

ARTICLE & ESSAY: CRIMINALIZING BUYERS UNDER CHILD SEX-TRAFFICKING LAWS AS A CRITICAL PROTECTION FOR CHILD VICTIMS

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Author: Christine M. Raino*

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Text

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Introduction

Otherwise, society will continue to label certain kids as "child prostitutes" or "teen prostitutes" as opposed to victims. With such labels that imply choice and fault, these victims are often ignored, arrested, or otherwise misidentified.¹

Across the nation, many states are shifting to the hard work of legislating specific protections for child sex-trafficking victims. Meanwhile, a threshold barrier to victim identification persists in state sex-trafficking statutes, threatening to undermine these emerging efforts on behalf of child victims. That barrier is the way states are defining child sex trafficking. As a nation, we are not using the same definition of child sex trafficking, and when the definition does not reflect the full scope of minor sex-trafficking victims, vulnerable youth are excluded not only from

¹ Holly Austin Smith, *Walking Prey: How America's Youth Are Vulnerable to Sex Slavery* 14 (2014).

the definition of victim but from the very protections that are being developed to help stop the cycle of exploitation.

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[*436] Even though every state in the nation has a law specifically criminalizing sex trafficking,³ there is considerable variation in the construction of these laws, and almost half of the states have a limited definition of child sex trafficking⁴ that does not include all commercial sexual exploitation of children ("CSEC").⁵ While state legislatures are steadily removing some of the statutory constructions that have historically limited the definition of child sex trafficking,⁶ the most pervasive limitation on state definitions is the requirement that a child have a trafficker in order to be recognized as a victim of sex trafficking.⁷ That is, a third-party [*437] controller must

² See Amanda Peters, Reconsidering Federal and State Obstacles to Human Trafficking Victim Status and Entitlements, 2016 Utah L. Rev. 535, 548 (2016) ("Victim labels qualify or disqualify individuals from receiving victim services. A person's right to be called a 'human trafficking victim' is directly connected to the entitlements the victim receives." (footnote omitted)); id. at 554 ("Entitlements earmarked for trafficking victims are inaccessible for individuals who cannot prove their status to the gatekeepers of trafficking benefits, protections, and services. There are real liberty and property interests attached to human trafficking victim status.").

³ See Shared Hope Int'l, National State Law Survey: Distinguishing Between Adult and Minor Victims 1-3 (2016) [hereinafter Distinguishing Between Adult and Minor Victims] (summarizing state sex-trafficking laws and specific protections for child victims under such laws).

⁴ See Shared Hope Int'l, National State Law Survey: Child Sex Trafficking Definitions 1-2 [hereinafter Child Sex Trafficking Definitions] (2016), http://sharedhope.org/wp-content/uploads/2016/11/State_law_survey_Child_Sex_Trafficking_Definitions.pdf (identifying twenty-three states as having a limited definition of child sex trafficking that does not define all commercially sexually exploited minors as victims of sex trafficking).

⁵ For purposes of this Article, CSEC occurs when something of value is exchanged for a sex act with a minor. "Minor" is defined as a person under the age of eighteen, and a "sex act" is any sexual conduct including sexual performance. See also Noreen Muhib, Glossary of Human-Trafficking Acronyms and Terms, Judges' J., Winter 2013, at 32, 32 ("In 1996, the World Congress against Commercial Sexual Exploitation of Children defined CSEC as sexual abuse by the adult and remuneration in cash or kind to the child or a third person or persons. The child is treated as a sexual object and as a commercial object. CSEC includes the prostitution of children, child pornography, child sex tourism, and other forms of transactional sex where a child engages in sexual activities to have key needs fulfilled, such as food, shelter, or access to education. It includes forms of transactional sex where the sexual abuse of children is not stopped or reported by household members, due to benefits derived by the household from the perpetrator.").

⁶ See Shared Hope Int'l, Eliminating the Third Party Control Barrier to Identifying Juvenile Sex Trafficking Victims 4 (2015) [hereinafter Eliminating Third Party Control], https://sharedhope.org/wp-content/uploads/2016/02/Policy_Paper_Eliminating_Third_Party_Control_Final.pdf (discussing the near consensus among state laws of eliminating the requirement to prove force, fraud, or coercion when the victim is a minor); Shared Hope Int'l, National State Law Survey: Force, Fraud, or Coercion 1-2 (2016) [hereinafter Force, Fraud, or Coercion], http://sharedhope.org/wp-content/uploads/2016/03/NSL_Survey_Force-Fraud-or-Coercion.pdf (showing that only five states retain the requirement to prove force, fraud, or coercion when the victim is a minor).

cause the child victim to exchange sex acts with a buyer.⁸ Consequently, the act of buying sex with a child is not enough to establish the crime of sex trafficking or to define the purchased child as a victim of trafficking.

Like two sides of the same coin, this requirement reflects a direct correlation between who the law does and does not identify as a trafficking perpetrator, and who the law does and does not identify as a trafficking victim.⁹ The detriment of not defining the crime of sex trafficking to include all commercially sexually exploited children, by failing to recognize buyers of sex with children as trafficking perpetrators, is the exclusion of particularly vulnerable victims from this definition. The victims most likely impacted are those who are too trauma bonded to recognize their own victimization or identify a trafficker¹⁰ and those who are exploited directly by buyers without the involvement of a trafficker (a form of exploitation increasingly seen among runaway and homeless youth who exchange sex acts to survive).¹¹ As a result, these vulnerable groups may not be identified and protected as child sex-trafficking victims.¹²

I. Uncoupling the Stigma from Child Sex-Trafficking Victims

One of the fundamental problems with requiring third-party control is that it conflicts with the realities of child sex-trafficking victimization and the unique traumas experienced by trafficking survivors. Survivor accounts explain how traffickers often operate under the radar of law enforcement by controlling victims so they [*438] appear to be acting independently.¹³ In addition to the apparent absence of the trafficker, child sex-trafficking victims often do

⁷ See Shared Hope Int'l, National State Law Survey: Eliminating the Third Party Control Barrier 1 (2016) [hereinafter State Law Survey: Third Party Control], http://sharedhope.org/wp-content/uploads/2016/03/NSL_Survey_Eliminating-the-Third-Party-Control-Barrier.pdf.

⁸ See, e.g., Alaska Stat. § 11.66.110(a)(2) (2016); Minn. Stat. § 609.322.1 (a) (2016); Ohio Rev. Code Ann. § 2905.32(C) (West 2016).

⁹ See Peters, *supra* note 2, at 546 (explaining that states with restrictive definitions limit the number of "cases [that] can be prosecuted because the crime encompasses a smaller list of prohibited conduct").

¹⁰ See Eliminating Third Party Control, *supra* note 6, at 3 ("Survivors, law enforcement and service providers report that victims are unable or unwilling to identify having a trafficker due to extreme trauma bonding, or were exploited young enough and long enough that they do not see themselves as victims.").

¹¹ See Dominique Roe-Sepowitz et al., Youth Experiences Survey: Exploring the Sex Trafficking Experiences of Homeless Young Adults in Arizona 4 (2016) (compiling the results of 199 surveys of homeless runaway young adults, aged eighteen to twenty-five, showing that 33.2% of the homeless young adults identified as sex-trafficking victims, 33.3% of female respondents self-reported that they had been sex trafficked, 25% of male respondents self-reported a sex-trafficking experience, and 36.1% reported that they were sex trafficked before the age of eighteen).

¹² See Eliminating Third Party Control, *supra* note 6, at 7 ("In some cases, these victims may not be actively controlled by a trafficker but continue "in the life" since it is how they know to survive. In both situations, these victims are unable to establish third party control, shifting them from victims to criminals who contribute to their own victimization.").

not recognize their own victimization,¹⁴ and even when they do, they are often afraid to expose their traffickers for fear of retribution.¹⁵ Trauma bonding further interferes with victims' ability and willingness to divulge their victimization and identify an exploiter.¹⁶

Narrowing child sex trafficking to cases where the victim is under the control of a trafficker creates a threshold requirement that a child demonstrate that he or she was controlled by a third party, since the victimization committed by the person who paid to have sex with that child is not sufficient to establish the crime of sex trafficking.¹⁷ Requiring a child victim to prove his or her victimization shifts the burden to the minor,¹⁸ much like the "force, fraud, or coercion" requirement that states have been systematically eliminating when the victim is a minor.¹⁹ This requirement hinges on a stereotypical concept of child sex-trafficking victims often seen in images of children with their hands bound or trapped in a cage.²⁰ [*439] The reality of how children become trapped in sex

¹³ See, e.g., Lexie Smith, 3 Ways to Combat Human Trafficking, Lexie Smith: Blog (Jan. 11, 2016), <http://lexiespeaks.com/blog/2016/1/10/3-ways-to-combat-human-trafficking> ("Many are trafficked through a false relationship with someone. Our loved ones are threatened and instead of chains we wear fake smiles to make everyone think we are ok, we want what is happening, and there is absolutely nothing wrong.").

¹⁴ See Megan Annitto, Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors, 30 Yale L. & Pol'y Rev. 1, 14 (2011) ("Many factors can prevent a young girl from realizing that she is being exploited or from recognizing the dangers that she faces, including age, lack of knowledge or experience, previous abuse, the need for attention, previous poor judgment, and, in some cases, learning disabilities and similar limitations." (footnote omitted)).

¹⁵ See, e.g., Stephen C. Parker & Jonathan T. Skrmetti, Pimps Down: A Prosecutorial Perspective on Domestic Sex Trafficking, 43 U. Mem. L. Rev. 1013, 1035 (2013) ("The sex trafficker may create a climate of fear that compels the victim to obey the sex trafficker for fear of additional violence.").

¹⁶ See Annitto, *supra* note 14, at 15 ("As a result of this careful manipulation, victims of commercial sexual exploitation often display symptoms of 'traumatic bonding' - more commonly known as Stockholm syndrome - which makes it difficult for them to separate themselves from the person responsible for their harm.").

¹⁷ See, e.g., Minn. Stat. § 609.322.1(a) (2016) (expressly excluding buyers of sex with children as offenders under the sex-trafficking law).

¹⁸ Peters, *supra* note 2, at 569.

¹⁹ See Force, Fraud, or Coercion, *supra* note 6, at 1-2.

²⁰ See, e.g., Becky Owens Bullard, A Picture Says a Thousand Words: Sending the Right Message About the Realities of Abuse Through Our Images, Voices Against Violence Project (June 5, 2012, 12:42 PM), <https://voicesagainstviolenceproject.com/2012/06/05/a-picture-says-a-thousand-words> (describing stereotypical images of "shackled, caged[,] and battered" victims and explaining that such portrayals are misleading because "[a] human trafficking case where an individual is physically chained or caged is not the norm").

trafficking is quite different from images of physical bondage, and the forces that perpetuate CSEC are more complex and subtle than "force, fraud, or coercion" and go beyond the role of the trafficker.²¹

The stereotypical victim also reflects another assumption: trafficking victims wait to be rescued.²² Due to trauma bonding,²³ fearfulness toward the trafficker, and negative past interactions with social and juvenile justice systems,²⁴ trafficking victims are likely to be unwilling to cooperate with law enforcement and service providers²⁵ and may reject services when offered.²⁶ Understanding the trauma and nature of the exploitation experienced by many young survivors sheds light on this behavior and how victims view themselves. Tremendous progress has been seen in responses to juvenile sex-trafficking victims that are strength based and do not delve into the details of exploitation in identifying and responding to victimization.²⁷ These successful trauma-informed responses would [*440] not be compatible with a requirement that child victims identify a trafficker in order to receive needed services.

²¹ See Wendi J. Adelson, *Child Prostitute or Victim of Trafficking?*, 6 U. Saint Thomas L.J. 96, 112 (2008) ("Traffickers prey on the most vulnerable people and employ all kinds of tactics to keep victims scared, dependent, and motivated not to report their traffickers. Pimps employ the same kinds of methods to ensnare and prostitute minors and to keep them under their control."); see also Shared Hope Int'l, *DEMAND. A Comparative Examination of Sex Tourism and Trafficking in Jamaica, Japan, the Netherlands, and the United States* 7 (2007), <http://sharedhope.org/wp-content/uploads/2012/09/DEMAND.pdf> (examining the sex-trafficking markets in four countries, including the United States, and identifying demand as the driving force behind sex-trafficking markets).

²² See Katherine C. Cunningham & Lisa DeMarni Cromer, *Attitudes About Human Trafficking: Individual Differences Related to Belief and Victim Blame*, 31 J. Interpersonal Violence 228, 231 (2015) ("Victims of sex trafficking in the media are portrayed as very young, innocent, and vulnerable children, in contrast to seemingly hardened, promiscuous youth who are viewed as willful sex workers."); see also Linda M. Williams & Mary E. Frederick, *Pathways into and out of Commercial Sexual Victimization of Children: Understanding and Responding to Sexually Exploited Teens* 60 (2009) ("Instead of a sad-eyed victim they confront a strong, willful, survivor who looks and acts quite differently from the victims portrayed in the media.").

²³ See Annitto, *supra* note 14, at 14.

²⁴ See, e.g., *id.* at 9 ("[Exploited youths'] pasts often reveal that the social systems designed to protect them have already failed them. Some children are prostituted as early as age nine, while the average age of entry into prostitution is estimated to be between twelve and fourteen.").

²⁵ See Rebecca Epstein & Peter Edelman, *Blueprint: A Multidisciplinary Approach to the Domestic Sex Trafficking of Girls* 5 (2013), <http://www.law.georgetown.edu/academics/centers-institutes/poverty-inequality/loader.cfm?csModule=security/getfile&pageid=169026>.

²⁶ See *id.*

²⁷ See Shared Hope Int'l, *JuST Response Council Protective Response Model 3* (2016), http://sharedhope.org/wp-content/uploads/2014/04/JRC_ResponseModel_Spreads_web.pdf ("Many victims are not likely to disclose their trafficking abuse, and access to services should not hinge on disclosure.").

Similarly, a legal approach to identifying juvenile sex-trafficking victims that requires trafficking victims to expose themselves as victims and fully acknowledge their victimization - despite the safety risks and potential trauma that could be associated with such a disclosure ²⁸ - is fundamentally in conflict with the special protections for children established under federal ²⁹ and most state sex-trafficking laws. ³⁰ Even though the bright line between minors and adults in requiring proof of "force, fraud or coercion" does not capture the continuum of exploitation experienced by many adult sex-trafficking victims, ³¹ this distinction is rooted in historical jurisprudence supporting the need for special statutory protections for children. ³² Clearly defining any commercially [*441] sexually exploited child as a victim of sex trafficking aligns with this history of carving out protections for minors by shifting the culpability, or the risk of mistake, to the offending adult. ³³

²⁸ See Parker & Skrmetti, *supra* note 15, at 1035.

²⁹ See ECPAT-USA, Inc., *Alternative Report: An NGO Response to the Periodic Report of the United States of America to the UN Committee on the Rights of the Child Concerning the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* 9 (2012), <http://www.ecpatusa.org/wp-content/uploads/2016/02/2012-ALTERNATIVE-REPORT-CONVENTION-ON-THE-RIGHTS-OF-THE-CHILD-ON-THE-SALE-OF-CHILDREN-CHILD-PROSTITUTION-AND-CHILD-PORNOGRAPHY.pdf> ("According to the [Trafficking of Victim's Protection Act ("TVPA")], sex trafficking of children is synonymous with child prostitution, or commercial sexual exploitation of children. It applies to all persons under the age of 18. Issues of consent, physical maturity, and the child's lack of acknowledgment of her/his victimhood are irrelevant."); Adelson, *supra* note 21, at 102 ("Because child prostitution is defined as his or her engagement in a commercial sex act at the behest of another, all prostituted children could be considered victims of human trafficking under the TVPA."); Peters, *supra* note 2, at 540 ("Minors, defined as persons under the age of eighteen, are presumed to be trafficking victims when they engage in commercial sex acts, even absent indicia of force, fraud, or coercion. They need not prove victim status under federal law to establish their eligibility to receive victim entitlements." (footnote omitted)).

³⁰ See *Distinguishing Between Adult and Minor Victims*, *supra* note 3, at 1-3.

³¹ Beverly Balos, *The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation*, 27 *Harv. Women's L.J.* 137, 160 (2004) (discussing the problems associated with distinguishing between minor and adult victims in light of research indicating that a large proportion of adult victims were initially victimized as children).

³² For over one hundred years, U.S. courts have recognized a particular need for laws to protect children from harm. See, e.g., *MacGreal v. Taylor*, 167 U.S. 688, 701 (1897) (explaining that the infancy doctrine acts "as a shield to protect the infant from harm and injustice"); see also Adelson, *supra* note 21, at 119 ("The Universal Declaration of Human Rights specifically proclaimed that childhood is a status entitled to special care and assistance. Correspondingly, "policy makers view children as a very special class of citizens, a group whose unique traits and circumstances warrant a different regulatory scheme from that which applies to adults." (quoting Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 *Hofstra L. Rev.* 547, 555 (2000))).

³³ See, e.g., *United States v. Daniels*, 685 F.3d 1237, 1250 (11th Cir. 2012) (holding that a defendant's "alleged lack of knowledge as to [the minor victim's] age cannot serve as a shield from conviction" under 18 U.S.C. § 2422(b) (2012) in light of "the congressional goal of protecting minors victimized by sexual crimes").

The reasons for these special protections for minors derive from a perception of children as inherently vulnerable and susceptible to exploitation by adults.³⁴ Over the past several years, the psychological vulnerability of minors has been demonstrated through research showing that brain development extends well into young adulthood³⁵ and, despite teens' apparent agency and executive reasoning, is still very much continuing during adolescence.³⁶ Special protections for children carved out in other areas of law further reflect the concern that minors, in certain contexts, need protection from the consequences of their own decisions or from potential exploitation by adults.³⁷ From restrictions on entering into contracts or marriage before the age of majority,³⁸ to age limitations on the use of cigarettes and alcohol,³⁹ to limiting military service to adults,⁴⁰ minors are protected from making decisions that could have serious health and safety repercussions.

[*442] Concomitantly, in other areas of law, specific penalties are carved out for adults who exploit children. In many cases these penalties apply regardless of the defendant's intention to exploit a minor, since the adult bears the risk of protecting a child by avoiding conduct that could lead to harm.⁴¹ These burden-shifting laws range from statutory rape laws that require the adult to avoid inadvertently engaging in sexual conduct with a minor⁴² to contract laws that make contracts fully voidable when an adult contracts with a minor.⁴³ Despite the precedent set

³⁴ See, e.g., *id.* at 1248 ("Clearly there is a 'special context' present here[,] ... the protection of the very young, that calls for a contextual approach to statutory interpretation. Moreover, our decision to reject a knowledge requirement to convict under § 2422(b) is consistent with congressional intent to protect the most vulnerable among us."); see also Adelson, *supra* note 21, at 107 (discussing the purpose of special protections for children under the TVPA).

³⁵ See ECPAT-USA, Inc., *supra* note 29, at 18 (discussing the need to protect adolescent girls under the TVPA given that prostitution can seriously impair "healthy mental and emotional development").

³⁶ E.g., *Graham v. Florida*, 560 U.S. 48, 68 (2010) (describing the "fundamental differences between juvenile and adult minds" and how those differences leave children more vulnerable to outside influences).

³⁷ See Kimberly J. Mitchell et al., *Conceptualizing Juvenile Prostitution as Child Maltreatment: Findings from the National Juvenile Prostitution Study*, 15 *Child Maltreatment* 18, 19 (2010) ("Illegal sexual activities by adults with children have been clearly designated as a core concern of the child maltreatment field, even when those activities involve some 'voluntary' participation on the part of youth.").

³⁸ E.g., *Moe v. Dinkins*, 533 F. Supp. 623, 629 (S.D.N.Y. 1981) (marriage); *Webster St. P'ship v. Sheridan*, 368 N.W.2d 439, 442 (Neb. 1985) (contracts).

³⁹ E.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 552 (2001) (cigarettes); *Gabree v. King*, 614 F.2d 1, 2 (1st Cir. 1980) (alcohol).

⁴⁰ See, e.g., *Welch v. Fritz*, 909 F.2d 1330, 1331 (9th Cir. 1990).

⁴¹ See, e.g., *United States v. Taylor*, 239 F.3d 994, 996-97 (9th Cir. 2001) (explaining that statutorily "heightened protection against sexual exploitation of minors" does not require the government to prove that the defendant knew the victim was a minor).

⁴² See, e.g., *Arias v. State*, 503 S.W.3d 523, 530 (Tex. App. 2016) (describing a statutory rape law that places the burden of determining the age of sexual partners on the adult).

by laws shifting the burden to adults to avoid harm in order to ensure special protections for minors, state laws have been slow to shift that burden to those who engage in commercial sex with children.⁴⁴ Instead, the approach in the commercial sex context has been to shift the burden to the minor victim who often faces criminal penalties for the crime committed against him or her.⁴⁵

So why do these victim hierarchies persist in the context of child sex trafficking? The problem seems to stem from stereotypes about [*443] child sex-trafficking victims that persist in our contemporary discussion,⁴⁶ despite increased understanding that the reality of sex trafficking is much more diverse and complex than these stereotypes reflect. For example, while the "force, fraud or coercion" narrative has been rejected when the victim is a minor and accordingly eliminated from most state sex-trafficking laws,⁴⁷ and federal law clearly defines all commercially sexually exploited children as victims of sex trafficking,⁴⁸ the idea that some children are choosing commercial sexual exploitation persists. As long as that concept is retained culturally, laws will continue to develop with that narrative in mind, and states will create victim hierarchies that provide greater protections for the stereotypical

⁴³ See, e.g., *Rivera v. Reading House Auth.*, 819 F. Supp. 1323, 1331 (E.D. Pa. 1993) (explaining that the purpose of making contracts with minors voidable "is to protect minors "against their own lack of discretion and against the snares of designing persons" and "to safeguard the interests of the minor" (quoting *Pankas v. Bell*, 198 A.2d 312, 315 (Pa. 1964))).

⁴⁴ See Shared Hope Int'l, *National State Law Survey: Mistake of Age Defense 1-7* (2016) http://sharedhope.org/wp-content/uploads/2016/03/NSL_Survey_Mistake-of-Age-Defense.pdf (showing that twenty-two states and the District of Columbia do not prohibit buyers of sex with children from asserting a mistake of age defense under buyer-applicable trafficking or CSEC laws).

⁴⁵ See Adelson, *supra* note 21, at 108 ("It is logically inconsistent that minors of a certain age are incapable of consenting to sex, but that they simultaneously can be punished for prostitution. The only difference between the two scenarios is that when money exchanges hands, these same children turn from victim to juvenile offender." (footnote omitted)); Jonathan Todres, *Maturity*, 48 *Hous. L. Rev.* 1107, 1110 (2012) ("Every state has a minimum age below which a child is considered not mature enough to consent to sex. However, if money is involved, in more than forty states that child is deemed mature enough to have consented to sex for money and be charged with the crime of prostitution"); Nikki J. Hasselbarth, Note, *Emerging Victimhood: Moving Towards the Protection of Domestic Juveniles Involved in Prostitution*, 21 *Duke J. Gender L. & Pol'y* 401, 401 (2014) ("The large majority of juveniles engaged in illegal sex work cannot even legally consent to the commercial sex acts that they are being prosecuted for Does the fact that there was a valued exchange automatically transform the otherwise statutorily raped juvenile from victim to criminal?").

⁴⁶ See *supra* notes 20-27 and accompanying text; see also Linda M. Williams, *Harm and Resilience Among Prostituted Teens: Broadening Our Understanding of Victimization and Survival*, 9 *Soc. Pol'y & Soc'y* 243, 244 (2010) (describing how child sex-trafficking victims' perception of their exploitation can perpetuate the negative stereotype that they are choosing their lifestyle and are consequently responsible for their own victimization).

⁴⁷ See *Force, Fraud, or Coercion*, *supra* note 6, at 1-2.

⁴⁸ Human Trafficking Issue Brief: Safe Harbor, Polaris Project, Fall 2015, <https://polarisproject.org/sites/default/files/2015%20Safe%20Harbor%20Issue%20Brief.pdf>.

victim seeking rescue and minimize the need to protect the more typical victims - those who are not knocking on the door seeking help and may even reject help when it is offered, those who have endured tremendous trauma and are operating under the effects of that trauma. ⁴⁹

Certain groups of commercially sexually exploited youth are most likely to be impacted by this requirement and excluded from the definition of sex trafficking. Male victims of commercial sexual exploitation are often overlooked, causing the prevalence of male victims to be similarly underestimated. ⁵⁰ However, some studies suggest that male victims may make up as much as half of the young people who have been commercially sexually exploited. ⁵¹ Some reasons why male victims tend to be overlooked include that they do not self-identify as victims of commercial sexual exploitation [*444] and often do not have a trafficker or third-party controller. ⁵² At the same time, male victims are an especially marginalized victim population with very few services specifically available to them, and there is a general lack of training on how to recognize and respond to male sex-trafficking victimization. ⁵³

Another marginalized group of young people who are at great risk of trafficking, but are also often overlooked as sex-trafficking victims, is the runaway and homeless youth population. ⁵⁴ With lesbian, gay, bisexual, transgender, queer, or questioning ("LGBTQ+") youth representing a substantial portion of the runaway and homeless youth population, and studies showing a high incidence of commercial sexual exploitation among homeless minors and young adults, ⁵⁵ there appears to be a growing intersection between marginalized youth and the risk of commercial

⁴⁹ See Epstein & Edelman, *supra* note 25, at 5.

⁵⁰ See, e.g., Ric Curtis et al., *The Commercial Sexual Exploitation of Children in New York City* 38 (2008).

⁵¹ See Cal. Child Welfare Council, *Ending the Commercial Sexual Exploitation of Children: A Call for Multi-System Collaboration in California* 20 (2013) (explaining that while research indicates "the number of boys and girls involved in CSE is likely similar," there are "far fewer boys and young men ... identified as either CSEC or at-risk of victimization"); see also Curtis et al., *supra* note 50, at 38 ("The portion of males in the overall [CSEC] population is far more substantial than had been previously been reported."); Sara Ann Friedman, *And Boys Too* 4 (2013) ("Commercially sexually exploited boys (CSEB), on the other hand, who may be considered too few to be counted or not in the need of help or services, have registered as a barely visible blip on the radar.").

⁵² Cal. Child Welfare Council, *supra* note 51, at 20-21.

⁵³ See Comm. on the Commercial Sexual Exploitation & Sex Trafficking of Minors in the U.S., Inst. of Med. & Nat'l Research Council, *Confronting Commercial Sexual Exploitation and Sex Trafficking of Minors in the United States* 246 (Ellen Wright Clayton et al. eds., 2013) (describing how victim support services for boys are scarce because adolescent males are often not viewed as being at risk for sex trafficking).

⁵⁴ See Meredith Dank et al., *Locked In: Interactions with the Criminal Justice and Child Welfare Systems for LGBTQ Youth, YMSM, and YWSW Who Engage in Survival Sex* 91 (2015) (explaining that interviewed law enforcement "did not consider LGBTQ youth to be trafficking victims since they perceived them to be engaging in the commercial sex trade of their own free will, regardless of their age").

sexual exploitation.⁵⁶ Since trafficking is a crime inherently linked to the exploitation of vulnerability, it is not surprising that particularly vulnerable youth would be targets of sex trafficking, but it is troubling that so many states' laws do not recognize this exploitation as trafficking unless there is a trafficker.⁵⁷ The barrier to many of these exploited minors being identified and assisted as victims of sex trafficking is the nature of their commercial sexual exploitation, which often does not involve a trafficker. In fact, recent studies show that commercial sexual exploitation of LGBTQ+ youth often does not involve a trafficker; instead, peers introduce the commercial sexual activity.⁵⁸ Similarly, runaway and homeless youth report having engaged in commercial sex acts in order to meet basic necessities, exchanging sex acts for housing, food, or money needed to survive.⁵⁹ Recent statistics regarding endangered [*445] runaways tracked by the National Center for Missing and Exploited Children indicate that the incidence of commercial sexual exploitation among this population may be increasing as the number of endangered runaways suspected of being sex-trafficking victims has steadily risen from one in eight in 2012 to one in five in 2016.⁶⁰

II. Acknowledging the Role of Demand

The perception of third-party control being fundamental to the crime of child sex trafficking also stems from the stereotype that a buyer is inherently less culpable than a trafficker - that buyers do not victimize children to the same degree as traffickers.⁶¹ However, in reality, there are many different kinds of buyers just as there are many different kinds of traffickers. Some traffickers are not violent;⁶² some buyers are extremely violent.⁶³ This

⁵⁵ Roe-Sepowitz et al., *supra* note 11, at 4, 25.

⁵⁶ See Polaris Project, *Breaking Barriers: Improving Services for LGBTQ Human Trafficking Victims 1* (2015).

⁵⁷ See *Child Sex Trafficking Definitions*, *supra* note 4, at 1-2.

⁵⁸ Curtis et al., *supra* note 50, at 46.

⁵⁹ Covenant House, *Homelessness, Survival Sex and Human Trafficking 11* (2013); Polaris Project, *supra* note 56, at 4; Roe-Sepowitz et al., *supra* note 11, at 7; see also Susan J. Popk et al., *Impossible Choices: Teens and Food Insecurity in America 20* (2016) (detailing accounts of school-age girls exchanging sex for money in order to provide financial support to their families).

⁶⁰ *Protecting Vulnerable Children: Hearing on Preventing and Addressing Sex Trafficking of Youth in Foster Care Before the Subcomm. on Human Res. of the H. Comm. on Ways & Means, 113th Cong.* (2013) (statement of John D. Ryan, Nat'l Ctr. for Missing & Exploited Children); *Child Sex Trafficking in America: A Guide for Parents and Guardians*, Nat'l Ctr. for Missing & Exploited Children, http://www.missingkids.com/en_US/documents/Fact_Sheet_Parents_Guardians2016.pdf (last updated Mar. 2016).

⁶¹ *Eliminating Third Party Control*, *supra* note 6, at 7.

⁶² Curtis et al., *supra* note 50, at 72 ("The youth were not uniform in their describing pimps as violent exploiters ...").

⁶³ See *id.* at 84-85 (describing CSEC youth accounts of violence perpetrated by sex buyers); Shared Hope Int'l, *Demanding Justice Arizona: A Field Assessment of Demand Deterrence and Enforcement and Justice for Victims 28* (2015),

continuum of severity is incorporated in the law with regard to traffickers, but culturally there remains quite a bit of reticence toward addressing the continuum of culpability with regard to buyers.⁶⁴

Perceived agency of minors is one reason that buyers have been considered less serious offenders. Opponents of treating buyers as [*446] offenders of sex trafficking cite concerns about potential unfairness in holding buyers accountable for misperceiving a child's age and unknowingly buying sex with a minor, or for believing minors who misrepresent their age, which is something victims are commonly instructed to do by their trafficker.⁶⁵ When a buyer who claims that he did not know the person he solicited for sex acts was a minor is charged with a serious felony offense, this is sometimes referred to as an unintended consequence of strong demand penalties.⁶⁶ However, this outcome is neither unintended nor unfair. The laws that specifically protect minors by removing a mistake of age defense are balancing a defendant's risk of mistake in favor of providing special protections to children.⁶⁷

Another circumstance where the role of buyers is often minimized is in the context of minors exchanging sex acts to meet basic needs, such as food and shelter, or to feed a chemical dependency. While often referred to as "survival sex," survivors have rejected this term because it downplays the severity of this form of exploitation.⁶⁸ Survival sex assumes a willing decision to exchange sex in order to meet basic needs,⁶⁹ but the term ignores the inherent

<https://sharedhope.org/wp-content/uploads/2015/05/Arizona-Field-Assessment-Report-ONLINE.pdf> (discussing survivor accounts of prevalence of violence perpetrated by buyers); Shared Hope Int'l, *United States v. Dean Sacco* (2014), http://sharedhope.org/wp-content/uploads/2014/04/U.S._v._DeanSacco.pdf.

⁶⁴ See Shared Hope Int'l, *Demanding Justice Report 2014*, at 37-40 (2014), https://sharedhope.org/wp-content/uploads/2014/08/Demanding_Justice_Report_2014.pdf (discussing the impact that cultural tolerance for buying sex has on anti-demand enforcement); see also, e.g., Shared Hope Int'l, *Protected Innocence Challenge Toolkit 2016: Building a Legal Framework of Protection for the Nation's Children 10-11* (2016), http://sharedhope.org/wp-content/uploads/2016/11/SHI_Protected_Innocence_Challenge_Toolkit.pdf (outlining a broad range of sex trafficking and CSEC offenses applicable to traffickers in most states and a comparatively narrower range of such offenses applicable to buyers in most states).

⁶⁵ See Elizabeth Scaife, *Gang Trap: Trafficking Response and Prevention Training Guide*, Shared Hope Int'l 31 (2015) ("The age of the victim may be disguised through his/her physical appearance and false identification; they are trained to memorize a fake name, birthdate and other simple information to recite to law enforcement in the event they are picked up."); see also *id.* at 32 (quoting "Maria," a survivor of trafficking as stating, "I lied about my age so much I didn't even know how old I was.").

⁶⁶ See, e.g., *United States v. Daniels*, 685 F.3d 1237, 1250 (11th Cir. 2012).

⁶⁷ See *id.*

⁶⁸ *Eliminating Third Party Control*, *supra* note 6, at 8 ("Accordingly, this term, 'survival sex' is commonly rejected by survivors. This terminology and its connotations, especially when referencing the conduct of minors, implies a false sense of agency or equal bargaining power, and enables tolerance and even punishment for youth.").

⁶⁹ *Id.*

coerciveness of offering to meet a person's basic needs while expecting sex acts in exchange. When an adult offers to meet a child's basic necessities in exchange for sex acts, the obvious exploitation of that child's extreme vulnerability precludes any true choice under the circumstances.⁷⁰ This approach of hinging the culpability of the adult perpetrator on the apparent agency of the child comports with neither the child protection goals of child sex-
[*447] trafficking laws nor the victim-centered, trauma-informed approach in responding to child sex-trafficking victims.⁷¹

III. The Direct Correlation Between Third-Party Control and Barriers to Victim Protections

As one of nineteen states that require third-party control in order to establish the crime of child sex trafficking,⁷² California case law provides two examples of how a third-party control requirement directly prevented commercially sexually exploited minors from accessing protections intended for sex-trafficking victims. In *In re M.D.*,⁷³ a California appellate court considered whether a commercially sexually exploited teenager could avoid being adjudicated delinquent for prostitution, and ultimately precluded the minor appellant from seeking protection from prostitution charges as a sex-trafficking victim.⁷⁴ Rather than identifying the teenager as a sex-trafficking victim, the court placed the burden on the exploited minor to prove her trafficking victimization.⁷⁵ Finding that she had not met her burden under California law,⁷⁶ the court declined to extend a statute enacted to protect sex-trafficking victims from prostitution convictions.⁷⁷ In explaining its rationale for shifting the burden to the minor to prove her victimization, the court acknowledged the trauma the minor appellant had likely experienced through her commercial sexual exploitation:

⁷⁰ See Libby Adler, *An Essay on the Production of Youth Prostitution*, 55 Me. L. Rev. 191, 194 (2002) ("These kids may be best understood as giving up sex in a desperate exchange - they may be hungry, cold, and destitute and possess little else with which to bargain for life's basic necessities. They may also be drug-addicted or in some other way totally beholden to a person who is eager to exploit them.").

⁷¹ See Adelson, *supra* note 21, at 104 ("Even if it appears that commercial sexual self-exploitation is a choice, a child's young age negates the ability to make that 'choice' a free and educated one.").

⁷² See State Law Survey: Third Party Control, *supra* note 7; see also Shared Hope Int'l, 2016 Analysis and Recommendations: California 13, 33 (2016), http://sharedhope.org/PICframe6/analysis/PIC_AR_2016_CA.pdf.

⁷³ 181 Cal. Rptr. 3d 761 (Cal. Ct. App. 2014).

⁷⁴ *Id.* at 764.

⁷⁵ *Id.* at 767.

⁷⁶ *Id.* ("Nothing in the language of [the statute] suggests an intent to create an evidentiary presumption that all minors charged with committing commercial sex acts are victims of human trafficking.").

⁷⁷ See *id.* at 765 (noting that the "stated purpose and intent" of the statute is to "recognize trafficked individuals as victims and not criminals").

Placing the burden of proof on the minor does not require the minor to establish "the often traumatizing and debasing situations they survived," ... but simply to prove that she (or he) was induced or persuaded to engage in the activity by another If true, it should not be difficult for the minor to prove this fact.⁷⁸

The court's assumption that "it should not be difficult for the minor victim to prove" her victimization by a trafficker in order to receive legal protection is inconsistent with both a trauma-informed [*448] understanding of the experiences of juvenile sex-trafficking victims and federal law.⁷⁹ However, the court should not have had to reach the question of who bore the burden of proving that the minor appellant was a victim of trafficking. While the case may have turned out differently if the juvenile court had been able to explore more deeply the circumstances of how the minor came to be arrested for prostitution,⁸⁰ and perhaps that additional inquiry could have exposed some facts that would have demonstrated that she was actually acting under the control of a third party, that inquiry should not have been necessary in the first place. The third-party control requirement under California's sex-trafficking law necessitated the court's decision, without which the fact that the appellant had engaged in conduct as a minor that violated the prostitution law would have been sufficient to deem her entitled to protections afforded a sex-trafficking victim.

That is the outcome dictated under federal law.⁸¹ The same minor appellant would have been considered a victim of sex trafficking under 18 U.S.C. § 1591(a)(1), the federal sex-trafficking law, when the buyer solicited her to exchange sex acts for money.⁸² As a result of California's evidentiary requirement that the minor appellant prove she had a trafficker or third-party controller, the court focused much of its factual inquiry on an adult - not the buyer - whom law enforcement observed interacting with the minor appellant preceding the minor's arrest.⁸³ The court considered whether this adult, who was charged with pandering, was the person causing the minor to engage in commercial sex acts.⁸⁴ The court found insufficient evidence that this individual, who also appeared to be involved in soliciting customers for commercial sexual activity, was controlling the minor or causing her to engage in commercial sex.⁸⁵ However, even if the court determined that [*449] this individual controlled the minor appellant,

⁷⁸ *Id.*

⁷⁹ See *Eliminating Third Party Control*, *supra* note 6, at 3; see also 18 U.S.C. § 1591(e)(1)-(2) (2012) (describing the contours of "coercion" as a means of trafficking children).

⁸⁰ The facts reviewed in the record focused on the testimony of the law enforcement officers; there is no indication that the court considered any evidence relating to prior or subsequent victimization in ruling on the motion. See *In re M.D.*, 181 Cal. Rptr. 3d at 763-64.

⁸¹ See 18 U.S.C. § 1591(a)(1).

⁸² See *In re M.D.*, 181 Cal. Rptr. 3d at 764.

⁸³ *Id.* at 767.

⁸⁴ *Id.*

such an outcome may have helped the minor appellant at the expense of the adult - who upon further inquiry may have been identified as another sex-trafficking victim. Since the court made no inquiry into the conduct of the buyer, and there was no apparent trafficker, the only identifiable adult in the record was another individual similarly situated to the minor appellant.⁸⁶

In *re Aarica S.*,⁸⁷ another California appellate case in which the juvenile defendant sought to dismiss prostitution charges on the basis of being a sex-trafficking victim,⁸⁸ shows how truly burdensome it can be for a commercially sexually exploited child to overcome the third-party control requirement. In this case, the minor appellant presented substantial evidence to the juvenile court that she was a victim of trafficking, including testimony that she had been trafficked by ten pimps over three years, starting when she was fourteen years old.⁸⁹ However, she also testified that on January 31, 2013, the date she was arrested for soliciting an undercover officer at the age of seventeen, she had not had a pimp since November 2012 and that she would have been able to keep the money she made because she did not have a pimp at the time.⁹⁰ This testimony led the juvenile court to deny her petition because she was not "under the power and under the control of one of these pimps" when she was arrested for prostitution.⁹¹

In considering the case on appeal, the court found that the minor appellant, despite having established that she was a victim of sex trafficking under California law, could not show that she was being trafficked at the time she solicited the undercover officer.⁹² In affirming the juvenile court decision, the appellate court explained its holding:

Appellant testified that she was not working for a pimp at the time of the incident. She explained that the reason she approached Officer Morales was that she "could do whatever he wanted really quick and then have money in [her] pocket because [she] didn't have any money." She agreed that no one forced her to get into the car and that she would get to keep the money she made because she did not have a pimp at the time. The evidence thus supports

⁸⁵ *Id.* at 768 ("The evidence is also consistent with numerous other possibilities, such as that she and Antonio were merely friends, both of whom voluntarily and on their own initiatives were soliciting prostitution. Neither the fact that Antonio was somewhat older than the minor, nor that she was arrested for pimping, necessarily compels the conclusion that the minor was a victim of Antonio's trafficking.").

⁸⁶ *Id.*

⁸⁷ 168 Cal. Rptr. 3d 136 (Cal. Ct. App. 2014).

⁸⁸ *Id.* at 137.

⁸⁹ *Id.* at 139.

⁹⁰ *Id.*

⁹¹ *Id.* at 139-40.

⁹² *Id.* at 141.

the conclusion that [*450] appellant did not solicit prostitution "as a result of being a victim of human trafficking."⁹³

Thus, despite establishing that she was a child sex-trafficking victim, appellant was deemed "an independent contractor" at the time of her arrest and adjudicated a ward of the state for engaging in prostitution.⁹⁴

While the unfortunate outcomes of these cases will no longer occur in California due to the enactment of Senate Bill 1322,⁹⁵ which removed culpability for minors from the prostitution law,⁹⁶ the third-party control barrier persists under California law. Consequently, other protections specifically carved out for victims of sex trafficking remain limited by the definition of a child sex-trafficking victim under California's human trafficking law.⁹⁷

IV. Third-Party Control and Statutory Construction: Not "If" but "How" Buyers Are Held Culpable

The pervasive stereotype that a child sex-trafficking victim must have a trafficker is reflected in state sex-trafficking laws in a variety of ways. Some constructions do not reach the conduct of buyers of sex with children⁹⁸ while others specifically exclude the conduct of buyers from trafficking penalties,⁹⁹ automatically creating a third-party control requirement. Other constructions reach the conduct of buyers but only when the buyer purchases or attempts to purchase sex acts with a child who is under third-party control.¹⁰⁰ Yet another construction establishes

⁹³ Id. at 142 (quoting Cal. Evid. Code § 1161(a) (West 2012)).

⁹⁴ Id. at 141.

⁹⁵ S.B. 1322, 2016 Leg., Reg. Sess. (Cal. 2016).

⁹⁶ See Cal. Penal Code § 647(b)(5) (West 2016).

⁹⁷ See, e.g., Cal. Civ. Code § 52.5(a) (West 2016) (providing victims of California's human trafficking law, Penal Code § 236.1, a civil action for injury resulting from their trafficking victimization); Cal. Penal Code § 1202.4(q) (West 2016) (mandating payment of restitution directly to a victim of Penal Code § 236.1).

⁹⁸ See, e.g., Cal. Penal Code § 236.1; Md. Code Ann., Crim. Law § 11-303 (West 2016); Va. Code Ann. § 18.2-357.1 (West 2016).

⁹⁹ See, e.g., Alaska Stat. § 11.66.110(a)(2) (2016); Conn. Gen. Stat. § 53a-192a (2016); Haw. Rev. Stat. § 712-1202 (2016); Me. Stat. tit. 17-A, § 851(2)(A) (2016); Minn. Stat. § 609.322.1(a) (2016); N.Y. Penal Law § 230.15(1) (McKinney 2016); Ohio Rev. Code Ann. § 2905.32(C) (LexisNexis 2016).

¹⁰⁰ This may be accomplished in either of two ways: through buyer-applicable language that requires that the child be trafficked by the trafficker in order for the buyer to be culpable for purchasing sex acts with that child, or by narrowly defining terms in the sex-trafficking statute that could reach buyer conduct to limit the statute's application to buyers who buy sex with a child who is under third-party control. See, e.g., Ind. Code § 35-42-3.5-1(d) (2016) ("A person who knowingly or intentionally pays, offers to pay, or agrees to pay money or other property to another person for an individual who the person knows has been forced into ... prostitution ... commits human trafficking"); Neb. Rev. Stat. § 28-830(12) (2016) (defining "services" to require that the victim have "an ongoing relationship" with an actor and that the minor act "under the supervision of or for the benefit of the actor,"

separate trafficking [*451] offenses for buyers and traffickers, under which the offense for traffickers requires third-party control, with buyers being charged under a separate offense. Even when the conduct of a buyer of sex with a child constitutes a separate offense, this approach bifurcates protections for child sex-trafficking victims, setting the stage for different levels of protection for child victims who have a trafficker and child victims who do not have a trafficker. ¹⁰¹

However, not all states that establish separate trafficking offenses for buyers require third-party control. Several states have enacted separate offenses for buyers that criminalize a buyer only when the child is under third-party control but simultaneously retain the ability to charge buyers under the core sex-trafficking law. ¹⁰² In the development of state sex-trafficking laws, there have been two primary models for constructing state laws: the federal sex-trafficking law, 18 U.S.C. § 1591, ¹⁰³ which was enacted in 2000 as part of the Trafficking Victims Protection Act ("TVPA"), ¹⁰⁴ and the Uniform Act on Prevention of and Remedies for Human Trafficking ("Uniform Act"), ¹⁰⁵ which was drafted by the National Conference of Commissioners on Uniform State Laws and approved for adoption by the states in 2013. ¹⁰⁶ A third way that state sex-trafficking laws have developed is by converting existing laws that [*452] criminalized CSEC, which were often codified within the prostitution chapter, into sex-trafficking laws. ¹⁰⁷ Of these three approaches to drafting state sex-trafficking laws, the state laws that track the federal sex-trafficking law are most likely to define all commercially sexually exploited children as victims of sex

effectively requiring a third-party controller); Wyo. Stat. Ann. § 6-2-707(a) (2016) ("A person is guilty of patronizing a victim of sexual servitude when the person pays, agrees to pay or offers to pay anything of value so that the person or another may engage in sexual activity with an individual when the person knows that the individual is a victim of sexual servitude").

¹⁰¹ See Unif. Act on Prevention of & Remedies for Human Trafficking § 15 (Nat'l Conference of Comm'rs on Unif. State Laws 2013); see also Eliminating Third Party Control, *supra* note 6, at 15 (establishing a third-party control requirement under the core sex-trafficking offense and criminalizes buyers of sex with children under a separate offense, resulting in bifurcated protections for victims; specifically, mandatory restitution and civil remedies are available to child victims with a trafficker while child victims of the patronizing offense are not entitled to these remedies).

¹⁰² See, e.g., Tex. Penal Code Ann. § 20A.02(a)(7)-(8) (West 2015) (criminalizing a buyer who knowingly "causes a trafficked child to engage in [prostitution]" or who "engages in sexual conduct" with a trafficked child); see also *id.* § 20A.02(a)(4) (defining "traffic" to mean "transport, entice, recruit, harbor, provide, or otherwise obtain another person by any means").

¹⁰³ 18 U.S.C. § 1591 (2012), amended by Justice for Victims of Trafficking Act (JVTA) of 2015, Pub. L. No. 114-22, 129 Stat. 227 (2016); see also Adelson *supra* note 21, at 102-03.

¹⁰⁴ Trafficking Victims Protection Act (TVPA) of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1466.

¹⁰⁵ Unif. Act on Prevention of & Remedies for Human Trafficking § 15 (Nat'l Conference of Comm'rs on Unif. State Laws 2013).

¹⁰⁶ *Id.*

¹⁰⁷ See 2013 Me. Legis. Serv. ch. 407 (West).

trafficking, while the Uniform Act requires third-party control under its core sex-trafficking offense¹⁰⁸ and converted CSEC laws often exclude or fail to reach the conduct of buyers.¹⁰⁹

V. Sex Trafficking Versus CSEC as the Umbrella Offense: A Victim-Centered Approach

While it may be easy to agree that an offense must be clearly defined in order for victims of that offense to be accurately identified and protected, it is important to consider why commercially sexually exploited children should be defined as victims of sex-trafficking rather than victims under the general category of CSEC laws. Indeed, considering the challenge of ensuring demand for sex acts with children is properly incorporated in all state sex-trafficking laws, defining child victims under the umbrella of CSEC laws seems, ostensibly, like a reasonable approach. However, a review of CSEC laws shows that this approach potentially stigmatizes child sex-trafficking victims,¹¹⁰ leaving gaps in identification and protection for those victims due to broad variation in the scope and construction of CSEC laws. These laws, which often use prostitution-related language to define the crime and sometimes even refer to the minor victim as a "prostitute," are often codified under the prostitution chapter as a heightened penalty that applies when the person patronized or solicited for sex is a minor.¹¹¹ While some sex-trafficking laws are also codified under the prostitution chapter, these trafficking laws are also more likely to require third- [*453] party control,¹¹² reflecting an entrenched perception of CSEC as an enhanced prostitution offense rather than recognition of the exploitation that occurs in the crime of child sex trafficking. Additionally, limitations in the statutory construction of certain CSEC laws may narrow the definition of victim, such as laws that criminalize a buyer only if (1) payment is made or offered directly to the minor or a law enforcement decoy, but not if the payment is offered or made to the trafficker or another party,¹¹³ (2) the minor victim is transported or moved,¹¹⁴ or (3) the defendant uses a computer to contact the minor victim.¹¹⁵

¹⁰⁸ See *Eliminating Third Party Control*, supra note 6, at 14.

¹⁰⁹ See *infra* Part V.

¹¹⁰ *Eliminating Third Party Control*, supra note 6, at 6 (discussing how codification of CSEC penalties for buyers as heightened penalties under prostitution laws can stigmatize victims).

¹¹¹ See, e.g., Ariz. Rev. Stat. Ann. § 13-3212 (2016) ("Child prostitution"); Colo. Rev. Stat. § 18-7-405.5 (2016) ("Inducement of child prostitution"); Conn. Gen. Stat. § 53a-83 (2016) ("Patronizing a prostitute"); 720 Ill. Comp. Stat. 5/11-18.1 (2016) ("Patronizing a minor engaged in prostitution"); La. Stat. Ann. § 14:82.1 (2016) ("Prostitution; persons under eighteen; additional offenses"); Me. Stat. tit. 17-A, § 855 (2016) ("Patronizing prostitution of minor or person with mental disability"); Mass. Gen. Laws ch. 272, § 53A (2016) ("Engaging in Sexual Conduct for Fee; Payors and Payees; Penalties"); Minn. Stat. § 609.324 (2016) ("Engaging in, hiring, or agreeing to hire minor to engage in prostitution; penalties").

¹¹² Alaska, Hawaii, Maine, and Maryland converted their existing CSEC laws that prohibit promoting prostitution into sex-trafficking laws, and all four states retain a third-party control requirement. See *State Law Survey: Third Party Control*, supra note 7, at 1.

¹¹³ See, e.g., Haw. Rev. Stat. Ann. § 712-1209.1 (2016) ("A person eighteen years of age or older commits the offense of solicitation of a minor for prostitution if the person intentionally, knowingly, or recklessly offers or agrees to pay a fee to a minor

From a statutory construction perspective, the concern is misidentification. Even if "victim" is separately defined to include all CSEC, despite the lack of buyer culpability under the trafficking law, there is a risk of misidentification due to the conflict in the law that arises when defining a "victim" inconsistently with the criminal statute. This has played out in states that have adopted the Uniform Act, where inconsistent protections apply depending on whether the child was exploited by a buyer or a trafficker.¹¹⁶ This could also lead to confusion in implementation of recent federal laws that prescribe a more robust role for child welfare when responding [*454] to child sex trafficking.¹¹⁷ Since a substantial number of child sex-trafficking victims have contact with child-serving agencies and there is tremendous need for the child-welfare system to provide specialized responses to child sex-trafficking victims, not having clear definitions of who is entitled to those services could cause some youth to be excluded due to misidentification.

Nor are the challenges that states face in constructing sex-trafficking statutes to eliminate third-party control necessarily addressed by making CSEC the umbrella offense for defining commercially sexually exploited minors. Since eight states have not enacted CSEC laws criminalizing the purchase of sex acts with a minor,¹¹⁸ children

or to a member of a police department, a sheriff, or a law enforcement officer who represents that person's self as a minor to engage in sexual conduct."); Va. Code Ann. § 18.2-346(B) (2016) ("Any person who solicits prostitution from a minor (i) 16 years of age or older is guilty of a Class 6 felony or (ii) younger than 16 years of age is guilty of a Class 5 felony.").

¹¹⁴ See, e.g., Ark. Code Ann. § 5-27-305(a) (2016) ("A person commits the offense of transportation of a minor for prohibited sexual conduct if the person transports, finances in whole or part the transportation of, or otherwise causes or facilitates the movement of any minor, and the actor: (1) knows or has reason to know that prostitution or sexually explicit conduct involving the minor will be commercially exploited by any person; and (2) acts with the purpose that the minor will engage in: (A) prostitution").

¹¹⁵ See, e.g., W. Va. Code Ann. § 61-3C-14b(a) (2016) ("Any person over the age of eighteen, who knowingly uses [or attempts to use] a computer to solicit, entice, seduce or lure ... a minor known or believed to be at least four years younger than the person using the computer ... in order to engage in ... [several crimes, including prostitution] is guilty of a felony").

¹¹⁶ While "victim" is defined to include all child sex-trafficking victims whether exploited by a trafficker under the sexual servitude law or by a buyer under the patronizing law, the protections set out for sex-trafficking victims are still staggered with greater protections being afforded victims with an identifiable trafficker. See Unif. Act on Prevention of & Remedies for Human Trafficking § 15 (Nat'l Conference of Comm'rs on Unif. State Laws 2013).

¹¹⁷ See Shared Hope Int'l, *State Impact: Preventing Sex Trafficking and Strengthening Families Act (PSTSFA) Justice for Victims of Trafficking Act (JVTA) 1-5* (2016), http://sharedhope.org/wp-content/uploads/2016/11/State-Impact-Memo_PIC_Fed-Legislation.pdf (summarizing provisions of the Justice for Victims of Trafficking Act and the Preventing Sex Trafficking and Strengthening Families Act that impact state laws and those that require or encourage implementation at the state level).

¹¹⁸ Shared Hope Int'l, *National State Law Survey: Buyer-Applicable Laws 1-6* (2016), http://sharedhope.org/wp-content/uploads/2016/03/NSL_Survey_Buyer-Applicable-Laws.pdf (cataloging the eight states - Alabama, Delaware, Indiana, New Hampshire, North Dakota, South Dakota, Vermont, and Wyoming - that do not have a law criminalizing CSEC by a buyer). Several other states have CSEC laws that reach buyers but carry low penalties or do not provide penalties for commercial sexual exploitation of older minors: Connecticut, Florida, California, Hawaii, Iowa, Kentucky, Maine, Michigan, Missouri,

exploited by buyers in those states would likely not be recognized as victims because the buyer's conduct would fall under the general solicitation statute. Even if children in those states were recognized as victims of child sexual abuse, the risk of disparate treatment of victims and resultantly inadequate sentences is high, while access to specialized services for child sex-trafficking victims would remain out of reach. However, to the extent the trafficking law criminalizes buying sex with a child in those states, that barrier to accessing services for child sex-trafficking victims would be eliminated, adequate penalties for the buyer would apply, and the state would have a nonstigmatizing approach to victim identification.

Conclusion

The victim hierarchy that results when state laws include a third-party control requirement not only undermines enforcement [*455] efforts by limiting the tools available for combatting demand but also creates substantial and unfair hurdles for commercially sexually exploited children who would otherwise be identified as sex-trafficking victims. These hurdles have a ripple effect, potentially barring access to the particular protections and specialized services that would accompany the status of being a victim of trafficking. Where special protections for sex-trafficking victims do exist, inconsistency between state and federal definitions, as well as differences amongst individual states, sets child victims up for a Russian roulette of potential responses, ranging from identification as a sex-trafficking victim with access to specialized trauma-informed services in one state to being identified as a juvenile delinquent detained on prostitution charges in another.¹¹⁹

Beyond the blatant unfairness of inconsistent responses to child sex-trafficking victims, efforts to better understand the crime and how to effectively combat it are also undermined by the lack of consistent definitions. One of the most persistent criticisms of efforts to combat sex trafficking has been the lack of data accurately establishing the prevalence of trafficking.¹²⁰ Efforts to conduct prevalence studies face many structural barriers given the hidden nature of the crime, but having a clear, agreed upon definition of child sex trafficking could further these efforts. As much as data is needed to better understand the scope and prevalence of the crime,¹²¹ there are considerable risks associated with conducting prevalence studies without first reaching a clear definition of child sex trafficking that does not underestimate the range of victims impacted by the crime.

Nebraska, Nevada, New York, North Carolina, South Carolina, Utah, and Virginia. See *id.*; see also Shared Hope Int'l, National State Law Survey: Base Penalties for Offenses Involving Older Minors 1-10 (2016), http://sharedhope.org/wp-content/uploads/2016/03/NSL_Survey_Base-Penalties-for-Offenses-Involving-Older-Minors.pdf.

¹¹⁹ Currently, thirty-one states retain criminal penalties for minors under state prostitution laws. Shared Hope Int'l, National State Law Survey: Non-Criminalization of Juvenile Sex Trafficking Victims 1-2 (2016), http://sharedhope.org/wp-content/uploads/2016/03/NSL_Survey_Non-Criminalization-of-Juvenile-Sex-Trafficking-Victims.pdf.

¹²⁰ See Maureen Q. McGough, Ending Modern-Day Slavery: Using Research to Inform U.S. Anti-Trafficking Efforts, Nat'l Inst. of Just. (Feb. 27, 2013), <https://www.nij.gov/journals/271/pages/anti-human-trafficking.aspx>; see also Peters, *supra* note 2, at 572 ("The federal government is attempting to obtain more reliable state human trafficking data.").

¹²¹ See, e.g., Peters, *supra* note 2, at 572.

Indeed, more than half of the nation's laws currently acknowledge the role of demand in the crime of child sex trafficking and recognize all commercially sexually exploited children as victims of sex trafficking. Shifting the laws in the remaining twenty-three states to align with this definition would not only accomplish statutory consistency, but would also provide the opportunity to stamp out the stereotypes that continue to stigmatize child sex-trafficking victims and bring awareness to the needs of all commercially sexually exploited children.

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