

MORE THAN “JOHNS,” LESS THAN TRAFFICKERS: IN SEARCH OF JUST AND PROPORTIONAL SANCTIONS FOR BUYERS OF SEX WITH TRAFFICKING VICTIMS

HEATHER C. GREGORIO*

The U.S. criminal justice system currently lacks a proportional, clear, and effective law targeted at individuals who purchase sex with trafficking victims. These “johns” of trafficking victims (JTVs) historically have remained anonymous and unaccountable. More recently, three unsatisfactory approaches to sanctioning this group have emerged. First, they are sometimes subjected to low-level patronization and solicitation misdemeanors alongside johns of consensual sex workers. Second, they are increasingly prosecuted as traffickers under sex-trafficking legislation. Third, they are occasionally prosecuted as statutory rapists and sex abusers if the victim is a minor. This Note argues that none of these first three approaches are an adequate fit for this population. Treating them simply as johns ignores the seriousness of their offense and does not distinguish prostitution from trafficking. Treating them as traffickers is disproportionate on the other extreme, especially with recent strict liability interpretations of sex-trafficking statutes and mandatory minimums, and furthermore dilutes the term “human trafficking.” Finally, treating them as statutory rapists is underinclusive and ignores the commercial nature of the offense. This Note explores a fourth approach being implemented sporadically on the federal and state levels: prosecuting johns of trafficking victims under legislation explicitly addressing this group. This Note argues that targeted legislation is the most appropriate and fair approach. It advocates modified versions of such legislation, with tailored mens rea standards and flexible penalties correlated to culpability.

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INTRODUCTION

Although the United States has been home to sex-trafficking operations for at least a century,¹ federal and state legislation defining and directly addressing the problem has been a relatively recent

¹ See KEVIN BALES & RON SOODALTER, THE SLAVE NEXT DOOR: HUMAN TRAFFICKING AND SLAVERY IN AMERICA TODAY 10–11 (2009) (reviewing the forced prostitution of immigrant women in the early twentieth century, as well as the contemporaneous specter of “white slavery,” a phenomenon that is empirically debated); Tamar R. Birkhead, *The “Youngest Profession”: Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1081–83 (2011) (discussing the history of underage prostitution in the United States). Domestic sex trafficking has gained attention in recent years, as the image of trafficking victims as four-year-old Cambodian girls chained in brothels has slowly been expanded to include the American-born teenagers that are also falling victim to the industry. HUMAN SMUGGLING AND TRAFFICKING CTR., U.S. DEP’T OF STATE, DOMESTIC HUMAN TRAFFICKING: AN INTERNAL ISSUE 2 (2008), available at <http://www.state.gov/documents/organization/113612.pdf> (“Americans often visualize a foreign female who was deceived upon arriving in the U.S. and finds herself being sexually exploited . . . [not] a [United States citizen] child or adult . . . kidnapped or lured from home and . . . prostituted at a local truck stop.”); Mike Kessler, *Gone Girls: Human Trafficking on the Home Front*, L.A. MAG., Oct. 14, 2014, at 3 (stating that although many believe that sex trafficking is “limited to developing nations, where wretched poverty leaves girls with few options,” it is prevalent in Los Angeles and other U.S. cities).

occurrence.² Three central actors are involved in sex-trafficking transactions—traffickers, victims, and purchasers. Over the past fifteen years, federal and state authorities have made significant progress in prosecuting traffickers,³ and modest strides in offering victims services rather than prosecuting them for prostitution.⁴ There is a general consensus within the anti-trafficking community that traffickers ought to be punished, and their victims ought to be protected.⁵

On the other hand, there is no consensus regarding the approach to take with purchasers of sex with trafficking victims. These men have generally been discussed within the broader category of purchasers of commercial sex, known colloquially as “johns,”⁶ perhaps

² Statutes like the Mann Act, 18 U.S.C. §§ 2421–24 (2012) and the Involuntary Servitude Law, 18 U.S.C. § 1584 (2012) were historically available to address human trafficking. *See infra* note 25 (discussing the history of the Mann Act); Pamela Chen & Monica Ryan, *Federal Prosecution of Human Traffickers*, in *LAWYER'S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE FOR VICTIMS* 271 & 281 n.2 (Jill Laurie Goodman & Dorchen A. Liedholdt eds., 2011) (stating that statute 18 U.S.C. § 1581-1588 (1948) “had long been on the books”). However, the passage of the Trafficking Victims Protection Act (TVPA) in 2000 (Pub. L. No. 106–386, 115 Stat. 1466 (codified at 18 U.S.C. §§ 1581–95) established federal legislation specifically targeted at sex and labor trafficking. *See* Chen & Ryan, *supra*, at 271 (noting that while the Mann Act as well as antislavery, peonage, and antismuggling statutes had “long been on the books,” the TVPA was innovative in specifically criminalizing “forced labor” and “sex trafficking” and in taking a “holistic approach to the problem of human trafficking”); *see also* Ellen L. Buckwalter et al., *Modern Day Slavery in Our Own Backyard*, 12 *WM. & MARY J. WOMEN & L.* 403, 416 (2006) (noting that “no anti-trafficking laws existed at the state level” until 2003).

³ There have been a number of successful federal and state prosecutions of traffickers in recent years. In fiscal year 2013, the Department of Justice convicted 113 defendants of sex trafficking offenses, and over 100 human trafficking cases were prosecuted at the state level, with a “heavy emphasis” on sex-trafficking cases. U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT* 398–99 (2014).

⁴ *See* Megan Annitto, *Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors*, 30 *YALE L. & POL'Y REV.* 1, 2–4 (2011) (noting the recent shift in federal and state laws toward recognizing trafficked minors as victims of statutory rape and sexual exploitation rather than prosecuting them for prostitution); Tanya Mir, *Trick or Treat: Why Minors Engaged in Prostitution Should Be Treated as Victims, Not Criminals*, 51 *FAM. CT. REV.* 163, 167–69 (2013) (discussing the “victim-centered” nature of safe harbor laws that decriminalize prostitution for victims of sex trafficking and instead provide these victims with specialized social services).

⁵ *See, e.g.*, Vicki Schultz, *Sex and Work*, 18 *YALE J.L. & FEMINISM* 223, 226 (2006) (noting that children engaged in prostitution should be treated as victims rather than criminals); Stephanie M. Berger, Note, *No End in Sight: Why the “End Demand” Movement Is the Wrong Focus for Efforts to Eliminate Human Trafficking*, 35 *HARV. J.L. & GENDER* 523, 569 (2012) (arguing that legalization would allow law enforcement to focus resources on traffickers and abusive johns). *See generally* Lisa Holl Chang, Comment, *Reaching Safe Harbor: A Path for Sex-Trafficking Victims in Wisconsin*, 2013 *WIS. L. REV.* 1489, 1493, 1500–04 (2013) (summarizing various state statutes that prosecute traffickers while preventing convictions of victims).

⁶ A commentator notes that the term “john” connotes the anonymity (and resulting impunity) that this group has been granted. *See* Julie Flefer, Note, *Shining the Spotlight on Johns: Moving Toward Equal Treatment of Male Customers and Female Prostitutes*, 10

because the distinction between “men buying compelled sex and . . . [men] buying sex from people who are not compelled by a third party”⁷ will often seem artificial in light of the overlap between the groups and the fact that johns may not know whether someone is working in prostitution voluntarily.⁸ This Note will refer to men who buy compelled sex as johns of trafficking victims (JTVs).⁹

Historically, JTVs, and johns in general, have rarely been sanctioned.¹⁰ Those who advocate a legal prostitution industry imply that johns are unfairly vilified, arguing that educating johns, including JTVs, can turn them into “allies in identifying women in forced prostitution,”¹¹ who may help victims escape their traffickers.¹² In contrast, those who believe that prostitution is inherently harmful to those involved describe johns and JTVs as culpable players in sex-trafficking operations,¹³ not only fueling

HASTINGS WOMEN’S L.J. 11, 11 (1999) (“We call them johns, a name suggesting faceless men covered by a cloak of anonymity.”).

⁷ MICHAEL SHIVELY ET AL., A NATIONAL OVERVIEW OF PROSTITUTION AND SEX TRAFFICKING DEMAND REDUCTION EFFORTS: FINAL REPORT 4 (2012), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/238796.pdf>.

⁸ Despite these difficulties, I will treat these two groups as distinct, if overlapping.

⁹ For clarity, I use the term “john” to refer to any purchaser of commercial sex, consensual or not. Therefore, JTVs are a subset of johns. Male pronouns will be used throughout the Note in light of the fact that men make up the vast majority of johns. See SHARED HOPE INT’L, DEMANDING JUSTICE PROJECT: BENCHMARK ASSESSMENT 22 (2013) (noting that in 407 cases of purchasing sex with minors, 99% of purchasers were male); Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 529 (2000) (“Virtually all of the purchasers of commercial sex are men.”); Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271, 292–93 (2011) (acknowledging that although there are many men and boys in prostitution, “their johns remain almost exclusively men”).

¹⁰ See Law, *supra* note 9, at 565 (noting the lack of criminal accountability for johns in general).

¹¹ Berger, *supra* note 5, at 569 (“If we are willing to acknowledge that not all men who buy sex are evil, perverted, or strange, then we can also refocus efforts to educate them.”).

¹² See JULIE HAM, GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN (GAATW), MOVING BEYOND “SUPPLY AND DEMAND” CATCHPHRASES: ASSESSING THE USES AND LIMITATIONS OF DEMAND-BASED APPROACHES IN ANTI-TRAFFICKING 31 (2011) (“[C]lients can or have helped to identify trafficked persons and helped women escape trafficked situations.”). Many JTVs see themselves in this role as well. 41% of johns surveyed in Chicago reported that they had tried to help or rescue a woman being harmed in prostitution. RACHEL DURCHSLAG & SAMIR GOSWAMI, CHICAGO ALLIANCE AGAINST SEXUAL EXPLOITATION, DECONSTRUCTING THE DEMAND FOR PROSTITUTION: PRELIMINARY INSIGHTS FROM INTERVIEWS WITH CHICAGO MEN WHO PURCHASE SEX 21 (2008).

¹³ See Iris Yen, Comment, *Of Vice and Men: A New Approach to Eradicating Sex Trafficking by Reducing Male Demand Through Educational Programs and Abolitionist Legislations*, 98 J. CRIM. L. & CRIMINOLOGY 653, 669–70 (2008) (“[Johns] feel their gender and money entitle them to have sex whenever, wherever, however, and with whomever they wish . . . dehumanizing prostitutes as ‘sluts’ and ‘whores’ who deserve degrading treatment . . .”).

demand, but also often subjugating victims to rape and serious violence.¹⁴

This Note will explore the question of how best to hold JTVs accountable within the U.S. criminal justice system. Acknowledging that JTVs have rarely faced serious consequences, and assuming that at least some of them ought to be held accountable—whether this group is limited to those with intent or knowledge, or should extend to negligent or honestly mistaken JTVs—it critically evaluates the approaches being taken on the federal and state levels. These approaches can be divided into four categories: (1) grouping JTVs with all johns and enforcing prostitution misdemeanors against them; (2) grouping JTVs with *traffickers*, and enforcing trafficking laws against them; (3) grouping JTVs with noncommercial sex offenders such as statutory rapists; and, least commonly, (4) treating JTVs as a distinct group by drafting legislation explicitly applicable to them.

This Note argues that the first three approaches, each possessing its own advantages, are ultimately inadequate. It analyzes each approach in light of the criminal justice goals of proportionality, flexibility, clarity, enforceability, and deterrence.¹⁵ The first strategy—a general john-focused approach—arguably has had success deterring sex trafficking on a macro level and avoids difficult problems of proving that a JTV had knowledge of a victim’s status. However, this approach fails to take into account that sex with a trafficking victim is a more inherently coercive and thus serious offense, warranting greater punishment, and furthermore will be unlikely to gain the support of those who oppose trafficking but not voluntary prostitution.¹⁶ The JTV-as-trafficker approach imposes accountability and provides deterrence. However, the severe mandatory minimums and interpretations of strict liability regarding a minor victim’s age make these state and federal statutes blunt and often disproportionate instruments, and furthermore risk diluting the term “human trafficking.”¹⁷ Other state statutes such as statutory rape laws are useful tools, but

¹⁴ In a San Francisco study, 70% of women and girls in prostitution in San Francisco had been raped or sexually assaulted, an average of thirty-one times each, and 65% had been physically abused, an average of four times each. Mimi H. Silbert & Ayala M. Pines, *Occupational Hazards of Street Prostitutes*, 8 CRIM. JUST. & BEHAV. 395, 396–97 (1981). Similarly, a study in Minneapolis found that 74% of interviewed women had been assaulted while working in prostitution, and 50% had been raped. See DONNA M. HUGHES, BEST PRACTICES TO ADDRESS THE DEMAND SIDE OF SEX TRAFFICKING 10 (2004), available at http://www.uri.edu/artsci/wms/hughes/demand_sex_trafficking.pdf.

¹⁵ See *infra* notes 63–66 and accompanying text (describing these goals).

¹⁶ See *infra* notes 34–36 (discussing the philosophy of this group, including its desire to decriminalize prostitution, rather than imposing punishments upon johns).

¹⁷ See *infra* Part II.B.2 (discussing these drawbacks of the approach).

they are underinclusive in various ways and insufficiently tailored to JTVs in light of the commercial nature of the offense. The last approach, legislation targeted at JTVs, is the best option currently being implemented. The benefits of such an approach include the ability to tailor sanctions to JTVs rather than binding their fates to johns, traffickers, or noncommercial sex abusers, thus achieving greater proportionality and clarity.

This Note advocates a modified version of the JTV-targeted approach. Unfortunately, existing examples of this fourth approach—§ 2423(b) of the Mann Act and JTV-focused state statutes—currently leave many JTV crimes without an appropriately tailored remedy. First, § 2423(b) only applies to JTVs who cross state lines with the intent of purchasing sex with a trafficking victim; federal jurisdiction will not be available in all other cases.¹⁸ This limitation, in conjunction with the fact that many states do not have JTV-targeted laws, means that JTVs who purchase sex with victims in states without such laws, and without crossing state lines, currently are not covered by a JTV-targeted statute. Second, § 2423(b) and the majority of JTV-focused state legislation only cover JTVs who purchase sex with minors; only a handful of states have legislation applicable to JTVs of adult victims.

Congress should fill these gaps by passing a federal statute explicitly aimed at all JTVs, including those who purchase sex with adult victims. Such a statute should achieve broad federal jurisdiction by using the language of the federal sex-trafficking statute, which prohibits sex trafficking that occurs “in or affecting interstate or foreign commerce.”¹⁹ Similarly, states should pass laws explicitly targeting all

¹⁸ The Mann Act was held to be a constitutional exercise of congressional power under the Commerce Clause in *Hoke v. United States*, 227 U.S. 308, 320–23 (1913). Although the use of the Commerce Clause to regulate the noncommercial crimes covered by the Mann Act has been criticized as an overextension of the Commerce Clause, see Laura Elizabeth Brown, Comment, *Regulating the Marrying Kind: The Constitutionality of Federal Regulation of Polygamy Under the Mann Act*, 39 McGEORGE L. REV. 267, 280–81 (2008), it seems undisputed that the regulation of *commercial* sex falls under Congress’s power to regulate interstate commerce. *Id.*

¹⁹ 18 U.S.C. § 1591(a)(1) (2012). The constitutionality of § 1591 has been upheld as a valid exercise of congressional power under the Commerce Clause. See *United States v. Paris*, 2007 U.S. Dist. LEXIS 78418, at *21–24 (D. Conn. 2007) (upholding the ability of Congress to criminalize sex trafficking even when the acts are performed intrastate, when such acts are commercial and there is a link between the acts and interstate commerce). In light of the constitutionality of both § 1591 and the Mann Act under the Commerce Clause, see *Hoke*, 227 U.S. at 320–23, there is no reason to think that a statute targeting all JTVs would not also survive under the Commerce Clause. Cf. *Gonzalez v. Raich*, 545 U.S. 1 (2005) (upholding Congress’s power under the Commerce Clause to regulate the intrastate cultivation of marijuana, noting that “[w]hen Congress decides that the total incidence of a practice poses a threat to a national market, it may regulate the entire class”). JTVs are by definition involved in a commercial activity, and the willingness of

JTVs. For the mens rea requirements of such statutes, this Note advocates a reckless disregard or knowledge standard for adult victims, and a strict liability standard regarding age for minor victims, with enhanced penalties for reckless disregard or knowledge. I also recommend sentencing enhancements if a JTV uses physical force against a victim, or if a particularly young minor is involved.

Although significant literature has been devoted to the success or failure of the john-focused approach, and the JTV-as-trafficker approach has gained attention in recent years, discussion of JTV-tailored legislation as a middle ground between these extremes has been notably missing from the conversation. This Note advocates a balance between these two extremes that is proportional, effective, and just.

Part I provides an overview of domestic sex trafficking and the role of JTVs within the industry. Part II critically analyzes the four current approaches to sanctioning JTVs, concluding that the fourth approach is the best option, despite its limitations. Finally, Part III discusses model legislation that functions as a modified and expanded version of the JTV-tailored approach. It offers suggestions for the details of such legislation, including the most appropriate mens rea requirements.

I

THE SEX-TRAFFICKING INDUSTRY AND ITS CONSUMERS

JTVs play an indispensable role in the flourishing of a fast-growing and predatory sex-trafficking industry. This Part offers background information on domestic sex trafficking, information about johns in general and JTVs in particular, and an overview of current legislation used against them.

A. *Background on Domestic Sex Trafficking*

Domestic sex trafficking is a complex phenomenon. Its victims are both U.S. citizens and foreigners involved in the U.S. commercial sex industry under the control of someone else.²⁰ The federal government defines severe sex trafficking as: “[T]he recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act . . . in which [the act] is induced by force, fraud, or

federal courts to find that the “in or affecting . . . interstate commerce” requirement of § 1591 is satisfied without the crossing of state lines in trafficking cases indicates that it would be easy to satisfy in cases involving JTVs as well. See Chen & Ryan, *supra* note 2, at 272–74 (discussing cases in which federal jurisdiction was upheld based on the use of the Internet, phone calls, credit card transactions, and even condoms).

²⁰ HUMAN SMUGGLING AND TRAFFICKING CTR., *supra* note 1.

coercion, or in which the person induced to perform such act has not attained 18 years of age.”²¹ Since 2000, it has provided for federal prosecution of severe sex trafficking under 18 U.S.C. § 1591.²² Under § 1591, there is no requirement that national or even state borders be crossed if interstate or foreign commerce is affected.²³ All fifty states have now implemented human trafficking statutes,²⁴ many similar or identical to § 1591.²⁵ At the federal level, the Mann Act has also been used to prosecute sex traffickers.²⁶

The United States is a source of trafficking victims, a transit country for trafficking, and a destination country in which victims—both foreign and domestic—are forced, induced, or compelled to work in prostitution.²⁷ The illegal and largely underground nature of

²¹ Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. § 7102(8)(A) (2012) (combining the definitions of “sex trafficking” and “severe forms of trafficking in persons”).

²² 18 U.S.C. § 1591(a) (2012) (criminalizing knowingly “recruit[ing], entic[ing], harbor[ing], transport[ing], provid[ing], obtain[ing], or maintain[ing]” a person, or “benefit[ing], financially or by receiving anything of value, from participating [in a trafficking venture]” if the actor knows or recklessly disregards the fact that a person is a victim of severe trafficking in persons).

²³ *Id.* (requiring that the act be “in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States”); see *supra* note 19 (discussing the validity of § 1591 under the Commerce Clause).

²⁴ See POLARIS PROJECT, A LOOK BACK: BUILDING A HUMAN TRAFFICKING LEGAL FRAMEWORK 2, fig.1 (2014), <http://www.polarisproject.org/storage/2014SRM-capstone-report.pdf> (presenting the chronology of states’ passage of human trafficking laws).

²⁵ U.S. DEP’T OF STATE, *supra* note 3, at 399 (finding, as of 2013, that 42 states and the District of Columbia defined child sex trafficking “consistent with federal law with no requirement to prove force, fraud, or coercion” for minors).

²⁶ See Chen & Ryan, *supra* note 2, at 271. The Mann Act, also known as the “White-Slave Traffic Act,” was passed in 1910 to combat prostitution, trafficking, and any other transportation of women and girls for an “immoral purpose.” White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2006)); Geneva O. Brown, *Little Girl Lost: Las Vegas Metro Police Vice Division and the Use of Material Witness Holds Against Teenaged Prostitutes*, 57 CATH. U. L. REV. 471, 479 n.60 (2008). It was passed in response to widespread fear in the early twentieth century that many white women were being forced into prostitution. See Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 6 DUKE MINER AWARDS 122, 145–46 (2007) (discussing the Act’s roots). The title of the Act reveals its racist history: “While white women were considered victims of prostitution, black women were deemed criminals, even if they were not actually prostitutes.” Nesheba Kittling, *God Bless the Child: The United States’ Response to Domestic Juvenile Prostitution*, 6 NEV. L.J. 913, 919 (2006). Before a 1980 amendment removed the vague immoral purpose provision in the Act, it was used to prosecute a range of behaviors unrelated to prostitution, such as polygamy and consensual interracial relationships. See Lisa Riordan Seville, *The Mann Act: Anatomy of a Law*, CRIME REPORT (Apr. 2, 2012), <http://www.thecrimereport.org/news/inside-criminal-justice/from-the-archives> (describing the government’s shift away from moral enforcement of racial and sexual views); Dubler, *supra*, at 790–94 (discussing how the “immoral purpose” provisions of the Immigration Act and White-Slave Traffic Act gave courts the power to identify elements of sexual immortality).

²⁷ U.S. DEP’T OF STATE, *supra* note 3, at 397.

the commercial sex industry makes it difficult to obtain accurate statistics about the number of sex-trafficking victims.²⁸ Traffickers use different strategies to engage their victims, but there is a common thread of exploiting populations with certain vulnerabilities, such as youth, immigration status, poverty, homelessness, drug and alcohol dependence, and, very commonly, a history of sexual assault and abuse.²⁹ Traffickers often engage in a “grooming” process, offering love and affection to young runaways, presenting themselves as boy-friends or father figures, and later asking or insisting that they engage in prostitution.³⁰ Other traffickers draw in victims with promises of an extravagant lifestyle,³¹ or simply by providing an alternative to an unhappy home situation.³² Some traffickers deceive foreign victims into coming to the United States under the guise of legitimate work

²⁸ For some clues as to how extensive the impact of sex trafficking is, see 22 U.S.C. § 7101(b)(1) (2012) (“Approximately 50,000 women and children are trafficked *into* the [United States annually].” (emphasis added)); ALISON SISKIN & LIANA SUN WYLER, CONG. RESEARCH SERV., RL34317, *TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS* 16 (2013) (stating that as of 2005, between 14,500 and 17,500 victims were trafficked into the United States each year). These statistics include labor trafficking victims, and do not include victims who are trafficked within the United States. One study found that 80% of people working in prostitution were under the age of eighteen when they entered the industry. Cheryl Hanna, *Somebody’s Daughter: The Domestic Trafficking of Girls for the Commercial Sex Industry and the Power of Love*, 9 WM. & MARY J. WOMEN & L. 1, 12 (2002). A Los Angeles detective estimated that 99% of the adults he encounters working in prostitution started when they were underage, which qualifies them as trafficking victims under most definitions of the term. Kessler, *supra* note 1.

²⁹ See RICHARD J. ESTES & NEIL ALAN WEINER, UNIV. OF PA. SCH. OF SOC. WORK, *THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA AND MEXICO* 1 (2001) (detailing factors that fuel sexual exploitation); LINDA A. SMITH ET AL., SHARED HOPE INT’L, *THE NATIONAL REPORT ON DOMESTIC MINOR SEX TRAFFICKING: AMERICA’S PROSTITUTED CHILDREN* 31–32 (2009), available at http://sharedhope.org/wp-content/uploads/2012/09/SHI_National_Report_on_DMST_2009.pdf. (noting that one juvenile justice facility found that 93% to 95% of commercially exploited children had a history of physical or sexual abuse); Chang, *supra* note 5, at 1494–95 (explaining traffickers’ exploitation of vulnerabilities). See generally Hanna, *supra* note 28, at 22 (discussing reasons why domestic violence victims end up in the industry).

³⁰ HUMAN SMUGGLING AND TRAFFICKING CTR., *supra* note 1, at 4–5; see also *United States v. Jimenez-Calderon*, 05-3713, 2006 U.S. App. LEXIS 14313, at *3 (3d Cir. June 9, 2006) (describing a Mexican sex-trafficking ring that recruited young girls from rural towns in Mexico to the United States with promises of love and marriage, later coercing them into prostitution through threats and force).

³¹ See, e.g., *United States v. Pipkins*, 378 F.3d 1281, 1285 (11th Cir. 2004) (describing a sex-trafficking ring in Atlanta in which pimps used this strategy to recruit underage girls), *vacated*, 125 S. Ct. 1617 (2005), *reinstated by* 412 F.3d 1251 (11th Cir. 2005).

³² See, e.g., *United States v. Elbert*, 561 F.3d 771, 774 (8th Cir. 2009) (affirming conviction of defendant who approached three adolescents in his car and, after finding out they were unhappy at home, brought them to his own home where he took pornographic photos of them, threatened them, and then forced them to engage in street prostitution while confiscating all of their money).

opportunities, subsequently using force, threats, and theft of documents to compel them to engage in commercial sex.³³

Despite consensus that sex trafficking is a serious and harmful crime, there is substantial controversy surrounding the best way to combat it, especially regarding the treatment of prostitution. Pro-legalization advocates believe that it should be legal to both sell and buy consensual sex. This group argues that full decriminalization is necessary to respect and protect sex workers because it facilitates regulation of the industry.³⁴ They argue that sanctions against johns do not reduce prostitution,³⁵ and they point out that criminalizing clients is bad for business and deters only “peaceful” johns.³⁶ On the other side of the debate are “abolitionists” who argue that it is impossible to safely regulate the prostitution industry.³⁷ These abolitionists believe that prostitution is inherently demeaning and dangerous to those working in the commercial sex industry.³⁸ This side generally argues

³³ See, e.g., *United States v. Valenzuela*, No. 09-50582, 2012 U.S. App. LEXIS 22609, at *3 (9th Cir. Oct. 9, 2012) (affirming sentences of defendants who recruited women and girls from Guatemala with promises of legitimate work, then forced them into prostitution by threats, “brutal physical and sexual violence, economic and social dependence, [and] lock and key”).

³⁴ See Law, *supra* note 9, at 583 (“Removing criminal sanctions against commercial sex would make it easier to protect sex workers from violence and rape, because women could complain without fearing prosecution.”); Ham, *supra* note 12, at 33–39 (arguing that punishing clients “threatens sex workers’ income security and working conditions,” “increases police’s power over [them],” stigmatizes them, and normalizes violence against them).

³⁵ See Law, *supra* note 9, at 568 (“The force of [sanctions against johns] will not determine, and historically never has determined, how many women will turn to the streets.” (quoting Wendy McElroy, *Prostitutes, Anti-Pro Feminists, and the Economic Associates of Whores*, in *PROSTITUTION: ON WHORES, HUSTLERS, AND JOHNS* 338 (James E. Elias et al. eds., 1998))).

³⁶ Wendy McElroy argues that laws targeting johns will only deter “[m]en who are married, with respectable careers and a reputation to protect,” leaving “men who are criminally inclined” as the primary clientele. McElroy, *supra* note 35, at 338. McElroy concludes that “police/feminist policy keeps peaceful johns off the streets and leaves women to compete more vigorously for johns and screen less rigorously those who approach them.” *Id.*

³⁷ See, e.g., SHIVELY ET AL., *supra* note 7, at 9–10 (“[D]eregulation and legalization do not ameliorate th[e] harms [of sex trafficking and prostitution] for more than a small portion of providers of commercial sex.”).

³⁸ See Janice G. Raymond, *Prostitution on Demand: Legalizing the Buyers as Sexual Consumers*, 10 VIOLENCE AGAINST WOMEN 1156, 1157 (2004) (“[V]alidating prostitution as work dignifies the sex industry and the male consumers, not the women in it.”); Andrea Dworkin, *Prostitution and Male Supremacy*, 1 MICH. J. GENDER & L. 1, 3 (1993) (“In prostitution, no woman stays whole. It is impossible to use a human body in the way women’s bodies are used in prostitution and to have a whole human being at the end of it”); see also Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 828 (1988) (discussing the belief that prostitution “reinforc[es] the sexist view that a woman’s role in a sexual encounter is to please a man”); Donna M. Hughes, *Wolves in Sheep’s Clothing: No Way to End Sex-Trafficking*, NAT’L

for maintaining or raising the penalties for buying sex, while often also advocating for the decriminalization of selling sex.³⁹ Abolitionists argue that legalizing prostitution increases demand, incentivizing traffickers to force people into the industry to make up for inadequate supply.⁴⁰ Disagreement between abolitionists and those in favor of legalization has led to ongoing debate over the language and effect of sex-trafficking legislation, and sections of the TVPA reflect compromises between the two groups.⁴¹

B. JTVs and the Industry

Traffickers recruit, force, and coerce their victims into the commercial sex industry, but it is JTVs who complete the cycle of exploita-

REV. ONLINE (Oct. 9, 2002, 9:15 AM), http://www.uri.edu/artsci/wms/hughes/wolves_in_sheeps_clothing.pdf (calling some pro-legalization advocates “wolves in sheep’s clothing,” questioning the idea that it would be “‘empowering’ for women to leave their homes, travel to other countries, and engage in prostitution with 10, 20, or 30 men per day”); NICHOLAS D. KRISTOF & SHERYL WUDUNN, *HALF THE SKY: TURNING OPPRESSION INTO OPPORTUNITY FOR WOMEN WORLDWIDE* 25–26 (2009) (advocating abolition as the appropriate method to combat the harms of prostitution).

³⁹ See, e.g., MacKinnon, *supra* note 9, at 307 (“Any adequate law or policy . . . has three parts: decriminalizing and supporting people in prostitution, criminalizing their buyers strongly, and effectively criminalizing third-party profiteers.”); Raymond, *supra* note 38, at 1158 (“Rather than sanctioning prostitution, states could address the demand by penalizing the men who buy women . . .”). Because of the harmful effects of full criminalization on victims, few anti-trafficking groups advocate this position, although most jurisdictions, including all states in the United States (with the exception of Nevada), follow a full criminalization model. Berger, *supra* note 5, at 528–29.

⁴⁰ See Yen, *supra* note 13, at 681 (“[O]rganized crime and sex trafficking have . . . increased because legalization stimulated a surge in male demand, which required a steady supply of women . . . [and] organized crime solved the problem of supply shortage by trafficking women and children.”); Norma Hotaling & Leslie Levitas-Martin, *Increased Demand Resulting in the Flourishing Recruitment and Trafficking of Women and Girls: Related Child Sexual Abuse and Violence Against Women*, 13 *HASTINGS WOMEN’S L.J.* 117, 118–19 (2002) (“Recruitment into prostitution flourishes in proportion to an increased demand . . .”); Raymond, *supra* note 38, at 1163–65 (discussing negative consequences of legalization in New Zealand, the Netherlands, and Victoria, Australia such as increases in prostitution, objectification of women, and pedophilia). Those in favor of legalization dispute this conclusion on an empirical basis. See, e.g., Law, *supra* note 9, at 608 (“Law enforcement seemingly has little effect on the incidence of commercial sex.”).

⁴¹ For example, advocates for legalization of prostitution lobbied for the inclusion of the force, fraud, or coercion standard in the definition of “sex trafficking,” in order to distinguish between sex trafficking and voluntary adult prostitution. See Tessa L. Dysart, *Child, Victim, or Prostitute? Justice Through Immunity for Prostituted Children*, 21 *DUKE J. GENDER L. & POL’Y* 255, 258–63 (2014). In contrast, abolitionists sought the elimination of the force, fraud, or coercion standard, viewing all prostitution as gender violence. *Id.* at 258–59. In a compromise, the definition of “sex trafficking” does not require force, fraud, coercion, or a minor survivor, but “severe forms of trafficking in persons”—the offense subject to the criminal penalties of 18 U.S.C. § 1591—does. The inclusion of force, fraud, and coercion for adults but not minors was another example of such compromise. *Id.* at 259.

tion by purchasing sex with the victims. There often is no way to tell whether a person working in prostitution is doing so voluntarily, and as a result many JTVs will not be aware that they are purchasing sex without real consent.⁴²

However, many johns seem to turn a blind eye to the circumstances of individuals in prostitution, indicating that some know, or suspect, that they have been JTVs or have otherwise engaged with women who experienced harm through prostitution. Although regional studies are not necessarily indicative of broad national trends, 42% of johns surveyed in Chicago believed that “prostitution causes both psychological and physical damage to women,” 20% reported that they had bought sex from “women who were trafficked from other countries,” and 32% believed that “the majority of women in prostitution entered the sex trade before the age of 18.”⁴³ Another study of johns in Georgia found that while only 3–4% of johns actively seek out minors (and thus are intentional JTVs), 28% are undeterred from attempting to purchase sex even when they learn that person is very likely under eighteen.⁴⁴

This research indicates that JTVs range from unaware (to various extents) to predatory. This Note assumes that JTVs should be treated proportionately to their mental culpability as much as possible. However, there may be room to hold even some reasonably oblivious JTVs accountable, such as those who purchase sex with minors.

C. Available Legislation Applicable to JTVs

A number of federal and state statutes have been used to prosecute JTVs. On the federal level, two of the laws used against traffickers have also been used to prosecute JTVs: § 1591 (the federal sex-

⁴² See SHIVELY ET AL., *supra* note 7, at 4 (“The distinction between people selling sex who are versus are not compelled by a third party is usually invisible to buyers—particularly since most buyers are motivated to believe that providers are involved voluntarily [M]ost johns cannot (or choose not to) see otherwise.”); Hotaling & Levitas-Martin, *supra* note 40, at 123 (“Although some children are prostituted by and/or specifically for pedophiles and preferential abusers, the majority of [JTVs of minors] are first and foremost prostitute users who become child sexual abusers through their prostitute use, rather than the other way around.”).

⁴³ DURCHSLAG & GOSWAMI, *supra* note 12, at 3; see also MELISSA FARLEY ET AL., MEN WHO BUY SEX: WHO THEY BUY AND WHAT THEY KNOW 14, 16 (2009) (reporting that 55% of johns surveyed believed that “a majority of women in prostitution were lured, tricked or trafficked,” and about a third of johns estimated that 50–90% of women in prostitution were abused as children).

⁴⁴ THE SCHAPIRO GRP., MEN WHO BUY SEX WITH ADOLESCENT GIRLS: A SCIENTIFIC RESEARCH STUDY 11–12 (2009), available at <http://www.youth-spark.org/wp-content/uploads/2012/05/TSG-Complete-Demand-Study.pdf> (reporting a study of johns who responded to advertisements for sex with a “young” female, and extrapolating statistics about all men who purchase sex based on other available data).

trafficking statute)⁴⁵ and the Mann Act.⁴⁶ The Mann Act contains one section that seems clearly directed at child sex abusers and JTVs of minors.⁴⁷ Sections 2423(a)⁴⁸ and 2422(b)⁴⁹ apply most clearly to traffickers, but can also be extended by their terms to JTVs. Finally, § 2421⁵⁰ and § 2422(a)⁵¹ are primarily directed at pimps (including pimps of consensual sex workers),⁵² but they could be read to apply to johns as well. Under these provisions, no proof of trafficking is

⁴⁵ *United States v. Jungers*, 702 F.3d 1066, 1075 (8th Cir. 2013) upheld the application of § 1591 to JTVs. Legislation is pending in Congress that would codify *Jungers* through an amendment to § 1591. See *infra* note 114 (discussing the proposed amendments).

⁴⁶ See *supra* note 26 (describing the Mann Act).

⁴⁷ 18 U.S.C. § 2423(b)–(f) (2012) (criminalizing “travel[ing] in interstate commerce or . . . into the United States . . . for the purpose of engaging in any illicit sexual conduct with another person” with “illicit sexual conduct” defined as “a sexual act . . . with a person under 18 years of age [illegal under federal law] or . . . any commercial sex act . . . with [a minor]”).

⁴⁸ *Id.* § 2423(a) (applying to someone who “knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution”).

⁴⁹ *Id.* § 2422(b) (applying to a person who “using the mail or any facility or means of interstate or foreign commerce . . . knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense”).

⁵⁰ *Id.* § 2421 (applying to one who “knowingly transports any individual in interstate or foreign commerce . . . with intent that such individual engage in prostitution”).

⁵¹ *Id.* § 2422(a) (applying to a person who “knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce . . . to engage in prostitution”).

⁵² The vast majority of § 2421 prosecutions have been against pimps. See, e.g., *United States v. Wheeler*, 444 F.2d 385, 388–90 (10th Cir. 1971) (affirming conviction under § 2421 of defendant who transported women across state lines, where they engaged in prostitution, finding that his intent could be inferred through circumstantial evidence); *Stewart v. United States*, 311 F.2d 109, 111, 113 (9th Cir. 1962) (upholding the conviction under § 2421 of defendant who drove to various locations with a woman working in prostitution and knowingly lived on her earnings). The statute has also been used against traffickers. See, e.g., *United States v. Chang Da Liu*, 538 F.3d 1078, 1081–82 (9th Cir. 2008) (upholding convictions of defendants who recruited women from China with false promises of legitimate jobs and later forced them into prostitution). However, at least one example can be found of the statute being applied to johns as well. *United States v. Roeder*, 526 F.2d 736, 738 (10th Cir. 1975) (rejecting defendant’s contention that § 2421 “does not contemplate a single series of acts of intercourse” and affirming conviction for transporting a woman interstate to engage in sex and the filming of a pornographic movie for pay). Section 2422(a) has been applied to pimps, traffickers, and other sex abusers. See, e.g., *United States v. Singh*, 518 F.3d 236, 241–43 (4th Cir. 2008) (affirming convictions of owners and managers of inns who allowed use of their rooms for prostitution); *United States v. Orr*, 622 F.3d 864, 865–66 (7th Cir. 2010) (affirming conviction of defendant who tried to convince a male undercover officer, posing as a woman, to move in with “her” three- and five-year-old daughters “for the purpose of ‘training’ them to become sexual ‘slaves’”). No case was found in which § 2422(a) was charged against a john.

required; they are aimed at prostitution generally.⁵³ I do not discuss these provisions in further detail because they are more directed at those who control individuals in prostitution rather than at purchasers; efforts to amend them to explicitly address johns have failed.⁵⁴

In the john-focused category, many state statutes criminalize solicitation and patronization of prostitution as misdemeanors.⁵⁵ In the JTVs-as-traffickers category, there are many state statutes that track § 1591, which can now be interpreted as covering JTVs.⁵⁶ Lastly, there are many state statutes that explicitly apply to JTVs. Some state statutes criminalize solicitation and patronization of prostitution with a minor, either in stand-alone statutes⁵⁷ or by including sentencing enhancements in solicitation and patronization statutes if a minor is involved.⁵⁸ Other states broadly prohibit soliciting or patronizing a victim of human trafficking.⁵⁹ Prosecutors thus have a range of tools at their disposal for charging JTVs.

Yet, historically, the vast majority of JTVs have not been prosecuted at all, even under misdemeanor john-targeted statutes.⁶⁰ There are different theories for this lack of accountability. Johns generally may escape sanctions because of an entrenched philosophy that “men will be men” and that “the biological male need for sexual intercourse is potent and uncontainable.”⁶¹ Similarly, some describe prostitution

⁵³ However, § 2422(a) has often been charged in conjunction with § 1591 against sex traffickers. *See, e.g.*, United States v. Carpenter, No. 07-14724, 2008 U.S. App. LEXIS 12106, at *1 (11th Cir. June 3, 2008) (affirming defendant’s convictions under both § 1591 and § 2422(a)).

⁵⁴ *See* End Demand for Sex Trafficking Act of 2005, H.R. Res. 2012, 109th Cong., § 5 (2005) (adding “including a purchaser of commercial sexual activities”). If applied to JTVs, these statutes could provide useful sanctions when there is insufficient evidence to prove a victim was trafficked. These statutes would also apply to JTVs who transport or persuade *adult* victims. These sections do not require proof of force, fraud, or coercion, or knowledge thereof, which would be useful given the difficulty in proving knowledge that an adult victim has been compelled. Of course, this broad reach implicates the proportionality concerns discussed in Part II.A.

⁵⁵ *See* sources cited *infra* note 172 (providing examples of such laws).

⁵⁶ *See infra* Part II.B.

⁵⁷ *See infra* note 170 (providing examples of such statutes).

⁵⁸ *See infra* note 171 (providing examples of such statutes).

⁵⁹ *See infra* notes 176–82 (discussing such statutes).

⁶⁰ *See* Law, *supra* note 9, at 565–69 (noting that, at least in 2000, “[m]ost U.S. states impose more serious penalties on people who sell sex than on those who buy”); *see also* Michelle Tomes, *A Child Is Not a Commodity: Stopping Domestic Child Sex Trafficking*, 24 U. FLA. J.L. & PUB. POL’Y 213, 222 (2013) (“More often than not, the only punishment that the customers receive is a citation that is more like a ticket.”). In the Farley study, only 6% of the 103 men had ever been arrested for soliciting prostitution. FARLEY ET AL., *supra* note 43, at 22–23.

⁶¹ Yen, *supra* note 13, at 668. Johns who participated in a research study made statements such as, “It should be legalised over here. This is the way God created us . . . If

as a “victimless crime” that should not be an enforcement priority for police or prosecutors.⁶² These excuses apply with less force to JTVs, who are in fact purchasing sex with victimized persons. However, in the many cases in which trafficking is not discovered, this reasoning will protect JTVs who *appear* to be johns of consenting sex workers. Even when trafficking is discovered, prosecutors may choose to focus enforcement efforts on traffickers rather than JTVs in the spirit of catching the bigger fish, especially if there is no evidence that a JTV had knowledge of trafficking.

II

CURRENT APPROACHES TO SANCTIONING JTVs

This Part analyzes the main legislative approaches to sanctioning JTVs, evaluating them in light of certain criminal justice goals. First, I evaluate these legislative schemes for proportionality, meaning that the penalties should be at least roughly correlated to the harm caused and the intent, or lack thereof, of the perpetrators involved.⁶³ A law that applies to a broad range of conduct risks being disproportional as applied to some of that conduct.⁶⁴ Flexibility in sentencing can also be valuable when pursuing proportionality, although the criminal justice community debates the relative value of uniform punishments versus

you don't have a partner then you have to go to a prostitute.” FARLEY ET AL., *supra* note 43, at 8; *see also* VICTOR MALAREK, *The Johns: Sex for Sale and the Men Who Buy It* 13 (2011) (“It has been widely accepted that there will always be a group of women available to satisfy men’s biological needs. They are seen as a necessary evil, a sort of safety valve for when a man’s sexual urge reaches critical mass.”).

⁶² *See, e.g.*, Suzanne H. Jackson, *To Honor and Obey: Trafficking in “Mail-Order Brides,”* 70 GEO. WASH. L. REV. 475, 566 (2002) (noting this attitude).

⁶³ *See, e.g.*, JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* 178–88 (Prometheus Books 1988) (1781) (explaining that proportionality is important in criminal law because (a) the punishment must be large enough to outweigh the profit of the offense; (b) the punishment must not be too large, or the individual will be incentivized to choose a more serious offense; (c) the punishment ought to be adjusted to each offense such that “for every part of the mischief there may be a motive to restrain the offender from giving birth to it;” and (d) that punishment ought not to be more than is necessary to prevent the crime). Proportionality has also been justified on rehabilitative and retributivist grounds. *See* A.C. Ewing, *The Morality of Punishment* 105 (1929) (“[I]f a man is very severely punished for a comparatively slight offence . . . [it] will lead to self-pity and despair, or anger and bitterness, [and he will] thus gain[] no moral advantage from his punishment”); HYMAN GROSS, *A THEORY OF CRIMINAL JUSTICE* 436 (1979) (“[A]ny punishment in excess of what is deserved for the criminal conduct is punishment without guilt.”).

⁶⁴ For example, a state that has first-, second-, and third-degree rape laws, or separate murder and manslaughter laws, will achieve more proportionality in the application of those laws than states with one rape law or one homicide law.

judicial discretion in sentencing.⁶⁵ I also evaluate these laws for clarity: A law that is more explicit in its coverage is less likely to be applied to a situation unforeseen, and perhaps unintended, by the legislature. Additionally, although the empirical validity of deterrence is debated,⁶⁶ this Note assumes that it is a concept with some worth and vitality. Finally, I assume that laws ought to be enforceable. If a law is too difficult to use in prosecutions—if, for example, it requires proof of intent that rarely exists—then it will not be effective.

A. *John-Targeted Approach*

The general john-targeted approach takes a macro view of the prostitution industry and sex trafficking. The philosophy behind it is that demand for prostitution fuels the trafficking industry.⁶⁷ It follows that by targeting all johns with light sanctions, shaming, and education, demand for prostitution will go down, and the incidence of sex trafficking will as well. This approach assumes that criminal sanctions and shaming techniques will deter at least some johns,⁶⁸ who have traditionally faced criminal consequences for buying commercial sex only rarely.⁶⁹ Demand-reduction strategies have been increasingly popular,

⁶⁵ See, e.g., Mark Osler, *The Promise of Trailing-Edge Sentencing Guidelines to Resolve the Conflict Between Uniformity and Judicial Discretion*, 14 N.C. J.L. & TECH. 203, 205 (2012) (discussing “the [long-time] tension between judicial discretion and the uniformity of sentences”).

⁶⁶ See Susan N. Herman, *Measuring Culpability by Measuring Drugs? Three Reasons to Reevaluate the Rockefeller Drug Laws*, 63 ALB. L. REV. 777, 782 (2000) (noting, in the context of long sentences for drug offenses, that “[t]here has been surprisingly little empirical research seeking to determine whether such heavy sentences have a deterrent effect on drug abuse or incidental crime”).

⁶⁷ U.S. DEP’T OF STATE, OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, PREVENTION: FIGHTING SEX TRAFFICKING BY CURBING DEMAND FOR PROSTITUTION (2011) (“[I]f there were no demand for commercial sex, trafficking in persons for commercial sexual exploitation would not exist in the form it does today.”); Yen, *supra* note 13, at 666 (“Sex trafficking is an efficient market that is very responsive to its clients’ needs.”).

⁶⁸ In a survey of johns in Chicago, 87% said they would be deterred by having their photo or name published in a local paper, 83% by having their photo or name on a billboard, 83% by jail time, 79% by a letter sent to their families, 68% by large fines, 58% by community service, and 41% by john school. DURCHSLAG & GOSWAMI, *supra* note 12, at 24. The Farley study found similar results. A majority of johns said they would be deterred by being added to a sex offender registry (85%), billboard posts (85%), time in prison (84%), higher fines (80%), letters sent to family members (79%), greater criminal penalties (77%), or community service (72%). 47% said that being required to attend an educational program would deter them. FARLEY ET AL., *supra* note 43, at 22.

⁶⁹ See FARLEY ET AL., *supra* note 43, at 26 (reporting that only 6% of the 103 men surveyed “had ever been arrested for soliciting prostitution”); see also Tomes, *supra* note 60, at 222 (“More often than not, the only punishment that the customers receive is a citation that is more like a ticket.”). If sanctioned at all, purchasers of sex generally only receive misdemeanors, as solicitation and patronization of prostitution is usually treated as

especially among abolitionists, with over 825 U.S. cities and counties having engaged in demand-focused tactics as of 2012.⁷⁰

U.S. jurisdictions seeking to target demand have implemented several approaches. Some use “reverse sting” operations in which law enforcement officials place or use ads and arrest johns who respond, generally charging them with solicitation and patronization of prostitution misdemeanors.⁷¹ “John schools,” a popular element of demand-focused approaches,⁷² seek to deter johns by educating them about the coercion and violence in the prostitution industry⁷³ and the health risks of purchasing prostitution.⁷⁴ Shaming methods,⁷⁵ often utilized in conjunction with john school and low-level prosecutions, include the publication of names and addresses in a public forum,⁷⁶ often on billboards and in newspapers.⁷⁷

a victimless “vice” crime. *See, e.g.*, Joe Dowd, *D.A. Announces Prostitution Sting Aimed at Johns*, PLAINVIEW PATCH (June 3, 2013, 12:15 PM), http://patch.com/new-york/plainview/da-announces-prostitution-sting-aimed-at-johns_792582a4 (discussing an undercover sting operation called “Flush the Johns” that led to the arrest of 104 men for third-degree patronizing a prostitute, a misdemeanor that is punishable by up to one year in jail, although few, if any, of the men were likely to receive more than fines).

⁷⁰ SHIVELY ET AL., *supra* note 7, at ii. The demand-focused approach is often called the Swedish Model because Sweden pursued a strong demand-focused campaign with the Act Prohibiting the Purchase of Sexual Services in 1999. *Id.* at vi; *see also* SWEDISH MINISTRY OF INTEGRATION AND GENDER EQUALITY, INFO SHEET: ACTION PLAN AGAINST PROSTITUTION AND HUMAN TRAFFICKING FOR SEXUAL PURPOSES 2, *available at* http://www.ungift.org/doc/knowledgehub/resource-centre/Governments/Sweden_Infosheet_National_Action_Plan_Against_Human_Trafficking_en.pdf.

⁷¹ SHIVELY ET AL., *supra* note 7, at 37–48.

⁷² *See, e.g.*, SHIVELY ET AL., *supra* note 7, at 61–77 (discussing john schools); Yen, *supra* note 13, at 675–78 (describing educational programs aimed at males as a method to reduce demand for prostitution). The concept gained significant attention in San Francisco in 1995 with the First Offender Prostitution Program. SHIVELY ET AL., *supra* note 7, at 73; Yen, *supra* note 13, at 676.

⁷³ *See* Yen, *supra* note 13, at 673–74 (“[S]ome [johns] would be deterred from buying commercial sexual services if they fully understood the harmful effects on society and serious criminal consequences . . .”).

⁷⁴ The San Francisco john school reportedly reduced recidivism by over 40%. SHIVELY ET AL., *supra* note 7, at vi. However, john schools have been criticized as ineffective. *See* Berger, *supra* note 5, at 551 (discussing some of the criticisms of john schools); Ham, *supra* note 12, at 36 (“Research has found that ‘John schools’ or educational programs to ‘rehabilitate’ male customers may change attitudes but not behaviour, and have not shown to be a cost-effective strategy for reducing prostitution.”).

⁷⁵ *See generally* SHIVELY ET AL., *supra* note 7, at 48–53 (providing an overview of shaming tactics).

⁷⁶ Publication of names and addresses of convicted offenders was advocated by the End Demand for Sex Trafficking Act of 2005, H.R. 2012, 109th Cong. § 4(b)(1)(C) (2005).

⁷⁷ *See* HUGHES, *supra* note 14, at 42–43 (describing a project in Omaha, Nebraska that involved publication and posting the names of convicted johns on billboards); Larry Neumeister, *Public Shaming of Prostitution Clients a Growing Trend, Can Harm Families*, HUFFINGTON POST, (Oct. 14, 2012, 10:06 AM), http://www.huffingtonpost.com/2012/10/14/shaming-prostitute-patrons-johns-public_n_1964925.html (discussing jurisdictions pursuing

1. Benefits

The john-focused approach has many advantages when applied to JTVs. First, some argue that the dichotomy between JTVs and other johns is artificial, since many JTVs do not know that they are purchasing sex with trafficking victims.⁷⁸ As a result, treating a JTV differently from a john who bought sexual services from a nontrafficked sex worker may seem unfair or disproportionate.

Secondly, from a deterrence standpoint, there is evidence that johns, and presumably JTVs as well, are deterred by low-level sanctions. Eighty-three percent of johns reported that having their photo and name on a billboard would deter them, the exact same percentage that reported that jail time would deter them.⁷⁹ If this is true, there may not be a deterrence advantage to imposing serious penalties on JTVs when low-level sanctions would suffice.

Third, from an enforceability standpoint, it will often be resource intensive to determine which johns are JTVs.⁸⁰ Additionally, where legislation targeted at JTVs does not impose a strict liability standard, it will be difficult to prove that JTVs had the required mental state for increased culpability. Thus it may be better to allocate law enforcement and prosecutorial resources to focusing on general sanctions against johns in order to reduce demand for prostitution on a macro scale and combat sex trafficking.

2. Shortcomings

Despite these benefits, general john-focused campaigns are an incomplete strategy for sanctioning JTVs. First, the penalties of john-focused campaigns are disproportionately low in relation to the harm inflicted by JTVs. One day of john school and a clean criminal record does not provide a sufficient sanction for someone whose "partner"

such measures). There is evidence that such postings may be effective deterrents for johns. See sources cited *supra* note 68. According to one CNN broadcast, there was a 42% drop in arrests following the postings in Omaha, Nebraska. *Paula Zahn Now: The State of the States, American Stories* (CNN television broadcast Feb. 1, 2005). However, these tactics are controversial, implicating due process concerns and potentially harming the family members of the johns targeted. SHIVELY ET AL., *supra* note 7, at 51–52. A related approach is to send "Dear John" letters to the homes of men arrested for prostitution offenses. *Id.* at 53–55 (discussing these letters). Some jurisdictions impound johns' cars and revoke their driver's licenses. *Id.* at 55–57 (describing the success of vehicle seizures and driver's license suspension as tactics to combat demand); Law, *supra* note 9, at 567 (noting the increased use of these sanctions in communities during the 1990s); see also Lefler, *supra* note 6, at 27–30 (describing the benefits and criticisms of these practices).

⁷⁸ See *supra* note 42 (explaining why many JTVs will not be aware of a victim's status).

⁷⁹ DURCHSLAG & GOSWAMI, *supra* note 12, at 24.

⁸⁰ See SHIVELY ET AL., *supra* note 7, at 4 (noting the difficulty in addressing sex trafficking and prostitution separately when combating demand).

has not consented to the sex act.⁸¹ Concerns about punishing JTVs who thought they were engaging in a consensual act can be mitigated by imposing more stringent mens rea requirements on JTV-targeted legislation.⁸² However, even if strict liability regarding age is imposed, the legal system has upheld analogous provisions in the context of sex with minors.⁸³ At the least, JTVs with knowledge or strong suspicion of a victim's trafficked status deserve higher penalties than johns who purchase sex from consenting sex workers. Employing a john-targeted approach in isolation overlooks this fact.

Relatedly, JTVs will plausibly be more deterred by long prison sentences than by low-level fines.⁸⁴ Although, as noted above, the empirical validity of deterrence is disputed, if johns knew that a mistake about a sex worker's age could result in a ten- or fifteen-year mandatory minimum jail sentence,⁸⁵ it is likely that at least some of them would be afraid to take the chance.

Second, demand-focused campaigns are unlikely to gain the support of pro-legalization advocates who disagree with their underlying premises, so it will probably be difficult to reach consensus on such measures.⁸⁶ In contrast, both sides of the legalization debate agree that sex trafficking is a serious problem.⁸⁷ Some pro-legalization advocates support criminal sanctions against JTVs, despite objecting to the punishment of "clients" of autonomous sex workers.⁸⁸ Therefore, if

⁸¹ See Tiffanie N. Choate, Comment, *Protecting the Lydias, Linas, and Tinas from Sex Trafficking: A Call to Eliminate Ambiguities of 18 U.S.C. § 1591*, 65 OKLA. L. REV. 665, 701–02 (2013) (explaining, in the context of arguing for a strict liability interpretation of § 1591(c), that “[a]t its core, sex trafficking of a minor is sexual assault” and “[w]hether 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 consent’”).

⁸² See *infra* Part III.C (discussing the arguments for and against different mens rea standards for JTV-targeted legislation).

⁸³ Statutory rape legislation, the Mann Act, and some child pornography legislation all impose strict liability for the age element of the crimes. See *infra* notes 146, 167, 208.

⁸⁴ See Samantha Healy Vardaman & Christine Raino, *Prosecuting Demand as a Crime of Human Trafficking: The Eighth Circuit Decision in United States v. Jungers*, 43 U. MEM. L. REV. 917, 952–53 (2013) (arguing, in the context of the proper penalties for JTVs, that “strong sentences” lead to “maximum deterrence”). *But cf.* Herman, *supra* note 66, at 782 (noting scant empirical evidence that harsh sentences for drug offenses deters “drug abuse or incidental crime”).

⁸⁵ The JTV-as-traffickers approach imposes such mandatory minimums at the federal level. See *infra* Part II.B.

⁸⁶ See *supra* notes 34–40 (discussing the disagreement between pro-legalization advocates and abolitionists on how to treat johns of consensual sex workers).

⁸⁷ See MacKinnon, *supra* note 9, at 271 (“No one defends trafficking. There is no pro-sex trafficking position any more than there is a public pro-slavery position for labor these days.”).

⁸⁸ See Berger, *supra* note 5, at 569 (after advocating against john-focused approaches, stating that, “[i]n addition, laws that punish men who knowingly buy sex from trafficked

JTVs are treated as a separate group, rather than conflated with all johns, some consensus may be possible regarding the approach for sanctioning JTVs.

Finally, from a practical enforcement standpoint, the fact that it often will be difficult to distinguish JTVs from johns is a weak excuse for not doing so in the cases in which it is possible. Although Professor Michael Shively and his colleagues argue that “[i]t is not feasible to develop separate interventions for men buying compelled sex and for those buying sex from people who are not compelled by a third party,”⁸⁹ they also point out that “it is possible to form separate laws that provide penalty enhancements for men who buy sex from trafficked persons.”⁹⁰ They also discuss the success of reverse sting operations,⁹¹ which can often be used to find JTVs of minors and supply proof of intent. Finally, if strict liability regarding age is imposed for such JTVs, the practical impediments to prosecuting them are greatly reduced.⁹² For all of these reasons, while the john-focused approach is perhaps a good strategy for reducing demand for prostitution, it is not a sufficient or complete tool for addressing JTVs.

B. *JTVs-as-Traffickers Approach*

JTVs can be prosecuted as traffickers under two main types of statutes. First, some states, when listing actions that qualify as sex trafficking, include verbs that explicitly apply to JTVs such as “solicits,”⁹³ “purchases,”⁹⁴ or “maintain the use of.”⁹⁵ In contrast, the federal sex-trafficking law and a majority of state laws do not contain these words,

and exploited women may be a beneficial tool for combating the harms of prostitution”); Law, *supra* note 9, at 524, 572–79 (arguing for a regime in which prostitution is decriminalized, but statutory rape, rape, and domestic violence laws are “mobilized” to address exploitation and violence against sex workers); Ham, *supra* note 12, at 7 (stating that “[s]ex workers’ rights groups and anti-trafficking allies have tried to shift the concept of ‘demand’ in a more rights-based direction by trying to reduce the demand for unprotected paid sex . . . , reducing the demand for exploitative labour . . . and increasing awareness among . . . clients about treating sex workers respectfully and ethically”).

⁸⁹ SHIVELY ET AL., *supra* note 7, at 4.

⁹⁰ *Id.* at 4 n.12. Furthermore, in the case of JTVs who purchase sex with minors, Shively et al. acknowledge that “there are already separate laws for commercial sex with children, which is always human trafficking.” *Id.*

⁹¹ *Id.* at 37–48.

⁹² See *infra* Part III.C.2.

⁹³ *E.g.*, ARK. CODE ANN. § 5-18-103(a)(4) (2013); R.I. GEN. LAWS § 11-67-6(b)(1) (2014).

⁹⁴ *E.g.*, TENN. CODE ANN. § 39-13-309(a)(2) (2014); WASH. REV. CODE ANN. § 9A.40.100(1)(a) (West 2014); OKLA. STAT. ANN. tit. 21, § 748(A)(6)(b) (West 2015).

⁹⁵ *E.g.*, LA. REV. STAT. § 14:46.3(A)(1) (LEXIS through 2014 Reg. Sess.).

leaving any argument that JTVs should be prosecuted as traffickers to rest on interpreting the ambiguous language of these statutes.⁹⁶

There has been extensive debate over whether § 1591 was intended to cover johns. Commentators are divided, with some stating the inclusion of JTVs as an undisputed fact,⁹⁷ and others criticizing the TVPA for *not* including a provision targeting JTVs.⁹⁸ Similarly ambiguous, § 2423(a) and § 2422(b) of the Mann Act apply most clearly to traffickers, but could be read to apply to JTVs as well. This Subpart focuses primarily on the approach of charging JTVs under § 1591, because it is the approach that is being pursued by federal prosecutors and several states. Furthermore, because legislation pending in Congress at the time of printing seeks to amend § 1591 to officially establish the JTV-as-trafficker approach in all federal cases,⁹⁹ evaluating the benefits and drawbacks of such an approach is an especially important exercise at this time.

In 2013, the Eighth Circuit Court of Appeals held in *United States v. Jungers* that § 1591 does not contain a “customer exception,”¹⁰⁰ meaning that it can apply to JTVs. After responding to fake online advertisements and agreeing to pay for sex with an eleven-year-old in

⁹⁶ Federal law and many of the state laws use the verb “obtains” or the phrase “benefits . . . by receiving anything of value, from participation in a [sex trafficking] venture” See, e.g., 18 U.S.C. § 1591(a); COLO. REV. STAT. § 18-3-504(2)(a) (2014) (using the verbs “sells, recruits, harbors, transports, transfers, isolates, entices, provides, receives, obtains by any means, maintains, or makes available”); § 720 ILL. COMP. STAT. ANN. § 5/10-9(d) (West 2014) (applying to one who “recruits, entices, harbors, transports, provides, or obtains by any means,” attempts to do so, or “benefits, financially or by receiving anything of value” in a trafficking venture); KAN. STAT. ANN. § 21-5426(a)(1)–(2) (2013) (applying to “recruitment, harboring, transportation, provision or obtaining” a sex trafficking victim or “intentionally benefitting financially or by receiving anything of value from participation in a venture that the person has reason to know has engaged in [such acts]”); WIS. STAT. ANN. § 940.302(1)(d) (West 2014) (defining trafficking as “recruiting, enticing, harboring, transporting, providing, or obtaining” someone for commercial sex without their consent). A few states with such language have provisions explicitly exempting JTVs, although this is the exception. See, e.g., MINN. STAT. ANN. § 609.322(1)–(1a) (West 2015) (exempting an individual from criminal liability for sex trafficking if he or she acted “as a prostitute or patron”); OHIO REV. CODE ANN. § 2905.32(C) (West 2014) (“In a prosecution under [the trafficking in persons statute], proof that the defendant engaged in sexual activity with any person, or solicited sexual activity with any person, whether or not for hire, without more, does not constitute a violation of this section.”).

⁹⁷ See, e.g., Marihug Cedeño, Note, *Pimps, Johns, and Juvenile Prostitutes: Is New York Doing Enough to Combat the Commercial Sexual Exploitation of Children?*, 22 CORNELL J.L. & PUB. POL’Y 153, 178 (2012) (“Under TVPA, buyers—much like traffickers—face ten years to life in prison if the victim is under the age of eighteen.”).

⁹⁸ Tomes, *supra* note 60, at 218 (“One major flaw in the TVPA is that it ignores the role of the people buying sex from sexually exploited childrenCongress is allowing these criminals to go free without consequences.”).

⁹⁹ See *infra* note 114.

¹⁰⁰ *Jungers*, 702 F.3d 1066, 1068, 1075.

one case,¹⁰¹ and fourteen-year-old twins in the other,¹⁰² defendants were arrested in a reverse sting and found guilty of attempted sex trafficking under 18 U.S.C. § 1591.¹⁰³ The district courts reversed their convictions, holding that § 1591 only applied to suppliers, and not to JTVs.¹⁰⁴ The district courts that separately heard these defendants' cases emphasized that, when viewed holistically in light of the statutory scheme¹⁰⁵ and evidence of congressional intent, it was clear that the statute did not cover JTVs.¹⁰⁶ One of the district courts, in *United States v. Bonestroo*, reasoned that § 1591 was “enacted to punish members of sex-trafficking rings and those who treat human beings as commodities to be bought and sold, not those who temporarily use children to satisfy their prurient interests.”¹⁰⁷

The Eighth Circuit reversed, holding that § 1591 encompassed purchasers.¹⁰⁸ It reasoned that “the expansive language of § 1591 ‘criminalizes a broad spectrum’ of conduct relating to the sex trafficking of children.”¹⁰⁹ To expose the error of the “defendants’ fixation on the distinction between suppliers and purchasers,”¹¹⁰ the Court described two hypothetical situations. In the first, a purchaser pays \$1000 to take a fourteen-year-old on a trip, for companionship and a sex act; in the second, the fourteen-year-old asks a friend to

¹⁰¹ *United States v. Jungers*, 834 F. Supp. 2d 930, 930–31 (D.S.D. 2011), *rev'd and remanded*, 702 F.3d 1066 (8th Cir. 2013).

¹⁰² *See Jungers*, 702 F.3d at 1068 (providing a more in-depth factual background of the *Bonestroo* case); *United States v. Bonestroo*, No. CR 11-40016-01-KES, 2012 U.S. Dist. LEXIS 981, at *1–2 (D.S.D. Jan. 4, 2012), *rev'd and remanded sub nom. Jungers*, 702 F.3d 1066. The Eighth Circuit case consolidated the district court cases of Daron Lee Jungers and Ronald Bonestroo. *Id.* at 1067.

¹⁰³ *Jungers*, 702 F.3d at 1067–68.

¹⁰⁴ *Bonestroo*, 2012 U.S. Dist. LEXIS 981, at *21–22; *Jungers*, 834 F. Supp. 2d at 933–34.

¹⁰⁵ For example, the *Bonestroo* court referenced the statute’s title section (“Peonage, Slavery, and Trafficking in Persons”), subchapter title (“Sex trafficking of children or by force, fraud, or coercion”), and placement between two other statutes addressing traffickers. *Bonestroo*, 2012 U.S. Dist. LEXIS 981, at *13–14.

¹⁰⁶ *See Jungers*, 834 F. Supp. 2d at 933 (concluding after a textual analysis of § 1591 that “the purpose of § 1591 is to punish sex traffickers and that Congress did not intend to expand the field of those prosecuted under that statute to those who purchase sex made available by traffickers”). The courts also referenced statutes explicitly criminalizing commercial sex with a minor, such as § 2422(b), § 2423, and § 2243, to demonstrate that Congress knew there were other remedies for such conduct, and that it knew how to use clear language to criminalize such action. *See Bonestroo*, 2012 U.S. Dist. LEXIS 981, at *14–19; *Jungers*, 834 F. Supp. 2d at 933; *see also* 18 U.S.C. § 2243 (2012) (prohibiting “knowingly engag[ing] in a sexual act with another person who . . . has attained the age of 12 years but has not attained the age of 16 years; and is at least four years younger than the person so engaging” within exclusive federal jurisdiction).

¹⁰⁷ *Bonestroo*, 2012 U.S. Dist. LEXIS 981, at *21.

¹⁰⁸ *United States v. Jungers*, 702 F.3d 1066, 1069 (8th Cir. 2013).

¹⁰⁹ *Id.* at 1070–71 (pointing especially to the words “whoever,” “any,” and “obtains”).

¹¹⁰ *Id.* at 1073.

drive her to the purchaser's house before the trip begins. The Court reasoned that it doubted that Congress intended that the purchaser would not be guilty of sex trafficking under § 1591, but that the victim's friend would be.¹¹¹ Acknowledging that it "may make some sense analytically" to limit § 1591 to suppliers, and that Congress may have had only suppliers in mind, the Court nevertheless declined to limit the statute.¹¹²

Jungers has the potential to dramatically expand the reach of the TVPA and state anti-trafficking legislation. As of 2013, twenty-five states had human trafficking laws that tracked the language of the federal law in using the word "obtains."¹¹³ Although *Jungers* specifically addressed JTVs who purchase sex with minors, the Court's reasoning could extend to JTVs who purchase sex with nonconsenting adults as well.

At the time of printing, legislation was pending in both the Senate and the House of Representatives that would codify *Jungers* and add the words "patronizes" and "solicits" to § 1591.¹¹⁴ If such legislation passes, the JTV-as-trafficker approach would be unambiguously available to all federal prosecutors.

In addition to § 1591, two Mann Act provisions that impose ten-year mandatory minimum sentences—§ 2422(b)¹¹⁵ and § 2423(a)¹¹⁶—use language broad enough to apply to JTVs¹¹⁷ and noncommercial

¹¹¹ *Id.* at 1072–73.

¹¹² *Id.* at 1074. The *Jungers* court also referenced statutes in which Congress explicitly made exceptions for particular groups, concluding that if it had intended to include a purchaser's exception, it knew how to do so. *Id.* at 1075.

¹¹³ Vardaman & Raino, *supra* note 84, at 953.

¹¹⁴ H.R. 181, 114th Cong. § 6 (2015) (as referred in Senate, Feb. 4, 2015); S. 140, 114th Cong. § 2 (2015) (as introduced in Senate Jan. 8, 2015). These bills also would explicitly make § 1591 strict liability regarding the age of a minor victim. H.R. 181, § 6; S. 140, § 2. For a discussion of the current ambiguity regarding whether § 1591 imposes strict liability, see note 128, *infra*.

¹¹⁵ 18 U.S.C. § 2422(b) (2012) (prohibiting using the mail or other "facility or means of interstate or foreign commerce" to "persuade[, induce[, entice[, or coerce[] . . . [a minor], to engage in prostitution, or any sexual activity for which any person can be charged with a criminal offense"). While most Mann Act provisions require crossing state lines, § 2422(b) does not, because the Internet is a "facility of interstate commerce." See *United States v. Tykarsky*, 446 F.3d 458, 470 (3d Cir. 2006) (reaching this conclusion); see also *United States v. Faris*, 583 F.3d 756, 758–59 (11th Cir. 2009), *superseded in part on other grounds by United States Sentencing Comm'n*, Amendment 732, *as recognized in Van Velkinburgh v. United States*, 2014 U.S. Dist. LEXIS 19808, *9 (N.D. Miss.).

¹¹⁶ 18 U.S.C. § 2423(a) (prohibiting "knowingly transport[ing] [a minor]" across state lines "with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense").

¹¹⁷ See, e.g., *United States v. Murrell*, 368 F.3d 1283, 1284–85 (11th Cir. 2004) (affirming the conviction under § 2422(b) of a man who offered to pay an undercover officer posing as a minor's father for sex with the minor).

sex abusers.¹¹⁸ However, the plain language, referring to *causing* someone to “engage in prostitution,”¹¹⁹ seems to fit most naturally with sex trafficking;¹²⁰ a victim is generally already engaging in prostitution when a JTV enters the picture to purchase sex. The strongest evidence that these two sections of the Mann Act were not targeted at JTVs is the language of § 2423(b), the section of the Act that does explicitly apply to JTVs. Section 2423(b) prohibits traveling to engage in “illicit sexual conduct,” which it defines as an illegal sexual act with a minor *or* “any commercial sex act” with a minor.¹²¹ It would be strange for the Mann Act to define the “illicit sexual conduct” of a JTV and then omit that definition from other sections of the Act also intended to reach JTVs. It seems more likely that these two provisions are not targeted at JTVs, but, like § 1591, may nevertheless apply to JTVs if the ambiguous language of the statute is interpreted to include JTVs. The rest of this Section will focus primarily on § 1591, but most of the arguments apply with equal strength to these Mann Act provisions.

1. *Benefits*

The JTVs-as-traffickers approach is appealing for many reasons. First, JTVs are not categorically less culpable than traffickers. Often JTVs will cause the most egregious harm to a sex-trafficking victim—raping, sexually and physically abusing, or demeaning and objectifying him or her.¹²² There will be situations, such as the one raised in the hypothetical in *Jungers*,¹²³ in which someone who is technically a trafficker is much *less* culpable than the JTV who has paid for the opportunity to rape an underage victim. While trafficking victims are often

¹¹⁸ See, e.g., *United States v. Zahursky*, 580 F.3d 515, 517 (7th Cir. 2009) (affirming the § 2422(b) conviction of a man who solicited an undercover federal agent for sex in an adult chatroom).

¹¹⁹ 18 U.S.C. § 2422(a),(b); 18 U.S.C. § 2423 (a).

¹²⁰ Both statutes have frequently been used to charge traffickers. See, e.g., *United States v. Rashkovski*, 301 F.3d 1133, 1135 (9th Cir. 2002) (affirming conviction of defendant under § 2422(b) who helped smuggle women into the United States and then coerced them with threats to engage in prostitution); *United States v. Robinson*, No. 05-CR-443, 2007 U.S. Dist. LEXIS 17629, at *28–31 (M.D. Pa. Mar. 14, 2007) (discussing the very close relationship between § 1591 and § 2423(a), and noting that “the Court has difficulty imagining many situations where interstate transportation conduct found to violate 18 U.S.C. § 1591 would not also violate 18 U.S.C. § 2423(a)”).

¹²¹ 18 U.S.C. § 2423(b), (f) (2012) (defining this term).

¹²² See *Hotaling & Levitas-Martin*, *supra* note 40, at 123 (finding that while 93% of minors in prostitution reported being beaten by a john, just over half reported being regularly beaten by their pimp).

¹²³ *United States v. Jungers*, 702 F.3d 1066, 1072–73 (describing the hypothetical situation in which someone who is technically a trafficker under the statute is less culpable than the JTV).

punished, JTVs—even those who have specifically requested minors—are able to slip away into the darkness of anonymity.

The JTV-as-trafficker approach is one answer to this problem. Especially considering the ambiguity of the language and legislative history of § 1591,¹²⁴ it is not unreasonable to read these statutes to cover JTVs. As such, this approach can be viewed as a creative way to close the loophole of JTV impunity. Furthermore, if Congress passes legislation explicitly extending § 1591 to JTVs, it will effectively endorse this approach and remove any questions about legislative intent.

Second, some state statutes support the argument that JTVs may be equated with traffickers for purposes of punishment. Some of these statutes impose serious mandatory minimums on JTVs,¹²⁵ and other statutes impose the same penalty for patronizing a minor as they do for promoting prostitution of a minor.¹²⁶

2. Shortcomings

However appealing it might be to bind the fates of JTVs to those of traffickers, doing so limits the ability of legislatures and courts to impose proportional and flexible sanctions upon JTVs. First, the 2008 amendments to § 1591, in addition to lowering the mens rea requirement from knowing to reckless, added a “reasonable opportunity to

¹²⁴ See *supra* notes 100–15.

¹²⁵ See, e.g., LA. REV. STAT. ANN. § 14:82.1(D)(1)–(2) (2013) (imposing fifteen- and twenty-five-year mandatory minimum sentences on certain adults who have sex with minors in prostitution); MONT. CODE ANN. § 45-5-601(3)(a)(i) (2013) (subjecting a patron of prostitution with a minor to a mandatory minimum sentence of twenty-five years, along with other penalties, when the patron is over eighteen years old); OKLA. STAT. ANN. tit. 21, § 748(C) (West 2015) (imposing a ten-year minimum sentence on those who knowingly purchase sexual services from a minor victim).

¹²⁶ Compare N.C. GEN. STAT. ANN. § 14-205.2(c) (West 2014) (identifying patronization of a prostitute as a Class F felony), with *id.* § 14-205.3 (identifying promoting prostitution as a Class F felony, unless higher penalties apply). However, sex trafficking of a minor is a more serious offense. See *id.* § 14-43.11(b) (identifying human trafficking as a Class C felony where the victim is a child, versus a Class F felony where the victim is an adult). Depending on prior records, a Class C felony in North Carolina carries a punishment between 58 and 146 months, while a Class F felony carries a punishment between 13 and 33 months. See North Carolina Felony Punishment Chart, September 9, 2013, available at http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/FelonyChart_1013MaxChart.pdf [hereinafter Felony Punishment Chart]. Idaho prohibits inducing or attempting to induce a minor into prostitution. IDAHO CODE ANN. § 18-5609 (2014) (imposing a two-year minimum sentence, fine, or both as punishment for such acts). It provides the same penalties for someone who “exchanges or offers to exchange anything of value for sexual conduct or sexual contact with a person under the age of eighteen.” *Id.* § 18-5610(1) (providing for the same punishment as § 18-5609). The penalty for human trafficking in Idaho is a maximum of twenty-five years. See *id.* § 18-8603.

observe” provision¹²⁷ that may impose strict liability regarding a minor victim’s age.¹²⁸ As a result of these amendments, extending § 1591 to JTVs means that every man who purchases sex with a seventeen-year-old, despite honestly and reasonably believing that he has purchased sex with a consenting adult, will be subject to a ten-year mandatory minimum sentence.¹²⁹ The House and Senate bills under consideration at the time of printing would explicitly establish such a strict liability standard.¹³⁰ While imposing such a sentence on the *Jungers* defendants—who *purposefully* purchased sex with eleven- and fourteen-year-olds¹³¹—may seem appropriate, the sweep of § 1591(c) extends far past those who intend to abuse children to those

¹²⁷ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110–457, 122 Stat. 5069 (codified as amended at 18 U.S.C. § 1591(c) (2012) (“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.”).

¹²⁸ See *United States v. Robinson*, 702 F.3d 22, 26–27 (2d Cir. 2012) (holding that § 1591 “imposes strict liability with regard to the defendant’s awareness of the victim’s age, thus relieving the government’s usual burden to prove knowledge or reckless disregard of the victim’s underage status under § 1591(a)” even though the seventeen-year-old victim testified that she told “everybody” that she was 19 years old); *United States v. Mack*, No. 1:13CR287, 2014 U.S. Dist. LEXIS 12198, at *13 (N.D. Ohio Jan. 31, 2014) (holding that the *scienter* requirement of § 1591 can now be met by proving that “(1) the defendant possessed actual knowledge of the victim’s underage status; (2) the defendant recklessly disregarded that fact; or (3) the defendant had a reasonable opportunity to observe the victim”). *But see* *United States v. Wilson*, No. 10-60102-CR-ZLOCH/ROSENBAUM, 2010 U.S. Dist. LEXIS 75149, at *19 (S.D. Fla. July 27, 2010) (“[W]here the Government elects to proceed under the reckless disregard level of *mens rea*, Section 1591(c) requires the Government to prove beyond a reasonable doubt not only that the defendant acted in reckless disregard, but also that the defendant had a reasonable opportunity to observe the person recruited.”). The current legislation pending in Congress would codify the *Robinson* approach in addition to codifying *Jungers*. See *supra* note 114 and accompanying text (describing these developments).

¹²⁹ See 18 U.S.C. § 1591(b) (applying a fifteen-year mandatory minimum to those who traffic a minor under fourteen years of age or use force, fraud, or coercion to traffic an adult, and a ten-year mandatory minimum to those who traffic a minor between fourteen and eighteen years of age without the use of fraud, force, or coercion).

¹³⁰ See *supra* note 114 (discussing this change).

¹³¹ Defendant Daron Lee Jungers faced a statutory minimum sentence of fifteen years because of the age of his victim. See *id.* Jungers is believed to have committed suicide the day before his sentence. See Jeff Reinitz, *Man Found Dead in Car Was Awaiting Hearing*, WATERLOO-CEDAR FALLS COURIER, Jan. 29, 2013, at A9. Ronald Bonestroo was sentenced to ten years in prison. Associated Press, *Iowa Man Sentenced in SD for Sex Trafficking*, ABERDEEN NEWS (June 18, 2013, 12:00 AM), http://www.aberdeennews.com/news/iowa-man-sentenced-in-sd-for-sex-trafficking/article_6b7d6bf0-ca4c-5846-a1a3-18369db0d419.html.

who believe they are engaging in an act that, albeit illegal, many consider to be a victimless crime.¹³²

Similarly, there is a stronger rationale for applying strict liability to traffickers than to JTVs. Traffickers often spend significant time with their victims; they usually have recruited them and continue to exercise control over them.¹³³ While it is possible that a minor could lie to an oblivious pimp about her age, it is more likely that he has coached her to lie. In contrast, a JTV generally encounters a trafficking victim briefly and is less likely to know or be able to verify her age. Interpreting § 1591 as strict liability makes sense as a way to facilitate successful prosecutions of traffickers, who usually know their victims' ages, even where there is no proof of such knowledge. In contrast, applying strict liability to JTVs will subject many to a ten-year mandatory minimum sentence, when they expected to face a fine at most. Imposing such large mandatory minimums upon JTVs removes a sentencing judge's discretion to consider varying circumstances and impose what she views as the just sentence, thus creating a rigid and inflexible system.¹³⁴

While this Note advocates strict liability regarding the age of minor victims in JTV-tailored legislation, it substantially mitigates the problems of § 1591 by proposing lower sentences without mandatory minimums for JTVs who have not acted with knowledge or reckless disregard. Under the proposed legislation, a JTV who is reasonably and honestly mistaken about age will face criminal liability, just as he would for statutory rape, and yet a judge will have the flexibility to impose a sentence that she finds appropriate in light of the circumstances, including the JTV's mental state.

Surveying the legislative landscape provides further indications that the JTV-as-trafficker approach is disproportionate. At both the federal and state levels, laws that explicitly impose separate penalties

¹³² See, e.g., *Alexander v. DeAngelo*, 329 F.3d 912, 915 (7th Cir. 2003) (theorizing that prostitution is a victimless crime).

¹³³ See *supra* notes 29–33 (discussing traffickers' methods of control over victims).

¹³⁴ Courts have used discretion to mitigate sentences when they have found that a defendant reasonably believed a minor victim was a consenting adult, even when consent of the victim is not a defense. See, e.g., *State v. Brooks*, 739 So. 2d 1223, 1225 (Fla. Dist. Ct. App. 1999) (affirming mitigation for the reasonable mistake of age of a defendant who purchased sex with a thirteen-year-old because “[a]lthough the victim in this case was young, her actions bespeak a maturity far beyond her years”). While *Brooks* was likely wrongly decided in light of the victim's very young age, see *id.* at 1225–26 (Thompson, J., concurring in part and dissenting in part), there are situations in which such a consideration could be relevant. See, e.g., *State v. Rife*, 789 So. 2d 288, 290 (Fla. 2001) (affirming a similar downward departure in sentencing for a conviction for sexual battery of a minor in which the victim was seventeen).

on JTVs and traffickers generally impose lower sentences on JTVs.¹³⁵ For example, for an offender with little to no criminal history, the U.S. Sentencing Guidelines recommend a baseline sentence of 51 to 63 months for crossing state lines to engage in prostitution with a minor,¹³⁶ but 97 to 121 months for trafficking a minor between the ages of fourteen to eighteen, and 151 to 188 months for trafficking a younger minor or an adult with force, fraud, or coercion.¹³⁷ This reflects a view among policymakers that JTVs are generally, if not always, less culpable than traffickers.¹³⁸

Finally, the JTVs-as-traffickers approach is problematic because it dilutes the term “human trafficking” by broadening it to include conduct that many would find to be less culpable than trafficking.¹³⁹

¹³⁵ Section 2423(b), unlike § 1591, does not impose a mandatory minimum sentence, and includes an affirmative defense for reasonable mistake of age. *See* 18 U.S.C. § 2423(g) (2012) (providing a reasonable mistake of age affirmative defense for “illicit sexual conduct”). *Compare, e.g.*, DEL. CODE ANN. tit. 11, § 787(b)(4) (2014) (establishing that patronizing a victim of sexual servitude is a Class D felony, or a Class C felony if the victim is a minor), *and id.* § 4205(b)(3)–(4) (2007) (identifying that a Class D felony carries an eight-year maximum sentence, while a Class C felony has a fifteen-year maximum sentence), *with id.* § 787(b)(3) (2014) (establishing the offense of sexual servitude as a Class C felony that becomes a Class B felony if the victim is a minor), *and id.* § 4205(b)(2)–(3) (2007) (identifying that a Class B felony provides a sentence of two to twenty-five years, while a Class C felony carries a fifteen-year maximum sentence). Indiana imposes a sentence of one to six years for knowingly or intentionally paying for an individual who the person knows has been forced into prostitution, or for solicitation of a child for sexual conduct, and a sentence of two to thirty years for offenses that constitute sex trafficking. *See* IND. CODE ANN. §§ 35-42-3.5-1, -4 (West 2012); IND. CODE ANN. §§ 35-50-2-4.5, -2.5, -2-5.5, -2-6. Iowa imposes a five-year maximum penalty for those who “knowingly engage[] in human trafficking by soliciting services or benefiting from the services of a victim,” with some exceptions. IOWA CODE ANN. § 710A.2(4) (West 2014) (identifying this crime as generally being a Class D felony); § 902.9(1)(e) (providing a five-year maximum sentence for Class D felonies). It imposes a ten-year sentence if the victim is a minor. § 710A.2(4) (identifying this crime as being a Class C felony); § 902.9(1)(e) (providing a ten-year maximum sentence for Class C felonies). It imposes a ten-year maximum if the person causes or threatens to cause injury to the victim while engaging in human trafficking, § 710A.2(2) (identifying this crime as being a Class C felony); § 902.9(1)(e) (providing a ten-year maximum sentence for Class C felonies), and a maximum of twenty-five-years if the victim is a minor. § 710A.2(2) (identifying this crime as being a Class B felony); § 902.9(1)(e) (providing a twenty-five-year maximum sentence for Class B felonies).

¹³⁶ U.S. SENTENCING GUIDELINES MANUAL § 2G1.3(a)(4) (2014) (establishing this range as the baseline sentence for § 2423(b)).

¹³⁷ *Id.* § 2G1.3(a)(1)–(2) (establishing this range as the baseline sentence for § 1591). A congressional codification of *Jungers* would be a departure from this more proportional approach.

¹³⁸ Although it could be argued that Congress (and state legislatures) intended “obtains” to cover JTVs, demonstrating political consensus to treat them as traffickers, ambiguity on this point makes it a weaker claim.

¹³⁹ *See infra* Part II.D (discussing the penalties imposed by state statutes that specifically target JTVs).

By encompassing JTVs in the term “traffickers,” it may be more difficult to impose very serious sanctions against traffickers generally, because those who view JTVs as less culpable than traffickers will object. For example, in the absence of congressional amendments to § 1591, courts evaluating whether sex-trafficking statutes impose strict liability regarding victims’ ages¹⁴⁰ may be more reluctant to find strict liability if sex-trafficking statutes are simultaneously being interpreted to cover JTVs, as in *Jungers*.¹⁴¹ Since federal courts are still split on whether § 1591(c) imposes strict liability regarding age and whether § 1591 encompasses JTVs, resolution of the second issue in the affirmative could influence courts to answer the first question in the negative. Thus, including JTVs in the trafficking statute could ultimately backfire and lead to reduced penalties for those who commit the acts that are more conventionally viewed as sex trafficking.

C. *Noncommercial Sex Offenders Approach*

There are noncommercial sex offenses that, while not specifically targeted at JTVs, apply to many of them. The unenacted End Demand for Sex Trafficking Act of 2005 suggested using statutory rape, sexual assault, and related legislation to “prosecut[e] and deter[] . . . purchasers.”¹⁴² These statutes are underutilized stopgaps for state prosecutors who want to impose more than a misdemeanor upon JTVs, but do not want to go to the lengths of charging trafficking.

JTVs are sometimes charged with statutory rape,¹⁴³ although states do not pursue this strategy vigorously.¹⁴⁴ Most statutory rape

¹⁴⁰ See, e.g., *United States v. Robinson*, 702 F.3d 22, 26 (2d Cir. 2012) (holding that § 1591 does impose strict liability regarding a victim’s age).

¹⁴¹ *United States v. Jungers*, 702 F.3d 1066, 1069 (8th Cir. 2013).

¹⁴² End Demand for Sex Trafficking Act of 2005, H.R. 2012, 109th Cong., § 4(b)(1)(A) (2005).

¹⁴³ See Laura Italiano, *Former Sportscaster Marvell Scott Pleads Guilty in Child Prostitute Case*, N.Y. POST (Aug. 16, 2011) <http://nypost.com/2011/08/16/former-sportscaster-er-marvell-scott-pleads-guilty-in-child-prostitute-case/> (reporting on a former sportscaster charged with patronizing a prostitute and statutory rape after having sex with a fourteen-year-old girl, ultimately pleading guilty to endangering the welfare of a child and serving twenty days of community service); see also *Jones v. State*, 232 N.E.2d 587 (Ind. 1968) (affirming defendant’s conviction of statutory rape of a fifteen-year-old prostitute). I use the term “statutory rape statutes” to refer to all legislation that prohibits sex with minors without regard to the minor’s consent. States also cover this conduct with sex abuse, sexual assault, and rape statutes.

¹⁴⁴ See *Exploiting Americans on American Soil: Domestic Trafficking Exposed: Hearing on H.R. 972 Before the Comm. on Sec. and Coop. in Europe*, 109th Cong. 29 (2005) (statement of Norma Hotaling, Executive Director and Founder, Standing Against Global Exploitation Project) (“[T]hough existing laws indicate that men should be charged with sexual abuse and statutory rape . . . police rarely if ever investigate, arrest and prosecute

laws are relatively straightforward, criminalizing sex with minors under a certain age, regardless of purported consent.¹⁴⁵ Statutory rape has long been considered a strict liability offense,¹⁴⁶ although some jurisdictions have a “reasonable mistake” defense.¹⁴⁷

1. Benefits

There are a number of benefits to using statutory rape legislation to prosecute JTVs. As these are strict liability offenses, proof of knowledge of age will not be required. Statutory rape statutes also allow for flexible punishment because they impose serious sentences but generally lack substantial mandatory minimums in the nature of § 1591, unless young minors are involved.¹⁴⁸

Professor Sylvia Law, in advocating against the john-targeted approach, points out that statutory rape prosecutions could be a powerful tool in holding JTVs accountable:

Statutory rape prosecutions . . . could send a powerful message. Rape, or even statutory rape, is a far more serious charge than patronizing a prostitute. It carries a higher penalty and greater

the so-called Johns.”); Moira Heiges, Note, *From the Inside Out: Reforming State and Local Prostitution Enforcement to Combat Sex Trafficking in the United States and Abroad*, 94 MINN. L. REV. 428, 444 (2009) (noting that “few, if any states use statutory rape or juvenile sexual offense laws to increase penalties for customers who pay for sex with minors”).

¹⁴⁵ See, e.g., *Cynthia M. v. Rodney E.*, 228 Cal. App. 3d 1040, 1044 & n.9 (Cal. App. 4th Dist. 1991) (stating that “[t]he undisputed fact that Cynthia consented to sexual intercourse with Rodney is, of course, not a defense to the crime of unlawful sexual intercourse,” while noting that mistake of fact regarding the minor’s age was a defense).

¹⁴⁶ *United States v. Ransom*, 942 F.2d 775, 777 (10th Cir. 1991); Choate, *supra* note 81, at 702.

¹⁴⁷ See, e.g., *People v. Hernandez*, 393 P.2d 673, 677 (Cal. 1964) (allowing a mistake-of-age defense to a statutory rape charge because the defendant had a “reasonable belief” that the survivor was old enough to consent, and the survivor had apparently misrepresented her age to him).

¹⁴⁸ See, e.g., ARK. CODE ANN. §§ 5-4-401(5), 5-14-127(a)(1)(A)(i) (2013) (making it a Class D felony with no mandatory minimum and a maximum of six years for someone over twenty to engage in sexual intercourse with someone under sixteen); *id.* at § 5-14-103(a)(3)(A), (c)(2) (sentencing someone who engages in sexual intercourse with someone under fourteen to a twenty-five-year mandatory minimum); DEL. CODE ANN. tit. 11, §§ 770(a)(1), (b), 4205(b)(3) (2013) (making it a Class C felony with no mandatory minimum and a maximum of fifteen years to have sexual intercourse with someone under sixteen); *id.* at §§ 773(a)(5), (c)(4), 4205(b)(1) (imposing a fifteen-year mandatory minimum sentence on someone who has sexual intercourse with someone under twelve); N.Y. PENAL LAW §§ 70.00(e), 130.25 (McKinney 2015) (making it a Class E felony with a four-year maximum to engage in sexual intercourse with someone under seventeen if the defendant is over twenty-one); *id.* §§ 70.00(d), 130.30 (making it a Class D felony with a seven-year maximum to engage in sexual intercourse with someone less than fifteen when the defendant is over eighteen); *id.* §§ 70.00(b), 130.35 (making it a Class B felony with a twenty-five-year maximum if the victim is under thirteen, if the defendant is eighteen or older, or under eleven if the defendant is under eighteen).

stigma. In addition, it seems that prosecution of statutory rape would be relatively easy [because] the girl's consent or the man's belief that she was older, even if she lied about her age, are not valid defenses.¹⁴⁹

However, Law also notes that a "deep change in the attitudes and assumptions of police, prosecutors, judges and juries" is necessary to increase the prevalence of these prosecutions.¹⁵⁰

Arguments opposing the use of statutory rape legislation in the context of sex trafficking lack merit. It is true that statutory rape legislation was designed to protect innocent children from predatory adults,¹⁵¹ and it could be argued that this legislation should not apply when a minor has chosen to make a living out of selling sex,¹⁵² or that the acceptance of money for a sex act is a clear demonstration of consent.¹⁵³ However, one of the primary purposes of early statutory rape legislation was "to protect young women from prostitution."¹⁵⁴ Additionally, the concept that a child under a certain age is legally incapable of consenting to sex applies just as much, if not more, when that child is accepting money from someone,¹⁵⁵ due to the potentially coercive effect of money. JTVs who buy sex with minors "should not be

¹⁴⁹ Law, *supra* note 9, at 5775.

¹⁵⁰ *Id.* at 575 ("Some older cases suggest that juries and judges may be reluctant to convict a man of statutory rape, if they believe that the girl offered sex for money, even when the facts show a clear violation of the statutory rape laws."). Such reluctance could be due either to a belief that payment is a manifestation of consent, or that girls working in commercial sex are less in need of protection. *See infra* notes 151–53 (presenting these attitudes).

¹⁵¹ *See, e.g.*, Lewis Bossing, Note, *Now Sixteen Could Get You Life: Statutory Rape, Meaningful Consent, and the Implications for Federal Sentencing Enhancement*, 73 N.Y.U. L. REV. 1205, 1205 & n.2 (1998) (discussing the state interests underlying statutory rape laws, which mainly involve "protecting young women (and their parents and future husbands) from 'white slavery,' 'sexual impurity,' teenage pregnancy, and sexually transmitted disease").

¹⁵² *See, e.g.*, *Jenkins v. State*, 877 P.2d 1063, 1067 (Nev. 1994) (Springer, J., dissenting) (suggesting that reasonable mistake should be a defense to statutory rape, in part because "very mature-looking" minors work in brothels and misrepresent their ages). Such an attitude was common in an era in which "the legal apparatus simply did not operate at the behest of nonvirtuous women." Chamallas, *supra* note 38, at 789 (noting that unchaste women could not sue for seduction, and a "promiscuous teenage girl could not be the victim of statutory rape") (citing MODEL PENAL CODE § 213.6(3), cmt. 419–20 (1980)).

¹⁵³ *Cf.* Chamallas, *supra* note 38, at 829 ("[I]t is difficult to classify a sexual encounter as coerced when the party who initiates the encounter is also the party subjected to economic pressure Ordinarily we presume that persons who initiate sexual encounters consent to those transactions.").

¹⁵⁴ Bossing, *supra* note 151, at 1240.

¹⁵⁵ *See State v. Haynes*, 242 P. 603, 604 (Or. 1926) (rejecting a defendant's claim in a statutory rape case that he should have been permitted to show that the victim had had previous sexual partners, and stating that, "if in fact she was under the age of consent, it would make no difference if she was the commonest prostitute").

able to evade state child exploitation laws simply because they have paid for such acts.”¹⁵⁶

The incongruity in how consent is viewed in the context of statutory rape versus prostitution has arisen in discussions of “Safe Harbor” laws that protect minors in prostitution from prosecution.¹⁵⁷ Charging JTVs with statutory rape would be another step toward uniform acknowledgment that minors cannot consent to sex, whether or not they are engaged in prostitution.

2. Shortcomings

There are certainly limitations to using statutory rape legislation to prosecute JTVs. First, these statutes are underinclusive. Ages of consent vary by state,¹⁵⁸ so there will be cases in which a sixteen- or seventeen-year-old is a minor under federal laws like the Mann Act and § 1591, but state statutes will not impose liability. Similarly, many statutory rape laws have age-gap provisions that decriminalize actions or reduce penalties if the defendant and minor are close in age, and “Romeo and Juliet” provisions provide an affirmative defense on the same grounds.¹⁵⁹ These provisions are premised on the concept that “the risk of coercion and exploitation is not as great between people close in age.”¹⁶⁰ This rationale should not apply to JTVs because a minor victim undoubtedly encounters coercion and exploitation at other stages throughout the trafficking process.¹⁶¹

Furthermore, statutory rape does not acknowledge the commercial nature of a JTV’s crime, as the purchase of commercial sex has a

¹⁵⁶ Heiges, *supra* note 144, at 465.

¹⁵⁷ See, e.g., *In re B.W.*, 313 S.W.3d 818, 820 (Tex. 2010) (reasoning that because the thirteen-year-old defendant could not have consented to sex as a matter of law, she could not be prosecuted as a prostitute); Pantea Javidan, Comment, *Invisible Targets: Juvenile Prostitution, Crackdown Legislation, and the Example of California*, 9 CARDOZO WOMEN’S L.J. 237, 238 (2003) (“A contradiction arises where juveniles are arrested, prosecuted, and incarcerated for having sex for money or other consideration under the same penal code that declares they have no legal capacity to consent to sex at all.”).

¹⁵⁸ Steve James, Comment, *Romeo and Juliet Were Sex Offenders: An Analysis of the Age of Consent and a Call for Reform*, 78 UMKC L. REV. 241, 254 (2009) (“Nationwide, the age of consent ranges from twelve to eighteen, with the most common age being sixteen.”).

¹⁵⁹ See Danielle Flynn, Note, *All the Kids are Doing It: The Unconstitutionality of Enforcing Statutory Rape Laws Against Children & Teenagers*, 47 NEW ENG. L. REV. 681, 685, 687–91 (2013) (discussing the “recent trend” of enacting such laws, and noting that in 2013, thirty of the fifty states had some kind of age-gap provision in statutory rape legislation); see also, e.g., TEX. PENAL CODE § 22.011(e) (West 2011) (providing an affirmative defense to sexual assault if the defendant is not more than three years older than the victim, and the victim was fourteen or older, in addition to other qualifications).

¹⁶⁰ James, *supra* note 158, at 256.

¹⁶¹ See *supra* notes 29–33 (discussing the patterns of coercion in sex trafficking operations).

uniquely serious impact on the victims involved, who are generally exploited on a regular basis by different men.¹⁶² However, in the absence of or until the implementation of JTV-tailored legislation, charging statutory rape in conjunction with patronization of prostitution may be the most proportional and effective approach.

Statutory rape is under-inclusive in another way—it will obviously not be an available tool for prosecuting JTVs who have purchased adult trafficking victims. Once again, this segment of JTVs remains more difficult to hold accountable. Although rape charges occasionally will be useful in such cases, the requirements of rape legislation will be exceedingly difficult to satisfy in this context.¹⁶³ For all of these reasons, noncommercial sex offense laws are insufficient sanctions for JTVs.

D. Targeted Legislation for JTVs

1. Section 2423(b) of the Mann Act

Although not widespread or comprehensive, a number of existing statutes explicitly and clearly apply to the actions of JTVs. Most of these statutes target JTVs who purchase sex with minors, but a handful of state laws are aimed at patronization of trafficking victims generally. Such JTV-focused legislation provides a more tailored fit for these offenders.

The Mann Act clearly applies to JTVs. As discussed above, § 2423(b) explicitly prohibits traveling in interstate commerce “for the purpose of engaging in any illicit sexual conduct with another person.”¹⁶⁴ The Act defines “illicit sexual conduct” as a sexual act with a person under eighteen or “any commercial sex act . . . with a person under 18.”¹⁶⁵

¹⁶² See SHARED HOPE INT’L, *supra* note 9, at 11 (“Statutory rape offenses are intended to protect children . . . by . . . essentially scaring the adult away This scenario does not equate to the intentional purchase of sex acts with a minor which has as the underlying basis prostitution, itself an offense in every state.”).

¹⁶³ Rape can be a difficult enough charge outside the context of commercial sex—even when a victim testifies that the defendant imposed sex upon her without her consent, juries can be reluctant to believe her without corroborating evidence. See David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1195–97 (1997) (describing these difficulties in rape cases). Surely they will be even less likely to believe a victim working in prostitution, and far less likely to believe that a JTV was able to tell that the victim did not consent if she offered him sex in exchange for money.

¹⁶⁴ 18 U.S.C. § 2423(b) (2012).

¹⁶⁵ *Id.* § 2423(f); see also *United States v. McGraw*, 351 F.3d 443, 447 (10th Cir. 2003) (affirming defendant’s conviction for finding and paying for what he thought was a “fantasy tour” that organized sex with children).

The Sentencing Guidelines recommend a sentencing baseline of 51 to 63 months for a § 2423(b) violation, with a 125-month maximum and no mandatory minimum.¹⁶⁶ While the government probably does not need to prove knowledge of a minor’s age,¹⁶⁷ it is an affirmative defense that the defendant reasonably believed the minor was an adult.¹⁶⁸

2. Various State Approaches for Targeting JTVs

A number of state laws expressly apply to JTVs.¹⁶⁹ First, many states have stand-alone statutes that criminalize patronization of prostitution with a minor.¹⁷⁰ Other states include subsections within patronization and solicitation laws that apply to JTVs who purchase sex with minors.¹⁷¹ Solicitation and patronization of prostitution is

¹⁶⁶ U.S. SENTENCING GUIDELINES MANUAL § 2G1.3 (2014).

¹⁶⁷ See *United States v. Griffith*, 284 F.3d 338, 350–51 (2d Cir. 2002) (rejecting the reasoning of a case that required proof of knowledge of age for § 2423(b)); cf. *United States v. Hamilton*, 456 F.2d 171, 173 (3d Cir. 1972) (holding that proof of knowledge of a victim’s age is not required under predecessor to § 2423). But see *United States v. Doyle*, No. 06-CR-224, 2007 WL 542138, at *4 (E.D. Wis. Feb. 16, 2007) (“[Section] 2423(b) does not potentially bring within its ambit adults who travel expecting a rendezvous with another adult . . . [T]he statute requires the government to prove that the defendant traveled with the intent of having sex with a person the defendant believed to be a minor.”).

¹⁶⁸ 18 U.S.C. § 2423(g) (2012); *United States v. Buttrick*, 432 F.3d 373, 378 (1st Cir. 2005) (noting that the burden of “production and persuasion” was on the defendant to prove reasonable mistake of age).

¹⁶⁹ Some of these laws, often called “CSEC” or “Commercial Sexual Exploitation of Children” laws, apply only to JTVs who have sex with minors. Alicia Wilson, *Using Commercial Driver Licensing Authority to Combat Human Trafficking Related Crimes on America’s Highways*, 43 U. MEM. L. REV. 969, 993, 1001 (2013).

¹⁷⁰ E.g., IDAHO CODE ANN. § 18-5610 (2014) (punishing anyone who “exchanges or offers to exchange anything of value for sexual conduct or sexual contact with a person under the age of eighteen” with two years to life in prison, a fine, or both); 720 ILL. COMP. STAT. ANN. 5/11-6 (West 2014) (punishing someone who, “with the intent that [various sex offenses] be committed, knowingly solicits a child or one whom he or she believes to be a child to perform an act of sexual penetration or sexual conduct”); *id.* at 5/11-18.1 (punishing patronizing a minor engaged in prostitution); R.I. GEN. LAWS § 11-37-8.8 (2014) (prohibiting knowingly soliciting someone under eighteen, or someone whom the person believes is under eighteen, for prostitution); *id.* at § 11-67-6(b)(2) (prohibiting “sell[ing] or purchas[ing] a minor for the purposes of commercial sex acts”). Louisiana provides that anyone over seventeen who engages in sexual intercourse with someone under eighteen who is practicing prostitution, if there is an age differential of more than two years, be subject to a maximum fine of \$50,000, imprisonment of fifteen to fifty years, or both. LA. REV. STAT. ANN. § 14:82.1(A)(1), (D)(1) (2014). If the victim is under fourteen, the fine is \$75,000 and the imprisonment range is twenty-five to fifty years. *Id.* at § 14:82.1(D)(2).

¹⁷¹ MASS. GEN. LAWS ch. 272, § 53A(c) (2014) (sanctioning purchasing sex with a minor to a maximum of ten years in prison). In North Carolina, an individual with little or no criminal history who “willfully solicits a minor” for prostitution is guilty of a Class G felony with a baseline sentence of ten to thirteen months, or a Class F felony with a baseline sentence of thirteen to sixteen months. N.C. GEN. STAT. §§ 14-205.1–2 (2014); Felony

overwhelmingly treated as a misdemeanor or otherwise carries relatively low penalties.¹⁷² Similarly, many states have trafficking statutes with *higher* penalties than those imposed on JTVs.¹⁷³ The required mens rea for these JTV-targeted statutes ranges from strict liability regarding age¹⁷⁴ to a knowledge standard.¹⁷⁵

Punishment Chart, *supra* note 126; OKLA. STAT. ANN. tit. 21, §§ 1029(A)(2), 1029(B), 1031 (West 2015) (imposing a ten-year maximum sentence on someone who “solicit[s], induce[s], entice[s], or procure[s]” another person to engage in prostitution if the person is under sixteen, with a presumption of coercion if the person working in prostitution is sixteen or seventeen). Oklahoma also includes “purchasing or obtaining” in its definition of human trafficking for commercial sex, but only when the victim is a minor. *Id.* at § 748(A)(6). The punishment for *knowingly* engaging in human trafficking with a minor victim is a ten-year minimum. *Id.* at § 748(C). New York’s punishment for patronizing a minor is less harsh than Oklahoma’s, see N.Y. PENAL LAW §§ 70.00(d)–(e), 230.05, 230.06 (McKinney 2009) (establishing that patronizing someone under fourteen carries a maximum term of four years, and that patronizing someone under eleven carries a maximum term of seven years). It also provides a defense if “the defendant did not have reasonable grounds to believe that the person was less than the age specified.” *Id.* at § 230.07. Several other states apply enhanced penalties for patronizing a minor. See IOWA CODE §§ 710A.2A, 902.9(e) (2015) (imposing a Class D felony for solicitation of commercial sexual activity with a minor, with a five-year maximum); MONT. CODE ANN. § 45-5-601(3)(a)(i) (2013) (subjecting an adult who patronizes a minor for prostitution to a minimum of twenty-five years); TEX. PENAL CODE ANN. § 43.02(c)(2) (West 2014) (making solicitation of a minor a strict liability second-degree felony); WASH. REV. CODE ANN. §§ 9.68A.100(1), 9A.20.021 (West 2014) (imposing a ten-year maximum for commercial sexual abuse or exploitation of a minor). As a related approach, Arizona’s “child prostitution” statute penalizes “using” a minor with a base penalty of ten to twenty-four years, “[e]ngaging in prostitution” with a minor with a sentence of thirteen to twenty-seven years if the minor is under fifteen, a sentence of seven to twenty-one years if the person “knows or should have known” that the minor is fifteen, sixteen, or seventeen, or a penalty of four months to two years if the minor is over fifteen and the person lacked such knowledge. ARIZ. REV. STAT. ANN. §§ 13-702, 13-705, 13-3212 (2014).

¹⁷² See, e.g., IOWA CODE § 725.1 (2015) (aggravated misdemeanor); § 53A(a)–(b) (imposing a maximum sentence of two-and-a-half years in prison); § 45-5-601(2)(b) (stating that someone convicted as a patron of prostitution is subject to a maximum fine of \$1000 or a maximum prison term of one year); N.Y. PENAL LAW § 230.04 (McKinney 2009) (Class A misdemeanor); N.C. GEN. STAT. §§ 14-205.1–2 (2014) (Class A1 misdemeanors); OKLA. STAT. ANN. tit. 21, §§ 1029, 1031 (West 2015) (imposing a maximum sentence of one year in prison); § 43.02 (Class A misdemeanor after the first or second offense).

¹⁷³ See, e.g., ARIZ. REV. STAT. ANN. §§ 13-1302, -705, -707 (2010) (imposing a sentence of three to twelve-and-a-half years in prison, or thirteen to twenty-seven years if the victim is under fifteen); N.C. GEN. STAT. § 14-43.11(a)–(b) (2014) (sanctioning human trafficking with a base sentence of thirteen to sixteen months if the victim is an adult, and fifty-eight to seventy-three months if the victim is a minor); Felony Punishment Chart, *supra* note 126; N.Y. PENAL LAW §§ 70.00(b)(c), 230.30, 230.32 (McKinney 2009) (establishing that promoting prostitution is subject to a fifteen-year maximum if the person has compelled someone to engage in prostitution or the victim is less than sixteen, and one to twenty-five years if the person being promoted is under eleven); *id.* at § 230.34(5)(h) (stating that sex trafficking also carries a sentence of one to twenty-five years).

¹⁷⁴ See, e.g., HAW. REV. STAT. § 712-1209.1(5) (West 2015).

¹⁷⁵ See, e.g., OKLA. STAT. ANN. tit. 21, § 748(B) (West 2015).

In contrast, Delaware,¹⁷⁶ Indiana,¹⁷⁷ Iowa,¹⁷⁸ Mississippi,¹⁷⁹ Vermont,¹⁸⁰ Wyoming,¹⁸¹ and perhaps New Jersey¹⁸² broadly prohibit soliciting or patronizing a victim of human trafficking.¹⁸³ Unlike the

¹⁷⁶ DEL. CODE ANN. tit. 11, §§ 787(b)(4), 4205(b)(3)–(4) (2014) (including in its human trafficking law a section for “patronizing a victim of sexual servitude,” punishable with up to eight years in prison, with a knowledge standard, unless the victim is a minor, in which case it is strict liability regarding the victim’s age, punishable with up to fifteen years).

¹⁷⁷ INDIANA CODE § 35-42-3.5-1(d) (2014) (“A person who *knowingly* or intentionally pays, offers to pay, or agrees to pay money or other property to another person for an individual who the person knows has been forced into: (1) forced labor; (2) involuntary servitude; or (3) prostitution; commits human trafficking, a Level 5 felony.” (emphasis added)). Section 35-42-4-6 states that solicitation of a child for sexual conduct is also a Level 5 felony. *Id.* § 35-42-4-6. A Level 5 felony carries a minimum sentence of one year. *Id.* § 35-50-2-1.

¹⁷⁸ IOWA CODE §§ 710A.2A(4), 902.9(1) (2015) (punishing a first offender who “*knowingly* engages in human trafficking by soliciting services or benefiting” from trafficking to a five-year maximum, or a ten-year maximum if the victim is a minor (emphasis added)).

¹⁷⁹ MISS. CODE ANN. § 97-3-54.1(b) (2013) (stating that a person who “*knowingly* purchases the forced labor or services of a trafficked person . . . shall be guilty of the crime of procuring involuntary servitude” (emphasis added)).

¹⁸⁰ VT. STAT. ANN. tit. 13, § 2655 (2014) (including in its human trafficking chapter a “[s]olicitation” section providing that anyone who “*knowingly* solicits a commercial sex act from a victim of human trafficking” is subject to a five-year maximum sentence in prison, a maximum fine of \$100,000, or both (emphasis added)); *id.* § 2654 (imposing the same penalties on those who “patroniz[e] or facilitat[e] human trafficking”).

¹⁸¹ WYO. STAT. ANN. § 6-2-707 (2013) (imposing a maximum fine of \$5000, a maximum imprisonment of three years, or both, for “patronizing a victim of sexual servitude . . . when the person *knows* that the individual” is such a victim (emphasis added)).

¹⁸² New Jersey’s new second-degree human trafficking law, implemented in 2013, punishes someone who “procures or attempts to procure a person to engage in [prostitution], or to provide labor or services, *whether for himself or another person*, knowing . . . or under circumstances in which a reasonable person would conclude that there was a substantial likelihood that the person was a victim of human trafficking.” N.J. STAT. ANN. § 2C:13-9.a.(2) (West 2014) (emphasis added). The statute further provides for several rebuttable presumptions that a defendant knew or should have known such person was a victim if the person was a minor, if the person “could not leave the premises where the person provided labor or services without accompaniment of another person or was otherwise subjected to significant restrictions on the person’s freedom of movement” or if the person “did not possess or have access to any means of communication . . . and was not permitted or was otherwise unable to communicate with another person without supervision or permission.” *Id.* While the language of this statute is somewhat ambiguous, and does not appear to have been interpreted yet by courts, the language appears to apply to JTVs.

¹⁸³ Other countries also have implemented JTV-targeted legislation that applies to JTVs of both minor and adult victims. For example, Croatia and Macedonia have enacted laws criminalizing purchasing sex with someone whom the JTV knows to be a victim of human trafficking, imposing imprisonment of between six months and five years. CRIMINAL CODE OF CROATIA, art. 175(6) (2003) (punishing with imprisonment between one and five years); CRIMINAL CODE OF THE REPUBLIC OF MACEDONIA, ch. 34, art. 418-a (2009) (punishing with imprisonment between six months and five years). The United Kingdom, in the Policing and Crime Bill of 2009, made it illegal to pay or agree to pay for services from a

minor-focused statutes discussed above, these statutes are carefully crafted to apply to all JTVs, not only JTVs of minors, and most impose a knowledge standard.¹⁸⁴

3. *Benefits*

These JTV-focused statutes provide clarity, proportionality, and deterrence. First, the state laws achieve clarity by explicitly applying to JTVs. Similarly, § 2423(b), with its clear definition of “illicit sex act,” is arguably a better indication of how Congress intended to treat JTVs than the ambiguous language of § 1591.

Secondly, these statutes are more proportional than the alternative approaches. The sentences generally fall between jurisdictions’ sentences for patronization and their sentences for sex trafficking, reflecting the view that JTVs are generally more culpable than johns of consenting adults, but less culpable than traffickers. Section 2423(b) and many of the state statutes thus strike a balance by carrying significant penalties, but generally lacking mandatory minimum sentences. As another compromise, some of the statutes, while not requiring that the government prove any culpable mental state, provide for affirmative reasonable mistake of age defenses.¹⁸⁵

Additionally, § 2423(b) and these state statutes, including the ones with knowledge standards, are especially useful tools for reverse stings. Law enforcement officials can post false advertisements, make an agreement with a JTV to come to a location (over state lines for federal stings), and arrest them upon arrival.¹⁸⁶ And courts have generally held that the absence of an actual minor in the transaction is not a defense under the Mann Act.¹⁸⁷

prostitute whom a third party has subjected to force, threats, coercion, or deception, regardless of whether the customer knew or should have known about the exploitation. Policing and Crime Act, 2009, c. 26, §§ 14–15 (U.K.). The penalty for this offense is a maximum fine of £1000. *Id.* §§ 14(4), 15(4) (identifying these crimes as Level 3 offenses); Criminal Justice Act, 1982, c. 48, § 37(2) (U.K.) (stating that the standard fine for a Level 3 offense is £1000).

¹⁸⁴ See *supra* notes 176–81 (providing information about these statutes).

¹⁸⁵ *E.g.*, 18 U.S.C. § 2423(b), (g) (2012); N.Y. PENAL LAW § 230.07 (McKinney 2009).

¹⁸⁶ See SHIVELY ET AL., *supra* note 7, at vi–viii (reporting that reverse stings of johns in several cities reduced prostitution).

¹⁸⁷ See, *e.g.*, *United States v. Tykarsky*, 446 F.3d 458, 461–62 (3d Cir. 2006) (affirming the conviction of a man who communicated in a chat room with an undercover FBI agent posing as a fourteen-year-old girl, and arranged to meet her in another state for sexual intercourse); *United States v. Meek*, 366 F.3d 705, 719 (9th Cir. 2004) (“That the individual turns out to be a decoy undercover officer does not vitiate the criminal conduct—indeed, such sting operations are ‘common practice.’”). One court, however, found that a sentence enhancement under section 2G1.3(b)(3)(A) of the United States Sentencing Commission’s Guidelines Manual was inappropriate when an undercover officer was involved instead of

4. Shortcomings

Yet despite the benefits offered by current legislation targeted at JTVs, there are still some significant drawbacks. The main problem with these statutes is that the Mann Act and the minor-focused statutes are underinclusive by not applying to JTVs who purchase sex from adult victims. Section 2423(b) is also underinclusive by only applying to JTVs who cross state lines to engage in the sex act. The other concerns with JTV-focused statutes stem from their mens rea requirements. The state statutes with knowledge requirements are difficult to prove, as will be discussed in Part III. Other state statutes that impose strict liability in pursuit of protecting minors might be challenged as imposing overly harsh sentences on JTVs who honestly did not know they were committing such a serious crime. Such concerns demonstrate that a thoughtful tailoring of the mens rea standard is necessary, and this task is taken up in Part III.C.

III

MODEL LEGISLATION TARGETED AT JTVs

While the laws discussed in Part II.D are generally proportional, tailored, and clear, they are underinclusive and impose a wide range of mens rea standards, as noted above. The following sections offer suggestions for consistent, fair, and comprehensive models of JTV-tailored statutes at both the federal and state levels.

A. A Federal JTV-Targeted Statute

Congress should build on the current penalty available in § 2423(b) of the Mann Act by passing a comprehensive JTV-targeted statute. This new statute would apply to all JTVs who commit commercial sexual exploitation with a federal nexus. The Mann Act has been upheld as a valid exercise of federal jurisdiction over commercial sex acts in light of the government's interest in prosecuting such crimes when they occur across state lines or involve interstate commerce.¹⁸⁸ While several sections of the Mann Act, including § 2422(b), can by their terms be extended to JTVs, it is incoherent to impose vastly different sentences on a JTV who drives across a border to commit his crime and a JTV who uses the Internet to arrange for a minor to meet him for commercial sex.¹⁸⁹ These inconsistencies

an actual minor. *Van Velkinburgh v. United States*, No. 1:07CR126-MPM-JAD, 2014 WL 637811, at *3 (N.D. Miss. Feb. 18, 2014) (explaining this position).

¹⁸⁸ *Hoke v. United States*, 227 U.S. 308, 320–23 (1913).

¹⁸⁹ While § 2423(b) does not have a mandatory minimum sentence, 18 U.S.C. § 2422(b) imposes a ten-year minimum. See 18 U.S.C. § 2422(b) (2012) ("Whoever . . . using . . . any

should be remedied by imposing a uniform sentence for all JTVs regardless of the federal nexus.

Therefore, the federal JTV-targeted statute should fill in the jurisdictional gaps of § 2423(b) by borrowing the jurisdictional language of § 1591 to cover JTVs who purchase sex with trafficking victims “in or affecting interstate or foreign commerce.”¹⁹⁰ This language would not only allow federal prosecutors to reach a broad range of JTV actions, including all of those covered in the Mann Act, but would also ensure more uniform punishment for those actions. The federal JTV-targeted statute should also fill in the gap that § 2423(b) leaves for johns of adult trafficking victims by including a section for those who solicit or patronize adult victims.

One way to achieve this uniform remedy is by amending § 1591 to include a section for JTVs.¹⁹¹ The new section could provide a subsection for adults and a subsection for minors. I will discuss the pros and cons of various mens rea requirements for this statute below. Congress may be reluctant to include a JTV-targeted statute as an amendment to § 1591 because doing so would most likely foreclose the use of the current § 1591 as applied to JTVs. To avoid this result, Congress could instead pass a standalone JTV statute.

In addition to including penalty enhancements for knowledge, I recommend penalty enhancements if the JTV uses physical force against the victim, or if a victim under fourteen is involved. I will discuss the other details of the statute below, but it could take the following form (assuming it is passed as a subsection of § 1591):

facility or means of interstate or foreign commerce . . . knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution . . . shall be . . . imprisoned not less than 10 years or for life.”)

¹⁹⁰ 18 U.S.C. § 1591 (2012). Although the Department of Justice objected to a proposal that it characterized as “expand[ing] the Mann Act to include cases ‘affecting’ interstate commerce,” its objections were based on the proposed legislation’s application to cases involving “pandering, pimping, and prostitution-related offenses” without force, fraud, or coercion. See Letter from Brian A. Benczkowski, Principal Deputy Asst. Att’y Gen., Dep’t of Justice, to the Hon. John Conyers, Jr., Chairman, Comm. on the Judiciary, House of Representatives, at 8 (Nov. 9, 2007), available at <http://www.justice.gov/archive/ola/views-letters/110-1/11-09-wilberforce-trafficking-victims-act.pdf> (opposing the proposal in the William Wilberforce Trafficking Victims Protection Reauthorization Act, H.R. 3887, § 1592(f)(1) (2007), which sought to introduce a “sex trafficking” offense with a ten-year maximum sentence for someone who “knowingly, in or affecting interstate or foreign commerce . . . persuades, induces, or entices any individual to engage in prostitution for which any person can be charged with an offense, or attempts to do so”). The Department’s objection would not be applicable to a JTV-focused statute, which specifically would require force, fraud, coercion, or a minor victim.

¹⁹¹ This amendment would be similar to the approach of Delaware and Iowa, which include their JTV provisions in their trafficking statutes. See *supra* notes 176, 178 (describing Delaware’s and Iowa’s trafficking statutes).

(f) Whoever, in or affecting interstate or foreign commerce, solicits or patronizes a person for commercial sex, or attempts to do so, if such person knew or acted in reckless disregard of the fact that such person had been subjected to force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means to cause the person to engage in a commercial sex act, shall be punished as provided in section h(a).

(g) Whoever, in interstate or foreign commerce, solicits or patronizes someone under 18 for commercial sex, or attempts to do so, shall be punished as provided in section h(b).

(h) (a) The punishment for an offense under subsection (f) is a minimum sentence of five years and a maximum sentence of life. (b) The punishment for an offense under subsection (g) is—(1) if the person knew that such person was a minor, acted in reckless disregard of the fact that such person was a minor, personally used physical force against such person, or if the minor had not attained the age of 14, to a minimum sentence of five years and a maximum sentence of life; (2) otherwise, to a maximum sentence of 20 years.

B. Model State Legislation

States should follow the lead of Delaware, Indiana, Iowa, Mississippi, Vermont, and Wyoming and pass statutes that broadly prohibit soliciting or patronizing a victim of sex trafficking.¹⁹² The terminology of such statutes should track the sex-trafficking statutes in those states. These state statutes would be more comprehensive than those focusing only on minors, but they could still impose different mens rea standards when dealing with adult and minor victims, similar to the standards imposed in the model federal legislation, above.

C. Mens Rea Standards for the Model JTV-Targeted Statute

This Note advocates different mens rea standards for JTVs of adult victims and JTVs of minor victims. Such a view does not suggest that adult victims are worthy of less protection; it simply reflects practical concerns about proving a defendant's mental state, and creates proportionality with other legislation directed at protecting minors. I will discuss the pros and cons of various mens rea standards in this section. I ultimately recommend a reckless disregard or knowledge standard for JTVs of adult victims, and a strict liability regarding age standard for JTVs of minor victims, with penalty enhancements for reckless disregard and knowledge.

¹⁹² DEL. CODE ANN. tit. 11, §§ 787(b)(4), 4205 (2014); INDIANA CODE § 35-42-3.5-1(d) (2014); IOWA CODE § 710A.2A (2015); MISS. CODE ANN. § 97-3-54.1(1)(b) (West 2013); VT. STAT. ANN. tit. 13, § 2655(a) (2014); WYO. STAT. ANN. § 6-2-707 (2013).

1. *Adult Victims*

Imposing strict liability upon JTVs of adult victims is not a realistic option. Strict liability is generally reserved for very narrow areas of criminal law, such as statutory rape, in which there is a strong public interest in imposing liability regardless of the perpetrator's mental state. There may be no way for a JTV of an adult victim to have the slightest indication of the person's victim status, while a JTV who purchases sex with a minor can at least make a visual estimate of the minor's age. Thus JTVs who are reasonably mistaken about whether adult victims are voluntarily engaging in prostitution are best addressed through john-targeted legislation.

All of the states that have enacted statutes directed at JTVs of adult victims have instead imposed a knowledge standard, with the potential exception of New Jersey.¹⁹³ Legislators are likely reluctant to impose significant sanctions on these JTVs without a higher mens rea requirement because most victims of trafficking will not identify themselves as such to JTVs. Additionally, evidence of coercion and even physical abuse will rarely be apparent.¹⁹⁴ A knowledge standard is presumably more appealing to legalization advocates because this law would not, for the most part, target or deter "peaceful johns,"¹⁹⁵ limiting serious penalties to JTVs with more culpable mental states.¹⁹⁶

However, there are significant drawbacks to imposing a knowledge standard. Such a standard may make these statutes somewhat redundant because rape legislation will often apply.¹⁹⁷ Additionally, such a standard will be so difficult to prove in court that almost all JTVs will escape punishment. Even if a victim testifies that she told a JTV that she was being compelled to engage in the sex act, it will most likely be her word against the JTV's. Such cases are difficult to prove in the context of rape;¹⁹⁸ it will be even more difficult to convince a

¹⁹³ See *supra* notes 176–81 (discussing various state statutes targeted at JTVs).

¹⁹⁴ See, e.g., Heiges, *supra* note 144, at 450 ("On the surface, victims of sex trafficking may be indistinguishable from 'voluntary' persons in prostitution."); Lefler, *supra* note 6, at 33 (noting that knowledge of coercion "seems very difficult to prove").

¹⁹⁵ See McElroy, *supra* note 35, at 338 (discussing how individuals working in prostitution, interviewed by the author, worry that policies that deter peaceful johns will make their work less safe).

¹⁹⁶ See Berger, *supra* note 5, at 569 (noting that "laws that punish men who knowingly buy sex from trafficked and exploited women may be a beneficial tool for combating the harms of prostitution," but arguing they are overbroad and "should be redrafted to prevent the prosecution of men without genuinely malicious intent" (emphasis added)).

¹⁹⁷ See Robin Charlow, *Bad Acts in Search of a Mens Rea: Anatomy of a Rape*, 71 *FORDHAM L. REV.* 263, 273 n.43 (2002) (providing examples of states that consider it rape when an individual engages in sex with the knowledge that the other person does not consent).

¹⁹⁸ See Bryden & Lengnick, *supra* note 163, at 1195–97 (discussing these challenges).

jury to believe someone engaging in prostitution. This option may be frustratingly underinclusive in many situations, especially those in which prosecutors strongly suspect that a JTV had knowledge of trafficking.

New Jersey's second-degree human trafficking law, which appears to apply to JTVs by its terms,¹⁹⁹ provides an interesting middle-ground approach by using a negligence standard in which someone will be guilty of second-degree human trafficking if he procures someone to engage in prostitution "knowing . . . or under circumstances in which a reasonable person would conclude that there was a substantial likelihood that the person was a victim of human trafficking."²⁰⁰ The statute provides for multiple rebuttable presumptions that the defendant knew or should have known someone was a victim if the victim was a minor or was encountered in circumstances indicative of force, fraud, and coercion.²⁰¹ Although the rebuttable presumptions may themselves be difficult to prove, this approach significantly lowers the burden of proof from knowledge, providing that a JTV will not be able to claim ignorance when faced with strong indicia of trafficking.

As a compromise, I recommend a standard that includes JTVs who either know someone is a trafficking victim or act with reckless disregard of that fact.²⁰² The statute could also include rebuttable presumptions that a person acted with reckless disregard in situations similar to those included in the New Jersey statute.²⁰³ While, as dis-

¹⁹⁹ *Supra* note 182.

²⁰⁰ N.J. STAT. ANN. § 2C:13-9.a.(2) (West 2014).

²⁰¹ *Id.* (establishing a rebuttable presumption that a defendant knew or should have known someone was a victim if the victim was a minor, if the victim "could not leave the premises where the person provided labor or services without accompaniment of another person or was otherwise subjected to significant restrictions on the person's freedom of movement," or if the victim "did not possess or have access to any means of communication, including but not limited to a cellular or other wireless telephone or other electronic communication device, and was not permitted or was otherwise unable to communicate with another person without supervision or permission").

²⁰² While a negligence standard would also provide a compromise between strict liability and knowledge, I have chosen reckless disregard because of difficulties with determining what a "reasonable" person would know indicates trafficking. Additionally, applying a reckless disregard/knowledge standard aligns the mens rea for JTVs with the mens rea for traffickers in § 1591. *See* 18 U.S.C. § 1591 (2012) (applying a reckless disregard/knowledge mens rea for the use of force, fraud, or coercion, in causing a person to engage in commercial sex acts). In practice, a reckless disregard standard and a negligence standard may function similarly. *See* Eric A. Johnson, *Mens Rea for Sexual Abuse: The Case for Defining the Acceptable Risk*, 99 J. CRIM. L. & CRIMINOLOGY 1, 6-9 (2009) (arguing that both standards "require more or less the same analysis [by the jury] of the justifiability of the risk").

²⁰³ Even without explicit rebuttable presumptions, such circumstances are at least useful examples of what could qualify as reckless disregard.

cussed, many sex-trafficking operations will offer few clues to a JTV of an adult victim and thus allow those JTVs to escape culpability, a reckless disregard standard will at least extend the statute's penalties to JTVs who ignore obvious clues.

2. *Minor Victims*

Some statutes that apply to JTVs of minor victims impose strict liability.²⁰⁴ One downside to applying strict liability to these JTVs is the philosophy that strict liability runs counter to the "criminal law goal of punishing culpable states of mind."²⁰⁵ A knowledge standard may be appealing because it avoids this result. Under a knowledge standard, JTVs who think they are participating in a victimless crime would not receive high sentences because of honest mistakes. Furthermore, a knowledge standard is not totally futile because reverse stings would continue to be a useful tool for catching JTVs who knowingly or intentionally purchased sex with minors.²⁰⁶

However, there are many benefits to imposing strict liability regarding age for JTVs of minors. First, such a standard would align the JTV-targeted legislation with statutory rape legislation²⁰⁷ and some child pornography legislation.²⁰⁸ Offering money for the opportunity to commit statutory rape should not be a shield from criminal prosecution.²⁰⁹ In fact, such an exchange makes strict liability more appropriate because a JTV already knows that he is committing an illegal act by soliciting prostitution.²¹⁰ Many JTVs do not actively seek

²⁰⁴ See, e.g., *supra* note 174 and accompanying text.

²⁰⁵ Letter from Brian A. Benzckowski to the Hon. John Conyers, Jr., *supra* note 190, at 8.

²⁰⁶ Furthermore, reverse stings are "simple and within the skills and staffing capacities of most law enforcement agencies." SHIVELY ET AL., *supra* note 7, at xii. For example, during "Operation Guardian Angel," police departments in Missouri, in collaboration with the DOJ, placed an ad on Craigslist with language such as, "\$young \$\$younger \$\$\$youngest" and "[b]e the first for the little girls." Abby Duncan, Comment, *A Tale of Two Districts: Lessons Learned from Missouri's Human Trafficking Task Forces*, 33 ST. LOUIS U. PUB. L. REV. 191, 206–07 (2013). Responders were arrested after they arrived at the specified location and offered payment. *Id.*

²⁰⁷ See *supra* note 146 and accompanying text (describing how many states' statutory rape laws impose strict liability regarding the minor's age).

²⁰⁸ See, e.g., *United States v. Malloy*, 568 F.3d 166, 172–73 (4th Cir. 2009) (finding no constitutionally required mistake of age defense in a prosecution for production of child pornography).

²⁰⁹ See *United States v. Jones*, 471 F.3d 535, 539–40 (4th Cir. 2006) (stating, in deciding to impose strict liability regarding age for a Mann Act violation, that "[i]t would be nonsensical to require proof of knowledge of the victim's age when the statute exists to provide special protection for all minors, including, if not especially, those who could too easily be mistaken for adults").

²¹⁰ In choosing whether to impose strict liability for an offense, the Supreme Court has taken into consideration whether the act would be innocent if the facts were as a mistaken

out sex with a minor, but neither do they take care to ensure that their “partner” is a consenting adult. As a Florida judge wrote in a separate opinion in *State v. Brooks*—in which the court allowed a reduced sentence because the thirteen-year-old whom the JTV solicited “appear[ed] much older” and was “looking for action”:

A downward departure based upon the fact that the victim is a prostitute ignores the state’s desire to protect children Brooks, age fifty-three, claims he thought this thirteen-year-old was an adult It appears to me more likely that Brooks really did not care how old she was and would not have stopped his solicitation if she had disclosed her age. What he thought should not be our concern; the effect upon the child should.²¹¹

A strict liability standard would also make it easier to prosecute JTVs who purchase sex with minors, and would involve less trauma for victims. Because the government would only need to prove that a sex act with a minor took place, there may be no need for victim testimony at all, or, even if the victim does have to testify, the scope of examination would be more limited.²¹² Thus victims are less likely to be retraumatized by having to testify.²¹³

I recommend a strict liability standard for JTVs who purchase sex with minors, in conjunction with sentencing enhancements for JTVs with more culpable mental states. JTVs who are genuinely and reasonably mistaken about a victim’s age should be subject to a sentence without a mandatory minimum, in order to allow a judge to impose what he believes to be a just sentence in light of the circumstances. A JTV who acts with reckless disregard or knowledge should receive a

defendant believed. *See, e.g., Staples v. United States*, 511 U.S. 600, 605–12 (1994) (refusing to apply a strict liability standard regarding whether a gun had inadvertently turned into an unregistered automatic weapon because owning a gun is not illegal per se and distinguishing the application of strict liability to the possession of unregistered hand grenades because owners of hand grenades know they are illegal). Strict liability in statutory rape legislation has survived despite the fact that consensual sexual activity with an adult would otherwise be legal. A JTV, in contrast, already knows that he is committing a crime when he purchases prostitution, so there is a stronger case for applying strict liability.

²¹¹ *State v. Brooks*, 739 So. 2d 1223, 1225–26 (Fla. Dist. Ct. App. 1999) (Thompson, J., concurring in part and dissenting in part).

²¹² *See Choate, supra* note 81, at 705–06, 712–13 (noting that strict liability reduces the need for victim testimony).

²¹³ A primary problem with an affirmative defense of reasonable mistake of age, such as the one in § 2423(g), is that it places the victim’s appearance and sexual reputation into issue, allowing the introduction of evidence of past promiscuity, where such evidence is not barred by “rape-shield” laws. *See, e.g., Harriett R. Galvin, Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 890–92 (1986) (discussing instances in which such evidence was offered or admitted).

higher penalty, with a mandatory minimum sentence.²¹⁴ While tiered penalties based on mens rea are unusual, Arizona provides an example of such an approach. The offense of “[e]ngaging in prostitution” with a minor is strict liability with a very high penalty if the victim is under fifteen; but if the victim is fifteen, sixteen, or seventeen, there is a significantly higher penalty for JTVs who are aware or negligent about the victim’s age.²¹⁵ A similar approach could be taken for JTVs of minors. This tiered penalty structure ensures that all JTVs of minors are penalized, aligning the legislation with statutory rape and other sex offense laws, but it also avoids the imposition of a large mandatory minimum on reasonably mistaken JTVs.

CONCLUSION

JTVs are distinct offenders who ought to be addressed through sanctions tailored to them. Treating them simply as johns gives too little weight to the harm they impose on trafficking victims; treating them as traffickers is too harsh and rigid; and treating them as statutory rapists or sex abusers is underinclusive and ignores the commercial element of their offenses. The best approach is legislation explicitly applicable to this group. Federal and state legislatures should use § 2423(b) of the Mann Act and existing state statutes as a starting point to pass JTV-targeted legislation that reaches the broadest number of culpable JTVs, with flexible and tailored penalties. Although difficulties in determining which johns qualify as JTVs and what mental states they possess pose real and challenging barriers to enforcement, practical difficulties should not deter legislatures from seeking a just and proportional approach to holding JTVs accountable for their crimes.

²¹⁴ It should be noted that linking increased penalties to a mens rea of knowledge or reckless disregard reintroduces the need for evidence of knowledge, and with it the potential for a victim to be retraumatized on the stand. However, unlike in the case of imposing a knowledge or reckless disregard standard across the board, under the model statute a prosecutor will have the option of not pursuing such an enhancement in particularly traumatic cases, without having to forgo the case entirely.

²¹⁵ ARIZ. REV. STAT. ANN. §§ 13-702, -705, -3212 (2010) (providing that “[e]ngaging in prostitution” with a minor carries a sentence of thirteen to twenty-seven years if the minor is under fifteen, seven to twenty-one years if the person “knows or should have known” that the minor is fifteen, sixteen, or seventeen, or four months to two years if the minor is over fifteen and the person reasonably did not know she or he was a minor).