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## Protecting the Lydias, Linas, and Tinas from Sex Trafficking: A Call to Eliminate Ambiguities of 18 U.S.C. § 1591

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## COMMENTS

### Protecting the Lydias, Linas, and Tinas from Sex Trafficking: A Call to Eliminate Ambiguities of 18 U.S.C. § 1591

#### *I. Introduction*

To honor the 200th anniversary of the “most glorious measure that had ever been adopted by any legislative body in the world”<sup>1</sup> and its champion, William Wilberforce, the 110th Congress passed the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA).<sup>2</sup> William Wilberforce, the Act’s namesake, fought tirelessly for over eighteen years to pass the first piece of legislation aimed at ending slavery in Great Britain, the Slave Trade Act of 1807.<sup>3</sup> Wilberforce spoke about the horrors inflicted upon those torn from their homes and subjected to the “arbitrary will and wanton caprice of others.”<sup>4</sup> Inspired by his passionate words that “[n]ever, never will we desist until we extinguish every trace of this bloody traffic to which our posterity, looking back to the history of those enlightened times, will scarce believe that it has been suffered to exist so long to disgrace and dishonor this country,”<sup>5</sup> Congress embraced Wilberforce’s legacy in the fight to end modern-day slavery with the passage of the TVPRA.<sup>6</sup>

Although abolished by the Thirteenth Amendment in 1865,<sup>7</sup> slavery, or, as it is known today, human trafficking, remains a prevalent issue as the second-largest criminal industry in the world, totaling over thirty-two billion dollars in market value.<sup>8</sup> Sex trafficking, defined as forcing or

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1. WILLIAM HAGUE, WILLIAM WILBERFORCE: THE LIFE OF THE GREAT ANTI-SLAVE TRADE CAMPAIGNER, at xvii (2007) (footnote omitted) (internal quotation marks omitted).

2. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044; Slave Trade Act of 1807, 47 Geo. 3, sess. 1, ch. 36.

3. HAGUE, *supra* note 1, at xv-xviii.

4. *Id.* at xvi.

5. 154 CONG. REC. H10902 (daily ed. Dec. 10, 2008) (statement of Rep. Smith).

6. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 122 Stat. at 5069.

7. U.S. CONST. amend. XIII, § 1.

8. *Sex Trafficking*, INT’L JUST. MISSION, 1, <http://www.ijm.org/sites/default/files/resources/Factsheet-Sex-Trafficking.pdf> (last visited May 29, 2013).

coercing a person to engage in a commercial sex act, constitutes 43% of human trafficking in the world.<sup>9</sup>

Sex traffickers target vulnerable people to traffic and exploit.<sup>10</sup> Lina, age thirteen, and Sinan, age sixteen, were best friends who struggled to find work to help support their families.<sup>11</sup> They took odd jobs when they could, but often went hungry when work was unavailable and money was scarce.<sup>12</sup> Desperate to find work, Lina and Sinan jumped at the opportunity brought to them by Sinan's aunt to work in a coffee shop.<sup>13</sup> Unfortunately, Sinan's aunt lied and trafficked the girls into a brothel.<sup>14</sup>

While Sinan managed to escape, Lina was held captive in the brothel.<sup>15</sup> Like the other women and girls trapped there, Lina was beaten, forced to drink as much alcohol as the customers, and raped repeatedly, day after day—until she was rescued by Sinan.<sup>16</sup> Lina's story, unfortunately, is a common one.<sup>17</sup> Sex traffickers often use lies and false promises of work to lure young women and children into sex trafficking.<sup>18</sup>

Lydia, instead of being tricked like Lina and Sinan, was kidnapped.<sup>19</sup> With promises of finding work as a model, Lydia, age sixteen, met a woman for dinner one night.<sup>20</sup> The after-dinner drink proved devastating.<sup>21</sup> Lydia awoke the next day, after being drugged the night before, to find herself in a terrifying situation.<sup>22</sup> She was told that she was now in a foreign

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9. *Human Trafficking: The Facts*, UNITED NATIONS, 1, [http://www.unglobalcompact.org/docs/issues\\_doc/labour/Forced\\_labour/HUMAN\\_TRAFFICKING\\_-\\_THE\\_FACTS\\_-\\_final.pdf](http://www.unglobalcompact.org/docs/issues_doc/labour/Forced_labour/HUMAN_TRAFFICKING_-_THE_FACTS_-_final.pdf) (last visited May 29, 2013).

10. *Sex Trafficking in the U.S.*, POLARIS PROJECT, <http://www.polarisproject.org/human-trafficking/sex-trafficking-in-the-us> (last visited May 29, 2013).

11. *IJM Cambodia: Brave Survivors Help Rescue Girls from Brothel*, INT'L JUST. MISSION (Nov. 30, 2011), <http://www.ijm.org/news/ijm-cambodia-brave-survivors-help-rescue-girls-brothel>.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *See Sex Trafficking in the U.S.*, *supra* note 10.

18. *Id.*

19. 146 CONG. REC. H2675, H2683 (May 9, 2000) (statement of Rep. Smith) Lydia's story is "an amalgamation of several true stories of women and girls who have been trafficked in Eastern Europe in recent years." *Id.*

20. *Id.*

21. *Id.*

22. *See id.*

country and was the property of a man.<sup>23</sup> That man threatened her, took away her passport and immigration documents, and convinced her that she was in debt to his agency for \$35,000.<sup>24</sup> When Lydia rebelled, the man beat her, raped her, allowed other men to gang-rape her, and deprived her of food and water for three days.<sup>25</sup> She was prostituted for six months before the local police raided the brothel.<sup>26</sup> Because she did not have immigration papers, Lydia was arrested and placed in prison before someone eventually recognized her as a trafficking victim.<sup>27</sup>

Children like Lydia and Lina are especially vulnerable to being trafficked.<sup>28</sup> Traffickers can easily manipulate children by making a child believe that she<sup>29</sup> is loved—by giving her attention—only to coerce the child into commercial sex activity by promising what the child perceives to be love and attention.<sup>30</sup>

Tina met a man who courted her and convinced her that he loved her.<sup>31</sup> He then persuaded her to move to Ohio with him.<sup>32</sup> She was fourteen years old at the time.<sup>33</sup> Upon arriving, he explained that she had to prove she loved him by “working” the streets so they could have their dream home.<sup>34</sup> When she resisted, he had his friends rape her.<sup>35</sup> He then told her she could have avoided the rape if she had simply done what he had said.<sup>36</sup> Tina was forced to walk the streets nightly, engaging in prostitution.<sup>37</sup> If she did not

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23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *See id.*

28. *See* Tina Frundt, *Enslaved in America: Sex Trafficking in the United States*, WOMEN’S FUNDING NETWORK, <http://www.womensfundingnetwork.org/resource/past-articles/enslaved-in-america-sex-trafficking-in-the-united-states> (last visited May 30, 2013).

29. For ease of writing, the author uses the female pronouns in reference to victims because the majority of children trafficked are young girls. However, sex trafficking is a significant problem that affects both genders. *See Sex Trafficking, supra* note 8 (noting that 80% of victims are female).

30. *See* Frundt, *supra* note 28.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

meet her nightly quota, she was repeatedly beaten, denied food, and locked in a closet.<sup>38</sup>

These stories only tell the tales of three of the two million children, both in the United States and worldwide, who are taken from their homes each year and forced into the commercial sex trade.<sup>39</sup> In its fight against this horrendous problem, Congress passed the Trafficking Victims Protection Act of 2000 (TVPA).<sup>40</sup> Eight years later, the TVPRA expanded on the original TVPA, embracing the goals established to provide a comprehensive approach to ending modern day slavery.<sup>41</sup> Those goals focused on the three “Ps”: protection, prevention and prosecution.<sup>42</sup>

Protection efforts are aimed at creating programs focused on providing shelter, food, legal support, and psychological care to identified trafficking victims.<sup>43</sup> Victims who are not United States citizens may be eligible for temporary residence visas.<sup>44</sup> Once victims are identified, the Department of Health and Human Services assists them in securing educational and vocational opportunities so that they do not fall prey to trafficking again.<sup>45</sup> However, in order to receive the protection needed, the person must first be recognized as a trafficking victim.<sup>46</sup> Because a trafficking victim often does not view herself as such, victims are often identified, if at all, by law enforcement officers or nongovernmental organizations that come into contact with the victim.<sup>47</sup>

Programs established to meet Congress’s goal of prevention focus on identifying victims by increasing public awareness.<sup>48</sup> Training programs

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38. *Id.*

39. *Sex Trafficking, supra* note 8.

40. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464.

41. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044, 5069; *Fact Sheet: Child Victims of Human Trafficking*, U.S. DEP’T OF HEALTH & HUMAN SERVS. (Aug. 8, 2012), <http://www.acf.hhs.gov/programs/ort/resource/fact-sheet-child-victims-of-human-trafficking>.

42. Trafficking Victims Protection Act of 2000, § 102(a), 114 Stat. at 1466.

43. *See id.* § 102(b), 114 Stat. at 1466-69 (describing the inadequacies and lack of protection efforts and the goal of the legislation); *see also id.* at § 102(b)(24), 114 Stat. at 1469.

44. *Id.* § 107(c)(3), 114 Stat. at 1477.

45. *Id.* § 107(b)(1), 114 Stat. at 1475-76.

46. *Id.* § 107(b)(1)(A), 114 Stat. at 1475.

47. HEATHER J. CLAWSON & NICOLE DUTCH, U.S. DEP’T OF HEALTH & HUMAN SERVS., IDENTIFYING VICTIMS OF HUMAN TRAFFICKING: INHERENT CHALLENGES AND PROMISING STRATEGIES FROM THE FIELD 3-4 (2007), *available at* <http://aspe.hhs.gov/hsp/07/human-trafficking/IdentVict/ib.pdf>.

48. *Fact Sheet: Child Victims of Human Trafficking, supra* note 41.

target those who may come in contact with a trafficking victim: law enforcement, medical personnel, nongovernmental organizations, and social workers, among others.<sup>49</sup> These programs train personnel how to identify a trafficking victim, how to interact with that person, and how to secure the needed help, from food and shelter to psychological care.<sup>50</sup>

To effectuate the goal of “just and effective punishment of traffickers,”<sup>51</sup> Congress established criminal statutes and provided prosecution tools for both federal and state agencies.<sup>52</sup> Congress identified two severe forms of sex trafficking as: (1) causing anyone to commit a commercial sex act through force, fraud, or coercion, or (2) causing a person under the age of eighteen years to commit a commercial sex act.<sup>53</sup> The criminalization of severe forms of sex trafficking is codified at 18 U.S.C. § 1591.<sup>54</sup>

Congress formally amended 18 U.S.C. § 1591 in the TVPRA, adding reckless disregard as a sufficient mens rea and adding a special evidentiary provision for the government when prosecuting severe forms of sex trafficking.<sup>55</sup> The evidentiary provision in § 1591(c), addressing the mens rea requirement of the victim’s status as a minor,<sup>56</sup> has been subject to varying interpretations.<sup>57</sup> One court held that this provision allowed the government to prove the mens rea of the victim’s age in one of three alternatives—by proving that the defendant either (a) knew the victim’s age, (b) recklessly disregarded the victim’s age, or (c) merely had a reasonable opportunity to observe.<sup>58</sup> Another court held that when the government prosecutes under the reckless disregard standard, the government must prove an additional element—that the defendant had a reasonable opportunity to observe the victim.<sup>59</sup> Aiming to *increase* the

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49. CLAWSON & DUTCH, *supra* note 47, at 4.

50. *Id.* at 4-5.

51. Trafficking Victims Protection Act of 2000, § 102(a), 114 Stat. at 1466.

52. *See id.*; *see also id.* § 112, 114 Stat. at 1486-90.

53. 22 U.S.C. § 7102(9) (2012).

54. *See* 18 U.S.C. § 1591 (2012); *see also* Trafficking Victims Protection Reauthorization Act of 2011, H.R. 2830, 112th Cong. § 212 (2011) (proposing a name change of 18 U.S.C. § 1591 to “severe forms of trafficking”).

55. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, sec. 222, § 1591, 122 Stat. 5044, 5069.

56. 18 U.S.C. § 1591(c).

57. *See* United States v. Robinson, 702 F.3d 22, 30-34 (2d Cir. 2012); United States v. Wilson, No. 10-60102-CR, 2010 WL 2991561, at \*7 (S.D. Fla. July 27, 2010).

58. *Robinson*, 702 F.3d at 34.

59. *Wilson*, 2010 WL 2991561, at \*6-7.

number of prosecutions of sex traffickers,<sup>60</sup> Congress inadvertently hindered its goal of prosecution by passing an ambiguous statute.

The ambiguity arising from the alternative interpretations of 18 U.S.C. § 1591 can have a detrimental effect on all three of Congress's goals. Prosecutors may elect to avoid prosecuting under this statute while the law remains unsettled.<sup>61</sup> Or the prosecutor may charge the defendant under a different statute, creating unintended negative consequences for both the victim and the fight to end sex trafficking.<sup>62</sup>

If the perpetrator is not prosecuted as a sex trafficker, the victim may be less likely to be recognized as a trafficking victim.<sup>63</sup> This identification is crucial for determination of eligibility for federally funded programs, such as immigration services.<sup>64</sup> In addition, non-identification may cause the victim to lose her right to mandatory restitution for trafficking victims under 18 U.S.C. § 1593.<sup>65</sup>

Prosecuting sex traffickers under an offense that carries a lighter punishment may also decrease the probability that a victim will testify or cooperate with the prosecution, which significantly reduces the likelihood of success.<sup>66</sup> Because of the heinous methods of control that sex traffickers

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60. See AMY FARRELL ET AL., NE. UNIV. INST. ON RACE & JUSTICE, UNDERSTANDING AND IMPROVING LAW ENFORCEMENT RESPONSES TO HUMAN TRAFFICKING: FINAL REPORT 22 (June 2008), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/222752.pdf>.

61. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.230 (2009), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcrm.htm#9-27.230](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.230). Federal prosecutors are given broad discretion in choosing when and how to prosecute and under which laws. *Id.* Logically, prosecutors consider ease of prosecution under a particular statute as well as the prosecutor's familiarity with a particular statute when selecting under which statute to charge. See, e.g., Alicia W. Peters, Trafficking in Meaning: Law, Victims, and the State 87 (2010) (unpublished Ph.D. dissertation, Columbia University), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/231589.pdf>.

62. See, e.g., D.C. CODE § 22-2705(c)(2) (2010) (not imposing a minimum mandatory sentence for causing a minor to engage in prostitution). *But see* 18 U.S.C. § 1591(b)(1)-(2) (2012) (imposing a mandatory minimum sentence of ten to fifteen years imprisonment, conditional on the age of the minor).

63. See Linda Smith & Samantha Healy Vardaman, *A Legislative Framework for Combating Domestic Minor Sex Trafficking*, 23 REGENT U. L. REV. 265, 278-79 (2010) (discussing the ramifications for charging sex traffickers under non-trafficking statutes); see also *Fact Sheet: Child Victims of Human Trafficking*, *supra* note 41.

64. 22 U.S.C. § 7105(b)(1)(A), (C) (2012) (addressing certification as human trafficking victims in order to receive services); see also Smith & Vardaman, *supra* note 63, at 287.

65. 18 U.S.C. § 1593.

66. *Combating Modern Slavery: Reauthorization of Anti-Trafficking Programs: Hearing on H.R. 3887 Before the H. Comm. on the Judiciary*, 110th Cong. 95 (2007).

exert over their victims,<sup>67</sup> victims are often terrified of testifying against perpetrators.<sup>68</sup> This fear is amplified if the victim knows that the perpetrator will not be subject to a significant prison term because the perpetrator is charged with a lesser offense.<sup>69</sup> Charging perpetrators with lesser offenses frequently results in shorter prison sentences.<sup>70</sup> Because of the psychological terror that the trafficker instills in the victim, the victim will fear that the trafficker will return to traffic her once more or that he will harm her family once he is released from prison.<sup>71</sup>

Finally, by charging the perpetrator under a lesser offense, efforts aimed at decreasing the demand in the commercial sex industry and, therefore, decreasing the frequency of sex trafficking, are wasted.<sup>72</sup> Sex trafficking is the second-largest criminal industry in the world because it is so profitable.<sup>73</sup> Without imposing significant risks on the perpetrators, such as

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67. Sex traffickers impose fear in their victims through a systematic process known as “grooming.” *Domestic Sex Trafficking: Criminal Operations of the American Pimp*, POLARIS PROJECT 3, <http://www.polarisproject.org/resources/resources-by-topic/sex-trafficking> (scroll through .pdf documents; then select “Domestic Sex Trafficking”) (last visited July 10, 2013). Methods of grooming include beating, burning, and raping the victim as well as emotional abuse, removing the victim from family and friends, and creating an environment where the victim must depend on the perpetrator. *Id.* Traffickers often impose a fear of law enforcement which may impair a victim’s ability to report or testify. *Id.*

68. *Combating Modern Slavery: Reauthorization of Anti-Trafficking Programs: Hearing on H.R. 3887 Before the H. Comm. on the Judiciary*, *supra* note 66, at 76 (statement of Dorchen A. Leidholt, Director, Sanctuary for Families’ Ctr. for Battered Women’s Legal Servs.).

69. *Id.* at 94 (statement of Ms. Florrie Burkey, Safe Haven).

70. *See, e.g.*, D.C. CODE § 22-2705(c)(2) (2010) (not imposing a minimum mandatory sentence for causing a minor to engage in prostitution). *But see* 18 U.S.C. § 1591(b)(1)-(2) (imposing mandatory minimum sentence of ten to fifteen years imprisonment, conditional on the age of the minor); *see also* SHARED HOPE INT’L, PROTECTED INNOCENCE CHALLENGE: STATE REPORT CARDS ON THE LEGAL FRAMEWORK OF PROTECTION FOR THE NATION’S CHILDREN: 2012, at 117-219, *available at* [http://sharedhope.org/wp-content/uploads/2012/09/ProtectedInnocenceChallenge\\_Final\\_2012\\_web2.pdf](http://sharedhope.org/wp-content/uploads/2012/09/ProtectedInnocenceChallenge_Final_2012_web2.pdf) (providing a state-by-state analysis of sex trafficking laws, including each state’s criminal statutes and punishment ranges).

71. *Combating Modern Slavery: Reauthorization of Anti-Trafficking Programs: Hearing on H.R. 3887 Before the H. Comm. on the Judiciary*, *supra* note 66, at 76 (statement of Dorchen A. Leidholt, Director, Sanctuary for Families’ Ctr. for Battered Women’s Legal Servs.).

72. Smith & Vardaman, *supra* note 63, at 267-68 (discussing supply and demand principles in the commercial sex industry).

73. *Sex Trafficking*, *supra* note 8.

lengthy prison terms, the profits of sex trafficking remain as powerful incentives because the corresponding risk is not perceived to be that great.<sup>74</sup>

In order to combat sex trafficking effectively, Congress's goals of protection, prevention, and prosecution must work in unison.<sup>75</sup> Because prosecution goals are hindered by an ambiguous statute, both the protection and prevention goals are also impeded.<sup>76</sup> As a result, 18 U.S.C. § 1591 must be amended so that prosecutors can effectively charge and prosecute sex traffickers, slowing the pace of the world's fastest growing criminal industry: human trafficking.<sup>77</sup>

In Part II, this comment applies traditional statutory interpretation methods to 18 U.S.C. § 1591 in an attempt to determine its meaning. Part III discusses the repercussions of the ambiguity inherent in § 1591 on Congress's goals of prevention, protection, and prosecution, as well as the impact on state anti-human trafficking programs. Part IV presents the arguments for and against holding a defendant strictly liable for the crime of sex trafficking of minors. Part V proposes changes to § 1591 that eliminate the ambiguities found in the current statute and, in turn, lead to more effective prosecutions of sex traffickers.

## *II. Determining the Meaning of 18 U.S.C. § 1591*

Inspired by the heart-wrenching stories of children forced into prostitution, occurring daily both abroad and in the United States, Congress passed the Trafficking Victims Protection Act of 2000.<sup>78</sup> Through this Act, Congress authorized the Department of Justice to prosecute those who commit sex trafficking of children by force, fraud, or coercion.<sup>79</sup> Under this version of the statute, the prosecution was required to prove the defendant knew the victim was less than eighteen years of age.<sup>80</sup>

When § 1591(a) was amended in 2008, Congress added reckless disregard as an alternative mens rea for proof the perpetrator caused a

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74. See generally Smith & Vardaman, *supra* note 63 (discussing the need for a strong legislative framework in order to affect the supply and demand in the commercial sex industry).

75. See 22 U.S.C. § 7101(b)(24) (2012).

76. FARRELL ET AL., *supra* note 60, at 22.

77. *Sex Trafficking*, *supra* note 8.

78. See Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464.

79. *Id.* § 112(a)(2), 114 Stat. at 1487.

80. See *id.*

minor to engage in a commercial sex act.<sup>81</sup> A special evidentiary provision was added to § 1591(c),<sup>82</sup> stating that in a prosecution under § 1591(a), the government need not prove the defendant knew the person caused to engage in a commercial sex act was under the age of eighteen years if the defendant had a reasonable opportunity to observe the person.<sup>83</sup> These amendments left prosecution and defense lawyers asking several questions. What does the government have to prove regarding the age of the minor? Must the government prove the defendant knew the victim's age or that the defendant recklessly disregarded the victim's age? Or rather, must the government only show that the defendant had a reasonable opportunity to observe the victim? Furthermore, what circumstances establish a "reasonable opportunity to observe"?

*A. Applying Traditional Methods of Statutory Interpretation to 18 U.S.C. § 1591*

To answer these questions, prosecution and defense teams must consider how a court might interpret the statute.<sup>84</sup> Traditional interpretation methods are most likely to be applied, including analyzing the plain language of the statute, reviewing the legislative history of the TVPA and its amendments, evaluating the common statutory scheme of federal sex crimes against children, and exploring the constitutional implications of the alternative interpretations.

*1. Plain language of 18 U.S.C. § 1591*

Courts approach statutory interpretation by first considering the language of the statute itself.<sup>85</sup> If the meaning of the statute is clear, "that language must ordinarily be regarded as conclusive."<sup>86</sup> Ordinary grammatical rules apply.<sup>87</sup>

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81. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, sec. 222, § 1591(a), 122 Stat. 5044, 5069.

82. Prior to 2008, subsection (c) provided definitions for a variety of words found in the sex trafficking statutes. See 18 U.S.C. § 1591(c) (Supp. II 2008).

83. 18 U.S.C. § 1591(c) (2012).

84. RONALD BENTON BROWN & SHARON JACOBS BROWN, STATUTORY INTERPRETATION: THE SEARCH FOR LEGISLATIVE INTENT 7-8 (2002).

85. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

86. *Id.*

87. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (citing grammatical structure in analysis of meaning of statute).

Reading 18 U.S.C. § 1591(c) on its own may initially seem clear and unambiguous: “In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained or maintained, the Government need not prove that the defendant knew that the person had not attained the age of 18 years.”<sup>88</sup> From just that subsection, it appears that the Government must only show that “the defendant had a reasonable opportunity to observe” the minor to satisfy the mens rea of the age element of the person recruited.<sup>89</sup> However, that reading of subsection (c) may not be consistent with the statutory scheme of § 1591 as a whole.<sup>90</sup> When reading subsection (a)(1), as referenced in subsection (c), ambiguity is revealed.

Whoever knowingly—in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, or maintains by any means a person; . . . knowing, or in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, 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).<sup>91</sup>

A plain reading of subsection (a)(1), applying normal grammatical rules, establishes the mens rea of the age element as knowledge or reckless disregard.<sup>92</sup> In light of subsection (a)(1), subsection (c) could be interpreted in two different ways.<sup>93</sup>

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88. 18 U.S.C. § 1591(c).

89. *See id.* The next logical question stemming from that reading of the statute asks what circumstances satisfy “reasonable opportunity to observe.” *See supra* Part II.B.

90. One judge found that reading to be inconsistent with the mens rea required in § 1591(a). *United States v. Wilson*, No. 10-60102-CR, 2010 WL 2991561, at \*6 (S.D. Fla. July 27, 2010). Courts interpret statutes consistently with the statutory scheme as a whole. *Erlenbaugh v. United States*, 409 U.S. 239, 243-45 (1972) (describing the canon of statutory construction as “*in pari materia*”).

91. 18 U.S.C. § 1591(a)(1).

92. If the inapplicable clauses are ignored, the subsection reads:

[W]hoever knowingly . . . recruits, entices, harbors, transports, provides, obtains, or maintains by any means a person . . . knowing, or in reckless disregard of the fact, . . . that the person has not attained the age of 18 years and

First, subsection (c) could stand on its own as providing an additional mens rea option for the age element by creating a type of strict liability once the Government has shown the defendant had a reasonable opportunity to observe the minor. This result is achieved by reading the subsection as removing the government's burden of proving the defendant's knowledge or reckless disregard of the minor's age.<sup>94</sup>

Alternatively, subsection (c) could be read into subsection (a)(1) as a means of proving reckless disregard.<sup>95</sup> Subsection (c) states that "the Government need not prove that the defendant knew that the person had not attained the age of 18 years" when the defendant had a reasonable opportunity to observe the minor.<sup>96</sup> This subsection could be interpreted to allow the government to prove the lesser mens rea of reckless disregard by demonstrating that the defendant had a reasonable opportunity to observe the minor. Obviously, a plain reading of the statute fails to produce clear results—a failing that is emphasized by the two courts that have addressed the interpretation of the statute.<sup>97</sup>

In *United States v. Wilson*, an unpublished opinion denying a motion to dismiss the indictment, Judge Rosenbaum of the Southern District of Florida interpreted the plain language of subsection (c) to require the government to prove beyond a reasonable doubt that "the defendant recklessly disregarded the person's age *and* had a reasonable opportunity to observe the person."<sup>98</sup> The court ruled that the statute was not ambiguous, despite the government's alternative reading of the statute.<sup>99</sup> The government interpreted § 1591(c) to allow strict liability to satisfy the element of the victim's status as a minor.<sup>100</sup> This ruling was delivered without significant explanation.<sup>101</sup>

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will be caused to engage in a commercial sexual act, shall be punished as provided in subsection (b).

*Id.*

93. Compare *United States v. Robinson*, 702 F.3d 22, 30-34 (2d Cir. 2012), with *Wilson*, 2010 WL 2991561, at \*7.

94. See, e.g., *Robinson*, 702 F.3d at 32.

95. See, e.g., *Wilson*, 2010 WL 2991561, at \*7.

96. 18 U.S.C. § 1591(c).

97. See *Robinson*, 702 F.3d at 30-34; *Wilson*, 2010 WL 2991561, at \*7.

98. 2010 WL 2991561, at \*6 (emphasis added).

99. *Id.*

100. *Id.*

101. See *id.*

Conversely, the Second Circuit interpreted subsection (c) as creating an alternative mens rea to satisfy the age element.<sup>102</sup> The court interpreted the statute as granting the government three mens rea options for proving the age element: (1) by showing the defendant knew the minor's age, (2) by showing the defendant recklessly disregarded the minor's age, or (3) by showing the defendant had a reasonable opportunity to observe the minor.<sup>103</sup> The court found that "the only interpretation [of § 1591(c)] that preserves any meaning, is that the provision creates strict liability where the defendant had a reasonable opportunity to observe the victim."<sup>104</sup> Notably, the court was aware of the interpretation by the *Wilson* court but maintained that the correct reading of the statute created a form of strict liability.<sup>105</sup>

As evidenced by conflicting interpretations offered by these two courts, a plain reading of § 1591 does not provide a clear answer as to the meaning of its wording. When a plain reading of the statute is insufficient, courts may turn to legislative history to determine Congress's intended meaning.<sup>106</sup>

## 2. Legislative History of § 1591

Because courts are directed to give effect to Congress's intent,<sup>107</sup> the legislative history of a statute may clarify Congress's intended interpretation of the statute. The intended interpretation can be deduced from the congressional record, which includes transcripts of Senate or House of Representative hearings,<sup>108</sup> and previous drafts of bills.<sup>109</sup> Legislative history often provides context to the language used in the statute.<sup>110</sup>

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102. *See Robinson*, 702 F.3d at 34.

103. *Id.*

104. *Id.* at 32.

105. *See id.* at 30.

106. *Flora v. United States*, 357 U.S. 63, 65 (1958) ("[A] thorough consideration of the relevant legislative history is required.").

107. *Id.*; *see also Miller v. French*, 530 U.S. 327, 336 (2000).

108. *See, e.g., Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 183 (1978) (utilizing a House of Representatives Conference Report in exercise of statutory interpretation).

109. *See, e.g., Kosak v. United States*, 465 U.S. 848, 854-56 (1984) (considering drafter's comments in exercise of statutory interpretation); *Hill*, 437 U.S. at 183 (utilizing previous drafts of bills in exercise of statutory interpretation).

110. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 110-16 (1980) (analyzing legislative history of a statute in order to determine its meaning).

Courts begin by looking at the stated purpose of the statute, typically found in the preamble.<sup>111</sup> The purpose of the TVPRA is “to enhance measures to combat trafficking in persons,”<sup>112</sup> and “to ensure just and effective punishment of traffickers.”<sup>113</sup> Devoted to achieving that purpose, Congress amended § 1591 by adding “reckless disregard” as an alternative scienter in subsection (a), in addition to adding subsection (c).<sup>114</sup> According to a congressional hearing, “reckless disregard” was deliberately added to “reach[] those who turn a willfully blind eye toward a person in commercial sexual activity who is being physically abused or is underage.”<sup>115</sup>

Congressman Howard Berman also stated that case law inspired the addition of subsection (c),<sup>116</sup> specifically citing *United States v. X-Citement Video, Inc.*<sup>117</sup> and *United States v. Jones*.<sup>118</sup> In *X-Citement Video*, the Supreme Court noted that the common-law presumption of mens rea was excused in statutes where the “perpetrator confronts the underage victim personally and may reasonably be required to ascertain that victim’s age.”<sup>119</sup> In *Jones*, the Fourth Circuit held that the government was not required to prove that the defendant knew the victim’s minor status in a prosecution for violation of 18 U.S.C. § 2423(a), which criminalizes the transportation of a minor across state lines for sexual purposes.<sup>120</sup>

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111. See, e.g., *Moskal v. United States*, 498 U.S. 103, 117 (1990) (relying on the purpose as stated in the statute in exercise of statutory interpretation); *Donovan v. Dewey*, 452 U.S. 594, 602 n.7 (1981) (citing the preamble to show congressional awareness of an issue); *United States v. Turkette*, 452 U.S. 576, 588-90 (1981) (relying on purposes section of enacted statute in statutory interpretation).

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

113. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 102(a), 114 Stat. 1464, 1466 (codified at 22 U.S.C. § 7101(a)). Because the 2008 act reauthorized the TVPA, and there is no “purpose” section for the 2008 act, the author assumes that the Reauthorization Act of 2008 was written in light of the stated purpose and findings of the TVPA.

114. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, sec. 222(b)(5), § 1591(a), (c), 122 Stat. at 5069.

115. 154 CONG. REC. H10904 (daily ed. Dec. 10, 2008) (statement of Rep. Howard Berman).

116. *Id.*

117. 513 U.S. 64 (1994).

118. 471 F.3d 535 (4th Cir. 2006).

119. 513 U.S. at 72 n.2.

120. 471 F.3d at 538-39. The Fourth Circuit’s holding in *Jones* is consistent with four other circuits. See *United States v. Griffith*, 284 F.3d 338, 351 (2d Cir. 2002); *United States v. Taylor*, 239 F.3d 994, 997 (9th Cir. 2001); *United States v. Scisum*, 32 F.3d 1479, 1485-

Delving into the previous versions of the bill reveals the development of subsection (c). Congressman Tom Lantos originally sponsored H.R. 3887, the initial bill seeking to reauthorize the TVPA, in 2007.<sup>121</sup> In the proposal, he included an amendment to 18 U.S.C. § 1591 that replaced the phrase “that the person has not attained the age of 18 years and . . . will be caused to engage in a commercial sex act” with “that the person (being a person who has not attained the age of 18 years) will be caused to engage in a commercial sex act” will be caused to engage in a commercial sex act.<sup>122</sup> In the same subsection, Congressman Lantos added, “In a prosecution under this subsection, the Government need not prove that the defendant knew that the person had not attained the age of 18 years.”<sup>123</sup> At that time, the proposal did not include a requirement that the defendant must have a reasonable opportunity to observe the minor.<sup>124</sup>

From this proposal, it appears that Congressman Lantos intended for the age of the minor merely to be a fact the government had to prove, with no mens rea required on the part of the defendant.<sup>125</sup> This viewpoint was advocated by Representative Carolyn Maloney during the committee hearing addressing this bill.<sup>126</sup> She urged both the removal of proof of the defendant’s knowledge of the victim’s status as a minor for conviction under the then-current version of § 1591 and, alternatively, use of the victim’s status as a minor to increase punishment in the sentencing phase.<sup>127</sup> Relieving the government’s burden of proof as to the defendant’s knowledge of the victim’s minor status also supported the goal of reducing reliance on victim testimony, a commonly-expressed objective during the committee hearing.<sup>128</sup>

H.R. 3887 died in the Senate in December 2007.<sup>129</sup> Congressman Lantos succumbed to cancer in February 2008,<sup>130</sup> and there was no activity to

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86 (10th Cir. 1994); *United States v. Hamilton*, 456 F.2d 171, 173 (3d Cir. 1972) (per curiam).

121. H.R. REP. NO. 110-430, at 84 (2007).

122. *Id.* (emphasis omitted).

123. *Id.*

124. *See id.*

125. *See id.*

126. *Combating Modern Slavery: Reauthorization of Anti-Trafficking Programs: Hearing on H.R. 3887 Before the H. Comm. on the Judiciary*, *supra* note 66, at 30 (statement of Rep. Carolyn B. Maloney).

127. *Id.*

128. *Id.* at 95 (statement of Amy Farrell, Inst. on Race & Justice, Ne. Univ.).

129. *Bill Summary & Status: H.R. 3887*, LIBRARY OF CONGRESS, <http://thomas.loc.gov/home/LegislativeData.php> (select “110” under “Select Congress”; then select

reauthorize the TVPA until December 2008.<sup>131</sup> Congressman Berman proposed H.R. 7311, containing the amendment that reflects the current state of § 1591.<sup>132</sup> Before the House of Representatives, Congressman Berman explained that H.R. 7311 drew from H.R. 3887, but “develop[ed] alternative proposals where the two bills diverge.”<sup>133</sup> Congressman Berman also stated that the intentions behind the provisions were “closely aligned.”<sup>134</sup> However, the resulting additions in H.R. 7311 of both the “reckless disregard” mens rea and subsection (c) reflected a significant divergence in congressional thought on mens rea.<sup>135</sup> After receiving approval by unanimous consent in both the House of Representatives and the Senate without amendment, President George W. Bush signed H.R. 7311 into law on December 23, 2008.<sup>136</sup>

The sponsors of H.R. 7311, obviously dissatisfied with the strict liability standard asserted in H.R. 3887, failed to indicate the source of the disagreement in the Congressional Record. Nevertheless, lobbyist materials may explain the shift in thought.<sup>137</sup> Nine days after the hearing on H.R. 3887 in 2007, the Department of Justice (DOJ) expressed its concerns about the bill to Committee on the Judiciary Chair Representative John Conyers, Jr.<sup>138</sup> Specifically, the DOJ was concerned with the creation of a strict liability crime by removal of the mens rea requirement for the minor’s status.<sup>139</sup> While similarities were drawn to 18 U.S.C. § 2423(a), a strict

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“Word/Phrase” under “Enter Search”; then select “Include Variants (plurals, etc.)”; then search “3887”; then select “H.R. 3887”; then select “All Information”) (last visited June 5, 2013).

130. David M. Herszenhorn, *Tom Lantos, 80, Is Dead; Longtime Congressman*, N.Y. TIMES (Feb. 12, 2008), <http://www.nytimes.com/2008/02/12/washington/12lantos.html>.

131. *Bill Summary & Status: H.R. 7311*, LIBRARY OF CONGRESS, <http://thomas.loc.gov/home/LegislativeData.php> (select “110” under “Select Congress”; then select “Berman, Howard L. [D-CA-28]” under “Choose House Members”; then select “Word/Phrase” under “Enter Search” and search “wilberforce”; then select “H.R. 7311”; then select “All Information”).

132. *Id.*

133. 154 CONG. REC. H10903 (daily ed. Dec. 10, 2008) (statement of Rep. Howard Berman).

134. *Id.*

135. *Bill Summary & Status: H.R. 7311*, *supra* note 131.

136. *Id.*

137. BROWN & BROWN, *supra* note 84, at 131.

138. See Letter from Brian A. Benczkowski, Principal Deputy Assistant Attorney Gen., U.S. Dep’t of Justice, to John Conyers, Jr., Chairman, House Comm. on the Judiciary (Nov. 9, 2007), available at <http://www.justice.gov/olp/pdf/dept-view-letter-hjc-on-hr3887.pdf>.

139. *Id.* at 8.

liability crime for aggravated sexual abuse, the DOJ pointed to the affirmative defense available under § 2423.<sup>140</sup> As written, H.R. 3887 created “a substantial mandatory minimum sentence for a[] . . . strict liability crime.”<sup>141</sup> The DOJ argued that the amendment to § 1591(a) “[ran] counter to the criminal law goal of punishing culpable states of mind.”<sup>142</sup> In a separate publication, the DOJ suggested that an affirmative defense might alleviate some of its concerns.<sup>143</sup>

While legislative history is commonly consulted in determining a statute’s meaning, some scholars suggest that current trends indicate the Supreme Court is reluctant to rely on statements made during a statute’s enactment.<sup>144</sup> The Court may decline to find a statement made during the legislative process to be “an authoritative interpretation” of a statute.<sup>145</sup> Legislative history is often criticized because it is comprised of statements made by individuals when the goal of statutory interpretation is to determine the collective intent of Congress.<sup>146</sup> Some scholars have even suggested that statements might be purposefully made to influence an interpretation of the statute that could not be achieved through the legislative process.<sup>147</sup> As a result, the pursuit of a statute’s meaning rarely concludes with an analysis of the legislative history.<sup>148</sup> However, legislative history remains a useful tool to understand the development of the language used in a particular statute.<sup>149</sup>

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140. *Id.* at 9; *see also* 18 U.S.C. § 2423(a), (g) (2012) (permitting a reasonable mistake-of-age defense).

141. Letter from Brian A. Benczkowski to John Conyers, Jr., *supra* note 138, at 8.

142. *Id.*

143. *Facts about the Department of Justice’s Anti-Trafficking Efforts: July 2008*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/olp/pdf/myths-and-facts.pdf> (last visited June 6, 2013).

144. CHRISTIAN E. MAMMEN, *USING LEGISLATIVE HISTORY IN AMERICAN STATUTORY INTERPRETATION* 27 (2002); *see also* BROWN & BROWN, *supra* note 84, at 117 (discussing critiques of relying on legislative history for statutory interpretation).

145. *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 582 (1994).

146. BROWN & BROWN, *supra* note 84, at 124; *see, e.g.*, *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 50 (1911); *United States v. Trans-Mo. Freight Ass’n*, 166 U.S. 290, 318 (1897) (collecting cases).

147. BROWN & BROWN, *supra* note 84, at 117.

148. *Id.* at 5 (“A number of judicial opinions use a combination of interpretative methods.”).

149. *See* *Russello v. United States*, 464 U.S. 16, 23-24 (1983) (discussing the evolution of a statute in determining congressional intent).

### 3. Common Statutory Scheme—Similar Statutes

Whenever possible, statutes should be interpreted to be consistent with existing statutes on the same subject matter.<sup>150</sup> This canon of statutory construction proves especially true for statutes amended or drafted by the same session in Congress.<sup>151</sup> Five federal statutes address criminal activity similar to that targeted in § 1591.<sup>152</sup>

Title 18 U.S.C. § 2241 criminalizes aggravated sexual abuse, defining the offense as “knowingly caus[ing] another person to engage in a sexual act” through the use of force or threatening death, serious bodily injury or kidnapping.<sup>153</sup> Section 2241(c) prescribes the increase in the mandatory minimum sentence based on the victim’s minority status.<sup>154</sup> Using language similar to § 1591, the statute punishes more severely those who knowingly engage in the prohibited conduct in subsections (a) and (b) with “a person who has not attained the age of 12 years.”<sup>155</sup> Notably, § 2241(d), substantially similar to § 1591(c), provides that “in a prosecution under subsection (c) of this section, the Government need not prove that the defendant knew that the other person engaging in the sexual act had not attained the age of 12 years.”<sup>156</sup> Reading the plain language of § 2241 indicates that the government must only prove the victim was less than twelve years old without the necessity of demonstrating that the defendant *knew* the victim’s age.<sup>157</sup> Therefore, § 2241 essentially creates a strict liability crime if the victim is less than twelve years old.

Section 2241 does not contain a provision allowing the alternative of proving the defendant acted with reckless disregard in committing the sexual act, as permitted in § 1591.<sup>158</sup> Nevertheless, because the language in § 1591(c) tracks so closely with § 2241(d), it may be assumed that Congress had a similar intent in mind—to create a strict liability crime as it

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150. *Erlenbaugh v. United States*, 409 U.S. 239, 243-45 (1972) (describing the canon of statutory construction as “*in pari materia*”).

151. *Id.* at 244.

152. 18 U.S.C. §§ 2241, 2251-2252, 2422-2423 (2012).

153. *Id.* § 2241(a).

154. *Id.* § 2241(c).

155. *Compare id.*, with 18 U.S.C. § 1591 (2012).

156. 18 U.S.C. § 2241(d).

157. *See id.*; *see also* *United States v. Brown*, 330 F.3d 1073, 1077 (8th Cir. 2003) (including jury instructions requiring the government to prove that the minor had not attained the age of twelve years at the time of the offense without an element requiring the defendant’s awareness of the victim’s age).

158. *Compare* 18 U.S.C. § 2241, with 18 U.S.C. § 1591.

relates to the commercial sexual exploitation of minors.<sup>159</sup> In fact, Congress cited this statute directly when stating the reasoning behind drafting § 1591.<sup>160</sup>

The federal statute criminalizing the production of child pornography, 18 U.S.C. § 2251, also creates strict liability regarding the element of the age of the victim.<sup>161</sup> The Supreme Court noted that strict liability was appropriate, as the producers of child pornography “confront[] the underage victim personally and may reasonably be required to ascertain that victim’s age.”<sup>162</sup> The perpetrator carries the “risk of error” of misidentifying the victim’s age.<sup>163</sup>

Perpetrators charged with an offense prohibited by § 1591 typically interact with the victim personally and, therefore, like under § 2251, can be reasonably required to determine the victim’s age.<sup>164</sup> Because the underlying conduct of pandering is illegal,<sup>165</sup> it may be even more appropriate that the sex trafficker carries the “risk of error,” similar to the child pornographer who misidentifies his victim’s age.<sup>166</sup>

But the Supreme Court refused to apply strict liability to the mens rea of the victim’s minority status in prosecuting the transportation of child pornography under 18 U.S.C. § 2252.<sup>167</sup> After carefully analyzing the statutory language and the congressional history, the Court ruled that making § 2252 a strict liability crime would raise constitutional issues, specifically with the First Amendment.<sup>168</sup> The mens rea in § 2252 distinguished “legal innocence from wrongful conduct.”<sup>169</sup>

However, the same constitutional issues do not arise with § 1591. Imposing strict liability for the mens rea for the age of the minor does not

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159. Compare 18 U.S.C. § 1591(c), with 18 U.S.C. § 2241(d).

160. 154 CONG. REC. H10904 (daily ed. Dec. 10, 2008) (statement of Rep. Howard Berman).

161. 18 U.S.C. § 2251; *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 76 n.5 (1994).

162. *X-Citement Video, Inc.*, 513 U.S. at 72 n.2.

163. *Id.* at 76 n.5.

164. See 18 U.S.C. § 1591(a). Persons involved with sex trafficking but who do not confront the victim personally are charged under 18 U.S.C. § 1591(b).

165. See, e.g., MD. CODE ANN., CRIM. LAW § 11-303 (West 2011).

166. *X-Citement Video, Inc.*, 513 U.S. at 76 n.5 (noting that producers of child pornography interact with victims and, therefore, can bear the “risk of error” in determining the performer’s age).

167. *Id.*; see also 18 U.S.C. § 2252.

168. *X-Citement Video, Inc.*, 513 U.S. at 78.

169. *Id.* at 73.

create the criminal conduct. The underlying conduct by the perpetrator—causing a person to engage in a commercial sex act—would still be illegal, regardless of the victim’s age.<sup>170</sup>

Coercing or enticing a minor to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense is prohibited in 18 U.S.C. § 2422.<sup>171</sup> Like 18 U.S.C. § 1591, it prohibits such conduct against an “individual who has not attained the age of 18 years.”<sup>172</sup> While the Supreme Court has not interpreted this statute, the Seventh Circuit applied the ruling from *United States v. X-Citement Video, Inc.* to hold, in *United States v. Coté*, that in a prosecution under this statute the government must prove that the defendant knew the victim was under the age of eighteen years.<sup>173</sup> The court avoided the potential constitutional issues discussed in *X-Citement Video*, where a scienter requirement distinguished legal conduct from wrongful conduct, by imposing a mens rea requirement on the age of the victim to avoid criminalizing legal conduct.<sup>174</sup> However, the requirement of mens rea of the victim’s age in § 1591 would not be necessary to distinguish legal conduct from wrongful conduct.

Perhaps the most similar statute to § 1591 is 18 U.S.C. § 2423, which criminalizes the transportation of minors across state lines or in foreign commerce for the purpose of engaging in criminal sexual activity or illicit sexual conduct.<sup>175</sup> Six circuit courts have addressed the interpretation of the mens rea of the age of the minor in this statute; all held that the government does not have to prove that the defendant knew that the victim was under the age of eighteen years.<sup>176</sup>

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170. If the perpetrator utilized force, fraud, or coercion to cause the victim to engage in a commercial sex act, and the jurisdictional requirements are satisfied, the perpetrator can be prosecuted under § 1591(a). Most states also criminalize causing a person to engage in a commercial sex act. See *Comprehensive State Human Trafficking Statutes*, POLARIS PROJECT (July 2011), [https://na4.salesforce.com/sfc/p/300000006E4SgF3edAeOtn\\_qXq9oDm1oHDoYM6c](https://na4.salesforce.com/sfc/p/300000006E4SgF3edAeOtn_qXq9oDm1oHDoYM6c).

171. 18 U.S.C. § 2422.

172. *Id.* § 2422(b).

173. *United States v. Coté*, 504 F.3d 682, 685-86 (7th Cir. 2007).

174. *See id.* at 686.

175. *See* 18 U.S.C. § 2423.

176. *United States v. Daniels*, 653 F.3d 399, 410 (6th Cir. 2011); *United States v. Cox*, 577 F.3d 833, 836-37 (7th Cir. 2009); *United States v. Jones*, 471 F.3d 535, 538-39 (4th Cir. 2006); *United States v. Griffith*, 284 F.3d 338, 350-51 (2d Cir. 2002); *United States v. Taylor*, 239 F.3d 994, 996 (9th Cir. 2001); *United States v. Hamilton*, 456 F.2d 171, 173 (3d Cir. 1972).

These rulings are diametrically opposed to the holding in *Flores-Figueroa v. United States*.<sup>177</sup> Addressing the interpretation of a statute criminalizing aggravated identity theft, the Supreme Court held in *Flores-Figueroa* that the word “knowingly” applied to each element of the statute.<sup>178</sup> The Sixth and Seventh Circuits, addressing the interpretation of § 2423 post-*Flores-Figueroa*, distinguished the case by focusing on the holding in *X-Citement Video*, on which the Court had relied in *Flores-Figueroa*.<sup>179</sup>

In *X-Citement Video*, the Supreme Court also held that the word “knowingly” applied to the age of the minor in the context of child pornography.<sup>180</sup> However, the Supreme Court specifically noted, on more than one occasion in *X-Citement Video*, that the mens rea was necessary to distinguish legal conduct from wrongful conduct.<sup>181</sup> The Sixth and Seventh Circuits distinguished *Flores-Figueroa* on that basis and held that § 2423 merely increased the punishment based on the victim’s minor status for already wrongful conduct.<sup>182</sup> The transportation of persons across state lines for the purpose of engaging in prostitution is prohibited in § 2421, which mirrors § 2423, but for the victim’s age language.<sup>183</sup> In light of Congress’s intent to provide minors with “special protection against sexual exploitation,” the Seventh Circuit noted that it would be “implausible that Congress would want it to be harder to prove a violation of § 2423(a) than of § 2421.”<sup>184</sup>

Justice Alito, concurring in *Flores-Figueroa*, emphasized that statutory interpretation should also consider context and that the majority’s holding should not be a rigid rule.<sup>185</sup> He specifically referenced § 2423 as an

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177. See 556 U.S. 646, 652 (2009).

178. *Id.* at 652-55.

179. *Id.* at 652; *Daniels*, 653 F.3d at 410 (citing the discussion of *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), in *Cox*, 577 F.3d at 837); *Cox*, 577 F.3d at 837.

180. *X-Citement Video, Inc.*, 513 U.S. at 75.

181. *Id.* at 72 n.5, 73 & n.3.

182. *Daniels*, 653 F.3d at 410 (citing the discussion of *X-Citement Video, Inc.*, in *Cox*, 577 F.3d at 837); *Cox*, 577 F.3d at 837.

183. See *Cox*, 577 F.3d at 837. Compare 18 U.S.C. § 2421 (2012), with 18 U.S.C. § 2423.

184. *Cox*, 577 F.3d at 837 (citing *United States v. Taylor*, 239 F.3d 994, 997 (9th Cir. 2001)).

185. *Flores-Figueroa v. United States*, 556 U.S. 646, 659-61 (2009) (Alito, J., concurring in part and concurring in the judgment).

example where the context may implicate that “knowingly” does not apply to all elements of the offense.<sup>186</sup>

In addition, Congress provided a safeguard in § 2423 to avoid any potential constitutional issues. Subsection (g) provides an affirmative defense for a defendant to prove by a preponderance of the evidence that he reasonably believed that the person was over the age of eighteen years.<sup>187</sup> However, this defense is not available for prosecutions under § 2423(a), which criminalizes transportation of any person with intent to engage in criminal sexual activity.<sup>188</sup> This harkens back to the Supreme Court’s statement in *X-Citement Video*—that strict liability as it pertains to age is permissible in cases where the underlying conduct itself is illegal, regardless of the victim’s minority status.

Congress passively approved this interpretation of § 2423.<sup>189</sup> *United States v. Jones* was cited by Congress in the passage of § 1591, imposing strict liability on the defendant for the victim’s age.<sup>190</sup> *Jones* held that the minor’s age was “a fact which the prosecution must prove and for which the defendant is responsible.”<sup>191</sup> That holding is consistent with the four other circuit courts that have ruled on the issue.<sup>192</sup> The *Jones* court noted that Congress amended § 2423 on nine different occasions since the circuit courts’ adoption of the strict liability interpretation yet never amended the statute to require the government to prove the defendant’s knowledge of the victim’s minor status.<sup>193</sup>

Sections 1591 and 2423 share special connections both in legislative history and in prosecution. Section 2423, originally enacted in 1978,<sup>194</sup> has become the statute used to punish those participating in child sex

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186. *Id.*

187. 18 U.S.C. § 2423(g).

188. *Id.* § 2423(a).

189. See 154 CONG. REC. H10904 (daily ed. Dec. 10, 2008) (statement of Rep. Howard Berman).

190. *Id.*; see also *United States v. Jones*, 471 F.3d 535 (4th Cir. 2006).

191. *Jones*, 471 F.3d at 538.

192. *Id.* at 538-39 (citing *United States v. Griffith*, 284 F.3d 338, 351 (2d Cir. 2002); *United States v. Taylor*, 239 F.3d 994, 997 (9th Cir. 2001); *United States v. Scisum*, 32 F.3d 1479, 1485-86 (10th Cir. 1994); *United States v. Hamilton*, 456 F.2d 171, 173 (3d Cir. 1972)).

193. *Id.* at 539.

194. Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, sec. 3(a), § 2423, 92 Stat. 7, 8 (1978).

tourism.<sup>195</sup> Child sex tourism occurs when a person travels with the intent to engage in any illicit sexual activity with a child in another country.<sup>196</sup> Sex trafficking of minors and child sex tourism are two closely related crimes, which have been addressed by Congress in conjunction with each other.<sup>197</sup> In its efforts to prosecute sex traffickers, the DOJ utilizes § 2423 in addition to § 1591.<sup>198</sup> Accordingly, § 2423 remains the most closely-related statute to § 1591, both in intent and construction.<sup>199</sup> For these reasons, the construction and application of § 2423 should inform the interpretation of § 1591.

A review of the statutory background against which Congress legislated demonstrates Congress's intent to protect children from sexual exploitation through the specific designs of these statutes.<sup>200</sup> Still, that goal must be balanced by avoiding the criminalization of legal conduct.<sup>201</sup> In light of the statutory context, Congress most likely drafted § 1591(c) to allow for strict liability as it applies to the victim's minority status in an effort to ease the burden on prosecuting sex traffickers. Causing a person to engage in a commercial sex act is already criminal conduct; the minority status simply increases the punishment.<sup>202</sup> However, courts are tasked with interpreting

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195. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, sec. 105, § 2423(b)-(g), 117 Stat. 650, 653-54 (amending 18 U.S.C. § 2423 to include punishment for those participating in child sex tourism).

196. See 18 U.S.C. § 2423 (2012).

197. See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, sec. 204, 208, §§ 2423(a), 1591(b), 120 Stat. 587, 613, 615.

198. See *Human Trafficking Prosecution Unit*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/crt/about/crm/htpu.php#tra> (last visited June 9, 2013).

199. See Adam Walsh Child Protection and Safety Act of 2006, sec. 204, 208, §§ 2423(a), 1591(b), 120 Stat. at 613, 615.

200. *United States v. Taylor*, 239 F.3d 994, 997 (9th Cir. 2001) (citing H.R. Rep. No. 105-557, at 17 (1998), *reprinted in* 1998 U.S.C.C.A.N. 678, 686).

201. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994).

202. Compare 18 U.S.C. § 1591(a)(1) (2012), with *id.* § 2422. All states and the District of Columbia have anti-pimping laws. ALA. CODE § 13A-12-111 (1977); ALASKA STAT. § 11.66.110 (2012); ARIZ. REV. STAT. ANN. § 13-3209 (2007); ARK. CODE ANN. § 5-70-101 (1975); CAL. PENAL CODE § 266i (West 2011); COLO. REV. STAT. § 18-7-203 (2011); CONN. GEN. STAT. § 53a-85 (2007); DEL. CODE ANN. tit. 11, § 1352 (1953); D.C. Code § 22-2705 (2013); FLA. STAT. § 796.05 (1943); GA. CODE ANN. § 16-6-11 (2006); HAW. REV. STAT. § 712-1202 (2010); IDAHO CODE ANN. § 18-5606 (1994); 720 ILL. COMP. STAT. 5/11-14.3 (2011); IND. CODE § 35-45-4-4 (1976); IOWA CODE § 725.3 (2013); KAN. STAT. ANN. § 21-6420 (2010); KY. REV. STAT. ANN. § 529.040 (West 2007); LA. REV. STAT. ANN. § 14:83.1 (1984); ME. REV. STAT. tit. 17-A § 853 (1975); MD. CODE ANN. CRIM. LAW § 11-304 (2013); MASS. GEN. LAWS ch. 272, § 7 (2013); MICH. COMP. LAWS § 750.455 (1948); MINN. STAT. § 609.322 (2012); MISS. CODE ANN. §97-29-51 (2013); MO. REV. STAT. § 567.050 (1977);

the statute as written and should not judicially amend the statute in an effort to align the statute more clearly with congressional intent.<sup>203</sup>

#### 4. *Avoiding Constitutional Issues*

In deference to Congress and the presumption that Congress legislates within the bounds of the Constitution, courts interpret statutes to avoid constitutional issues.<sup>204</sup> Interpreting § 1591(c) to create strict liability as to the age of the victim may violate the constitutional prohibition against cruel and unusual punishment found in the Eighth Amendment.<sup>205</sup> Such an argument has already been advanced, although it was not considered due to ripeness concerns.<sup>206</sup> A person convicted under § 1591(a)(1) faces a minimum sentence of ten years imprisonment to a maximum sentence of life in prison.<sup>207</sup> If the minor involved was under the age of fourteen years, the defendant faces imprisonment for a minimum of fifteen years to a maximum sentence of life.<sup>208</sup>

These mandatory minimum sentences were established in 2006.<sup>209</sup> Before 2006, a conviction under § 1591(a)(1) did not have a mandatory

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MONT. CODE ANN. § 45-5-602 (2007); NEB. REV. STAT. § 28-802 (2013); NEV. REV. STAT. § 201.300 (1997); N.H. REV. STAT. ANN. § 645:2 (2009); N.J. STAT. ANN. § 2C:34-1 (West 2013); N.M. STAT. ANN. § 30-9-4 (1981); N.Y. PENAL LAW § 230.32 (McKinney 2013); N.C. GEN. STAT. § 14-204 (1919); N.D. CENT. CODE § 12.1-29-01 (2013); OHIO REV. CODE ANN. § 2907.22 (LexisNexis 2011); 21 OKLA. STAT. § 1081 (2002); OR. REV. STAT. § 167.012 (2011); 18 PA. CONS. STAT. § 5902 (2011); R.I. GEN. LAWS § 11-34.1-7 (2009); S.C. CODE ANN. § 16-15-100 (1976); S.D. CODIFIED LAWS § 22-23-2 (2005); TENN. CODE ANN. § 39-13-515 (2011); TEX. PENAL CODE ANN. § 43.03 (West 1994); UTAH CODE ANN. § 76-10-1305 (LexisNexis 2000); VT. STAT. ANN. tit. 13, § 2637 (2001); VA. CODE ANN. § 18.2-357 (1980); WASH. REV. CODE § 9A.88.070 (2012); W. VA. CODE § 61-8-5 (2010); WIS. STAT. § 944.33 (2001); WYO. STAT. ANN. § 6-4-103 (2013).

203. *United States v. Granderson*, 511 U.S. 39, 68-69 (1994) (Kennedy, J., concurring in the judgment) (“It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think, perhaps along with some Members of Congress, is the preferred result.”).

204. *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (collecting cases).

205. *United States v. Wilson*, No. 10-60102-CR, 2010 WL 2991561, at \*10-11 (S.D. Fla. July 27, 2010).

206. *Id.* (declining to address the Eighth Amendment issue because the defendant had not been sentenced and, thus, the issue was not ripe for review).

207. 18 U.S.C. § 1591(b)(2).

208. *Id.* § 1591(b)(1).

209. *See Adam Walsh Child Protection and Safety Act of 2006*, Pub. L. No. 109-248, sec. 208, § 1591(b), 120 Stat. 587, 615.

minimum sentence.<sup>210</sup> If the victim was between the ages of fourteen years and eighteen years, the maximum sentence was forty years imprisonment.<sup>211</sup> Without specifically raising a potential constitutionality issue, the DOJ expressed concerns regarding the “substantial mandatory minimum sentence for an already unusual strict liability crime.”<sup>212</sup>

While it may seem that the penalties are harsh for a strict liability crime, especially the mandatory minimum sentences, it is unlikely that a court will rule the statute unconstitutional based on cruel and unusual punishment grounds.<sup>213</sup> To be unconstitutional on these grounds, the punishment must be “grossly disproportionate to the severity of the crime.”<sup>214</sup> In light of courts’ deference to Congress in setting punishment terms, courts rarely find a non-capital sentence grossly disproportionate to the related offense.<sup>215</sup> The likelihood that a ten- or fifteen-year mandatory minimum sentence will be determined to be cruel and unusual is unlikely, even if the sentence is imposed under a strict liability standard.<sup>216</sup>

The constitutionality of the sentencing provisions in § 1591 still has not been challenged.<sup>217</sup> But a sentence of thirty years for aggravated sexual abuse of a minor, under 18 U.S.C. § 2241, survived a constitutional challenge for cruel and unusual punishment despite the strict liability standard for the victim’s minor status.<sup>218</sup> The Supreme Court has hinted that a life without the possibility of parole sentence might fall to an Eighth

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210. 18 U.S.C. § 1591(b)(1) (Supp. III 2003) (amended 2006).

211. *Id.* § 1591(b)(2).

212. Letter from Brian A. Benczkowski to John Conyers, Jr., *supra* note 138, at 8.

213. *See Rummel v. Estelle*, 445 U.S. 263, 272 (1980) (“Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.”).

214. *Id.* at 271.

215. *United States v. Farley*, 607 F.3d 1294, 1343 (11th Cir. 2010) (citing *Harmelin v. Michigan*, 501 U.S. 957, 998-99 (1991)). The Supreme Court upheld a mandatory life sentence for obtaining \$120.75 by false pretenses, imposed based on a recidivist statute. *Rummel*, 445 U.S. at 266, 285. *Contra Solem v. Helm*, 463 U.S. 277, 281, 283-84, 303 (1983) (affirming the Eighth Circuit’s decision overturning a sentence of life imprisonment without parole for a check fraud offense, and distinguishing *Rummel* on the fact that the sentence in *Rummel* had the possibility of parole).

216. *See Rummel*, 445 U.S. at 272.

217. Except, of course, in *United States v. Wilson*. No. 10-60102-CR, 2010 WL 2991561, at \*10-11 (S.D. Fla. July 27, 2010). In that opinion, addressing several pre-trial motions, the court declined to address the cruel and unusual punishment challenge, stating that the defendant lacked standing as he had not been convicted and sentenced. *Id.*

218. *Farley*, 607 F.3d at 1342.

Amendment challenge.<sup>219</sup> Because § 1591 does not allow for that penalty, and due to the deference shown to the legislature in determining minimum and maximum prison terms, a constitutional challenge rooted in the Eighth Amendment would likely fail to prevent a court from applying strict liability to the minor's age in a prosecution under § 1591.

*B. The Role of "Reasonable Opportunity to Observe"*

Regardless of which alternative interpretation of § 1591(c) the court adopts, it must also define "reasonable opportunity to observe."<sup>220</sup> A number of questions must be answered, including what circumstances establish a "reasonable opportunity to observe." The court must also consider whether to instruct the jury to focus on either the reasonableness of the opportunity to observe the minor or the reasonableness of the conclusions drawn from the opportunity to observe the minor.

Addressing each in turn, no definitive answers exist. Neither case law nor legislative history provides any concrete guidance as to the appropriate definition of "reasonable opportunity to observe." A common theme emerges, however, based on duration of the observation and the context of the observation.

While no court has defined "reasonable opportunity to observe," two cases may shed light on what satisfies a "reasonable opportunity to observe."<sup>221</sup> In the only published opinion applying § 1591(c), the jury in *United States v. Robinson* found by special verdict that the defendant had a reasonable opportunity to observe the victim and, therefore, to determine her status as a minor.<sup>222</sup> In that case, the defendant recruited a seventeen-year-old victim to engage in prostitution.<sup>223</sup> The victim testified that the defendant was her "boyfriend" and "lover" whom she had dated for two-

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219. *See* *Graham v. Florida*, 130 S. Ct. 2011, 2023, 2034 (2010) ("The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.").

220. 18 U.S.C. § 1591(c) (2012).

221. *See* *United States v. Robinson*, 702 F.3d 22, 27-29 (2d Cir. 2012); *United States v. Paris*, No. 03:06-CR-64(CFD), 2007 WL 3124724, at \*9 (D. Conn. Oct. 24, 2007).

222. *Robinson*, 702 F.3d at 29; *see also* Special Verdict Form, *Robinson*, No. 09-CR-794 (E.D.N.Y. Jan. 26, 2010). Because the opinion in *Wilson* was a ruling on a pre-trial motion for summary judgment, the court did not apply § 1591(c) to the facts of the case. *See Wilson*, 2010 WL 2991561.

223. *Robinson*, 702 F.3d at 27-29; Brief for United States at 15-17, *Robinson*, 702 F.3d 22 (No. 11-0301), 2011 WL 3437848, at \*26-28.

and-a-half years.<sup>224</sup> The jury found these facts sufficient to satisfy “reasonable opportunity to observe.”<sup>225</sup>

In a case charged under the 2000 version of § 1591,<sup>226</sup> the jury found that the defendant consciously avoided knowing the victim’s age based on evidence that the defendant had seen the minor’s naked body when she was fourteen years of age, had sex with her at that age, and knew that she had “young friends who were still in high school.”<sup>227</sup> The defendant caused the victim to engage in commercial sex acts for approximately one-and-a-half years.<sup>228</sup> In both this case and *Robinson*, the defendants had opportunities to observe the minors for at least one year and had sexual relations with the minors.<sup>229</sup>

Significantly shorter durations of observation have likewise been found to establish “reasonable opportunit[ies] to observe,” albeit in different contexts.<sup>230</sup> During a bank robbery, twenty minutes sufficed for a witness to have a “reasonable opportunity to observe” the defendant for identification purposes, despite the witness’s distress at the time of observation.<sup>231</sup> In another case, the defendant kidnapped a young girl and her brother when they were walking home from school with friends.<sup>232</sup> After raping the girl twice, the defendant left the girl and her brother in a field where they were rescued by the police later that day.<sup>233</sup> The police apprehended the defendant the following day and he was identified by the girl and her brother, as well as by friends who were present when the abduction

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224. Transcript of Trial, *United States v. Robinson*, No. 09-CR-794 (E.D.N.Y. Jan. 26, 2010).

225. *Robinson*, 702 F.3d at 29.

226. 18 U.S.C. § 1591 (2000) (amended 2008) (requiring proof that the defendant knew the victim’s age).

227. *United States v. Paris*, No. 3:06-CR-64(CFD), 2007 WL 3124724, at \*9 (D. Conn. Oct. 24, 2007) (discussing the charges resulting from victim Marianne C.).

228. *Id.* at \*2.

229. *Robinson*, 2012 WL 5971545, at \*8-9; *Paris*, 2007 WL 3124724, at \*2.

230. *E.g.*, *United States v. Holiday*, 457 F.2d 912, 915 (3d Cir. 1972) (discussing “ample opportunity” to observe the defendant during bank robbery); *United States v. Hinkle*, 448 F.2d 1157, 1158 (D.C. Cir. 1971) (observing the defendant for three to four minutes in good lighting at less than eight feet away sufficed for identification purposes).

231. *Nettles v. Wainwright*, 677 F.2d 410, 414 (5th Cir. Unit B 1982).

232. *Reynold v. Lockhart*, 470 F.2d 161, 162 (8th Cir. 1972) (per curiam).

233. *Id.*

occurred.<sup>234</sup> The Eighth Circuit noted that “the nature of the crime itself” allowed the victims the opportunity to observe the defendant.<sup>235</sup>

The common theme of confronting the person in close proximity for some period of time emerges. This is consistent with the Supreme Court’s statements, in dicta, that a producer of child pornography “confronts the underage victim personally and may reasonably be required to ascertain that victim’s age.”<sup>236</sup> Therefore, “reasonable opportunity to observe” may simply require confronting the victim personally for some reasonable amount of time. When a defendant has observed a victim over a significant period of time and had sexual relations with her, it may be easier to establish that the defendant had a reasonable opportunity to observe.<sup>237</sup> However, where the minor victim is close to the age of eighteen years and possibly more physically developed, it may become more challenging to satisfy “reasonable opportunity to observe.” The definition of “reasonable” becomes pertinent.

In difficult cases, determining whether the defendant had a reasonable opportunity to observe the minor may turn on whether the focus is on the reasonableness of the opportunity or the reasonableness of the conclusions drawn from the observation of the minor.<sup>238</sup> For example, the defendant may have a reasonable opportunity to observe the victim at length, but his observations may reasonably lead him to believe that the victim is at least eighteen years of age. Observing the victim purchase cigarettes or alcohol or the victim’s physical appearance may lead the reasonable person to conclude that the victim is over the age of eighteen years.

Denial of the admission of this type of evidence (demonstrating that lay witnesses reasonably concluded the victim was at least the age of consent) was held to be reversible error in a conviction of sexual abuse of a minor.<sup>239</sup>

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234. *Id.*

235. *Id.*; see also *United States ex rel. Oliver v. Pennsylvania*, 321 F. Supp. 192, 194 (E.D. Pa. 1970) (stating that a rape victim “had sufficient opportunity to observe each of them” after observing the defendants for two hours).

236. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 n.2 (1994); see also 154 CONG. REC. H10904 (daily ed. Dec. 10, 2008) (statement of Rep. Howard Berman) (citing *X-Citement Video, Inc.*, as motivating the addition of subsection (c) to 18 U.S.C. § 1591).

237. *Domestic Sex Trafficking: Criminal Operations of the American Pimp*, *supra* note 67. Because many sex traffickers groom their victims by raping them, this fact pattern may be common. *Id.*

238. Without statutory or judicial guidance, the jury will have to determine whether the length of time was reasonable to determine the age of the victim or, alternatively, whether the *observations* would reasonably lead the defendant to believe the victim was a minor.

239. *United States v. Yazzie*, 976 F.2d 1252, 1253 (9th Cir. 1992).

The court stated that the lay witnesses' conclusions that the victim was at least the age of consent based on observations of the victim smoking, of the victim driving a vehicle, and of the victim's physical appearance would have been helpful to the jury in understanding a fact at issue, namely the defendant's reasonable-mistake-of-age defense.<sup>240</sup> In that case, the mere opportunity to observe may not have put the defendant on sufficient notice that the person was less than eighteen years of age. Establishing "reasonable opportunity to observe" may depend on demonstrating that the defendant observed indicators that reasonably led him to believe the victim was a minor.

Ultimately, the definition of "reasonable opportunity to observe" may simply be a question left for the jury to decide based on the judge's instructions.<sup>241</sup> Jurors may draw inferences as to whether the defendant had the opportunity to reasonably observe the minor based on their own observations of the minor during trial or through other evidence, such as photographs of the minor from the time period when first recruited.<sup>242</sup>

### *III. Repercussions Resulting from the Ambiguity of 18 U.S.C. § 1591*

Congress enacted 18 U.S.C. § 1591, among other statutes, to empower federal prosecutors and agencies to effectively punish sex traffickers.<sup>243</sup> However, empirical and anecdotal evidence demonstrates prosecutors may elect to prosecute sex traffickers under different laws.<sup>244</sup> For example, a representative of the Human Trafficking Task Force in Washington, D.C., testified that the majority of the prosecutions the task force has conducted have been under local or state laws because prosecutions under 18 U.S.C. §

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240. *Id.* at 1254-56.

241. *See, e.g.*, *United States v. Del Toro*, 426 F.2d 181, 184 (5th Cir. 1970) ("It is the function of the jury to determine the facts and thereby the guilt or innocence of the defendant."); Transcript of Trial at 350, *United States v. Robinson*, No. 09-CR-794 (E.D.N.Y. Jan. 26, 2010).

242. *See, e.g.*, *United States v. Irving*, 452 F.3d 110, 122 (2d Cir. 2006) (holding that in a case alleging the receipt and possession of child pornography, jurors can rely on common sense to determine whether children in photographs were real as opposed to virtual).

243. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 102, 114 Stat. 1464, 1466.

244. Peters, *supra* note 61, at 87; Smith & Vardaman, *supra* note 63, at 278; *e.g.*, Brooke Grona-Robb, *Prosecuting Human Traffickers*, TEX. DIST. & CNTY. ATTORNEYS ASS'N, <http://www.tdcaa.com/node/7370> (last visited June 9, 2013).

1591 are too resource-intensive and run a higher risk of re-traumatizing the victim when compared to prosecutions under local laws.<sup>245</sup>

Prosecuting under state laws will hinder the other TVPA goals of prevention and protection. Not only is sex trafficking a nationwide problem,<sup>246</sup> states often lack the necessary resources to effectively prosecute sex trafficking enterprises that can span states and nations.<sup>247</sup> Victims may lose access to federally funded victim services if their cases are not tried under a federal trafficking statute.<sup>248</sup> Prevention efforts are not met because local statutes often have significantly lighter prison sentences.<sup>249</sup> In addition, the effectiveness of the federal statute can impact state prosecutions as states often model their prosecutions of sex trafficking crimes after federal programs. Without effective federal prosecution under § 1591, Congress's goal of eradicating the second-largest criminal industry in the world will not be realized.<sup>250</sup>

#### *A. Consequences of Ineffective Prosecution on the Goal of Protecting Sex Trafficking Victims*

Prosecuting under state laws often results in inadequate protection for the victim. Since its inception, the TVPA has provided coordinated social services to victims, as well as immigration services, if needed, that cannot be duplicated by the states.<sup>251</sup> In order to access these services and protections, victims must be recognized as sex trafficking victims.<sup>252</sup>

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245. *Combating Modern Slavery: Reauthorization of Anti-Trafficking Programs: Hearing on H.R. 3887 Before the H. Comm. on the Judiciary*, *supra* note 66, at 43 (statement of Bradley W. Myles, Nat'l Program Director, Polaris Project).

246. *See, e.g., Annual Report—2010: National Human Trafficking Resource Center (NHTRC)*, POLARIS PROJECT 19 (2011), available at <https://na4.salesforce.com/sfc/p/300000006E4Si WNbb7yid8slHcffD3847fcBJts=> (detailing hotline calls from victims from states across the nation).

247. *Accord* 22 U.S.C. § 7101(b)(24) (2012) (describing the need for federal legislation to attack the problem of human trafficking from the states to worldwide).

248. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464; 18 U.S.C. § 1593 (2012); *see also* Smith & Vardaman, *supra* note 63, at 278-79 (discussing the ramifications of charging sex traffickers under non-trafficking statutes).

249. The local D.C. statute has a statutory maximum of twenty years for pandering of a minor, with no mandatory minimum, which is significantly less than the mandatory minimum of ten or fifteen years, depending on the age of the minor, to a maximum of life imprisonment under the federal statute. *Compare* D.C. CODE § 22-2705(c)(2) (2010), with 18 U.S.C. § 1591(b)(1)-(2).

250. *Sex Trafficking*, *supra* note 8.

251. *See* Trafficking Victims Protection Act of 2000, § 107, 114 Stat. at 1474-80.

252. 22 U.S.C. § 7105(b).

Oftentimes, victims of trafficking are identified only after being arrested for prostitution.<sup>253</sup> Child victims of sex trafficking may spend a significant amount of time in juvenile detention before being identified as trafficking victims.<sup>254</sup> Once released from detention, these victims need food, shelter, psychological care, and legal services.<sup>255</sup> Child victims are often placed in foster care, but they need special attention, including health care and counseling.<sup>256</sup> Depending on how long individuals are held by their traffickers, they may also need educational or vocational training.<sup>257</sup> Without these services, the victims may be more vulnerable to being re-trafficked.<sup>258</sup> Through the TVPA, a trafficking victim may be eligible for these types of services.<sup>259</sup>

In order for an immigrant child to receive social services, a requestor, typically an investigator, must submit a form to the Office of Refugee Resettlement.<sup>260</sup> This requires, first, that the investigator recognize the child as a victim of trafficking and, second, that the investigator be aware of the social services available through the United States Department of Health and Human Services as provided by the TVPA.<sup>261</sup>

In addition, prosecution and conviction under the federal sex trafficking statute result in mandatory restitution to be paid to the victim or her guardian.<sup>262</sup> If necessary, an identified victim of sex trafficking may be

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253. Linda A. Smith et al., *The National Report on Domestic Minor Sex Trafficking: America's Prostituted Children*, SHARED HOPE INT'L 52 (2009), available at [http://sharedhope.org/wp-content/uploads/2012/09/SHI\\_National\\_Report\\_on\\_DMST\\_2009.pdf](http://sharedhope.org/wp-content/uploads/2012/09/SHI_National_Report_on_DMST_2009.pdf).

254. *Id.* at 54.

255. See *Fact Sheet: Child Victims of Human Trafficking*, *supra* note 41.

256. *Id.*

257. See *Job Training*, POLARIS PROJECT, <http://www.polarisproject.org/what-we-do/client-services/our-services/job-training-program> (last visited June 10, 2013) (describing job training programs available for human trafficking victims).

258. See *Combating Modern Slavery: Reauthorization of Anti-Trafficking Programs: Hearing on H.R. 3887 Before the H. Comm. on the Judiciary*, *supra* note 66, at 76 (statement of Dorchen A. Leidholt, Director, Sanctuary for Families' Ctr. for Battered Women's Legal Servs.).

259. 22 U.S.C. § 7105 (2012). In order to be eligible for these benefits, the Secretary of Health and Human Services must certify that the victim meets certain requirements, including that she assists in the investigation. *Id.* § 7105(b)(1)(E).

260. U.S. Dep't of Health & Human Servs., Request for Assistance for Child Victims of Human Trafficking (OMB No. 0970-0362, n.d.), available at [http://www.acf.hhs.gov/sites/default/files/ort/request\\_for\\_assistance\\_for\\_child\\_victims\\_of\\_human\\_trafficking.pdf](http://www.acf.hhs.gov/sites/default/files/ort/request_for_assistance_for_child_victims_of_human_trafficking.pdf).

261. *Id.* (instructing investigators regarding law enforcement providing assistance).

262. 18 U.S.C. § 1593.

eligible for federal witness protection.<sup>263</sup> Without prosecution under 18 U.S.C. § 1591, the victim may not be eligible for these benefits.<sup>264</sup>

While prosecution itself is not necessary for a victim to be eligible for social services under the TVPA, official acknowledgement of her as a trafficking victim is required.<sup>265</sup> Because acknowledgement as a trafficking victim first requires that the law enforcement agent or prosecutor recognize the victim as such, awareness of the crime of sex trafficking and how to identify sex trafficking victims is necessary.<sup>266</sup> This awareness comes from proper training and the application of that training to effective prosecutions.<sup>267</sup> Without training and prosecution experience, victims will not be recognized as trafficking victims because investigators and prosecutors will fail to identify the signs that a child has been trafficked into the commercial sex industry.<sup>268</sup> Furthermore, if the child is not recognized as a trafficking victim, she may face prosecution for prostitution<sup>269</sup> and may be more likely to be re-trafficked without the resources to keep her safe.<sup>270</sup>

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263. *Id.* § 1594.

264. *See* 22 U.S.C. § 7105(b). While prosecution is not required, prosecution under 18 U.S.C. § 1591 means the prosecutor identified the victim as a sex trafficking victim, which will make her eligible for these services. *See* 18 U.S.C. § 1591. Furthermore, if the person is identified as a victim of another type of crime (for example, pandering), she may not be eligible for these services limited to sex trafficking victims. *See* 22 U.S.C. § 7105(b).

265. *See* 22 U.S.C. § 7105(b).

266. *See* HEATHER J. CLAWSON ET AL., ICF INT'L, PROSECUTING HUMAN TRAFFICKING CASES: LESSONS LEARNED AND PROMISING PRACTICES 24 (Jun. 30, 2008), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/223972.pdf>.

267. *See id.*

268. *See id.*

269. *See, e.g.*, Tex. Penal Code Ann. § 43.02 (West 2011).

270. *See Combating Modern Slavery: Reauthorization of Anti-Trafficking Programs: Hearing on H.R. 3887 Before the H. Comm. on the Judiciary, supra* note 66, at 102-03 (emphasizing the importance of safe shelter for victims to avoid being re-trafficked); *see also* HEATHER J. CLAWSON & LISA GOLDBLATT GRACE, U.S. DEP'T OF HEALTH & HUMAN SERVS., FINDING A PATH TO RECOVERY: RESIDENTIAL FACILITIES FOR MINOR VICTIMS OF DOMESTIC SEX TRAFFICKING (n.d.), available at <http://aspe.hhs.gov/hsp/07/HumanTrafficking/ResFac/ib.pdf> (discussing safety issues arising from traffickers stalking shelters where victims are staying). In addition, victims may develop a strong attachment to the trafficker as “one form of the Stockholm Syndrome—an extreme form of [Post-Traumatic Stress Disorder] otherwise most frequently seen in torture victims”—which may lead a victim to return to her trafficker. *Id.*

*B. Consequences of Ineffective Prosecution on the Goal of Preventing Sex Trafficking*

As the second-fastest growing criminal enterprise in the world,<sup>271</sup> sex trafficking is driven by the economic principles of supply and demand.<sup>272</sup> In order to prevent sex trafficking, the economic benefits that appeal to criminals must be reduced by increasing the costs and risks imposed by participating in this crime.<sup>273</sup> Strong and definite punishment imposes a significant risk on the industry.<sup>274</sup> Lengthy prison sentences are designed to deter criminals from re-entering the criminal world.<sup>275</sup> As a result, Congress established significant prison terms for sex traffickers, ranging from a minimum of ten years to life imprisonment.<sup>276</sup>

Difficulties and uncertainties of federal prosecution of sex trafficking lead to the referral of cases for prosecution to the state level.<sup>277</sup> However, because most state prison sentences are significantly shorter than those in the federal system, the deterrent effect is minimized.<sup>278</sup> State sentences for human trafficking violations can be as short as five years.<sup>279</sup> The states that do not have human trafficking statutes prosecute under anti-pimping or pandering laws.<sup>280</sup> These laws can impose a punishment as small as one-year imprisonment that can be waived in lieu of probation.<sup>281</sup> Moreover, federal punishment is often a more significant deterrent than state-level

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271. *Sex Trafficking*, *supra* note 8.

272. *See* Smith & Vardaman, *supra* note 63, at 266-68 (discussing “[t]he Business of Sex Trafficking”).

273. For a discussion of economic principles applied to the sex trafficking market, see *id.*

274. One purpose of punishment is to deter criminals from participating in or repeating criminal activity. *See* WAYNE R. LAFAVE, *CRIMINAL LAW* 26-27 (4th ed. 2003) (discussing theories of punishment); *see also* Smith & Vardaman, *supra* note 63, at 277 (stating that traffickers will move to jurisdictions that have more lenient human trafficking statutes).

275. *See* LAFAVE, *supra* note 274, at 27 (stating that punishment should be an “unpleasant experience” that will deter the criminal from participating in future criminal activity).

276. 18 U.S.C. § 1591(b) (2012).

277. *Combating Modern Slavery: Reauthorization of Anti-Trafficking Programs: Hearing on H.R. 3887 Before the H. Comm. on the Judiciary*, *supra* note 66, at 43 (statement of Bradley W. Myles, Nat’l Program Director, Polaris Project) (discussing use of local statutes to prosecute sex traffickers in order to avoid burdensome federal prosecutions).

278. *See, e.g.*, D.C. CODE § 22-2705(c)(2) (2010) (no mandatory minimum sentence); *see also* LAFAVE, *supra* note 274, at 29.

279. *E.g.*, CAL. PENAL CODE § 236.1(c) (West 2012).

280. *See, e.g.*, NEV. REV. STAT. ANN. §§ 176A.100, 201.300 (West 2011).

281. *See, e.g., id.*

punishment because parole does not exist in the federal system,<sup>282</sup> whereas state prison systems result in shorter actual imprisonment due to the parole system.<sup>283</sup>

In the event that federal prosecution is pursued, prosecutors may be able to prosecute under 18 U.S.C. § 2423, as opposed to § 1591, but only if the trafficker actually transported the victim across state lines.<sup>284</sup> Because prosecutors are given wide deference to determine what charges to bring, a prosecutor will likely choose to indict under a statute with which he is more familiar.<sup>285</sup> If a prosecutor successfully convicts under § 2423, the sex trafficker will receive a significantly lighter sentence than if the trafficker had been convicted under § 1591.<sup>286</sup> Under the federal sentencing guidelines, a defendant with no criminal history who is convicted under § 2423 will receive a sentence of at least 120 months.<sup>287</sup> The same defendant convicted under § 1591 would receive a sentence of at least 180 months.<sup>288</sup> Electing to prosecute under § 2423 decreases the defendant's sentence by at least sixty months.<sup>289</sup> Congress recognized the need for harsh punishment of

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282. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 214(b), 98 Stat. 1987, 2014 (abolishing parole in the federal system through the repeal of 18 U.S.C. § 5041).

283. See, e.g., NEV. REV. STAT. ANN. § 209.432-209.451 (West 2011); Memorandum from Rex Reed, Adm'r, Offender Mgmt. Div. of Dep't of Corr. to Departmental Staff (Jan. 3, 2008), available at <http://www.doc.nv.gov/?q=node/80> (discussing how inmates can decrease the amount of time spent in prison through good behavior and work credit through the Nevada parole system).

284. Section 2423 criminalizes the transportation of minors across state lines for the purpose of engaging in criminal sexual activity. 18 U.S.C. § 2423 (2012). If the sex trafficker crosses state lines, § 2423 will also apply. See *id.* Prosecutors may choose to bring charges under both § 1591 and § 2423. See, e.g., *United States v. Brooks*, 610 F.3d 1186, 1191 (9th Cir. 2010).

285. Peters, *supra* note 61, at 87.

286. The minimum mandatory punishment for a defendant convicted under § 2423(a) is ten years, compared to fifteen years under § 1591(b). Compare 18 U.S.C. § 2423(a), with 18 U.S.C. § 1591(b). In addition, the federal sentencing guidelines establish the base offense level for a conviction under § 2423 as twenty-eight, compared to thirty-four for a conviction under § 1591, which may lead to a substantially lower sentence. U.S. SENTENCING GUIDELINES MANUAL § 2G1.3 (2012).

287. 18 U.S.C. § 2423(a); see also *infra* note 289.

288. 18 U.S.C. § 1591(b)(1).

289. Compare *id.*, with *id.* § 2423(a). The difference is calculated by comparing the minimum required sentence for a conviction under 18 U.S.C. § 2423 (120 months) to the minimum required sentence for a conviction under 18 U.S.C. § 1591 (180 months), with the assumption that the defendant does not have a criminal history and the judge sentences to the minimum possible terms. Notably, the difference in punishment is not only limited to the length of the prison term. The difference in base levels also impacts the amount of

sex traffickers when it increased the mandatory penalty to a minimum of 180 months' imprisonment.<sup>290</sup> However, by prosecuting under § 2423, that need is not realized.

For these reasons, there must be an effective federal statute to secure prosecution of sex traffickers. Federal prosecution has a greater impact on reducing the supply in the sex trafficking industry by imposing more significant risks on traffickers through significant prison terms.<sup>291</sup> The essential goal of preventing sex trafficking is better served and more likely achieved through federal prosecution.

### *C. Consequences of Ineffective Federal Prosecution on State Anti-Human Trafficking Programs*

The effectiveness of state human trafficking statutes is affected by the nature of the federal statute for two reasons. First, many states with human trafficking statutes modeled their statutes after the Model State Anti-Trafficking Criminal Statute (Model Law), created by the DOJ.<sup>292</sup> The Senate encouraged states to use this Model Law when creating their own anti-trafficking statutes.<sup>293</sup> The Model Law mirrors the federal statute, thereby embodying the inherent ambiguity and resulting consequences.<sup>294</sup> Because 92% of human trafficking investigations occur at the state level,<sup>295</sup> any challenges presented by the federal statute are likely to also occur in federally inspired state statutes.

Second, the structure of federal programs often provides guidelines for states implementing similar programs.<sup>296</sup> Because programs supporting trafficking victims and prosecuting the traffickers were first identified and

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permissible fines. See U.S. SENTENCING GUIDELINES MANUAL § 5E1.2(c)(3) (comparing the fine range of \$12,500 to \$125,000 for base level twenty-eight with the fine range of \$17,500 to \$175,000 for base level thirty-four).

290. See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, sec. 208, § 1591, 120 Stat. 587, 615.

291. Because "[t]he magnitude of the threatened punishment is clearly a factor" in determining a punishment's deterring effect, the risks imposed on the trafficker are greater. See LAFAYE, *supra* note 274, at 29.

292. MODEL STATE ANTI-TRAFFICKING CRIMINAL STATUTE (2004), available at <http://www.legislationline.org/documents/id/6805>.

293. S. RES. 414, 108th Cong. (2004).

294. Compare MODEL STATE ANTI-TRAFFICKING CRIMINAL STATUTE, with 18 U.S.C. § 1591 (2012).

295. DUREN BANKS & TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS, 2008-2010, at 4 (Apr. 2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cshti0810.pdf>.

296. See, e.g., MODEL STATE ANTI-TRAFFICKING CRIMINAL STATUTE.

developed at the federal level, some state programs are modeled after the federal programs.<sup>297</sup> Unfortunately, the federal program is underdeveloped as some prosecutors are electing to prosecute under local laws.<sup>298</sup> If the federal program is undeveloped then states do not have the necessary guidance to develop better programs. The DOJ recently increased its training for federal prosecutors and agencies, and similar training is also made available to state agencies.<sup>299</sup> If prosecutors do not use the federal sex trafficking of a minor statute, the training becomes useless.<sup>300</sup> Because most cases are investigated at the state level,<sup>301</sup> any expertise developed in the federal program is not utilized to prosecute sex traffickers.<sup>302</sup>

Due to the underdevelopment of these programs, 68% of state and local prosecutors indicated that human trafficking was not an issue in their jurisdictions.<sup>303</sup> The study noted, however, that a lack of knowledge and awareness of human trafficking issues may explain why those prosecutors believed human trafficking did not occur in their jurisdictions.<sup>304</sup> As a result, the programs designed to protect human trafficking victims, prevent the occurrence of human trafficking, and prosecute the perpetrators are ineffective. Congress must set the example through a well-designed statute and fully supporting programs. Because 18 U.S.C. § 1591 is subject to alternative interpretations,<sup>305</sup> Congress should amend the statute to clearly identify the intended mens rea of the victim's status as a minor in order to

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297. See *Combating Modern Slavery: Reauthorization of Anti-Trafficking Programs: Hearing on H.R. 3887 Before the H. Comm. on the Judiciary*, *supra* note 66, at 41 (statement of Bradley W. Myles, Nat'l Program Director, Polaris Project); see also SHARED HOPE INT'L, *supra* note 70, at 117-219 (discussing each state's law and identifying those that are comparable to federal legislation). Training opportunities may be increasing. See U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS: FISCAL YEAR 2009, at 63 (2010), available at <http://www.justice.gov/archive/ag/annualreports/tr2009/agreporhumantrafficking2009.pdf>.

298. Peters, *supra* note 61, at 87; Smith & Vardaman, *supra* note 63, at 278.

299. See U.S. DEP'T OF JUSTICE, *supra* note 297, at 63.

300. Training will not yield more effective prosecutions if there are no prosecutions in the first place. Moreover, any skills learned will not be practiced. Therefore, training is wasted.

301. BANKS & KYCKELHAHN, *supra* note 295, at 4.

302. Compare *id.*, with U.S. DEP'T OF JUSTICE, *supra* note 297, at 63.

303. CLAWSON ET AL., *supra* note 266, at 23.

304. *Id.*

305. See *supra* Part II.A.1.

achieve the stated goals of the TVPA: prevention, protection and prosecution.<sup>306</sup>

#### *IV. Determining the Most Effective Mens Rea Standard*

The two courts that have addressed the interpretation of 18 U.S.C. § 1591 construed the mens rea of the age of the victim as two conflicting concepts: one adopting the strict liability approach,<sup>307</sup> the other holding that § 1591(c) merely provides a method to prove the mens rea for the age of the victim.<sup>308</sup> The question then remains of whether the defendant should be held liable for the victim's age, regardless of the defendant's knowledge or lack thereof. While many public interest groups promote the adoption of strict liability,<sup>309</sup> others express concern about the implications of imposing strict liability for a felony carrying such a severe penalty.<sup>310</sup>

##### *A. Justifications for the Adoption of a Strict Liability Standard*

Due to the heinous nature of the crime of sex trafficking of minors, public policy cries out for strict liability.<sup>311</sup> In fact, the 2008 amendment to the TVPA proposed by Congressman Chris Smith, called for strict liability.<sup>312</sup> Congressman Smith was concerned with the prevalence of forced prostitution and wanted to take all steps to eradicate the practice.<sup>313</sup> However, others involved in the drafting of anti-trafficking legislation were

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306. See Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 102, 114 Stat. 1464, 1466.

307. *United States v. Robinson*, 702 F.3d. 22, 26 (2d Cir. 2012).

308. *United States v. Wilson*, No. 10-60102-CR, 2010 WL 2991561, at \*7-8 (S.D. Fla. July 27, 2010).

309. See, e.g., *Model Provisions of Comprehensive State Legislation to Combat Human Trafficking: Commentary*, POLARIS PROJECT 11, available at [http://www.polarisproject.org/storage/documents/policy\\_documents/cml%20commentary%20edition%203%20final%20wout%20links.pdf](http://www.polarisproject.org/storage/documents/policy_documents/cml%20commentary%20edition%203%20final%20wout%20links.pdf) (last visited June 12, 2013); CTR. FOR WOMEN POLICY STUDIES, NAT'L INST. ON STATE POLICY ON TRAFFICKING OF WOMEN AND GIRLS, RESOURCE GUIDE FOR STATE LEGISLATORS: MODEL PROVISIONS FOR STATE ANTI-TRAFFICKING LAWS 3 (2005), available at <http://www.centerwomenpolicy.org/pdfs/TraffickingResourceGuide.pdf> [hereinafter RESOURCE GUIDE FOR STATE LEGISLATORS: MODEL PROVISIONS FOR STATE ANTI-TRAFFICKING LAWS] (proposing statutory language that lacks a mens rea requirement for the victim's age).

310. See, e.g., Letter from Brian A. Benczkowski to John Conyers, Jr., *supra* note 138, at 8.

311. *Infra* IV.A.4. (discussing various public policy groups advocating for strict liability).

312. *Bill Summary & Status: H.R. 3887*, *supra* note 129.

313. Peters, *supra* note 61, at 45-47.

concerned that Congressman Smith's focus on sex trafficking ignored labor trafficking.<sup>314</sup> A series of compromises and revisions resulted in the ambiguous language that was ultimately passed.<sup>315</sup>

Several arguments support an adoption of the strict liability standard, originally advocated for by Congressman Smith, in order to effectively prosecute sex traffickers and eradicate the practice of human trafficking. First, applying strict liability to the crime of sex trafficking would not be a radical change from well-established crimes, such as statutory rape. Second, the imposition of strict liability does not result in criminalizing otherwise legal conduct. Third, congressional intent appears to support the strict liability standard. Finally, most public interest groups and nongovernmental organizations that work with trafficking victims support the adoption of the strict liability standard.

*1. Similar Strict Liability Sex Crime: Statutory Rape*<sup>316</sup>

The TVPA did not necessarily create new crimes, but rather adapted pre-established crimes to be more effective at fighting human trafficking.<sup>317</sup> Before 2000, sex trafficking was punished through statutes criminalizing actions such as kidnapping or extortion.<sup>318</sup> Even today, defendants are often charged with other crimes in addition to sex trafficking, such as prostitution or drug trafficking.<sup>319</sup> The principles behind these pre-established crimes should be considered when determining what the mens rea requirement should be in sex trafficking of minors laws.<sup>320</sup>

At its core, sex trafficking of a minor is sexual assault.<sup>321</sup> Whether the trafficker actually commits the sexual assault or causes the sexual assault through the solicitation of clients, the heart of the crime is "sexual intercourse [or sexual contact] with another person who does not

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314. *Id.* at 47-50.

315. *Bill Summary & Status: H.R. 3887*, *supra* note 129.

316. The TVPA recognized that sex trafficking incorporates the elements of other crimes, such as forcible rape, kidnapping, and fraud. 22 U.S.C. § 7101(b)(9)-(10) (2012). Congress noted that those laws were inadequate to eliminate human trafficking. *Id.* § 7101(b)(14)-(15). Consequently, Congress passed 18 U.S.C. § 1591 to provide appropriate punishment for sex traffickers. *See* 18 U.S.C. § 1591(b).

317. Peters, *supra* note 61, at 59-61.

318. *Id.*

319. *See* FARRELL ET AL., *supra* note 60, at 77-78.

320. *See* *Morissette v. United States*, 342 U.S. 246, 273 (1952) (considering common law treatment of crime in order to determine mens rea of statute).

321. *Compare* 18 U.S.C. § 1591(e)(3), with *Sexual Assault*, BLACK'S LAW DICTIONARY 131 (9th ed. 2009).

consent.”<sup>322</sup> Every state imposes criminal liability for sexual intercourse or sexual contact with a minor under an identified age, commonly called statutory rape.<sup>323</sup> Most states make statutory rape a strict liability offense.<sup>324</sup> Very few states require any mens rea or “consciousness of wrongdoing.”<sup>325</sup> The imposition of strict liability for sexual intercourse or contact with a minor rests on two principles: (1) regardless of the minor’s voluntary participation in the act, the minor lacks capacity to consent due to age, and (2) the state has an interest in enforcing morality and protecting its minor citizens.<sup>326</sup>

Similar principles apply to the crime of sex trafficking of a minor. The federal government maintains sincere interests in enforcing sex trafficking laws to protect children from abuse and in protecting its citizens from crime.<sup>327</sup> First, similar to statutory rape laws, children lack the capacity to consent to commercial sex acts and should be protected from engaging in commercial sex acts “in an uninformed manner, thereby exposing themselves to physical and emotional harm.”<sup>328</sup> Second, sex trafficking is a criminal industry, driven by the economic theory of supply and demand.<sup>329</sup> While the federal government can prosecute those who seek commercial sex acts performed by minors (representing the “demand” in the commercial sex industry), investigating and prosecuting those who provide the supply constitutes a more effective method of preventing sex trafficking.<sup>330</sup> Moreover, criminal enterprises do not exist in a vacuum. Human traffickers often participate in other crimes as well, such as drug trafficking.<sup>331</sup>

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322. *Sexual Assault*, BLACK’S LAW DICTIONARY 131 (9th ed. 2009); see MODEL PENAL CODE § 2.11(3)(a) (indicating that children cannot give effective consent because they are considered legally incompetent).

323. ASAPH GLOSSER ET AL., LEWIN GRP., STATUTORY RAPE: A GUIDE TO STATE LAWS AND REPORTING REQUIREMENTS 6-7 (2004), available at <http://aspe.hhs.gov/hsp/08/sr/statelaws/report.pdf>; *Statutory Rape*, BLACK’S LAW DICTIONARY 1374 (9th ed. 2009).

324. See Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, app. (2003) (identifying states that impose strict liability through the public welfare offense model and hybrid model).

325. *Id.* at 345, app. (identifying states that require some scienter element to be convicted of statutory rape under the true crime model).

326. *Id.* at 334-35.

327. See 22 U.S.C. § 7101(a) (2012).

328. LAFAVE, *supra* note 274, at 875.

329. *Sex Trafficking*, *supra* note 8; see Smith & Vardaman, *supra* note 63, at 265-66 (discussing “[t]he Business of Sex Trafficking”).

330. *Contra* Smith & Vardaman, *supra* note 63, at 266-68.

331. See FARRELL ET AL., *supra* note 60, at 77-78.

## 2. No Criminalization of Otherwise Legal Conduct

There is another aspect to the comparison of statutory rape and sex trafficking that strengthens the argument for strict liability. In some cases, statutory rape laws may hold a person criminally liable for a felony even though he acted with an innocent mind.<sup>332</sup> For example, a person could engage in consensual sexual activity with another whom he reasonably believed to be an adult based on the person's statements and actions.<sup>333</sup> In most states, criminal liability is imposed even if the minor claims to have consented because, legally, minors lack the capacity to consent.<sup>334</sup> Therefore, in some cases of statutory rape, what the defendant may have reasonably perceived as consensual, innocent conduct with a person of age becomes criminal through the imposition of strict liability based solely on the minor's age.<sup>335</sup>

The Supreme Court cautioned about this type of strict liability with crimes bearing significant punishment in *United States v. X-Citement Video, Inc.*<sup>336</sup> The Court interpreted the statute prohibiting the shipping, receipt, distribution, or reproduction of child pornography as including a scienter requirement specifically because it was knowledge of the age of the person depicted in the pornography that distinguished "legal innocence from wrongful conduct."<sup>337</sup> In a statutory rape case, innocent conduct (where a defendant reasonably believed that the person was of age and was able to give valid consent) could lead to criminal liability without a mens rea requirement.<sup>338</sup>

However, in the case of sex trafficking, the victim's age does not distinguish legal innocence from wrongful conduct. Regardless of the victim's age, the act of "recruit[ing], entic[ing], . . . transport[ing], provid[ing], obtain[ing], or maintain[ing] . . . a person" who will be caused "to engage in a commercial sex act" is a crime.<sup>339</sup> While the federal statute requires force, fraud, or coercion to be convicted of sex trafficking if the

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332. See Carpenter, *supra* note 324, at app.

333. *Id.* at 335. Notably, statutory rape laws acknowledge that the minor may have participated consensually. *Id.*

334. *Id.* at 334.

335. *Id.* at 350.

336. 513 U.S. 64, 71-73 (1994).

337. *Id.* at 66, 73 (interpreting 18 U.S.C. § 2252(a)).

338. See Carpenter, *supra* note 324, at 333 ("[E]ngaging in sexual activity is risky business. Implicit in the risk the actor assumes is that sexual intercourse, even between consenting adults, may be proscribed by statute.").

339. See 18 U.S.C. § 1591(a) (2012); see also, e.g., IDAHO CODE ANN. § 18-5609 (2004).

victim is over the age of eighteen, a defendant causing a person to engage in a commercial sex act without force, fraud, or coercion can often be prosecuted under anti-pimping or pandering laws at the state level.<sup>340</sup> The underlying conduct of causing a person to engage in a commercial sex act is prohibited by law.<sup>341</sup> There is no underlying innocent conduct.

Critics of strict-liability crimes are often concerned with the concept of convicting a person of a serious crime without a culpable state of mind.<sup>342</sup> In a statutory rape case, it is easy to imagine the scenario of the nineteen-year-old boy engaging in consensual sexual intercourse with a seventeen-year-old girl who he reasonably believed was eighteen years old. This type of fact pattern may justify critics' concerns about holding a person criminally liable for a felony that was committed without a culpable mind.<sup>343</sup> But those concerns simply are not present in a sex trafficking case.

Regardless of age or consent, the defendant must have a culpable state of mind. He must have the intent of causing the person to be engaged in a commercial sex act, an intent that must be proven by the prosecution.<sup>344</sup> Essentially, the minority status of the victim becomes a "'jurisdictional fact' that enhances an offense otherwise committed with an evil intent."<sup>345</sup> Any concern that a defendant would be convicted of a serious felony without a culpable mind is misplaced.

### 3. Congressional Intent

In addition to considering the common law background against which the federal statute was passed, congressional intent must be considered when determining whether a strict liability standard should be adopted. When the bill amending 18 U.S.C. § 1591 passed in the House of Representatives, Congressman Berman explained that "the prosecution will be exempted from having to prove beyond a reasonable doubt that a defendant who had a reasonable opportunity to observe the person . . . knew that the person had not attained the age of 18 years."<sup>346</sup> The amendment was inspired by the Supreme Court's footnote in *X-Citement Video* noting that

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340. See, e.g., W.VA. CODE § 61-8-8 (2010); see also sources cited *supra* n. 202

341. See, e.g., *id.* (prohibiting knowingly supporting oneself via a prostitute's earnings).

342. LAFAVE, *supra* note 274, at 279.

343. *Id.*; see Carpenter, *supra* note 324, at 340-41.

344. 18 U.S.C. § 1591.

345. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 n.3 (1994) (citing *United States v. Feola*, 420 U.S. 671 (1975)).

346. 154 CONG. REC. H10904 (daily ed. Dec. 10, 2008) (statement of Rep. Howard Berman).

the presumption of mens rea excludes sex offenses.<sup>347</sup> Congressman Berman added that the decision to relieve the government of its burden of proving the defendant knew the victim was under the age of eighteen years brought the statute in line with similar criminal statutes, specifically the federal statutory rape statute found in the Mann Act, which is a strict liability felony when committed against a child less than twelve years of age.<sup>348</sup>

In addition, the Congressional Research Service supports an interpretation of congressional support for strict liability by stating, “[The amendment] absolves the government from having to prove that a trafficker actually knew the age of a child victim, as long as it shows that he had a reasonable chance to observe the victim.”<sup>349</sup> Based on the legislative history, Congress most likely intended § 1591 to hold the defendant strictly liable for the age of the victim.<sup>350</sup>

Legislatures often resort to creating strict liability crimes when convictions are hard to obtain due to challenges in proving mens rea.<sup>351</sup> This may be especially true in human trafficking cases. In a national survey, prosecutors stated that a human trafficking case is “rarely successful” without victim testimony.<sup>352</sup> A number of factors can impact whether a victim will testify, including fears of retaliation, threats to families,<sup>353</sup> and other prosecutorial factors, such as lengths of sentences and likelihoods of conviction.<sup>354</sup>

Testimony by children raises additional concerns. Children, while presumed competent,<sup>355</sup> may have challenges communicating their

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347. *Id.*; see *X-Citement Video*, 513 U.S. at 72 n.2.

348. 154 CONG. REC. H10904 (daily ed. Dec. 10, 2008) (statement of Rep. Howard Berman) (citing *United States v. Jones*, 471 F.3d 535 (4th Cir. 2006)).

349. CHARLES DOYLE, CONG. RESEARCH SERV., R40190, THE WILLIAM WILBERFORCE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2008 (P.L. NO. 110-457): CRIMINAL LAW PROVISIONS 7 (2009), available at <http://niwaplibrary.wcl.american.edu/reference/additional-materials/vawa-legislative-history/trafficking-victims-protection-act-and-reauthorization/congressional-research-service-reports-tvpa-and-tvpras/TVPRA%20CRS%20Report.pdf> (last visited June 13, 2013).

350. See discussion *supra* Part II.A.2.

351. LAFAVE, *supra* note 274, at 273.

352. CLAWSON ET AL., *supra* note 266, at vi.

353. See FARRELL ET AL., *supra* note 60, at 83-84.

354. *Combating Modern Slavery: Reauthorization of Anti-Trafficking Programs: Hearing on H.R. 3887 Before the H. Comm. on the Judiciary*, *supra* note 66, at 94 (statement of Ms. Florrie Burke, Safe Haven).

355. FED. R. EVID. 601 (stating that every person is presumed to be competent, regardless of age).

testimony in an effective or credible manner.<sup>356</sup> In addition, the impact of testifying on a child victim may create challenges in deciding whether a child victim should testify.<sup>357</sup> Child victims of sexual assault were more likely to be re-traumatized by the process of testifying in criminal court, demonstrating signs of distress several months after the trial.<sup>358</sup> The Supreme Court has repeatedly recognized a compelling interest in “protect[ing] . . . minor victims of sex crimes from further trauma and embarrassment.”<sup>359</sup> Because of the impact on child victims and the resulting challenge in prosecuting a human trafficking case that relies significantly on victim testimony, the legislature may find a strict liability standard appropriate in sex trafficking of a minor cases.

#### 4. Public Support for the Adoption of the Strict Liability Standard

Most public interest groups encourage the adoption of the strict liability standard for the age of the victim.<sup>360</sup> The United Nations’ Model Law against Trafficking in Persons does not expressly require the prosecution to prove that the defendant knew that the person recruited was a minor.<sup>361</sup> Rather, force, fraud, or coercion is assumed when the victim is a child.<sup>362</sup> The prosecution must only prove exploitation—that the child was caused to participate in a commercial sex act.<sup>363</sup> Any additional showing of the

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356. 5 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:116 (3d ed. 2007).

357. Christianna M. Lamb, *The Child Witness and the Law: The United States’ Judicial Response to the Commercial, Sexual Exploitation of Children in Light of the UN Convention on the Rights of the Child*, 3 OR. REV. INT’L L. 63, 70-71 (2001).

358. Brief for Amicus Curiae American Psychological Association in Support of Neither Party at \*9, *Maryland v. Craig*, 497 U.S. 836 (1990) (No. 89-478), 1990 WL 10013093, at \*9 (“The testifying children’s distress was mainly manifested in greater depression, anxiety, and psychosomatic symptoms.”).

359. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982); see also *Craig*, 497 U.S. at 852 (collecting cases).

360. See, e.g., UNITED NATIONS OFFICE ON DRUGS & CRIME, MODEL LAW AGAINST TRAFFICKING IN PERSONS 37 (2009) [hereinafter MODEL LAW AGAINST TRAFFICKING IN PERSONS], available at [http://www.unodc.org/documents/human-trafficking/Model\\_Law\\_against\\_TIP.pdf](http://www.unodc.org/documents/human-trafficking/Model_Law_against_TIP.pdf); *Model Provisions of Comprehensive State Legislation to Combat Human Trafficking: Commentary*, supra note 309, at 11; RESOURCE GUIDE FOR STATE LEGISLATORS: MODEL PROVISIONS FOR STATE ANTI-TRAFFICKING LAWS, supra note 309, at 3.

361. See MODEL LAW AGAINST TRAFFICKING IN PERSONS, supra note 360, at 37.

362. *Id.* (specifying human trafficking of a child without a mens rea element).

363. *Id.* at 35-36, 39 (defining “exploitation” and applying that definition to child victims).

defendant's knowledge of the age of the minor is unnecessary.<sup>364</sup> Similarly, the age of the victim may increase the sentencing range for the defendant simply "if . . . the circumstance[] [is] present."<sup>365</sup>

The Polaris Project, a nongovernmental organization dedicated to ending human trafficking, partners with the federal government and its entities through grant-funded programs.<sup>366</sup> In addition to operating the National Human Trafficking Resource Center hotline, the Polaris Project often serves as a consultant for Congress and agencies within the federal government.<sup>367</sup> Through its lobbying efforts, the Polaris Project advocates for adoption of model anti-trafficking laws.<sup>368</sup> Citing statutory rape laws and international law, the model laws do not require a showing that the defendant knew the victim's age.<sup>369</sup> In commentary, the Polaris Project argued that the strict liability standard does not raise constitutional concerns when the defendant had a reasonable opportunity to observe the victim because "there is no policy reason to protect those who . . . are aware they are supporting the commercial sexual exploitation of another person which is already a crime in most states."<sup>370</sup>

The National Institute on State Policy on Trafficking of Women and Girls of the Center for Women Policy Studies endorsed similar provisions.<sup>371</sup> The age of the minor is a sentencing enhancement factor; the defendant need not know that the victim was under the age of eighteen years to either be convicted of sex trafficking or receive the sentencing enhancement.<sup>372</sup>

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364. *See id.* at 37 (specifying human trafficking of a child without a mens rea element).

365. *Id.* at 39.

366. *See National Human Trafficking Resource Center*, POLARIS PROJECT, <http://www.polarisproject.org/what-we-do/national-human-trafficking-hotline/the-nhtrc/overview> (last visited June 16, 2013).

367. *See, e.g., Combating Modern Slavery: Reauthorization of Anti-Trafficking Programs: Hearing on H.R. 3887 Before the H. Comm. on the Judiciary*, *supra* note 66, at 40-46 (statement of Bradley W. Myles, Nat'l Program Director, Polaris Project).

368. *Model Provisions of Comprehensive State Legislation to Combat Human Trafficking*, POLARIS PROJECT, <http://www.polarisproject.org/what-we-do/policy-advocacy/capacity-building/model-provisions-of-comprehensive-state-legislation-to-combat-human-trafficking> (last visited July 7, 2013).

369. *Model Provisions of Comprehensive State Legislation to Combat Human Trafficking: Commentary*, *supra* note 309, at 11.

370. *Id.*

371. *See RESOURCE GUIDE FOR STATE LEGISLATORS: MODEL PROVISIONS FOR STATE ANTI-TRAFFICKING LAWS*, *supra* note 309.

372. *Id.* at 3.

In addition, a number of states have adopted the strict liability standard. Of the thirty-two jurisdictions with sex trafficking of minors statutes,<sup>373</sup> nineteen hold the defendant responsible for the minor's age by either adopting the strict liability standard or prohibiting the defense of mistake of age.<sup>374</sup> Only one state specifically requires the prosecution to prove the defendant knew the victim's age.<sup>375</sup> The remaining twelve jurisdictions with sex trafficking of minors statutes model their laws after the federal sex trafficking statutes, thereby embodying the inherent ambiguities.<sup>376</sup> Eight states with trafficking statutes do not specify a different statute or penalty for those who traffic minors.<sup>377</sup> The remaining eleven states do not have trafficking statutes and typically prosecute under a pandering, compelling prostitution, or kidnapping statute.<sup>378</sup>

A strong majority supports the adoption of a strict liability standard for the mens rea of the age of the minor. A strict liability standard would facilitate more effective prosecutions and make greater strides towards abolishing the sex trafficking industry. However, the drawbacks to the strict liability standard must be considered as well.

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373. This number includes thirty-one states and the District of Columbia.

374. CAL. PENAL CODE § 236.1 (West 2010); COLO. REV. STAT. § 18-3-502 (2010); FLA. STAT. § 787.06 (2012); GA. CODE ANN. § 16-5-46 (2011); IOWA CODE § 710A.2 (2012); KAN. STAT. ANN. § 21-5426 (2012); KY. REV. STAT. ANN. § 529.100 (West 2007); MASS. GEN. LAWS ch. 272, § 4A (2011); MINN. STAT. § 609.322 (2009); MO. REV. STAT. § 566.212 (2011); N.H. REV. STAT. ANN. § 633:7 (2011); N.C. GEN. STAT. § 14-43.13 (2006); N.D. CENT. CODE § 12.1-40-01 (2009); 21 OKLA. STAT. § 867 (2011); 18 PA. CONS. STAT. § 3002 (2007); R.I. GEN. LAWS § 11-67-6 (2009); S.D. CODIFIED LAWS § 22-49-2 (2011); TENN. CODE ANN. § 39-13-309 (2012); UTAH CODE ANN. § 76-5-310 (West 2008).

375. DEL. CODE ANN. tit. 11, § 787 (2007).

376. ARIZ. REV. STAT. ANN. § 13-1307 (2010); D.C. CODE § 22-1834 (2010); 720 ILL. COMP. STAT. 5/10-9 (2010); IND. CODE § 35-42-3.5-1 (2013); LA. REV. STAT. ANN. § 14:46.3 (2011); MICH. COMP. LAWS § 750.462g (2006); MISS. CODE ANN. § 97-3-54.1 (2006); NEB. REV. STAT. § 28-831 (2006); N.M. STAT. ANN. § 30-52-1 (2008); TEX. PENAL CODE ANN. § 20A.02 (West 2011); VT. STAT. ANN. tit. 13, § 2652 (2011); WIS. STAT. § 948.051 (2011).

377. ALA. CODE § 13A-6-152 (2010); ALASKA STAT. § 11.41.360 (2012); ARK. CODE ANN. § 5-11-108 (2005); CONN. GEN. STAT. § 53a-192a (2010); N.J. STAT. ANN. § 2C:13-8 (WEST 2005); N.Y. PENAL LAW § 230.34 (McKinney 2007); OHIO REV. CODE ANN. § 2905.32 (West 2011); WASH. REV. CODE § 9A.40.100 (2011).

378. HAW. REV. STAT. § 712-1203 (2011); IDAHO CODE ANN. § 18-5609 (1994); ME. REV. STAT. tit. 17-A, § 301 (2009); MD. CODE ANN., CRIM. LAW § 11-303 (WEST 2011); MONT. CODE ANN. § 45-5-602 (2007); NEV. REV. STAT. § 201.300 (1997); OR. REV. STAT. § 167.017 (2011); S.C. CODE ANN. § 16-15-415 (2004); VA. CODE ANN. § 18.2-47 (2009); W. VA. CODE § 61-8-8 (2011); WYO. STAT. ANN. § 6-4-103 (1993).

*B. Concerns Weighing Against the Adoption of a Strict Liability Standard*

While the public outcry demands strict liability for sex trafficking,<sup>379</sup> long established principles of criminal law may prevent the adoption of a strict liability standard for this crime.<sup>380</sup>

Offenses without a mens rea requirement “generally are disfavored.”<sup>381</sup> Common law requires some level of mens rea.<sup>382</sup> A person cannot be punished for a crime at common law without at least acting with negligence.<sup>383</sup> However, as statutory law has developed, strict liability has gained a strong foothold in certain types of crimes.<sup>384</sup> Strict liability is often reserved for public welfare offenses<sup>385</sup> or for crimes that carry a light penalty, usually less than one-year imprisonment, such as misdemeanors.<sup>386</sup> The Model Penal Code limits strict liability to violations punishable only by a civil penalty, such as a fine or forfeiture.<sup>387</sup> Furthermore, the Model Penal Code dictates that strict liability should not be applied to offenses that give “rise to any disability or legal disadvantage based on conviction of a criminal offense.”<sup>388</sup> Many scholars and commentators have expressed concerns about punishing a person without demonstrating a culpable state of mind.<sup>389</sup>

The DOJ expressed these concerns regarding the proposed 2008 amendment to the TVPA, stating that removing the knowledge requirement combined with the mandatory minimum sentence of ten years “would create a rare circumstance wherein there is a substantial mandatory minimum sentence for an already unusual strict liability crime.”<sup>390</sup> While

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379. See discussion *supra* Part IV.A.4.

380. For example, at common law, strict liability crimes were prohibited. *Staples v. United States*, 511 U.S. 600, 605 (1994) (citing *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436-37 (1978)).

381. *Id.* at 606 (citing *Liparota v. United States*, 471 U.S. 419, 426 (1985)).

382. *Id.* at 605 (citing *U.S. Gypsum Co.*, 438 U.S. at 436).

383. LAFAVE, *supra* note 274, at 272.

384. For example, strict liability is typical for “public welfare offenses” and statutory rape. See *Carpenter*, *supra* note 324, at 322-32.

385. *Id.* (discussing the public welfare offense doctrine from the perspective of its potential application to statutory rape laws).

386. LAFAVE, *supra* note 274, at 272-73.

387. MODEL PENAL CODE § 1.04(5) (2011).

388. *Id.*

389. See, e.g., Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828 (1999); Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731 (1960).

390. Letter from Brian A. Benzckowski to John Conyers, Jr., *supra* note 138, at 8.

not explicitly stated by Congress, these types of concerns may have motivated the changes made to Representative Smith's original strict liability proposal.<sup>391</sup> Concerns about imposing such a severe punishment of up to life imprisonment for a crime where the defendant neither knew the victim's age nor had an opportunity to ascertain the victim's age may have motivated the changes.<sup>392</sup>

Moreover, not all prostitutes are coerced into the sex industry.<sup>393</sup> Many enter the industry voluntarily.<sup>394</sup> To impose strict liability on a defendant who panders a prostitute, who while age seventeen claims to be age twenty, would offend the idea of imposing punishment only on a person with a culpable state of mind.<sup>395</sup> A defendant could reasonably believe that the person he is pandering is an adult.<sup>396</sup> But that underlying conduct of pandering is still illegal.<sup>397</sup> However, a defendant convicted of pandering may only face up to five years in prison compared with possible life imprisonment if convicted of sex trafficking.<sup>398</sup> Such a difference in prison terms for the same conduct should not be accepted lightly.<sup>399</sup> It would be unfair to impose such a significant increase in punishment on a person who reasonably believed that he was working with an adult.

The DOJ also noted that the creation of a strict liability crime may lead to "legal challenges."<sup>400</sup> One defendant charged with sex trafficking advanced an Eighth Amendment challenge, alleging that the imposition of

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391. See *Bill Summary & Status: H.R. 3887*, *supra* note 129.

392. *Model Provisions of Comprehensive State Legislation to Combat Human Trafficking: Commentary*, *supra* note 309, at 11.

393. Ronald Weitzer, *The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade*, 35 POL. & SOC'Y 447, 453 (2007), available at [http://myweb.dal.ca/mgoodyea/Documents/Migration%20studies/The%20social%20construction%20of%20sex%20trafficking%20Weitzer%20Pol%20Soc%202007%20%2035\(3\)%20%20447-475.pdf](http://myweb.dal.ca/mgoodyea/Documents/Migration%20studies/The%20social%20construction%20of%20sex%20trafficking%20Weitzer%20Pol%20Soc%202007%20%2035(3)%20%20447-475.pdf).

394. *Id.*

395. See Wasserstrom, *supra* note 389, at 731 ("The imposition of severe criminal sanctions in the absence of any requisite mental element has been held by many to be incompatible with the basic requirements of our Anglo-American, and, indeed, any civilized jurisprudence." (footnote omitted)).

396. See Carpenter, *supra* note 324, at 352.

397. See, e.g., MD. CODE ANN., CRIM. LAW § 11-303 (West 2011).

398. Compare, e.g., MASS. GEN. LAWS ch. 272, § 4A (2011), and WYO. STAT. ANN. § 6-4-103 (West 2013), with 18 U.S.C. § 1591(b) (2012) (establishing punishment ranging from a minimum of ten years imprisonment to life imprisonment, based on the minor's age).

399. See Michaels, *supra* note 389, at 841 ("[C]riminal punishment must be predicated on some independent culpability . . .").

400. Letter from Brian A. Benzckowski to John Conyers, Jr., *supra* note 138, at 8.

strict liability constituted a violation of the constitutional protection against cruel and unusual punishment.<sup>401</sup> Even though the Supreme Court has only held one strict liability crime unconstitutional,<sup>402</sup> 18 U.S.C. § 1591 should strive to embody the constitutional protections advanced by the framers of the Bill of Rights.<sup>403</sup> Simply because the statute would probably not be held unconstitutional on Eighth Amendment grounds does not render strict liability necessary or appropriate for this type of felony.

Principles of fairness may prevent the adoption of the strict liability standard. The philosophy on which the American criminal legal system is based dictates that strict liability should not be imposed for any felony, especially one with such a severe punishment.<sup>404</sup> While not applying the strict liability standard may make prosecutions more challenging, embracing a fair and just criminal system should overcome the desire to ease the burden on the prosecution.<sup>405</sup>

#### *V. Proposed Changes to 18 U.S.C. § 1591*

After careful review of the arguments presented for and against strict liability for the age of the minor in prosecutions under 18 U.S.C. § 1591, the author proposes the following changes.

First, the current language of § 1591(c) should be stricken from the statute. In its place, subsection (c) should read:

In a prosecution under subsection (a) of this section, the Government need not prove that the defendant knew or recklessly disregarded the fact that the person so recruited, enticed, harbored, transported, provided, obtained or maintained, had not attained the age of 14 years. If the person so recruited, enticed, harbored, transported, provided, obtained or maintained had attained the age of 14 years but had not attained the age of 18 years, it is a defense, which the defendant must establish by a

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401. *United States v. Wilson*, No. 10-60102-CR, 2010 WL 2991561, at \*10-11 (S.D. Fla. July 27, 2010); *see also supra* text accompanying notes 98-101. The constitutional challenge was dismissed on ripeness grounds because the defendant had not yet been sentenced. *Wilson*, 2010 WL 2991561, at \*10-11.

402. *See Lambert v. California*, 355 U.S. 225, 229-30 (1957) (holding that strict liability was inappropriate in felon registration statute because of notice issues).

403. *United States v. Witkovich*, 353 U.S. 194, 199 (1957) (“[A] restrictive meaning must be given if a broader meaning would generate constitutional doubts.”).

404. Michaels, *supra* note 389, at 841.

405. *See generally id.*

preponderance of the evidence, that the defendant reasonably believed that the person had attained the age of 18 years.

With this proposal, strict liability will be imposed if the victim is under the age of fourteen years. However, the government must prove that the defendant knew or recklessly disregarded the age of the victim if the victim is at least fourteen years old but less than eighteen years old.<sup>406</sup> If the victim was at least fourteen years old but less than eighteen years old, the defendant may defend on the basis that he reasonably believed the victim to be at least eighteen years old. These changes reflect a compromise between the opposing views on strict liability in this context while providing an effective platform for Congress to achieve its goals of eradicating sex trafficking.

This compromise avoids the concerns resulting from severely punishing a defendant pandering a person—whom he reasonably believed to be an adult—who voluntarily entered the sex industry. The defendant in this situation could advance a reasonable mistake-of-age defense, which could be plausible when the minor is over the age of fourteen years.<sup>407</sup> However, the plausibility of a reasonable mistake-of-age defense significantly decreases when the victim is less than fourteen years of age.<sup>408</sup> Essentially, when the victim is less than fourteen years of age, it is no longer plausible that the victim entered the industry voluntarily or that the defendant reasonably believed the victim was at least eighteen years of age. Therefore, strict liability can be imposed without offending the concerns of punishing a person without a culpable state of mind.<sup>409</sup>

While the reckless disregard mens rea may reach the same result as strict liability when the victim is under the age of fourteen years,<sup>410</sup> the strict

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406. The age of fourteen years is selected because a girl typically experiences puberty by that time. See *Puberty & Precocious Puberty: Overview*, NAT'L INST. OF CHILD HEALTH & HUMAN DEV., <http://www.nichd.nih.gov/health/topics/puberty/Pages/default.aspx> (last updated Apr. 3, 2013). During puberty, a girl experiences growth spurts and breast development, causing her appearance to resemble an adult.

407. For example, 18 U.S.C. § 2423(g) (2012), codifies a reasonable mistake-of-age defense for the crime of transportation of minors.

408. The plausibility that a defendant reasonably believed a child less than fourteen years old was actually an adult diminishes because a reasonable person would not observe a child less than fourteen years old and believe she was an adult. In this case, the defendant can bear the “risk of error” if he unreasonably believes a young child is an adult. See *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 76 n.5 (1994).

409. This situation avoids criminalizing otherwise legal conduct. See *id.* at 73.

410. Reckless disregard could probably be found by a showing that, because the victim was less than fourteen years of age, the defendant could not have reasonably believed that

liability standard promotes Congress's goal of protecting the victim. Victim testimony is key to successful sex trafficking prosecutions.<sup>411</sup> However, testifying can re-traumatize the victim, a risk that increases if the victim is a younger child.<sup>412</sup> By imposing strict liability when the child is under the age of fourteen years, the child may not have to testify, or the amount of testimony required of the child may be reduced.<sup>413</sup> Furthermore, cross-examination of the child will be significantly limited. The victim's conduct and actions become less important as the key element to prove will be whether the defendant caused the victim to engage in a commercial sex activity. For example, the victim will not need to testify about her reputation or prior sexual history (or lack thereof). Rather, her testimony will be limited to the commercial sex activity itself. With less testimony required from the child, the trauma on the child will be reduced. Therefore, Congress's goal of prosecution can be advanced, while focus remains on the protection of the child-victim.

The above compromise also brings § 1591 more closely in line with current statutes.<sup>414</sup> Congress specifically cited 18 U.S.C. § 2241 as inspiration for its draft of § 1591.<sup>415</sup> Subsection (d) of § 2241 imposes strict liability for the offense of aggravated sexual abuse by relieving the government of its burden to prove that the defendant knew the victim was younger than twelve years old.<sup>416</sup> However, this subsection has not raised the concern that a defendant could reasonably believe the person engaged in the sexual act was an adult because the age at which strict liability is imposed is less than twelve years old.<sup>417</sup> Also, § 2241 requires the defendant know that the person was not an adult, as opposed to offering the option of proving that the defendant recklessly disregarded the person's age.<sup>418</sup> While § 1591 was inspired by § 2241, the differences in the statutes

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the victim was an adult. *See, e.g.*, Special Verdict Form, *United States v. Robinson*, No. 09-CR-794 (E.D.N.Y. Jan. 26, 2010) (finding that the defendant recklessly disregarded the age of the minor when she was seventeen years of age).

411. *See* CLAWSON ET AL., *supra* note 266, at vi.

412. *See* Lamb, *supra* note 357, at 70-71.

413. Because the government would not be required to prove the defendant knew or recklessly disregarded the minor's age, the government may be able to present evidence other than the child victim's testimony to prove the other elements.

414. *See, e.g.*, 18 U.S.C. §§ 2241, 2423 (2012).

415. 154 CONG. REC. H10904 (daily ed. Dec. 10, 2008) (statement of Rep. Howard Berman).

416. 18 U.S.C. § 2241(d).

417. *See id.*

418. *Id.* § 2241(c).

have led to the concerns raised by the current version of § 1591. The proposed compromise makes § 1591 more consistent with § 2241 by lowering the age of the victim at which strict liability is imposed from eighteen years of age to fourteen years of age.

The reasonable mistake-of-age defense was inspired by 18 U.S.C. § 2423.<sup>419</sup> Criminalizing the transportation of minors with the intent to engage in illicit sexual conduct or criminal sexual activity under § 2423 requires that the defendant have knowledge that the person transported was a minor.<sup>420</sup> The reasonable mistake-of-age defense is included to avoid punishing those who reasonably believed the person transported was an adult.<sup>421</sup> Similar scenarios could arise with cases charged under § 2423 and § 1591.<sup>422</sup> For example, the person transported or caused to engage in a commercial sex activity could assert that she is an adult by stating her age as older than eighteen years or by participating in activities typically reserved for adults, such as purchasing alcohol or cigarettes. In these cases, it would be unfair to impose such an increase in punishment when the defendant reasonably believed the person was an adult. By including a reasonable mistake-of-age defense in the proposed compromise, that scenario can be avoided.

Finally, the above compromise represents the best statutory scheme to further Congress's goal of prosecuting severe forms of trafficking while appeasing those on both sides of the political issue. Those who advance the strict liability standard will see that those who traffic children younger than fourteen years of age are justly punished without offending the principles of those who believe that a person should not be punished without a culpable state of mind. The proposed compromise will be less likely to succumb to constitutional challenges because the same result under a strict liability standard could be met with a reckless disregard standard, albeit with more implications for the victim.<sup>423</sup>

The proposed compromise seeks to balance the arguments for and against strict liability while remaining dedicated to the TVPA's goals of protection, prevention, and prosecution. By imposing strict liability only against those defendants trafficking children younger than age fourteen, the goal of protecting the victim is served by not requiring extensive testimony

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419. *See id.* § 2423(g).

420. *See id.* § 2423(a), (b).

421. *See id.*

422. *See, e.g.,* United States v. Brooks, 610 F.3d 1186, 1191 (9th Cir. 2010).

423. For example, under the reckless disregard standard, the child victim would most likely be required to testify. *See* CLAWSON ET AL., *supra* note 266, at vi.

from the child. Additionally, requiring the prosecution to prove the defendant knew or recklessly disregarded the victim's age when the victim is older than age fourteen avoids the concerns regarding the imposition of strict liability for a severe felony on a less culpable mind.<sup>424</sup> With an unambiguous federal statute, the goal of prevention can be met through effective prosecutions of sex traffickers, thereby taking a necessary step toward abolishing sex trafficking.

### VI. Conclusion

Lydia, Lina, and Tina<sup>425</sup> are fortunate survivors of sex trafficking. Lydia was eventually recognized as a victim of sex trafficking and given the services she needed, although her traffickers were never charged with sex trafficking.<sup>426</sup> Lina managed to escape with the help of her friend, Sinan.<sup>427</sup> With the help of the International Justice Mission and the Siem Reap Anti-Human Trafficking Police, the other women and children kept in the same brothel were rescued and all received care and counseling.<sup>428</sup> Tina escaped from her life of forced prostitution and currently advocates on behalf of victims of sex trafficking.<sup>429</sup>

Congress's three goals of protection, prevention, and prosecution are aimed at preventing children, like Lydia, Lina, and Tina, from living these horrendous stories.<sup>430</sup> While there may be disagreements on how to effectuate these goals, parties on both sides of the argument agree on one thing: no person or child should be forced to engage in a commercial sex activity.<sup>431</sup> In its current ambiguous state, 18 U.S.C. § 1591 does not advance the goals of prevention, protection, and prosecution. Each year that § 1591 remains ambiguous, an estimated 100,000 children in the United States are taken from their homes and forced into the commercial sex

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424. The defendant would be less culpable because he reasonably believed the person trafficked was an adult. However, the defendant could still be prosecuted under other statutes, such as 18 U.S.C. § 1591(a), if force, fraud, or coercion was used.

425. See discussion *supra* Part I.

426. 146 CONG. REC. H26831 (daily ed. May 9, 2000) (statement of Rep. Chris Smith).

427. *IJM Cambodia: Brave Survivors Help Rescue Girls from Brothel*, *supra* note 11.

428. *Id.*

429. Frundt, *supra* note 28.

430. See Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 102, 114 Stat. 1464, 1466-69.

431. See, e.g., 22 U.S.C. § 7101(a) (2012); MODEL LAW AGAINST TRAFFICKING IN PERSONS, *supra* note 360; *Model Provisions of Comprehensive State Legislation to Combat Human Trafficking: Commentary*, *supra* note 309; RESOURCE GUIDE FOR STATE LEGISLATORS: MODEL PROVISIONS FOR STATE ANTI-TRAFFICKING LAWS, *supra* note 309.

industry.<sup>432</sup> The power to eradicate the second-largest criminal industry in the world lies within Congress's reach. By amending § 1591 to eliminate ambiguities, Congress can advance its goals of preventing a child from being taken from her home and forced to endure the pain and suffering of being trafficked into the sex industry, protecting the children that have already been trafficked, and prosecuting those who engage in this heinous crime.

*Tiffanie N. Choate*

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432. Smith et al., *supra* note 253, at iv.