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## You Sell Molly, I'll Sell Holly: Prosecuting Sex Trafficking in the United States

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# You Sell Molly, I'll Sell Holly: Prosecuting Sex Trafficking in the United States

## TABLE OF CONTENTS

Introduction .....	1025
I. Twenty-First Century Slavery in the United States.....	1029
A. What is Sex Trafficking? .....	1029
B. Common Misconceptions .....	1031
II. We Have the Laws, so Where Is Tim?.....	1035
A. Federal Sex Trafficking Laws.....	1036
B. State Sex Trafficking Laws .....	1038
C. The Laws in Action .....	1040
1. Cost-Benefit Analysis .....	1040
2. Challenges Faced by Prosecutors and Law Enforcement .....	1044
III. Rethinking How to Stop Tim from Selling Holly .....	1045
A. The Need for a Stricter Approach.....	1046
B. A Uniform Attack Plan Amongst States.....	1050
C. A New Approach to Prosecution .....	1053
1. Collaborative Efforts.....	1053
2. Improving Investigations.....	1054
3. Addressing Intimidation.....	1055
4. Implementing Forfeiture by Wrongdoing .....	1055
5. Introducing Expert Testimony .....	1056
Conclusion.....	1057

## INTRODUCTION

Worried her parents would be disappointed in her for getting a bad grade in school, 15-year-old Holly ran away from her home in Auburn, Washington.<sup>1</sup> She then met Tim, a 32-year-old male who agreed to give

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1. Gloria Riviera et al., *Daughters for Sale: How Young American Girls Are Being Sold Online*, ABCNEWS (May 25, 2016, 9:56 PM), <http://abcnews.go.com/US/daughters-sale-young-american-girls-sold-online/story?id=39350838> [https://perma

her a place to stay.<sup>2</sup> He was nice in the beginning but soon became controlling and abusive.<sup>3</sup> Tim dressed Holly in provocative clothing and took sexually suggestive pictures of her.<sup>4</sup> He used the pictures to post ads of Holly on Backpage.com,<sup>5</sup> containing titles like “Well worth it, 150 an hour.”<sup>6</sup> At Tim’s demand, Holly received 25 to 30 calls an hour and made up to \$4,000 per weekend by having sex with strange men.<sup>7</sup> Tim did not allow Holly to keep the money, forcing her to give everything to him.<sup>8</sup> Tim began to physically abuse Holly and sleep next to the door so that she could not escape during the night.<sup>9</sup> Holly “worked” every day, making money for Tim while her parents and the police searched tirelessly for her.<sup>10</sup>

Tim sold Holly as a sex slave for 108 days before police officers were able to locate her Backpage.com ad.<sup>11</sup> Officers set up a sting<sup>12</sup> at a hotel, and although Holly thought she was going on just another “call,” she found officers waiting upon walking into the room.<sup>13</sup> The officers rescued Holly, reunited her with her family, and arrested Tim, who was tried for sex trafficking of a minor.<sup>14</sup> Holly testified at the trial by recounting her 108

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.cc/HW2U-3B9Q]. The names of the victim and trafficker provided in the source were changed for purposes of this Comment.

2. *Id.*

3. *Id.*

4. *Id.*

5. BACKPAGE.COM, <http://www.backpage.com> (last visited Nov. 3, 2017) [<https://perma.cc/K8HA-V4SN>]; *Holding Online Facilitators Accountable: Campaign Targeted at Backpage.com*, SHAREDHOPE INT’L (Feb. 24, 2012), <https://sharedhope.org/2012/02/holding-online-facilitators-accountable-campaign-targeted-at-backpage-com/> (“Backpage.com is an online classifieds site . . . where many so-called ‘adult’ ads are placed. Backpage.com has been identified by law enforcement and service providers as a hub for child sex trafficking.”) [<https://perma.cc/ZJ9S-XEJW>].

6. Riviera et al., *supra* note 1.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Sting Operation Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/s/sting-operation/> (last visited Dec. 21, 2017) (defining a “sting” as “a deceptive operation designed to nab criminals”) [<https://perma.cc/2HVH-LYJ9>].

13. *Id.*

14. *Id.*

days of rape<sup>15</sup> and abuse.<sup>16</sup> Her testimony was the prosecutor's primary source of evidence, and it helped secure Tim's sentence of 26 years in jail.<sup>17</sup> Holly's case illustrates what should happen when a child is sold as a sex slave. Sadly, her experience is not the norm.<sup>18</sup>

Human trafficking is a criminal enterprise based on the economic principles of supply and demand.<sup>19</sup> It generates more than \$150 billion per year, which is more annual profit earned than the tobacco industry, Google, Big Oil, or the United States banking system.<sup>20</sup> This Comment compares sex trafficking of domestic minor females,<sup>21</sup> a subcategory of human trafficking victims, to other crimes, such as selling "Molly,"<sup>22</sup> by conducting a cost-benefit analysis to illustrate why sex trafficking is so pervasive.

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15. 22 U.S.C. § 7101(b)(9) (2012) ("Trafficking includes all the elements of the crime of forcible rape when it involves the involuntary participation of another person in sex acts by means of fraud, force, or coercion.").

16. Riviera et al., *supra* note 1.

17. *Id.*

18. Kelly Heinrich & Kavitha Sreeharsha, *The State of State Human-Trafficking Laws*, 52 JUDGES' J. (ABA), Winter 2013, at 28 ("Human trafficking is rarely prosecuted in the United States despite the proliferation of laws.").

19. Amanda Walker-Rodriguez & Rodney Hill, *Human Sex Trafficking*, 80 FED. BUREAU OF INVESTIGATION LAW ENFORCEMENT BULL., Mar. 2011, at 1, 6 (stating that human trafficking is a growing criminal enterprise); *see also* U.S. DEPT. OF STATE, TRAFFICKING IN PERSONS REPORT 2016, at 15 (June 2, 2005), <http://www.state.gov/j/tip/rls/tiprpt/2005/46606.htm> (stating that human trafficking has both a supply and demand side) [<https://perma.cc/DNL7-VSW4>].

20. Carina Kolodny, *Slavery Is Still Thriving And Is More Profitable Than Big Oil*, HUFF. POST (May 22, 2014, 1:33 PM), [http://www.huffingtonpost.com/2014/05/22/modern-slavery-profits-big-oil\\_n\\_5365220.html](http://www.huffingtonpost.com/2014/05/22/modern-slavery-profits-big-oil_n_5365220.html) [<https://perma.cc/8LGB-QSD3>]; *ILO says forced labour generates annual profits of US \$ 150 billion*, INT'L LABOUR ORG. (May 20, 2014), [http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_243201/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_243201/lang--en/index.htm) [<https://perma.cc/9JQW-97BD>]; *see also* TRAFFICKING IN PERSONS REPORT 2016, *supra* note 19, at 2 (John F. Kerry, former Secretary of State, stating, "[W]e want to bring to the public's attention the full nature and scope of the \$150 billion illicit human trafficking industry.").

21. Sex trafficking has many subcategories, such as male and female, minor and adult, and domestic and international. This Comment addresses the issue of domestic minor female sex trafficking.

22. Molly is a term used for 3, 4-methylenedioxy-methamphetamine ("MDMA"), a synthetic drug that alters one's mood and perception. *Drug Facts-MDMA (Ecstasy/Molly)*, NAT'L INST. ON DRUG ABUSE, <https://www.drugabuse.gov/publications/drugfacts/mdma-ecstasy-molly> (last updated Oct. 2016) [<https://perma.cc/9VGX-QGRR>].

To combat the magnitude and seriousness of sex trafficking, a two-prong approach is required. First, legislatures across the United States must make sex trafficking a strict liability<sup>23</sup> crime in their states. Second, because of the nature of the crime, prosecutors need innovative strategies to secure convictions in sex trafficking cases.<sup>24</sup> Laws alone are not enough to stop Tim from selling Holly. The federal government and many states have sufficient laws, yet few cases are prosecuted under those laws.<sup>25</sup> Making sex trafficking a strict liability crime and providing additional training to law enforcement officers and prosecutors will make selling Holly less appealing to criminals and thereby significantly reduce sex trafficking in the United States.

Louisiana is leading the way in the fight against sex trafficking.<sup>26</sup> Louisiana laws are the most comprehensive and proactive out of all 50 states.<sup>27</sup> Specifically at issue in this article is Louisiana's stance, along with 16 other states, to make sex trafficking of a minor a strict liability crime.<sup>28</sup>

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23. *Strict Liability Crime*, BLACK'S LAW DICTIONARY (10th ed. 2014) (stating that a strict liability crime is "an offense for which the action alone is enough to warrant a conviction, with no need to prove a mental state; a crime that does not require a *mens rea* element").

24. Jennifer Gentile Long & Teresa Garvey, *No Victim? Don't Give Up: Creative Strategies in Prosecuting Human Trafficking Cases Using Forfeiture by Wrongdoing and Other Evidence-Based Techniques*, STRATEGIES: THE PROSECUTORS' NEWSL. ON VIOLENCE AGAINST WOMEN, Nov. 2012, at 1, [http://www.aequitasresource.org/S\\_Issue\\_7\\_No\\_Victim-Dont\\_Give\\_Up.pdf](http://www.aequitasresource.org/S_Issue_7_No_Victim-Dont_Give_Up.pdf) [<https://perma.cc/WM3W-YZEZ>].

25. Heinrich & Sreeharsha, *supra* note 18 (stating that studies show "human trafficking is rarely prosecuted in the United States despite the proliferation of laws.").

26. SHAREDHOPE INT'L, 2015 PROTECTED INNOCENCE CHALLENGE: A LEGAL FRAMEWORK OF PROTECTION FOR THE NATION'S CHILDREN (2015), <http://sharedhope.org/wp-content/uploads/2015/11/PIC2015REPORT2.pdf> [hereinafter 2015 PROTECTED INNOCENCE CHALLENGE] [<https://perma.cc/8J4P-P8ZK>].

27. *Id.*

28. ALA. CODE § 13A-6-152(a)(3) (2017); ARK. CODE ANN. § 5-18-103 (2017); CAL. PENAL CODE § 236.1 (West 2017); COLO. REV. STAT. § 18-3-504 (2017); DEL. CODE ANN. tit 11, § 787 (2017); FLA. STAT. § 787.06(3)(g) (2017); IOWA CODE § 710A.2(8) (2015); LA. REV. STAT. § 14:46.3(C)(2) (2015); MINN. STAT. § 609.352 (2017); MISS. CODE ANN. § 97-3-54.1(a)(c) (2017); MO. REV. STAT. § 566.212(2) (2017); NEV. REV. STAT. ANN. § 201.300 (2017); N.J. STAT. ANN. § 2C:34-1(b)(7) (West 2017); N.C. GEN. STAT. § 14-43.11 (2017); N.D. CENT. CODE § 12.1-40-01(3) (2017); S.C. CODE ANN. § 16-15-425 (2017); S.D. CODIFIED LAWS § 22-24A-5 (2017); *see also* NAT'L DISTRICT ATTORNEYS ASS'N, DOMESTIC MINOR HUMAN SEX TRAFFICKING (CHILD PROSTITUTION) (2015), <http://www.ndaa.org/pdf/Human%20Trafficking%203-3-2015.pdf> [<https://perma.cc/NWX9-98FD>].

Part I describes the many facets of sex trafficking and addresses common misconceptions related to the crime. Part II explains why sex trafficking laws rarely are used in prosecution despite substantial improvements in federal and state sex trafficking laws. Part III poses two solutions that, when combined, will greatly decrease instances of sex trafficking. In seeking to address the issue of sex trafficking, “We should be asking ourselves—what if that victim of trafficking was my daughter, son, sister, or brother? . . . [B]ecause ending modern slavery isn’t just a fight we should attempt—it is a fight we can and must win.”<sup>29</sup> Making sex trafficking a strict liability crime and implementing innovative prosecution strategies equips the United States with the tools it needs to win the fight and finally abolish sex slavery.

#### I. TWENTY-FIRST CENTURY SLAVERY IN THE UNITED STATES

In 1865, Congress passed the Thirteenth Amendment and abolished slavery in the United States.<sup>30</sup> Currently, however, there are more people enslaved than at any other time in the nation’s history.<sup>31</sup> Twenty-first century slavery has evolved into a criminal enterprise of supply and demand, in which financial gain and low conviction rates are the driving forces.<sup>32</sup> Misconceptions surrounding modern-day slavery prevent society and the criminal justice system from seeing the inhumanity that once caused such outrage as to prompt a constitutional amendment.<sup>33</sup>

##### A. *What is Sex Trafficking?*

Human trafficking is an umbrella term for “the act of recruiting, harboring, transporting, providing, or obtaining a person for compelled labor or commercial sex acts through the use of force, fraud, or

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29. TRAFFICKING IN PERSONS REPORT 2016, *supra* note 19 (quoting former Secretary of State John F. Kerry).

30. *13th Amendment to the U.S. Constitution: Abolition of Slavery*, NAT’L ARCHIVES (Sept. 8, 2016), <https://www.archives.gov/historical-docs/13th-amendment> [<https://perma.cc/NJZ2-5H4F>]; *see also* U.S. CONST. amend. XIII.

31. Tony Maddox, *Modern-day Slavery: A Problem That Can’t Be Ignored*, CNN FREEDOM PROJECT (Mar. 4, 2011, 11:17 AM), <http://thecnnfreedomproject.blogs.cnn.com/2011/03/04/modern-day-slavery-a-problem-that-cant-be-ignored/> [<https://perma.cc/DY3K-DXSA>].

32. U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 2007, at 35 (June 2007).

33. *See generally Myths and Misconceptions*, NAT’L HUMAN TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/what-human-trafficking/myths-misconceptions> (last visited Jan. 10, 2017) [<https://perma.cc/TN8X-PLAY>].

coercion.”<sup>34</sup> Human trafficking is the fastest growing and second largest criminal industry in the world after drug dealing.<sup>35</sup> In 2012, the International Labour Organization (“ILO”)<sup>36</sup> reported that an estimated 21 million people globally are victims of human trafficking.<sup>37</sup>

Sex trafficking is a subcategory of human trafficking.<sup>38</sup> Sex trafficking is defined as “the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act.”<sup>39</sup> Sex traffickers use violence, threats, lies, debt bondage, and other forms of coercion to compel individuals to engage in commercial sex<sup>40</sup> acts against their will.<sup>41</sup> Although it may be difficult to believe that slavery is still rampant in the United States, sex trafficking has been reported in every state and the District of Columbia.<sup>42</sup> More specifically, the Department of Justice (“DOJ”) reported that between

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34. *What is Modern Slavery*, U.S. DEP’T OF STATE, <http://www.state.gov/j/tip/what/index.htm> (last visited Nov. 2, 2017) [https://perma.cc/9MBZ-637C].

35. *Look Beneath the Surface*, U.S. DEP’T OF HEALTH AND HUM. SERVS.: ADMIN. FOR CHILDREN AND FAMILIES (Dec. 20, 2016), [http://www.acf.hhs.gov/sites/default/files/orr/social\\_service\\_brochure.pdf](http://www.acf.hhs.gov/sites/default/files/orr/social_service_brochure.pdf) [https://perma.cc/US4T-J7QC].

36. *About the ILO*, INT’L LABOUR ORG., <http://www.ilo.org/global/about-the-ilo/lang--en/index.htm> (last visited Nov. 6, 2017) (stating that the International Labour Organization is a “tripartite [United Nations] agency . . . [that] brings together governments, employers, and workers representatives . . . to set labour standards, develop policies and devise programmes (sic) promoting decent work for all women and men”) [https://perma.cc/YBG2-RP4L].

37. *ILO says forced labour generates annual profits of US \$ 150 billion*, *supra* note 20.

38. *What is Modern Slavery*, *supra* note 34; *see also* TRAFFICKING IN PERSONS REPORT 2016, *supra* note 19 (discussing that human trafficking can take many different forms, including forced labor, debt bondage, domestic servitude, forced child labor, unlawful recruitment and use of child soldiers, sex trafficking, and child sex trafficking).

39. 22 U.S.C. § 7102(10) (2012).

40. § 7102(4) (A commercial sex act is “any sex act on account of which anything of value is given to or received by any person.”); *see also* 18 U.S.C. § 1591(e)(3) (defining a commercial sex act as “any sex act, on account of which anything of value is given to or received by any person”).

41. *Sex Trafficking*, POLARIS PROJECT, <https://polarisproject.org/sex-trafficking> (last visited Nov. 6, 2017) [https://perma.cc/9Q2S-VK4B].

42. NAT’L HUMAN TRAFFICKING RES. CTR., NAT’L HUMAN TRAFFICKING RES. CTR. (NHTRC) DATA BREAKDOWN: UNITED STATES REPORT (2015), [http://traffickingresourcecenter.org/sites/default/files/NHTRC%202015%20United%20States%20Report%20-%20USA%20-%2001.01.15%20-%2012.31.15\\_OTIP\\_Edited\\_06-09-16.pdf](http://traffickingresourcecenter.org/sites/default/files/NHTRC%202015%20United%20States%20Report%20-%20USA%20-%2001.01.15%20-%2012.31.15_OTIP_Edited_06-09-16.pdf) [https://perma.cc/39KC-3QWP].

January 2008 and June 2010, 83% of victims in confirmed sex trafficking incidents in the United States were United States citizens.<sup>43</sup>

### *B. Common Misconceptions*

The crime of sex trafficking is widely misunderstood by the general public as well as by law enforcement and prosecutors.<sup>44</sup> Misconceptions regarding the realities of sex trafficking reduce the ability to address the crime effectively.<sup>45</sup> Although numerous misconceptions exist, this Comment highlights only three.

The first misconception is that minors can voluntarily become prostitutes.<sup>46</sup> The main distinctions between sex trafficking and prostitution are consent and coercion.<sup>47</sup> Coercion, however, is not an element that must be proven when dealing with sex trafficking of minors.<sup>48</sup> Therefore, the only distinction between sex trafficking of minors and prostitution is consent.<sup>49</sup> Individuals below the age of consent, which in Louisiana is 17,<sup>50</sup> cannot

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43. OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS, 2008–2010 (Apr. 2011), <http://www.bjs.gov/content/pub/pdf/cshti0810.pdf> [<https://perma.cc/TB5R-UXM8>].

44. PHYLLIS J. NEWTON ET AL., NAT'L OPINION RES. CTR. (NORC) AT THE U. OF CHI., NORC FINAL REPORT: FINDING VICTIMS OF HUMAN TRAFFICKING vii–ix (2008).

45. *Id.*; see also *Myths and Misconceptions*, *supra* note 33.

46. Throughout this Comment, statistics and data from other sources describe sex trafficking of a minor as “minor prostitution.” That term, however, is not accurate and can be misleading. In the case of both adults and minors, specifically with minors because they are legally unable to consent, prostitution and sex trafficking are not interchangeable terms as many sources suggest. Malika Saada Saar, Op-Ed, *There is no such thing as a child prostitute*, WASH. POST (Feb. 17, 2014), [https://www.washingtonpost.com/opinions/there-is-no-such-thing-as-a-child-prostitute/2014/02/14/631ebd26-8ec7-11e3-b227-12a45d109e03\\_story.html?utm\\_term=.2d1a6ee894e1](https://www.washingtonpost.com/opinions/there-is-no-such-thing-as-a-child-prostitute/2014/02/14/631ebd26-8ec7-11e3-b227-12a45d109e03_story.html?utm_term=.2d1a6ee894e1) [<https://perma.cc/GV9R-4MR7>]; *Prostitution*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining prostitution as “the act or practice of engaging in sexual activity for money or its equivalent; commercialized sex”).

47. See Jo Doezema, *Who Gets to Choose? Coercion, Consent and the UN Trafficking Protocol*, 10 GENDER & DEV. 20, 21 (2002).

48. *Human Trafficking*, NAT'L HUM. TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/type-trafficking/human-trafficking> (last visited Feb. 2, 2018) (stating that it is not necessary to demonstrate force, fraud, or coercion in sex trafficking cases involving minors) [<https://perma.cc/5T7U-4HAL>]; see also 22 U.S.C. § 7102(9)(A) (2012).

49. Compare *Human Trafficking*, *supra* note 48, with Doezema, *supra* note 47.

50. LA. REV. STAT. § 14:80(A)(1) (2017); see also *Legal Age of Consent in All 50 States*, SURVIVOR ALLIANCE, <https://www.thesurvivoralliance.com/forallies>

be considered a “prostitute” because they are legally incapable of consenting to the act.<sup>51</sup> Sex trafficking of a minor is defined as a “severe form of trafficking.”<sup>52</sup> Prostitution, pornography, stripping, escort services, and other sexual services are all forms of sex trafficking when children are involved.<sup>53</sup> Many minor victims are sold on websites, such as Backpage.com, to buyers known as “johns.”<sup>54</sup> To meet the definition of sex trafficking, the crime requires force, fraud, or coercion, unless the victim is under the age of 18.<sup>55</sup> Therefore, any minor used in a commercial sex act is per se a victim of trafficking, regardless of the minor’s willingness or desire to engage in the sex act.<sup>56</sup>

The second misconception is the notion that adults involved in prostitution<sup>57</sup> are acting voluntarily and are personally receiving payment

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/legal-age-consent-50-states/ (last visited Feb. 2, 2018) (showing that the age of consent ranges from 16 to 18 years old, with 16 years of age being the age of consent in the majority of states) [https://perma.cc/4U9B-AMA7].

51. § 14:80(A)(1); *see also* § 7102(9)(A) (indicating that when a victim is under 18 years old, force, fraud, or coercion do not have to be proven for the commercial sex act to be considered sex trafficking).

52. § 14:80(A)(1) (defining a severe form of trafficking as “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age”).

53. NAT’L DISTRICT ATTORNEYS ASS’N, *supra* note 28; *Child Exploitation and Obscenity Section (CEOS): Frequently Asked Questions (FAQS)*, DEP’T OF JUSTICE, <https://www.justice.gov/criminal-ceos/frequently-asked-questions-faqs> (last updated June 3, 2015) (stating that children victimized through prostitution are not typically voluntarily engaging in prostitution and should be considered victims) [https://perma.cc/JDR8-JG2K].

54. *Human Trafficking & Online Prostitution Advertising*, CONGRESSWOMAN ANN WAGNER, <https://wagner.house.gov/Human%20Trafficking%20%26%20Online%20Prostitution%20Advertising> (last visited Nov. 2, 2017) (stating that of the \$45 million in revenue from United States online prostitution advertising in 2013, 82.3% was generated by “Backpage.com, a general classifieds site that has succeeded Craigslist as the nation’s leading publisher of online prostitution advertising.”) [https://perma.cc/FU6W-YKfV]; *Trafficking Terms*, SHAREDHOPE INT’L, <http://sharedhope.org/the-problem/trafficking-terms/> (last visited Nov. 2, 2017) (stating that a “John” is an individual who pays for or trades something of value for sexual acts) [https://perma.cc/7RMJ-6YJA].

55. § 7102(9)(A); *see also* *FAQ’s: What about the girls who choose prostitution? Are they victims of trafficking too?*, SHAREDHOPE INT’L, <http://sharedhope.org/the-problem/faqs/> (last visited Nov. 2, 2017) [https://perma.cc/67EN-JULR].

56. *What about the girls who choose prostitution? Are they victims of trafficking too?*, *supra* note 55.

57. *Prostitution*, BLACK’S LAW DICTIONARY, *supra* note 46.

for their sexual services.<sup>58</sup> In actuality, trafficking victims often are wrongly discounted as consenting adults.<sup>59</sup> A trafficking victim may begin as a consenting prostitute but later is coerced into trafficking through the control of a “pimp.”<sup>60</sup> A victim may appear to be a consenting adult because she believes she is in love with her trafficker, does not self-identify as a victim, is not operating in the vicinity of the trafficker, or is away from the trafficker’s physical control with ample opportunity to ask for help or flee.<sup>61</sup> Individuals in these situations, however, are typically victims of sex trafficking because force, fraud, or coercion is usually present, thus meeting the elements of sex trafficking.<sup>62</sup>

In addition, though a prostitute may currently be an adult, the average age of entry into prostitution is 12 to 14 years old.<sup>63</sup> Therefore, an adult prostitute’s victimization likely began at a very early age, making it extremely difficult—even as an adult—for a victim to escape the control of her trafficker, having suffered years of psychological and physical abuse.<sup>64</sup> Dispelling the belief that an adult who appears to be a prostitute

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58. CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS, 2008–2010, *supra* note 43 (stating that almost 40% of suspected incidents of human trafficking involve allegations of prostitution of an adult or child); *The Link Between Prostitution and Sex Trafficking*, U.S. DEP’T OF STATE (Nov. 24, 2004), <https://2001-2009.state.gov/r/pa/ei/rls/38790.htm> (“[T]he vast majority of women in prostitution don’t want to be there. Few seek it out or choose it, and most are desperate to leave it. A 2003 study ‘found that 89[%] of women in prostitution want to escape.’”) [<https://perma.cc/4KW4-RMTJ>].

59. *Prevention: Fighting Sex Trafficking by Curbing Demand for Prostitution*, U.S. DEP’T OF STATE (June 2011), <https://2009-2017.state.gov/documents/organization/167329.pdf> [<https://perma.cc/J5HE-J4JS>].

60. *Id.*; see also *Street Based: Who are the Traffickers?*, NAT’L HUMAN TRAFFICKING HOTLINE, <https://traffickingresourcecenter.org/sex-trafficking-venuesindustries/street-based> (last visited Nov. 2, 2017) (stating that the traffickers in street-based commercial sex situations often are individual traffickers, more commonly known as “pimps”) [<https://perma.cc/U4LC-APV2>].

61. U.S. DEPT. OF STATE, *TRAFFICKING IN PERSONS REPORT 2013*, at 27 (June 2013), <https://www.state.gov/documents/organization/210737.pdf> [<https://perma.cc/7S3V-66C7>].

62. *Id.*

63. Walker-Rodriguez & Hill, *supra* note 19, at 2–3 (citing RICHARD J. ESTES & NEIL ALAN WEINER, *COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA, AND MEXICO: EXECUTIVE SUMMARY* (U. of Penn. 2001)).

64. *E.g.*, *Fact Sheet: Identifying Victims of Human Trafficking*, OFFICE ON TRAFFICKING IN PERSONS, ADMIN. FOR CHILDREN & FAMILIES, U.S. DEPT. OF HEALTH AND HUMAN SERVS. (Aug. 8, 2012), <https://www.acf.hhs.gov/otip/resource/fact-sheet-identifying-victims-of-human-trafficking> (last visited Jan. 13, 2017) [<https://perma.cc/8HLZ-LSBU>].

is not a victim of sex trafficking is crucial to combating the crime. Accurately identifying the situation as sex trafficking enables citizens to make the needed reports, officers to investigate adequately, and juries and judges to convict the trafficker instead of the victim for prostitution.<sup>65</sup>

The third misconception is that sex trafficking victims primarily come from situations of poverty.<sup>66</sup> Victims come from all socioeconomic backgrounds and races.<sup>67</sup> It is not necessarily poverty that makes a victim vulnerable.<sup>68</sup> A trafficker typically will offer the victim love and attention initially but then will manipulate and eventually force the individual to sell her body.<sup>69</sup> Traffickers prey on the vulnerable, and vulnerable people exist in every socioeconomic class.<sup>70</sup> A judge or jury may doubt that an individual from a wealthy family was actually a victim of sex trafficking and choose to dismiss or lower the charges based on their misunderstanding of the crime.<sup>71</sup> Because victims typically do not self-identify, the

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65. AMY FARRELL ET AL., NE. UNIV. INST. ON RACE AND JUST. & URBAN INST., IDENTIFYING CHALLENGES TO IMPROVE THE INVESTIGATION AND PROSECUTION OF STATE AND LOCAL HUMAN TRAFFICKING CASES EXECUTIVE SUMMARY 8–9 (Apr. 2012), <http://www.in.gov/icw/files/412592-State-and-Local-Human-Trafficking-Cases.pdf> [<https://perma.cc/77AR-WH6N>].

66. *Myths and Misconceptions*, *supra* note 33.

67. *In Our Own Backyard: Child Prostitution and Sex Trafficking in the United States: Hearing on S. Hrg. 111–587 Before the Subcomm. On Human Rights and the Law, 111th Cong. 9* (2010) [hereinafter *In Our Own Backyard*] (statement of Beth Phillips, United States Attorney, Western District of Missouri, Kansas City, Missouri) (“[W]e have found that the victims come from a wide variety of different backgrounds, different socioeconomic backgrounds, different races.”); *Myths & Misconceptions*, *supra* note 33 (“Poverty alone is not a single causal factor or universal indicator of a human trafficking victim. Trafficking victims can come from a range of income levels, and many may come from families with higher socioeconomic status.”).

68. *In Our Own Backyard*, *supra* note 67; *see also*, *Myths & Misconceptions*, *supra* note 33.

69. *In Our Own Backyard*, *supra* note 67, at 7–12.

70. *The Victims & Traffickers*, POLARIS PROJECT, <https://polarisproject.org/victims-traffickers> (last visited Mar. 9, 2018) (“[R]unaway and homeless youth, as well as victims of domestic violence, sexual assault, war or conflict, or social discrimination are [frequent circumstances that lead to vulnerabilities] targeted by traffickers.”) [<https://perma.cc/4Z7W-4X2L>].

71. FARRELL ET AL., *supra* note 65, at 11–12 (stating that there are many “challenges relat[ing] to judges’ reluctance to accept/rule on human trafficking cases and jury bias” and that “[t]here is a serious lack of understanding of the crime of human trafficking among police, prosecutors, judges, and juries . . . . Due to this lack of understanding, when cases that involve elements of human

individual may tell the court she chose to undertake the acts voluntarily or choose not to testify.<sup>72</sup> To address sex trafficking effectively, the general public and the legal community must be taught that a trafficking victim could easily resemble one's sister, daughter, neighbor, or co-worker.

Misconceptions contribute to the lack of prosecution and enforcement of sex trafficking laws. When an officer, prosecutor, judge, or jury member is uninformed about the nature of the crime before him, he is unable to make accurate decisions regarding the trafficker's charges or determine whether a crime was even committed.<sup>73</sup> Educating the public and legal community about sex trafficking combats this evil by increasing the number of arrests and convictions of traffickers, thus decreasing the incentive to sell Holly.<sup>74</sup>

## II. WE HAVE THE LAWS, SO WHERE IS TIM?

Historically, sex trafficking was believed to be so pervasive because countries lacked the necessary laws to address the crime adequately.<sup>75</sup> Over the last 16 years, the United States has developed comprehensive

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trafficking victimization do come to the attention of actors in the criminal justice system, they often go unrecognized.”).

72. E.g., *The Mindset of a Human Trafficking Victim*, DEP'T OF HEALTH & HUMAN SERVS., [https://www.acf.hhs.gov/sites/default/files/orr/understanding\\_the\\_mindset\\_of\\_a\\_trafficking\\_victim\\_1.pdf](https://www.acf.hhs.gov/sites/default/files/orr/understanding_the_mindset_of_a_trafficking_victim_1.pdf) (last visited Mar. 31, 2018) (“Many victims do not self-identify as victims. They also do not see themselves as people who are homeless or as drug addicts who rely on shelters or assistance.”) [<https://perma.cc/XL34-UVMQ>]; LINDA A. SMITH ET AL., SHAREDHOPE INT’L, THE NAT’L REPORT ON DOMESTIC MINOR SEX TRAFFICKING: AMERICA’S PROSTITUTED CHILDREN 13 (May 2009), [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) (“60% of [commercial sexual exploitation of children] cases involving prostitution of a minor presented to the U.S. Attorney’s Offices were declined for prosecution.”) [<https://perma.cc/YZ72-452R>].

73. FARRELL ET AL., *supra* note 65, at 8–12.

74. Adolfo Flores, *Arrests related to human trafficking on the rise in O.C.*, *report says*, L.A. TIMES (Aug. 7, 2014), <http://www.latimes.com/local/lanow/la-me-ln-oc-human-trafficking-related-arrests-20140806-story.html> (stating that arrests more than doubled between 2011–2013 in Orange County, California and that the increase is “because of the increase in awareness and education in law enforcement”) [<https://perma.cc/2KSK-CAVX>]; Lex Talamo, *Law enforcement’s response to sex trafficking*, SHREVEPORT TIMES, May 24, 2016, <https://www.shreveporttimes.com/story/news/watchdog/trafficking/2016/05/24/law-enforcements-response-sex-trafficking/83538240/> (“Federal, state and local law enforcement have a new awareness of human trafficking and have seen an 86 percent increase in the cases identified between 2014 to 2015.”) [<https://perma.cc/QWQ2-G6WW>].

75. See 22 U.S.C. § 7101(b)(14)–(20) (2012).

federal and state laws in an effort to eradicate sex trafficking.<sup>76</sup> Data indicates that despite having these laws in place, there is a substantial lack of prosecutions in relation to the magnitude of reported sex trafficking instances.<sup>77</sup>

#### A. Federal Sex Trafficking Laws

In 2000, Congress passed the Trafficking Victims Protection Act (“TVPA”), creating the first comprehensive federal law to address trafficking.<sup>78</sup> The TVPA provides a three-pronged approach to combat trafficking—prevention, protection, and prosecution.<sup>79</sup> Before the enactment of the TVPA, traffickers were punished under laws applying to lesser offenses, such as forcible rape, kidnapping, and fraud.<sup>80</sup> Congress determined that the laws for lesser offenses were inadequate to eliminate sex trafficking because the laws failed to impose sufficient penalties for the crime committed, which led Congress to enact specific sex trafficking statutes.<sup>81</sup>

Since 2000, Congress has passed four Trafficking Victims Protection Reauthorization Acts (“TVPRAs”).<sup>82</sup> Although it is beyond the scope of this Comment to address each reauthorization, four provisions contained in the 2008 Act are pertinent. First, the 2008 Act expanded several criminal

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76. § 7101(b)(14) (stating that as of October 28, 2000, “No comprehensive law exists in the United States that penalizes the range of offenses involved in the trafficking scheme.”).

77. See Amy Farrell et al., *The Prosecution of State-Level Human Trafficking Cases in the United States*, 6 ANTI-TRAFFICKING REV. 48–70 (2016), [http://gaatw.org/ATR/AntiTraffickingReview\\_issue6.pdf](http://gaatw.org/ATR/AntiTraffickingReview_issue6.pdf) [<https://perma.cc/E59C-2CEU>].

78. § 7101(b)(14) (stating that as of October 28, 2000, “No comprehensive law exists in the United States that penalizes the range of offenses involved in the trafficking scheme,” which led to the passage of the TVPA. The TVPA includes 22 U.S.C. §§ 7101–7110, Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, 114 Stat. 1464).

79. §§ 7101–7114; see also Walker-Rodriguez & Hill, *supra* note 19, at 2–3.

80. § 7101(b)(9)–(10), (14)–(15).

81. *Id.* (leading to the passage of 18 U.S.C. §§ 1591, 2421–2423).

82. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113–4, § 2, tit. XII, 127 Stat. 54, 136–60; William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110–457, 122 Stat. 5044; Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109–164, 119 Stat. 3558; Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108–193, 117 Stat. 2875.

provisions, including removing the knowledge-of-age requirement<sup>83</sup> in certain instances involving minors.<sup>84</sup> Second, the Act lowered the knowledge standard of proof from “knowing” to “reckless disregard” of the use of force, fraud, or coercion in causing a person to engage in commercial sex.<sup>85</sup> Third, the Act placed human trafficking crimes in the most serious crime category for states’ mandatory crime reports, which are sent monthly to the Federal Bureau of Investigation (“FBI”).<sup>86</sup> Fourth, the 2008 TVRPA requires states to report prostitution and vice crimes<sup>87</sup> separately to the FBI and ordered the DOJ to create a model state anti-trafficking statute.<sup>88</sup> The TVPRAs, and specifically these four provisions, evidence the federal government’s substantial improvements and efforts in addressing sex trafficking.

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83. The knowledge-of-age requirement was an element of the crime of sex trafficking that required the prosecution to prove the defendant trafficker knew or should have known that the victim was a minor. Removing the knowledge-of-age requirement from the federal law makes sex trafficking of a minor a strict liability crime. *See* *State v. Sims*, 195 So. 3d 441, 444 (La. 2016) (“Although strict liability criminal offenses are generally disfavored, this Court has recognized a legislature’s authority to exclude the element of knowledge or intent in defining a criminal offense.”).

84. William Wilberforce Trafficking Victims Protection Reauthorization Act; *Trafficking Victims’ Protection Act—Fact Sheet*, POLARIS PROJECT, <https://na4.salesforce.com/sfc/p/#300000006E4S8BPMayCvVPSIRhm2BionQ2HiFHY=https://perma.cc/ZX8F-LUKX>.

85. William Wilberforce Trafficking Victims Protection Reauthorization Act; *Trafficking Victims’ Protection Act – Fact Sheet*, *supra* note 84.

86. William Wilberforce Trafficking Victims Protection Reauthorization Act; *see also Trafficking Victims’ Protection Act—Fact Sheet*, *supra* note 84 (stating that the two-principle state reporting mechanisms are the Uniform Crime Reporting (“UCR”) and the National Incident-Based Reporting System (“NIBRS”)); *Uniform Crime Reporting*, FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov> (last visited Nov. 2, 2017) [<https://perma.cc/FT3D-V3CY>]; *Data Quality Guidelines*, FED. BUREAU OF INVESTIGATION, [https://ucr.fbi.gov/data\\_quality\\_guidelines](https://ucr.fbi.gov/data_quality_guidelines) (last visited Dec. 26, 2017) [<https://perma.cc/N3QD-ENWR>].

87. Vice crime is a generic legal term used to describe offenses of an immoral nature, such as prostitution and pornography. *Vice Crime*, USLEGAL, <https://definitions.uslegal.com/v/vice-crimes/> (last visited Nov. 2, 2017) [<https://perma.cc/T96F-P4NN>].

88. *Trafficking Victims’ Protection Act—Fact Sheet*, *supra* note 84, at 4.

### B. State Sex Trafficking Laws

Although the federal response to sex trafficking continues to improve, states have a significant role to play in combating the problem.<sup>89</sup> State and local government agencies are more likely to lead sex trafficking investigations, with federal agencies leading only seven percent of the cases.<sup>90</sup> Because states typically lead the investigations, state law must adequately and consistently meet the needs of attorneys prosecuting traffickers, and victims must be provided the necessary services to aid their recovery.<sup>91</sup>

The TVRPA initiated a program that authorizes funding through the DOJ to assist state and local law enforcement with their efforts to combat trafficking.<sup>92</sup> With the funding assistance, many jurisdictions have created a human trafficking task force.<sup>93</sup> Additionally, reports generated under the TVRPA showed that states could not rely simply on federal law but required their own anti-sex trafficking laws to address the crime effectively.<sup>94</sup> In response, Washington and Texas passed the first state anti-trafficking laws in 2003.<sup>95</sup> Louisiana, however, is now leading the fight against sex trafficking.<sup>96</sup>

According to the Shared Hope International (“Shared Hope”) grading system, Louisiana’s sex trafficking laws are more comprehensive and proactive than any other state’s laws.<sup>97</sup> Shared Hope is a non-profit anti-

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89. *A Look Back: Building a Human Trafficking Legal Framework*, POLARIS PROJECT (2014), <https://polarisproject.org/sites/default/files/2014-Look-Back.pdf> [<https://perma.cc/BA7F-9GER>].

90. CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS, 2008–2010, *supra* note 43.

91. *See, e.g., Service Providers*, NAT’L HUM. TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/audience/service-providers> (last visited Nov. 2, 2017) (stating that survivors of human trafficking “often have ongoing, complex needs, including case management, shelter, legal services, and mental health care”) [<https://perma.cc/4N6P-ARRG>].

92. Walker-Rodriguez & Hill, *supra* note 19, at 2–3.

93. *Id.*

94. *A Look Back: Building a Human Trafficking Legal Framework*, *supra* note 89. *See* CHARLES DOYLE, CONG. RESEARCH SERV., R43597, SEX TRAFFICKING: AN OVERVIEW OF FEDERAL CRIMINAL LAW, Summary (June 25, 2015) (showing that though sex trafficking is a state crime, federal law only makes sex trafficking a crime when it affects interstate or foreign commerce or involves travel in interstate or foreign commerce).

95. *Id.*

96. 2015 PROTECTED INNOCENCE CHALLENGE, *supra* note 26.

97. *See id.*

sex trafficking organization that develops prevention strategies, restoration programs, and justice initiatives to combat modern-day slavery around the globe.<sup>98</sup> One such initiative is Shared Hope's Protected Innocence Challenge.<sup>99</sup> Under the Protected Innocence Challenge, every state receives a report card evaluating the sufficiency of its laws regarding domestic minor sex trafficking.<sup>100</sup> Shared Hope uses the report cards to address the implementation of each state's enacted laws.<sup>101</sup>

The Shared Hope report cards have led state legislatures to create and improve their laws in an effort to combat sex trafficking in their states more effectively.<sup>102</sup> In the 2015 Protected Innocence Report, Louisiana scored a 99.5-A<sup>103</sup>—the highest score awarded in the report and the highest ever received by any state.<sup>104</sup> Only four years earlier, in 2011, Louisiana received a 70-C.<sup>105</sup>

Many states' laws, however, are still inadequate. In 2015, 11 states received a D, 13 states received a C, 21 states received a B, and only 6 states received an A.<sup>106</sup> New York and California, two highly populated

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98. *Our Story*, SHAREDHOPE INT'L (2015), <http://sharedhope.org/wp-content/uploads/2014/06/Shared-Hope-Fact-Sheet.pdf> (stating that Shared Hope International is a non-profit organization established in 1998 by United States Congresswoman Linda Smith to eradicate sex trafficking) [<https://perma.cc/TJJ2-DNRZ>].

99. *About Us: December 2011 First Annual Protected Innocence Challenge Report Cards*, SHAREDHOPE INT'L (2015), <http://sharedhope.org/about-us/our-story/> [<https://perma.cc/W7B6-U7JV>].

100. *Id.*

101. 2015 PROTECTED INNOCENCE CHALLENGE, *supra* note 26, at 10–16. Shared Hope evaluates states on the basis of the following six points of law: (1) criminalization of domestic minor sex trafficking; (2) criminal provisions addressing demand; (3) criminal provisions for traffickers; (4) criminal provisions for facilitators; (5) protective provisions for the child victims; and (6) tools for investigation and prosecution. *Id.* at 23. For a detailed description of each group, see *id.* at 23–27.

102. *Id.* at 1.

103. The Protected Innocence Legislative Framework assigns a point value of 0 to 2.5 based on a written point allocation scheme to account for the critical elements of the six components. See *id.* at 27. The points within each of the six areas are totaled to determine a final number for each state. *Id.* The total is then given a corresponding letter grade: A (90–102.5), B (80–89), C (70–79), D (60–69), F (0–59). *Id.* The letter grades reflect the level of protection provided by the laws in the respective state in domestic minor sex trafficking cases. The report also provides a short analysis of each state's legislation. *Id.*

104. *Id.* at 10–14.

105. *Id.* at 11.

106. *Id.* at 16.

states,<sup>107</sup> were among those receiving Ds.<sup>108</sup> Four states—South Dakota, New Hampshire, Maine, and Hawaii—tied for last place and received a 62.5-D.<sup>109</sup> The fact that nearly half of the states in the United States scored a C or below confirms that further action is required to protect victims adequately and prosecute traffickers sufficiently at the state level.<sup>110</sup> Further, even in states that have adequate laws, the enforcement of those laws presents a major shortcoming in effectively addressing sex trafficking at the state level.<sup>111</sup>

### C. *The Laws in Action*

Despite having nearly 16 years of anti-sex trafficking legislation in place, few cases are prosecuted under these laws.<sup>112</sup> Low prosecution rates are one of the primary reasons why sex trafficking is so pervasive.<sup>113</sup> When a trafficker is not adequately punished for his crime, his “costs” of doing business remain low and his “benefits” remain high.<sup>114</sup> Low prosecution rates stem from the immense challenges faced by law enforcement and prosecutors in sex trafficking cases.<sup>115</sup>

#### 1. *Cost-Benefit Analysis*

From a business model standpoint, a cost-benefit analysis demonstrates why sex trafficking is so prevalent despite comprehensive federal and state anti-sex trafficking legislation.<sup>116</sup> The product involved in sex

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107. *US States - Ranked by Population 2018*, WORLD POPULATION REVIEW, <http://worldpopulationreview.com/states/> (last visited Dec. 26, 2017) [<https://perma.cc/PA4Q-WKB2>].

108. *Id.* (showing New York received a 66-D and California received a 65.5-D).

109. *Id.*

110. *Id.*

111. Lex Talamo, *Louisiana's Anti-Trafficking Laws Lack Teeth*, SHREVEPORT TIMES (May 23, 2016), <http://www.shreveporttimes.com/story/news/watchdog/2016/05/22/louisianas-anti-trafficking-laws-lack-teeth/83026928/> (State Senator Ronnie Johns stating that “[o]ver the course of the last four years, we have been recognized as having some of the best laws in the state. The problem comes with enforcement.”) [<https://perma.cc/6U7E-SU6M>]; *see also* Farrell et al., *supra* note 77.

112. *See* Farrell et al., *supra* note 77.

113. *See, e.g.*, LOUISE SHELLEY, *HUMAN TRAFFICKING: A GLOBAL PERSPECTIVE* 3 (Cambridge Univ. Press 2009).

114. *Cf. id.*

115. FARRELL ET AL., *supra* note 65.

116. Siddharth Kara, *Supply and Demand: Human Trafficking and the Global Economy*, HARVARD INT’L REV. (Summer 2011) (on file with author).

trafficking—a person—provides criminals with four cost-benefit incentives to commit sex trafficking as opposed to another crime: (1) high profits; (2) low startup cost; (3) low probability of arrest; and (4) low prosecution rates.<sup>117</sup>

First, the product involved in sex trafficking produces substantial profits. Of the \$150 billion in annual profits generated by human trafficking, \$99 billion comes from the sex trafficking industry.<sup>118</sup> Victims typically are given a quota by their trafficker of 10 to 15 buyers per night, though some victims are sold to as many as 45 buyers per night at peak demand times, such as during sporting events or conventions.<sup>119</sup> Shared Hope conservatively estimates that a victim purchased for sex acts by five men per night, for five nights per week, for an average of five years, would be raped by 6,000 buyers during the course of her victimization.<sup>120</sup> If each buyer pays \$150, as in Holly's case, the trafficker will receive \$900,000 in five years from one victim. A drug dealer is estimated to make only \$125,000 in five years.<sup>121</sup> With such high “benefits,” it is evident why Tim, and many others, choose to sell Holly instead of Molly.

Second, there is virtually no startup cost with sex trafficking.<sup>122</sup> For example, a drug dealer selling Molly typically needs to make an initial purchase to buy the drug and, after each sale, must make another purchase to replenish the product.<sup>123</sup> A criminal in the “business” of sex trafficking,

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117. See, e.g., SHELLEY, *supra* note 113.

118. *Economics of Forced Labour*, INT'L LABOUR ORG. (May 20, 2014), [http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_243201/lang-en/index.htm](http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_243201/lang-en/index.htm) [<https://perma.cc/T3DF-DGYD>].

119. SHAREDHOPE INT'L, THE NATIONAL REPORT ON DOMESTIC MINOR SEX TRAFFICKING: AMERICA'S PROSTITUTED CHILDREN 20 (May 2009), [http://sharedhope.org/wp-content/uploads/2012/09/SHI\\_National\\_Report\\_on\\_DMST\\_2009with\\_out\\_cover.pdf](http://sharedhope.org/wp-content/uploads/2012/09/SHI_National_Report_on_DMST_2009with_out_cover.pdf) [<https://perma.cc/PXU5-YR3F>].

120. *Id.*

121. Steven D. Levitt & Sudhir Alladi Venkatesh, *An Economic Analysis of Drug-selling Gang's Finances*, Q. J. OF ECON. 755, 756 (2000) (estimating a drug dealer's mean annual income to be \$20,000–\$30,000).

122. Michael J. Frank & G. Zachary Terwilliger, *Gang-Controlled Sex Trafficking*, 3 VA. J. CRIM. L. 342, 348–49 (2015).

123. *Id.* at 348–49, 349 n.22 (“Natural barriers to entry are significantly higher in some criminal industries than others. Differences in startup costs are an important determinant of these barriers. Startup costs include physical capital, labor, and human capital; requirements that would-be criminals must satisfy to engage in their desired enterprise.’ For sex traffickers, those barriers are paltry, particularly in comparison to their likely profits.” (quoting Peter T. Leeson & Douglas B. Rogers, *Organizing Crime*, 20 SUP. CT. ECON. REV. 89, 94 (2012))).

however, is not required to make an initial investment because there is no need to buy the product—the victim—from a supplier. Traffickers can sell their product over and over again, eliminating the need to make additional purchases after each sale.

Third, the product involved in sex trafficking provides a low probability of arrest.<sup>124</sup> The probability of arrest is significantly lower in sex trafficking because officers are unable to detect the illegal product.<sup>125</sup> Because victims of sex trafficking typically do not self-identify as victims or are under such extensive fear and manipulation from the trafficker, they are unlikely to alert officers of a crime.<sup>126</sup> In comparison with someone in possession of Molly, the illegal substance is detectable, making it evident a crime has been committed.<sup>127</sup> Even in cases in which an arrest is made, the inability to detect a crime in instances of sex trafficking leaves prosecutors with insufficient evidence to present at trial, rendering them unlikely to prosecute the trafficker.<sup>128</sup>

Fourth, the particular product involved in sex trafficking fosters low prosecution rates.<sup>129</sup> In a sex trafficking case, a successful prosecution often turns on the testimony of a child who has suffered severe forms of physical and psychological abuse at the hands of her trafficker.<sup>130</sup> Often,

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124. *Id.* at 356.

125. *Id.* at 356–57.

126. Robert Moossy, *Sex Trafficking: Identifying Cases and Victims*, NAT'L INST. OF JUSTICE, <https://www.nij.gov/journals/262/pages/sex-trafficking.aspx> (last visited Dec. 26, 2017) (showing that during a routine trafficking stop, even when an officer sees a female who appears fearful of a person in the vehicle, the officer likely is unable to characterize the situation) [<https://perma.cc/8QSZ-MNJX>].

127. Frank & Terwilliger, *supra* note 122, at 356–57.

128. *Id.* at 361–62 (“[T]estimony from sex trafficking victims is crucial to successfully prosecuting [sex trafficking] cases.”).

129. Compare HEATHER J. CLAWSON ET AL., NAT'L INST. OF JUSTICE, ICF INT'L, PROSECUTING HUMAN TRAFFICKING CASES: LESSONS LEARNED AND PROMISING PRACTICES iii (June 2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/223972.pdf> (showing only 289 cases were prosecuted under the TVPA between 2000 and 2007) [<https://perma.cc/2585-EY5D>], with *Underground Commercial Sex Economy: Report Sheds New Light on Sex Trafficking Industry in US*, POLARIS PROJECT (Mar. 12, 2014), <https://polarisproject.org/news/press-releases/underground-commercial-sex-economy-report-sheds-new-light-sex-trafficking> (reporting that the National Human Trafficking Resource Center has received almost 15,000 reports of human trafficking cases since 2007) [<https://perma.cc/5ADS-7WV2>].

130. Frank & Terwilliger, *supra* note 122, at 361–62 (“[T]estimony from sex trafficking victims is crucial to successfully prosecuting [sex trafficking] cases.”); *In Our Own Backyard*, *supra* note 67 (statement of Beth Phillips, U.S. Attorney, W. Dist. of Mo., Kansas City, Missouri).

however, victims cannot be located for trial or are unwilling to testify against their trafficker because they are in love with their abuser.<sup>131</sup> The bond a victim feels toward her abuser is known as Stockholm Syndrome and is similar to what domestic violence victims experience.<sup>132</sup> The victim also may lack a supportive family structure or may have become addicted to drugs.<sup>133</sup> Many children feel ashamed and distrustful or even feel that no wrong has been committed against them.<sup>134</sup> Without the victim's testimony, prosecutors have little to no evidence to present at trial. Low

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131. FARRELL ET AL., *supra* note 65, at 201 (stating that one of the main reasons why gaining victim/witness cooperation is so difficult is because of the victim's unconditional love for the trafficker); Wendy L. Patrick, *Human Trafficking: Psychology of Recruitment*, PSYCH. TODAY (Jan. 13, 2014), <https://www.psychologytoday.com/blog/why-bad-looks-good/201401/human-trafficking-psychology-recruitment> ("Many trafficking victims have been seduced into their circumstances by traffickers posing as adoring suitors, and have stayed in their situation out of love for their abuser. Accordingly, the relationships between human traffickers and their victims often masquerade as consensual relationships of love and affection. . . . Similar to grooming techniques used by child molesters, the use of professed love and attention in the recruitment process is an easier method of manipulation than force or violence due to the strong emotional bond victims form with their offenders.") [<https://perma.cc/WAR3-LQ6S>].

132. See SMITH ET AL., *supra* note 72, at 35, 40–44; Dorchen A. Leidholdt, *Human Trafficking and Domestic Violence A Primer for Judges*, 52 JUDGES' J. (ABA) 16, 17 (2013), [http://www.americanbar.org/publications/judges\\_journal/2013/winter/human\\_trafficking\\_and\\_domestic\\_violence\\_a\\_primer\\_for\\_judges.html](http://www.americanbar.org/publications/judges_journal/2013/winter/human_trafficking_and_domestic_violence_a_primer_for_judges.html) (last visited Nov. 6, 2017) [<https://perma.cc/VB7W-U3QK>]; ELLIOTT GLUCK AND RRICHA MATHUR, STATE POL'Y ADVOCACY AND REFORM CTR., CHILD SEX TRAFFICKING AND THE CHILD WELFARE SYSTEM (July 2014), <http://childwelfareparc.org/wp-content/uploads/2014/07/Sex-Trafficking-and-the-Child-Welfare-System.pdf> ("In addition to trauma due to sexual abuse, trafficked children and youth often form emotional bonds with their trafficker, making it difficult to realize when they are being exploited. Victims may make progress in rehabilitating their lives, only to leave their support system and go back to their abuser. Researches have identified this positive feeling by a victim towards an abuser as Stockholm syndrome and have found that trafficked children and youth often display its characteristics.") [<https://perma.cc/Q2GE-3SRG>]; Lisa Marie Jenkins, *Human Sex-Trafficking, A Collective Negligence*, HUFF. POST (Jan. 12, 2017), [https://www.huffingtonpost.com/lisa-marie-jenkins/human-sextrafficking-a-co\\_b\\_8964396.html](https://www.huffingtonpost.com/lisa-marie-jenkins/human-sextrafficking-a-co_b_8964396.html) (stating that child victims of sex trafficking "will often develop Stockholm syndrome, identifying with their abuser and don't know how to get out or even want to get out, as they are full of shame and are trapped by the belief that this is love") [<https://perma.cc/5L7H-EHAX>].

133. *In Our Own Backyard*, *supra* note 67.

134. *Id.*

prosecution rates regarding sex trafficking crimes stem from the challenges faced by law enforcement and prosecutors in the course of investigating and prosecuting sex trafficking cases.<sup>135</sup>

## 2. Challenges Faced by Prosecutors and Law Enforcement

Sex trafficking cases present many unique challenges for prosecutors and law enforcement. Along with the inability to detect illegal activity and insufficient evidence to present at trial, they lack familiarity with sex trafficking laws.<sup>136</sup> This lack of familiarity leads prosecutors to dismiss or reduce the trafficker's charges, only exacerbating the problem.<sup>137</sup>

Though many states' laws provide adequate penalties for sex trafficking offenses, the trafficker is usually not prosecuted under those laws, making the penalty ineffective.<sup>138</sup> In the United States, prosecutors have considerable discretion in deciding what charges to bring against a defendant and "[r]esearch suggests that prosecutors commonly make charging decisions based on the likelihood of conviction."<sup>139</sup> A prosecutor's assessment of whether a case is likely to result in a conviction is based on factors like the strength of the evidence against the defendant, suspect and victim characteristics, and the victim's relationship to the suspect.<sup>140</sup>

After assessing the possibility of securing a conviction in a sex trafficking case, prosecutors typically choose either to dismiss the charges or charge the trafficker with a lesser crime they deem to be more likely to result in a conviction.<sup>141</sup> Thus, the prosecutor's decision to dismiss or reduce the charges renders sex trafficking laws—no matter how comprehensive—largely ineffective in combating the crime. A primary factor contributing to the prosecutor's incorrect charging decision, as well

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135. Long & Garvey, *supra* note 24; Farrell et al., *supra* note 77.

136. Farrell et al., *supra* note 77, at 52–53.

137. See SMITH ET AL., *supra* note 72, at 13 (“[P]rosecutors continue to apply more familiar laws—commercial sexual exploitation of children [“CSEC”] and other sexual abuse laws—many of which carry lesser penalties.”).

138. See Elizabeth M. Wheaton et al., *Economics of Human Trafficking*, INT’L MIGRATION 116, 122, 130–36 (2010), <https://www.amherst.edu/media/view/247221/original/Economics+of+Human+Trafficking.pdf> [<https://perma.cc/SS86-VQHE>].

139. Farrell et al., *supra* note 77, at 51.

140. *Id.* at 52.

141. See SMITH ET AL., *supra* note 72, at 13 (“[P]rosecutors continue to apply more familiar laws—commercial sexual exploitation of children [“CSEC”] and other sexual abuse laws—many of which carry lesser penalties.”).

as the ineffectiveness of sex trafficking laws, is a lack of familiarity with these laws by prosecutors and law enforcement.<sup>142</sup>

Even when sufficient evidence exists to pursue prosecution, prosecutors may still dismiss the charges.<sup>143</sup> Prosecutors are more likely to dismiss charges when they are unsure of a case's processing norms, such as routine charges, plea agreements, how a jury will perceive victims or witnesses, and punishment.<sup>144</sup> A prosecutor's lack of familiarity with sex trafficking crimes and laws make him less likely to be able to predict how a judge or jury will interpret the evidence or perceive the victims.<sup>145</sup> Trafficking laws are also difficult to navigate and require evidence that prosecutors and officers are not accustomed to obtaining.<sup>146</sup> One prosecutor stated that "trafficking law hasn't been used that much, so, as a prosecutor, you don't want to be the only one using it, and all of a sudden your case doesn't go forward."<sup>147</sup> The lack of knowledge as to the case's processing norms, combined with the difficulty of navigating the statutes, causes prosecutors to shy away from prosecuting sex trafficking cases.<sup>148</sup>

The challenges posed in the prosecution and enforcement of trafficking laws, along with the low "costs" and high "benefits" incurred by the trafficker, reveal why sex trafficking is so pervasive despite legislative attempts to remedy the problem. Adequate laws and innovative strategies are needed to assist prosecutors and law enforcement in countering the high incentives and low repercussions involved in selling Holly as opposed to selling Molly.

### III. RETHINKING HOW TO STOP TIM FROM SELLING HOLLY

In assessing state level sex trafficking laws, two problems become apparent. First, nearly half of the states still do not have adequate laws.<sup>149</sup> Second, the states that do have adequate laws are not prosecuting offenders under those laws.<sup>150</sup> Making sex trafficking a strict liability crime would address both of these issues. Though imposing strict liability will greatly aid prosecutors combating sex trafficking, this change alone is not

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142. *See id.*

143. Farrell et al., *supra* note 77, at 52–53.

144. *Id.*

145. *Id.* at 53.

146. *Id.* at 60.

147. *Id.*

148. *Id.*

149. 2015 PROTECTED INNOCENCE CHALLENGE, *supra* note 26, at 16.

150. Farrell et al., *supra* note 77, at 48, 60–62.

sufficient. To secure a conviction against a trafficker, prosecutors also need a new approach as to how they build their case.

### A. *The Need for a Stricter Approach*

The first step in eradicating sex trafficking is to make sex trafficking a strict liability crime. In criminal law, criminal liability is determined by the presence of both *mens rea* and *actus reus*.<sup>151</sup> *Mens rea* is the mental state required for a crime, and *actus reus* is the physical conduct required for the crime.<sup>152</sup> A strict liability crime is “an offense for which the action alone is enough to warrant a conviction, with no need to prove a mental state; a crime that does not require a *mens rea* element.”<sup>153</sup> Once the conduct element, the *actus reus*, has been satisfied, the offender is guilty of the crime, regardless of whether he knew or should have known the action was illegal.<sup>154</sup> The Supreme Court has stated that a *mens rea* component is necessary to distinguish legal conduct from wrongful conduct; thus, courts generally disfavor strict liability crimes.<sup>155</sup>

Statutory rape, along with public welfare offenses,<sup>156</sup> has long been held as one of the exceptions to the *mens rea* requirement.<sup>157</sup> Statutory rape is “unlawful sexual intercourse with a person under the age of consent (as defined by statute), regardless of whether it is against that person’s will.”<sup>158</sup> Though states use different terms to refer to the conduct, every state imposes

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151. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 85 (2012) (“[C]rimes have two components: the ‘*actus reus*,’ the physical or external portion of the crime; and the ‘*mens rea*,’ the mental or internal feature.”).

152. See *id.*

153. *Strict Liability Crime*, BLACK’S LAW DICTIONARY, *supra* note 23.

154. *Criminal Law*, CORNELL U. LAW SCH. (2016), [https://www.law.cornell.edu/wex/criminal\\_law](https://www.law.cornell.edu/wex/criminal_law) [<https://perma.cc/QFE5-MM8B>].

155. *United States v. X-Citement Video*, 513 U.S. 64, 72–73, 72 n.3 (1994).

156. Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 56 n.5 (1933) (“The term, ‘public welfare offenses,’ is used to denote the group of police offenses and criminal nuisances, punishable irrespective of the actor’s state of mind,” thus a crime punishable without proof of a *mens rea*.).

157. See *Morrisette v. United States*, 342 U.S. 246, 251 n.8 (1952) (illustrating that in 1952, statutory rape became a strict liability crime); DRESSLER, *supra* note 151, at 147 (stating that perhaps the most common example of a non-public welfare offense that is characterized as strict liability is statutory rape and that “Congress and state legislatures began to enact laws, most of which contained no express *mens rea* requirement, that came to be characterized as ‘public welfare offenses,’” and “[n]otwithstanding the presumption against strict criminal liability, courts frequently authorize it in the case of public welfare offenses.”).

158. *Statutory Rape*, BLACK’S LAW DICTIONARY (10th ed. 2014).

criminal liability for sexual intercourse or sexual contact with a minor.<sup>159</sup> In most states, statutory rape is a strict liability crime, requiring no “consciousness of wrongdoing.”<sup>160</sup> There are two rationales for making statutory rape a strict liability crime: first, regardless of the minor’s voluntary participation in the act, the minor is legally incapable of consenting; and second, the state has an interest in enforcing morality and protecting its minor citizens.<sup>161</sup>

Similar principles apply to the crime of sex trafficking of a minor. At its most basic level, sex trafficking of a minor is statutory rape.<sup>162</sup> A minor is legally unable to consent to commercial sex acts just as she is unable to consent to non-commercial sex acts.<sup>163</sup> Therefore, when a trafficker sells a minor to a john, the john is committing statutory rape, and the trafficker is soliciting, organizing, and profiting from the rape. The fact that something of value was exchanged in the commercial context is irrelevant. Like rape, sex trafficking is a criminal offense, regardless of the victim’s age.<sup>164</sup> A lengthier sentence for a trafficker who victimizes a minor should be considered a “cost of doing business,” or as Chief Justice Rehnquist stated, it is reasonable for the offender to bear the “risk of error.”<sup>165</sup> Imposing strict liability on sex trafficking would increase the cost of doing business as a trafficker because it would increase the chances of receiving punishment for the crime, thus decreasing the incentive to sell Holly.<sup>166</sup>

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159. ASAPH GLOSSER ET AL., LEWIN GRP., STATUTORY RAPE: A GUIDE TO STATE LAWS AND REPORTING REQUIREMENTS 6–7 (2004), <https://pdfs.semanticscholar.org/e033/91f984cd7134f06312951b0aa56b31ebd727.pdf> [<https://perma.cc/95R3-P3RY>].

160. See Sandra Norman-Eady, *Statutory Rape Laws by State*, OLR RES. REPORT (Apr. 14, 2003), <https://www.cga.ct.gov/2003/olrdata/jud/rpt/2003-r-0376.htm> [<https://perma.cc/4TWB-95C6>]; see also Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 345 (2003) (identifying states that require some scienter element for statutory rape under the true crime model).

161. See Carpenter, *supra* note 160, at 334–35.

162. Compare *Statutory Rape*, BLACK’S LAW DICTIONARY, *supra* note 158, with 18 U.S.C. § 1591 (2012).

163. See LA. REV. STAT. § 14:80 (2017) (suggesting that there is no differentiation between commercial and non-commercial sex acts).

164. Compare Norman-Eady et al., *supra* note 160, with 22 U.S.C. § 7102 (2012) [<https://perma.cc/UYL9-B57U>].

165. *United States v. X-Citement Video*, 513 U.S. 64, 76 n.5 (1994) (stating that because producers of child pornography interact with the victims, it is reasonable for the producers to bear the “risk of error” in determining the individual’s age).

166. Although the john, and many times the trafficker as well, could be charged with statutory rape as opposed to sex trafficking, the punishment imposed for

Further, when compared to statutory rape, there is an even greater justification for implementing strict liability in sex trafficking crimes. Sex trafficking is a criminal industry, driven by the economic theory of supply and demand.<sup>167</sup> Though the federal government can prosecute those persons who seek commercial sex acts performed by minors—representing the “demand” side—investigating and prosecuting traffickers who provide the supply is imperative to address the crime adequately.<sup>168</sup> Without making sex trafficking a strict liability crime, the burden on prosecutors to prove the *mens rea* element is typically too great to secure a conviction.<sup>169</sup> Therefore, just as statutory rape is a strict liability crime, there is even greater justification for strict liability in sex trafficking because it assists in combating a criminal industry.

Strict liability offenses, however, generally are disfavored because they lack the *mens rea* requirement.<sup>170</sup> Many scholars and commentators have expressed concerns about punishing a person without requiring the individual to demonstrate a culpable state of mind.<sup>171</sup> There is also the concern that strict liability violates a person’s Fifth Amendment right to Due Process.<sup>172</sup> The United States Supreme Court, however, repeatedly has upheld strict liability crimes and their constitutionality.<sup>173</sup>

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statutory rape is not adequate to deter the criminal enterprise of sex trafficking. In contrast, the punishment for sex trafficking is substantially greater. For example, under 18 U.S.C. § 1591, sex trafficking of a minor imposes a punishment of up to life in prison. 18 U.S.C. § 1591(b).

167. *Human Trafficking: Why Trafficking Exists*, NAT’L HUMAN TRAFFICKING RES. CTR., <https://traffickingresourcecenter.org/type-trafficking/human-trafficking> (last visited Nov. 2, 2017) [<https://perma.cc/T63T-WW59>].

168. See Linda Smith & Samantha Healy Vardaman, *A Legislative Framework for Combating Domestic Minor Sex Trafficking*, 23 REGENT U. L. REV. 265, 278–79 (2010) (discussing the ramifications for charging sex traffickers under non-trafficking statutes).

169. See POLARIS PROJECT, 2013 ANALYSIS OF STATE HUMAN TRAFFICKING LAWS 37–38 (Aug. 2013), <https://polarisproject.org/sites/default/files/2013-State-Ratings-Analysis.pdf> [<https://perma.cc/6F5F-NUJ3>].

170. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437–38 (1978).

171. See, e.g., Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828 (1999); Richard A. Wasserstorm, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731 (1960).

172. Michaels, *supra* note 171; Wasserstorm, *supra* note 171.

173. See *United States v. Balint*, 258 U.S. 250, 252 (1922) (holding that strict liability offenses do not violate the Fifth Amendment’s Due Process Clause); *Staples v. United States*, 511 U.S. 600, 636 (1994) (“[I]t is the responsibility of Congress, not this Court, to amend the statute if Congress deems it unfair or unduly strict.”).

The purpose of the *mens rea* requirement in criminal offenses is to prevent a defendant from being punished for something that he did not know was wrong; it is this knowledge that distinguishes legal innocence from wrongful conduct.<sup>174</sup> In cases of sex trafficking, however, the defendant knows it is wrong to engage in the *actus reus*, the act of trafficking the individual, whether or not he knows the victim's age. The defendant's Fifth Amendment rights, taking into account that he knows his actions are illegal although he may not know the age of his victim, must be weighed against the need to prosecute a hidden and pervasive criminal industry that is inflicting severe long-term physical and psychological effects<sup>175</sup> on children in the United States. In deciding if sex trafficking should be a strict liability crime, each state must choose how it will allocate the competing weights. In 2016, Louisiana chose to balance the scales and apportion more weight to the victims.

In *State v. Sims*, the Louisiana Supreme Court upheld the constitutionality of Louisiana Revised Statutes § 14:46.3, which imposes strict liability on the crime of sex trafficking.<sup>176</sup> The statute criminalizes the trafficking of children for sexual purposes and indicates that lack of knowledge as to a victim's age is not a defense to the crime.<sup>177</sup> The defendant in *Sims* challenged the constitutionality of the statute, asserting that it denied her due process because it was contradictory, vague, ambiguous, and indefinite.<sup>178</sup> Though the Court noted that strict liability criminal offenses generally are disfavored, it nevertheless upheld the constitutionality of the statute, making Louisiana one of 17 states to impose strict liability on the crime of sex trafficking.<sup>179</sup>

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174. See *United States v. X-Citement Video*, 513 U.S. 64, 72–73 (1994).

175. SMITH ET AL., *supra* note 72, at 41–44.

176. *State v. Sims*, 195 So. 3d 441, 445 (La. 2016); see also LA. REV. STAT. § 14:46.3 (2017).

177. § 14:46.3; *Sims*, 195 So. 3d at 445 (stating that lack of knowledge as to the victim's age is not a defense).

178. *Sims*, 195 So. 3d at 442.

179. *Id.* at 444, 448; ALA. CODE § 13A-6-152(a)(3) (2017); ARK. CODE ANN. § 5-18-103 (2017); CAL. PENAL CODE § 236.1 (West 2017); COLO. REV. STAT. § 18-3-504 (2017); DEL. CODE ANN. tit. 11, § 787 (2017); FLA. STAT. § 787.06(3)(g) (2017); IOWA CODE § 710A.2(8) (2015); LA. REV. STAT. § 14:46.3(C)(2) (2015); MINN. STAT. § 609.352 (2017); MISS. CODE ANN. § 97-3-54.1(a)(c) (2017); MO. REV. STAT. § 566.212(2) (2017); NEV. REV. STAT. ANN. § 201.300 (2017); N.J. STAT. ANN. § 2C:34-1(b)(7) (West 2017); N.C. GEN. STAT. § 14-43.11 (2017); N.D. CENT. CODE § 12.1-40-01(3) (2017); S.C. CODE ANN. § 16-15-425 (2017); S.D. CODIFIED LAWS § 22-24A-5 (2017); see also NAT'L DISTRICT ATTORNEYS ASS'N, *supra* note 28; *Strict Liability Crime*, BLACK'S LAW DICTIONARY, *supra* note 23 (stating that a strict liability crime is "an offense for which the action alone

*Sims* represents a critical component of effectively combating sex trafficking. If the requirement to prove that the trafficker knew the victim was a minor—something that is virtually impossible to do—is removed, a chain reaction will take place: prosecutors will become more confident in their ability to secure a conviction and will prosecute more sex trafficking cases under sex trafficking laws, increasing the trafficker’s “cost” in selling Holly, which will lead to a substantial decrease in sex trafficking.

### *B. A Uniform Attack Plan Amongst States*

Although the federal government is a key player in the war against sex trafficking, the war ultimately will be won or lost at the state and local levels.<sup>180</sup> Three main reasons justify why state involvement is crucial in abolishing sex trafficking. First, sex trafficking largely is a mobile market, and inconsistent state laws create significant patchwork problems.<sup>181</sup> Traffickers, if thought of as rational businesspeople, will gravitate toward states with the most relaxed trafficking laws, that is, the lowest cost of doing business.<sup>182</sup> Second, state authorities are more likely to come into contact with victims of sex trafficking because they are intimately

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is enough to warrant a conviction, with no need to prove a mental state; a crime that does not require a *mens rea* element”).

180. See, e.g., Daniel Tichenor, *The Politics of Modern Slavery in America: Advocacy Groups and Human Trafficking Reform*, in MARSHALING EVERY RESOURCE: STATE AND LOCAL RESPONSES TO HUMAN TRAFFICKING 43 (Dessi Dimitrova ed., 2007) (“The imperatives driving the pursuit of state-level trafficking legislation are largely about the distribution of resources: prosecutions of traffickers and victim identification depend heavily on the mobilization of state and local law enforcement.”); see also ABA CTR. FOR HUMAN RIGHTS, UNIF. LAW COMM’N PROJECT PROPOSAL: UNIFORM HUMAN TRAFFICKING LAW 2 (2010), [http://www.uniformlaws.org/shared/docs/Human%20Trafficking/PRHT\\_Final%20Report%20v%20\(5\)\\_Jul10.pdf](http://www.uniformlaws.org/shared/docs/Human%20Trafficking/PRHT_Final%20Report%20v%20(5)_Jul10.pdf) (proposing a uniform state anti-trafficking law as a solution) [<https://perma.cc/CHT7-FBLU>].

181. ABA CTR. FOR HUMAN RIGHTS, *supra* note 180.

182. See Siddharth Kara, *Designing More Effective Laws Against Human Trafficking*, 9 NW. J. INT’L HUM. RTS. 123, 138–43, app. (2011) (analyzing the low-risk, high-reward economics of sex trafficking to show that traffickers are economically rational criminal entrepreneurs and creating actual balance sheets of theoretical sex traffickers to illustrate their business model); see also ILO *says forced labour generates annual profits of US \$ 150 billion*, *supra* note 21, at 13 tbl.2.1 (estimating total annual profits from human trafficking to be \$150.2 billion, \$99 billion from sex trafficking, and \$51.2 billion from forced labor).

involved in the daily affairs of the communities they serve.<sup>183</sup> Third, the magnitude of sex trafficking is simply too large for the federal government to handle on its own.<sup>184</sup> To address these state level issues effectively, a uniform plan of attack is required.

In 2013, the Uniform Law Commission drafted the Uniform Act on the Prevention of and Remedies for Human Trafficking (“Uniform Act”) to unify states’ laws and enhance anti-sex trafficking efforts at the state level.<sup>185</sup> The Uniform Act officially was endorsed by the American Bar Association soon after its adoption, which represents a critical step forward in providing states a comprehensive plan to establish effective criminal penalties and victim protections.<sup>186</sup> The Uniform Act, however, is only a model law and its adoption is at the discretion of each state.

To combat sex trafficking in the United States effectively, it is imperative that states use the Uniform Act. Consistency among state trafficking laws will promote collaboration between law enforcement officers, prosecutors, lawyers, non-government organizations (“NGOs”), and others involved in the investigation and prosecution of sex trafficking.<sup>187</sup> Though every state has laws regarding sex trafficking, they vary greatly in both scope and substance. Some states’ laws are comprehensive while others have only minimal provisions.<sup>188</sup> The Uniform Act solves those inconsistencies and provides states with the three components necessary to address trafficking:

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183. Jim Finckenauer & Min Liu, *State Law and Human Trafficking*, in *MARSHALING EVERY RESOURCE: STATE AND LOCAL RESPONSES TO HUMAN TRAFFICKING*, *supra* note 180, at 7 (noting that local police are more likely to come across trafficking cases than either federal or state authorities).

184. James Gallagher & Dominique Roe-Sepowitz, *Exploring Sex Trafficking and Prostitution Demand During the Super Bowl 2014*, ASU SCH. OF SOC. WORK 4 (2014), [https://socialwork.asu.edu/sites/default/files/%5Bterm%3Aname%5D/%5Bnode%3Acreate%3Acustom%3AYm%5D/exploring-sex-trafficking-and-prostitution-demand-during-the-super-bowl-2014\\_2.pdf](https://socialwork.asu.edu/sites/default/files/%5Bterm%3Aname%5D/%5Bnode%3Acreate%3Acustom%3AYm%5D/exploring-sex-trafficking-and-prostitution-demand-during-the-super-bowl-2014_2.pdf) (“The sheer volume of illicit activity and potential for minor victims overwhelms the capacity of any single law enforcement agency to respond in a way that would discourage traffickers . . . [A]ny solutions to the issue will require a multifaceted and multijurisdictional approach.”) [<https://perma.cc/VZ5R-7XRE>].

185. UNIFORM ACT ON PREVENTION OF AND REMEDIES FOR HUMAN TRAFFICKING (2013); *Acts: Prevention of and Remedies for Human Trafficking*, UNIF. LAW COMM’N (2016), <http://www.uniformlaws.org/Act.aspx?title=Prevention%20of%20and%20Remedies%20for%20Human%20Trafficking> (last visited Nov. 2, 2017) [<https://perma.cc/UM87-V25D>].

186. *A Look Back: Building a Human Trafficking Legal Framework*, *supra* note 89; AM. BAR ASS’N, RESOLUTION WITH REPORTS TO THE HOUSE OF DELEGATES (2013).

187. RESOLUTION WITH REPORTS TO THE HOUSE OF DELEGATES, *supra* note 186.

188. *Id.*

(1) comprehensive criminal provisions; (2) provisions for victim services and remedies; and (3) establishing a coordinating body.<sup>189</sup>

If states adopt the Uniform Act, sex trafficking will become a strict liability crime in every state.<sup>190</sup> Strict liability of sex trafficking allows law enforcement to identify sex trafficking more easily because it eliminates the requirement for officers to ascertain the defendants' thoughts.<sup>191</sup> Making sex trafficking a strict liability crime also gives prosecutors an incentive to prosecute the trafficker.<sup>192</sup> *Mens rea*, the criminal mindset of the defendant, is subjective, making prosecutors reluctant to spend the time and resources required to prove the defendant knew the victim was a minor.<sup>193</sup> When the additional burden of proving the offender knew the victim's age is eliminated, prosecutors are more confident in securing a conviction and thus more likely to prosecute the trafficker.<sup>194</sup>

Increasing the number of prosecutions in sex trafficking cases should decrease the commission of the crime. Not only will there be a greater conviction rate, taking traffickers out of the industry and into jail, but the trafficker's "cost of doing business" also will increase—further deterring the criminal.<sup>195</sup> Although a comprehensive set of uniform criminal laws is needed to stop modern-day slavery, these laws alone are insufficient to prevent Tim from just finding another Holly to sell.<sup>196</sup>

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189. *Id.*

190. Mark Kelman, *Strict Liability: An Unorthodox View*, in 4 ENCYCLOPEDIA OF CRIME AND JUST. 1512, 1515 (Sanford H. Kadish ed., 1983) ("[P]roof of state of minds is administratively burdensome."); Assaf Hamdani, *Mens Rea and the Cost of Ignorance*, 93 VA. L. REV. 415, 422 (2007) ("Mental states are inherently difficult to prove, especially since the prosecution can often rely only on circumstantial evidence to support its case.").

191. An officer's ability to spot a crime is an essential element of the prosecution of that crime because often an officer or investigator is the one who turns the information over to the prosecutor for prosecution. Victims of sex trafficking typically do not self-identify; therefore, it becomes imperative for an officer to be able to recognize the crime quickly. *See* discussion *supra* Part I.B.

192. *See* Hamdani, *supra* note 190, at 422.

193. *See id.*

194. Thomas Weigend, *Criminal Procedure: Comparative Aspects*, 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 537–46 (1983).

195. *Cf.* SHELLEY, *supra* note 113, at 3; Frank & Terwilliger, *supra* note 122, at 348–49.

196. RESOLUTION WITH REPORTS TO THE HOUSE OF DELEGATES, *supra* note 186.

### C. A New Approach to Prosecution

Prosecutors and law enforcement face many challenges in the course of investigating and prosecuting sex trafficking cases.<sup>197</sup> The most difficult challenge is the inability or unwillingness of a victim to participate in the prosecution process.<sup>198</sup> Though challenges involving victim participation also are prevalent in domestic violence and child abuse cases,<sup>199</sup> sex trafficking involves an additional element not seen in these related crimes: the traffickers' significant financial interest in his victims.<sup>200</sup> The challenges present in sex trafficking cases require prosecutors to take a new approach. It is a prosecutor's responsibility to achieve justice, and it is his duty to "use every legitimate means to bring about a just [conviction]."<sup>201</sup> Several investigative and prosecutorial strategies can aid prosecutors in making a victim willing to participate in the prosecution or increase conviction rates without the victim's participation.

#### 1. Collaborative Efforts

One strategy is for prosecutors to collaborate with advocates and agencies in the anti-sex trafficking field.<sup>202</sup> Prosecutors should employ a multidisciplinary team ("MDT")<sup>203</sup> in their prosecutorial efforts.<sup>204</sup> MDTs should include representatives from law enforcement, prosecution, advocacy, medical and social services, and other agencies and systems with which sexually exploited victims may have contact.<sup>205</sup> Using MDTs allows prosecutors to incorporate elements and philosophies of traditional domestic violence and sexual violence responses, which are based on victim-centered, offender-focused principles.<sup>206</sup> The exchange of information and intelligence in a MDT also improves the collection and documentation of corroborating evidence, which enhances the victim's credibility and aids the

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197. See SMITH ET AL., *supra* note 72, at vi; Long & Garvey, *supra* note 24, at 1.

198. Long & Garvey, *supra* note 24, at 1.

199. *Id.*

200. *Id.*

201. *Berger v. United States*, 295 U.S. 78, 88 (1935).

202. CLAWSON ET AL., *supra* note 129, at vi, viii, 10, 19, 24–25.

203. *Multidisciplinary Team*, LAW DICTIONARY, <http://thelawdictionary.org/multidisciplinary-team/> (last visited Nov. 6, 2017) (stating that a multidisciplinary team is a group of professionals from multiple specializations who combine their expertise and experience to achieve a specific objective) [<https://perma.cc/N8FW-4K36>].

204. Long & Garvey, *supra* note 24, at 2.

205. *Id.*

206. *Id.*

prosecutor when the victim is unavailable to participate at trial.<sup>207</sup> As the “gatekeepers to the criminal justice system,” law enforcement and prosecutors must collaborate with all criminal justice professionals to make the system work well for victims and others who seek justice in the courts.<sup>208</sup>

## 2. *Improving Investigations*

The second strategy is the use of innovative investigation techniques by prosecutors. Though there likely are numerous techniques available to prosecutors, this Comment addresses three that have proven especially useful in sex trafficking cases. First, prosecutors should work with medical and other experts to interpret and explain victim injury, lack of injury, common dynamics, and other important evidence that can provide prosecutors with the necessary tools to proceed in prosecution when a victim is uncooperative or unavailable.<sup>209</sup> Even in cases in which a victim is willing to participate, corroboration is necessary to dispel prevailing myths<sup>210</sup> about these crimes, the victims, and the offenders, as well as the need to convince fact finders of the defendant’s guilt beyond a reasonable doubt.<sup>211</sup>

The second investigation technique prosecutors should use in sex trafficking cases is being cognizant of additional charges that typically apply to the trafficker.<sup>212</sup> One of these charges is credit fraud.<sup>213</sup> Investigators should inquire into the use of the victim’s social security number to fraudulently obtain credit cards or welfare services.<sup>214</sup> Obtaining the victim’s credit history can prevent damages to the victim’s credit as well as provide prosecutors with additional charges against the defendant.<sup>215</sup>

A third technique is to always interview the defendant to ascertain statements that can be used to corroborate portions of the victim’s statement or other evidence or lead to additional charges.<sup>216</sup> Though corroboration strengthens the prosecution of any case, it is particularly useful when a

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207. *Id.*

208. Farrell et al., *supra* note 77, at 9; see CLAWSON ET AL., *supra* note 129, at 19–21.

209. Long & Garvey, *supra* note 24, at 3.

210. See generally *Myths and Misconceptions*, *supra* note 33; see also *supra* Part I.B.

211. Long & Garvey, *supra* note 24, at 2–3.

212. *Id.* at 3; see also CLAWSON ET AL., *supra* note 129, at 22 (stating that prosecutors should be proactive about what charges can be brought against the trafficker).

213. Long & Garvey, *supra* note 24, at 3.

214. *Id.*

215. *Id.*

216. See Moosy, *supra* note 126, at 1; Long & Garvey, *supra* note 24, at 3.

victim is unwilling or unable to participate in the prosecution.<sup>217</sup> When a victim is unable to participate in a prosecution, evidence-based strategies enable the prosecutor to overcome hearsay or confrontation objections to the victim's out-of-court statements by focusing on the documentation of information.<sup>218</sup> Improving investigations by working with experts, securing additional charges, and corroborating the victim's statements allows a prosecutor to present a meaningful case to the judge and jury that can withstand many of the challenges involved in prosecuting sex trafficking cases.

### 3. Addressing Intimidation

Third, prosecutors should recognize, document, and respond to intimidation and witness tampering. Though victim and witness intimidation exists in almost every type of criminal case, it is especially pervasive and difficult to detect in sex trafficking cases.<sup>219</sup> To curb intimidation, prosecutors must educate victims and witnesses about common intimidation tactics.<sup>220</sup> Victims need to know how to recognize various methods of intimidation and should be encouraged to report any suspicious behavior immediately to authorities.<sup>221</sup> Addressing intimidation not only increases victim participation, but it also aids prosecutors in establishing the forfeiture by wrongdoing doctrine.

### 4. Implementing Forfeiture by Wrongdoing

The fourth strategy is the use of the forfeiture by wrongdoing doctrine.<sup>222</sup> The Sixth Amendment provides defendants with the right to confront witnesses who testify against them; this right, however, is not absolute.<sup>223</sup> If defendants do something "wrong," they forfeit their right to confront that

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217. Long & Garvey, *supra* note 24, at 3.

218. Farrell et al., *supra* note 77; Long & Garvey, *supra* note 24, at 3.

219. Long & Garvey, *supra* note 24, at 2.

220. AEQUITAS, THE PROSECUTORS' RESOURCE: WITNESS INTIMIDATION 8–10 (Mar. 2014), <http://www.aequitasresource.org/The-Prosecutors-Resource-Intimidation.pdf> [<https://perma.cc/A972-UYDS>].

221. *Id.*

222. Long & Garvey, *supra* note 24, at 4 ("Rule 804(b)(6) of the Federal Rules of Evidence codifies forfeiture by wrongdoing as an exception to the rule against hearsay. Several states have adopted some version of Fed. R. Evid. 804(b)(6), while many other states have adopted the doctrine on the basis of equitable forfeiture principles.").

223. *Id.* at 3; Giles v. California, 554 U.S. 353, 358–60, 375–76 (2008); AEQUITAS, THE PROSECUTORS' RESOURCE: FORFEITURE BY WRONGDOING (2012), [http://www.aequitasresource.org/The\\_Prosecutors\\_Resource\\_Forfeiture\\_by\\_Wrongdoing.pdf](http://www.aequitasresource.org/The_Prosecutors_Resource_Forfeiture_by_Wrongdoing.pdf) [<https://perma.cc/EFE2-Q4SY>].

witness at trial.<sup>224</sup> The wrongdoing can consist of “direct or explicit forms of intimidation, such as murder, assault, threats, and other aggressive behavior.”<sup>225</sup> The wrongdoing, however, also can be indirect or subtle, such as declarations of love or promises to marry.<sup>226</sup> In these instances, prosecutors can introduce the absent witness’s prior out-of-court statements under the doctrine of forfeiture by wrongdoing.<sup>227</sup>

Out-of-court statements, coupled with corroborating evidence, can provide prosecutors with sufficient evidence to prosecute sex trafficking cases even when the victim is unable or unwilling to participate.<sup>228</sup> Because of the victim-centered nature of the crime and the fact that the victims are generally uncooperative or unavailable, admitting the victim’s out-of-court statements greatly increases the probability of a conviction.<sup>229</sup> As the probability of conviction increases, the prosecutor’s willingness to bring charges against the trafficker also increases.<sup>230</sup> Thus, using the forfeiture by wrongdoing doctrine in sex trafficking cases may make the crime significantly less enticing to Tim.

### 5. *Introducing Expert Testimony*

The fifth strategy is the introduction of expert testimony to explain victim behavior.<sup>231</sup> Sex trafficking prosecutions, like prosecutions involving other forms of violence against women and children, often involve dynamics and victim behaviors that may seem counterintuitive to laypeople or allied professionals unfamiliar with these crimes.<sup>232</sup> This misunderstanding could reflect negatively on a victim’s credibility.<sup>233</sup> By working with experts to prepare and prosecute sex trafficking cases, prosecutors can better identify

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224. Long & Garvey, *supra* note 24, at 3; THE PROSECUTORS’ RESOURCE, *supra* note 223.

225. Long & Garvey, *supra* note 24, at 3.

226. *Id.*

227. *Id.*; Davis v. Washington, 547 U.S. 813, 833 (2006) (“[T]he rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds. That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.” (quoting Crawford v. Washington, 541 U.S. 36, 62 (2004))).

228. Long & Garvey, *supra* note 24, at 3.

229. *Id.* at 3–5.

230. See Farrell et al., *supra* note 77, at 48–70.

231. *Id.* at 5; Florrie Burke, *How Using Expert Consultants & Expert Witnesses Can Strengthen Your Human Trafficking Case*, WARNATH GRP. (2016), <http://www.warnathgroup.com/using-expert-consultants-expert-witnesses-can-strengthen-human-trafficking-case/> [https://perma.cc/C49F-ZLPG].

232. Long & Garvey, *supra* note 24, at 5.

233. *Id.*; Burke, *supra* note 231.

relevant evidence and more readily explain the context of the crime.<sup>234</sup> Expert testimony can be critical in helping prosecutors explain dynamics and victim behavior to the jury so that jurors will understand the common control tactics of pimps and traffickers and will not misinterpret a victim's lack of participation as evidence of dishonesty or lack of credibility.<sup>235</sup>

No matter the quantity or quality of laws enacted by the legislature, “[w]hen the system is ineffective or indifferent to victims, the victims remain vulnerable, offenders are not held accountable, communities become less safe, and justice is not achieved.”<sup>236</sup> It is the prosecutor’s enforcement of state laws that defines the difference between law-on-the-books and law-in-action.<sup>237</sup> Implementing innovative prosecution and investigation techniques allows the system to operate effectively, which creates law-in-action and ensures justice for the children of the United States.

#### CONCLUSION

To fulfill their duty adequately, prosecutors must be provided with laws that realistically allow them to achieve justice, such as laws making sex trafficking a strict liability crime. Statistics indicate, however, that laws alone are insufficient despite their quality and quantity.<sup>238</sup> Prosecutors must prosecute sex trafficking aggressively, using appropriate strategies that weaken the incentives for traffickers to intimidate their victims and maximize support for victims during and after their involvement with the criminal justice system. It is only when the laws of the states and the efforts of prosecutors align that Tim will stop selling Holly.

*Tiffany Dupree\**

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234. Long & Garvey, *supra* note 24, at 5; Burke, *supra* note 231.

235. Long & Garvey, *supra* note 24, at 6; Burke, *supra* note 231.

236. Long & Garvey, *supra* note 24, at 6.

237. FARRELL ET AL., *supra* note 65, at 11.

238. *See supra* Part II.

\* J.D./D.C.L., 2018. Paul M. Hebert Law Center, Louisiana State University. This Comment is dedicated to my husband, Philip Dupree Jr., and my children, London and Bailey Dupree, for their love and support throughout the writing process and my law school journey as a wife and mom. As a family we have loved and served victims of sex trafficking in our community for many years and know that we will continue to fight for those that have been victimized by this heinous crime. Many thanks to Professor Ken Levy and Professor Andrea Carroll for their invaluable guidance and constructive feedback during the development of this Comment. Lastly, special thanks to the countless prosecutors, judges, and non-profit organizations who work tirelessly to provide not only justice for the victims of sex trafficking, but also hope and a new beginning.