

4-27-2020

Kids, Not Commodities: Proposing a More Protective Interpretation of the Child Sex Trafficking Statute for Victims and Defendants

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Recommended Citation

Kimberly Blasey, *Kids, Not Commodities: Proposing a More Protective Interpretation of the Child Sex Trafficking Statute for Victims and Defendants*, 77 Wash. & Lee L. Rev. 931 (2020), <https://scholarlycommons.law.wlu.edu/wlulr/vol77/iss2/8>

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Kids, Not Commodities: Proposing a More Protective Interpretation of the Child Sex Trafficking Statute for Victims and Defendants

Kimberly Blasey*

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* J.D. Candidate May 2020, Washington and Lee University School of Law; B.A. 2015, University of North Carolina at Chapel Hill. I would like to thank Professor John D. King and the Washington and Lee Law Review Editorial Board for their invaluable advice during the writing process of this Note. I also thank my family for their constant support, especially during law school.

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I. Introduction

When fifteen-year-old Alyssa Beck ran away from home, her life changed forever.¹ Fleeing an abusive father, Alyssa moved in with friends.² One friend introduced her to a few older men who took her under their wings.³ They let Alyssa stay in their apartments and began buying her food, clothes, hair products, and makeup.⁴

“I thought these guys were my boyfriends,” Alyssa said.⁵ “Everything that was missing in my life they supplied to me.”⁶

One of these men was Ian Sean Gordon.⁷ Gordon was the first to rape Alyssa.⁸ He shoved a pillow over her face and called his friends, telling them they could “do whatever [they] want to

1. See Michelle Miller, *Inside the World of Child Sex Trafficking and the High-Tech Approach to Saving Victims*, CBS (Mar. 31, 2018), <https://perma.cc/4XZH-NV9E> (last visited Jan. 23, 2020) (describing how Alyssa became involved with a sex trafficker) (on file with the Washington and Lee Law Review).

2. See *id.* (explaining that the first time Alyssa ran away was after her father hit her with a belt and a subsequent Social Services investigation failed to discover any abuse).

3. See *id.* (stating that the men allowed Alyssa to sleep in their apartments, bought her clothes, and provided her food as part of their “grooming” scheme).

4. See *id.* (“They gave me the clothes that I needed, the hair stuff, the makeup and they made me feel pretty.”).

5. *Id.*

6. *Id.*

7. See *id.* (stating that Alyssa met Gordon after two weeks of living on the streets).

8. See *id.* (explaining that a few days after meeting Alyssa, Gordon became violent and brutally beat and raped her).

her” for twenty dollars.⁹ After the rape, Gordon threatened to kill Alyssa and her family if she tried to leave.¹⁰

As the days progressed, Gordon drove Alyssa to various hotels where he supplied an endless stream of customers who paid him to rape Alyssa.¹¹ Gordon got her addicted to drugs and took all of her clothes to prevent her from running away from the hotels.¹²

Alyssa almost gave up, until one person gave her the strength to attempt an escape.¹³ “I remember one time I was there and it was after a really bad beating and rape,” Alyssa said.¹⁴ “I remember sitting there and thinking about my little brother. And I just remember thinking about my brother’s smile. And just thinking about his innocence.”¹⁵

The thoughts of her younger brother inspired Alyssa to run out of a motel room one day while Gordon was not looking.¹⁶ But within seconds, Gordon was behind her, grabbing her and dragging her to his car.¹⁷ “You’re gonna die today,” Gordon said as he threw Alyssa into the car.¹⁸ Alyssa did not allow fear to paralyze her—when the car came to a stoplight, she jumped out.¹⁹ Beaten and bloody, she ran down the expressway until she

9. *See id.* (“I heard him start call[ing] to people and telling them, ‘Hey, I have this girl here, you can come do whatever you want to her, just for 20 dollars.’”).

10. *See id.* (explaining that it is common for sex traffickers to use violence and threats to compel their victims to act in a certain way).

11. *See id.* (discussing Alyssa’s memories of being raped by dozens of men).

12. *See id.* (“They know that pain and the addiction can force their victims into providing more services in order to get their fix.”).

13. *See id.* (“But in her darkest days, there was one person who kept her going.”).

14. *Id.*

15. *Id.*

16. *See id.* (stating that after two weeks of being held in captivity, Alyssa summoned the courage to attempt an escape).

17. *See id.* (“Next thing you know this thing comes behind me and grabs me by my hair and this thing was [Gordon].”).

18. *Id.*

19. *See id.* (stating that Alyssa attempted one last escape).

found a phone and called her mother.²⁰ Her mother called police.²¹

The FBI eventually took on Alyssa's case, which led to the arrests of seven people involved in buying or trafficking Alyssa.²² Gordon pleaded guilty to sex trafficking and was sentenced to life in prison²³—one of the first life sentences handed down to a trafficker in the United States.²⁴

Alyssa's story, though utterly horrific, is far from unique.²⁵ Around the globe, an estimated 40.3 million victims share similar realities to Alyssa's.²⁶ Modern-day slavery, commonly referred to as human trafficking,²⁷ continues to be the fastest-growing and most lucrative global industry—ahead of the drug industry—because a human can be used, abused, sold, and exploited time and time again, unlike drugs that disappear once consumed.²⁸ State-sanctioned slavery was abolished in

20. *See id.* (explaining that Alyssa passed out and then made her way to a Regency Inn to call her mother).

21. *See id.* (stating that Alyssa's mom called the police before picking Alyssa up).

22. *See id.* (stating that the FBI's "Operation Abandoned Hope" led to the arrests of seven people by the summer of 2010).

23. *See id.* (stating that Gordon and five others pleaded guilty to sex trafficking and another man pleaded guilty to producing child pornography for his part in filming Alyssa).

24. *See id.* (stating that the federal judge imposed a life sentence due to "the brutality and violence and complete and utter lack of respect for human life").

25. *See* U.N. OFFICE ON DRUGS AND CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS 6 (2009) (stating that sexual exploitation makes up seventy-nine percent of human trafficking instances, making it the most common form of trafficking).

26. *See Forced Labour, Modern Slavery and Human Trafficking*, ILO, <https://perma.cc/LCR6-39EX> (last visited Jan 26, 2020) ("At any given time in 2016, an estimated 40.3 million people are in modern slavery . . .") (on file with the Washington and Lee Law Review).

27. *See What Is Modern Slavery*, U.S. DEP'T. OF STATE, <https://perma.cc/S5A8-PQ32> (last visited Jan. 26, 2020) ("'Trafficking in persons,' 'human trafficking,' and 'modern slavery' are used as umbrella terms to refer to both sex trafficking and forced labor.") (on file with the Washington and Lee Law Review).

28. *See ANNA RODRIGUEZ, MA'AM ANNA: THE REMARKABLE STORY OF A HUMAN TRAFFICKING RESCUER 31* (Amanda Bindel ed., 2013) (comparing the human trafficking industry to the drug industry).

1865,²⁹ but the practice has only expanded since then.³⁰ Today, human trafficking is a \$150 billion industry.³¹ If lined up shoulder to shoulder, slaves in today's world would create a line from Beijing, China to Cape Town, South Africa.³² Of the victims currently enslaved, twenty-five percent are children.³³ In other words, one in four victims of modern slavery is a child.³⁴

In 2000, Congress passed the Victims of Trafficking and Violence Protection Act, 18 U.S.C. § 1591, to protect children like Alyssa.³⁵ It criminalized defendants who knowingly engaged in a trafficking act, knew the victim was underage, and knew that the child victim would be forced to engage in a commercial sex act.³⁶ In 2008, Congress amended the statute in order to relax the government's burden of proof by reducing the mens rea element requiring knowledge that the victim was a

29. See *Slavery Abolished in America with Adoption of 13th Amendment*, HISTORY.COM (July 21, 2010), <https://perma.cc/9MZG-LWQU> (last visited Jan. 26, 2020) (noting that the Thirteenth Amendment was officially adopted into the Constitution in 1865) (on file with the Washington and Lee Law Review).

30. See Tedx Talks, *Every 15 Seconds: Matt Friedman TEDxSanJoaquin*, YOUTUBE (Nov. 8, 2012), <https://youtu.be/iU9TeVofkDo> (noting that the number of slaves has nearly tripled since the end of the Transatlantic slave trade).

31. See *ILO Says Forced Labour Generates Annual Profits of US \$150 Billion*, ILO (May 20, 2014), <https://perma.cc/E4GH-W86Q> (last visited Jan. 26, 2020) (stating that every year, forced labor generates \$150 billion in illegal profits, two-thirds of which is produced from commercial sexual exploitation) (on file with the Washington and Lee Law Review).

32. See Tedx Talks, *supra* note 30 (“If you were to line these people up shoulder to shoulder, it would take you all the way from Beijing, China to Cape Town, South Africa.”).

33. See *Forced Labour, Modern Slavery and Human Trafficking*, *supra* note 26 (“1 in 4 victims of modern slavery are children.”).

34. *Id.*

35. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 112, 114 Stat. 1464 (codified at 18 U.S.C. § 1591) [hereinafter TVPA of 2000] (enacting the child sex trafficking statute to strengthen “prosecution and punishment of traffickers”).

36. See John Cotton Richmond, *Federal Human Trafficking Review: An Analysis & Recommendations from the 2016 Legal Developments*, 52 WAKE FOREST L. REV. 293, 302 (2017) (explaining Congress's original wording and intent for the statute).

minor.³⁷ Under the amendment, a conviction now requires that a defendant either knew the victim's age, recklessly disregarded the victim's age, or had a "reasonable opportunity to observe" the victim.³⁸

Subsection (c) of the statute states: "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."³⁹ This provision caused confusion among scholars⁴⁰ and district courts⁴¹

37. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 222, 122 Stat. 5044 (codified at 18 U.S.C. § 1591) [hereinafter Victims Protection Reauthorization Act] (providing that the Government need not show that a defendant knew the victim had not attained the age of eighteen to prove a "reasonable opportunity to observe"); see also *United States v. Duong*, 848 F.3d 928, 933–34 (10th Cir. 2017) ("Section 1591(c) specifically states that the government should be relieved of a burden when a defendant had a reasonable opportunity to observe the victim.").

38. Compare TVPA of 2000 § 112 (requiring a person to knowingly engage in a trafficking act, know that a victim was underage, and know that the child victim would be compelled to engage in a commercial sex act), with Victims Protection Reauthorization Act § 222 (amending the statute to include a "reckless disregard" and "reasonable opportunity to observe" standard).

39. 18 U.S.C. § 1591(c) (2018) (emphasis added).

40. See *Richmond*, *supra* note 36, at 303 ("At the time these amendments were passed, it was unclear how courts might apply the . . . 'reasonable opportunity to observe' provision."); see also 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, 689 (2013)

The court must also consider whether to instruct the jury to focus on either the reasonableness of the opportunity to observe the minor or the reasonableness of the conclusions drawn from the opportunity to observe the minor Neither case law nor legislative history provides any concrete guidance as to the appropriate definition of "reasonable opportunity to observe."

41. Compare *United States v. Wilson*, No. 10-60101-CR-ZLOCH/ROSENBAUM, 2010 U.S. Dist. LEXIS 75149, at *7 (S.D. Fla. Jul. 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."), with *United States v. Rivera*, No. 13-CR-149(KAM), 2015 WL 7455504, at *21 (E.D.N.Y. Nov. 23, 2015) ("[T]he government may satisfy its burden for the mens rea element in one of three ways, by proving that the

regarding the standard of proof necessary to show a “reasonable opportunity to observe” a victim. Some courts held that the provision required a showing of *both* a reckless disregard of the victim’s age *and* a “reasonable opportunity to observe” the victim.⁴² Others found it required *either* a showing of a reckless disregard *or* a “reasonable opportunity to observe” the victim.⁴³ Under the latter interpretation, any defense regarding lack of knowledge of a victim’s age would thus be irrelevant to a prosecution under the “reasonable opportunity to observe” provision.⁴⁴ This interpretation requiring strict liability eventually became the settled standard once cases reached federal appellate courts.⁴⁵ In other words, a “reasonable

defendant (1) had knowledge of the victim’s age; (2) acted in reckless disregard of the victim’s age; or (3) had a reasonable opportunity to view the victim.”).

42. See *Wilson*, 2010 U.S. Dist. LEXIS 75149, at *7 (stating that the Government must prove a defendant’s reckless disregard of the victim’s age as well as his “reasonable opportunity to observe” the victim); see also *United States v. Robinson*, 702 F.3d 22, 31 (2d Cir. 2012) (Kearse, J., concurring)

I am not persuaded that the amended section imposes strict liability on a defendant who has a reasonable opportunity to observe his underage sex-trafficking victim but who neither knows nor recklessly disregards the fact that the victim has not attained the age of 18 years It is not clear to me that when Congress, in the amended § 1591, specified only that such an opportunity to observe means that the government need not prove that the defendant “knew,” 18 U.S.C. § 1591(c), Congress meant that the government also need not prove that the defendant acted in reckless disregard.

43. See *Rivera*, 2015 WL 7455504, at *21 (stating that a conviction is proper upon a showing of a defendant’s reckless disregard of a victim’s age or upon a showing of his “reasonable opportunity to observe” the victim).

44. See *id.* (stating that strict liability applies to the “reasonable opportunity to observe” provision).

45. See *United States v. Lockhart*, 844 F.3d 501, 515–16 (5th Cir. 2016) (stating that the language in § 1591(c) transformed the offense “from one requiring a specific mens rea into a strict liability offense”); *United States v. Smith*, 662 F. App’x 132, 136 (3d Cir. 2016) (stating that this provision “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” (quoting *United States v. Robinson*, 702 F.3d 22, 26 (2d Cir. 2012))); *United States v. Davis*, 854 F.3d 601, 605 (9th Cir. 2017) (stating that § 1591(c) created a strict liability offense); *United States v. Booker*, 447 F. App’x 726, 727 (7th Cir. 2011) (noting that “lack of knowledge of the minor’s age is not a defense if the defendant had a ‘reasonable opportunity to observe’ the victim.” (citing 18 U.S.C. § 1591(c))).

opportunity to observe” is a standalone mens rea element and the statute requires a showing of either a “reasonable opportunity to observe” or a “reckless disregard,” but not both.⁴⁶

The appellate clarification of the correct strict liability statutory standard caused a new wave of confusion regarding what behavior constitutes a “reasonable opportunity to observe.”⁴⁷ Director of the Human Trafficking Institute John Cotton Richmond opined that recent Second and Fifth Circuit cases applying the statute have highlighted an emerging question: “What evidence does it take to prove that a defendant had a ‘reasonable opportunity to observe’ his victim?”⁴⁸ Richmond predicts that this evidentiary threshold is likely to become a frequent topic of litigation, and thus, “[g]uidance will be necessary as future courts determine what contact or information is sufficient to apply the ‘reasonable opportunity to observe’ standard.”⁴⁹

This Note addresses how courts should interpret the “reasonable opportunity to observe” standard when assessing evidence. In other words, what quantum of evidence is, and should be, sufficient to prove a defendant had a “reasonable opportunity to observe” a sex trafficking victim? Would a singular brief encounter with an older-appearing prostitute satisfy the standard? If so, would the mere fact that the “prostitute” was actually a minor be the only evidence needed to obtain a conviction? Or would the defendant’s intention and attempt to order services from an adult prostitute shed light on the reasonableness of his observation opportunity? Moreover, in

46. See *Robinson*, 702 F.3d at 30 (describing the jury instructions that required the government to prove the defendant “knew that Jane Doe had not attained the age of eighteen years, or he recklessly disregarded that fact, or he had a reasonable opportunity to observe Jane Doe”); *United States v. Copeland*, 820 F.3d 809, 812 (5th Cir. 2016) (upholding jury instructions that required proof that “(1) the defendant knew T.J. had not attained the age of 18 years, or (2) the defendant recklessly disregarded the fact that T.J. had not attained the age of 18 years, or (3) the defendant had a reasonable opportunity to observe T.J.”).

47. See Richmond, *supra* note 36, at 308, 357 (stating that the Fifth Circuit’s 2016 cases highlighted “an emerging question” of the evidentiary standard necessary to prove a “reasonable opportunity to observe,” which “teed up future litigation over the quantum of evidence sufficient to trigger its application”).

48. *Id.* at 308.

49. *Id.* at 309.

the age of increasing technology, would trafficking a minor through a webcam videochat satisfy the standard? For instance, would a man in the United States requesting sexual performances from a Filipino child over videochat constitute a “reasonable opportunity to observe” that child even without an in-person, face-to-face interaction? This Note answers these questions.

Part II analyzes three recent cases that employ the “reasonable opportunity to observe” standard: *United States v. Robinson*,⁵⁰ *United States v. Copeland*,⁵¹ and *United States v. Valas*.⁵² It then determines which factors these cases reveal as sufficient to constitute a “reasonable opportunity to observe.” Part III discusses how the currently utilized factors and interpretation of the standard create two issues: under-criminalization of legitimate forms of sex trafficking and over-criminalization of non-trafficking behavior. Part IV articulates a solution by presenting a revised list of factors that courts should consider when determining whether a defendant had a “reasonable opportunity to observe” a victim. For purposes of this Note, traffickers are referred to in masculine pronouns and victims are referred to in feminine pronouns. However, this Note recognizes that women can be, and are, perpetrators of trafficking, while men and boys can be victims of sex trafficking.⁵³

II. What Is a “Reasonable Opportunity to Observe?”

Three cases in the past six years “teed up future litigation over the quantum of evidence sufficient to trigger” a “reasonable

50. 702 F.3d 22 (2d Cir. 2012).

51. 820 F.3d 809 (5th Cir. 2016).

52. 822 F.3d 228 (5th Cir. 2016).

53. See UNODC, *Global Report on Trafficking in Persons*, UNITED NATIONS (2014), <https://perma.cc/PS2X-3R4M> (PDF) (stating that over thirty percent of convicted traffickers between 2010 and 2012 were women) (on file with the Washington and Lee Law Review); see also Michelle Lillie, *Invisible Men: Male Victims of Sex Trafficking*, HUMAN TRAFFICKING SEARCH (2014), <https://perma.cc/PCF7-FK5K> (last visited Jan. 31, 2020) (stating that while women comprise the majority of detected sex trafficking victims, men are the most overlooked victims of sex trafficking) (on file with the Washington and Lee Law Review).

opportunity to observe” conviction under 18 U.S.C. § 1591(c).⁵⁴ In 2012, the Second Circuit affirmed a child sex trafficking conviction in *United States v. Robinson*, in which the defendant sold his apparently consenting seventeen-year-old girlfriend to multiple customers for commercial sex.⁵⁵ The teen dropped out of high school and became an exotic dancer and prostitute.⁵⁶ She testified that she routinely told her clients and friends, including the defendant, that she was nineteen.⁵⁷ She insisted that the defendant was her boyfriend, rather than her pimp, and that he did not facilitate her line of work.⁵⁸ Nevertheless, in a special verdict form, the jury explicitly found that the defendant had a “reasonable opportunity to observe” the victim and the Second Circuit affirmed the verdict.⁵⁹

In 2016, the Fifth Circuit also affirmed a child sex trafficking conviction in *United States v. Copeland* which involved two men engaged in a traditional pimping scheme.⁶⁰ The victim, T.J., had run away from her home in San Antonio, Texas.⁶¹ While at a bus stop, she met Marcus Wright—Malcolm Copeland’s codefendant—who recruited and convinced her to prostitute.⁶² The victim told Wright that she was fifteen and he advised her to tell everyone that she was eighteen.⁶³ It is not clear whether Wright informed his partner Copeland of the victim’s true age.⁶⁴ Copeland later posted photographs of T.J. on

54. Richmond, *supra* note 36, at 308, 357.

55. See *Robinson*, 702 F.3d at 35 (“[H]e was causing her to engage in commercial sex acts as a minor.”).

56. See *id.* at 27 (explaining that Jane Doe was arrested several times for prostitution after dropping out of high school).

57. See *id.* (explaining Jane Doe’s testimony that she told “everybody” that she was nineteen).

58. See *id.* (stating that Jane Doe claimed that the defendant lived off her prostitution income but that he in no way facilitated her line of work).

59. See *id.* at 29 (providing that the jury returned a special verdict finding that Robinson had a “reasonable opportunity to observe” Jane Doe).

60. See *Copeland*, 820 F.3d at 811 (stating that Copeland and his codefendant ran an escort service).

61. See *id.* at 810 (stating that T.J. was a runaway).

62. See *id.* (describing how Wright advised the victim to lie about her name and age and introduced her to the codefendants, one of whom explained that she would be having sex with different men for money).

63. See *id.* (“Wright told her to tell everyone that she was eighteen and that her name was Barbie.”).

64. See *id.* (stating only that the victim revealed her age to Wright).

Backpage.com⁶⁵—an advertising website since shut down by the government due to its promotion of sex trafficking.⁶⁶ Wright gave T.J. a cellphone through which customers contacted her.⁶⁷ He or Copeland then transported her to meet customers.⁶⁸ In response to a possible missing person report, police officers were dispatched to a motel where they found T.J.⁶⁹ Copeland was convicted of sex trafficking children under 18 U.S.C. § 1591⁷⁰ and the Fifth Circuit upheld his conviction, rejecting his argument that the statute does not impose strict liability and the judge should not have instructed the jury to convict upon a finding of a “reasonable opportunity to observe” the victim alone.⁷¹

Finally, the Fifth Circuit affirmed the conviction of Raymond R. Valas in 2016.⁷² Valas, a former Army Lieutenant Colonel, contacted T.J., the victim from *Copeland*, through a Backpage.com advertisement.⁷³ He admitted that he met the victim at his hotel room on two different nights,⁷⁴ but claimed

65. *See id.* (stating that the codefendants advertised the prostitutes on Backpage.com).

66. *See* Taylor Goebel, *Human Trafficking ‘Hub’ Backpage Is Long Gone, but the Problem Still Remains*, USA TODAY (Feb. 7, 2019), <https://perma.cc/5FRW-BH7T> (last visited Jan. 26, 2020) (explaining that the website was involved in three-quarters of child trafficking reports received by the National Center for Missing and Exploited Children between 2013 and 2017) (on file with the Washington and Lee Law Review).

67. *See* United States v. Copeland, 820 F.3d 809, 811 (5th Cir. 2016) (“T.J. received calls from potential clients on a cell phone provided by Wright.”).

68. *See id.* (“Some combination of Copeland, Wright and Doak would transport T.J. to the prearranged location of her sexual assaults.”).

69. *See id.* at 810 (explaining that police officers found T.J. in a Motel 6 room in San Antonio, Texas).

70. *See id.* at 811 (providing that the jury convicted Copeland of two counts of sex trafficking and the court sentenced him to 216 months in prison and twenty years of supervised release).

71. *See id.* (rejecting Copeland’s arguments that 18 U.S.C. § 1591(c) does not impose strict liability and is an unconstitutional provision).

72. *See* United States v. Valas, 822 F.3d 228, 248 (5th Cir. 2016) (rejecting Valas’s argument regarding the statute’s requisite mens rea and affirming his conviction).

73. *See id.* at 235 (describing the victim’s testimony that she received online messages from Valas about meeting him at a hotel).

74. *See id.* (“Valas admitted to the jury that he met with T.J. at his hotel room briefly on two different nights . . .”).

he was interviewing her as part of his research fellowship at Syracuse University, in which he was studying Salvadoran gang activity and sex trafficking.⁷⁵ He maintained that he and T.J. first interacted during a thirty-second conversation at his hotel door⁷⁶ and then spoke for fifteen minutes the following day.⁷⁷ Through his own volition, he sought and passed a privately-administered polygraph test in which he repeatedly denied having sex with T.J.⁷⁸ The judge found the test legally unreliable and it was not introduced into evidence.⁷⁹ T.J. denied participating in any research interview and testified that Valas paid her \$150 on both nights to engage in commercial sex.⁸⁰ Phone records showed that Valas and T.J. spoke on the phone eighteen times and texted four times before the second interaction the following day.⁸¹ Valas based his appeal on seven arguments, one of which maintained that the statute does not allow a conviction based solely on a “reasonable opportunity to observe” the victim.⁸² The Fifth Circuit rejected this argument and affirmed his conviction.⁸³

75. See Jeremy Blackman, *National Guard Commander Disputes Texas Sex Trafficking Claim*, CONCORD MONITOR (Nov. 7, 2014 1:39:08 AM), <https://perma.cc/7FHR-NL3G> (last visited Jan. 22, 2019) (discussing Valas’s enrollment in a research fellowship) (on file with the Washington and Lee Law Review); see also *Valas*, 822 F.3d at 242 (stating that Valas testified that he called T.J. as part of his independent and unofficial scholarly research on prostitution).

76. See *Valas*, 822 F.3d at 235 (explaining Valas’s testimony that he met the victim at the hotel room door for less than thirty seconds on August 26, 2013).

77. See *id.* (explaining Valas’s testimony that he spoke with the victim on August 27, 2013 for no more than fifteen minutes as part of his independent research project).

78. See Blackman, *supra* note 75 (“Valas later passed a polygraph test in which he was repeatedly asked whether he had sex with the girl . . .”).

79. See *id.* (“[T]he test was unsolicited and therefore legally unreliable.”).

80. See *Valas*, 822 F.3d at 235 (explaining testimony that Valas gave the victim \$150 each day, which was her price for thirty minutes of sexual services).

81. See *id.* (discussing the multiple phone calls and text messages between Valas and the victim that occurred over the course of two days).

82. See *id.* (describing Valas’s argument that “the district court improperly instructed the jury on § 1591’s scienter requirement regarding the victim’s age, resulting in a conviction based on a lower mental state than authorized by the statute”).

83. See *id.* (affirming Valas’s conviction).

Though the cases of *Robinson*, *Copeland*, and *Valas* involved vastly different facts, the courts relied upon surprisingly similar factors in affirming each conviction, as this section will demonstrate.

A. *Recent Trends: Robinson, Copeland, and Valas*

Each court highlighted several factors that were relevant to the question of whether the evidence showed a “reasonable opportunity to observe” a child sex trafficking victim.⁸⁴ In affirming *Robinson*’s conviction, the Second Circuit did not explicitly state the requisite evidence to prove the standard, but it noted several relevant factors.⁸⁵ It repeatedly discussed the victim’s youthful appearance and demeanor,⁸⁶ despite holding that the standard required strict liability and thus that the defendant need not be aware of the victim’s age.⁸⁷ It stated that because the victim appeared youthful, “her status as a minor would have been obvious” to any observer,⁸⁸ implying that the reasonableness of the defendant’s observation opportunity depends in part on whether the victim’s demeanor and appearance match her true age. The court also emphasized the

84. *See id.* at 240–41 (discussing the defendant’s knowledge of the signs of human trafficking, prior involvement in prostitution schemes, and other factors); *see also* *United States v. Copeland*, 820 F.3d 809, 810–11 (5th Cir. 2016) (discussing the recruitment of the victim, transportation of victim, knowledge of victim’s age, and other factors); *United States v. Robinson*, 702 F.3d 22, 27–28, 36 (2d Cir. 2012) (discussing the underage social network of the victim, the defendant’s access to the victim’s finances, the defendant’s history of prostitution involvement, and other factors).

85. *See Robinson*, 702 F.3d at 35–36 (explaining the court’s rejection of the defendant’s evidentiary challenges regarding the “reasonable opportunity to observe” provision).

86. *See id.* at 35

[T]he jury had an opportunity to observe Jane Doe testify at trial, when she was nineteen years old, and also to view several photographs of Jane Doe taken before she turned eighteen . . . [and] that Jane Doe’s appearance and demeanor were such that her status as a minor would have been obvious to someone intimately involved in her life.

87. *See id.* at 26 (“This provision, when applicable, 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).”).

88. *Id.* at 35.

significance of the underage social network of the victim and noted that because Robinson met the victim through his high school-aged sister, he was likely aware of the victim's age.⁸⁹

Additionally, the court discussed as relevant factors the length of the two-and-a-half-year relationship between Robinson and the victim,⁹⁰ as well as the intimate nature of the relationship.⁹¹ Moreover, it noted Robinson's coercive behavior, as the evidence showed that he regularly used the victim's sex work profits for himself⁹² and repeatedly threatened and pressured her into prostituting on certain nights.⁹³ Finally, the court highlighted Robinson's history of pimping,⁹⁴ which could make him more knowledgeable of the signs of human trafficking and therefore require a shorter period of time necessary to constitute a "reasonable opportunity to observe."⁹⁵

Like the Second Circuit, the Fifth Circuit implied certain relevant factors of a "reasonable opportunity to observe" in *United States v. Copeland*.⁹⁶ It discussed the fact that Copeland

89. *See id.* at 36 (stating that a reasonable jury could find that Robinson was aware of the victim's age, and thus had a "reasonable opportunity to observe" the victim, "especially given that their relationship began before Jane Doe dropped out of high school during her junior year").

90. *See id.* at 35 (quoting the government's position that "it would strain credulity to suggest that someone who had known her as long and as intimately as Robinson would not have learned her true age").

91. *See id.* at 35–36 ("A reasonable jury could conclude that Robinson's ability to personally observe his underage victim, especially given their intimate relationship, put him on notice of an unjustifiably high risk that she was underage.").

92. *See id.* at 28 (discussing a tape in which Robinson admitted to using the victim's profits).

93. *See id.* at 38

A reasonable juror, for example, could conclude that Robinson sounded a lot more like Jane Doe's pimp than her "boyfriend," "lover," or "best friend," when he threatened that, if she did not have the "f***ing money," he would "beat the sh**" out of [her] stupid a** . . . [and] throw [her] in a f***ing garbage can and let everybody know [she] ain't sh**."

94. *See id.* at 28 (explaining a tape played at trial that portrayed Robinson's involvement and promotion of prostitution in the past).

95. *Compare id.* (describing Robinson's admission of his history with pimping), with *United States v. Valas*, 822 F.3d 228, 241 (5th Cir. 2016) (concluding that Valas's annual employment training about human trafficking made it more likely that he was aware of the "signs, dangers, and horrors" of trafficking).

96. 820 F.3d 809 (5th Cir. 2016).

was part of an operation that actively recruited the victim for prostitution,⁹⁷ took photographs of her,⁹⁸ and used Backpage.com to advertise her for commercial sex.⁹⁹ The most important factor seemed to be that Copeland physically interacted with the victim when he transported her to meet sex-buyers.¹⁰⁰ Moreover, like the *Robinson* court, the *Copeland* court implied that knowledge of the victim's age could create a "reasonable opportunity" by noting that the victim told the codefendant that she was fifteen, and thus, Copeland might have been aware of her age.¹⁰¹ Though the statute forbids lack of knowledge of a victim's age as a defense,¹⁰² a victim revealing her age to a defendant would certainly increase the reasonableness of any opportunity to observe her.

Additionally, similar to the Second Circuit, the Fifth Circuit emphasized Copeland's multiple interactions with sex trafficking victims, as he had been indicted for trafficking another minor.¹⁰³ His other experiences could have made him more aware of the signs of human trafficking, which would shorten the period of time necessary for him to have a "reasonable opportunity to observe" a trafficking victim.¹⁰⁴ Finally, the court noted the length and coercive nature of the interaction and observation opportunity by explaining that for five days, Copeland ordered the victim to perform sexual acts

97. See *id.* at 810 (noting that Copeland assisted his codefendants with recruiting and training potential prostitutes).

98. See *id.* ("Copeland . . . had [the codefendant] take pictures of T.J. for her internet profile.").

99. See *id.* (stating that Copeland and his codefendants posted pictures of the prostitutes to Backpage.com).

100. See *id.* at 811 (noting that Copeland transported the victim to various hotels and directed her to perform sexual acts for money).

101. Compare *United States v. Robinson*, 702 F.3d 22, 35–36 (2d Cir. 2012) ("Jane Doe's appearance and demeanor were such that her status as a minor would have been obvious. . . ."), with *Copeland*, 820 F.3d at 810 (stating that the victim told Copeland's codefendant that she was fifteen years old).

102. See *Copeland*, 820 F.3d at 813 (providing that the statute imposes strict liability).

103. Compare *id.* at 811 (explaining that Copeland's indictment referenced T.J. and another minor victim), with *Robinson*, 702 F.3d at 28 (describing Robinson's promotion of prostitution in prior instances).

104. Compare *Copeland*, 820 F.3d at 810 (describing Copeland's prior involvement with recruiting and training prostitutes), with *Valas*, 822 F.3d at 241 ("He was trained on human trafficking: its signs, dangers, and horrors.").

for money and transported her to the “prearranged location[s] of her sexual assaults.”¹⁰⁵

The Fifth Circuit relied on similar factors in *United States v. Valas*.¹⁰⁶ Like the other two courts, the *Valas* court emphasized the defendant’s prior involvement with human trafficking¹⁰⁷—but this time in a very different way. Unlike Robinson and Copeland, whose experiences as pimps exposed them to human trafficking victims,¹⁰⁸ Valas’s prior involvement with trafficking consisted only of general knowledge of the industry.¹⁰⁹ The court stated that Valas had attended training sessions at his place of employment that centered on recognizing signs of human trafficking and, thus, he knew “its signs, dangers, and horrors.”¹¹⁰ Moreover, Valas, like Robinson¹¹¹ and Copeland,¹¹² had prior experience with the adult prostitution industry.¹¹³ He had previously interacted with and possibly had sex with other prostitutes whom he contacted on Backpage.com.¹¹⁴ Finally, the *Valas* court noted the defendant’s

105. See *Copeland*, 820 F.3d at 811 (“For five days in 2013, T.J. was directed by Copeland . . . to perform sexual acts for money.”).

106. 822 F.3d 228 (5th Cir. 2016).

107. See *id.* at 241 (describing the training Valas attended).

108. See *Robinson*, 702 F.3d at 28 (noting Robinson’s prior experience as a pimp); see also *United States v. Copeland*, 820 F.3d 809, 810 (5th Cir. 2016) (stating that Copeland was part of an operation that recruited multiple prostitutes).

109. See *Valas*, 822 F.3d at 241 (stating that the defendant participated in annual Department of Defense training on human trafficking).

110. See *id.* (concluding that the PowerPoint slides cast doubt on Valas’s defense because “he was trained on human trafficking: its signs, dangers, and horrors”).

111. See *United States v. Robinson*, 702 F.3d 22, 28 (2d Cir. 2012) (describing Robinson’s history of pimping).

112. See *Copeland*, 820 F.3d at 810 (stating that Copeland recruited and trained other prostitutes).

113. See *Valas*, 822 F.3d at 240 (describing evidence of messages between Valas and six other prostitutes on Backpage.com).

114. See *id.* (discussing evidence that Valas had contacted at least six other women on Backpage.com both before and after he met T.J.).

interaction with the victim for between fifteen and sixty minutes¹¹⁵ and the sexual nature of their encounter.¹¹⁶

An analysis of these three cases reveals that the Second and Fifth Circuits utilize similar factors to determine whether a defendant had a “reasonable opportunity to observe” a child sex trafficking victim. The following subsection lists the combined criteria these courts have relied on in their analyses of the requisite evidence to obtain a § 1591(c) conviction. This predictive list sheds light on how the Second and Fifth Circuits, and potentially other Circuits and lower courts, approach § 1591(c) cases.

B. The Current Interpretation: Necessary Factors to Constitute a “Reasonable Opportunity to Observe”

The *Robinson*, *Copeland*, and *Valas* courts focused on defendants engaged in starkly different behaviors. *Robinson*’s trafficking act involved his three-year romantic yet coercive relationship with his victim;¹¹⁷ *Copeland*’s resembled a more traditional pimping operation;¹¹⁸ and *Valas*’s was based on two thirty-minute interactions in a hotel room.¹¹⁹ Yet, the cases suggest that appellate courts will affirm a “reasonable opportunity to observe” conviction if some combination of the following factors is present:

1. A defendant’s prior involvement with prostitutes or knowledge of signs of human trafficking;¹²⁰

115. *See id.* at 235 (comparing *Valas*’s assertion that he spent a total of fifteen minutes with the victim against her assertion that the time amounted to one hour).

116. *See id.* (stating that the jury found that *Valas* engaged in commercial sex acts with the victim).

117. *See Robinson*, 702 F.3d at 35, 38 (describing evidence that *Robinson* threatened and used force against Jane Doe over the course of three years).

118. *See United States v. Copeland*, 820 F.3d 809, 810–11 (5th Cir. 2016) (describing *Copeland*’s role in recruiting and training prostitutes for a multi-victim operation).

119. *See United States v. Valas*, 822 F.3d 228, 235 (5th Cir. 2016) (describing *Valas*’s two interactions with the victim in his hotel room).

120. *See Robinson*, 702 F.3d at 28 (noting *Robinson*’s admission of his involvement with pimping on a previous occasion); *see also Copeland*, 820 F.3d at 810 (stating that *Copeland* was part of an operation that recruited

2. A defendant's physical interaction with a victim;¹²¹
3. At least a one-hour interaction between a defendant and victim;¹²²
4. A relationship or established social connection between a defendant and victim;¹²³
5. A victim's youthful demeanor;¹²⁴
6. A victim's disclosure of minor status;¹²⁵
7. A victim's deceitfulness about her age;¹²⁶
8. A defendant's knowledge of the background or underage social network of a victim;¹²⁷ and
9. A defendant's participation in the recruitment or advertisement of a victim's services.¹²⁸

prostitutes); *Valas*, 822 F.3d at 240–41 (concluding that Valas had contacted multiple prostitutes on Backpage.com and received annual anti-trafficking training at his work).

121. See *Robinson*, 702 F.3d at 27, 35 (explaining that Robinson and the victim physically and intimately interacted over the course of almost three years); see also *Copeland*, 820 F.3d at 811 (discussing Copeland's physical interaction with the victim when he transported her to meet sex-buyers); *Valas*, 822 F.3d at 235, 41 (stating that Valas spent time with the victim in his hotel room).

122. See *Valas*, 822 F.3d at 235 (explaining that the victim twice received \$150, which was the price for thirty minutes of her services); see also *Copeland*, 820 F.3d at 811 (noting that Copeland was with the victim for five days); *Robinson*, 702 F.3d at 27, 35 (stating that the defendant and victim interacted for almost three years).

123. See *United States v. Robinson*, 702 F.3d 22, 35 (2d Cir. 2012) (stating that Robinson lived with the victim, which would have put him on notice of her status as a minor); see also *Valas*, 822 F.3d at 235 (stating that Valas spoke on the phone with the victim eighteen times).

124. See *Robinson*, 702 F.3d at 35–36 (“Jane Doe’s appearance and demeanor were such that her status as a minor would have been obvious . . .”).

125. See *Copeland*, 820 F.3d at 810 (“T.J. told Wright she was fifteen years old . . .”).

126. See *Robinson*, 702 F.3d at 35 (2d Cir. 2012) (explaining that Jane Doe told “everybody” that she was nineteen); see also *Copeland*, 820 F.3d at 810 (noting that the codefendant told the victim to lie about her age); *Valas*, 822 F.3d at 241 (stating that the victim “billed herself” as nineteen years old).

127. See *Robinson*, 702 F.3d at 36 (explaining that the defendant likely knew the victim’s minor status because they met through her sister while the victim was in high school); see also *Valas*, 822 F.3d at 241 (stating that the victim never discussed her background with Valas); *Copeland*, 820 F.3d at 810 (explaining that the victim discussed her minor status with the codefendant).

128. See *Copeland*, 820 F.3d at 810 (discussing Copeland’s involvement in recruiting, taking pictures, and advertising the victim on Backpage.com).

This factor list displays the current interpretation of 18 U.S.C. § 1591(c)'s "reasonable opportunity to observe" standard. Nevertheless, as the following section illustrates, this interpretation is inherently flawed and results in various criminal enforcement issues by straying from Congress's original intent for the statute.

III. A Flawed Factor List: Issues Created by the Current Interpretation

The utility of the current interpretation of what constitutes a "reasonable opportunity to observe" is limited and could cause confusion among lower courts because it both under-criminalizes and over-criminalizes the offense of sex trafficking children.

A. Under-Criminalization

Under the current factor list of the interpretation of § 1591(c), courts emphasize the importance of a defendant's physical interaction with a victim.¹²⁹ The *Copeland* court, for example, highlighted the defendant's physical interaction with the victim when he transported her to meet sex-buyers.¹³⁰ The *Valas* court noted that the defendant spent thirty minutes with the victim in his hotel room on two separate days.¹³¹ The *Robinson* court emphasized the intimate nature of the defendant's and victim's physical interactions over a two-and-a-half year period.¹³² In addition, the Second Circuit recently upheld jury instructions providing that the defendant

129. See *supra* Part II.B (labeling physical interaction as a relevant factor under the current interpretation of the standard).

130. See *United States v. Copeland*, 820 F.3d 809, 811 (5th Cir. 2016) (stating that Copeland transported the victim to the locations where she was sexually assaulted).

131. See *United States v. Valas*, 822 F.3d 228, 235 (5th Cir. 2016) (providing the victim's testimony that Valas paid her twice for thirty minutes of sexual services).

132. See *Robinson*, 702 F.3d at 35–36 (stating that the physically intimate relationship provided a reasonable opportunity for Robinson to observe the victim).

had a “reasonable opportunity to observe” the victim if he had a “face-to-face interaction” with her.¹³³

The emphasis on a physical interaction, however, fails to achieve Congress’s statutory intent to criminalize a broad range of sex trafficking conduct.¹³⁴ Congress stated that its purpose for passing the Victims of Trafficking and Violence Protection Act of 2000 was to combat the following issues:

Existing legislation and law enforcement in the United States and other countries are inadequate to deter trafficking and bring traffickers to justice, failing to reflect the gravity of the offenses involved. No comprehensive law exists in the United States that penalizes the range of offenses involved in the trafficking scheme. Instead, even the most brutal instances of trafficking in the sex industry are often punished under laws that also apply to lesser offenses, so that traffickers typically escape deserved punishment.¹³⁵

When Congress amended 18 U.S.C. § 1591 in 2015, it further stated that its purpose was to “clarify the range of conduct punished as sex trafficking” in order to thwart the concern that traffickers were receiving lenient sentences.¹³⁶

Nevertheless, requiring a physical interaction under the current interpretation of a “reasonable opportunity to observe”¹³⁷ dilutes punishment of “the most brutal instances of trafficking.”¹³⁸ It prevents the application of the statute to modern forms of trafficking that do not involve physical interactions, such as webcam child sex trafficking¹³⁹—the

133. See *United States v. Corley*, 679 F. App’x 1, 5–6 (2d Cir. 2017) (noting jury instructions that equated a “face-to-face interaction” with a “reasonable opportunity to observe”).

134. See TVPA of 2000, Pub. L. No. 106-386, § 112, 114 Stat. 1464 (codified at 18 U.S.C. § 1591) (criminalizing those who recruit, entice, harbor, transport, provide, or obtain a sex trafficking victim).

135. *Id.* § 102(b)(14).

136. See *Justice for Victims of Trafficking Act of 2015*, Pub. L. No. 114-22, § 108(c), 129 Stat. 227 (codified at 18 U.S.C. § 1591) [hereinafter *JVTA of 2015*] (describing amendments that serve to reduce demand for sex trafficking).

137. See *supra* Part II.B (listing a defendant’s physical interaction with a victim as a relevant factor in assessing whether he had a “reasonable opportunity to observe” her).

138. TVPA of 2000 § 112.

139. See *Sunshine de Leon, Cyber-Sex Trafficking: A 21st Century Scourge*, CNN (Jul. 18, 2013) <https://perma.cc/MF44-X6L3> (last visited Jan. 27, 2020) (describing a cyber form of sex trafficking in which most victims are recruited

development of which has been a recent, but widespread addition to the human trafficking industry.¹⁴⁰

Webcam child sex trafficking involves perpetrators seeking live, virtual sex shows from children who are often located thousands of miles away in another country.¹⁴¹ A computer screen separates perpetrators from their victims, preventing any type of physical interaction.¹⁴² Parents and relatives are some of the most common sources of supply in this trafficking scheme, as they create the shows by pressuring their children to perform sexual acts or abusing the children on camera themselves.¹⁴³ However, the overwhelming demand for these sex shows fuels the industry.¹⁴⁴ According to the Federal Bureau of Investigation, 750,000 predators are online at any given time seeking abusive livestreamed shows.¹⁴⁵

Investigating online buyers of webcam child sex shows proves difficult for law enforcement officers.¹⁴⁶ Perpetrators are increasingly gravitating towards this form of trafficking because of its enhanced sense of anonymity and reduced risk of detection compared with physically traveling to a location to meet and exploit a child.¹⁴⁷ As one journalist noted, “[C]yber-sex

by friends or family members to perform sex shows on the internet) (on file with the Washington and Lee Law Review).

140. See *id.* (describing webcam sex trafficking and the “newest but not less sinister world of sexual exploitation”).

141. See, e.g., *id.* (describing a fourteen-year-old Filipina cyber-sex trafficking victim who performed online shows for men around the world).

142. See *id.* (“Anyone who has a computer, internet and a Web cam can be in business.”).

143. See Martha Mendoza, *AP Exclusive: Big Child Webcam Sex Bust Reveals Rising Abuse*, AP NEWS (May 9, 2017), <https://perma.cc/G9XR-XPXE> (last visited Jan. 27, 2020) (explaining how impoverished parents and relatives exploit their children on the internet for easy money) (on file with the Washington and Lee Law Review).

144. See *id.* (stating that the rapid expansion of the crime is an epidemic).

145. See *id.* (“[A]t any given moment, 750,000 child predators are online.”).

146. See *id.* (explaining the difficulties in investigating webcam sex tourism due to the fact that “pedophiles now operate in virtual anonymity”); see also de Leon, *supra* note 139 (“[T]he private nature of the technology allows the crime to take place in a venue that law enforcement can’t easily access—and that makes it harder to gather evidence against perpetrators.”).

147. See Joshua T. Carback, *Cybersex Trafficking: Toward a More Effective Prosecutorial Response*, 43 CRIM. L. BULL. 1, 26 (2018) (“The use of a webcam

trafficking appears to be the perfect 21st century crime. Technology has made it easier to access and exploit the vulnerable, operate illegal activities across borders and more difficult to discover the identities of those who are behind the crime.”¹⁴⁸

To avoid detection, perpetrators seek and view sex shows through encrypted livestreams on the dark web.¹⁴⁹ They pay victims with bitcoin, untraceable debit cards, or wire transfers through Western Union under false names.¹⁵⁰ They livestream the shows to avoid storing incriminating evidence on clouds or hard drives.¹⁵¹ Even when law enforcement officers detect suspicious behavior, they have difficulty gathering proof of the crime due to the private nature of the video shows¹⁵²—predators and victims usually “meet” in a chat room before deciding to take their conversation to a private video stream.¹⁵³

The purported anonymity of seeking these shows online attracts predators with particularly heinous sexual fantasies.¹⁵⁴ According to the anti-trafficking organization International Justice Mission, “The more abusive the show, the more the customer pays.”¹⁵⁵ Let’s take a look at one predator who capitalized on this twisted market. Fleeing multimillion-dollar fraud allegations, Australian national Peter Scully moved to the

as a modality to sell sexual exploitation for the gratification of foreign buyers confers purchasers with a greater level of anonymity, and therefore a lesser degree of risk than physically traveling abroad to exploit children in person.”).

148. De Leon, *supra* note 139.

149. See Mendoza, *supra* note 143 (explaining perpetrators’ use of livestreams to enhance virtual anonymity).

150. See *id.* (stating that the use of smart phones and wi-fi have led to an expansion of webcam sex trafficking because predators now use money transfer services and virtual payment methods).

151. See *id.* (“By livestreaming, they bypass digital markers law enforcement embeds in illegal content to catch people downloading, sharing or saving child pornography on computers or in the Cloud.”).

152. See *id.* (“Once isolated, pedophiles now operate with virtual anonymity . . .”).

153. See *id.* (discussing the use of chat room groups and online forums to buy and sell child sex shows).

154. See *Cybersex Trafficking*, IJM, <https://perma.cc/P7FW-DNLT> (PDF) (explaining how predators search online for shows depicting abuse of young children—some even under the age of two).

155. *Id.*

Philippines in 2011.¹⁵⁶ Over the next four years, Scully recorded and live streamed films in which he violently raped and abused young Filipina girls—all at the request of online pedophiles.¹⁵⁷ In one film, two young girls are seen digging their own graves before Scully rapes and strangles them.¹⁵⁸ One of these girls was later found buried underneath his house.¹⁵⁹ Another film shows Scully brutally sexually abusing an eighteen-month-old infant.¹⁶⁰ He dubbed the film *Daisy's Destruction* and sold it on the dark web to thousands of predators worldwide, receiving as much as \$10,000 per individual view.¹⁶¹ While Scully was

156. See Tammy Mills, Chris Vedelago & Lindsay Murdoch, *Alleged Paedophile Peter Gerard Scully Fled a Sordid Past in Melbourne*, SYDNEY MORNING HERALD (Mar. 6, 2015 4:30 PM), <https://perma.cc/V9S7-WVDC> (last visited Jan. 22, 2020) (stating that Scully fled Australia to the Philippines following his involvement in a property scheme that defrauded over twenty investors of \$2.68 million) (on file with the Washington and Lee Law Review).

157. See *Australian Peter Scully Given Life Sentence for Human Trafficking, Rape in Philippines, Reports Say*, ABC (Jun. 13, 2018 8:55 PM), <https://perma.cc/UW6J-FZSX> (last visited Feb. 7, 2019) (explaining Scully's production of violent child pornography films) (on file with the Washington and Lee Law Review); see also Mills, Vedelago & Murdoch, *supra* note 156 ("Police allege Scully, who used the aliases of Peter Ridell and Peter Russell, orchestrated a scheme where paedophiles paid to live stream videos of children as young as one being tortured and sexually abused as per their requests.").

158. See Samuel Osborne, *Philippines Signals It Wants to Bring Back Death Penalty Just So It Can Execute Australian Alleged Paedophile*, INDEPENDENT (Sept. 23, 2016), <https://perma.cc/3WWG-L94T> (last visited Jan. 22, 2020) (describing the abuse Scully inflicted on various girls) (on file with the Washington and Lee Law Review).

159. See *Australian Peter Scully Given Life Sentence for Human Trafficking, Rape in Philippines, Reports Say*, *supra* note 157 (stating that one victim's skeleton was discovered buried under a house that Scully had rented).

160. See *id.* (describing Scully's abuses).

161. See Rob Waugh, *What Is Daisy's Destruction? 'Snuff Film' Urban Legend Actually Exists*, METRO (Sept. 26, 2016), <https://perma.cc/NYJ9-53XW> (last visited Jan. 27, 2020) (explaining the demand for the video around the world) (on file with the Washington and Lee Law Review).

convicted of human trafficking in 2018,¹⁶² individuals continue to trade his film online and avoid law enforcement detection.¹⁶³

Though Scully's actions were some of the most horrific and sadistic instances of child abuse,¹⁶⁴ thousands of predators like him continue to fulfill customers' requests for webcam child sex shows.¹⁶⁵ The United States does not criminalize webcam or cybersex trafficking as a federal offense.¹⁶⁶ Instead, it criminalizes these acts under child pornography, online solicitation, or corruption of children laws,¹⁶⁷ which is precisely what Congress intended to avoid.¹⁶⁸ While penalties for alternative offenses such as child pornography can be severe,¹⁶⁹ Congress explicitly enacted 18 U.S.C. § 1591 to ensure that traffickers were not punished under lesser offenses.¹⁷⁰ It also made clear that its purpose was to criminalize a wide array of conduct because no law existed at the time that covered the range of offenses involved in sex trafficking.¹⁷¹ It included a

162. See Candace Sutton, *Infamous Pedophile Smiles as He Gets Life in Prison*, N.Y. POST (June 14, 2018), <https://perma.cc/PVC6-9EYF> (last visited Jan. 27, 2020) (explaining that Scully was found guilty of human trafficking in a Philippines court and still faced up to sixty charges for murder, torture, and abuse) (on file with the Washington and Lee Law Review).

163. See *Australian Peter Scully Given Life Sentence for Human Trafficking, Rape in Philippines, Reports Say*, *supra* note 157 (describing the upload of the video to the internet and its widespread sales).

164. See Osborne, *supra* note 158 (stating that Scully's actions were so depraved that prosecutors and authorities advocated for the Philippines to reintroduce the death penalty).

165. See Mendoza, *supra* note 143 (stating that at any given time, there are 750,000 child predators online).

166. See Bart W. Schermer et. al., *Legal Aspects of Sweetie 2.0*, LEIDEN U. (Oct. 3, 2016), <https://perma.cc/W2ZJ-4SQX> (PDF) (noting the absence of webcam sex trafficking laws in various countries, including the United States).

167. See *id.* (providing a chart of the laws that United States federal courts apply to webcam sex trafficking).

168. See TVPA of 2000, Pub. L. No. 106-386, § 102(b)(14), 114 Stat. 1464 (codified at 18 U.S.C. § 1591) (enacting the statute because “[n]o comprehensive law exists in the United States that penalizes the range of offenses involved in the trafficking scheme”).

169. See 18 U.S.C. § 2252(b)(1) (2018) (providing a penalty of up to forty years imprisonment for certain child pornography offenses).

170. See TVPA of 2000 § 102(b)(14) (“[T]he most brutal instances of trafficking in the sex industry are often punished under laws that also apply to lesser offenses, so that traffickers typically escape deserved punishment.”).

171. See *id.* (“No comprehensive law exists in the United States that penalizes the range of offenses involved in the trafficking scheme.”).

variety of activities under the term “sex trafficking” in order to acknowledge that sex trafficking is not a single, simple action, but is rather manifest in a plethora of complex and constantly changing forms.¹⁷² Nevertheless, courts have interpreted the definition to rely heavily on the presence of a physical interaction between the defendant and victim,¹⁷³ which prevents the statute from adapting to developments in technology. Webcam sex trafficking instances were rare, if not nonexistent, when Congress enacted 18 U.S.C. § 1591(c) in 2000,¹⁷⁴ but as technology advances, human trafficking only becomes more complicated.¹⁷⁵ The progression of this crime into more sophisticated realms should not prevent it from being included in “the range of conduct punished as sex trafficking.”¹⁷⁶

Not only does the current interpretation of the statute allow for under-criminalization of emerging forms of sex trafficking, but it also over-criminalizes actions that fall outside of Congress’s definition of sex trafficking. Though Congress intended to criminalize a comprehensive range of offenses involved in the trafficking scheme,¹⁷⁷ there are certain actions—though separate criminal offenses in themselves—that should not be encompassed in the statutory definition of child sex trafficking. Those actions are discussed in the following subsection.

B. Over-Criminalization

The current interpretation of 18 U.S.C. § 1591(c), outlined in the factor list in Part II.B, problematically considers a

172. See, e.g., *What Is Modern Slavery?*, ANTI-SLAVERY INT’L., <https://perma.cc/CP69-PP5W> (last visited Jan. 27, 2020) (describing the various forms of human trafficking, such as child slavery, forced marriage, and bonded labor) (on file with the Washington and Lee Law Review).

173. See *supra* Part II.B (describing how courts assess a physical interaction between the victim and defendant).

174. See *Mendoza*, *supra* note 143 (stating that the first high-profile international case of webcam sex trafficking was reported in 2011).

175. See *id.* (explaining how the proliferation of smart phones and the internet paved the way for the expansion of cyber trafficking crimes).

176. JVTA of 2015, Pub. L. No. 114-22, § 108(c), 129 Stat. 227 (codified at 18 U.S.C. § 1591).

177. See TVPA of 2000 § 102(b)(14) (providing Congress’s intent to create a comprehensive law that criminalizes a broad range of trafficking offenses).

relationship or established social connection between a defendant and victim as well as a defendant's knowledge of signs of human trafficking. The combination of these factors paves the way for an over-criminalization of individuals to whom Congress did not intend the statute to apply.¹⁷⁸

1. Violation of Legislative Intent

Courts' current interpretations of the "reasonable opportunity to observe" standard allows for convictions of people who are not actually "trafficking children" according to Congress's original intent for the statute.¹⁷⁹ In passing the child sex trafficking statute, Congress set out 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."¹⁸⁰ It further stated:

It is the sense of Congress that . . . a sex trafficker [is] a person who "knowingly . . . recruits, entices, harbors, transports, provides, obtains, or maintains by any means a person . . . knowing, or in reckless disregard of the fact, that means of force, threats of force, fraud, coercion . . . 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."¹⁸¹

According to the stated legislative intent, sex trafficking encompasses a wide variety of criminal activities.¹⁸² Those who engage in the most pervasive forms of sex trafficking would unquestionably be categorized as sex traffickers under the Act.¹⁸³ For instance, the definition of "sex trafficker" includes persons who lure undocumented populations into the United States with false promises of jobs¹⁸⁴ because they knowingly

178. *See id.* § 102(a) (enacting 18 U.S.C. § 1591 in order to combat trafficking in persons, slavery, and involuntary servitude).

179. *See id.* § 102(b) (explaining the definition of human trafficking).

180. *Id.* § 102(a).

181. JVTA of 2015 § 108 (quoting 18 U.S.C. § 1591).

182. *See id.* (criminalizing seven different actions).

183. *See id.* (providing that those who knowingly cause another person to engage in a commercial sex act are sex traffickers).

184. *See What Is Modern Slavery?*, *supra* note 172 (stating that traffickers will often promise a fake new job to someone living in poverty).

recruit, entice, harbor, and transport the victims.¹⁸⁵ Moreover, Congress would certainly deem as sex traffickers parents who sell their child's virginity,¹⁸⁶ as well as business owners who exploit undocumented employees to sell sex,¹⁸⁷ and "financial lenders" who offer impoverished individuals loans with exorbitant interest rates that they then force the borrowers to pay off through prostitution.¹⁸⁸ The statute's definition of a sex trafficker also encompasses traditional pimps who engage in complex, manipulative, and violent tactics to recruit and force children to enter the prostitution industry.¹⁸⁹

Nonetheless, despite the broad range of activities covered under 18 U.S.C. § 1591, courts should not allow certain behavior to be criminalized under the statute. Importantly, sex trafficking children and soliciting a prostitute must be recognized as two distinct criminal actions that carry different consequences. It is crucial to first understand the difference between sex trafficking and prostitution. Only adults can be prostitutes, while both adults and children can be sex trafficking

185. See TVPA of 2000, Pub. L. No. 106-386, § 112, 114 Stat. 1464 (codified at 18 U.S.C. § 1591) (providing that a sex trafficker is a person who knowingly recruits, entices, or transports a victim).

186. See Russell Goldman, *Utah Mother Tried to Sell Daughter's Virginity for \$10,000, Say Cops*, ABC NEWS (May 24, 2011), <https://perma.cc/EBQ8-CD6V> (last visited Jan. 27, 2020) (explaining that Felicia McClure attempted to sell her thirteen-year-old daughter's virginity against the daughter's wishes) (on file with the Washington and Lee Law Review).

187. See *Human Trafficking—Exploitation of Illegal Aliens*, FAIR (Aug. 2016), <https://perma.cc/DZV5-EJNX> (last visited Mar. 7, 2020) ("While anyone can become a victim of trafficking, illegal aliens are highly vulnerable to being trafficked due to a combination of factors, including lack of legal status and protections, limited language skills and employment options, poverty and immigration-related debts, and social isolation.") (on file with the Washington and Lee Law Review).

188. See *Debt vs. Debt-Bondage: What's the Difference?*, POLARIS BLOG (Mar. 1, 2016), <https://perma.cc/MU6S-ZZTB> (last visited Jan. 27, 2020) (explaining that traffickers impose unreasonable interest rates on loans, often as high as 400%, and convince victims that they must prostitute to pay off the debt) (on file with the Washington and Lee Law Review).

189. See LINDA SMITH & CINDY COLOMA, *RENTING LACY: A STORY OF AMERICA'S PROSTITUTED CHILDREN 76* (Shared Hope Int'l ed., 2013) (describing how a pimp manipulates child victims).

victims.¹⁹⁰ Many scholars argue that there is no such thing as a “child prostitute” because young children cannot legally consent to sex, and thus cannot freely choose to become prostitutes.¹⁹¹ Adults, on the other hand, can be trafficked into the prostitution industry or they can enter it through their own volition.¹⁹² Therefore, though the merits and reasoning behind it can be debated,¹⁹³ a distinction remains between those who sell sex: an

190. See *What’s Wrong with Calling a Child a Prostitute?*, SHARED HOPE INT’L (Jan. 7, 2010), <https://perma.cc/MH5K-U3CA> (last visited Jan. 31, 2020) (“A child cannot be a prostitute because she/he is a victim of commercial sexual exploitation and the federal law defines this child as a victim of sex trafficking.”) (on file with the Washington and Lee Law Review).

191. See *id.* (noting that under federal law, all minors engaged in commercial sex acts are classified as trafficking victims); see also Samantha Cowan, *Why Sex-Trafficked Children Can’t Be Called Prostitutes*, TAKE PART (Sept. 23, 2015), <https://perma.cc/3NJA-479R> (last visited Jan. 31, 2020) (stating that the term “child prostitute” is “misleading because it suggests consent and criminality when none exists”) (on file with the Washington and Lee Law Review); Malika Saada Saar, *There Is No Such Thing as a Child Prostitute*, WASH. POST (Feb. 17, 2014), <https://perma.cc/K65T-66UJ> (last visited Jan. 30, 2020) (explaining that because vulnerable children are exploited and forced against their will to sell sex, they cannot ever truly “choose” to become prostitutes) (on file with the Washington and Lee Law Review).

192. See Kelly J. Bell, *A Feminist’s Argument on How Sex Work Can Benefit Women*, INQUIRIES J. (2009), <https://perma.cc/BRV6-47Y2> (last visited Jan. 31, 2020) (explaining the argument that sex work is not always a form of violence, but can be a choice for women) (on file with the Washington and Lee Law Review); see also *Should Prostitution Be a Normal Profession?*, BBC, <https://perma.cc/A4G3-YJLB> (last visited Jan. 31) (detailing an interview with a prostitute who said, “I do this on my own choice” because she needed to pay rent until she found another job) (on file with the Washington and Lee Law Review). But see Julie Bindel, *Most ‘Sex Workers’ Are Modern-Day Slaves*, SPECTATOR (Aug. 19, 2017), <https://perma.cc/43VF-J4Q6> (last visited Jan. 31, 2020) (“Prostitution is rarely, if ever, a choice.”) (on file with the Washington and Lee Law Review); Natasha Guynes, *Sex Work Is Almost Never a Choice*, MARIECLAIRE (Aug. 30, 2018), <https://perma.cc/48RS-5UBE> (last visited Jan. 31, 2020) (“The most common words I hear from the women who come to [my non-profit organization]: ‘I don’t have a choice.’”) (on file with the Washington and Lee Law Review).

193. See Bindel, *supra* note 192 (arguing that women never become prostitutes out of true free will because “whatever lobbyists say, women and girls in prostitution are overwhelmingly from abusive backgrounds, living in poverty, and otherwise marginalised. They are not free or empowered: they are abused and trapped”); see also Guynes, *supra* note 192 (explaining that women are pushed into prostitution by poverty and necessity, not by choice or a desire to perform sex work); Freddy Hayes, *Treat Prostitutes as Victims, Not Criminals*, DALLAS NEWS (Apr. 21, 2017), <https://perma.cc/ATR8-NRPA> (last

adult is typically assumed to be a prostitute unless she indicates that she did not willingly choose that line of work, while a child is automatically considered a sex trafficking victim due to her age.¹⁹⁴

Based on this line of reasoning, this section focuses on men who solicit prostitutes—that is, adult sellers of sex. Men who solicit prostitutes are not pimps—they are those who purchase sexual services from prostitutes.¹⁹⁵ This section argues that this category of men who have good-faith—albeit illegal—intentions to solicit of-age prostitutes are not, and should not, automatically be criminalized as child sex traffickers when the victim is found to be underage.¹⁹⁶

Recognizing the need to distinguish between soliciting a prostitute and trafficking children in no way disregards the great harm caused by those who solicit prostitutes. Prostitution undoubtedly dehumanizes women and is an inherently dangerous industry.¹⁹⁷ Prostitutes are exposed to higher likelihoods of rape, physical violence, post-traumatic stress disorder, and even murder.¹⁹⁸ In fact, it is often argued that

visited Jan. 31, 2020) (“There is a misconception that women choose to go into prostitution because it is a quick way to make easy money. However, the vast majority of these women are forced to engage in prostitution.”) (on file with the Washington and Lee Law Review).

194. See *What’s Wrong with Calling a Child a Prostitute?*, *supra* note 190 (stating that children engaged in commercial sex acts are automatically deemed trafficking victims under federal law).

195. See *John*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2020) (stating that a john is “a prostitute’s client”).

196. See JVTA of 2015, Pub. L. No. 114-22, § 108, 129 Stat. 227 (codified at 18 U.S.C. § 1591) (stating that those who purchase sexual acts from trafficking victims should be criminalized only if merited by the facts of the case).

197. See Bureau of Public Affairs, *The Link Between Prostitution and Sex Trafficking*, U.S. DEP’T OF STATE (Nov. 24, 2004), <https://perma.cc/NJC3-7SL9> (last visited Jan. 27, 2020) (“The U.S. Government adopted a strong position against legalized prostitution . . . based on evidence that prostitution is inherently harmful and dehumanizing, and fuels trafficking in persons, a form of modern-day slavery.”) (on file with the Washington and Lee Law Review).

198. See *id.* (stating the results of a study showing that sixty to seventy percent of prostitutes had been raped; seventy to ninety-five percent had been physically assaulted; and sixty-eight percent met the criteria for post-traumatic stress disorder); see also Devon Brewer et al., *Extent, Trends, and Perpetrators of Prostitution-Related Homicide in the United States*, 51 J.

prostitution fuels sex trafficking by feeding the demand for commercial sex and providing a “façade behind which traffickers for sexual exploitation operate.”¹⁹⁹ In other words, prostitution, especially when legalized, allows trafficking victims to hide in plain sight—to an outside observer, a trafficked victim would appear to be willfully prostituting herself.²⁰⁰ Men who solicit prostitutes provide the necessary demand to fuel both of these violent industries and are to blame for perpetuating this form of violence against women.²⁰¹ These men are, and should be, held accountable.

This Note in no way argues that men who solicit or attempt to solicit adult prostitutes should be free from criminal liability. In fact, other countries have shown that focusing prosecutions on the demand for prostitution—the men who purchase sex—can lead to a sharp decrease in sex trafficking.²⁰² However, this Note suggests that soliciting or attempting to solicit an adult prostitute is less morally culpable than sex trafficking children. Men who seek out a prostitute, and who have perhaps been duped by pimps or victims themselves about the victim’s age, should not face the same liability as if they had sex trafficked children. A child sex trafficking conviction results in

FORENSIC SCI. 1101, 1107 (2006) (finding that prostitutes have the highest homicide victimization rate of any set of women ever studied).

199. See Bureau of Public Affairs, *supra* note 197

Prostitution and related activities—including pimping and patronizing or maintaining brothels—fuel the growth of modern-day slavery by providing a façade behind which traffickers for sexual exploitation operate. Where prostitution is legalized or tolerated, there is a greater demand for human trafficking victims and nearly always an increase in the number of women and children trafficked into commercial sex slavery.

200. See Rachel Lloyd, *Legalizing Prostitution Leads to More Trafficking*, N.Y. TIMES (Aug. 24, 2015), <https://perma.cc/E6X3-AL87> (last visited Jan. 31, 2020) (explaining that legalization of prostitution in some countries has led to an increase in trafficking because traffickers recruit children and marginalized women to meet the increased demand for commercial sex) (on file with the Washington and Lee Law Review).

201. See *id.* (quoting the Swedish Government’s position that “[i]nternational trafficking in human beings could not flourish but for the existence of local prostitution markets where men are willing and able to buy and sell women and children for sexual exploitation”).

202. See *id.* (stating that in 1999 the Swedish government began aggressively prosecuting customers—instead of prostitutes—and saw a seventy-five percent decrease in men buying sex, thus reducing the overall size of the country’s prostitution and sex trafficking industries).

at least a ten-year imprisonment sentence and at most a life sentence.²⁰³ If not given a life sentence, a convicted person must register as a sex offender,²⁰⁴ which has drastic consequences including permanently limiting where he can live, work, socialize, and travel.²⁰⁵ On the other hand, soliciting a prostitute is typically a state-level offense²⁰⁶ that does not require sex offender registration and generally results in a maximum incarceration period of one year for a first-time offense.²⁰⁷

One man who represents the importance of distinguishing between attempting to solicit an adult prostitute and child sex trafficking is Raymond Valas.²⁰⁸ Valas did not engage in any of the widespread forms of modern-day trafficking.²⁰⁹ He did not enslave, kidnap, sell, collect proceeds from, or smuggle the victim.²¹⁰ Rather, he went on Backpage.com, sent messages to a variety of prostitutes advertising their services, and met up with

203. See 18 U.S.C. § 1591(b)(1) (2018) (stating that a defendant will be sentenced to a term of imprisonment “not less than 10 years or for life”); see also 18 U.S.C. § 1591(b)(2) (providing that the minimum period of incarceration increases to fifteen years if the offense involved force, threats of force, fraud, or coercion); 18 U.S.C. § 1591(d) (describing an additional penalty of twenty-five years of imprisonment for obstructing the enforcement of the child sex trafficking statute).

204. See 34 U.S.C. § 20911(1), (3)(A)(i) (2018), (providing that any defendant convicted of a sex offense must register as a sex offender and stating that sex trafficking under 18 U.S.C. § 1591 is a Tier II sex offense).

205. See Fenzel et al., *Understanding Collateral Consequences of Registry Laws: An Examination of the Perceptions of Sex Offender Registrants*, 11 JUST. POL’Y J. 1, 4 (2014) (describing the collateral consequences of sex offender registration).

206. Soliciting a prostitute can be prosecuted under various federal laws, such as 18 U.S.C. 2422(b) (2018), but it is much more frequently charged at the state level. See generally *U.S. Federal and State Prostitution Laws and Related Punishments*, PROCON, <https://perma.cc/YDL3-5T3Q?type=image> (last visited Jan. 28, 2020) (on file with the Washington and Lee Law Review).

207. See *id.* (providing examples of state level solicitation of a prostitution penalties, including a maximum incarceration period of thirty days in Arkansas, six months in California, and one year in Georgia).

208. *United States v. Valas*, 822 F.3d 228, 248 (5th Cir. 2016).

209. Compare G.A. Res. 55/25, at 32 (Nov. 15, 2000) (defining human trafficking as using threats, force, coercion, abduction, fraud, deception, or abuse of power to exploit another person), with *Valas*, 822 F.3d at 240 (explaining that the defendant claimed that he attempted to hire an adult prostitute, as the victim’s advertisement stated that she was nineteen).

210. See *Valas*, 822 F.3d at 235 (explaining that the defendant solicited the victim to perform commercial sex acts).

one of them who, unbeknownst to him, was a minor.²¹¹ Valas, and others like him, could undoubtedly be prosecuted for attempting to solicit a prostitute.²¹² Instead, due to the strict liability nature of 18 U.S.C. § 1591(c), Valas was convicted of child sex trafficking because he “purchase[d] illicit sexual acts from” a trafficking victim.²¹³

Some might argue that Valas’s behavior was precisely what Congress intended to criminalize when it enacted 18 U.S.C. § 1591. In fact, Congress added the words “solicits or patronizes” to the list of activities criminalized under the statute to make “absolutely clear for judges, juries, prosecutors, and law enforcement officials 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.”²¹⁴ Nevertheless, the final clause of this sentence is key.²¹⁵ Criminalizing typical sex-buyers like Valas without assessing whether the facts of the case merit a distinction diminishes the congressional purpose of the statute.²¹⁶

Even if, despite his denial,²¹⁷ Valas knew he was “obtaining” or “soliciting” an underage trafficking victim,²¹⁸ thus placing his conviction squarely within the statute’s parameters, his case still raises the issue of when criminalization of similarly-situated sex-buyers would be—and more importantly, would not be—“merited by the facts of the case.”²¹⁹ Knowledge

211. *See id.* (stating that the defendant hired the victim through her Backpage.com advertisement which claimed she was an adult).

212. *See, e.g.,* VA. CODE ANN. § 18.2-346(B) (2019) (“Any person who offers money or its equivalent to another for the purpose of engaging in sexual acts . . . shall be guilty of solicitation of prostitution . . .”).

213. *See* JVTA of 2015, Pub. L. No. 114-22, § 109(2), 129 Stat. 227 (codified at 18 U.S.C. § 1591) (stating that courts have interpreted the term “obtain” to encompass those who purchase illicit sexual acts from trafficking victims).

214. *Id.* § 109(4).

215. *See id.* (stating that criminalization of sex-buyers must be merited by the facts of a particular case).

216. *See id.* (describing the statute’s purpose).

217. *See Valas*, 822 F.3d at 241 (discussing Valas’s naiveté defense based on the victim’s advertisement which stated that she was a nineteen-year-old prostitute).

218. *See* JVTA of 2015 § 109(1) (defining a sex trafficker as one who knowingly obtains or solicits a victim).

219. *Id.* at § 109(4).

that the victim is, in fact, a victim of human trafficking should merit such factual distinction.²²⁰ However, if a defendant attempts to solicit an adult prostitute and is unaware that the person who shows up to meet him is an underage human trafficking victim, his pre-conceived expectations of this person might render his “opportunity to observe” unreasonable under § 1591(c). In other words, if a defendant utilized a service such as Backpage.com and ordered the services of a prostitute who held herself out to be twenty years old, then that defendant would expect a twenty-year-old woman to show up to meet him. He would have ample “opportunity to observe” her, but how could he reasonably be expected to ascertain her true age of, say seventeen, or her status as a trafficking victim? If ascertaining her true age is an unreasonable expectation, then his opportunity to observe her must, too, be unreasonable under § 1591(c).

Therefore, given the drastic differences in both culpability and conviction consequences between sex trafficking children and attempting to solicit an adult prostitute, courts should carefully distinguish between the two actions when assessing a defendant’s “opportunity to observe” a victim.

2. “Relationships” Between Defendants and Victims

One might argue that 18 U.S.C. § 1591(c) already distinguishes sex trafficking from attempting to solicit an adult prostitute by considering the existence of “a relationship or established social connection between a defendant and victim.”²²¹ A violent, coercive relationship with unbalanced power dynamics, for instance, is illuminative of a defendant’s observation opportunity of a victim and may merit labeling him a sex trafficker.²²² In other words, the existence of an abusive relationship between a defendant and victim could be evidence

220. See, e.g., *United States v. Jungers*, 702 F.3d 1066, 1073 (8th Cir. 2013) (stating that a man who responded to an advertisement offering an eleven-year-old girl for sex knowingly enticed her).

221. See *supra* Part II.B.

222. See *United States v. Robinson*, 702 F.3d 22, 28 (2d Cir. 2012) (discussing Robinson’s repeated threats to kill the victim if she left him or failed to pay him).

that the defendant is a pimp engaged in sex trafficking.²²³ On the other hand, a man who merely attempted to solicit a prostitute would have no former social connection to the victim, which would diminish the reasonableness of any observation opportunity he had with the victim.

Nonetheless, a danger exists in encouraging courts to broadly consider the existence of a relationship between a defendant and victim. To some, Robinson's conviction might seem unfair because the victim adamantly testified that Robinson was her boyfriend and in no way her trafficker or pimp.²²⁴ Other defendants might present similar evidence that they were in a romantic relationship with the victim, which, if coupled with a lack of evidence of abuse or violence and a victim's testimony that she prostituted out of her own free will, could weigh against a finding of sex trafficking.²²⁵ However, the victim's response in *Robinson* is typical of child sex trafficking victims.²²⁶ Trafficking victims often believe their pimps are their boyfriends due to the pimp's manipulative recruitment tactics.²²⁷ Pimps frequently target young, vulnerable girls who have low self-esteem.²²⁸ Foster children, runaways, and the

223. See Katherine Lynn & Amy Dalrymple, *Manipulation and Threats from Pimps Keep Victims in the Life of Prostitution Unwillingly*, BILLINGS GAZETTE (Jan. 6, 2015), <https://perma.cc/2AML-6BYL> (last visited Jan. 28, 2020) ("Experts say trafficking shares the dynamic of domestic violence . . .") (on file with the Washington and Lee Law Review).

224. See *Robinson*, 702 F.3d at 27 ("Throughout the trial, Jane Doe insisted that Robinson was her boyfriend rather than her pimp, and that he was only living off of her income as a prostitute rather than facilitating that line of work.")

225. See, e.g., 18 U.S.C. § 1591 (2018) (providing that force and coercion are elements of sex trafficking of children).

226. See Lisa Holl Chang, Comment, *Reaching Safe Harbor: A Path for Sex-Trafficking Victims in Wisconsin*, 2013 WIS. L. REV. 1489, 1497 (explaining that traffickers convince vulnerable girls to enter the commercial sex industry by posing as their boyfriends).

227. See SHI Staff, *Why Her? What You Need to Know About How Pimps Choose*, SHARED HOPE INT'L (Apr. 10, 2013), <https://perma.cc/PN8Y-TSZE> (last visited Jan. 27, 2020) (identifying the four steps of recruitment as identifying the need of the child, fulfilling the need, removing any other sources of need fulfillment, and exploiting the child's dependence for need fulfillment) (on file with the Washington and Lee Law Review).

228. See SMITH & COLOMA, *supra* note 189, at 75 ("Pimps find it easiest to manipulate vulnerable girls with low self-esteem, girls from troubled homes, foster children, runaways, and sometimes the mentally disabled.")

mentally disabled often meet these criteria.²²⁹ In *Renting Lacy: A Story of America's Prostituted Children*, Linda Smith and Cindy Coloma describe the “courtship” process:

The pimp will introduce himself and gradually get to know a girl. He will listen to her problems and act like he cares. He may shower her with gifts and compliments. Perhaps he'll provide her with food and a place to sleep at night. However, he'll always establish himself as the victim's “boyfriend,” creating a sense of protection and security. This period can last anywhere from a few days to several months.²³⁰

Following courtship, the pimp strategically isolates the victim from friends and family in order to increase her dependence on him.²³¹ He then gradually introduces physical violence into the relationship.²³² One article explains, “Pimp control is the art of making a girl feel wanted, enough that she suffers the punches for the emotional connection.”²³³ Eventually, through abuse and manipulation of their “relationship,” the pimp convinces the victim that she wants to be a prostitute—she will do anything to protect her relationship after her pimp has brainwashed her into thinking only he will provide for, protect, and love her.²³⁴ “You wait on your man hand

229. See *id.* (explaining that these categories of girls are often targeted because of their vulnerability and loneliness).

230. *Id.* at 75–76.

231. See *id.* at 76

As the pimp listens to the youth's “troubles” at home or school, and as he is establishing himself as her savior, the pimp also works to isolate the child from those who may object to their relationship. The strategic removal of friends and family members ensures, as the relationship shifts from caring to exploitative, that the child will have no one to turn to other than the pimp.

232. See *id.* at 76–77

A pimp typically, however, uses a mixture of love and affection with anger and violence. He's quick to fluctuate between the two states. He may tell one of his girls he loves her and in the next minute slap her across the face. This creates a powerful combination of love and fear that makes the victim obedient.

233. Lymn & Dalrymple, *supra* note 223.

234. See SMITH & COLOMA, *supra* note 189, at 76 (stating that after the isolation period, the pimp will gradually introduce the idea of prostitution through various manipulative tactics); see also Lymn & Dalrymple, *supra* note 223 (“Through psychological manipulation, the pimp brainwashes his victims

and foot,” one former prostitute described.²³⁵ “You go to prison for him, you take cases for him, you go get his money every night, rain, sleet or snow. You pull other women for him.”²³⁶

The pimp knows how to maintain power.²³⁷ As Smith and Coloma described,

The pimp’s primary focus is control: controlling every movement the girls make and every dollar they bring in. The physical control is easier to identify and observe; the psychological abuse can be more difficult to understand. A girl who is frequently beaten, cut, raped, and tortured is guaranteed to do everything the pimp wants her to do.²³⁸

Iceberg Slim, a renowned pimp, described how he executes this practice: “I want to be the boss of her life, even her thoughts. I got to con them that Lincoln never freed the slaves.”²³⁹ Another pimp stated, “After you have broken her spirit, she has no sense of self-value. Now pimp, put a price tag on the item you have manufactured.”²⁴⁰

The prolonged abuse and exploitation often blinds victims to the reality of their situations, and they continue to believe their pimps are their boyfriends.²⁴¹ The emotional element of the “relationship” is commonly the only thing keeping victims from leaving.²⁴² Therefore, taking into account the existence of a relationship²⁴³ between the defendant and victim in “reasonable opportunity to observe” analyses is problematic and counterproductive. It might marginally aid in preventing the over-criminalization of sex-buyers (who, unlike pimps, have no

into thinking only he can provide for them and that no one else understands them . . .”).

235. Lymn & Dalrymple, *supra* note 223.

236. *Id.*

237. See SMITH & COLOMA, *supra* note 189, at 76–77 (explaining the “powerful combination of love and fear” that pimps implement in their processes of controlling a victim).

238. *Id.* at 76.

239. RODRIGUEZ, *supra* note 28, at 46.

240. *Id.*

241. See SMITH & COLOMA, *supra* note 189, at 76 (stating that the pimp always establishes himself as the victim’s boyfriend in order to create a sense of security).

242. See Lymn & Dalrymple, *supra* note 223 (“If not for the emotional element, the girls would leave . . .”).

243. See *supra* Part II.B (providing “a relationship or established social connection between a defendant and victim” as a factor).

prior relationship with a victim), but only at the expense of inadequately protecting victims. A better way to prevent over-criminalization, to be discussed in the following subsection, is to eliminate the consideration of “knowledge of signs of human trafficking” from § 1591(c) analyses.

3. Knowledge of Signs of Sex Trafficking: Research vs. Direct Contact

According to the “reasonable opportunity to observe” factor list, courts take into account a defendant’s knowledge of signs of human trafficking,²⁴⁴ which perhaps prevents the over-criminalization of non-traffickers engaged in distinct behavior such as attempting to solicit an adult prostitute.²⁴⁵ Under this theory, it is reasonable to apply the child sex trafficking statute to a person who claims he believed he was with an of-age prostitute if he has a previous criminal history, for example, of sex trafficking children. His criminal history would demonstrate a likely knowledge of the signs and dangers of human trafficking, so he either knew or should have known that he was with a child sex trafficking victim based on his prior experiences.

However, the broad categorization of this factor as “knowledge of signs of human trafficking”²⁴⁶ still paves the way for over-criminalization. The factor not only encompasses human trafficking criminal histories, but also work-related training and academic research.²⁴⁷ The *Valas* court, for instance, noted the relevancy of a Department of Defense PowerPoint presentation used by the prosecution to prove Valas’s awareness of the signs of human trafficking.²⁴⁸ The court stated that “as a Lieutenant Colonel in the United States Army,

244. See *supra* Part II.B (providing “prior involvement with prostitutes or knowledge of signs of human trafficking” as a factor).

245. See *United States v. Valas*, 822 F.3d 228, 241 (5th Cir. 2016) (explaining that Valas’s admission that he attended anti-trafficking training cast doubt on his defense that he believed the victim was an adult).

246. See *supra* Part II.B.

247. See *Valas*, 822 F.3d at 241 (noting evidence that the defendant attended an annual anti-trafficking training).

248. See *id.* (stating that the PowerPoint presentation made it more likely that Valas contacted the victim for a sexual encounter, rather than for a research project).

[Valas] was trained on human trafficking annually: its signs, dangers, and horrors.”²⁴⁹ It concluded that the PowerPoint presentation made it more probable that Valas contacted the victim for sexual relations rather than to conduct a research interview as he defended because “a career Army officer who takes annual human trafficking awareness training is informed not to invite a prostitute into his private hotel room for an ‘interview.’”²⁵⁰ It was irrelevant to the court that Valas testified he could not recall whether he had seen that precise PowerPoint presentation.²⁵¹ The court stated, “Even if these were not the exact slides that Valas trained on, they at a minimum alerted the jury to the type of training Valas would have experienced.”²⁵²

Allowing this factor of knowledge of human trafficking to encompass work-related trainings expands the crime of child sex trafficking. If Valas spent a total of only one hour conversing with his victim yet still met the standard because he admitted to previously receiving anti-trafficking training,²⁵³ then there might be no scenario in which a court would conclude that a defendant with prior training interacted with a sex trafficking victim but had an insufficient “opportunity to observe” her. In other words, does one’s attendance at an anti-trafficking training necessarily mean he will be able to spot the signs of it in a potential victim? Is it fair to hold defendants to such a standard?

The factor should be narrowed to avoid unjust results. Attending training sessions on human trafficking is very different from gathering first-hand experience through directly interacting with victims.²⁵⁴ Compare, for example, the histories

249. *Id.*

250. *Id.*

251. *See id.* (declaring that the use of the slides was proper even though Valas could not remember if he had seen them before).

252. *Id.*

253. *See id.* at 235, 241 (explaining that Valas spent thirty minutes with the victim on two separate days, never discussed her background, and conversed with her only about her appearance’s similarity to her Backpage.com photos).

254. *See* Diane Cole, *A Message from Your Brain: I’m Not Good at Remembering What I Hear*, NAT’L GEOGRAPHIC (Mar. 13, 2014), <https://perma.cc/6EW4-RZ4Z> (last visited Jan. 28, 2020) (describing a study that found that people remember tactile experiences with more regularity than auditory experiences) (on file with the Washington and Lee Law Review).

of Robinson and Valas.²⁵⁵ Both have experiences that satisfy the factor of “knowledge of human trafficking,” but in starkly different ways. Robinson admitted to pimping multiple times in the past,²⁵⁶ which falls under the same factor category as Valas’s attendance at a human trafficking PowerPoint presentation.²⁵⁷ Had the court not given a life sentence to Ian Sean Gordon, Alyssa Beck’s trafficker,²⁵⁸ his sex trafficking conviction²⁵⁹ could be assessed at a subsequent criminal proceeding in the same manner as a former flight attendant’s standard work training that instructed staff to be on the lookout for certain signs that a traveler might be a victim of human trafficking.²⁶⁰ A court could find that an employee at a shelter for trafficking victims who used his position to recruit and sell victims²⁶¹ had “knowledge of

255. Compare *United States v. Robinson*, 702 F.3d 22, 27 (2d Cir. 2012) (describing the two-and-a-half year pimping relationship between the defendant and victim), with *Valas*, 822 F.3d at 241 (noting the significance of an anti-trafficking training presentation which Valas may not have even remembered).

256. See *Robinson*, 702 F.3d at 28 (discussing Robinson’s prior involvement with pimping).

257. See *United States v. Valas*, 822 F.3d 228, 241 (5th Cir. 2016) (discussing Valas’s annual anti-trafficking work training).

258. See *supra* Part I (describing the story of a fifteen-year-old girl who was sex trafficked).

259. See *Miller*, *supra* note 1 (stating that Gordon pleaded guilty to sex trafficking and was sentenced to life in prison).

260. See *Meet the Abduction Survivor Helping Airlines Stop Human Trafficking*, CNN (Oct. 17, 2019), <https://perma.cc/P5RC-E4JC?type=image> (last visited Jan. 28, 2020) (describing various ways to identify trafficking victims in airports such as looking for those who have tattoos, are not dressed appropriately, and are afraid to discuss their destination or travel plans) (on file with the Washington and Lee Law Review).

261. See *Former Staff Mentor at Florida Keys Children’s Shelter Convicted of Child Sex Trafficking*, FBI (Nov. 6, 2015), <https://perma.cc/GJ98-RPRM> (last visited Mar. 7, 2020) (discussing how an employee recruited girls from a youth shelter to become prostitutes) (on file with the Washington and Lee Law Review); see also Deanna Hackney, *Arizona Migrant Shelter Worker Accused of Sexually Abusing Teenage Boys*, CNN (Aug. 4, 2018), <https://perma.cc/HRM9-FMNS> (last visited Jan. 28, 2020) (describing how a shelter employee abused migrant children who were at risk for trafficking) (on file with the Washington and Lee Law Review).

signs of human trafficking” in the same way as a college student who once wrote a research paper on human trafficking.²⁶²

Robinson, Gordon, and the shelter employee are much less likely to forget the details of their direct experiences with victims than Valas, the flight attendant, or the college student.²⁶³ Indeed, Valas admitted to attending annual anti-trafficking training, but testified he could not remember the training or if he had seen the exact slides offered by the prosecution.²⁶⁴ He, and other employees, are under no obligation to remember or even pay attention during a couple-hour work training, but courts can assume that defendants remember such trainings and apply the information to their interactions with potential victims years after the trainings have concluded.²⁶⁵ Direct contact with victims provides a much deeper basis of knowledge than academic research or work-related training,²⁶⁶ yet courts erroneously treat the two experiences as the same in their assessments of § 1591(c)’s factor of “knowledge of signs of human trafficking.”²⁶⁷

The outlined issues with the current interpretation of what evidence is necessary to show a “reasonable opportunity to observe” a child sex trafficking victim display a need to clarify the standard. To eradicate the issues of both under- and over-criminalization, the next section advocates a revised factor list that courts should use when assessing evidence under § 1591(c).

262. See *UMass-Amherst Offers Intro to Human Trafficking Online Class to Raise Awareness*, MASSLIVE (Jul. 26, 2017), <https://perma.cc/DR8U-35GE> (last visited Jan. 28, 2020) (describing an online course which aims to teach students how to spot signs of human trafficking) (on file with the Washington and Lee Law Review).

263. See Cole, *supra* note 254 (explaining that people remember what they hear far less often than they remember what they see or touch).

264. See Valas, 822 F.3d at 241 (stating that Valas could not remember whether the slides depicted the exact training he received).

265. See *id.* (declaring that even if Valas did not remember the training, it was similar enough to what he experienced).

266. See Cole, *supra* note 254 (discussing the differences in memory recall depending on “whether we see it, hear it, or touch it”).

267. See *supra* Part II.B.

IV. A Better Approach for Victims and Defendants

As demonstrated in Part III, the current factor list that courts use to assess whether a defendant had a “reasonable opportunity to observe” a victim is inherently flawed. This section recommends solutions to mend the problematic factors and advocates for a new list of factors that courts should consider when assessing whether evidence is sufficient to satisfy § 1591(c). This new list is a more efficient and effective way to protect victims of various forms of sex trafficking while simultaneously safeguarding defendants from being convicted of crimes that do not match their level of culpability.

A. Under-Criminalization Due to Emphasis on Physical Interaction

As discussed, courts consider whether a defendant had a physical interaction with a victim when evaluating evidence under § 1591(c).²⁶⁸ Webcam sex trafficking raises the issue of whether a perpetrator can reasonably observe a victim by viewing a virtual depiction of that person.²⁶⁹ Courts can better protect victims of webcam sex trafficking and the statute’s legislative intent²⁷⁰ if they expand the emphasis on physical interactions to include virtual interactions. Restricting the factor to in-person or face-to-face communications prevents the statute from adapting to developments in technology.²⁷¹ While in 2000,²⁷² Congress had no way of predicting that human trafficking would rapidly inhabit the cyberworld with

268. See *supra* Part II.B (providing a defendant’s “physical interaction with a victim” as a relevant factor to interpreting the statute).

269. See *supra* Part III.A (explaining how the factor list fails to incorporate virtual interactions).

270. See TVPA of 2000, Pub. L. No. 106-386, § 112, 114 Stat. 1464 (codified at 18 U.S.C. § 1591) (explaining that Congress enacted the statute because no law existed that covered the range of activities in the human trafficking scheme).

271. See *Mendoza, supra* note 143 (“The relatively new crime of webcam sex tourism is spreading rapidly, with new digital technologies sparking what the United Nations call an ‘alarming growth of new forms of child sexual exploitation online.’”).

272. See *generally* TVPA of 2000 § 1 (providing that the statute was enacted in 2000).

perpetrators flocking to the internet to exploit victims, this new virtual crime cannot reasonably be excluded from the “range of conduct punished as sex trafficking.”²⁷³ Congress selected this broad language precisely to allow the law to adapt to unexpected developments in the trafficking industry.²⁷⁴ Requiring that the statute only encompass those crimes that existed when Congress enacted it would be inefficient and contrary to the statute’s purpose.²⁷⁵ But most importantly, it would leave victims desperately vulnerable and unprotected.²⁷⁶ Therefore, the interpretive factor should be amended to guide courts to consider “a physical or virtual interaction between a defendant and victim.”

B. Over-Criminalization in Violation of Legislative Intent

Congress intended to criminalize modern forms of slavery,²⁷⁷ but the current factor list allows criminalization of sex-buyers who seek to solicit an adult prostitute.²⁷⁸ While this, of course, is criminally punishable behavior,²⁷⁹ it does not always fall under the category of sex trafficking or merit the higher sentences and consequences that come with a sex trafficking conviction.²⁸⁰ A man who expects to briefly interact with an adult prostitute might not have a “reasonable

273. JVTA of 2015, Pub. L. No. 114-22, § 108(c), 129 Stat. 227 (codified at 18 U.S.C. § 1591).

274. See *id.* § 109(1) (enacting the statute because no law existed that criminalized all behavior under the umbrella term of “sex trafficking”).

275. See TVPA of 2000 § 102(a) (stating the purpose to combat the contemporary manifestation of trafficking in persons).

276. See *supra* Part III.A (explaining how victims of virtual trafficking are unprotected).

277. See TVPA of 2000 § 102(a) (“The purposes of this division are 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.”).

278. See *supra* Part III.B (explaining how the application of the current factors over-criminalizes certain groups of people).

279. See 18 U.S.C. § 2422 (2018) (criminalizing the solicitation of a prostitute); see also 18 U.S.C. § 2421 (2018) (criminalizing the promotion of prostitution); *U.S. Federal and State Prostitution Laws and Related Punishments*, *supra* note 206 (providing each state’s penalties for solicitation of a prostitute).

280. See *supra* Part III.B.

opportunity to observe” a victim who has held herself out to be of legal age.²⁸¹

To remedy this issue, courts should consider a factor that imposes a minimum time period on an interaction between a defendant and victim—that is, set an amount of time that would render an “opportunity to observe” presumptively reasonable. Perhaps a total interaction time of one hour, as displayed in *Valas*,²⁸² is reasonable, however it still raises the issue of how much time would constitute an *unreasonable* opportunity to observe a victim. The ideal time period should afford ample time to assess whether, despite any preconceived notions about someone’s adult status, a person is actually an underage victim of sex trafficking. If there were such a time limit, individuals would have ample notice under the law to assess a potential victim and those who unknowingly, unintentionally, and briefly interact with sex trafficking victims would not face sex trafficking criminalization.

The Eleventh Circuit held that a defendant had a “reasonable opportunity to observe” a sex trafficking victim when he spent twenty minutes photographing her for Backpage.com advertisements.²⁸³ Twenty minutes was a “considerable interaction” according to the court.²⁸⁴ Outside of the context of sex trafficking, other courts have also determined that twenty minutes was the minimum time requirement to have a “reasonable opportunity to observe.” In *Nettles v. Wainwright*,²⁸⁵ for example, the Fifth Circuit held that a victim could reliably testify about a perpetrator’s identity because she viewed him for “more than twenty minutes” and therefore had a sufficient opportunity to observe him.²⁸⁶

281. See *supra* Part III.B (providing examples of inappropriate applications of the statute).

282. See *United States v. Valas*, 822 F.3d 228, 235 (5th Cir. 2016) (explaining that the victim came to Valas’s room for thirty minutes two days in a row).

283. See *United States v. Blake*, 868 F.3d 960, 975–76 (11th Cir. 2017) (stating that twenty minutes was a “considerable interaction,” and therefore a “reasonable opportunity to observe”).

284. *Id.*

285. 677 F.2d 410 (5th Cir. 1982).

286. See *id.* at 414 (applying a minimum time limit to be able to render a reliable identification of a perpetrator).

The Supreme Court of Maine imposed the same time limit on a witness's reliable observation of a defendant's sanity.²⁸⁷ The court stated that it "certainly know[s] of no jurisdiction in which the opinion of a lay witness, as to the sanity of a man, whom he has seen less than twenty minutes, would be regarded as admissible."²⁸⁸ The Arkansas Supreme Court quoted Maine's twenty-minute time limit when it held that a non-expert witness's less-than-five-minute observation of a defendant was an unreasonable opportunity to observe her.²⁸⁹

Lastly, certain states require police officers to observe suspected drunk drivers for a minimum of twenty minutes before breathalyzing them.²⁹⁰ For instance, a Tennessee court excluded the results of a breathalyzer test because "the defendant had been observed for seventeen minutes rather than the twenty minutes required by law."²⁹¹ Therefore, based on the time limits implied by other courts in the § 1591(c) context as well as those set in other areas of the law pertaining to reasonable observation opportunities, courts evaluating evidence under § 1591(c) should consider a factor of "at least a twenty minute interaction" between a defendant and child sex trafficking victim.

C. Over-Criminalization Due to Consideration of Relationships and Knowledge of Human Trafficking

To better target the conduct that Congress intended to criminalize,²⁹² the interpretive factors should gauge whether

287. See *State v. Turner*, 138 A. 562, 563 (Me. 1927) (requiring that witnesses have a sufficient opportunity to observe a defendant before testifying about his sanity).

288. *Id.*; see also *Henderson v. State*, 94 S.W.2d 467, 468 (Tex. Crim. App. 1936) (permitting an expert witness to testify about the sanity of the defendant after viewing him for "about twenty minutes" during trial).

289. See *Spence v. State*, 184 S.W.2d 986, 988 (Ark. 1931) ("They had no reasonable opportunity to observe her acts and conduct except for a period of time not exceeding five minutes . . .").

290. See *State v. Ugrovics*, 982 A.2d 1211, 1214 (N.J. Super. Ct. App. Div. 2009) (noting that officers must observe suspected drunk drivers for the prescribed twenty minutes before administering a breathalyzer test); *State v. Sensing*, 843 S.W.2d 412, 416 (Tenn. 1992) (same).

291. *Sensing*, 843 S.W.2d at 416.

292. See TVPA of 2000, Pub. L. No. 106-386, § 112, 114 Stat. 1464 (codified at 18 U.S.C. § 1591) (criminalizing contemporary trafficking in persons).

the defendant engaged in common forms of trafficking behavior by focusing on a defendant's abuse and coercion of a victim. As discussed in Part III.B.2, broadly assessing the existence of a "relationship" between the defendant and the victim would not properly solve under- and over-criminalization issues due to the typical recruiting tactics of pimps manipulating victims into believing the two are in a relationship. Therefore, that factor should be eliminated and the list instead should include "a defendant's use of force or coercion on a victim" and "a defendant's knowledge that a victim has a pimp or is otherwise performing sexual services not of her or his own free will."

Additionally, as founder of the Human Trafficking Institute John Cotton Richmond recommended, a factor should be added that targets "[a] defendant's possession, review, or absence of [a] victim's identification documents"²⁹³ to further measure a defendant's use of coercion on a victim, and thus, his "opportunity to observe" her. This factor would especially protect undocumented persons. Undocumented victims often fear that they will be deported if they report their traffickers to law enforcement.²⁹⁴ Traffickers capitalize on victims' fears and immigration statuses by taking their passports and identifying papers to restrict any ability to escape.²⁹⁵

Finally, under the current factor list, courts consider "prior involvement with prostitutes or knowledge of signs of human trafficking."²⁹⁶ However, as explained, this has the potential to criminalize those who merely attend a work-related training or conduct academic research on human trafficking in the same

293. Richmond, *supra* note 36, at 310.

294. See Stephen P. Wood, *The Intersection of Human Trafficking and Immigration*, HARV. L.: PETRIE FLOM (June 27, 2018), <https://perma.cc/CC5F-7MHT> (last visited Mar. 28, 2020) ("The ever-looming threat of deportation . . . can be a significant deterrent to victims reporting their traffickers, making them even more reliant on them for perceived protection. Many traffickers use the threat of deportation to control their victims, and the widespread enforcement of immigration policy reinforces that fear.") (on file with the Washington and Lee Law Review).

295. See *id.* ("These are people who are often afraid, alone and frequently have had their passports and other identifying papers taken from them by their traffickers. They have no way to contact family or friends, as they are stripped of their identity and have to rely on their traffickers for survival.")

296. See *supra* Part II.B.

manner as those who have a history of actively recruiting, manipulating, and abusing trafficking victims.²⁹⁷ Because direct interaction with victims should be distinguished from learning about trafficking through work trainings,²⁹⁸ the factor should be specified to “prior direct experience with human trafficking victims.” This new factor specifies prior involvement with human trafficking, not prostitution, to preserve Congress’s intent to protect child sex trafficking victims under 18 U.S.C. § 1591.²⁹⁹ Though the human trafficking and adult prostitution industries often overlap,³⁰⁰ the factor should specifically target defendants with a history of human trafficking in order to preserve Congress’s statutory intent.

D. A Revised Factor List

As this Note has demonstrated, the current interpretation of 18 U.S.C. § 1591(c) is problematic and can lead to under-criminalization of child sex trafficking as well as over-criminalization of non-trafficking behavior. In order to better prevent courts from perpetuating these issues, this Note recommends the following modified factor list that courts should use to determine whether a defendant had a “reasonable opportunity to observe” a victim. In assessing the evidence regarding whether this standard is met, courts should consider the following factors:

1. A defendant’s prior direct experiences with human trafficking victims;
2. A defendant’s physical or virtual interaction with a victim;
3. At least a twenty-minute interaction between a defendant and victim;

297. See *supra* Part III.B (explaining how the broad interpretation of the factor causes over-criminalization).

298. See *supra* Part III.B.3 (arguing that direct contact with victims provides a more reasonable “opportunity to observe” a victim than other indirect interactions).

299. See TVPA of 2000 § 102(a), (b) (enacting the statute to combat contemporary forms of child sex trafficking).

300. See Bureau of Public Affairs, *supra* note 197 (explaining how prostitution fuels human trafficking); see also Chuck Neubauer, *Most Human Trafficking Related to Prostitution*, WASH. TIMES (Apr. 28, 2011), <https://perma.cc/P66S-3TXA> (last visited Jan. 29, 2020) (stating that more than eighty percent of suspected incidents of human trafficking involved forced prostitution) (on file with the Washington and Lee Law Review).

4. A defendant's use of force or coercion on a victim;
5. A defendant's knowledge that a victim has a pimp or is otherwise performing sexual services not of her own free will;
6. A defendant's possession, review, or absence of a victim's identification documents;
7. A victim's youthful demeanor;
8. A victim's disclosure of minor status;
9. A victim's deceitfulness about her age;
10. A defendant's knowledge of the background or underage social network of a victim; and
11. A defendant's participation in the recruitment or advertisement of a victim's services.

Using these factors will better ensure accuracy, protection, and fairness in child sex trafficking cases. This standardized list of factors based on many analyses of the current state of modern-day human trafficking will aid courts in consistently employing accurate interpretations of § 1591(c), as well as provide stronger protection for victims and fairness for defendants.

V. Conclusion

"The only way not to find this problem in any city is simply not to look for it."

—John F. Clark, President of the National Center for Missing and Exploited Children³⁰¹

When Congress passed the Victims of Trafficking and Violence Protection Act of 2000, it stated:

One of the founding documents of the United States, the Declaration of Independence, recognizes the inherent dignity and worth of all people. It states that all men are created equal and that they are endowed by their Creator with certain unalienable rights. The right to be free from slavery and involuntary servitude is among those unalienable rights.³⁰²

301. Marianne Clyde, *Not One More Victim*, FAUQUIER TIMES (Aug. 11, 2018), <https://perma.cc/6N2M-6G6G> (last visited Mar. 28, 2020) (on file with the Washington and Lee Law Review).

302. TVPA of 2000 § 102(b)(22).

It is the duty of courts to earnestly safeguard these unalienable rights. Failing to properly interpret statutes in light of changing technology and criminal industries allows victims and defendants to fall through the cracks.

At age sixteen, Alyssa Beck escaped sexual slavery and was present when a federal judge sentenced her trafficker to life in prison.³⁰³ However, most victims are not as fortunate. Despite recent improvements in awareness and law enforcement,³⁰⁴ there are still more than 10 million child trafficking victims across the globe.³⁰⁵ Protecting children like Alyssa depends on clarifying the interpretation of a “reasonable opportunity to observe” a child sex trafficking victim under 18 U.S.C. § 1591(c). In recent years, courts have assessed whether a defendant had a “reasonable opportunity to observe” a child sex trafficking victim by focusing on his physical interaction with the victim, his knowledge of human trafficking, his relationship with the victim, and other factors.³⁰⁶ However, the current list of factors that courts utilize creates a plethora of issues.³⁰⁷ It under-criminalizes legitimate forms of modern sex trafficking, such as webcam sex trafficking,³⁰⁸ and over-criminalizes behavior outside the realm of sex trafficking.³⁰⁹ To resolve these issues, courts should instead focus on factors that encompass virtual interactions, coercive and violent relationships, and a defendant’s prior direct experiences with human trafficking victims.³¹⁰

303. See Miller, *supra* note 1 (stating that Ian Sean Gordon received one of the first life sentences for trafficking in the United States).

304. See Rebecca Sadwick, *7 Ways Technology Is Fighting Human Trafficking*, FORBES (Jan. 11, 2016), <https://perma.cc/WB4G-8FCA> (last visited Jan. 29, 2020) (explaining various technological advancements that allow law enforcement officers to combat new forms of human trafficking) (on file with the Washington and Lee Law Review).

305. See *Forced Labour, Modern Slavery and Human Trafficking*, *supra* note 26 (noting that there are currently 40.3 million victims trapped in human trafficking, twenty-five percent of whom are children).

306. See *supra* Part II.B (providing a full list of factors that courts use).

307. See *supra* Part III (explaining how the factor list under-criminalizes sex trafficking acts and over-criminalizes other behavior).

308. See *supra* Part III.A (discussing the application of the statute to webcam sex trafficking).

309. See *supra* Part III.B (explaining the consequences of problematic factors).

310. See *supra* Part IV.D (providing a full list of recommended factors).

The government is responsible for eradicating the rampant spread of child sex trafficking. Courts can perform their role in this global effort by applying an accurate and protective interpretation of the child sex trafficking statute. As civil rights leader Fannie Lou Hamer once said, “Nobody’s free until everybody’s free.”³¹¹

311. See Terry Fitzpatrick, “*Nobody’s Free Until Everybody’s Free*”, FREE THE SLAVES BLOG (Jan. 31, 2018), <https://perma.cc/JNV4-Y3RZ> (last visited Jan. 29, 2020) (quoting Fannie Lou Hamer) (on file with the Washington and Lee Law Review).