image or video files and these are not created when the crime is livestreamed over the internet, unless there is some further action made by the virtual abuser.⁸² These problems lead to the underreporting of this crime.

In assessing prevalence, this report explored the approximate percentage of Filipino IP addresses linked to OSEC.⁸³ One of the key findings in the final report was a “consistent” and “sharp” rise in the number of IP addresses linked to OSEC activity in the years between 2014 and 2017 which more than doubled each year.⁸⁴ This huge rise in prevalence coincided with the number of cases referred to Philippine anti-trafficking authorities each year.⁸⁵

75. INT’L JUST. MISSION, *supra* note 51, at 19.

76. Martha Mendoza, *Big child webcam sex bust reveals rising abuse*, ASSOCIATED PRESS (May 9, 2017), <https://apnews.com/article/89a16bb3e8cf4beeacd865cc47b419a4>. This “epidemic” has only been fueled by the spread of cheaper, faster internet, and the now seeming ubiquitous cell phone ownership which together provide unprecedented access for the abusers. Wongsamuth & Blomberg, *supra* note 24.

77. Olivia Solon, *Child sexual abuse images and online exploitation surge during pandemic*, NBC NEWS (Apr. 23, 2020, 3:01 PM), <https://www.nbcnews.com/tech/tech-news/child-sexual-abuse-images-online-exploitation-surge-during-pandemic-n1190506>.

78. *Id.*

79. INT’L JUST. MISSION, *supra* note 51, at 1.

80. *See id.* at 10.

81. *Id.* at 16.

82. *Id.*

83. *Id.* at 30.

84. *Id.* at 11.

85. *Id.* at 12.

2. *The Legal Framework in the Philippines*

The Filipino statute that governs the criminalization of human trafficking was originally passed in 2003 as the Anti-Trafficking in Persons Act of 2003.⁸⁶ The acts that were criminalized in the Republic Act of 9208 Section 4(a) were narrower than subsequent amendments.⁸⁷ In expounding upon some of the terms found in Section 4(a), the Act defined the illegal aspects of the crime fairly broadly, including Section 3(a)'s definition of human trafficking.⁸⁸ That definition of human trafficking mirrors the Palermo Protocol, an international framework promulgated to combat trafficking in persons to which the Philippines is a signatory.⁸⁹ Sexual exploitation, as used in sections 3(f) and 4(a), is itself defined as “participation by a person in prostitution or the production of pornographic materials as a result of being subjected to a threat, deception, coercion, abduction, force, abuse of authority”⁹⁰ The Republic Act No. 9208 section 3(a) also provides that “[t]he recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall also be considered as ‘trafficking in persons’”⁹¹ This provision acknowledges that a child’s consent is immaterial.⁹²

As broadly as the original Republic Act No. 9208 was drafted, the protections were not sufficient. Consequently, the Republic Act No. 9208 was amended by the “Expanded Anti-Trafficking in Persons Act of 2012” through Republic Act No. 10364 to include further definitions of human trafficking and expand

86. See Anti-Trafficking in Persons Act of 2003, Rep. Act No. 9208, § 1 (May 26, 2003), as amended by Rep. Act No. 10364 (Feb. 6, 2013) (Phil.). The Act was passed in the Twelfth Congress of the Republic of the Philippines in its Second Regular Session declaring that “the State values the dignity of every human person and guarantees the respect of individual rights.” Anti-Trafficking in Persons Act of 2003, Rep. Act No. 9208, § 2 (May 26, 2003), as amended by Rep. Act No. 10364 (Feb. 6, 2013) (Phil.). The Act was to “protect the people from any threat of violence and exploitation, eliminate trafficking in persons, and mitigate pressures for involuntary migration and servitude of persons.” Anti-Trafficking in Persons Act of 2003, Rep. Act No. 9208, § 2 (May 26, 2003), as amended by Rep. Act No. 10364 (Feb. 6, 2013) (Phil.).

87. See Anti-Trafficking in Persons Act of 2003, Rep. Act No. 9208, § 4(a) (May 26, 2003), as amended by Rep. Act No. 10364 (Feb. 6, 2013) (Phil.).

88. See *id.* § 3(a).

89. 2237 U.N.T.S. 319. See G.A. Res. 55/25, art. 3, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Nov. 15, 2000).

90. Anti-Trafficking in Persons Act of 2003, Rep. Act No. 9208, § 3(f) (May 26, 2003) (Phil.). See also *id.* § 3(c) (defining prostitution); § 3(h) (defining pornography). See also Expanded Anti-Trafficking in Persons Act of 2012, Rep. Act No. 10364, § 3(h) (Feb. 6, 2013) (Phil.) (now defining “Sexual Exploitation” as “participation by a person in prostitution, pornography or the production of pornography, in exchange for money [or] profit . . . or where the participation is caused or facilitated by any means of intimidation or threat, use of force, or other forms of coercion”).

91. *Id.* § 3(a).

92. See also *id.* § 3(b) (defining child).

available sentences.⁹³ The original Act No. 9208 also did not directly address cybersex trafficking. The new Act No. 10364 encompassed a wide range of amendments, some of which addressed the growing problem of cybersex trafficking directly.⁹⁴ One important amendment was the addition of Section 4(k), which provides in relevant part that:

It shall be unlawful for any person . . . [t]o recruit, transport, harbor, obtain, transfer, maintain, hire, offer, provide, adopt or receive a child for *purposes of exploitation* or trading them, including but not limited to, the act of buying and/or selling a child for any consideration or for barter for purposes of exploitation. Trafficking for purposes of exploitation of children shall include: . . . (2) [t]he use, procuring or offering of a child for prostitution, for the production of pornography, or for *pornographic performances*⁹⁵

However, by far the most relevant addition to Republic Act. No. 9208, for the purposes of cybersex trafficking, was the enactment of the new section 4(l), which provides that it is unlawful “[t]o organize or direct other persons to commit the offenses defined as acts of trafficking under this Act.”⁹⁶ It is important to read this addition along with the newly amended Republic Act No. 9208 Section 6 which states that “[v]iolations of Section 4 of this Act shall be considered as qualified trafficking . . . [w]hen the offender directs or through another manages the trafficking victim in carrying out the exploitative purpose of trafficking.”⁹⁷ This will have knock-on sentencing implications.

There are three components that must be satisfied for crimes to fall under the purview of the new Republic Act No. 10364, namely (1) acts; (2) means; and (3) purpose.⁹⁸ The “acts” involve, for example, the recruitment, or the hiring “with or without the victim’s consent or knowledge, within or across national

93. Owen et al., *supra* note 66, at 15; *Primer on RA 9208 Anti-Trafficking in Persons Act of 2003 as amended by RA 10364 Expanded Anti-Trafficking in Persons Act of 2012*, COMM’N ON FILIPINOS OVERSEAS 1 (2015), https://www.dilg.gov.ph/PDF_File/reports_resources/dilg-reports-resources-2017323_e21a5b9c4f.pdf; Expanded Anti-Trafficking in Persons Act of 2012, Rep. Act No. 10364, § 1 (Feb. 6, 2013) (Phil.). Enacted by the Fifteenth Congress in its Third Regular Session.

94. See COMM’N ON HUM. RTS. OF THE PHILIPPINES, INPUTS TO THE SPECIAL RAPporteur ON THE SALE AND SEXUAL EXPLOITATION OF CHILDREN’S THEMATIC REPORT TO THE HUMAN RIGHTS COUNCIL MARCH 2020 SESSION (2019). For example, the Rep. Act No. 10364 included more activity that could be encompassed as human trafficking and provided for “heavier penalties for the use of trafficked persons.” *Id.* at 1–2. See also Expanded Anti-Trafficking in Persons Act of 2012, Rep. Act No. 10364, § 5 (Feb. 6, 2013) (Phil.) (adding a new section 4-A regarding the attempted trafficking in persons that was inserted in Rep. Act No. 9208); Owen et al., *supra* note 66, at 15 (noting some of the enhanced penalties under the new Act No. 10364).

95. Expanded Anti-Trafficking in Persons Act of 2012, Rep. Act No. 10364, § 4(k) (Feb. 6, 2013) (Phil.) (emphasis added).

96. § 4(l) (emphasis added).

97. § 9(i).

98. COMM’N ON FILIPINOS OVERSEAS, *supra* note 93, at 5.

borders.”⁹⁹ The “means” acts include those committed by, for example, the use of force, or coercion, or “the giving or receiving of payments or benefits to achieve the consent of a person having control over another person.”¹⁰⁰ Finally, the requisite purpose is achieved through actions committed via certain means for the purpose of “exploitation or the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery, [or] involuntary servitude”¹⁰¹ All three elements must be present except if the situation involves trafficking of a child.¹⁰² The act, means, and purpose components also mirror the Palermo Protocol and is a common way of describing human trafficking.¹⁰³

While some of the sanctions from the original Act remained unaltered, some sanctions were added by the new Act.¹⁰⁴ For example, “[a]ny person found guilty of qualified trafficking under Section 6 shall suffer the penalty of life imprisonment” and a fine.¹⁰⁵ As discussed above, this new section incorporates violations of section 4 as “qualified trafficking,” thus yielding harsher punishment.¹⁰⁶ Finally, section 13 of the Republic Act No. 10364, which amends section 11 of the Republic Act No. 9208, sets greater punishments for crimes involving trafficked children.¹⁰⁷ This amendment thus greatly increases the punishments for individuals engaging in the “use of a trafficked person.”¹⁰⁸ This will help to further strengthen the link between the culpability of the original trafficker and that of the virtual offender and place them on a more equal footing.¹⁰⁹

The final noteworthy amendment is the new section 26-A.¹¹⁰ This new section allows the Filipino government to exercise jurisdiction over acts covered by the

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. See 2237 U.N.T.S. 319; G.A. Res. 55/25, art. 3 *supra* note 89 (defining “[t]rafficking in persons” as “the recruitment, transportation, transfer, harbouring or receipt of persons, by *means* of the threat or use of force or other forms of coercion . . . for the *purpose* of exploitation) (emphasis added).

104. Compare Anti-Trafficking in Persons Act of 2003, Rep. Act No. 9208, § 10(a) (May 26, 2003) (Phil.), with Expanded Anti-Trafficking in Persons Act of 2012, Rep. Act No. 10364, § 12 (Feb. 6, 2013) (Phil.); Owen et al., *supra* note 66, at 15.

105. Anti-Trafficking in Persons Act of 2003, Rep. Act No. 9208, § 10(e) (May 26, 2003), as amended by Rep. Act No. 10364, § 12 (Feb. 6, 2013) (Phil.).

106. Anti-Trafficking in Persons Act of 2003, Rep. Act No. 9208, §§ 4, 6 (May 26, 2003), as amended by Rep. Act No. 10364, § 9 (Feb. 6, 2013) (Phil.).

107. Anti-Trafficking in Persons Act of 2003, Rep. Act No. 9208, § 11(a)(2) (May 26, 2003), as amended by Rep. Act No. 10364, § 13 (Feb. 6, 2013) (Phil.).

108. Cf. Anti-Trafficking in Persons Act of 2003, Rep. Act No. 9208, § 11 (May 26, 2003), as amended by Rep. Act No. 10364, § 13 (Feb. 6, 2013) (Phil.).

109. See Owen et al., *supra* note 66, at 15 (noting the rise in “penalty for the ‘use of a Trafficked Person’”).

110. Anti-Trafficking in Persons Act of 2003, Rep. Act No. 9208, § 26-A (May 26, 2003), as amended by Rep. Act No. 10364, § 23 (Feb. 6, 2013) (Phil.).

Act, even when committed outside of the Philippines.¹¹¹ Practically speaking, this provision would not have much of a bearing against, for example, those who commit the offenses in the United States. This is because the resources of the Philippines are unlikely to stretch beyond the domestic demand for enforcement and prosecution. Such language also appears to be a recognition of the Philippines' status as a hub for this crime.

3. *The Administrative Framework in the Philippines*

The Inter-Agency Counsel Against Trafficking (IACAT) is the entity that coordinates the implementation of Republic Act No. 9208, along with the Philippine Department of Justice.¹¹² IACAT is tasked with the elimination and prevention of trafficking in persons in the Philippines, as well as the conviction of traffickers.¹¹³

The Philippine Department of Justice receives its mandate from the Administrative Code of 1987.¹¹⁴ Under Executive Order 292, the Philippine Department of Justice is the government's "principal law agency."¹¹⁵ Thus, it acts as the government's prosecution agency and investigates crimes, prosecutes offenders and oversees the correctional system, which it does through the National Bureau of Investigation and the National Prosecution Service.¹¹⁶

In its most recent annual report from 2017, the Philippines Department of Justice stated that from January-December of 2017, IACAT had a total of fifty-three convictions which resulted in the conviction of forty-eight traffickers.¹¹⁷ This is a vast improvement as compared to 2013, the year that the Republic Act No. 10364 came into effect, where the IACAT recorded twenty convictions, resulting in the convictions of eighteen traffickers in the time ranging from April 2012 to January 2013.¹¹⁸

111. *Id.*

112. PHIL. DEP'T OF JUST., *Inter-Agency Council Against Trafficking*, https://www.doj.gov.ph/iacat_webpage.html (last visited Sept. 27, 2021). Additionally, the Department implements the Anti-Child Pornography Act of 2009, and the Cybercrime Prevention Act of 2012. PHIL. DEP'T OF JUST., *Vision, Mission, Quality Policy/Objectives, Mandate and Functions*, <https://www.doj.gov.ph/vision-mission-and-mandate.html> (last visited Sept. 27, 2021).

113. PHIL. DEP'T OF JUST., *Inter-Agency Council Against Trafficking*, https://www.doj.gov.ph/iacat_webpage.html (last visited Sept. 27, 2021).

114. PHIL. DEP'T OF JUST., *Vision, Mission, Quality Policy/Objectives, Mandate and Functions*, <https://www.doj.gov.ph/vision-mission-and-mandate.html> (last visited Sept. 27, 2021).

115. *Id.*

116. *Id.*

117. PHIL. DEP'T OF JUST., *Department of Justice Annual Report CY 2017* 11 (2017), [https://www.doj.gov.ph/files/Annual_Reports/CY%202017%20Annual%20Report%20\(revised\).pdf](https://www.doj.gov.ph/files/Annual_Reports/CY%202017%20Annual%20Report%20(revised).pdf).

118. PHIL. DEP'T OF JUST., *Department of Justice Annual Report 2012* 21 (2012), https://www.doj.gov.ph/files/Annual_Reports/2012%20DOJ%20Annual%20Report.pdf. The Republic Act No. 10364 was approved on February 6, 2013 and became effective two weeks after its subsequent publication. Expanded Anti-Trafficking in Persons Act of 2012, Rep. Act No. 10364, § 33 (Feb. 6, 2013) (Phil.).

Another important facet of the Philippine Department of Justice in its fight against human trafficking is its Office of Cybercrime, which was created with the passage of Republic Act No. 10175, known as the Cybercrime Prevention Act of 2012.¹¹⁹ The Office of Cybercrime is primarily tasked with “implementing law enforcement investigation and prosecution strategies in curbing cyber-related crimes nationwide.”¹²⁰ Importantly, the Office of Cybercrime receives reports of online child sexual exploitation cases from the National Center for Missing and Exploited Children.¹²¹ The office reported an average of 3,700 reports of child exploitation per month where either the victim or the offender is present in the Philippines, thus including cases where virtual abusers are concerned.¹²² The disparity between these monthly numbers as compared to the number of prosecutions likely stem from a lack of resources to pursue all of the cases as well as lack of proper training and other issues.¹²³ These numbers have drastically increased since this report was published, however. The Office of Cybercrime said in May 2020 that it had received 279,166 cyber tips from March to May 2020, as compared with 76,561 such tips over March to May 2019.¹²⁴ That is an increase of 264.63%.¹²⁵

Encouragingly, in 2017, the Filipino and United States governments entered into the U.S.-Philippines Child Protection Compact (CPC).¹²⁶ The CPC aims to increase protection of children from both OSEC and labor trafficking by committing significant resources to the cause.¹²⁷ The impetus for the CPC was a concern for “increasing reports of online sexual exploitation of Philippine children who are induced to perform sex acts for live internet broadcast to paying customers.”¹²⁸ Part of the explicit purpose of the CPC is to “improve the capacity of the Philippines and civil society to prosecute and convict child traffickers” and it does this in part by providing funding to these governmental instruments, as well as to NGO’s who work closely with them.¹²⁹ Another promising sign of the direction that the Philippines and others are taking to

119. PHIL. DEP’T OF JUST., *supra* note 117, at 14.

120. *Id.*

121. *Id.*

122. *Id.*

123. See *Child Protection Compact Partnership Between the Government of the United States of America and the Government of the Republic of the Philippines*, Philippines-U.S. (Apr. 11, 2017), <https://www.state.gov/child-protection-compact-partnership-between-the-government-of-the-united-states-of-america-and-the-government-of-the-republic-of-the-philippines/> [hereinafter *Child Protection Compact*].

124. Lian Buan, *Reports of sexual abuse of children triple during lockdown*, RAPPLER (May 25, 2020, 10:13 AM), <https://www.rappler.com/nation/doj-blames-telecoms-reports-sexual-abuse-children-triple-coronavirus-lockdown>.

125. *Id.*

126. INT’L JUST. MISSION, *supra* note 51, at 17–18.

127. *Id.*

128. *Child Protection Compact*, *supra* note 123, at 1.

129. *Id.* at 3.

combat this problem is the establishment of the Philippine Internet Crimes Against Children Center (PICACC) in 2019.¹³⁰ PICACC is an international collaboration of several law enforcement entities from around the world that seeks to combat OSEC through an “enhanced global response.”¹³¹ Given the global and international nature of this crime, such transnational collaborative efforts will be essential in combatting OSEC.¹³²

C. United States

In the United States, cybersex trafficking in the livestreaming context implicates two separate statutory schemes—human trafficking statutes and child pornography statutes.

1. *The Trafficking Victims Protection Act of 2000 and its Reauthorizations*

The Trafficking Victims Protection Act (TVPA) was originally enacted in 2000.¹³³ The TVPA has been reauthorized a total of nine times, and its purposes and findings as they were originally envisioned have remained unaltered.¹³⁴ Its most basic purpose is to “combat trafficking in persons” and “to ensure just and effective punishment of traffickers.”¹³⁵ As one of its primary rationales used to support the need for this important piece of legislation, the Act’s findings section states that:

130. INT’L JUST. MISSION, *EUROPOL’s Most Wanted: Arrested for Cybersex Trafficking*, <https://www.ijm.org/news/europols-most-wanted-arrested-facing-charges-for-cybersex-trafficking> (last visited Sept. 18, 2021).

131. UNITED KINGDOM NAT’L CRIME AGENCY, *Launch of the Philippine Internet Crimes Against Children Center* (Feb. 27, 2019), <https://www.gov.uk/government/news/launch-of-the-philippine-internet-crimes-against-children-center>; PHIL. DEP’T OF JUST., *Global Summit Bares Best Practices in Combatting the Livestreaming of Sexual Abuse* (Nov. 19, 2020), https://www.doj.gov.ph/news_article.html?newsid=681. PICACC’s members include the Philippine National Police, the National Bureau of Investigation, the Australian Federal Police, the United Kingdom National Crime Agency, and the International Justice Mission. *Id.*

132. PHIL. DEP’T OF JUST., *supra* note 131.

133. Trafficking Victims Protection Act, 22 U.S.C. §§ 7101–7114.

134. *See id.* The TVPA’s ninth amendment occurred at the end of the 115th Congress. POLARIS, THE 2019 TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT: A TOPICAL SUMMARY AND ANALYSIS OF FOUR BILLS 3 (2019), <https://polarisproject.org/wp-content/uploads/2020/01/Polaris-TVPRA-2019-Analysis.pdf>. The four bills that comprise the most recent TVPA reauthorization are: H.R. 2200, the Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act of 2018, S. 1311, the Abolish Human Trafficking Act of 2017, S. 1312, the Trafficking Victims Protection Act of 2017, and S. 1862, the Trafficking Victims Protection Reauthorization Act of 2017. *Id.*

135. 22 U.S.C. § 7101(a). Its other purpose is to protect the victims of this “contemporary manifestation of slavery” which it acknowledges predominantly affects women and children. *Id.* In the Act’s “findings” section, it further notes that such women and children are often targets because of disproportionate levels of poverty and lack of opportunities in their countries of origin. 22 U.S.C. § 7101(b)(4). *See also* Julie Marie Lopiccio, Note and Comment, *Where are the Victims? The New Trafficking Victims Protection Act’s Triumphs and Failures in Identifying and Protecting Victims of Human Trafficking*, 30 WHITTIER L. REV. 851, 860 (2009).

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.¹³⁶

Such “deserved” punishment for this serious crime “is not reflected in current sentencing guidelines, resulting in weak penalties for convicted traffickers.”¹³⁷ Further underlining the appropriate gravitas of the crime at issue, the Act states that the trafficking of persons is an “evil” and “transnational” crime and must be deterred by recognizing the “serious[ness]” of the offense and applying “appropriate punishment.”¹³⁸ Given the new form of cybersex trafficking prevalent today, these findings remain as relevant as when the statute was originally enacted. On top of this, the Act proscribes two “severe forms of trafficking in persons,” namely (1) “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or [2] in which the person induced to perform such act has not attained 18 years of age”¹³⁹

Taken together, when the TVPA 2000 was enacted, it was meant to be widely applicable in “penaliz[ing] the range of offenses involved in [] trafficking.”¹⁴⁰ It was also intended to apply appropriate punishments, specifically so that perpetrators would not be punished under “lesser offenses.”¹⁴¹ Finally, protecting minor children was seen as especially important in pursuing these goals.¹⁴²

One of the most important reauthorizations to the TVPA was the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008.¹⁴³ Included was the addition of 18 U.S.C. § 1591(c) which relaxed the government’s burden of proof by including an alternative mens rea element that

136. 22 U.S.C. § 7101(b)(14); *United States v. Jungers*, 702 F.3d 1066, 1074 (8th Cir. 2013).

137. 22 U.S.C. § 7101(b)(15).

138. 22 U.S.C. § 7101(b)(21); 22 U.S.C. § 7101(b)(24).

139. 22 U.S.C. § 7102(11); Tiffanie N. Choate, *Protecting the Lydias, Linas, and Tinas from Sex Trafficking: A Call to Eliminate Ambiguities of 18 U.S.C. § 1591*, 65 OKLA. L. REV. 665, 669 (2013).

140. 22 U.S.C. § 7101(b)(14).

141. *Id.*

142. See also Ryan Dalton, Note, *Abolishing Child Sex Trafficking on the Internet: Imposing Criminal Culpability on Digital Facilitators*, 43 U. MEM. L. REV. 1097, 1103 (2013) (noting that by default, any person under the age of eighteen who engages in a commercial sex act is a victim of human trafficking under the TVPA).

143. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008).

related to cases where the victim was a minor.¹⁴⁴ The section of the Act that the addition augments is 18 U.S.C. § 1591(a)(1) which provides in relevant part that:

Whoever knowingly . . . recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person . . . knowing . . . that means of force, threats of force, fraud, coercion . . . or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).¹⁴⁵

Section 1591(c) itself states that “[i]n a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person . . . the Government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years.”¹⁴⁶

This is the federal statute that, *inter alia*, “criminalizes [the] sex trafficking of children.”¹⁴⁷ This is another instance where the legislature, given the seriousness of the offense, wanted to relax the evidentiary burden, especially as it related to minors, to make it easier for the government to convict those engaged in human trafficking.

After the case of *United States v. Jungers* and its subsequent codification, it is now clear that the “plain and unambiguous provisions” of 18 U.S.C. § 1591 apply to both the supply side, as well as the consumer side, of human trafficking.¹⁴⁸ The Court latched on to the statute’s broad language and Congress’ intent and held that section 1591 applied to a purchaser of commercial sex acts who violated its terms.¹⁴⁹ Subsequent to *Jungers*, the TVPA was amended in 2015 to add the terms “maintains, patronizes, or solicits” to section 1591.¹⁵⁰ The purpose of the amendments was both to clarify the range of conduct that could be punished as sex trafficking as well as to make “absolutely clear . . . that criminals who purchase sexual acts from human trafficking victims may be arrested, prosecuted, and convicted as sex trafficking offenders.”¹⁵¹ Furthermore, in the case of *United States v. Gemma*, the court affirmed that when

the victim [is a] minor and [cannot] legally consent, the government [does] not need to prove the elements of fraud, force, or coercion,

144. See Kimberly Blasey, Note, *Kids, Not Commodities: Proposing a More Protective Interpretation of the Child Sex Trafficking Statute for Victims and Defendants*, 77 WASH. & LEE L. REV. 931, 935–36 (2020); Choate, *supra* note 139, at 672–73 (describing the new provision as a “special evidentiary provision”).

145. 18 U.S.C. § 1591(a)(1). See also § 1591(e)(3) (defining commercial sex act).

146. 18 U.S.C. § 1591(c).

147. Dalton, *supra* note 142, at 1121.

148. *United States v. Jungers*, 702 F.3d 1066, 1069 (8th Cir. 2013).

149. *Id.* at 1075.

150. Justice for Victims Trafficking Act of 2015, Pub. L. No. 114–22, 129 Stat. 227, § 108(a)(1) (2015).

151. *Id.* §§ 109(4), 108(c).

which are required for adult victims. Instead, the government [is] only required to prove [defendant] knowingly recruited, enticed, harbored, transported, provided, or obtained a minor, knowing the minor would be caused to engage in commercial sex acts.¹⁵²

This longstanding view shows that where children are concerned, the bar to prosecution is further lowered in acknowledgement that children are in greater need of protection and the crime is more heinous.

2. “Reasonable Opportunity to Observe”

The proper interpretation of the new clause, specifically what exactly constituted a “reasonable opportunity to observe” was initially unclear. Some courts held that the requisite mens rea for conviction under section 1591 was whether the defendant either actually knew or recklessly disregarded the person’s age and had a reasonable opportunity to observe.¹⁵³ However, the generally accepted standard now recognizes a disjunctive test and gives the government three avenues to demonstrate the requisite mens rea.¹⁵⁴

The court in *United States v. Robinson* articulated these three avenues as requiring proof beyond a reasonable doubt that: “(1) the defendant knew that the victim was under eighteen; (2) the defendant recklessly disregarded the fact that the victim was under eighteen; or (3) the defendant had a reasonable opportunity to observe the victim.”¹⁵⁵ This court based its interpretation on the plain text and structure of the section and concluded that this was the “most natural reading” of the provision.¹⁵⁶ The court further stated that “[t]his reading gives force to the provision’s obvious goal—to reduce the government’s burden where the defendant had a reasonable opportunity to observe the victim.”¹⁵⁷

One standard of applying section 1591(c) is that the “provision creates strict liability where the defendant had a reasonable opportunity to observe the victim.”¹⁵⁸ Under this standard, the Government does not need to prove

152. *United States v. Gemma*, 818 F.3d 23, 34 (1st Cir. 2016) (quoting *United States v. Elbert*, 561 F.3d 771, 777 (8th Cir. 2009). *See also* INT’L CTR. FOR MISSING & EXPLOITED CHILD., *supra* note 16, at 4 (recognizing that, by definition, a child cannot consent to their own exploitation and so the coercive factors that are necessary in other contexts are inapplicable in these situations).

153. *See e.g.* *United States v. Wilson*, No. 10-60102-CR-ZLOCH/ROSENBAUM, 2010 U.S. Dist. LEXIS 75149, at *16–17 (S.D. Fla. July 27, 2010).

154. *United States v. Robinson*, 702 F.3d 22, 32 (2d Cir. 2012); *United States v. Corley*, 679 F. App’x 1, 5 (2d Cir. 2017); *United States v. Kelsey*, 807 F. App’x 61, 65 (2d Cir. 2020); *United States v. Lockhart*, 844 F.3d 501, 513–14 (5th Cir. 2016).

155. *United States v. Robinson*, 702 F.3d 22, 34 (2d Cir. 2012); Choate, *supra* note 139, at 669.

156. *Robinson*, 702 F.3d at 31–32.

157. *Id.* at 32.

158. *Id.*; *United States v. Lockhart*, 844 F.3d 501, 515–16 (5th Cir. 2016); *United States v. Davis*, 854 F.3d 601, 605 (9th Cir. 2017). The court in *Robinson* held that section 1591(c) “imposes strict liability with regard to the defendant’s awareness of the victim’s age, thus relieving the

knowledge or reckless disregard of the victim's underage status where the defendant had a reasonable opportunity to observe the victim, thus relieving it of its usual burden.¹⁵⁹ This is reinforced by the legislative history to the amendment, which noted that this "special evidentiary provision" was added to exempt the prosecution from having to show mens rea of the victim's age where there was a "reasonable opportunity to observe" that victim.¹⁶⁰ Some commentators argue that this standard cannot properly be termed strict liability since the Government must first prove that the defendant had a "reasonable opportunity to observe the person" the victim under section 1591(c) before it is relieved of its other mens rea burdens.¹⁶¹ In other words, it is a "standalone mens rea element."¹⁶²

The conduct necessary to satisfy a "reasonable opportunity to observe," however, is not entirely clear. While it is true that criminal statutes without mens rea requirements are generally "disfavored," this particular "presumption does not apply to sex crimes against minors, at least when the defendant confronts the victim personally."¹⁶³ This latter language, particularly "confront[ing] the victim personally" is indicative of one of the law's shortcomings. This is not the only case to place an emphasis on in-person meetings to satisfy the "reasonable opportunity to observe" requirement.¹⁶⁴ A rigid emphasis on physical interactions would exclude the type of livestreaming offenses previously discussed to the detriment of the victim. In turn this would require proof beyond reasonable doubt of either "knowledge" or "reckless disregard" of the victim's age and negate the lower evidentiary burden put in place to make it easier to prosecute those who traffic minors.

3. Section 2251

18 U.S.C. § 2251 is the primary statute under which individuals are charged for child pornography related crimes.¹⁶⁵ Section 2251(a) was amended by the

government's usual burden to prove knowledge or reckless disregard of the victim's underage status under § 1591(a)." *Robinson*, 702 F.3d at 26.

159. *United States v. Copeland*, 820 F.3d 809, 813 (5th Cir. 2016); *United States v. Smith*, 662 F. App'x 132, 136 (3d Cir. 2016).

160. 154 CONG. REC. H10904 (2008).

161. Jennifer Nguyen, Note, *The Three Ps of the Trafficking Victims Protection Act: Unaccompanied Undocumented Minors and the Forgotten P in the William Wilberforce Trafficking Prevention Reauthorization Act*, 17 WASH. & LEE J. CIV. RTS. & SOC. JUST. 187, 216 (2010).

162. Blasey, *supra* note 144, at 938.

163. *Staples v. United States*, 511 U.S. 600, 606 (1994); *United States v. Copeland*, 820 F.3d 809, 813–14 (5th Cir. 2016) (holding that eliminating the scienter requirement regarding the victim's age did not violate the defendant's due process rights due to the fact that Congress often eliminated scienter requirements for such crimes).

164. See e.g. *United States v. Alcius*, 952 F.3d 83, 87 (2d Cir. 2020) (holding that there was more than sufficient evidence for the jury to conclude that the defendant had a "reasonable opportunity to observe" the victim where the defendant met the minor victim in person at least twice).

165. 18 U.S.C. § 2251.

Providing Resources, Officers, and Technology to Eradicate Cyber Threats to our Children Act of 2008 to add the language “or for the purpose of transmitting a live visual depiction of such conduct” to aid in investigation and prosecution efforts.¹⁶⁶ This section, as amended, is now employed against defendants in the transnational cybersex trafficking crimes that this article has explored.¹⁶⁷ Relying on the Act’s legislative history, some U.S. Circuit Courts have stated that under section 2251(a), “knowledge of the performer’s age is not an element of a prosecution for production of child pornography.”¹⁶⁸

Section 2251(c) states that “[a]ny person who . . . employs, uses, persuades, induces, entices, or coerces any minor to engage in . . . any sexually explicit conduct outside of the United States, . . . for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e).”¹⁶⁹ However, unlike section 2251(a), section 2251(c) likely includes a scienter requirement because it was added at a different time, and Congressional intent to exclude a scienter requirement under section 2251(a) cannot be inferred onto section 2251(c).¹⁷⁰

Section 2251(a) therefore removes the scienter element as to knowledge of the victim’s age in cases concerning the production of child pornography.¹⁷¹ The Court in *United States v. Copeland* noted that Congress has imposed strict liability for crimes concerning the victim’s age in cases concerning sexual acts with minors in several federal statutes.¹⁷² Each one, including 18 U.S.C. § 2251(a) was upheld.¹⁷³ Indeed, the Court in *United States v. Ruggiero* states this proposition more plainly by stating that “[k]nowledge of the victim’s age is neither an element of § 2251(a) nor an affirmative defense to a prosecution for

166. Providing Resources, Officers, and Technology to Eradicate Cyber Threats to our Children Act of 2008, Pub. L. No. 110-401, 122 Stat. 4229, § 301(1)(a) (codified as 18 U.S.C. § 2251).

167. See e.g. *United States v. Meyer*, No. 19-cr-105-CJW, 2020 U.S. Dist. LEXIS 25450, at *1 (N.D. Iowa Feb. 5, 2020) (charging the defendant under 18 U.S.C. § 2251(a) for inducing minors to engage in sexually explicit conduct over Skype); U.S. ATT’YS OFF., N. DIST. IOWA, *supra* note 35 and accompanying text.

168. *United States v. Fletcher*, 634 F.3d 395, 400-01 (7th Cir. 2011) (rejecting the defendant’s assertion that Congress intended to include such a knowledge requirement). See H.R. REP. NO. 95-811, at 5 (1977) (Conf. Rep.). The conference report stated

[t]he Senate Bill contains an express requirement in proposed section 2251(a) that the crime be committed ‘knowingly.’ The House amendment does not. The conference substitute accepts the House provision with the intent that it is not a necessary element of a prosecution that the defendant knew the actual age of the child.

Id. See also *United States v. X-Citement Video*, 513 U.S. 64, 76 (1994).

169. 18 U.S.C. § 2251(c)(1). See also § 2251(c)(2)(A) (listing the conduct necessary to fall under 18 U.S.C. § 2251(c)).

170. *X-Citement Video*, 513 U.S. at 77.

171. Choate, *supra* note 139, at 682.

172. *United States v. Copeland*, 820 F.3d 809, 814 (5th Cir. 2016).

173. *Id.*

it.”¹⁷⁴ The elements of this particular crime then are (1) “that a defendant arrange for a minor to engage in sexually explicit conduct for the purpose of creating a visual depiction,” and (2) there is a nexus to foreign commerce.¹⁷⁵

The relatively simple elements that must be proven, along with the strict liability standard contained in section 2251(a) relating to the victim’s age, demonstrate a relatively lower threshold to conviction in cases where minors are involved. This threshold was further lowered by removing the phrase “for pecuniary profit” when criminalizing the act of producing child pornography.¹⁷⁶ Taken together, this helps establish a pattern of prioritizing the protection of children and this should be properly extended to the cybersex livestreaming scenario.

4. Child Sex Tourism

The problem of extraterritorial child abuse has been addressed previously in the context of child sex tourism. Such abuse occurs when abusers travel to a foreign country, often with high levels of poverty or a weak rule of law, to engage in illicit sexual acts with children.¹⁷⁷ The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act, was enacted in 2003 to address this issue of child “sex tourism.”¹⁷⁸ As amended, 18 U.S.C. § 2423 now makes it illegal for “[a]ny United States citizen . . . who travels in foreign commerce . . . [to engage] in any illicit sexual conduct with another person”¹⁷⁹ The addition of this subsection meant that the government no longer had to prove that the defendant traveled with the intent to engage in the illicit sexual activity with minors, thus lowering the threshold for prosecution.¹⁸⁰ Section 2423(b) has been used to charge United States citizens who travel to the Philippines to engage in illicit sexual acts with minors.¹⁸¹

174. *United States v. Ruggiero*, 791 F.3d 1281, 1285 (11th Cir. 2015).

175. *Id.* at 1284–85.

176. *Id.* at 1289.

177. U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., *Trafficking in Persons Report* 28 (2020).

178. *Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act)*, Pub. L. No. 108–21, 117 Stat. 650, § 105 (codified as 18 U.S.C. § 2423).

179. 18 U.S.C. § 2423(c).

180. H.R. REP. NO. 108-66, at 5 (2003) (Conf. Rep.); *Cf.* 18 U.S.C. § 2423(b).

181. *See e.g.*, *United States v. Rosenow*, No. 17CR3430 WQH, 2018 U.S. Dist. LEXIS 198054, at *18 (S.D. Cal. Nov. 20, 2018); U.S. ATT’YS OFF., S. DIST. OF CAL., *San Diego Man Sentenced to 25 years in Federal Prison for Child Pornography Offenses* (Mar. 2, 2020), <https://www.justice.gov/usao-sdca/pr/san-diego-man-sentenced-25-years-federal-prison-child-pornography-offenses> (“[W]e will not let borders keep us from protecting these vulnerable victims whenever possible.”). *See also* U.S. Dep’t State, Bureau of Democracy, H.R. and Lab., *Trafficking in Persons Report* 455 (2021) (noting the convictions of “foreign nationals who entered the Philippines for the purpose of engaging in child sex tourism.”).

5. Sentencing

The sentencing outcomes for a violation of section 1591 and section 2251 vary greatly. Under section 1591, the statute differentiates its sentencing length primarily based on the age of the victim. If a defendant violates section 1591(a), the victim is under the age of fourteen-years-old, and the offense was “effected by means of force, threats of force, fraud, or coercion” then the sentence ranges from a mandatory minimum of fifteen years all the way to life imprisonment.¹⁸² If a defendant violates section 1591(a), the victim is between the ages of fourteen and eighteen, and the offense was not effected by force, fraud, or coercion, then the sentence ranged from a minimum of ten years imprisonment to life imprisonment.¹⁸³

The penalty under section 2251, on the other hand, states that: “Any individual who violates . . . this section shall be . . . imprisoned not less than 15 years nor more than 30 years, but if such person has one prior conviction under [18 U.S.C. § 1591 or § 2251] . . . such person shall be . . . imprisoned for not less than 25 years nor more than 50 years”¹⁸⁴ The harsher penalties for trafficking, especially of children, compared to child pornography demonstrate the acknowledgement that the former deserves greater punishment.

V. ANALYSIS

What was once a new form of trafficking is rapidly becoming a larger problem. An acceleration in prevalence was only exacerbated by the COVID-19 pandemic and there are no signs that this modern form of human trafficking is going away anytime soon.

Gathering all of the evidence available from the Philippines, we know that a typical OSEC crime will include a viewer who sends payment to the initial trafficker, who then abuses the child to produce the CSAM via livestream.¹⁸⁵ Such a chain of events constitutes trafficking in persons, as defined in the Palermo Protocol.¹⁸⁶ The Filipino government has responded accordingly. The government made some essential changes to Republic Act No. 9208 when they amended that statute with Republic Act No. 10364, the most important of which was making it a crime to “organize or direct other persons to commit” the trafficking offenses contained in the act.¹⁸⁷ These two additions show an intent to bring acts undertaken by foreign or virtual offenders under the purview of the Act. In another addition, the words “pornographic performances” could be

182. 18 U.S.C. § 1591(b)(1).

183. *Id.* § 1591(b)(2).

184. *Id.* § 2251(e).

185. INT’L JUST. MISSION, *supra* note 51, at 16.

186. *Id.*

187. *See supra* Section IV, Part II.C for a discussion of the relevant statutes; Expanded Anti-Trafficking in Persons Act of 2012, Rep. Act. No. 10364, § 4(l) (Feb. 6, 2013) (Phil.); *see also* § 4(k).

construed to include acts performed over a live stream, and the acts of “offer[ing],” “obtain[ing],” and “hir[ing]” would include abusers who purchased the trafficked victim, rather than only recruiting or harboring them for those purposes.¹⁸⁸

As previously discussed, three elements must be satisfied for crimes to fall under the purview of the Republic Act No. 9208 as amended by the Republic Act No. 10364, namely (1) acts; (2) means; and (3) purpose.¹⁸⁹ Applying these elements to a hypothetical situation involving a virtual abuser who is directing abuse of a child from overseas, such an offense would likely fall under the purview of the amended statute. The (1) “act” element could be satisfied because a virtual offender would be “hiring” or “obtaining” the child without their consent and “across national borders.”¹⁹⁰ The (2) “means” element could be satisfied as the virtual offender would be paying for the consent of the person “having control over another person.” Finally, the (3) “purpose” element could be satisfied, especially when bearing in mind the earlier definition of “sexual exploitation,”¹⁹¹ because the virtual abuser would be exploiting the production of pornographic materials by someone who was forced or coerced in that position.

Two further points lend credence to this analysis. First is the aforementioned addition of Section 4(l) which allows for the extension of the illegality to persons such as the virtual abuser without straining the three-element analysis beyond credulity. Second is the further amendment of the Republic Act No. 9208 Section 6 by Section 9 of the Republic Act No. 10364, which in pertinent parts states that “[v]iolations of Section 4 of this Act shall be considered as qualified trafficking: When the offender directs or through another manages the trafficking victim in carrying out the exploitative purpose of trafficking.”¹⁹² The original section relating to children and qualified trafficking remained unaltered by Republic Act No. 10364.¹⁹³ This illustrates a clear intent to treat the virtual offender as a trafficker in persons.

188. *Id.* § 4(k).

189. Primer on RA 9208 *Anti-Trafficking in Persons Act of 2003 as amended by RA 10364 Expanded Anti-Trafficking in Persons Act of 2012*, *supra* note 93, at 5.

190. *Id.* Expanded Anti-Trafficking in Persons Act of 2012, Rep. Act No. 10364, § 19 (Feb. 6, 2013) (Phil.) (creating a new § 17-B to be inserted into Republic Act No. 9208). Furthermore, “the consent of a victim of trafficking to the intended exploitation shall be irrelevant where any of the means set forth in Section 3(a) of this Act has been used.” *Id.*

191. See Anti-Trafficking in Persons Act of 2003, Rep. Act No. 9208, § 3(f) (May 26, 2003) (Phil.) (codifying “participation by a person in prostitution or the production of pornographic materials as a result of being subjected to a threat, deception, coercion, abduction, force, abuse of authority, debt bondage, fraud or through abuse of a victim’s vulnerability”).

192. Expanded Anti-Trafficking in Persons Act of 2012, Rep. Act No. 10364, § 9 (Feb. 6, 2013) (Phil.) (adding section 6(i) to the Rep. Act No. 9208).

193. See Anti-Trafficking in Persons Act of 2003, Rep. Act No. 9208, § 6 (May 26, 2003) (Phil.) (stating that qualified trafficking includes when the trafficked person is a child).

The amendments relating to sanctions further helps to strengthen the link between the culpability of the original trafficker and that of the virtual offender and seeks to put them on a more equal footing.¹⁹⁴ Importantly, with the aforementioned new additions to both Section 4 and Section 6 of Republic Act No. 10364, such sanctions are now readily applicable to the virtual offender thus giving trafficker level sanctions to the virtual offender. Taken together, the statutory scheme in the Philippines has been redrawn to be able to treat both the person who physically traffics the child, and the person who virtually directs the child's abuse as guilty of human trafficking violations.

Such changes are aimed at deterrence. The hope is that stories such as the capture of five traffickers in the Philippines who livestreamed the abuse of eleven victims, ranging from two to seventeen-years old, to foreign customers, and their subsequent prosecution under human trafficking laws will become less common.¹⁹⁵ Another case involved a three-year old boy who was sexually abused by his own mother via livestream in exchange for payment.¹⁹⁶ Recognizing the full extent of culpability, the mother was charged under human trafficking laws.¹⁹⁷

The situation is somewhat different in the United States. Some of the signs have been positive. For example, the case of *United States v. Jungers* and its subsequent codification made it clear that section 1591 applied to both the supply and consumer side of human trafficking.¹⁹⁸ Congress has also made clear that trafficking crimes relating to minors are some of the severest forms of trafficking in persons.¹⁹⁹ Furthermore, subsequent amendments to the statute have lowered the evidentiary bar needed to prosecute under the statute. The seemingly prevailing position is that three avenues are available when proof of a victim's age is concerned.²⁰⁰ As Robinson noted, "[t]his reading gives force to the provision's obvious goal—to reduce the government's burden where the

194. See Owen et al., *supra* note 66, at 15; *Compare* Anti-Trafficking in Persons Act of 2003, Rep. Act No. 9208, § 10(a) (May 26, 2003) (Phil.), with Expanded Anti-Trafficking in Persons Act of 2012, Rep. Act No. 10364, § 12 (Feb. 6, 2013) (Phil.).

195. *Eleven Children Rescued from Online Exploitation*, INT'L JUST. MISSION, <https://www.ijm.org/news/eleven-children-rescued-from-online-exploitation-as-five-traffickers-face-charges> (last visited Sept. 18, 2021). See also *Wave of Rulings Ushers in Justice for Vulnerable Children*, INT'L JUST. MISSION, <https://www.ijm.org/news/wave-of-rulings-ushers-in-justice-for-vulnerable-children> (last visited Sept. 18, 2021) (describing the arrest of a foreign national and a Filipino woman for crimes relating to the livestreaming abuse of a minor girl).

196. M G Martin, *Mother caught sexually abusing three-year-old son for payment*, PHIL. LIFESTYLE NEWS (Feb. 26, 2018), <https://philippineslifestyle.com/mother-caught-sexually-abusing-three-year-old-son/>.

197. *Id.*

198. *United States v. Jungers*, 702 F.3d 1066, 1069 (8th Cir. 2013).

199. 22 U.S.C. § 7102(11); Choate, *supra* note 139, at 669.

200. See e.g., *supra* text accompanying note 155; Choate, *supra* note 139, at 669 (discussing *United States v. Robinson*, 702 F.3d 22, 34 (2d Cir. 2012)).

defendant had a reasonable opportunity to observe the victim.”²⁰¹ While the lowering of the evidentiary bar was a welcome amendment, problems persist in its application as the government still needs to show a “reasonable opportunity to observe.”

One law review article reviewed several appellate level decisions regarding the “reasonable opportunity to observe” standard in section 1591(c) and compiled several factors that the courts focus on in determining whether this standard has been met, and concluded that these factors placed an emphasis on in-person interactions.²⁰² Placing such an emphasis on physical interactions to the exclusion of cybersex trafficking cases goes against the congressional intent of trying to punish the most severe forms of trafficking where minors are involved.²⁰³ This may prevent the proper application of the statute to cybersex trafficking with the lower burden of proof that Congress intended the law enforcement agencies to have when prosecuting those who purchase trafficked children for commercial sex purposes.²⁰⁴

As for section 2251, this section criminalizes one of the various means of the procurement of a minor to then engage in sexually explicit conduct “for the purpose of transmitting a live visual depiction of such conduct.”²⁰⁵ This broad language suggests that the application of this provision applies to the customers, directors and viewers, of the abuse.²⁰⁶ Given this applicability, as well as the fact that section 2251 also applies strict liability when the victim’s age is concerned, prosecutors have an easier time prosecuting under this statute than the human trafficking statute.

Although the penalties for a violation of section 2251 are still severe, the prospect of a life sentence under section 1591 is far more severe.²⁰⁷ This disparity in sentencing reflects the view that a violation of section 1591 is a more heinous crime, and therefore more blameworthy as reflected by the severity of sentence.

201. *Robinson*, 702 F.3d at 32.

202. *See* Blasey, *supra* note 144, at 947–50. Some of the factors included “[a] defendant’s prior involvement with prostitutes or knowledge of signs of human trafficking; A defendant’s physical interaction with a victim; At least a one-hour interaction between a defendant and victim; [and a] relationship or established social connection between a defendant and victim.” *Id.*

203. *Id.* at 950.

204. *Robinson*, 702 F.3d at 32; Blasey, *supra* note 144, at 950.

205. 18 U.S.C. § 2251(a).

206. *Buchanan*, *supra* note 37; *see e.g.* United States v. Meyer, No. 19-cr-105-CJW, 2020 U.S. Dist. LEXIS 25450, at *1 (N.D. Iowa Feb. 5, 2020) (charging the defendant under 18 U.S.C. § 2251(a) for inducing minors to engage in sexually explicit conduct over Skype).

207. *See e.g. U.S. Sex Offender Gets 84 Years for Abusing Filipino Girls*, INT’L JUST. MISSION, <https://www.ijm.org/news/american-sex-offender-sentenced-to-84-years-for-abusing-filipino-girls-online> (last visited Sept. 14, 2021).

VI. COMMENT

One of the reasons that the current statutory schemes in the United States are not fully equipped to combat cybersex trafficking in the livestreaming context is because of its relative novelty. While there is some overlap between the crime of producing child pornography and the crime of cybersex trafficking, important differences between the two crimes mean that they should not be treated as interchangeable. It might be argued that the reason the initial trafficker in the Philippines is charged with human trafficking, while the customer in the United States is charged with producing child pornography is because there is a difference in levels of culpability and society sees the customer's behavior as severe, but less harmful. This kind of assertion misses the point in one crucial respect. The customer in these kinds of cases differs with how we have traditionally conceptualized the behavior of the child pornographer.²⁰⁸ Traditionally we see the child pornographer as the "passive consumer" of abuse that has occurred at some previous point in time.²⁰⁹ This temporal disconnect is the crucial difference. In the livestreaming context, as the name suggests, the customers are partaking actively in the abuse of the victim and so the temporal disconnect vanishes. The customer takes on the role of director and pays for someone else to physically abuse the minor victim in a foreign jurisdiction. Through *Jungers* and its subsequent codification, it is now clear that purchasers of trafficked children are themselves human traffickers, and so the question becomes whether the in-person and virtual crimes are really that different. Imagine a scenario where the customer pays the trafficker for in-person access to the minor victim for the purposes of engaging in commercial sexual acts. Imagine that these acts take place in a hotel room, or a brothel. In this instance, the customer would be guilty of human trafficking crimes under 18 U.S.C. § 1591. Now imagine that the facts above are the same, except now the customer is separated by nothing more than a screen and so must direct the initial trafficker to enact the same abuse he might do so if he were physically present. Is the customer's behavior any less blameworthy in the latter scenario?²¹⁰

In some ways, cybersex trafficking in the livestreaming context sits at a unique intersection that helps to demonstrate why it is an error to treat child sexual abuse like child pornography in these situations. This is because the trafficking in these circumstances has all the social harms of child sex and exploitation, since the child is being sexually abused by one individual at the direction of another, as well as all the social harms of child pornography since

208. Buchanan, *supra* note 37.

209. *Id.*

210. This is not a new concept. For example, in assassinations the criminal law already punishes both the directing party and the party who carries out the crime. *See e.g.* 18 U.S.C. § 1958.

the video or images can be out there forever in circulation.²¹¹ In this way, all the parties involved “act in concert as part of a global network of possessors, distributors, and producers who pursue the common purpose of trafficking in images of child sexual abuse.”²¹² Thus, from a social harm perspective, the virtual abusers are more like human traffickers than child pornographers and it does not follow that we charge the virtual abusers only with the “lesser” social harm.

A look at instances of child sex tourism is also helpful in understanding how we should view these problems. The PROTECT Act of 2003 addressed the extraterritorial crime of traveling abroad to engage in illicit sex with children. United States citizens have been charged and held culpable for these crimes that occurred abroad.²¹³ Furthermore, these crimes occur in the same context as cybersex trafficking in the livestreaming context, the main difference being the lack of physical travel to the Philippines to commit the crime. Once again, these traffickers are finding novel ways around detection and prosecution, even when the same harms are occurring and so once again the law must be updated and clarified so as to keep pace with these developments. Given the extraterritorial jurisdictional concerns inherent in cybersex trafficking, since the rape occurs abroad, one approach would be to solve this issue in the same way as for child sex tourism. The jurisdictional reach of the domestic 18 U.S.C. § 1591 could be extraterritorially expanded like in 18 U.S.C. § 2423.

With the way the statutes have been interpreted, now customers have an additional “benefit” of facing less severe charges and punishment for their actions when they take their crime online.²¹⁴ Case law would suggest that the far greater prosecutorial emphasis has been placed on the supplier side of the human trafficking equation.²¹⁵ There is even anecdotal evidence that the customers themselves see this disconnect and their behavior as less blameworthy.²¹⁶ For these customers to be convicted under human trafficking laws, certain impediments should be removed. For example, section 1591

211. See *New York v. Ferber*, 458 U.S. 747, 759 (1982) (“[T]he materials produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation.”).

212. *Paroline v. United States*, 572 U.S. 434, 483 (2014).

213. See *Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act)*, Pub. L. No. 108-21, 117 Stat. 650, § 105 (2003) (codified as 18 U.S.C. § 2423).

214. See e.g. Leif Coorlim, *Girls from CNN Freedom Project help bust U.S. child pornographer*, CNN (May 29, 2013), <https://www.cnn.com/2013/05/28/us/child-porn-conviction> (convicting a child pornographer to twelve-years in federal prison where the defendant took part in “sex shows that forced young girls in the Philippines to act out customers’ fantasies”).

215. *United States v. Jungers*, 702 F.3d 1066, 1069 (8th Cir. 2013) (“Since Congress enacted § 1591 . . . the lion’s share of prosecutions . . . have involved offenders who have played some part in supplying commercial sex acts.”).

216. See e.g. Martha Mendoza, *Big child webcam sex bust reveals rising abuse*, ASSOCIATED PRESS (May 9, 2017), <https://apnews.com/article/89a16bb3e8cf4beeacd865cc47b419a4>.

should be amended to explicitly include crimes in the livestreaming context to fall under the statute's ambit. This would prevent unintended consequences such as the courts' overreliance on physical interactions between the customer and the victim when applying the lesser burden of "reasonable opportunity to observe."²¹⁷ This would have the joint benefit of aligning the statute with Congressional intent.²¹⁸ Such an amendment could be relatively simple. As we have seen in the Philippine context, such an amendment might read: "It shall be unlawful to organize or direct other persons to commit the offenses defined as acts of trafficking under this Act."²¹⁹ In addition, addressing the jurisdictional concerns would require amending 18 U.S.C. § 1596 to make explicit that cybersex trafficking crimes were included in the extraterritorial scope, even when the crime occurred abroad but the trafficker remained in the United States.²²⁰

CONCLUSION

Today, Joy has fulfilled her dream of returning to school, and is working to help inspire other survivors of cybersex trafficking to pursue their own dreams.²²¹ After many years of abuse, Joy and Kim have finally been freed from their traffickers in the Philippines.²²² Many defendants, like those responsible for trafficking and exploiting Kim and Joy in the Philippines, are charged and convicted under the Philippine human trafficking statutes. Even though the Philippines is the country of supply, their statutes encompass the virtual customer with parallel levels of culpability. However, many defendants, like those paying to direct the abuse of Kim and Joy, even if they are caught, will be charged under lesser offenses involving lesser punishment. The TPVA should be amended and updated accordingly to encompass the kinds of crimes that the recent scourge of cybersex trafficking has wrought upon society. The kind of scourge that is not going away on its own anytime soon.

217. Blasey, *supra* note 144, at 949.

218. *Id.* at 950. This article notes that criminalizing cybersex trafficking in the livestreaming context under child pornography laws "is precisely what Congress intended to avoid." *Id.* at 954–55 (2020).

219. See Rep. Act No. 10364, § 4(l); INT'L JUST. MISSION, *supra* note 51, at 21 (noting that "[u]nder Philippine law, OSEC conduct falls within the broad category of trafficking in persons crimes")

220. See 18 U.S.C. § 1596.

221. Joy says, "We were left with no choice but to follow her instructions," INT'L JUST. MISSION, <https://www.ijm.org/stories/joy> (last visited Oct. 22, 2021).

222. *Id.*; Kim thought nothing was wrong. But that was about to change, INT'L JUST. MISSION, <https://www.ijm.org/stories/kim> (last visited Oct. 22, 2021).