

## THE PLIGHT OF THE PROSECUTOR: MINORS INVOLVED IN SEX TRAFFICKING

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### **Introduction**

Imagine that you are a young girl, of middle school age, who seems to have finally made a good friend. This older friend has introduced you to her older friends, most of which are in high school. Your friend takes you to your first party, so you do everything you can to try to fit in and act cool. You even try drugs for the first time just to impress the people you are with. Shortly after the party, you begin becoming closer and closer to this friend.

When you are not together in person, you follow each other on all social media platforms. Her presence in your life is constant. She continues to take you to house parties, where you are treated like you are not twelve years old. She even picks up you and your friends and takes you to the mall or the park. Sometimes she buys you expensive things like shoes or makeup. The attention feels amazing. However, sometimes when she gets mad or annoyed with you, she can be very mean. Sometimes she hits you, but it does not bother you that much. The good outweighs the bad in your mind, and you know she has your best intentions at heart. One day, she introduces you to an older man, who claims to be a relative of hers. He is an intimidating man who sells drugs out of his house. He gives you drugs to get high and tells you that he thinks you are beautiful. You cannot believe a man thinks you are beautiful. You are apprehensive, but are reassured by the fact that he is related to your best friend. Little do you know, this man has just paid your best friend 2,000 for you. This man owns you. A few days later, your best friend tells you that you have to start stripping. You are not thrilled by the idea, but she gives you everything you need for free. Your best friend also tells you that you do not get to keep any of the money you make. Your money

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must all go to that older man. You are now that man's property. One day you try to leave the strip club, and your best friend gets mad and beats you. You learn to stay put.

Months later, that older man rapes you, and your best friend does nothing to stop him. Next thing you know, you are forced into having sex with multiple men a day for money. If you do not have sex with the various men, the older man has threatened to hurt your family. You continue to do what he says, with the help of your best friend. She picks you up, drops you off, and comforts you in between.

One day, when the plans change, your best friend insists on robbing some men and forces you to come along. Unfortunately, the robbery does not go as planned, and a man paying for sex is shot and killed. Even though you did not fire a gun, you are charged with capital murder and aggravated robbery. You are sentenced to twenty years in prison. You claim that you are the real victim and that you have been sexually trafficked by the parties involved, but that does not make a difference in the outcome.

This scenario may seem dramatic, but it is almost exactly what happened in 2016 to Mia, a sixteen year old girl, living in Fort Worth, Texas.<sup>2</sup> Although there is conflicting evidence about what really happened the night of the robbery, the presiding judge believed that Mia "went more or less willing along with the opportunity" her traffickers provided.<sup>3</sup> Incidents like Mia's happen every day to young girls and boys who are sexually trafficked throughout the world. Because a trafficker has enough power to force victims to have sex for money, they can also force them to

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<sup>2</sup> Angelina Chaplin, She Says Her Best Friend Sold her To A Pimp. The Court Says She's a Criminal, HUFFINGTON POST (Dec. 21, 2019), [https://www.huffpost.com/entry/youth-sex-trafficking-violent-crimes-legal-system\\_n\\_5df7f060e4b0ae01a1e59701](https://www.huffpost.com/entry/youth-sex-trafficking-violent-crimes-legal-system_n_5df7f060e4b0ae01a1e59701).

<sup>3</sup> *Id.*

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commit other crimes unrelated to sex.<sup>4</sup> These child victims are prosecuted and charged with prostitution and other crimes, when they should be treated as “sexually exploited youths.”<sup>5</sup>

This scenario also draws a parallel to that of a young lady named Cyntoia Brown. Similarly to Mia, Cyntoia Brown was found guilty of aggravated robbery and first-degree murder at the age of sixteen.<sup>6</sup> Cyntoia Brown was “picked up at a Sonic Drive-in” by a real estate agent named Johnny Allen in Nashville, TN.<sup>7</sup> She was then brought to his home to have sex.<sup>8</sup> Based on her account, Cyntoia “pulled a pistol out of her purse and fatally shot Allen” in self-defense.<sup>9</sup> She thought he was also reaching for a gun and feared for her life.<sup>10</sup> She left the scene with Allen’s money, gun, and truck.<sup>11</sup> Although she was acting to protect herself, Cyntoia is “sentenced to life with possibility of parole.”<sup>12</sup> A young girl, who was a victim of sex trafficking herself, was branded and treated as a criminal. Cyntoia spent 15 years of her life incarcerated for a crime she was almost forced to commit.<sup>13</sup>

A criminal prosecutor is responsible for disciplining and charging minors involved in sex trafficking whom are arrested for prostitution or other crimes. For most, a prosecutor is seen as someone who promotes the application of justice. However, for victims of sexual trafficking that happen to be minors, prosecutors may be viewed in an entirely different light. They may be viewed as a faulty rescuer who has wrongly painted the victim as a criminal, similar to their assailant.

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<sup>4</sup> *Id.*

<sup>5</sup> Tanya Mir, *Trick or Treat: Why Minors Engaged in Prostitution Should Be Treated As Victims, Not Criminals*, 1 Fam. Ct. Rev. 163 (2013).

<sup>6</sup> Jonathan Garcia, *A Timeline of The Cyntoia Brown Case, Conviction and Successful Bid for Clemency*, THE TENNESSEAN (Dec. 18, 2018) <https://www.tennessean.com/story/news/2018/12/11/cyntoia-brown-case-facts-story-timeline-2018/2276009002/>.

<sup>7</sup> *Id.*

<sup>8</sup> Bobby Allyn, *Cyntoia Brown Released After 15 Years In Prison For Murder*, NPR (Aug. 7, 2019), <https://www.npr.org/2019/08/07/749025458/cyntoia-brown-released-after-15-years-in-prison-for-murder>.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Supra* note 6.

<sup>13</sup> *Supra* note 8.

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However, the chagrining decision of a prosecutor is not made with ease. There are several factors a prosecutor must consider, including applicable and available law, which can differ at the federal or state level. This disparity between federal and state law can lead a prosecutor to be forced to prosecute minors involved in sex trafficking to the fullest extent possible. It is clear that a problem is present in how minor victims of sex trafficking are treated by prosecutors, but the resolution may be closer than we think.

Part I of this Note provides a brief overview of the mechanics of sex trafficking, focusing on its history, key players, and its relationship to intersectionality, the interconnected nature of social categorizations such as race, class, and gender. Part II analyzes the legal framework available to prosecutors in regard to minors involved in sex trafficking. Part III discusses the scope of the problem, demonstrating the effect the legal framework has on prosecutors as well as the minors sex trafficking victims. Part IV of this Note offers a proposed statutory solution moving forward, asserting that all states adopt and enact a universal statute that somewhat mimics the TVPA. Part V concludes the Note.

### I. The Mechanics of Sex Trafficking

The history of sex trafficking most likely can be traced back “to the dawn of civilization.”<sup>14</sup> The development of sex trafficking as a practice finds its origin in the practice of prostitution, also referred to as the “world’s oldest profession.”<sup>15</sup> Modern prostitution began “during the Victorian Era” with the beginning of the industrial revolution in the United States of America and Europe.<sup>16</sup> Along with this wave of industrialization came a “wave of migrant prostitution, associated with

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<sup>14</sup> Donna Hughes, *Combatting Sex Trafficking: A History*, FAIR OBSERVER (Oct. 6, 2013), [https://www.fairobserver.com/region/north\\_america/combating-sex-trafficking-history/](https://www.fairobserver.com/region/north_america/combating-sex-trafficking-history/).

<sup>15</sup> Jessica N. Drexler, *Governments’ Role in Turning Tricks: The World’s Older Profession in the Netherlands and the United States*, 15 DICK J. INT’L L. 201 (1996).

<sup>16</sup> Iris Leos Hickenbottom, *Prostitution Then and Now, Women’s Issues Then and Now: A Feminist Overview of the Past 2 Centuries*, [http://www.cwrl.utexas.edu/~ulrich/femhist/sex\\_work.shtml](http://www.cwrl.utexas.edu/~ulrich/femhist/sex_work.shtml) (last updated May 18, 2002).

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sex trafficking” in Europe.<sup>17</sup> This was due to a very open immigration policy.<sup>18</sup> This is an example of the early presence of intersectionality in sex trafficking. The components of one’s race, ethnicity, and origin play a large role in this example of sex trafficking.

As time pasted on, the “international disdain” for the practice of prostitution grew.<sup>19</sup> In Paris, the exploitation of minors for prostitution was criminalized.<sup>20</sup> In Spain, the licenses of brothels were abolished.<sup>21</sup> The United States then experienced their own large wave of immigrants, leading to the establishment of strict immigration laws and mass deportation.<sup>22</sup> These rules regarding immigration led to the creation of a black market for sex.<sup>23</sup> The desire for citizenship from a large amount of individuals and the robust demand for prostitution made sex-trafficking into a successful business.<sup>24</sup>

During the 20<sup>th</sup> century, sex trafficking became more engrained into society. It became normal for U.S. soldiers to seek prostitution overseas.<sup>25</sup> “Comfort women” were provided by the Japanese military.<sup>26</sup> This behavior was later duplicated in Thailand and other countries around the world.<sup>27</sup> The demand for exotic women and exposure of them to the United States led to an increase

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<sup>17</sup> Amanda-Walker Rodriguez, *The Crime Next Door: An Examination of the Sex Trafficking Epidemic In The United States and How Maryland Is Addressing The Problem*, 41 U. Balt. L.F. 43, 45 (2010).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Martti Lehti & Kauko Aromaa, *Trafficking for Sexual Exploitation*, 34 CRIME & JUST. 133, 167–68 (2006).

<sup>22</sup> *Supra* note 17 at 46.

<sup>23</sup> Salvador A. Cicero-Dominguez, *Assessing the U.S.-Mexico Fight Against Human Trafficking and Smuggling: Unintended Results of U.S. Immigration Policy*, 4 Nw. U.J. Int’l Hum. Rts., 303, 317–18 (2005).

<sup>24</sup> *Id.* at 322.

<sup>25</sup> Tara Hatsough, *Asylum for Trafficked Women: Escape Strategies Beyond the T Visa*, 13 HASTINGS WOMEN’S L.J. 77, 79–80 (2002).

<sup>26</sup> *Id.* at 79.

<sup>27</sup> *Supra* note 17, at 48.

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in sex trafficking in the country.<sup>28</sup> Tales of sex trafficking began to emerge across the United States, and the issue became widespread and well known.<sup>29</sup>

This history of continued proliferation of sex trafficking led to the form of sex trafficking we recognize today. Sex trafficking is defined to occur “when someone uses force, fraud, or coercion to cause a commercial sex act with an adult or cause a minor to commit a commercial sex act.”<sup>30</sup> A commercial sex act is further defined to include “prostitution, pornography and sexual performance done in exchange for any item of value, such as money, drugs, shelter, food, or clothes.”<sup>31</sup> These definitions are consistent with the Trafficking Victims Protection Act,<sup>32</sup> which will be later discussed in great detail. A typical sex trafficking scenario involves three parties: a buyer, a trafficker or “pimp”, and a victim.<sup>33</sup> A victim is a person being sexually trafficked and “includes both girls and boys who are bought and sold for profit.”<sup>34</sup> A trafficker or “pimp” has conceptual custody over the victim, and “exploits victims to earn revenue from buyers.”<sup>35</sup> Lastly, a buyer, the cause for demand, “fuels the market with their money.”<sup>36</sup> A buyer can also be referred to as a “john.”<sup>37</sup>

Traffickers or “pimps” find their victims in a number of ways, including the utilization of social media and the internet.<sup>38</sup> Other ways include clubs, bars, and recruitment by other victims

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<sup>28</sup> Donna Hughes, *Best Practices to Address Demand Side of Sex Trafficking*, Women Studies Program, University of Rhode Island (Aug. 2004) (quoting Bob Edwards, First-Offender Prostitution Program Finishes First Year, NPR (Apr. 4, 1996).

<sup>29</sup> *Supra* note 17, at 49–50.

<sup>30</sup> Shared Hope International, *What is Sex Trafficking?* (2020), <https://sharedhope.org/the-problem/what-is-sex-trafficking/>.

<sup>31</sup> *Id.*

<sup>32</sup> Trafficking Victims Protection Act (TVPA) of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1466 (codified in scattered sections of 18 and 22 U.S.C.).

<sup>33</sup> *Supra* note 30.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Shared Hope International, *Trafficking Terms* (2020), <https://sharedhope.org/the-problem/trafficking-terms/>.

<sup>38</sup> *Supra* note 30.

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of sex trafficking as seen in the anecdote above.<sup>39</sup> A trafficker will use fear, intimidation, threats, and violence to guarantee the victim does what they want when they want it done.<sup>40</sup> According to the United States Bureau of Justice, about seventy-seven percent of traffickers were male.<sup>41</sup> The same study revealed that ninety-four percent of the victims of sex trafficking are female.<sup>42</sup> These statistics demonstrate that most sex trafficking scenarios evidence a power struggle between male and female. This is another aspect of intersectionality.

This study also highlights the fact that most victims of sex trafficking are not White/Caucasian. Sixty-three percent of victims were classified as Hispanic/Latino, while twenty-six percent of victims were classified as White/Caucasian.<sup>43</sup> Forty percent of the victims were classified as Black/African American and seventeen percent of the victims were classified as Asian.<sup>44</sup> It is clear that race and origin play a large part in the recruiting of sex trafficking victims, and that minorities are disproportionately chosen. These classes of victims present as easier targets to the traffickers most likely due to their low socio-economic status. The more less fortunate a person may be, the more likely they are able to be coerced into doing something for money. The “something” in this situation happens to be sex. This is another example of the relationship between intersectionality and sex trafficking.

Unfortunately, the common age of a victim of sex trafficking is between the age of fourteen and sixteen.<sup>45</sup> It is noted that “pre-teen or adolescent girls are more susceptible to the calculated

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Duren Banks & Tracy Kyckelhahn, U.S. Dept. of Justice, Bureau of Justice Statistics, *Characteristics of Suspect Human Trafficking Incidents, 2008–2010*, 6 (2011), [http:// www.BJS.gov/content/pub/pdf/cshti0810.pdf](http://www.BJS.gov/content/pub/pdf/cshti0810.pdf).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Supra* note 30.

advances, deception, and manipulation tactics used by trafficker/pimps.”<sup>46</sup> This is one of several reasons why a significant number of children are at such high risk in the United States for commercial sex exploitation and sex trafficking.<sup>47</sup> Another contributing factor can be a victim’s personal history. Most commonly, victims have a history of physical or sexual violence as well as substance abuse.<sup>48</sup> These unhealthy environments can cause victims to run away, and then be susceptible to sex trafficking.<sup>49</sup> Other sources of victims include “group homes, foster homes, or juvenile institutions.”<sup>50</sup> The fact that these victims become homeless make them extremely attractive and almost defenseless to sex trafficking.<sup>51</sup>

The practice of sex trafficking thrives on successful recruitment of minor sex trafficking victims. Successful recruitment of minors in sex trafficking is determined by how powerful and strong the relationship between the victim and the trafficker is.<sup>52</sup> As evidenced by our story about Mia above, many traffickers first “approach victims as friends and later form romantic relationships with victims.”<sup>53</sup> This creates a sense of dependency and loyalty between the victim and the trafficker.<sup>54</sup> Once this relationship is established, traffickers “take advantage of” a victims’

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<sup>46</sup> LINDA A. SMITH, SAMANTHA HEALY VARDAMAN & MELISSA A. SNOW, SHARED HOPE INTERNATIONAL, THE NATIONAL REPORT ON DOMESTIC MINOR SEX TRAFFICKING: AMERICA’S PROSTITUTED CHILDREN 4 (2009).

<sup>47</sup> Moira Heiges, *From the Inside Out: Reforming State and Local Prostitution Enforcement to Combat Sex Trafficking in the United States and Abroad*, 94 MINN. L. REV. 428, 433 (2009) (“Researches estimate that some 300,000 U.S. children are currently involved in, or at risk for, commercial sexual exploitation, including trafficking for prostitution.”)

<sup>48</sup> Tamar R. Birckhead, *The “Youngest Profession”: Consent, Autonomy, and Prostituted Children*, 88 WASH. U.L. REV. 1055, 1094 (2011).

<sup>49</sup> *Supra* note 5, at 165.

<sup>50</sup> *Id.*

<sup>51</sup> Cherly Hanna, *Somebody’s Daughter: The Domestic Trafficking of Girls for the Commercial Sex Industry and the Power of Love.*, 9 WM. & MARY J. WOMEN & L. 1, 21 (2002).

<sup>52</sup> Melissa Farley, *Prostitution, Trafficking, and Cultural Amnesia: What We Know in Order to Keep the Business of Sexual Exploitation Running Smoothly*, 18 YALE L.J. & FEMINISM 109, 111 (2006) (noting that prostitutes are victims of intimate partner violence by pimps and are subjected to exploitation, isolation, assault, and abuse).

<sup>53</sup> *Supra* note 47 (Stating that “Experts attribute the recent proliferation of juvenile prostitution to the ease with which pimps can access and market youth for sex in today’s commercial and media-savvy culture. Pimps target vulnerable minors in internet chat rooms or shopping malls, and then involve them in romantic relationships that cater to their emotional needs”).

<sup>54</sup> Norma Hotaling, Kristie Miller & Elizabeth Trudeau, *The Commercial Sexual Exploitation of Women and Girls: A Survivor Service Provider’s Perspective*, 18 Yale L.J. & Feminism 181, 185 (2006).

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“naivete and troubled backgrounds so that these young women submit to their own sexual exploitation.”<sup>55</sup>

Sex trafficking involves not only “(1) the creation of vulnerability for purposes of exploitation”, but also involves “(2) seamless justifications for compulsive pathological performance.”<sup>56</sup> The first point can be illustrated by many examples of sex trafficking and its history. The creation of vulnerability between the victim and their trafficker leads to the future exploitation of the victim, as discussed above. In regard to the history of sex trafficking, the ability to gain “citizenship, in the United States, has historically been used to create vulnerability for purposes of both labor and sexual exploitation.”<sup>57</sup> Without citizenship, an illegal immigrant’s employment options are quite limited, and can lead to forced employment in “the commercial sex trade.”<sup>58</sup> The production of vulnerability in order to exploit minors in sex trafficking can also be viewed through the lens of a “capitalist model.”<sup>59</sup> Through this lens, every traditional party involved in sex trafficking plays an important role. The victims of sex trafficking represent the laborers, the product they are producing is sex, and the traffickers or “pimps” control the production of sex and receive the revenue and surplus.”<sup>60</sup>

In regard to “seamless justifications for compulsive pathological performance,”<sup>61</sup> this aspect of sex trafficking can be seen in the numerous ways a trafficker exercises his or her power over the victim.<sup>62</sup> This power can translate itself to a phenomenon known as victim blaming, in

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<sup>55</sup> *Supra* note 49; *See also Id.* at 185 (“The strategy of befriending and love is designed to fit the vulnerabilities of its potential victims, conning them into dependency, fear, and submission before ‘turning them out’ into the sex trade.”).

<sup>56</sup> Blanche Bong Cook, *Stop Traffic: Using Expert Witnesses to Disrupt Intersectional Vulnerability in Sex Trafficking Prosecutions*, 24 Berkeley J. Crim L. 147 101, 105 (2019).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 106.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Supra* note 56.

<sup>62</sup> *Id.* at 106.

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which “the victim rather than the perpetrator bears responsibility” for the action.<sup>63</sup> This practice of victim blaming “renders the pathology of the perpetrator invisible because it shifts the blame from the perpetrator to the victim.”<sup>64</sup> It also “normalizes exploitation” of the victim of sex trafficking.<sup>65</sup> The trafficker is not deemed at fault in the eyes of the victim, which in turn allows the trafficker to exercise more control over the victim and justify forcing the victim to have sex with individuals for money.

It is evident and without question that the world of sex trafficking is complex and complicated. It involves many moving parts and great risk to all that are involved. A significant issue in the world of sex trafficking is the criminal prosecution of minors in sex trafficking. To better understand why prosecutors make this decision, an analysis of the existing law available that currently governs minors involved in sex trafficking is necessary.

## II. Existing Legal Framework

Any serious discussion concerning the prosecution of minors involved in sex trafficking must begin with an examination of existing statutes and laws to which minors are already subject. Without such examination, it is impossible to ascertain what, if anything, requires alteration. While it is true that there are obvious holes in current laws that govern minors involved in sex trafficking, that is not to say the existing statutory schemes fail on all accounts. When a prosecutor is presented with a case that involves a minor in sex trafficking, many factors play a part in their charging decision. Some of these factors include whether the prosecutor is prosecuting the minor at the state or federal level, and if at the state level, what the state’s law specifically provides for. Additional factors may include the specific facts of the case at hand, and what the prosecutor hopes

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<sup>63</sup> Harassment Assault Law-Student Team, *How to Avoid Victim Blaming* (2020), <https://orgs.law.harvard.edu/halt/how-to-avoid-victim-blaming/>.

<sup>64</sup> *Supra* note 62.

<sup>65</sup> *Id.*

to gain as a result of the case. Several factors play into a prosecutor's decision, which ultimately have a profound effect on the victim.

The first controlling factor in a prosecutor's prosecutorial discretion in a case dealing with minors involved in sexual trafficking is whether it is being tried at the federal or state level. The contention and divergence between state and federal law leave the prosecutor responsible for impactful decision making. The prosecutors themselves have to decide how they will prosecute the case, determining which set of laws will guide them in their decision making. This can be seen while examining a federal prosecutor's choices versus a state prosecutor's choices. Their charging decisions usually differ greatly in the effect they have on a minor being sexually trafficked. While federal law protects prostituted minors and labels them as victims, state law does not seem to have followed the trend.

The Trafficking Victims Protection Act<sup>66</sup> identifies minors that have been commercially sexually trafficked as victims. The TVPA states "severe forms of trafficking in persons" include "sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which a person induced to perform such act has not attained eighteen years of age."<sup>67</sup> It was enacted by the federal government in October 2000.<sup>68</sup> Since they are below the age of 18, "any prosecuted minor is a victim of sex trafficking and entitled to the protections and remedies provided by the TVPA."<sup>69</sup> This provision also provides that proof of force, fraud, or coercion is not necessary in the

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<sup>66</sup> Trafficking Victims Protection Act (TVPA) of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1466 (codified in scattered sections of 18 and 22 U.S.C.).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> The TVPA is designed to rehabilitate victims of human trafficking and provides services to achieve this restorative goal. See Susan L. Pollet, *Child Prostitutes: Criminals or Victims?*, N.Y. L. J. (Apr. 16, 2010), <http://www.nycourts.gov/ip/parent-ed/pdf/Teenageprostitution.pdf> (explaining that victims of human trafficking "may not be incarcerated or penalized for unlawful acts committed as a result of their victimization and are entitled to numerous benefits under the act including financial assistance, protective custody and medical care--kind of services all juvenile prostitutes need.").

production of a minor sex trafficking case. At the federal level, a minor involved with sexual trafficking is truly treated as a victim. The creation of the law was initiated by “primarily foreign-focused committees,” including the Committee of International Relations and the Committee on Foreign Relations.<sup>70</sup> Although this legislation was primarily enacted to “aid victims of international human trafficking,” domestic victims of human and sex trafficking are under its protection as well.<sup>71</sup>

This federal law has been updated and reauthorized several times, “most recently in January of 2019.”<sup>72</sup> In 2005, the great abundance of domestic cases was acknowledged by Congress and the TVPA was amended to include more domestic sex trafficking assistance.<sup>73</sup> This amendment also included a specialized rehabilitation plan, “which provides residential assistance” for minor trafficking victims.<sup>74</sup> It also “established grants to assist local governments in investigating and combatting domestic minor sex trafficking cases.”<sup>75</sup> In 2008, the amendment of the TVPA “focused primarily on prevention.”<sup>76</sup> The 2013 and 2017 reauthorizations of the TVPA expanded its budget allocated to victim services and created “emergency task force[s] in highly susceptible areas.”<sup>77</sup>

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<sup>70</sup> Juliana Spano, *Prevention Not Punishment: Child Victims of Sex Trafficking Must Be Treated Not Detained*, 48 Hofstra L. Rev. 253, 256 (2019).

<sup>71</sup> *Id.*; See U.S. CONST. art. I, § 8, cl. 3 (stating the federal government only has jurisdiction “[t]o regulate Commerce with foreign nations, and among the several states, and with Indian Tribes”); Victims of Trafficking and Violence Act of 2000 § 102(b)(12).

<sup>72</sup> Polaris, *Policy and Legislation* (2020), <https://polarisproject.org/policy-and-legislation/>.

<sup>73</sup> Trafficking Victims Protection Reauthorization Act of 2005 § 2.

<sup>74</sup> *Supra* note 69, at 259; See also Trafficking Victims Protection Reauthorization Act of 2005 § 102(b).

<sup>75</sup> Trafficking Victims Protection Reauthorization Act of 2005 § 202.

<sup>76</sup> William Wilberforce, Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110–457, § 235(2), 122 Stat. 5044, 5074 (codified as amended in scattered sections of 8, 18 and 22 U.S.C.).

<sup>77</sup> *Supra* note 69, at 259; Trafficking Victims Protection Reauthorization Act of 2013, H.R. 898, 113th Cong. § 202 (2013); Trafficking Victims Protection Act of 2017, Pub. L. No. 115–393, § 301, 132 Stat. 5265, 5271 (codified as amended in scattered sections of 8, 18, and 22 U.S.C.). The 2013 version of the TVPA include a provision providing six annual federal grants awarding between \$1,5000 and \$2,000,000 used to combat sex trafficking. The 2017 act granted \$77,000,000 to victim services.

Under the TVPA, a minor involved in sex trafficking is afforded additional protections and amenities that are not offered at the state level. Prosecution at the state level usually turns out differently for the victim. At the state level, state prosecutors are known for charging and sentencing victims of sex trafficking on state prostitution grounds.<sup>78</sup> The state laws used can include “blanket bans on prostitution that do not distinguish commercial sex acts on the basis of age or any other factor.”<sup>79</sup> Minor sex trafficking victims are usually “treated as either adult prostitution offenders or juvenile delinquents, both of which result in detention.”<sup>80</sup> This is due to the fact that “most states do not have minimum age requirements in their prostitution statutes.”<sup>81</sup> Many states, regardless of the age of the victim, adjudicate “prostitution as a criminal act for which both adults and minors can be penalized.”<sup>82</sup> An individual’s status as a minor can sometimes have no effect on their prosecution.

The prosecution of minors involved in sex trafficking differ greatly from state to state, and even differ from jurisdiction to jurisdiction. If a prosecutor is charging a minor involved in sex trafficking with prostitution, its identity as a state law crime will lead “different states and jurisdictions [to] utilize different approaches in addressing minors convicted of prostitution.”<sup>83</sup> This large disparity in styles of prosecution lead to even larger disparities across the country on how minor victims of sex trafficking should be dealt with.<sup>84</sup> This lack of uniformity presents an

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<sup>78</sup> See Shared Hope International, *The National Report On Domestic Minor Sex Trafficking: America’s Prostituted Children* (2009), available at [http://sharedhope.org/wp-content/uploads/2012/09/SHI\\_National\\_Report\\_on\\_DMST\\_2009.pdf](http://sharedhope.org/wp-content/uploads/2012/09/SHI_National_Report_on_DMST_2009.pdf).

<sup>79</sup> Wendi Adelson, *Child Prostitute or Victim of Trafficking?*, U. ST. T. L.J. 96, 97 (2009).

<sup>80</sup> *Supra* note 5, at 166; See also Shelby Schwartz, *Harboring Concerns: The Problematic Conceptual Reorientation of Juvenile Prostitution Adjudication in New York*, 18 COLUM. J. GENDER & L. 235, 236 (2008) (“The traditional adjudication of juvenile prostitutes through juvenile delinquency proceedings typifies state responses.”).

<sup>81</sup> *Supra* note 80; See also *supra* note 48, at 1059.

<sup>82</sup> See Shared Hope International, *State Law Survey: Prohibiting Criminalization of Juvenile Sex Trafficking Victims Under State Prostitution Laws* (2015), [http://sharedhope.org/wp-content/uploads/2015/09/SharedHopeStateLawSurvey\\_Non-criminalizationofminors.pdf](http://sharedhope.org/wp-content/uploads/2015/09/SharedHopeStateLawSurvey_Non-criminalizationofminors.pdf) (last accessed Sept. 27, 2020).

<sup>83</sup> *Supra* note 80.

<sup>84</sup> *Id.*

even larger problem when “minors are trafficked across states.”<sup>85</sup> It is clear that prosecution at the state level is not as helpful to a minor involved in sex trafficking than prosecution at the federal level.

The issue of prosecutorial discretion in cases involved with minors in sexual trafficking presents a number of interesting contradictions. “Despite the existence of statutory rape laws,” minors involved in sexual trafficking are arrested for prostitution.<sup>86</sup> Although a minor is not of the proper age to consent to sexual activity, she can be punished and arrested for soliciting or performing sexual acts.<sup>87</sup> This anomaly needs to be corrected and should be corrected through the use of better prosecutorial discretion.

In order to help “stop the cycle of exploitation and the revictimization” of minors involved in sex trafficking, some states have enacted Safe Harbor legislation that somewhat mimic the TVPA. The Safe Harbor statutes “create a presumption of immunity” for sexually trafficked minors.<sup>88</sup> Safe Harbor legislation and statutes recognize that minors engaged in prostitution “are victims of sexual abuse” themselves.<sup>89</sup> The motivation behind this victim-centered approach is that “majority of minors engaged in prostitution are victims of sex crimes, and thus deserve legal protection.”<sup>90</sup> As of 2015, thirty-four states have enacted some type of Safe Harbor legislation to protect minor victims of sexual trafficking.<sup>91</sup> These Safe Harbor laws differ from state to state in

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<sup>85</sup> *Id.*; See also Kate Brittle, *Child Abuse by Another Name: Why the Child Welfare System is the Best Mechanism in Place to Address the Problem of Juvenile Prostitution*, 36 HOFSTRA L. REV. 1339, 1343 (2008) (“Absent a strong national domestic trafficking policy, juvenile prostitution is generally handled by either the adult criminal justice system or the juvenile justice system”).

<sup>86</sup> Kate Brittle, *Child Abuse by Another Name: Why the Child Welfare System is the Best Mechanism in Place to Address the Problem of Juvenile Prostitution*, 36 HOFSTRA L. REV. 1339, 1343 (2008) (“Juvenile domestic nationals found to be prostituting are treated as criminals. This is despite the statutory inconsistencies regarding a juvenile's ability to consent to sexual activity.”).

<sup>87</sup> *Id.*

<sup>88</sup> *Supra* note 5, at 163.

<sup>89</sup> *Id.* at 162.

<sup>90</sup> *Id.* at 167.

<sup>91</sup> Polaris, *Human Trafficking Brief: Safe Harbor Fall 2015*, <https://polarisproject.org/wp-content/uploads/2019/09/2015-Safe-Harbor-Issue-Brief.pdf>.

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the way in which they help victims. Certain Safe Harbor laws direct juvenile sex trafficking victims to specialized services, while others protect minors from criminalization for prostitution.<sup>92</sup> These laws may also differ specifically in their “degree of immunization from prosecution” as well as “the maximum ages offered protection.”<sup>93</sup> However, Safe Harbor laws from different states also “share commonalities.”<sup>94</sup> Most of the Safe Harbor statutes are centered around “targeting demand, prosecuting traffickers and pimps, identifying victims, and delivering social services.”<sup>95</sup>

For example, the state of Illinois protects minors from criminalization for prostitution. It’s prostitution statute gives “immunity from prosecution for any minor charged with a prostitution offense.”<sup>96</sup> Following this, the minors involved are then placed in the child welfare system and provided specialized social services.<sup>97</sup> This approach does not involve the juvenile justice system. Prosecutors in the state of Illinois can choose, and most likely will, employ the Safe Harbor statute and prevent charging the victim with a crime. This has become to be known as a “social work approach.”<sup>98</sup>

The theory behind this “social work approach” is that “all minors involved in prostitution” and sex trafficking are considered victims due to “their young age in a exploitive and coercive industry.”<sup>99</sup> Because the minors have endured abuse or most likely been neglected as children, they are not subject to “any penalization or punishment” for their involvement in sex trafficking.<sup>100</sup>

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<sup>92</sup> National Council of Jewish Women, *Fact Sheet: Safe Harbor Laws*, <https://www.ncjw.org/wp-content/uploads/2017/07/Fact-Sheet-Safe-Harbor-Updated-2016.pdf> (Sept. 2016).

<sup>93</sup> *Supra* note 90.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*; See also Linda Smith & Samantha Healy Vardaman, *A Legislative Framework for Combating Domestic Minor Sex Trafficking*, 23 Regent U.L. Rev. 265, 276 (2011).

<sup>96</sup> 720 ILL. COMP. STAT. ANN. § 5/11-14 (West 2011).

<sup>97</sup> *Supra* note 5, at 167.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*; See also Megan Annitto, *Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minor*, 30 Yale L. & Pol’y Rev. 1, 19 (2011).

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This Safe Harbor legislation is centered around “providing comprehensive services to the greatest number of victims.”<sup>101</sup> Although Illinois’ approach to minors involved in sex trafficking presents a victim favored approach, there are also a few drawbacks.<sup>102</sup> One of its drawbacks includes the absence of “prosecutorial and judicial discretion.”<sup>103</sup> This, in turn, treats every minor victim of sex trafficking the same and discounts “the experiences of individual victims.”<sup>104</sup> Illinois’ approach also operates “under the assumption that social services will rehabilitate” all minors involved in sex trafficking.<sup>105</sup> The over-inclusiveness of this approach could be problematic for minors who require “rehabilitation in a strict setting.”<sup>106</sup>

In contrast to the state of Illinois, the state of New York has Safe Harbor legislation in place, but in a different way. New York’s Act<sup>107</sup> “decriminalizes prostitution for minors by requiring the replacement of a delinquency petition with a Person in Need of Supervision petition. These petitions call for providing juvenile offenders with social services.<sup>108</sup> These social services include medical care, counseling, and emergency shelter.<sup>109</sup> However, the main contrast in New York’s law is its allowance of judicial discretion. In this instance, if a judge determines “that an individual requires additional rehabilitation and supervision in a secure placement, the prosecution and detention of a minor can take place.”<sup>110</sup>

This Safe Harbor legislation awards prosecutors in the state of New York with more options than the state of Illinois. It may seem more strict that the approach implemented by Illinois,

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<sup>101</sup> *Supra* note 5 at, 167.

<sup>102</sup> *Id.* at 168.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*; *See also supra* note 48, at 1105.

<sup>106</sup> *Id.*

<sup>107</sup> N.Y. SOC. SERV. LAW § 447 (McKinney 2010).

<sup>108</sup> N.Y. FAM. CT. ACT § 311.4 (McKinney 2010).

<sup>109</sup> N.Y. SOC. SERV. LAW § 447-a. (McKinney 2010).

<sup>110</sup> Shelby Schwartz, *Harboring Concerns: The Problematic Conceptual Reorientation of Juvenile Prostitution Adjudication in New York*, 18 COLUM. J. GENDER & L. 235, 236 (2008).

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but the allowance of judicial discretion is only applicable when “one of the exceptions applies.”<sup>111</sup> This, in turn, provides immunity to all other minors outside the exceptions “from prosecution as juvenile delinquents.”<sup>112</sup>

Other examples include Alaska, Arkansas, Arizona, and Florida, which each have “criminalized the *knowing* trafficking of another person with the intent that such person engage in forced labor.”<sup>113</sup> Missouri legislation provides a victim even more “protection” by stating that victims of sexual trafficking crimes are afforded the rights and protections provided by TVPA.<sup>114</sup> If all states enacted legislation like Missouri, it seems that victims of sexual trafficking would be much better off.

There are pros and cons to each stance a prosecutor may take when prosecuting a minor victim in sexual trafficking. Those on the side of immunity “note that finding prostituted children delinquent for engaging in prostitution can further victimize them,”<sup>115</sup> create a large disparity between federal and state law, and may serve as an “obstacle to full rehabilitation” for the victim.<sup>116</sup> Those on the other side of the argument, who oppose immunity, vow that prosecutors continue to have “the ability to charge a prostituted child to ensure the child’s cooperation in the prosecution of its traffickers.”<sup>117</sup> The opposition also points out that unprosecuted minors may be left to “the mercy of pimps and johns without the judicial system to advocate for their treatment and rehabilitation.”<sup>118</sup> It seems that it is up to the prosecutor to choose the better of two evils.

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<sup>111</sup> *Supra* note 5, at 169; *See also supra* note 108.

<sup>112</sup> *Id.*

<sup>113</sup> ALASKA STAT. ANN. § 11.41.310 (2006); FLA. STAT. ANN. § 787; ARK. STAT. ANN. §5-11-108 (2006); Ariz. Stat. Ann. § 13-1308 (2006).

<sup>114</sup> MO. STAT. ANN. § 566.233.

<sup>115</sup> *Supra* note 79, at 111.

<sup>116</sup> *Id.* at 121.

<sup>117</sup> Tessa L. Dysart, *Child, Victim, Or Prostitute? Justice Through Immunity for Prostituted Children*, 21 DUKE J. GENDER L. & POL’Y 255 (2014).

<sup>118</sup> Brenda Zurita, The Beverly LaHaye Institute, *Children in Prostitution: What to Do ? 3* (2012), available at [http://www.cwfa.org/images/content/CWA\\_Decriminalization-of-Prostitution-for-Minors2012.pdf](http://www.cwfa.org/images/content/CWA_Decriminalization-of-Prostitution-for-Minors2012.pdf).

These pros and cons can be further represented by case law. Before NY state enacted New York's Safe Harbor for Exploited Children Act, a young girl named Nicolette was arrested for prostitution in the city of New York.<sup>119</sup> Since it was her second arrest, she was convicted as a juvenile and sent to a detention facility.<sup>120</sup> She was twelve years old at the time of this arrest. The age of consent in New York is 17.<sup>121</sup> Even though she is not old enough to consent to sex, she was deemed old enough to consent to selling it.

In contrast to this, the opposite was established in Texas. The Texas Supreme Court "acknowledged the incongruity in applying prostitution laws to minors."<sup>122</sup> The minor sexual trafficking victim offered to engage an undercover cop in practices of prostitution. She was, at first, charged in criminal court, but later was charged under the Family Code due to her age.<sup>123</sup> The court eventually held "because a thirteen year old cannot legally consent to sex, a thirteen year old should not be prosecuted for prostitution."<sup>124</sup> It reasoned "the rule that an underage child cannot consent to sex need not derive from a statute, . . . but is a part of common law."<sup>125</sup> They also supported their reasoning by referring to their own state's Penal Code and its relevant sections.

Another possibility for prosecutors at the state level are to make the decision to charge the assailant and possibly the victim in federal court. Traffickers are able to be prosecuted under both state and federal law. Both federal and state claims can be brought in to federal court as well. However, since most states are more "familiar" with prosecuting prostitution instead of sexual

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<sup>119</sup> *In re Nicolette R.*, 779 N.Y.S.2d 487, 488 (2004).

<sup>120</sup> *Id.* ("Although appellant was 12 years old at the time of her arrest and thus would have been deemed ... incapable of consenting to any sexual act ... this circumstance was irrelevant to the issue of whether she was properly found to have committed an act, which if committed by an adult, would constitute the crime of prostitution ... Accordingly, the court properly denied appellant's motion to dismiss the petition.").

<sup>121</sup> *Id.*

<sup>122</sup> *In re B.W.*, 313 S.W.3d 818 (Tex. 2010).

<sup>123</sup> *Id.* at 819.

<sup>124</sup> *Id.* at 824.

<sup>125</sup> *Payne v. Commonwealth*, 623 S.W.2d 867, 875 (Ky.1981).

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trafficking, once again victims get the short end of the stick.<sup>126</sup> Victims are stuck between “being viewed as a victim of trafficking under federal law and a prostitute under state law.”<sup>127</sup> An interesting point can also be made in regards to the familiarity prosecutors have with the federal law available. It seems that most prosecutors would rather defer using federal law to federal prosecutors. They would rather prosecute cases “using existing laws they were more familiar with, such as rape, kidnapping, and prostitution.”<sup>128</sup>

The benefits of the Trafficking Victims Protection Act are apparent, as well as certain benefits imbedded in state law prosecution. Both methods of prosecution can benefit the minor victim of sex trafficking, but in different ways. It seems that state law prosecution can help provide victims with more access to localized social services. However, federal prosecution under the TVPA ensures that a minor will not be criminally charged with any crime and fully recognized as a victim.

### III. Scope of the Problem

The scope of the prosecution of minors involved in sex trafficking is one of duality. The issue of prosecutorial discretion affects the minor victims of sexual trafficking more than anyone involved. However, something can be said about the prosecutors themselves exercising discretion. The National Institute of Justice (NIJ) performed a study that investigated “the effects of existing federal and state legislation from the perspective of the prosecution and identified critical challenges and barriers to successful prosecution of cases.”<sup>129</sup> This research was conducted by

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<sup>126</sup> Sarah Pierce, *Prosecuting Human Trafficking in the United States: State and Federal Jurisdictions*, (2015) <https://humantraffickingsearch.org/prosecuting-human-trafficking-in-the-united-states-state-and-federal-jurisdictions/>.

<sup>127</sup> Carr, Bridgette A. "When Federal and State Systems Converge: Foreign National Human Trafficking Victims Within Juvenile and Family Courts." *JUV. & FAM. CT. J.* 63, NO. 1 (2012): 77-90.

<sup>128</sup> *Supra* note 117.

<sup>129</sup> Heather J. Clawson, et. al., *Prosecuting Human Trafficking Cases: Lessons Learned and Promising Practices*, 7 <https://www.ncjrs.gov/pdffiles1/nij/grants/223972.pdf> (June 30, 2008).

“critical analysis of federal cases” as well as “in-depth interviews of federal and state prosecutors.”<sup>130</sup>

First, a list of all “TVPA- related prosecutions” since October 2000 was created.<sup>131</sup> The list identified 298 cases.<sup>132</sup> Interviews were then conducted with the federal prosecutors who had prosecuted these TVPA related cases.<sup>133</sup> This included samples from 13 jurisdictions.<sup>134</sup> In general, New York and California prosecuted the most federal TVPA cases.<sup>135</sup> Another interesting statistic discovered including the nationalities of the victims. The largest percentage of victims of sexual trafficking were Mexican, followed by Honduran and then American.<sup>136</sup> Minors involved in sexual trafficking are included in this statistic. A little less than half the cases studied involved sexual trafficking charges.<sup>137</sup> It was also discovered that a majority of the cases resulted in guilty verdicts. In addition to that, less than one percent of the cases studied were acquitted.<sup>138</sup> This leads us to conclude that if a defendant is indeed “brought to trial, a favorable disposition for the federal government is likely.”<sup>139</sup>

In regards to the interviews with federal prosecutors, “all of the respondents agreed that the TVPA was very helpful in the prosecution of” sexual trafficking cases.<sup>140</sup> They stated strengths of the legislation included:

- Raises the awareness of the human trafficking problem within the U.S.
- Facilitates social services for victims

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 8.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 9.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 13.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 16.

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- Enables victims to receive restitution for the crimes committed against them
- Creates the ability of prosecutors to prosecute conduct that was never before considered trafficking (prosecution of minors)
- Allows for stricter penalties for offenders.<sup>141</sup>

The federal prosecutors were also asked about what they thought were limitations of the TVPA.

- Lack of harsh penalties for abuse
- The lack of emergency housing for minor victims of trafficking (International and domestic)
- The lack of funding to meet the needs of domestic trafficking victims.<sup>142</sup>

This survey and study was also performed with state and local prosecutors.<sup>143</sup> Only 77 local and state prosecutors were questioned. A little over half of the prosecutors “reported that they were familiar with the Trafficking Victims Protection Act of 2000.”<sup>144</sup> Interestingly, when prosecutors were asked about how the TVPA had an impact on cases being brought to them, only four percent said that it had.<sup>145</sup> Here lies one of the problems with a state or local prosecutors prosecutorial discretion. It does not seem that they are familiar or educated enough on the resources available to victims of sexual trafficking. Even more shocking was that some respondents did not know if their own state had any anti-trafficking legislation. Only twenty-four percent of prosecutors used their state legislation when prosecution sexual trafficking cases.<sup>146</sup>

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 22.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 23

Although only a small number of local and state prosecutors claimed to use their states legislation when prosecuting sexual trafficking cases, strengths of state legislation were listed as such:

- Allows local prosecutors to prosecute human trafficking at the state or local level
- Establishes human trafficking as a felony offense
- Has special provisions for trafficking of minors
- Criminalization of benefitting financially from human trafficking.
- Allowing victims to take civil action against traffickers.<sup>147</sup>

One of the most alarming statistics to come out of this study seems to be that sixty-eight percent of local and state prosecutors considered human and sexual trafficking to NOT be a problem in their jurisdictions.<sup>148</sup> Only five percent considered it to be a serious problem. Why is there such a big disparity in the knowledge and prevalence of human and sexual trafficking between federal prosecutors and state and local prosecutors? Local and state prosecutors cited the reason as “prosecutors not recognizing some cases as human trafficking cases and lack of reporting.”<sup>149</sup> Prosecutors are cited victims and their inability to “come forward out of fear of retaliation, distrust of authorities, and lack of understanding of their rights and therefore the crime remains hidden.”<sup>150</sup> It seems that the prosecutors themselves are engaged in victim blaming.

In concluding the study, it is obvious that the federal governments have realized sexual trafficking, especially the sexual trafficking of minors, to be a major problem. The state and local governments seem to be on their way, but claim they need more resources and need to focus more on the victim. If the prosecution is able to focus more on the victim, it seems the outcome will be

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

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more favorable for all. The goal is for states to continue developing new legislation for the sexual trafficking of minors that is just as effective, if not more, as the Trafficking Victims Protection Act of 2000.

Not only do prosecutors face the challenge of how to prosecute the minor victims of sexual trafficking (which laws to use), but they also struggle with the consequences of choosing their state or local law. If they choose to prosecute minor victims under their states law, which all vary, the victim will be the person that suffers the most. As stated earlier, there are pros and cons to applying state law to the prosecution. There is an argument to be made that all states should enact legislation and laws that “require minors to be immune from prosecution of prostitution.”<sup>151</sup> There are also some that argue for New York’s choice of law, and give prosecutors and judges the opportunity to prosecute for prostitution. However, it seems that since the federal government has enacted the Trafficking Victims Protection Act and other acts that provide protection and immunity to minor sexual trafficking victims, should the states not follow in its footsteps? This further supports the argument that prosecutors should engage their states and help enact legislation to do so.

The issue of prosecutorial discretion affects the minor victims of sexual trafficking more than any party involved. States that prosecute minor sex trafficking victims to the fullest extent and funnel “children through the juvenile justice system” can harm the victim even more than the sex trade itself.<sup>152</sup> There are many awful and long-lasting side effects associated with sex trafficking for minor victims. Not only are minors subjected to physical afflictions, but mental

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<sup>151</sup> Victims of Trafficking & Violence Prot. Act of 2000, PUB. L. NO. 106-386, § 112(a)(2), 114 Stat. 1464, 1486-88.

<sup>152</sup> *Supra* note 70, at 274; *See also* MALIKA SAADA SAR ET AL., CTR. ON POVERTY AND INEQUALITY AT GEORGETOWN LAW, THE SEXUAL ABUSE TO PRISON PIPELINE: THE GIRLS’ STORY 12 (2015) (stating that imprisonment subjects girls to psychological and physical harm which re-traumatizes girls).

ailments as well.<sup>153</sup> The list of physical damage that a minor in sex trafficking can endure is long, including “broken bones, bruising, malnourishment, sexually transmitted diseases, and medical issues associated with addictions.”<sup>154</sup> These physical issues can often develop from untreated beatings and sexual assaults throughout the period that a minor is sex trafficked.<sup>155</sup> Minors who are girls may also become pregnant and can “face pregnancy complications” due to rape or sexual assault.<sup>156</sup> The presence of pregnancy can also be utilized by traffickers to further establish the bond between the trafficker and the victim.<sup>157</sup> Last but certainly not least, a minor involved in sex trafficking can become severely addicted to drugs provided by the trafficker and later use the drugs as a way to cope with their situation, furthering their addiction.<sup>158</sup>

Mentally, a minor involved in sex trafficking can experience quite a few ailments as well. Minors whom are sex trafficked “can experience post-traumatic stress disorder, extreme anxiety, self-harm, shame, guilt, and hopelessness.”<sup>159</sup> Since minors are more susceptible to this mental ailments, they are chosen over adults for exploitation. Along with the mental ailments listed, minors involved in sex trafficking may also develop an “inability to trust others.”<sup>160</sup> This distrust can carry on for the rest of their lives, leading to a distrust of law enforcement as well.<sup>161</sup> This

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<sup>153</sup> Heather J. Clawson & Lisa Goldblatt Grace, *Finding a Path to Recovery: Residential Facilities for Minor Victims of Domestic Sex Trafficking*, SEX TRAFFICKING OF MINORS: OVERVIEW, FEDERAL RESPONSE AND JUSTICE SYSTEM ISSUES 137, 138 (Cara A. Saunders ed., 2015).

<sup>154</sup> *Supra* note 70, at 274; *See also Id.*

<sup>155</sup> U.S. DEPT. OF HEALTH & HUMAN SERV. ADMIN. FOR CHILDREN, YOUTH & FAMILIES, GUIDANCE TO STATES AND SERVICES ON ADDRESSING HUMAN TRAFFICKING OF CHILDREN & YOUTH IN THE U.S. 5 (2014).

<sup>156</sup> *Supra* note 70, at 275; *See also* Hanni Stoklsa et al., Commentary, *Human Trafficking, Mental Illness and Addiction: Avoiding Diagnostic Overshadowing*, 19 AMA J. ETHICS 23, 25 (2017) (“71.2 percent of 66 respondents reported at least one unwanted pregnancy during the period of their exploitation ... 55.2 percent of the 67 female survivors reported at least one abortion.”).

<sup>157</sup> Hanni Stoklsa et al., Commentary, *Human Trafficking, Mental Illness and Addiction: Avoiding Diagnostic Overshadowing*, 19 AMA J. ETHICS 23, 25 (2017).

<sup>158</sup> *Supra* note 155, at 6. Sixty-six percent of clients reported to an anti-trafficking service provider that drug use led to them being trafficked, while 84.3% of sex trafficking survivors nationwide reported that they used substances while trafficked.

<sup>159</sup> *Supra* note 70, at 275; *See also supra* note 153, at 138–39.

<sup>160</sup> *Supra* note 70, at 275.

<sup>161</sup> TRAFFICKING VICTIMS ADVOCACY PROJECT, CRIMINALIZATION OF TRAFFICKING VICTIMS 2 (2015).

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distrust of law enforcement, and even the criminal justice system, can stem from being prosecuted as a prostitute or to the fullest extent. If all the authorities are capable of doing is arresting a minor involved in sex trafficking for prostitution or other related charges, and cannot actually cease the sex trafficking or protect the minor, then it seems the distrust may be accurately manifested.

In accordance with the states that do offer some protection for the minors involved in sex trafficking that avoid prosecution, the protection must be adequate. In certain states that enforce Safe Harbor statutes, as discussed earlier, additional social services are made available to the victim of sex trafficking. Some of these social services include the availability to live in special shelters, so the victim has somewhere safe to return to. However, some of the shelters may have restrictions on how long the victim is able to stay there.<sup>162</sup> These restrictions make it very hard to allow the minors “receive the facilities they need before releasing them back on the streets.”<sup>163</sup> Shelters may also be ill equipped to provide services specifically for minor sex trafficking victims, as most shelters admit and care for all homeless youth.<sup>164</sup> Although providing social services for minor victims of sex trafficking is certainly a step in the right direction, it cannot be deemed a full proof remedy.

A further point can be made about states that enforce Safe Harbor legislation. Will Safe Harbor legislation is an admirable attempt at protecting the minor victims of sex trafficking, it is done quite inconsistently.<sup>165</sup> This is due to the fact that each state that enacts Safe Harbor legislation has drafted it to protect minors in a different way. Certain states will protect minors involved in sex trafficking from prosecution only at a certain age.<sup>166</sup> Other states will charge the

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<sup>162</sup> *Supra* note 70, at 275.

<sup>163</sup> *Id.*

<sup>164</sup> *Supra* note 153, at 140 (“Shelters are equipped for runaways, not trafficking victims.”).

<sup>165</sup> Kajal Patel, *Child Prostitutes or Sexually Exploited Minors: The Deciding Debate in Determining How Best to Respond to Those Who Commit Crimes as a Result of Their Victimhood*, 2017 U. ILL. L. REV. 1545, 1554 (2017).

<sup>166</sup> *Id.*

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minor with prostitution, but will divert them into social programs instead of the juvenile justice system.<sup>167</sup> On the other hand, some states may combine both approaches, subject to additional or different conditions.<sup>168</sup>

The effect of multiple states with multiple approaches to the protection of minors involved in sex trafficking leads to certain minors in certain states open to more protection than offers. This lack of uniformity in protection from prosecution seems unfair and even discriminatory to the minor victims of sex trafficking. The location of which state the sex trafficking occurs should not be a controlling factor in the prosecution of a minor victim. All minor victims of sex trafficking should be afforded the same protection, regardless of whether there state has instituted a specific Safe Harbor law or not. This logic not only applies for the prosecution of minors for prostitution, or prostitution related charges, but also other crimes committed as a result of the sexual exploitation. Although enacting Safe Harbor legislation is surely better than a state not enacting it all, it also cannot be deemed the best remedy.

#### IV. Moving Forward: Proposed Regulation for the Protection of Minors

The existing regulatory framework, although imperfect, is preferable to the absence of any regulatory framework at all. While it has been successful in halting the prosecution of minors involved in sex trafficking at the federal level, it has only been somewhat successful at the state level. The existing regulatory scheme must be improved by either revising and editing existing state laws to mimic the TVPA or the creation of a universal statute for all states to adopt must occur. If the state legislatures, possibly with the help of Congress, proceed accordingly, the prosecution of minors involved in sex trafficking can be greatly reduced in a manner that both further protects the victims of sex trafficking and further assist prosecutors in their prosecution of

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

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the root cause, the traffickers. To achieve that desirable result, state legislatures and Congress should act as outlined in this part.

State legislatures should first, even those of states that have already enacted Safe Harbor legislation, attempt to draft a new or revise an existing statute to mimic the relevant part of the TVPA. The TVPA has determined that sex trafficking has occurred when a person induced to perform a commercial sex act has not attained eighteen years of age. The elements of force, fraud, or coercion no longer need to be proven by law. A minor sex trafficking victim is completely protected from prosecution under this Act. Depending on the state law readily available, state legislators should advocate and push for a similar provision to be added to their states' law regarding sex trafficking. This could be done, as it has been done in Missouri, by adding to the applicable law that victims of sex trafficking crimes are afforded the rights and protections provided by the TVPA. Additionally, and more specifically, state legislatures should advocate to change their state's definition of sex trafficking to include the definition provided by the TVPA. This action would give the prosecutors the proper law to enforce and give them the opportunity to not prosecute minor victims of sex trafficking.

Along with adoption of the definition of sex trafficking under the TVPA, state legislators also need to adopt the additional protections provided to victims of sex trafficking. These include a specialized rehabilitation program as well as additional social services. This will be easier to do for states that have already enacted safe harbor legislation that already has these programs put in place. State legislators also should lobby to Congress for additional funds to successfully run the additional social service programs. However, the prior inconsistency present in the various Safe Harbor laws of each state may become apparent once again if old Safe Harbor laws are simply revised or added to.

Due to this inconsistency, the adoption of a universal statute that protect minors from being prosecuted in sex trafficking should also be contemplated. In order to formulate and create a successful universal statute, Congress should not only turn to the TVPA but also to certain states that have enacted Safe Harbor legislation. This approach would be highly collaborative. The universal statute must first outright decriminalize child prostitution and recodify minors selling commercial sex as victims, as it does in the TVPA. This reclassification is absolutely necessary in order to halt the prosecution of minors in sex trafficking. It changes the legal view of the minor from a criminal to a victim. The term “minor” must be further defined as a child that has obtained the age of eighteen or who is younger. The definition of minor should be consistent with a state’s other legal definition of minors, such as statutory rape laws. In turn, the definition of a minor will be constant throughout a state’s jurisprudence.

The main counter argument to the decriminalization of minors is that without a criminal charge, the minors will no longer have interact with law enforcement, and in turn they will return to the world of sex trafficking. However, the filing of a child abuse report could remedy this specific problem. A child abuse report would allow the minor to remain in custody, which could lead to the minor being placed in a protective home. This abuse report could also serve to alert and assist outside victim services programs in assisting the minor and preventing their return to their trafficker. This could also allow for specialized and specific victim care for each victim involved. This action would leave the victim without an arrest record, which can allow a victim more options in the future.

The creation and drafting of the universal statute should also draw from Illinois’ Safe Harbor law. Illinois employs the decriminalization of commercial sex and prostitution, as would be required above. The state also employs a social work approach, and minor victims are placed

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in the child welfare system as opposed to the juvenile justice system. This would be another key component to the universal state statute. The child welfare system would be mandated by statute to provide the minor victim with specialized social services. This would give every minor victim of sex trafficking an opportunity to benefit from social services, not previously mandated nor regularly provided. A counter argument to this provision is that rehabilitation through social services is not conducive to every minor victim's recovery, and they may warrant rehabilitation through detention. However, this arguments is applicable to a small minority set of victims, and therefore does not carry much weight.

Lastly, the universal state statute should include a provision regarding a presumption of credibility in the victim's account, testimony and statements in regard to their sex trafficking. This shall lend itself to the bigger problem present here, the demand for sex trafficking and infrequent prosecution of the trafficker themselves. The universal state statute shall hold a presumption of believability to demonstrate to the minor that they are, in fact, a true victim of a crime and should have faith in the prosecutor and the criminal justice system. If a universal state statute was created with these three main requirements in mind, the prosecution of minors involved in sex trafficking would cease to be as substantial of a problem as it appears today.

## V. Conclusion

In conclusion, it is clear that the prosecution of minors involved in sex trafficking represents a monumental fault in not only prosecutorial discretion but the criminal justice system as a whole. The issue seems to negatively affect all parties involved. While certain states and the federal government have tried to remedy the issue, they have not been completely successful. It is advised that states adopt a universal state statute that calls for the decriminalization of minors involved in sex trafficking as well as their immunity from prosecution. The state statute also calls

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for a presumption of credibility for the victim. The plight of the prosecutor could be assisted with the adoption of a universal state statute.