

2019

## Mens Rea Reform as a Demand-Side Solution to the Problem of Sex Trafficking

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### Recommended Citation

Daniel Michael Criswell, *Mens Rea Reform as a Demand-Side Solution to the Problem of Sex Trafficking*, 51 Case W. Res. J. Int'l L. 327 (2019)

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# MENS REA REFORM AS A DEMAND-SIDE SOLUTION TO THE PROBLEM OF SEX TRAFFICKING

*Daniel Michael Criswell\**

*Trafficking in persons has existed around the world for many years, yet the United States has only begun to take this modern form of slavery seriously in the last two decades. The nature of sex trafficking has caused confusion for the United States and others around the globe regarding how to best deal with the commercial sex industry. The failure to reduce the commercial sex industry through traditional means of prosecuting the traffickers and their victims has motivated Sweden, and consequently the United States, to pursue a different strategy: reducing the demand through the prosecution of the buyers of commercial sex. While this infant strategy has yet to produce any results, all is not lost. The United States must reform the statute's mental state requirement and lower the burden prosecutors bear in trafficking cases.*

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INTRODUCTION

In February 2011, a man named Mr. Jungers responded to an online advertisement for sex with a child in Sioux Falls, South Dakota.<sup>1</sup> Jungers and the anonymous seller negotiated the transaction through a number of emails, detailing the age and rate for the girl.<sup>2</sup> After traveling to Sioux Falls, Jungers entered the house to pick up his reservation, but the girl was not there—the police were.<sup>3</sup> The officers arrested Jungers and charged him with attempted commercial sex trafficking in violation of 18 U.S.C. §§ 1591 and 1594.<sup>4</sup> At trial, Jungers argued that he was not culpable under the statute because he was a mere consumer of commercial sex acts and not a “trafficker.”<sup>5</sup> The jury found him guilty.<sup>6</sup> Soon after, however, the district judge

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1. United States. v. Jungers, 702 F.3d 1066, 1067 (8th Cir. 2013).

2. *Id.*

3. *Id.* at 1068.

4. *Id.*; 18 U.S.C. § 1591 (2015); 18 U.S.C. § 1594 (2015).

5. *Jungers*, 702 F.3d at 1068.

6. *Id.*

acquitted Jungers, reasoning 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.”<sup>7</sup>

On appeal, the Court of Appeals for the Eighth Circuit addressed the issue of whether § 1591 applies to both suppliers and buyers of commercial sex acts.<sup>8</sup> The Court found, through the plain language of the statute, that nothing in the text itself suggests Congress’s intent to exclude purchasers, and therefore § 1591 applies to both sellers and buyers of commercial sex.<sup>9</sup> This expansive interpretation opened the door for new strategies regarding federal and state prosecutions in sex trafficking.

This Note will explore the two most culpable parties involved in sex trafficking—the party forcing another to engage in sex acts, and the party paying for the sex acts—and compare the effectiveness of prosecutions aimed at those parties. Part I will explore the background of sex trafficking as well as the international and domestic efforts to solve the problems of sex trafficking. Part II will analyze the prosecution of the seller of trafficking victims and discuss the barriers to convictions under domestic trafficking statutes. Part III will analyze the recent trend to prosecute the buyer of commercial sex, and will critique the construction of federal and state trafficking statutes. Finally, Part IV will analyze mens rea reform opportunities, and advocate for a standard of negligence with the hope to increase conviction rates of traffickers in the United States.

## I. UNDERSTANDING HUMAN TRAFFICKING

Sex trafficking is a subset of human trafficking<sup>10</sup> in which human beings are coerced into sexual exploitation against their will.<sup>11</sup> A 2004 report estimated between 600,000 and 800,000 people were trafficked

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7. *Id.* (emphasis added).

8. *Id.* at 1069.

9. *Id.*

10. The term “human trafficking” is a term of art that represents the modern slavery of human beings in the commercial sex trade, manufacturing, agriculture, domestic servitude, and other industries. See *What is Human Trafficking?*, DEP’T OF HOMELAND SECURITY, <https://www.dhs.gov/blue-campaign/what-human-trafficking> [<https://perma.cc/Z2DW-UQW3>] (last visited Feb. 10, 2018) (defining and explaining human trafficking).

11. *Sex Trafficking*, POLARIS PROJECT, <https://polarisproject.org/human-trafficking/sex-trafficking> [<https://perma.cc/2F2Z-CJ96>] (last visited Feb. 10, 2018).

worldwide in 2003,<sup>12</sup> which explains the staggering estimate of 20.9 million people currently in bondage because of trafficking.<sup>13</sup> Although these numbers are often controversial because of the “complexity involved in making accurate assessments,”<sup>14</sup> as well as the secretive and illegal nature of the industry,<sup>15</sup> trafficking is a global issue. Many countries have laws to combat human trafficking, but little progress has been made to overcome it.<sup>16</sup>

Vulnerabilities within society, such as poverty, political instability, and the existence of marginalized groups, combined with the ongoing demand for cheap labor and commercial sex, contribute to the transnational harm of human trafficking.<sup>17</sup> Victims of human trafficking around the world are subjected to serious injury, namely high levels of physical and psychological harm.<sup>18</sup> One report on the physical and psychological impacts on women and adolescents trafficked into Europe found that ninety-five percent of victims had been physically assaulted or coerced into a sexual act while being trafficked.<sup>19</sup> Other victims had confirmed mental health problems— anxiety, post-traumatic stress, and depression—that continued long after being rescued from extreme environments.<sup>20</sup>

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12. U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 23 (2004), <http://www.state.gov/documents/organization/34158.pdf> [<https://perma.cc/9NRH-Z9XP>] (last visited Feb. 10, 2018).
  13. *Human Trafficking*, POLARIS PROJECT, <https://polarisproject.org/human-trafficking> [<https://perma.cc/R7U4-WSQ2>] (last visited Feb. 10, 2018).
  14. David R. Hodge, *Sexual Trafficking in the United States: A Domestic Problem with Transnational Dimensions*, 53 SOCIAL WORK 143, 144 (2008) (“[V]ictims may believe that social services providers will not take their claims seriously, that the police will charge them for some offense, or that the authorities are unable to protect them from traffickers’ reprisals . . . . [I]n some nations, police collude with traffickers, returning those who escape to their former exploiters in the sex or prostitution industry.”).
  15. Vanessa Baird, *Trafficked*, NEW INTERNATIONALIST (Sept. 1, 2007), <https://newint.org/features/2007/09/01/keynote> [<https://perma.cc/USA2-PJRF>].
  16. ALISON SISKIN & LIANA SUN WYLER, CONG. RESEARCH SERV., R34317, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 9-10 (2013).
  17. *Id.* at 8-9.
  18. Baird, *supra* note 15.
  19. *Id.* (reporting gruesome injuries such as being kicked while pregnant, having heads slammed into doors and floors, being hit with bats, being punched in the face, and being burned with cigarettes).
  20. *Id.*

But how do individuals get caught up in the vicious industry of sex trafficking in the first place? Sex traffickers lure individuals into the industry through a number of techniques.<sup>21</sup> For example, members of organized crime rings may take women off the streets and sell them to traffickers.<sup>22</sup> In these instances, the victims are typically drugged and kidnapped, not knowing where they are or whom they are with.<sup>23</sup> In other instances, traffickers induce their victims by making false promises of employment.<sup>24</sup> These “employment scams” occur in various forms of “prosperous opportunities,” including working as a maid, dancing at clubs, or modeling.<sup>25</sup> Sometimes victims even agree to go to another country with the expectation they will be involved in the sex industry,<sup>26</sup> but despite their initial consent to sex work, they are subsequently forced into sexual activity to which they had not agreed, nor would have, if presented with the truth beforehand.<sup>27</sup>

## II. PROSECUTING THE SELLERS AND OBSTACLES TO OVERCOME

### A. *A History of International Trafficking Laws*

Until recently, policymakers have made limited efforts to combat the problem of sex trafficking.<sup>28</sup> Internationally, the trafficking of women and children has existed for many years,<sup>29</sup> but it was only first brought to light in 1904 in the International Agreement for the Suppression of the White Slave Traffic.<sup>30</sup> Almost fifty years went by before the United Nations addressed human trafficking in the 1949

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21. See April Rieger, *Missing the Mark: Why the Trafficking Victims Protection Act Fails to Protect Sex Trafficking Victims in the United States*, 30 HARV. J.L. & GENDER 231, 235-236 (2007) (illuminating the different techniques used by traffickers to obtain victims).
22. *Id.* at 236.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 237.
27. *Id.* For example, a Russian-American trafficker recruited a Latvian woman to work in a sophisticated nightclub in Chicago as a bikini dancer for \$60,000 a year. When she arrived, the traffickers took away her passport and forced her to dance topless or nude to repay the unknown debt she was “charged” for her entry into the United States. *Id.*
28. SISKIN, *supra* note 16, at 9.
29. Michelle Jeffs, *Punishing Pimps and Johns: Sex Trafficking and Utah’s Laws*, 28 B.Y.U. J. PUB. L. 219, 226 (2013).
30. *Id.*; International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83.

Convention for the Suppression of the Traffic in Persons and Exploitation of the Prostitution of Others,<sup>31</sup> and still another fifty years passed before the United Nations presented the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,<sup>32</sup> which introduced a new and comprehensive definition of human trafficking:

[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>33</sup>

Past treaties recognized the problem of trafficking, but the Protocol was the first to provide a broad definition of trafficking.<sup>34</sup> It was also the first instrument to address all facets of human trafficking, including the prevention of trafficking, protection of victims, and punishment of offenders.<sup>35</sup> It simultaneously laid the foundation for the creation of a federal trafficking law in the United States.<sup>36</sup>

### *B. Trafficking Laws in the United States*

In 1910, Congress passed the Mann Act, which aimed to prevent the transportation of human beings across state or international lines for the purpose of prostitution or other immoral acts.<sup>37</sup> However, Congress did not respond to the increasing epidemic of human

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31. Laura L. Shoaps, *Room for Improvement: Palermo Protocol and the Trafficking Victims Act*, 17 LEWIS & CLARK L. REV. 931, 936-37 (2013) (explaining that the Convention had a limited focus on the trafficking of women for sex, and failed to address the extent to which trafficking occurred outside the realm of sex, specifically, for example, in labor).
  32. G.A. RES. 55/25, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Nov. 15, 2000).
  33. *Id.* at Annex I, Article 3.
  34. Shoaps, *supra* note 31, at 933.
  35. Cindy Braspenning, *Human Trafficking in the Netherlands: The Protection of and Assistance to Victims in Light of Domestic and International Law and Policy*, 17 INTERCULTURAL HUM. RTS. L. REV. 329, 351 (2006).
  36. Shoaps, *supra* note 31, at 933-4.
  37. Jeffs, *supra* note 29, at 229-30.

trafficking again until 2000 with the Trafficking Victims Protection Act (TVPA).<sup>38</sup> Like the definition of human trafficking in the Protocol, the TVPA defined trafficking in persons to mean:

(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or

(B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.<sup>39</sup>

The purpose of the TVPA was to “combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims.”<sup>40</sup> Traditionally in trafficking cases, the “pimps” and “johns”<sup>41</sup> went without punishment because the law enforcement focused on the sex worker.<sup>42</sup> Rather than protecting the victims, existing laws imposed severe punishment on them.<sup>43</sup> But a new century was to bring about new changes, and the new TVPA remodeled that legal landscape by focusing on three categories: protection, prosecution, and prevention.<sup>44</sup>

The TVPA increased protection for victims by providing assistance to victims of trafficking, such as providing them non-immigrant status through T-visas so that their presence in the United States could aid the prosecution of their trafficker.<sup>45</sup> Regarding prosecution, the TVPA authorized the United States to prosecute traffickers for commercial sexual exploitation and labor exploitation of human beings, instead of the traditional prosecution of the victims

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38. 22 U.S.C. § 7102 (2000). The Trafficking Victims Protection Act of 2000 is one of three sections within the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended at 22 U.S.C. §§ 7101-7113 (2015)).

39. 22 U.S.C. § 7102(8) (2000).

40. 22 U.S.C. § 7101(a) (2000).

41. Jeffs, *supra* note 29, at 224-25.

42. *Id.* at 226.

43. Hodge, *supra* note 14, at 148.

44. *Summary of the Trafficking Victims Protection Act (TVPA) and Reauthorizations FY 2017*, ATEST (Jan. 11, 2017, 8:40 AM), <https://endslaveryandtrafficking.org/summary-trafficking-victims-protection-act-tvpa-reauthorizations-fy-2017-2/> [<https://perma.cc/YP9G-XL3Z>].

45. *Id.*



themselves.<sup>46</sup> The TVPA authorized the United States to further trafficking-prevention efforts by providing assistance to countries around the world through research, programs, and law-drafting.<sup>47</sup>

Over the years, Congress has expanded the TVPA's reach through a number of reauthorizations.<sup>48</sup> In 2003, Congress created a civil action that allowed victims to sue their traffickers in federal court and required the Attorney General to report annually on anti-trafficking efforts.<sup>49</sup> In 2005, Congress created extraterritorial jurisdiction of the TVPA over trafficking committed overseas by persons employed by, or accompanying, the federal government, and created rehabilitative facilities for trafficking victims.<sup>50</sup> In 2008, Congress changed the mens rea standard for the act of advertising human trafficking from a knowledge requirement to reckless disregard that force, fraud, or coercion would be used; imposed criminal liability on those who knowingly, and with intent to defraud, recruited people to the United States by making false representations; and criminalized the financial advancement resulting from participation in ventures that engage in trafficking.<sup>51</sup> Finally, in 2013, Congress penalized the confiscation of identification documents—a common act performed by traffickers to isolate their victims.<sup>52</sup>

### *C. Complications of Prosecuting the Sellers*

Sex trafficking first became a federal crime under the TVPA,<sup>53</sup> and as mentioned previously, the TVPA shifted prosecutorial focus from victims to traffickers.<sup>54</sup> Consequently, the TVPA forced prosecutors to adjust to the new policy, producing low prosecution rates despite an increase in the rate between 2001 and 2008.<sup>55</sup> Since then, the number of successful prosecutions has increased dramatically, with the Department of Justice (DOJ) reporting federal

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46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. John Elrod, Note, *Filling the Gap: Refining Sex Trafficking Legislation to Address the Problem of Pimping*, 68 VAND. L. REV. 961, 968 (2015).

54. See *id.* at 967 (highlighting the TVPA's focus on "prosecuting traffickers" while "protecting human trafficking victims.").

55. See *id.* at 970 (highlighting how despite a percentage increase in human trafficking prosecutions, prosecutions were already low before so the increase is not indicative of effectiveness).

convictions of 297 traffickers in 2015 alone, a record high.<sup>56</sup> Still, former Attorney General Loretta Lynch has recognized that “there is much work left to do”<sup>57</sup> if the United States would like to make its mark on trafficking.<sup>58</sup>

Nevertheless, Ms. Lynch’s hopes of significant progress may be out of reach due to the difficulties prosecutors face when utilizing the TVPA. First, the TVPA does not criminalize all acts related to commercial sexual activities.<sup>59</sup> Section 1591 of the United States Code only criminalizes “severe sex trafficking” where force, fraud, or coercion is present.<sup>60</sup> Consequently, prostitution without the presence of force, fraud, or coercion is not a crime under the TVPA.<sup>61</sup> This leads to the second issue, where experts believe that the requirement to show force, fraud, or coercion renders the TVPA essentially ineffective.<sup>62</sup> To emphasize this point, research shows prosecutors often use the Mann Act over the TVPA because the prosecutors are not required to prove the use of force, fraud, or coercion.<sup>63</sup>

The difficulty of proving force, fraud, and coercion under the TVPA often ties the prosecutor’s hands and has forced some

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56. U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS 63 (2015), <https://www.justice.gov/archives/page/file/870826/download> [<https://perma.cc/M7NT-ZGVQ>].
  57. *Id.* at 130.
  58. Reports estimate that 4.5 million people have been sex trafficked, and 17,500 foreign nationals are trafficked annually into the United States. Elrod, *supra* note 53, at 962.
  59. Elrod, *supra* note 53, at 968.
  60. 22 U.S.C. § 7102(8) (2000).
  61. Elrod, *supra* note 53, at 968; *but cf.* John Philip Jenkins, *Prostitution*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/prostitution> [<https://perma.cc/33VV-MGBS>] (last visited Feb. 10, 2018) (explaining prostitution is still illegal in most of the United States, minus a few counties in Nevada).
  62. *See* Norma Ramos, *Addressing Domestic Human Trafficking*, 6 U. ST. THOMAS L. J. 21, 23 (2008) (highlighting how the Coalition Against Trafficking in Women (CATW) believes the TVPA falls short and advocates for correcting this issue).
  63. *See* Elrod, *supra* note 53, at 969 (“The Mann Act is often used to prosecute pimps in sex trafficking cases because the prosecutors are not required to prove the use of force, fraud, or coercion.”); *see generally* 18 U.S.C.A. § 2422(a) (2006) (showing that the Mann Act reads, “Whoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce . . . to engage in prostitution . . . or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.”).

prosecutors to move forward only in “slam dunk”<sup>64</sup> cases.<sup>65</sup> Although prosecutors realize the law does not require all three elements to be met, they generally like to have all present to protect the case on appeal should one element be disproven.<sup>66</sup> A study on the three elements showed that prosecutors considered force the easiest to prove because physical evidence, such as photographs of abuse, was easier to obtain than other evidence.<sup>67</sup> Prosecutors believed fraud was a bit harder to prove, but acknowledged working on cases where a contract had been signed by the victim to do “work” in modeling, music videos, or domestic work.<sup>68</sup> Unsurprisingly, prosecutors cited coercion as the most difficult to prove because of its ambiguous and “mushy” nature.<sup>69</sup>

Prosecutors have found other issues, too.<sup>70</sup> Lack of departmental resources has caused prosecutors to sometimes hand-pick the promising cases,<sup>71</sup> and limited funds and a low count of personnel with expertise in prosecution under the TVPA compounds the issue.<sup>72</sup> Several U.S. Attorneys even mentioned their jurisdiction’s limitations

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64. AMY FARRELL, ET AL., IDENTIFYING CHALLENGES TO IMPROVE THE INVESTIGATION AND PROSECUTION OF STATE AND LOCAL HUMAN TRAFFICKING CASES 198 (2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/238795.pdf> [<https://perma.cc/84E5-7EJ9>] (describing “slam dunk” cases as cases “[w]here you have more than one cooperating victim, or witnesses, and . . . corroborating evidence all meets . . . [I]t’s handed to you on a silver platter. And so all the ducks are in a line; you’ve got your victims, witnesses. They’re all cooperators, they’ll all go before the grand jury and say X, Y and Z. You’ve got hotel receipts, you’ve got . . . medical records, you’ve got . . . pictures of injuries, you’ve got loaded guns, you’ve got the smoking gun from the grassy knoll . . . [T]hey want it all pretty.”).
65. Elrod, *supra* note 53, at 971.
66. FARRELL, ET AL., *supra* note 64, at 204.
67. *Id.* at 205.
68. *Id.*
69. *Id.*
70. *See id.* (prosecutors find the federal human trafficking laws complicated and ambiguous because of how the statute is written and unclear legal standards).
71. *Id.* at 199.
72. *See id.* at 201 (explaining that “if you have lack of personnel and no dedicated personnel, then they can’t take every little case and try to run it down. They have to, you know, prioritize.”); *see also id.* at 206 (explaining that because prosecuting attorneys feel uncomfortable with the trafficking statute, they try to use other charges).

caused them to prioritize and focus solely on the trafficking of juveniles.<sup>73</sup>

Finally, prosecutors admitted to rejecting some claims because detrimental harms caused early on in the investigation left the prosecutors with little to no workable evidence.<sup>74</sup> “It would be helpful to have a uniform policy on how to deal with these cases on the local level so the cases are not damaged before they get to the federal side. The first 24-48 hours are critical.”<sup>75</sup> Consequently, federal prosecutors have told law enforcement to treat the crime scene more carefully and to collect hard evidence such as condoms from the trash, hotel receipts, and cash—all items that might help validate the victim’s testimony in court.<sup>76</sup> Due to prosecutorial difficulty in winning trafficking cases under the TVPA regime, policymakers’ reform efforts have shifted to a focus on the “demand side” of sex trafficking.

### III. THE JVTA AMENDMENT AND A PROPOSAL FOR A UNIFORM STATE TRAFFICKING STATUTE

The relationship between buyers and sellers in a commercial sex transaction stems from simple economics. All things equal, the point where the highest price a buyer is willing to pay meets the lowest price the seller is willing to sell is called the market price.<sup>77</sup> The market price may change according to the number of buyers in the marketplace, or as a result of a complete demand curve shift.<sup>78</sup> A demand curve shift to the left or right represents a change in the buyer’s preferences.<sup>79</sup> Specifically, a higher desirability of the good shifts the demand curve to the right, resulting in a larger demand of

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73. See *id.* at 199 (admitting that a prosecutor’s department only took cases involving children).

74. *Id.* at 199-200.

75. *Id.* at 200.

76. *Id.* at 213.

77. See *generally* *Market Equilibrium*, KHAN ACADEMY, <https://www.khanacademy.org/economics-finance-domain/microeconomics/supply-demand-equilibrium/market-equilibrium-tutorial/a/market-equilibrium> [https://perma.cc/P7DZ-B6Z2] (last visited Sept. 28, 2018).

78. See *generally* *Changes in Equilibrium Price and Quantity*, KHAN ACADEMY, <https://www.khanacademy.org/economics-finance-domain/microeconomics/supply-demand-equilibrium/market-equilibrium-tutorial/a/changes-in-equilibrium-price-and-quantity-the-four-step-process-cnx> [https://perma.cc/8UKK-B2NM] (last visited Sept. 28, 2018).

79. David Sarokin, *What Causes the Demand Curve to Shift to the Left?*, CHRON., <http://smallbusiness.chron.com/causes-demand-curve-shift-left-15857.html> [https://perma.cc/PY4V-3KQD] (last visited Feb. 10, 2018).

that good at any given price.<sup>80</sup> Alternatively, a demand curve shift to the left indicates the buyer's desire for the market good is less, resulting in fewer items demanded at a given price.<sup>81</sup> To entice more demand, sellers may lower their prices, which has the effect of eliminating suppliers from the market because those sellers will be unwilling to enter their goods into that market at the lower price.

Apply this same analysis to sex trafficking, where one can see that a buyer's desirability for commercial sex has a clear and direct impact on the number of victims in the marketplace.<sup>82</sup> Higher buyer desirability increases demand, and consequently, drives more victims into the marketplace. Less desirability decreases demand and moves victims out of the marketplace because suppliers are unwilling to sell. All else being equal, without any buyers, or alternatively, a low amount of them, profitability in the commercial sex industry would likely diminish and suppliers would have no incentive to participate. Thus, prosecuting buyers is a legitimate solution to the problem of trafficking.<sup>83</sup>

*A. The JVTA Amendment to the TVPA*

A court of the United States first convicted a buyer under the TVPA in 2011 in *U.S. v. Jungers*.<sup>84</sup> The Court reasoned that the TVPA applies to anyone who "knowingly . . . recruits, entices, harbors, transports, provides, obtains or maintains [a child] by any means" and ruled that Jungers knowingly obtained a trafficked person for the purpose of sex.<sup>85</sup> A staff attorney with the National District Attorneys Association's National Center for Prosecution of Child Abuse praised the decision to prosecute the demand side of sex

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80. *Id.*

81. *Id.*

82. See Donna M. Hughes, *Combating Sex Trafficking: A Perpetrator-Focused Approach*, 6 U. OF ST. THOMAS L. J. 28, 38–40 (2008) (noting that demand for victims is "the driving force of sex trafficking").

83. For a non-economic analysis as to the culpability of buyers, see Heather C. Gregorio, Note, *More Than "Johns," Less Than Traffickers: In Search of Just and Proportional Sanctions for Buyers of Sex with Trafficking Victims*, 90 N.Y.U. L. REV. 626, 649 (2015) (saying that "[o]ften [buyers] will cause the most egregious harm to a sex-trafficking victim -- raping, sexually and physically abusing, or demeaning and objectifying him or her."); see also 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, 123 (2002) (reporting that while 93% of minors in prostitution were beaten by a john, just over half reported being regularly beaten by their pimp).

84. *United States v. Junger*, 701 F.3d at 1067, 1076.

85. *Id.* at 1075.

trafficking, saying, “[T]he Court took a very important step towards ending the commercial sex trade . . . .”<sup>86</sup> Yet *Jungers* remains an anomaly as few cases have been brought against buyers since the decision.<sup>87</sup>

Congress passed the Justice for Victims of Trafficking Act (JVTA) in 2015, intending to make demand-side prosecutions easier.<sup>88</sup> Among other things, the JVTA revised § 1591 to clarify that buyers may be charged with sex trafficking by “patroniz[ing]” or “solicit[ing]” victims of trafficking.<sup>89</sup> According to the legislative history, Congress intended to affirm the *Jungers* opinion that “criminals who purchase sexual acts from human trafficking victims may be arrested, prosecuted, and convicted as sex trafficking offenders when this is merited by the facts of a particular case.”<sup>90</sup> The rest of this Note will analyze the elements of § 1591 and state trafficking laws, honing in on the effectiveness of the JVTA and the difficulties prosecutors may face as they attempt to prosecute buyers of trafficked sex.

### 1. In or Affecting Interstate Commerce

Section 1591 of Title 18 of the United States Code, often cited as the federal trafficking statute, and amended as of 2015, reads, in pertinent part, as follows:

(a) Whoever knowingly--

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

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in

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86. Kevin M. Ryan, Blog, *Federal Court: If You Buy a Girl You're a Sex Trafficker*, HUFFINGTON POST (May 6, 2014), [https://www.huffingtonpost.com/kevin-m-ryan/federal-court-sex-trafficking\\_b\\_4906848.html](https://www.huffingtonpost.com/kevin-m-ryan/federal-court-sex-trafficking_b_4906848.html) [<https://perma.cc/7W56-99WZ>].

87. See Ann Wagner & Rachel Wagley McCann, *Prostitutes or Prey? The Evolution of Congressional Intent in Combating Sex Trafficking*, 54 HARV. J. ON LEGIS. 701, 750-51 (2017) (demonstrating the confusion prosecutors face when deciding how to charge and handle cases against buyers, despite *Jungers*).

88. Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat. 227.

89. Wagner, *supra* note 87, at 751.

90. 161 CONG. REC. S1533-01, at S1536 (2015).

reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).<sup>91</sup>

In 2016, the United States Court of Appeals for the Eleventh Circuit considered the interstate commerce element of § 1591 in *United States v. Baston*.<sup>92</sup> In *Baston*, the appellant-trafficker argued that his trafficking of the victim was not “in or affecting” interstate commerce.<sup>93</sup> The Court argued that “in commerce” refers to the “channels” and “instrumentalities” of interstate commerce.<sup>94</sup> It concluded, citing other circuit Court cases that held similarly,<sup>95</sup> that communicating by phone, text, or Instagram; convincing the victim to cross state lines on a bus; advertising her services on Backpage.com; and staying with the victim at hotels was sufficient proof that his conduct was “in commerce.”<sup>96</sup> The Court also argued that even if the trafficking occurred exclusively in one state, a defendant whose illegal acts occur intrastate “still acts ‘in commerce’ if he ‘uses the channels or instrumentalities of interstate commerce to facilitate their commission.’”<sup>97</sup> The defendant’s use of phones, the internet, hotels, and buses facilitated the trafficking of his victim, and thus his conduct was “in commerce.”<sup>98</sup>

Next, “affecting interstate commerce” refers to the term of art that “ordinarily signal[s] the broadest permissible exercise of Congress’ Commerce Clause power”<sup>99</sup> and reaches “purely local activities that are part of an economic ‘class of activities’ that have a substantial

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91. 18 U.S.C. § 1591 (2015).

92. *United States v. Baston*, 818 F.3d 651, 660 (11th Cir. 2016).

93. *Id.* at 663.

94. *Id.* at 664.

95. *See id.* (citing *United States v. Daniels*, 685 F.3d 1237, 1246 (11th Cir. 2012) (cell phone, interstate bus travel); *United States v. Evans*, 476 F.3d 1176, 1179 (11th Cir. 2007) (hotels that serve interstate travelers); *United States v. Pipkins*, 378 F.3d 1281, 1295 (11th Cir. 2004) (internet)).

96. *Id.*

97. *Baston*, 818 F.3d at 664.

98. *Id.*

99. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003).

effect on interstate commerce.”<sup>100</sup> The Court explained that “sex trafficking by force, fraud, or coercion—even when it occurs ‘solely in Florida’—‘ha[s] the capacity when considered in the aggregate . . . to frustrate Congress’s broader regulation of interstate and foreign economic activity.’”<sup>101</sup> Congress has broad powers to pursue traffickers under the federal statute, and therefore very little will be out of its reach when applying the first element.

## 2. Actus Reus

A criminal statute traditionally has two main parts: the act itself, in Greek called the *actus reus*, and the mental state of the actor, known as the *mens rea*.<sup>102</sup> The broad application of § 1591 covers many participants in a trafficking scheme. Understanding that a victim may change hands from the initial enticement or capture to final sale, Congress criminalized all stages of the supply chain.<sup>103</sup> Individuals that recruit, entice, harbor, transport, provide, or obtain other people as trafficking victims play an essential and harmful role in the success of sex trafficking, and therefore Congress legitimately labeled each actor as a contributing supplier and trafficker.<sup>104</sup>

Recently, through the passage of the JVTAs, Congress added two new culpable conducts, “solicits” and “patronizes,” to § 1591(a)(1).<sup>105</sup> By adding these actions to the statute, Congress gave prosecutors clear permission to target the buyers of commercial sex.

Not only does the statute criminalize the sale and purchase of trafficked sex, § 1591(a)(2) assigns culpability to third-party individuals and businesses that benefit financially from a venture that

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100. *See Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (interpreting the broad range of power given to Congress under the Commerce Clause of the United States Constitution).

101. *Baston*, 818 F.3d at 665 (quoting *United States v. Evans*, 476 F. 3d 1176, 1179 (2007)).

102. *Actus Reus*, LEGAL INFORMATION INSTITUTE, [https://www.law.cornell.edu/wex/actus\\_reus](https://www.law.cornell.edu/wex/actus_reus) [<https://perma.cc/7KVW-MJCW>] (last visited Feb. 14, 2018).

103. 18 U.S.C. § 1591 (2015).

104. *Id.*

105. According to Merriam-Webster dictionary, to “patronize” means “to be a frequent or regular customer or client of. *Patronize*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/patronize> [<https://perma.cc/9C6X-PGRN>] (last visited Feb. 10, 2018). “Solicit” means “to entice or lure especially into evil,” or “to proposition (someone) especially as or in the character of a prostitute,” or “to try to obtain by usually urgent requests or pleas.” *Solicit*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/solicit> [<https://perma.cc/FUA9-953R>] (last visited Feb. 10, 2018).



has engaged in sex trafficking.<sup>106</sup> Section (e) broadly defines a “venture” as “any group of two or more individuals associated in fact, whether or not a legal entity.”<sup>107</sup> The Court of Appeals for the Sixth Circuit addressed some confusion surrounding this definition in *United States v. Afyare*.<sup>108</sup> In that case, the government contended that § 1591(a)(2) contained four distinct elements: The defendant (1) must know or recklessly disregard that members of a venture sex traffic an adult by means of force, fraud, or coercion; (2) must knowingly benefit (3) from participation in that venture, regardless of its stated or other purpose; and (4) someone in that venture must engage in sex trafficking.<sup>109</sup> Put simply, the government argued that although the defendant had no direct involvement in the sex trafficking scheme, he benefited from being a part of a venture in which some individuals connected to that venture took part in sex trafficking.<sup>110</sup> The Court found this bystander-interpretation to be incorrect.<sup>111</sup> Instead, the Court concluded that § 1591(a)(2) targets those who participate in a sex trafficking venture by “commit[ting] some ‘overt act’ that furthers the sex trafficking aspect of the venture.”<sup>112</sup>

Last year, the Court of Appeals for the First Circuit heard a case in which the plaintiff-victim brought a claim against her trafficker, a

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106. 18 U.S.C. § 1591(a)(2) (2015).

107. 18 U.S.C. § 1591(e)(6) (2015).

108. 632 F. App'x 272 (6th Cir. 2016).

109. *Id.* at 285. The Court presents the following hypothetical to illustrate the government’s interpretation of the statute: The defendant joins a soccer team with some sex traffickers, who sponsor the team financially. The traffickers do not hide the source of the sponsorship, such that defendant knows, or recklessly disregards such knowledge, that his teammates are engaged in sex trafficking. Under the government’s interpretation, the defendant could be prosecuted under the statute because (1) he knows or recklessly disregards such knowledge that members of his venture (the team) sex traffic, (2) he knowingly benefits (3) from participation on the venture (team), and (4) someone on his team is engaged in trafficking. *Id.* at 286.

110. *Id.* at 286.

111. *Id.* The district court applied, and the Sixth Circuit confirmed, a three-element version where “[t]he defendant (1) must know or recklessly disregard that members of a venture either sex traffic an adult by means of force, threats, or coercion, or sex traffic a child; and (2) must knowingly benefit (3) from participation in that sex-trafficking venture.” *Id.* at 285.

112. *Id.* at 286. In the soccer player hypothetical, the Court argued that playing on the same soccer team with traffickers was irrelevant, and the defendant would not be culpable unless the prosecution proved that the defendant engaged in some aspect of the sex trafficking along with his teammates. *Id.* at 286.

hotel owner, and the two hotel operators.<sup>113</sup> Here, the trafficker enticed the victim to meet him and took her captive against her will.<sup>114</sup> The trafficker kept the victim at a hotel, with which he had prior commercial dealings.<sup>115</sup> On one occasion specifically, the trafficker and one of the hotel operators exchanged high-fives in the parking lot and spoke about “getting this thing going again” after the trafficker informed the operator about the victim.<sup>116</sup> At trial, the defendant-operators admitted that they were a financial beneficiary from the trafficking, but said they had never personally groomed or coerced any of the victims.<sup>117</sup> The Court reversed the district court’s order granting the defendant’s motion to dismiss.<sup>118</sup> Now the prosecutor must prove, in tandem with the Sixth Circuit’s decision in *Afyare*, that the hotel operators were not merely third-party beneficiaries, but committed an overt act that contributed to the supply chain.<sup>119</sup> Fortunately, the prosecutor has evidence that the operator had, on at least one occasion, opened the hotel’s gates to allow the victims to bring back customers.<sup>120</sup>

### 3. Mens Rea

Mens rea is the most important, and often the most difficult, element of a crime to establish.<sup>121</sup> The term mens rea refers to “the particular mental state provided for the definition of the offense.”<sup>122</sup> In the United States, each jurisdiction has the police power to decide which mens rea to attach to each individual crime in its criminal statutes.<sup>123</sup> The Model Penal Code recognizes four traditional mens

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113. *Ricchio v. McLean*, 853 F.3d 553 (1st Cir. 2017).

114. *Id.* at 555.

115. *Id.*

116. *Id.* On other occasions, one of the operators ignored the victim’s cry for help in escaping the trafficker’s custody, and showed “indifference” to the victim’s “obvious physical deterioration” when she saw her. *Id.*

117. *Louisiana Motel Owner Pleads Guilty in Sex Trafficking Case*, U.S. DEP’T OF JUSTICE (July 1, 2015), <https://www.justice.gov/opa/pr/louisiana-motel-owner-pleads-guilty-sex-trafficking-case> [<https://perma.cc/R44B-2ND8>].

118. *Ricchio*, 853 F.3d at 558.

119. *Afyare*, 632 Fed. Appx at 286.

120. *Louisiana Motel Owner Pleads Guilty in Sex Trafficking Case*, *supra* note 117.

121. Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 974 (1932).

122. Rachel A. Lyons, Note, *Florida’s Disregard of Due Process Rights for Nearly A Decade: Treating Drug Possession As A Strict Liability Crime*, 24 ST. THOMAS L. REV. 350, 354 (2012) (quoting JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 119 (5th ed. 2009)).

123. *Id.*

rea standards: purpose, knowledge, recklessness, and negligence.<sup>124</sup> In § 1591's original version, Congress required a knowing standard to convict any person of engaging in one of the prohibited activities.<sup>125</sup> In 2008, Congress amended the mens rea standard to include a standard of reckless disregard.<sup>126</sup> But Congress's addition of the words "reckless disregard" may cause the unexperienced reader to stumble on what actions require a knowing standard and which require the lesser standard of reckless disregard.

The first thing that strikes the reader in § 1591(a) is the word "knowingly."<sup>127</sup> Congress set out the mens rea at the forefront of the statute, explicitly providing that the actions taken in section (a)(1) were covered upon the actor's knowledge of their doing that action.<sup>128</sup> The knowledge requirement here pertains only to the action of the defendant; not to whether the seller or buyer has knowledge that a victim has been sex trafficked.<sup>129</sup> The government can easily satisfy this standard to prove that the defendant at least knew he was acting.

§ 1591 (a)(2) contains two mens rea standards. This time, the mens rea applies to the defendant's recognition of the victim's status.<sup>130</sup> Individuals that recruit, entice, harbor, transport, provide, obtain, maintain, patronize, or solicit a person while knowing that that person is a victim of force, fraud, or coercion are culpable under the statute.<sup>131</sup> The exception to the knowing requirement in the statute is the actus reus of advertising—anyone that advertises a person in reckless disregard of the fact that force, fraud, or coercion will be used to cause the person to engage in a commercial sex act is

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124. See Kenneth W. Simmons, *Should the Model Penal Code's Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. OF CRIM. LAW 179, 180 (2003) (stating that the MPC limits its terms for *mens rea* to purpose, knowledge, recklessness, and negligence).

125. 18 U.S.C. § 1591(a). Pub. L. No. 106-386, 114 Stat. 1487 (2000).

126. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, H.R. 7311, 110th Cong. § 222 (2008).

127. 18 U.S.C. § 1591(a) (2015).

128. *Id.*; see also *United States v. Todd*, 627 F.3d 329, 334 (9th Cir. 2010) ("When an act of Congress requires knowledge of a future action, it does not require knowledge in the sense of certainty as to a future act. What the statute requires is that the defendant know in the sense of being aware of an established modus operandi that will in the future cause a person to engage [the act].").

129. 18 U.S.C. § 1591(a) (2015).

130. See 18 U.S.C. § 1591(a)(2) (2015) (covering those who benefit from a human trafficking venture).

131. See 18 U.S.C. § 1591(b)(2) (2015) (outlining the punishments for those covered by this statute).

culpable under the statute.<sup>132</sup> This segment of the statute seems to be directly related to advertising sex on Backpage.com.<sup>133</sup>

*B. State Trafficking Laws*

Before analyzing the effects of the elements of the federal sex trafficking statute, it is important to examine state trafficking laws as well. The passage of the TVPA encouraged states to pass their own legislation<sup>134</sup>—currently all fifty states have passed sex trafficking laws.<sup>135</sup> Out of 3,969 trafficking convictions in 2011, only 151 of those occurred at the federal level,<sup>136</sup> leading experts to believe that the battle over trafficking will be won or lost on the state front.<sup>137</sup> Yet problems persist in this arena because laws vary considerably from state to state.<sup>138</sup> For example, some state statutes include only sex trafficking and not labor trafficking, despite estimates that labor trafficking accounts for seventy-eight percent of trafficking globally.<sup>139</sup> Other state laws only address human trafficking of minors, or combine human trafficking laws with smuggling laws.<sup>140</sup> To combat these inconsistencies, the American Bar Association Center for Human Rights submitted to the Uniform Law Commission a proposal

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132. 18 U.S.C. § 1591(a)(2) (2015).

133. For more information on sex advertisements on Backpage.com, see Annie Kelly, *Small Ads Sex Trafficking: The Battle Against Backpage*, GUARDIAN (July 2, 2017), <https://www.theguardian.com/global-development/2017/jul/02/fight-for-my-daughter-battle-against-backpage-child-sex-trafficking> [<https://perma.cc/83JQ-7QAC>] (describing Backpage.com).

134. Elrod, *supra* note 53, at 969.

135. *Id.*

136. Kelly Heinrich and Kavitha Sreeharsha, *The State of State Human-Trafficking Laws*, AMERICAN BAR ASSOCIATION: THE JUDGES JOURNAL, (Jan. 31, 2013) [https://www.americanbar.org/publications/judges\\_journal/2013/winter/the\\_state\\_of\\_state\\_humantrafficking\\_laws.html](https://www.americanbar.org/publications/judges_journal/2013/winter/the_state_of_state_humantrafficking_laws.html) [<https://perma.cc/5SW7-5Q25>].

137. See Andrew Hall, Note, *The Uniform Act on Prevention of and Remedies for Human Trafficking*, 56 ARIZ. L. REV. 854, 871 (2014) (demonstrating how more federal action has been taken to encourage state and local authorities to address human trafficking).

138. Elrod, *supra* note 53, at 969. The Polaris Project rated every states' anti-trafficking laws in 2013 and found only New Jersey, Delaware, and Washington to have fully satisfactory anti-trafficking laws across ten categories of analysis. See *2014 State Ratings on Human Trafficking Laws*, POLARIS PROJECT, <http://polarisproject.org/resources/2014-state-ratings-human-trafficking-laws> [<https://perma.cc/Y7XY-ZL9Z>] (last visited Feb. 10, 2018).

139. Heinrich, *supra* note 136.

140. *Id.*

for a model state anti-trafficking statute.<sup>141</sup> The ABA Center for Human Rights argued a uniform state law would “render the current patchwork of state anti-trafficking laws far more effective by providing a centralized ‘one-stop’ standard that most accurately reflects the actual criminal behavior of traffickers and avoids piecemeal investigations under divergent state statutes . . . .”<sup>142</sup>

### 1. Actus Reus

The ABA Center for Human Rights updated the definition of “human trafficking” in the Uniform Act to include “patronizing a victim of sexual servitude.”<sup>143</sup> Section 6 reads, in pertinent part, as follows:

A person commits patronizing a victim of sexual servitude if the person knowingly gives, agrees to give, or offers to give anything of value so that an individual may engage in commercial sexual activity with another individual and the person knows that the other individual is a victim of sexual servitude.<sup>144</sup>

Accordingly, the ABA proposed to qualify the buyers of commercial sex as “traffickers” even before Congress did.

Some state legislators have used the word “obtain” in crafting their trafficking statutes,<sup>145</sup> but just one court has followed the Jungers holding that the word “obtain” could sufficiently catch buyers of sex trafficking victims.<sup>146</sup> Because only two courts have employed

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141. Erin N. Kauffman, *The Uniform Act on Prevention of And Remedies for Human Trafficking: State Law and the National Response to Labor Trafficking*, 41 J. LEGIS. 291, 310 (2015).

142. *Id.* (quoting ABA CENTER FOR HUMAN RIGHTS, UNIFORM LAW COMMISSION PROJECT PROPOSAL: UNIFORM HUMAN TRAFFICKING LAW 2 (2010)).

143. UNIFORM ACT ON PREVENTION OF AND REMEDIES FOR HUMAN TRAFFICKING § 6 (UNIF. LAW. COMM’N 2013) [hereinafter *Uniform Act*].

144. *Id.* at § 6(a).

145. *See, e.g.*, CAL. PENAL CODE § 236.1 (West 2012) (including the word “obtain” in the statute); 720 ILL. COMP. STAT. 5/10-9 (2013) (same); KY. REV. STAT. ANN. § 529.110 (Westlaw through 2017 Reg. Sess.) (same); MASS. GEN. LAWS ANN. ch. 265, § 50 (West 2017) (same); MICH. COMP. LAWS ANN. 750.462b (West Supp. 2009)(enacted 2006) (same); OHIO REV. CODE ANN. § 2905.32 (West 2013) (same).

146. *See State v. Rufus*, 868 N.W.2d 534, 542 (N.D. 2015) (holding that “the plain meaning of ‘obtain’ . . . is broad enough to encompass acquiring temporary custody of a person for the purpose of engaging in commercial sex acts with that person.”).

this interpretation,<sup>147</sup> the addition of “patronizing,” like the federal statute, clarifies any ambiguity for courts and prosecutors as to whether buyers are culpable under state sex trafficking statutes. State legislators should consider this slight modification to their statutes and align themselves with the federal objective to prosecute buyers.

## 2. Mens Rea

Section six of the Uniform Act is similar to § 1591 of the federal law. The law contains two different components, one pertaining to the mens rea of the action, and the other to the mens rea that concerns the status of the trafficked person as a victim of sexual servitude.<sup>148</sup> Both mens rea standards for the Uniform law are a “knowing” standard, similar to many current state statutes.<sup>149</sup> Only a few states have stricter standards.<sup>150</sup>

## IV. ALTERNATIVE SOLUTIONS: STRICT LIABILITY, RECKLESS, OR NEGLIGENCE?

Unfortunately, the DOJ has had a slow start in its prosecution of buyers under the amended statute.<sup>151</sup> In 2016, the DOJ submitted a written testimony of its progress, presenting “demand-side” cases it has seen in over twenty different jurisdictions;<sup>152</sup> every one of those cases involved a trafficked child while none involved the purchase of an adult.<sup>153</sup>

A strong reason for this shortcoming might be the knowing mens rea standard, where the prosecutors must prove that the buyers knew the victims they purchased were victims of sex trafficking. Without having been told any information about the victims, and without having seen firsthand any evidence of force, fraud, or coercion,

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147. *See id*; *see also United States v. Gum*, W.D.Okla. 2015 U.S. Dist. LEXIS 151581 (Nov. 9, 2015) (finding *Jungers* persuasive in that § 1591 applies to both suppliers and purchasers of commercial sex).

148. *Uniform Act*, *supra* note 143, §6(a).

149. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 265, § 50 (West 2017) (employing a knowing *mens rea* standard); IND. CODE § 35-42-3.1-1(2013) (same) ; GA. CODE ANN. § 16-5-46 (LEXIS through 2010 Reg. Sess.) (same); IOWA CODE ANN. § 710A.2 (West 2014) (same); MICH. COMP. LAWS ANN. 750.462b (West Supp. 2009)(enacted 2006) (same); MISS. CODE ANN. § 97-3-54.1 (2013) (same); MO. ANN. STAT. 566.206 (West Supp. 2009) (enacted 2004) (same).

150. *See, e.g.*, CAL. PENAL CODE § 236.1 (West 2012) (using the strictest mental state of intent); MINN. STAT. ANN § 609.322 (West 2015) (same).

151. Wagner, *supra* note 87, at 743.

152. *Id.* at 755.

153. *Id.*

convictions under § 1591 become difficult. Additionally, any glimmer of a promising case is stifled because of a buyer's "willful blindness."<sup>154</sup> This knowledge-avoidance tactic protects buyers, who choose not to know about certain facts of the situation, from prosecution.<sup>155</sup>

While the trafficking of children requires a knowledge element, the standard for prosecutors to meet is easier than in cases involving adult victims.<sup>156</sup> In *Jungers*, the Court identified the victim as a child and analyzed the case through that lens. Because *Jungers* plainly indicated he wanted an eleven-year-old for sex,<sup>157</sup> the Court most likely interpreted *Jungers*' knowledge as a non-issue.

The difficulty in proving knowledge in adult-victim trafficking cases might be solved by lowering the mens rea requirements for federal and state trafficking statutes. But before changing the law, legislators must consider what actions to criminalize and whom to penalize. There are two competing interests involved: effectiveness and fairness. The effectiveness interest looks for the best way to conquer the problem and disregards most other factors in an analysis, while the fairness interest implements solutions that do not result in unnecessarily disparate results or unjustifiably harsh sentences.

A lower mental state would change the kinds of buyers that are prosecuted. Under the current mental state of knowledge, prosecutors apprehend buyers who know they are engaging a victim of sex trafficking, but want the commercial sex anyways. This higher mental state functions to catch the more depraved buyer, but only the small class of them, leaving out every other buyer of commercial sex that either does not know, or chooses not to know, the victim's status. As a result, the mental state of knowledge falls somewhere in the middle on the effectiveness-fairness scale.

A statute with a less stringent mental state requirement can capture more criminal activity because it casts a wider net. A lower

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154. Willful blindness is "deliberate failure to make a reasonable inquiry of wrongdoing (as drug dealing in one's house) despite suspicion or an awareness of the high probability of its existence." *Willful Blindness*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2011).

155. See Tim Swarens, *Who Buys a Trafficked Child for Sex? Otherwise Ordinary Men*, USA TODAY (Jan. 30, 2018), <https://www.usatoday.com/story/opinion/nation-now/2018/01/30/sex-trafficking-column/1073459001/> [<https://perma.cc/T4D8-C5KW>] (stating that a former buyer did not "want to know how the sausage is made.").

156. See 18 U.S.C. § 1591(a)(2) (2015) (stating that "knowing...that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act" is punishable under the statute) *but see* 18 U.S.C. §1591(c) (2015) (relieving the government from proving the defendant knew the victim was under 18 if the defendant had a "reasonable opportunity to observe" the victim).

157. *United States v. Jungers*, 702 F. 3d 1066, 1067 (11th Cir. 2013).

mental state requirement could create culpability for buyers of trafficked sex that should have known, or should have been aware because of surrounding circumstances, that a purchased individual was a victim of sex trafficking. To go even further, attaching no mental state at all to the status of the purchased individual would catch every single buyer of commercial sex in its net, regardless of whether the buyer knew the purchased individual was sex trafficked or not. Some might argue this kind of statute leans heavily in favor of effectiveness and creates an unjust consequence for the buyer, yet sex trafficking's aggregate harm may justify the severity of the punishment. If the United States were to eliminate the mental state from the federal trafficking statute for buyers, it would find itself in a similar position to that of Sweden.

*A. Sweden's Model*

On January 1, 1999, Sweden became the first country in the world to legalize the sale of sex and criminalize the purchase of it.<sup>158</sup> It passed the law to protect commercial sex workers<sup>159</sup> by eliminating the criminalization of all commercial sex work.<sup>160</sup> In terms of the allocation of responsibility, the Swedes believe the purchaser and trafficker are both blameworthy, but that the purchaser's impact fosters the abusive environment created by prostitution and trafficking, and thus they should be punished and required to compensate the victim.<sup>161</sup>

In 1998, prior to the law's effective date, Swedish social services' prostitution groups estimated they were aware of 730 women in the country involved in street prostitution.<sup>162</sup> A year after the new law's implementation, street prostitution essentially disappeared.<sup>163</sup> Although it regained some potency a year later, a 2008 study showed the total number of individuals in street prostitution had decreased by half since 1999.<sup>164</sup> These numbers are often compared to numbers

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158. Statens Offentliga Utredningar [SOU] 2010:49 Förbud mot köp av sexuell tjänst. En utvärdering 1999-2008 (Swed.), *translated in* THE BAN AGAINST THE PURCHASES OF SEXUAL SERVICES: AN EVALUATION 1999-2008, 4 (Mireille L. Key & Jennifer Evans trans., Swed. Inst., Nov. 2010) [hereinafter SWEDISH INSTITUTE].

159. Max Waltman, *Prohibiting Sex Purchasing and Ending Trafficking: The Swedish Prostitution Law*, 33 MICH. J. INT'L L. 133, 135 (2011).

160. SWEDISH INSTITUTE, *supra* note 158, at 14.

161. *Id.* at 155.

162. SWEDISH INSTITUTE, *supra* note 158, at 20.

163. *Id.*

164. *Id.* The study indicated that "[t]his reduction can be viewed as a direct consequence of the criminalization of buying sex." *Id.* at 27.



in Denmark and Norway, where purchasing sex is legal.<sup>165</sup> Based on evidence, researchers estimated individuals involved in prostitution in Sweden equaled one-tenth of those in Denmark, and one-eighth of those per capita in Norway.<sup>166</sup> The National Criminal Investigation Department provides additional positive statistics, stating that telephone interceptions involving pimps have shown them to be “disappointed with the prostitute market in Sweden.”<sup>167</sup> Likewise, a reliable self-reporting method has shown that the percentage of men who reported buying sex dropped from 12.7% in 1996 to 7.6% in 2008.<sup>168</sup>

Yet, even with positive results, there is a hesitancy to praise the law.<sup>169</sup> While the law may have decreased the number of individuals immersed in street prostitution in Sweden, it is unknown whether prostitution in general has decreased.<sup>170</sup> One theory is that the rise of technology and the internet has driven prostitution indoors and made it more difficult for law enforcement to investigate.<sup>171</sup> Skeptics also question the safety of the victims that are left.<sup>172</sup> Because lower demand and fewer clients cause lower prices, victims are not at liberty to reject potentially-harmful buyers.<sup>173</sup>

To add another layer, Sweden finds itself in the middle of a strong debate over whether prostitution is inherently coercive and thus a form of sex trafficking. On one side, sex-work advocates believe that laws against prostitution infringe upon the rights of the individuals to choose to engage in sex work.<sup>174</sup> Advocates argue victims of sex trafficking who have been forced, defrauded, or coerced into engaging in commercial sex are very different from individuals exercising their own choice to enter prostitution.<sup>175</sup> Under this view, conflating prostitution with sex trafficking is disfavored.<sup>176</sup>

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165. Waltman, *supra* note 159, at 146-47.

166. *Id.*

167. *Id.* at 147.

168. *Id.* at 148.

169. See Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. Pa. L. Rev. 1655, 1718 (2010) (explaining the skepticism of the Swedish law).

170. *Id.* at 1718-1719.

171. *Id.*

172. *Id.*

173. *Id.*

174. Elrod, *supra* note 53, at 972.

175. *Id.* at 973.

176. *Id.*

In opposition, abolitionists<sup>177</sup> believe ending prostitution is “instrumentally valuable” to abolishing sex trafficking.<sup>178</sup> The legalization of prostitution leads to an increase in the market demand for commercial sex which, in turn, creates a profit motive for pimps to provide those sexual services.<sup>179</sup> To maintain their supply, pimps regularly engage in dangerous and destructive conduct involving force, fraud, or coercion.<sup>180</sup> Thus, the industries are linked: “[A]s the prostitution industry as a whole goes, so goes sex trafficking.”<sup>181</sup>

Nevertheless, despite the skepticism and debate, one thing stands tall: Sweden has found a way to protect commercial sex victims by legalizing the sale of sex and, at the same time, curbing the high volumes of commercial sex that usually follows the legalization of it by strictly prosecuting those who purchase it.

### *B. An Analysis: Mens Rea Reform*

Since 2012, over 825 cities and counties in the United States have pursued a demand-focused campaign to stop sex trafficking.<sup>182</sup> However, the United States has yet to fully embrace the Swedish Model, which would call for two crucial changes in domestic public policy: the elimination of the distinction between the purchase of prostituted sex and the purchase of trafficked sex, and the decriminalization of the sale of commercial sex. Without any verification that prostitution is inextricably linked to sex trafficking, both changes would be a step backwards for the United States.

The first problem with Sweden’s approach is that the merger of prostitution statutes with trafficking statutes would result in a purchaser-centralized statute with no mental state as to the status of the victim as trafficked.<sup>183</sup> Anyone who would solicit, or patronize a

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177. In its simplest term, “abolitionist” refers to individuals that seek to eradicate both sex trafficking and the prostitution industry in general. Michelle Madden Dempsey, *Sex Trafficking and Criminalization: In Defense of Feminist Abolitionism*, 158 U. PA. L. REV. 1729, 1730 (2010).

178. *Id.* at 1749.

179. *Id.* at 1752-53.

180. *Id.* at 1753.

181. Elrod, *supra* note 53, at 974.

182. See MICHAEL SHIVELY, ET AL., NAT’L INST. OF JUSTICE, A NATIONAL OVERVIEW OF PROSTITUTION AND SEX TRAFFICKING DEMAND REDUCTION EFFORTS, NO. 238796, FINAL REPORT (2012) (overviewing national demand-focused initiatives). These initiatives are most played out through what is called the “reverse sting” operation, where police officers pose as women on the street or online to lure buyers. Gregorio, *supra* note 83, at 642.

183. See Asaaf Hamdani, *Mens Rea and the Cost of Ignorance*, 93 VA. L. REV. 415, 416-18 (2007) (discussing a background of criminal statutes that have no mental states, often referred to as strict liability statutes).

person for, commercial sex, without regard to whether the person was a victim of sex trafficking, would commit a crime. Under a law such as this, the purchase of sex with a prostitute would be equally as culpable as the purchase of sex with a trafficked victim. However, these crimes are not equal, and should not be made equal; forced, fraudulent, or coerced sex does not equal consensual sex. The severity of each crime's punishment evidences the different levels of criminality in the eyes of the legislature.<sup>184</sup> Equal punishment would indeed disincentivize purchasers of commercial sex to explore the status of the person with whom they have sex. Because sex with a prostitute would be equally as wrong as having sex with a trafficked victim, buyers would not care to ask or know the status of the person bought for sex. United States law and policy should instead encourage individuals to abstain from the purchase of sex with trafficked victims. Distinct punishments would encourage buyers who want to purchase sex to do a little due diligence, and to understand that a careful examination of the situation could save them fifteen years in prison.

The second problem with Sweden's approach is Congress would have to decriminalize the sale of commercial sex. The decriminalization of the sale of commercial sex has worked on the surface in Sweden, but the United States should refrain from implementing this strategy until more data surfaces about its long-term effects. Almost two decades have passed since the United States started prosecuting the traffickers of commercial sex, and United States prosecutors have finally begun to gain some traction. Now to eliminate the trafficker's culpability to pursue a relatively unproven strategy would foolishly pull the rug out from underneath the prosecutor's feet.

Instead of the Swedish Model, the United States should pursue a smaller change that still has the potential to yield a big impact. The federal and state trafficking statutes have not produced effective results because of the high mens rea standard of knowledge, so Congress and state legislatures should consider implementing a lower standard for all actus reus elements. A lower mens rea standard would decrease the burden shouldered by the government in proving that the defendant engaged in one of the prohibited actus reus and hopefully increase the convictions of traffickers in court. Legislatures would have two mens rea standards to choose from: reckless or negligence.

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184. See, e.g., O.R.C. § 2907.24 (2016) (stating that “[n]o person shall solicit another who is eighteen years of age or older to engage with such other person in sexual activity for hire.”).

1. Reckless

Criminal law generally permits a finding of recklessness when an individual consciously disregards a substantial and unjustifiable risk that the material element exists.<sup>185</sup> At first glance, a reckless standard appears workable. A prosecutor would have to prove that the circumstances presented a risk that the person was trafficked, that the defendant was aware of the risk, and that the defendant disregarded the risk. Each case would be highly dependent upon particular facts and circumstances, leaving juries to evaluate the case through signs of trafficking emanating from the person or the situation. Fortunately, the Polaris Project and the Department of Health and Human Services say that psychological and physical signs of trafficking exist.<sup>186</sup> Victims are often controlled physically or psychologically and cannot leave their home or workplace without supervision.<sup>187</sup> Victims are often addicted to alcohol or drugs as a coping mechanism to escape their situation, and they may have signs of physical abuse such as burns, bruises, or scars.<sup>188</sup> Finally, victims may lack knowledge about what city they are in or the location of where they are living.<sup>189</sup> Unfortunately for prosecutors, the presence of trafficking signs would not be enough—they would still have to establish that the defendant was aware of the trafficking signs. Suddenly, the reckless standard does not look so promising: the prosecutor is faced again with proving the defendant's knowledge about certain facts of the situation.

2. Negligence

"I didn't mean to do it: I just didn't think."<sup>190</sup> This common statement emphasizes the negligence standard's place in civil and

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185. *Farmer v. Brennan*, 511 U.S. 825, 836-37 (1994) (citing Unif. Model Penal Code § 2.02(2)(c) (1985)).

186. *See Recognize the Signs*, POLARIS PROJECT, <http://polarisproject.org/human-trafficking/recognize-signs> [<http://perma.cc/56YH-PJ9T>] (last visited on Feb. 10, 2018) (describing the signs of trafficking); *see also Identifying Victims of Human Trafficking Fact Sheet*, DEP'T OF HEALTH & HUMAN SERVICES, [https://www.acf.hhs.gov/sites/default/files/orr/fact\\_sheet\\_identifying\\_victims\\_of\\_human\\_trafficking.pdf](https://www.acf.hhs.gov/sites/default/files/orr/fact_sheet_identifying_victims_of_human_trafficking.pdf) [<https://perma.cc/Y9FN-NFFM>] (last visited Feb. 10, 2018) (identifying the signs of trafficking). This list identifies a few signs of human trafficking but is not exhaustive. The signs in this list may not be present in all trafficking situations.

187. *Recognize the Signs*, *supra* note 186.

188. *Id.*

189. *Id.*

190. *Negligence and the General Problem of Criminal Responsibility*, 81 YALE L.J. 949, 975 (1972).

criminal law. Thoughtless action is not an acceptable reason to evade responsibility,<sup>191</sup> and it should not prevail when individuals participate in the sex trafficking industry. The negligence standard would apply to participants in the supply chain of sex trafficking, for example those that transport the victims and to the buyers of trafficked sex. Instead of culpability only for knowledge of the fact that force, fraud, or coercion had been used on the victim, individuals would now be culpable of aiding the trafficking industry by neglecting the signs of trafficking. At last, willful blindness would no longer excuse anyone in the trafficking industry from culpability because the defendant's actual perception of the risk that the victim had been trafficked would bear no weight on the analysis.

A negligence mental state in § 1591 would look similar to the following:

(a) Whoever knowingly--

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

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), negligent to the fact that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

According to the Model Penal Code, a person acts negligently with respect to an element of a criminal offense when "he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct."<sup>192</sup> Considering the circumstances known to the defendant, the actor's failure to perceive the risk must involve a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.<sup>193</sup> Replicate this standard with sex trafficking where the defendant would act negligently if he, considering the circumstances, grossly deviated from the standard of care that a reasonable person would observe in those

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191. *Id.* at 976.

192. MODEL PENAL CODE §2.02(2)(d) (2016).

193. *Id.*

circumstances. Thus, the prosecutor would have to prove that circumstances existed that presented a substantial risk that the person had been trafficked—for example, the victim exhibited signs of trafficking and the defendant grossly deviated from the way a reasonable person would have acted in the same circumstance.

A negligence standard considers a reasonable person's actions under similar circumstances. The reasonable person is a fictitious character who is never negligent and always acts according to the standard of care due to others around him, thus safeguarding himself from liability;<sup>194</sup> he “[exercises] those qualities of attention, knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interests of others.”<sup>195</sup> In conforming to the reasonable person standard, the actor is required to do what the ideal person would do in his place.<sup>196</sup>

To hold a negligence standard in sex trafficking, it is necessary to lay out the expectation of how the ideal person would act. While this ideal person would change his behavior according to the circumstances presented (for example, if he was harboring trafficked individuals versus soliciting them for purchase), there are common behaviors that would apply to a reasonable person in the places of both the buyer and seller of trafficked victims. The reasonable person, for example, when engaged with any person who has a risk of being sex trafficked, would take precautions in both his behaviors and mental recitals to avoid culpability. He would carefully ask questions, such as the victim's origins or age,<sup>197</sup> and if the victim is aware of where they are. The reasonable person would be particularly suspicious of non-English-speaking individuals, especially ones that do not have any identification documents.<sup>198</sup> The reasonable person would carefully scrutinize the arrangements that are made, recognizing that trafficking appears in certain types of establishments<sup>199</sup> and victims may not be allowed to come and go without supervision.<sup>200</sup> The reasonable person would observe the

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194. RESTATEMENT (SECOND) OF TORTS § 283 (AM. LAW INST. 2018).

195. *Id.* at §283, cmt. b.

196. *Id.* at §283, cmt. c.

197. *See Recognize the Signs*, *supra* note 186 (enumerating signs of human trafficking victims).

198. *Id.*

199. *Hotline Reports 250 Cases of Sex and Labor Trafficking in Nail Salons Since 2007*, NAILS MAGAZINE (April 11, 2017), [http://www.nailsmag.com/news/118\\_117/hotline-reports-250-cases-of-sex-and-labor-trafficking-in-nail-salons-since-2007](http://www.nailsmag.com/news/118_117/hotline-reports-250-cases-of-sex-and-labor-trafficking-in-nail-salons-since-2007) [<http://perma.cc/F48V-BAX8>].

200. *Recognize the Signs*, *supra* note 186.

physical appearance of the victim, if possible, to look for evidence of abuse, substance addiction, or marks that show branding.<sup>201</sup> Finally, the reasonable person would not just be mindful upon initial engagement, but would remain aware throughout all interactions with the victim and would connect readily apparent cues where reasonable.

To legitimize the reasonable person and the behavior that this person would exhibit, the federal and state governments should publish information about how to spot trafficked victims, or even further, publish who this reasonable person is. General awareness to the public would establish the standard of care that a reasonable person would take when soliciting commercial sex so as to not purchase trafficked sex.

Once the reasonable person is established, the prosecution would bear the burden to introduce evidence that the defendant grossly failed to adhere to the standard of care that a reasonable person would have in his circumstance. To do this, the prosecutor would look to establish that the victim exhibited signs of trafficking, and that those signs were so evident that a reasonable person in the same circumstance would see them and disengage the victim so as to avoid culpability. For example, the prosecutor might want to present evidence of the physical features of the victim, including marks on the body, or the victim's general appearance, such as the influence of drugs or alcohol. The prosecutor might also want to present evidence of communication exchanges or any mention of locations.

Until now, most of the analysis has been evaluated with street-level trafficking in mind. However, solicitation of commercial sex has shifted from street-level to online in recent years.<sup>202</sup> While web-based sting operations are easy for police to initiate,<sup>203</sup> online solicitations complicate the analysis because of the minimum amount of information exchanged between the parties and the lack of interaction between the buyer and the trafficked victim. The prosecutors may find themselves in tough positions where they are unable to produce quality evidence because of the impersonal nature of the online interaction. Nevertheless, prosecutors could overcome this obstacle by encouraging the police, in their sting operations, to offer up information to the buyer that a reasonable person would conclude presents a risk of sex trafficking. In addition, when the buyer and the officer posing as the victim are face-to-face, the officer could offer up additional information so as to inform the buyer of trafficking signals.

A change in the mens rea standard for sex trafficking would not rid prosecutors of all difficulty. Certainly one adjustment cannot solve the trafficking problem. But lowering the mens rea to negligence could

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201. *Id.*

202. SHIVELY, *supra* note 182, at 47.

203. *Id.*

provide prosecutors some room to work with, if not at least a fighting chance to secure a single federal conviction of a buyer of trafficked sex.

### CONCLUSION

Millions of people around the world have been affected by human trafficking, and millions more will realize its impact as the industry grows every year. Different countries have utilized various strategies to hinder the growth of sex trafficking. Sweden legalized the sale of sex and criminalized the purchase of it. The United States adopted the TVPA to pursue the prosecution of the traffickers, and recently undertook a commitment to prosecute the buyers of trafficked sex. However, after almost two years, the prosecution of buyers remains elusive.

The mens rea of knowing makes it difficult for prosecutors to get convictions of buyers in court because many buyers do not know that they are purchasing a victim of human trafficking, or alternatively, choose not to know. Mens rea reform to a strict liability standard as to the status of the person as trafficked or not would equalize the purchase of prostituted sex and trafficked sex, theoretically eliminating any incentive for the buyer to explore the status of the person before purchase. Mens rea reform to the standard of reckless would pose a difficulty similar to the current knowledge standard and would not expand the TVPA's reach. A mens rea reform to the standard of negligence would prove most effective. With this standard, buyers who should have been aware of the signs of trafficking, to the extent that signs presented themselves in the situation, and performed one of the prohibited acts in the statute, would be culpable. Still, mens rea reform would not rid the prosecutor of all difficulty, but it would finally give prosecutors a standard with which they can work.