

CRIMINAL PROVISIONS

POLICY GOAL: Use of a law enforcement decoy is not an available defense under sex trafficking and commercial sexual exploitation of children (CSEC) laws.

In this new digital-age, social media and personal advertisement platforms have made it easier than ever for buyers and traffickers to solicit minors for commercial sex, providing offenders with a sense of freedom and anonymity.¹ But just as buyers and traffickers have taken to the Internet, efforts to criminalize these perpetrators have also gone online.

To effectively and proactively combat commercial sexual exploitation, law enforcement agencies have increasingly relied on “reverse sting” operations in which officers pose as minors to identify and arrest buyers and traffickers who seek to recruit or purchase minors for commercial sex.² Permitting law enforcement to pose as a minor for the purpose of investigating commercial sex crimes is essential to fighting these crimes without risking actual harm to children. Such stings, whether initiated through print media or web-based services, are generally safer for law enforcement and allow officers to collect more evidence and build stronger cases against buyers and traffickers.³ Accordingly, use of a law enforcement decoy is an effective and child-protective approach to proactively investigate trafficking and CSEC offenders.

In interpreting and enforcing child sex trafficking and commercial sexual exploitation of children (CSEC) laws, the focus should be on the intent of the defendant to engage in commercial sex with a child and the steps he or she took in furtherance of that intent. The fact that an agreement for commercial sex was made between the defendant and a law enforcement decoy does not negate the fact that the defendant intended to solicit an actual child for sex.

Accordingly, states can ensure buyers and traffickers are held accountable in these situations by amending their trafficking and CSEC laws to expressly prohibit defendants from asserting a defense based on the fact that a law enforcement officer, rather than an actual minor, was involved. Some states have taken the added step of defining “minor,” for purposes of certain offenses, to include a person under 18 years of age, a law enforcement officer posing as a person under 18 years of age, or a person the offender believed to be under 18 years of age.⁴

Notably, statutes permitting prosecution—even when the person solicited or purchased was not actually a minor—have withstood constitutional challenges.⁵ Offenders in such states are unable to assert decoy defenses. For example, in *State [of North Dakota] v. Sheperd*, a defendant was arrested and charged with patronizing a minor for commercial sexual activity after responding to an online advertisement during a sting operation. The defendant tried to present an argument that he did not violate the statute because it requires the presence of a minor; however, the court ruled that the statute does not require the presence of a minor because part of the purpose and context of the statute is to target individuals who intentionally seek out children as their sexual objects. A Texas appellate court made a similar statement when it upheld a conviction for online solicitation of a minor in *Zapata v. State*. This defendant was also arrested during a sting operation. In upholding the conviction, the court stated that the offense of online solicitation is complete at the time of solicitation.

DRAFTING CONSIDERATIONS: *To accomplish this policy goal, state law should...*

- ▶ Ensure child sex trafficking and CSEC laws allow for use of a law enforcement decoy by prohibiting decoy defenses.

RELATED ISSUES:

- 1.1** The child sex trafficking law is expressly applicable to buyers of commercial sex with any minor under 18.
- 1.2** Commercial sexual exploitation of children (CSEC) laws specifically criminalize purchasing or soliciting commercial sex with any minor under 18.
- 1.3** Commercial sexual exploitation of children (CSEC) laws apply to traffickers and protect all minors under 18.
- 1.4** Mistake of age is not an available defense under sex trafficking and commercial sexual exploitation of children (CSEC) laws.

SUPPORTING RESOURCES:

- ▶ [Demanding Justice report](#)

¹ DR. VANESSA BOUCHÉ, THORN, SURVIVOR INSIGHTS: THE ROLE OF TECHNOLOGY IN DOMESTIC MINOR SEX TRAFFICKING 6-7 (2018).

² Mary Graw Leary, *Dear John, You Are A Human Trafficker*, 68 S.C. L. REV. 415, 428-29, 429 n.71 (2017); U.S. DEPARTMENT OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS 44 (2010) <https://www.justice.gov/psc/docs/natstrategyreport.pdf> (noting that police posed as minors in 25% of arrests for internet crimes against children).

³ David Barney, *Trafficking Technology: A Look at Different Approaches to Ending Technology-Facilitated Human Trafficking*, 45 PEPPERDINE L. REV. 747, 778 (2018); see also Ann Wagner & Rachel Wagley McCann, *Prostitutes or Prey: The Evolution of Congressional Intent in Combating Sex Trafficking*, 54 HARV. J. ON LEGIS. 17, 90 (2017).

⁴ See 15 Am. JUR. 2d *Computers and the Internet* §16 (2020). Similarly, according to Federal Sentencing Law and Practice, sentencing guidelines for crimes of Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; and Use of Interstate Facilities to Transport Information about a Minor define "minor" as "(A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years." Thomas W. Hutchison, et al., Federal Sentencing Law and Practice § 2G1.3 (2020 update).

⁵ 33 A.L.R. 6th 373 §§ 6-10 (2008).