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COMMENT: A Minor Conflict: Why the Objectives of Federal Sex Trafficking Legislation Preempt the Enforcement of State Prostitution Laws Against Minors

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COMMENTS

A MINOR CONFLICT: WHY THE OBJECTIVES OF FEDERAL SEX TRAFFICKING LEGISLATION PREEMPT THE ENFORCEMENT OF STATE PROSTITUTION LAWS AGAINST MINORS

SUSAN CRILE*

The doctrine of federal preemption provides a framework for resolving the tension between the treatment of prostituted minors under federal sex trafficking law and criminal prostitution laws in many states. Federal preemption doctrine holds that state laws are preempted if they conflict with a federal law by frustrating its purpose. The federal Trafficking Victims Protection Act (TVPA) defines individuals under age eighteen who engage in commercial sex as per se victims of severe sex trafficking. The TVPA seeks to protect these individuals by treating them as victims and providing them with services. Many states, on the other hand, define prostitution without regard to age and enforce criminal prohibitions against the same category of minors that the federal law seeks to protect. This Comment argues that states' enforcement of criminal prostitution laws against minors frustrates the TVPA's purposes with regard to prostituted minors by (1) treating prostituted minors as offenders, rather than victims, (2) contributing to misidentification of victims, and (3) discouraging prostituted minors from cooperating with law enforcement, thereby impeding federal efforts to investigate and prosecute

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trafficking. This Comment concludes that the TVPA preempts states' enforcement of criminal prostitution laws against minors.

"We have created a legal dichotomy in America in which the Federal Government views prostituted children as victims, yet most [s]tates treat them as criminals."[1]

1. *In Our Own Backyard: Child Prostitution and Sex Trafficking in the United States: Hearing Before the Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary*, 111th Cong. 2 (2010) [hereinafter *In Our Own Backyard*] (statement of Sen. Richard Durbin, Chairman, S. Subcomm. on Human Rights & the Law).

INTRODUCTION

Minors under the age of eighteen are purchased for sex throughout America.[2] The full extent of the problem is difficult to measure,[3] in part because of the underground nature of prostitution generally,[4] but also because prostituted minors[5] are commonly subjected to psychological manipulation and abuse that makes them unlikely to self-identify as victims.[6] Despite the difficulty of measuring the problem, however, it is certain that the number of minors involved in prostitution is substantial.[7] For example, the U.S. Congress has cited research suggesting up to 300,000 American minors are at risk for commercial sexual exploitation.[8] An article published by the Department of Justice's (DOJ) Office of Juvenile Justice and Delinquency Prevention further estimates that, for those at-risk individuals who do enter into prostitution, the average age of entrance is thirteen- or fourteen-years-old.[9] These young people

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2. *See* LINDA A. SMITH ET AL., SHARED HOPE INT'L, THE NATIONAL REPORT ON DOMESTIC MINOR SEX TRAFFICKING: AMERICA'S PROSTITUTED CHILDREN 11 (2009), *available at* http://www.sharedhope.org/Portals/0/Documents/SHI_National_Report_on_DMST_2009.pdf (describing the results of a study of domestic minor sex trafficking in ten U.S. locations and concluding that domestic minor sex trafficking was a substantial problem with three locations reporting more than 100 victims in one to eight years and one location reporting more than 5000 victims in thirteen years); *see also Child Exploitation & Obscenity Section*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/criminal/ceos/subjectareas/prostitution.html (last visited Aug. 20, 2012) (noting that prostituted minors come from various parts of America).

3. *See* David Finkelhor & Richard Ormrod, *Prostitution of Juveniles: Patterns from NIBRS*, JUV. JUSTICE BULL., June 2004, at 1–2 *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/203946.pdf (noting that statistics on juveniles involved in prostitution have often relied on conjecture).

4. *See* SMITH ET AL., *supra* note 2, at 29 (noting that the underground character of prostitution is more pronounced today because much marketing of prostitution has transferred to online forums, where it is arguably harder to detect); *cf.* Finkelhor & Ormrod *supra* note 3, at 10 (reporting that local law enforcement confusion about whether minors should be categorized as victims or offenders compounds the difficulty of measuring the number of prostituted minors).

5. I use the term "prostituted minor" throughout this Comment to refer to individuals under age eighteen who are involved in commercial sex.

6. *See* SMITH ET AL., *supra* note 2, at 41 (suggesting that prostituted minors' failure to self-identify as victims is linked to the formation of trauma bonds caused by "pimp control"); *see also* Kate Brittle, Note, *Child Abuse by Another Name: Why the Child Welfare System is the Best Mechanism in Place to Address the Problem of Juvenile Prostitution*, 36 HOFSTRA L. REV. 1339, 1344 (2008) (noting that minors are often trained by pimps to lie about their age or to deny any involvement in prostitution).

7. *See* DUREN BANKS & TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS, 2008–2010, at 3 (2011), *available at* http://www.bjs.gov/content/pub/pdf/cshti0810.pdf (showing that federally funded human trafficking task forces opened 2515 investigations of human trafficking between 2008 and 2010 and that forty-percent involved prostitution or sexual exploitation of a child).

8. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. 109-164, § 2(5), 119 Stat. 3558, 3559 (2006).

9. William Adams et al., *Effects of Federal Legislation on the Commercial Sexual*

share characteristics, such as histories of neglect, abuse, or homelessness, that make them vulnerable to exploitation.[10] In addition, they almost always have pimps—individuals who target and recruit vulnerable minors and use combinations of feigned affection, psychological coercion, and physical or emotional abuse to dominate their victims and profit from their sexual exploitation.[11]

Federal sex trafficking law and state criminal prostitution laws are in conflict over the treatment of prostituted minors.[12] States generally define prostitution without regard to age,[13] meaning, for example, that a seventeen-year-old who engages in commercial sex commits prostitution under most state laws.[14] In contrast, the federal Trafficking Victims Protection Act of 2000[15] (TVPA) establishes that any individual under age eighteen who engages in commercial sex is

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Exploitation of Children, JUV. JUSTICE BULL., July 2010, at 3, *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/228631.pdf.

10. *See* Trafficking Victims Protection Reauthorization Act of 2005 § 2(6) (noting the susceptibility of runaway and homeless children to prostitution); FRANCES GRAGG ET AL., N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., NEW YORK PREVELANCE STUDY OF COMMERCIALLY EXPLOITED CHILDREN: FINAL REPORT 45 (2007), *available at* http://www.ocfs.state.ny.us/main/reports/csec-2007.pdf (reporting that minors subjected to commercial sexual exploitation were overwhelmingly likely to have prior welfare involvement due to child abuse and neglect investigations or foster care placement); SMITH ET AL., *supra* note 2, at 49 (describing homelessness and chronic running away as warning signs of domestic minor sex trafficking).

11. *See* POLARIS PROJECT, DOMESTIC SEX TRAFFICKING: THE CRIMINAL OPERATIONS OF THE AMERICAN PIMP 3, *available at* http://www.dcjs.virginia.gov/victims/humantrafficking/vs/documents/Domestic_Sex_Trafficking_Guide.pdf (last visited Aug. 20, 2012) (discussing the general technique of "pimp control," involving an initial period of affection or romance, followed by a "grooming" period, and then sexual exploitation imposed through psychological coercion and physical violence); SMITH ET AL., *supra* note 2, at 38 (asserting that a popular tactic of traffickers and pimps is to identify a victim's need—whether it be the need for a parental presence or the need for a place to sleep—and to fill that need, so as to establish dependency).

12. *See infra* Part II.B (describing how the enforcement of criminal prostitution laws against minors in some states conflicts with the federal government's objectives of protecting victims of trafficking and prosecuting traffickers).

13. *See, e.g.*, KAN. STAT. ANN. § 21-6419(a) (2012) ("Prostitution is performing for hire, or offering or agreeing to perform for hire where there is an exchange of value, any of the following acts: (1) Sexual intercourse; (2) sodomy; or (3) manual or other bodily contact stimulation of the genitals of any person with the intent to arouse or gratify the sexual desires of the offender or another."); ME. REV. STAT. tit. 17-A, § 851(1) (2006) (criminalizing "engaging in, or agreeing to engage in, or offering to engage in a sexual act or sexual contact . . . in return for a pecuniary benefit"); *see also* Daniel J. Franklin, *Prostitution and Sex Workers*, 8 GEO. J. GENDER & L. 355, 356 n.5 (2007) (collecting state prostitution statutes).

14. *See* Wendi J. Adelson, *Child Prostitute or Victim of Trafficking?*, 6 U. ST. THOMAS L.J. 96, 97 & n.2 (2008) (observing that minors are subject to criminal penalties for prostitution in all but one state)*; see also infra* Part I.A.2 (describing newly enacted state laws that prevent criminal prosecution of some prostituted minors).

15. Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of 8, 18 and 22 U.S.C. (2006 & Supp. I 2008)).

a victim of sex trafficking.[16] Thus, the same seventeen-year-old who would be treated by state law as a criminal deserving punishment is viewed by federal law as a victim of sex trafficking entitled to protection.

This Comment argues that under the doctrine of federal preemption, the TVPA preempts enforcement of state criminal prostitution laws against minors. Preemption refers to the displacement of state law by federal law pursuant to the Supremacy Clause of the Constitution.[17] Preemption can be inferred from the existence of a conflict between federal and state laws; a conflict exists if state law frustrates the purpose of a federal law.[18] In this case, the TVPA preempts states' application of criminal prostitution laws to minors because enforcing criminal prostitution laws against minors frustrates the TVPA's objectives of protecting sex trafficking victims and prosecuting traffickers. Part I provides an overview of how state prostitution laws apply to minors and examines the federal TVPA. Part I also explains the doctrine of federal preemption, focusing particularly on conflict preemption, a mode of implied preemption. Part II uses implied conflict preemption principles, which hold that federal law preempts state law where state law impedes the objectives of federal law, to analyze the TVPA's preemptive effect on applications of state prostitution laws to minors. This analysis shows that applying state prostitution laws to minors frustrates the accomplishment and full execution of the TVPA's prosecutorial and protective purposes. This Comment concludes that states' enforcement of criminal prostitution laws against minors is preempted by the TVPA.

I. BACKGROUND

A. State Laws Governing the Treatment of Prostituted Minors

Traditionally, state laws have addressed minors in prostitution only insofar as the minors come under general criminal prohibitions on

16. 22 U.S.C. § 7102(8)(A) (2006) (defining sex trafficked minors as victims of "severe forms of trafficking in persons"); *see also* ALISON SISKIN & LIANA SUN WYLER, CONG. RESEARCH SERV., RL34317, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 21 (2010) (relaying the consensus that prostitution by minors fits the TVPA's definition of "severe forms of human trafficking"). Although the TVPA also covers labor trafficking, this Comment is concerned exclusively with sex trafficking.

17. *See* U.S. CONST. art. VI, cl. 2 (declaring that federal law "shall be the supreme Law of the Land").

18. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 550–51 (2001) (finding certain Massachusetts cigarette advertising regulations preempted by the Federal Cigarette Labeling and Advertising Act because they would "upset federal legislative choices").

prostitution. This has partially changed in recent years, however, as growing awareness of sex trafficking has led some states to reconsider how their prostitution laws apply to minors.[19] Legislation in only a small number of states now protect some minors against prosecution for prostitution, in many cases, mandating diversion to social services instead.[20] Nevertheless, the traditional model, in which prostituted minors are viewed as offenders, remains the status quo in most jurisdictions in America.[21]

1. Prostituted minors are considered offenders under the traditional criminal model

Prostitution is a crime in every state,[22] with the partial exception of Nevada, where prostitution is permitted in certain licensed establishments.[23] The vast majority of states do not discriminate between adults and minors in defining and enforcing the crime.[24] As a result, minors in these states are subject to criminal or delinquency penalties for engaging in commercial sex acts.[25] Minors who fall under the age limit specified by a state's delinquency statute are ordinarily adjudicated in family or juvenile court proceedings.[26]

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19. *See infra* Part I.A.2 (discussing Safe Harbor laws); *see also Pending State and Federal Legislation*, POLARIS PROJECT, http://www.polarisproject.org/what-we-do/policy-advocacy/pending-legislation (last visited Aug. 20, 2012) (tracking the progress of pending trafficking legislation in every state as legislatures reassess the prostitution of minors).

20. *See* MINN. STAT. ANN. § 609.093 subdiv. 1 (West Supp. 2011) (effective Aug. 1, 2014) (providing diversion services for any sexually exploited youth who has not been previously adjudicated for engaging in prostitution). Diversion programs allow people arrested on criminal charges to avoid jail by attending education or counseling sessions that aim to divert them from reoffending. Randall G. Shelden, *Detention Diversion Advocacy: An Evaluation*, JUV. JUSTICE BULL., Sept 1999, at 1.

21. *See infra* Part I.A.1 (discussing laws that criminalize prostitution without reference to age).

22. *See* Franklin, *supra* note 13, at 356–57 (explaining that states determine their own prostitution laws).

23. NEV. REV. STAT. § 201.354 (2007) (imposing no penalty for prostitution in licensed establishments).

24. *See* MODEL PENAL CODE § 251.2(1) (1985) (defining prostitution without reference to age). *But see* MICH. COMP. LAWS § 750.448 (2009) (defining prostitution as an offense committed by individuals over the age of sixteen).

25. *See Domestic Minor Sex Trafficking: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 1 (2010) [hereinafter *Domestic Minor Sex Trafficking Hearing*] (statement of Rep. Robert C. Scott, Chairman, H. Subcomm. on Crime, Terrorism, & Homeland Sec.) (noting that minors are often arrested for prostitution and as a result do not receive the services they need); Francine T. Sherman & Lisa Goldblatt Grace, *The System Response to the Commercial Sexual Exploitation of Girls*, *in* JUVENILE JUSTICE: ADVANCING RESEARCH, POLICY, AND PRACTICE 331, 343 (Francine T. Sherman & Francine H. Jacobs eds., 2011) (asserting that the criminal law model has harmful long term effects on prostituted minors).

26. *See* HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 103 (2006), *available at*

These age limits vary by state and range from fifteen- to seventeen-years-old.[27] Minors who do not qualify for delinquency proceedings are processed in criminal court as adults.[28] Although the juvenile justice system theoretically focuses on rehabilitation and individualized justice,[29] dispositions for prostituted minors in juvenile court do not greatly differ from that in criminal court.[30] For example, in a typical jurisdiction, dispositional options for juveniles and offenders in criminal court both include probation, detention, or conditional dismissal pending good behavior.[31]

Although minors in most states are subject to the same criminal prostitution laws to which adults are subject, the rationale for maintaining criminal penalties for minors may be different. Traditionally, courts have upheld criminal prohibitions of prostitution on the grounds that they are rationally related to the protection of public health, morals, and general welfare, and are thus

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http://www.ojjdp.gov/ojstatbb/nr2006/downloads/NR2006.pdf (listing the oldest age for original juvenile court jurisdiction set by state statutes).

27. *Id.*; *see, e.g.*, N.C. GEN. STAT. § 7B-1501(7) (2011) (defining a delinquent juvenile as a person under the age of sixteen-years-old who commits a crime); TENN. CODE ANN. § 39-13-513(d) (2011) (defining a legal minor as under the age of eighteen-years-old).

28. *See* Tamar R. Birckhead, *The "Youngest Profession": Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1059 (2011) (lamenting that prosecutorial discretion is the only factor limiting whether minors are prosecuted for prostitution offenses in many states); Brittle, *supra* note 6, at 1343–44 (explaining that state statutes specify the age at which the juvenile justice system will no longer have original jurisdiction over a minor).

29. *See* SNYDER & SICKMUND, *supra* note 26, at 94 (explaining that concerns about improving child welfare were central to the original concept of juvenile justice).

30. *See* M. ALEXIS KENNEDY & NICOLE JOEY PUCCI, SHARED HOPE INT'L, LAS VEGAS ASSESSMENT: IDENTIFICATION OF DOMESTIC MINOR SEX TRAFFICKING VICTIMS AND THEIR ACCESS TO SERVICES 2, 7–8 (2007), *available at* http://www.sharedhope.org/Portals/0/Documents/LasVegas_PrinterFriendly.pdf (noticing that prostituted minors in Las Vegas spend an average of seventeen days in detention before being adjudicated); SNYDER & SICKMUND, *supra* note 26, at 96–97 (recognizing increasing similarities between the criminal and juvenile systems since the 1990s); Christianna M. Lamb, *The Child Witness and the Law: The United States' Judicial Response to the Commercial, Sexual Exploitation of Children in Light of the U.N. Convention on the Rights of the Child*, 3 OR. REV. INT'L L. 63, 82 (2001) (describing juvenile courts as essentially punitive institutions); *see also* Sherman & Grace, *supra* note 25, at 331 (providing an anecdote about a commercially sexually exploited fifteen-year-old who was charged as a delinquent and spent months in detention).

31. *See* Courtney Bryan, *Representing and Defending Victims of Commercial Sexual Exploitation in Criminal Court*, *in* LAWYER'S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE FOR VICTIMS 183, 184 (Jill Laurie Goodman & Dorchen A. Leidholdt eds., 2011) (relaying that prostitution cases are referred to as "dispos" ("disposables") in criminal court jargon because they are considered trivial and are often disposed of at arraignment with conditional dispositions or pleas); Shelby Schwartz, Note, *Harboring Concerns: The Problematic Conceptual Reorientation of Juvenile Prostitution Adjudication in New York*, 18 COLUM. J. GENDER & L. 235, 243 (2008) (describing typical dispositions for prostituted minors in New York family court as including placement in a facility or probation).

legitimate exercises of the states' police powers.[32] While states may argue that the purpose of penalizing prostituted minors is to promote those interests,[33] alternative justifications for criminalizing prostitution are commonly proffered in the context of minors.[34] For example, some argue that the threat of prosecution should be used to negotiate minors' cooperation in the prosecution of pimps and traffickers.[35] An alternative argument centers on the idea that arrest and prosecution provide protection for prostituted minors by keeping them off the streets and away from their pimps and traffickers,[36] and by linking them with service providers.[37]

Regardless of the justification, enforcing criminal prostitution law against minors is inconsistent with statutory rape laws[38] in some states

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32. *See, e.g.*, State v. Hicks, 360 A.2d 150, 152 (Del. Super. Ct. 1976) (determining that the state had a rational basis for prohibiting prostitution because it could reasonably conclude that prostitution puts a strain on marriage, increases incidences of disease, and forces unwanted solicitation on some members of the community), *aff'd per curiam*, 373 A.2d 205 (Del. 1977).

33. *See* Megan Annitto, *Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors*, 30 YALE L. & POL'Y REV. 1, 26–28 (2011) (linking the justification of moral wrongdoing to a misperception of the level of coercion involved in the sex trafficking of minors).

34. *See id.* at 27 & n.116 (noting that opponents of New York's Safe Harbor Act argued in favor of prosecuting prostituted minors because it is a way to protect them from further exploitative pimps and to encourage them to "provide information against [their] pimp"); Birckhead, *supra* note 28, at 1083–84 (noting that advocates of enforcement against prostituted minors assert that criminal detention and the threat of criminal detention are necessary tools to ensure minors' cooperation).

35. *See* Birckhead, *supra* note 28, at 1084 (reporting that those who support the prosecution of prostituted minors believe that it is necessary to encourage their cooperation, but rejecting this justification because it ignores the evidence about the complex psychological effects of trafficking on minors and the dependency it engenders); Bob Herbert, Op-Ed., *The Wrong Target*, N.Y. TIMES (Feb. 19, 2008), http://www.nytimes.com/2008/02/19/opinion/19herbert.html (describing how New York prosecutors objected to an early effort to pass Safe Harbor legislation by arguing that the threat of jail was necessary to convince prostituted minors to testify against pimps).

36. *See* SHARED HOPE INT'L ET AL., REPORT FROM THE U.S. MID-TERM REVIEW ON THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN AMERICA 15 (2006), *available at* http://www.sharedhope.org/Portals/0/Documents/US_MTR_of_CSEC.PDF [hereinafter SHARED HOPE REPORT FROM THE U.S. MID-TERM REVIEW] (describing advocates' concerns about releasing minors back to pimps or abusive family relationships).

37. *See* Birckhead, *supra* note 28, at 1085 (presenting the argument that without these tools, courts have no way to ensure victims receive treatment and counseling); Geneva O. Brown, *Little Girl Lost: Las Vegas Metro Police Vice Division and the Use of Material Witness Holds Against Teenaged Prostitutes*, 57 CATH. U. L. REV. 471, 471–74, 496–501 (2008) (describing a Las Vegas police practice of using material witness holds to detain prostituted minors and the police and prosecutors' defense of the practice as beneficial to the safety of the prostituted minors).

38. *See* ASAPH GLOSSER ET AL., THE LEWIN GRP., STATUTORY RAPE: A GUIDE TO STATE LAWS AND REPORTING REQUIREMENTS 6–7 (2004), *available at* http://aspe.hhs.gov/hsp/08/SR/StateLaws/report.pdf (cataloguing state age of consent laws, with the average age of consent being sixteen-years-old). Statutory rape laws make it illegal to engage in sexual activity with individuals below a certain age. *Id.* at 5. The principle

because it allows minors to be prosecuted for engaging in commercial sex even though they are legally unable to consent to sex.[39] In 2010, the Texas Supreme Court held that this dichotomy was untenable.[40] The Texas court drew on recent U.S. Supreme Court cases, like *Roper v. Simmons*[41] and *Graham v. Florida*,[42] in declaring that, with regard to prostitution, "minors of a certain age have a reduced or nonexistent capacity to consent, no matter their actual agreement or capacity."[43] While the Texas court's decision effectively eliminated criminal liability for prostituted minors under that state's age of consent,[44] some other states have recently enacted legislation with similar effects.[45]

2. Safe Harbor laws redefine prostituted minors as victims in need of services

Since the passage of the federal TVPA, ten states have enacted some form of legislation limiting the criminal liability of minors who are arrested for prostitution[46]: Connecticut,[47] Illinois,[48]

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underlying such laws is that individuals below a certain age are not mature enough to consent to sex. *Id.* at 2. Thus, these laws assume that statutory rape is coercive even when both parties voluntarily engage in the sex act. *Id.*

39. *See* Birckhead, *supra* note 28, at 1069–70 (discussing the tension between the two types of laws and noting that the purpose of statutory rape laws is to deter sex that is not truly consensual). Courts are not in agreement about the significance of this dichotomy. *Compare In re* B.W., 313 S.W.3d 818, 820 (Tex. 2010) (holding that a thirteen-year-old could not be prosecuted for prostitution because she was under the age of consent), *with In re* Nicolette R., 779 N.Y.S.2d 487, 488 (App. Div. 2004) (permitting a prostitution adjudication in juvenile court despite the fact that the juvenile was age twelve and thus under the age of consent).

40. *See In re B.W.*, 313 S.W.3d at 820 (reasoning that because children thirteen and younger cannot consent to sex under Texas law, they also cannot be tried for prostitution under Texas law).

41. 543 U.S. 551, 574 (2005) (holding that minors should not be eligible for the death penalty because eighteen is the age at which "society draws the line for many purposes between childhood and adulthood").

42. 130 S. Ct. 2011, 2034 (2010) (interpreting the Cruel and Unusual Punishments Clause to that mean juveniles convicted of non-homicide offenses cannot be sentenced to life without parole); *see also Miller v. Alabama*, 132 S. Ct 2455, 2464 (2012) (holding that a mandatory sentence of life without parole for those who were under age eighteen at the time of their crimes violates the Eighth Amendment).

43. *In re B.W.*, 313 S.W.3d at 823.

44. *See id.* at 826 (inferring an exception in the criminal prostitution law for minors under the age of consent because the statutory rape law indicates the legislature has decided that children under the age of consent lack the mental capacity to meaningfully agree to sex).

45. *See infra* Part I.A.2 (discussing ten states' attempts to create legislation with the goal of providing services to prostituted minors instead of punishment).

46. *See Pending State and Federal Legislation*, *supra* note 19 (providing information on enacted trafficking legislation and daily updates on pending trafficking legislation in every state). This progress has not come without opposition. *See, e.g.*, Kyle Wingfield, *Sex Trade Kids Truly Victims*, ATLANTA J.-CONST., Feb. 7, 2010, at A22 (noting that opposition groups have frustrated the passage of a Georgia Safe Harbor bill). Hawaii is also considering a bill that would establish that a person who is under

Massachusetts,[49] Michigan,[50] Minnesota,[51] New York,[52] Ohio,[53] Tennessee,[54] Vermont,[55] and Washington[56]. These laws, which are often referred to as Safe Harbor laws,[57] vary in scope; however, each requires that some category of prostituted minors be removed from delinquency or criminal court proceedings and diverted instead to social services, such as psychological counseling or long-term housing.[58]

Safe Harbor laws contain different age requirements. For example, the law in Illinois states that a minor under age eighteen is immune

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eighteen and charged with a prostitution offense is immune from prosecution. H.R. 2234 H.D. 1, 26th Leg., Reg. Sess. (Haw. 2012).

47. CONN. GEN. STAT. § 53a-82 (2012) (redefining prostitution as an offense committed by an individual sixteen years of age or older and creating a rebuttable presumption that sixteen- and seventeen-year-olds did not consent to engage in the offense).

48. 720 ILL. COMP. STAT. ANN. 5/11-14(d) (2012) (transferring jurisdiction over prostituted minors from the criminal justice system to child protective services).

49. MASS. GEN. LAWS ch. 119, § 39L (2012) (creating a presumption that a person under age eighteen who engages in prostitution should be treated as a child in need of protective services rather than be prosecuted).

50. *See* MICH. COMP. LAWS § 750.448–.449 (2009) (defining prostitution as a crime committed by individuals over the age of sixteen). Unlike other states that have enacted laws that eliminate criminal punishment for some prostituted minors, Michigan does not require that prostituted minors be diverted to service providers or alternative programs.

51. MINN. STAT. ANN. § 609.093 subdiv. 1 (West Supp. 2011) (effective Aug. 1, 2014) (requiring that prostituted sixteen- and seventeen-year-olds be diverted to specialized programs rather than be adjudicated as a delinquent).

52. N.Y. SOC. SERV. LAW §§ 447-a to -b (McKinney 2010) (authorizing services for sexually exploited youth); N.Y. FAM. CT. ACT § 732 (stating that juveniles arrested for prostitution can be declared a "person . . . in need of supervision"). The New York law is titled the "Safe Harbour Act." Although the New York legislature chose to use "harbour," the English spelling of "harbor," N.Y. SOC. SERV. LAW § 447-a, I use "harbor" throughout this Comment.

53. H.R. 262, 129th Gen. Assemb., Reg. Sess. (Ohio 2011) (authorizing juvenile courts to suspend a complaint pending the child's completion of diversion actions if the alleged delinquent child is charged with prostitution).

54. TENN. CODE ANN. § 39-13-513(d) (2011) (mandating that persons under age eighteen are immune from prosecution for prostitution as a juvenile or adult and shall be placed under temporary protective custody).

55. VT. STAT. ANN. tit. 13, §§ 2652(c)(1), 2653(a)(1) (2011) (defining people who are under eighteen and engaged in prostitution as victims of aggravated human trafficking and providing them with immunity against prostitution charges).

56. WASH. REV. CODE § 13.40.070(7) (2012) (providing for diversion from delinquency proceedings for minors alleged to have committed their first prostitution offense).

57. Not all of the laws discussed in this section are named "Safe Harbor." I use the term here to identity a category of laws that limit criminal responsibility and increase provision of services for prostituted minors.

58. *See Human Trafficking Legislative Issue Brief: Sex Trafficking of Minors and "Safe Harbor,"* POLARIS PROJECT 1 (Apr. 20, 2012), http://www.polarisproject.org/storage/documents/policy_documents/Issue_Briefs/issue%20brief%20-%20safe%20harbor%20-%20april%202012.pdf (listing non-prosecution and provision of services as components of a comprehensive Safe Harbor law and citing examples of existing Safe Harbor laws).

from prosecution and should receive specialized services instead.[59] On the other hand, Connecticut immunizes minors under sixteen from prosecution and creates a presumption that minors age sixteen and seventeen are coerced into committing the offense.[60]

In addition to age,[61] some states also condition their laws' protections on factors such as previous offenses[62] or cooperation with service providers.[63] For example, although Minnesota and Washington require that certain minors arrested for prostitution be referred to diversion programs rather than receive criminal punishments, these protections are only mandatory for first time offenders.[64] Likewise, New York's protections are mandatory only if the minor has not previously offended, cooperates with service

59. *See* 720 ILL. COMP. STAT. 5/11-14(d) (2012) (transferring jurisdiction over prostituted minors from the criminal justice system to child protective services).

60. CONN. GEN. STAT. § 53a-82 (2012).

61. The age element is even more complicated under New York's Act. The New York law defines a minor under age eighteen involved in prostitution as a "sexually exploited child" and authorizes the provision of services for people meeting this definition. N.Y. SOC. SERV. LAW §§ 447-a to -b (McKinney 2010). In addition, it mandates non-prosecution of some minors by creating a presumption that a respondent brought to family court on charges of prostitution should be considered a "person in need of supervision" and not a delinquent. N.Y. FAM. CT. ACT § 311.4(3). New York's family court jurisdiction, however, only extends to minors under age sixteen. *Id.* § 301.2(1). As such, the Act effectively only mandates protection for prostituted minors under age sixteen. *See* Annitto, *supra* note 33, at 46–47 (noting the legislature's rejection of an earlier version of the New York law that contained language that would have protected all minors under age eighteen). At least one New York court has interpreted the Safe Harbor Act's non-prosecution protection as extending to sixteen- and seventeen-year-olds as well. In *People v. Samantha R.*, No. 2011KN092555, 2011 WL 6303402 (N.Y. Crim. Ct. Dec. 16, 2011), the court decided sua sponte to dismiss a sixteen-year-old defendant's criminal prostitution charge, reasoning that the Safe Harbor law implies that criminal courts should transfer prostitution cases to family court when the defendants are under age eighteen. *Id.* at *4. The court noted that while the Act did not alter the penal law, the prosecution of a minor, seen as a "sexually exploited child" and a "victim" within the courts and legislature, is incompatible with the ameliorative intent of the Safe Harbor Act, state trafficking laws, and the TVPA. *Id.* at *3–4.

62. *See, e.g.*, MINN. STAT. ANN. § 609.093 subdiv. 1(a) (West Supp. 2011) (effective Aug. 1, 2014) (describing circumstances that disqualify a minor for protection against prosecution); N.Y. FAM. CT. ACT § 311.4(3) (granting discretion to continue a delinquency proceeding if the minor previously committed an act of prostitution).

63. *See, e.g.*, N.Y. FAM. CT. ACT § 311.4(3) (stating that a court is not required to divert a case if the youth is unwilling to cooperate with service providers).

64. *See* MINN. STAT. ANN. § 609.093 subdiv. (1)(a)(1) (applying the first-time-offense procedure where the sixteen- or seventeen-year-old was not previously adjudicated delinquent for engaging in prostitution); WASH. REV. CODE § 13.40.070(6)–(7) (2012) (instructing the prosecutor to divert the case if it is the defendant's first offense). Conditions like these have been criticized as failing to account for prostituted minors' circumstances and the dynamics of pimp control. *See* Annitto, *supra* note 33, at 51–52 (evaluating the weaknesses of New York's Safe Harbor law as illustrated by a case involving a prostituted minor who was denied the benefit of the law's non-prosecution provision because the minor had a prior arrest).

providers, and has never been the subject of a "person in need of supervision" petition in family court.[65]

In summary, although some states have begun to recognize the prostitution of minors as distinct from that of adults, the relatively progressive schemes adopted in these states still allow for the prosecution of some prostituted minors. Moreover, Safe Harbor laws exist in only ten states,[66] while the vast majority continues to criminalize prostitution for minors.[67] As a result, many minors who are considered victims under federal law are nevertheless considered offenders under state laws.

B. The Trafficking Victims Protection Act

While there is no federal prostitution statute,[68] the federal government has taken a dominant role in fighting sex trafficking.[69] The central piece of federal sex trafficking legislation, the TVPA, was enacted in 2000 and has since been reauthorized three times.[70] Federal authority to regulate sex trafficking stems from the Commerce Clause.[71] The purpose of the TVPA is to combat trafficking in persons by ensuring punishment of traffickers and protection for trafficking victims.[72] When the TVPA initially passed in 2000, Congress's focus was international trafficking.[73] However,

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65. *See* N.Y. FAM. CT. ACT § 311.4(3) (listing factors that render ineffective the statutorily authorized presumption that a prostituted minor is a victim of sex trafficking); *In re* Bobby P., 907 N.Y.S.2d 540, 547–49 (Fam. Ct. 2010) (refusing to convert a minor's prostitution case from a delinquency case to a "person in need of supervision" case because the court doubted the minor's willingness to embrace court-ordered services).

66. *See supra* notes 52–56 (citing various state prostitution statutes that exempt minors).

67. *See supra* Part I.A.1 (discussing the traditional age-indiscriminate approach to enforcing prostitution laws).

68. *See* Franklin, *supra* note 13, at 364 (explaining that primary authority for regulating prostitution has traditionally been thought to lie with the states).

69. *See* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 374–78 (2011) [hereinafter 2011 TRAFFICKING IN PERSONS REPORT] (highlighting the primacy of the federal government in the United States' efforts to combat trafficking).

70. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (codified in scattered sections of 6, 8, 18, 22, and 42 U.S.C. (Supp. II 2009)); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006); Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875.

71. *See* United States v. Powell, No. 04 CR 885, 2006 WL 1155947, at *3 (N.D. Ill. Apr. 28, 2006) (concluding that in enacting the TVPA, Congress found that trafficking adversely affects interstate commerce, and as such, the government need not prove interstate travel to satisfy the interstate commerce element in a trafficking case).

72. *See* 22 U.S.C. § 7101(a) (2006) (describing human trafficking as a "contemporary manifestation of slavery").

73. *Id.* § 7101(b) (referring to characteristics of international trafficking); *see also* Birckhead, *supra* note 28, at 1078 (describing the international focus of the TVPA as

nothing in the text of the 2000 Act prevents its application to U.S. citizens.[74] Indeed, subsequent reauthorizations of the TVPA explicitly acknowledge that Congress considers domestic and international trafficking equally criminal and that the protective provisions of the Act apply with equal force to both foreign and U.S. citizen victims.[75]

The TVPA provisions fall into three categories: punishment, prevention, and protection.[76] Under the punishment category, the Act strengthened available prosecution and sentencing statutory mechanisms[77] and made it a crime to engage in sex trafficking that constitutes a "severe form[] of trafficking in persons."[78] In

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reflecting a deep disconnect between treatment of foreign born and "domestic" trafficking victims); Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 2990 (2006) (suggesting that Congress's initial lack of attention to domestic trafficking is indicative of a broader tendency to ignore the role of the United States in perpetuating trafficking).

74. *See* Annitto, *supra* note 33, at 40 (noting that the language of the original TVPA technically applied to domestic minor trafficking victims); Birckhead, *supra* note 28, at 1079 (observing that the TVPA's language makes no distinction between foreign and domestic victims and the legislative history indicates that many of the Act's sponsors understood it to apply to domestic victims); *see also* 146 CONG. REC. 16,705 (2000) (statement of Sen. Paul Wellstone) (explaining that the 2000 TVPA was designed in part to enhance domestic anti-trafficking efforts).

75. *See* Trafficking Victims Protection Reauthorization Act of 2005 § 2(4)–(6) (finding that trafficking exists within the United States); H.R. REP. NO. 109-317, pt. 1, at 11 (2005) (defining domestic trafficking as the "trafficking of United States citizens and permanent residents"); H.R. REP. NO. 109-317, pt. 2, at 22 (explaining that state and local programs funded pursuant to the TVPA should improve services to domestic minor trafficking victims to eliminate any inconsistency in the provision of services to foreign and domestic trafficking victims); Angela D. Giampolo, *The Trafficking Victims Protection Reauthorization Act of 2005: The Latest Weapon in the Fight Against Human Trafficking*, 16 TEMP. POL. & CIV. RTS. L. REV. 195, 210–11 (2006) (describing how the 2005 reauthorization of the TVPA aims to improve services for domestic trafficking victims, including establishing a grant program to strengthen state and local responses to victims).

76. *See* H.R. REP. NO. 106-487, pt. 2, at 1 (2000) (describing the ways in which the federal government combats sex trafficking and dividing its approach into three prongs: prevention of trafficking, punishment of traffickers, and protection of victims); Theodore R. Sangalis, Comment, *Elusive Empowerment: Compensating the Sex Trafficked Person Under the Trafficking Victims Protection Act*, 80 FORDHAM L. REV. 403, 405 (2011) (suggesting that the federal government has struggled in practice to balance the three objectives of sex trafficking legislation). The prevention prong of the TVPA is not discussed in the Comment. Provisions falling under this category include a call for establishing a system for monitoring worldwide anti-trafficking efforts, and authorization for the establishment of programs in foreign countries to increase public awareness of trafficking and to provide economic opportunities to potential victims to deter trafficking. *See, e.g.*, 22 U.S.C. § 7104(a)–(b) (directing the President to aid victims of international trafficking internationally and promote public awareness).

77. *See* Rosy Kandathil, *Global Sex Trafficking and the Trafficking Victims Protection Act of 2000: Legislative Responses to the Problem of Modern Slavery*, 12 MICH. J. GENDER & L. 87, 98 (2005) (explaining that the TVPA enhanced sentences for crimes such as kidnapping and sexual abuse when those crimes occur in the course of trafficking).

78. *See* 18 U.S.C. § 1591 (prohibiting sex trafficking of children or sex trafficking

particular, the Act makes it a crime to cause a person to engage in a commercial sex act either (1) through the use of "force, fraud, or coercion" *or* (2) where the person induced to perform the commercial sex act is under eighteen years of age.[79] Congress identified two different forms of "severe" sex trafficking[80] indicating that it considered sex trafficking of minors qualitatively different than sex trafficking of adults.[81]

While Congress requires proof of compulsion to establish sex trafficking of an adult, it does not require proof of compulsion when the victim is a minor.[82] Similarly, under the TVPA, minors who engage in commercial sex are categorically defined as victims of severe sex trafficking.[83] In defining "victim of severe sex trafficking," Congress again made a distinction—this time implicitly—between minors and adults by requiring proof of compulsion for adult victims but not minor victims.[84] Since the TVPA aims to protect victims of

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by force, fraud, or coercion). The types of conduct made criminal under 18 U.S.C. § 1591 constitute "severe forms of trafficking" under 22 U.S.C. § 7102(8)(A). *See* Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1679 (2010) (explaining that the TVPA's "key operational terms" only apply to sex trafficking that qualifies as a "severe form of trafficking in persons"). The TVPA defines only some forms of sex trafficking as "severe." *Compare* 22 U.S.C. § 7102(8)(A) (defining "severe" forms of sex trafficking as sex trafficking of children or by force, fraud, or coercion), *with id.* § 7102(9) (defining sex trafficking as "the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act").

79. 22 U.S.C. § 7102(8)(A).

80. The term "severe sex trafficking" does not appear in the Code. I use the term to refer to the two forms of sex trafficking defined in 18 U.S.C. § 1591 and identified in 22 U.S.C. § 7102(8)(A).

81. *See* Robert Uy, *Blinded by Red Lights: Why Trafficking Discourse Should Shift Away from Sex and the "Perfect Victim" Paradigm*, 26 BERKELEY J. GENDER L. & JUST. 204, 205–06 (2011) (describing the TVPA's "clear distinction" between trafficking of adults and minors as resulting from the view that minors cannot, under any circumstances, consent to commercial sex).

82. *See* 22 U.S.C. § 7102(8)(A) (requiring either force, fraud, or coercion, *or* the inducement of a person under the age of eighteen to commit severe sex trafficking); *see also* Pamela Chen & Monica Ryan, *Federal Prosecution of Human Traffickers*, *in* LAWYER'S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE FOR VICTIMS 271, 273 (Jill Laurie Goodman & Dorchen A. Leidholdt eds., 2011) (emphasizing the fact that compulsion is not required to prove sex trafficking of a minor).

83. *See* 22 U.S.C. § 7102(8A), (13) (categorizing children involved in commercial sex acts as victims of severe sex trafficking, regardless of whether force, fraud, or coercion was used against them); *see also In Our Own Backyard*, *supra* note 1, at 2 (statement of Sen. Richard Durbin, Chairman, S. Subcomm. on Human Rights & the Law) (declaring that Congress intended the TVPA to treat all children who were involved in commercial sex crimes as victims); H.R. REP. NO. 109-317, pt. 2, at 23 (2005) (affirming that any person younger than eighteen-years-old who is induced to perform a commercial sex act is considered a victim of severe trafficking under the TVPA); SISKIN & WYLER, *supra* note 16, at 21 (finding widespread acceptance of the proposition that all prostitution by minors constitutes severe sex trafficking under the TVPA).

84. *See* 22 U.S.C. § 7102(13). The TVPA defines a victim of a severe form of trafficking with reference to the disjunctive definition of severe forms of trafficking

severe sex trafficking,[85] it directs the DOJ to issue regulations for federal law enforcement personnel and immigration officials regarding, for example, the need to provide security if a victim's safety is at risk;[86] the need to refrain from holding victims in custody in a manner inappropriate in light of their status as victims;[87] and the need to ensure that they have access to information about their rights as victims of crime.[88]

The Act also provides two types of immigration relief for foreign trafficking victims: first, it authorizes the Department of Homeland Security (DHS) to allow the continued presence of some victims of trafficking in the United States,[89] and second, it authorizes regulations to create the T visa, which grants status to victims of trafficking for a four-year period and can be adjusted to permanent residency after that period to allow for further immigration relief.[90] In addition, the TVPA instructs the Department of Health and Human Services, the Department of Labor, the Legal Services Corporation, and various other federal agencies to expand benefits and services for victims of severe sex trafficking.[91] Victim assistance funded pursuant to these provisions includes medical care, mental health treatment, shelter, translation and interpretation, immigration and legal assistance, and other services.[92] Finally, the TVPA creates a civil remedy[93] for trafficking victims that entitles them to restitution.[94]

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in persons found in 22 U.S.C. § 7102(8).

85. *See, e.g.*, *id.* § 7101(b)(19) (establishing that victims of severe sex trafficking should not be punished for unlawful acts committed solely as a result of being trafficked); U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS FISCAL YEAR 2010, at 9 (2011) [hereinafter ATTORNEY GENERAL'S 2010 REPORT], *available at* http://www.justice.gov/ag/annualreports/tr2010/agreporthuman trafficking2010.pdf (describing federal agencies' activities pursuant to the TVPA as providing support and services for victims, such as shelter options and rehabilitation programs).

86. 22 U.S.C. § 7105(c)(1)(C).

87. *Id.* § 7105(c)(1)(A).

88. *Id.* § 7105(c)(2).

89. *See id.* § 7105(c)(3) (setting out the circumstances under which a trafficking victim can be granted continued presence in the United States, such as the participation in an investigation).

90. 8 C.F.R. § 214.11(p)(1) (2012).

91. *See* 22 U.S.C. § 7105(b) (requiring heads of agencies to establish various programs to provide victims with assistance, benefits, and services).

92. SUBCOMM. ON DOMESTIC TRAFFICKING, SENIOR POLICY OPERATING GRP. ON TRAFFICKING IN PERSONS, FINAL REPORT AND RECOMMENDATIONS 8–9 (2007) [hereinafter SENIOR POLICY OPERATING], *available at* http://www.acf.hhs.gov/ trafficking/SPOGReport-Final9-5-07.pdf. The Senior Policy Operating Group was established by TVPA, and certain agencies are mandated to report human trafficking initiatives to it. 42 U.S.C. § 14044d.

93. 18 U.S.C. § 1595. The effectiveness of the civil remedy is a separate question. *See* Sangalis, *supra* note 76, at 405 (arguing that victims have not benefited from the civil remedy).

Despite the TVPA's clear indication that minors involved in commercial sex are victims and that victims should not be treated as criminals, the 2008 reauthorization of the TVPA contains a savings clause.[95] A savings clause is language in a statute that exempts some legal provisions from the displacement that would otherwise occur.[96] In the case of the TVPA, the savings clause states, "[n]othing in this Act . . . (1) may be construed to treat prostitution as a valid form of employment under Federal law; or (2) shall preempt, supplant, or limit the effect of any State or Federal criminal law."[97] Consequently, although there is clearly inconsistency between the federal sex trafficking law and the status of prostituted minors under state criminal prostitution laws, it is not immediately clear what impact the TVPA should have on the continued application of state prostitution laws to minors.

C. Federal Preemption of Conflicting State Laws

One way to evaluate the apparent conflict between federal law and state law is using preemption analysis. Preemption refers to the displacement of state law by federal law pursuant to the Supremacy Clause of the Constitution, which states that federal law is the "supreme Law of the Land."[98] Long-established Supreme Court doctrine holds that the "touchstone" of preemption is congressional purpose.[99] As such, in the clearest instances of preemption, Congress expressly indicates its intent to preempt state law in the language of a statute;[100] however, even when a federal statute does not contain

94. 18 U.S.C. § 1593(b) (setting the amount payable upon a restitution order as "the greater of the gross income or value" to the trafficker of the victim's services). The civil remedy allows a sex trafficking victim to sue his or her trafficker in federal court for damages arising from a violation of 18 U.S.C. § 1591.

95. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 225(a), 122 Stat. 5044, 5072 (foreclosing any preemption of state or federal law). Although this language appears as a note in the U.S. Code, it not officially codified therein. 22 U.S.C. § 7101 note (Supp. II 2009).

96. BLACK'S LAW DICTIONARY 1461 (9th ed. 2009).

97. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 225(a).

98. U.S. CONST. art. VI, cl. 2; *see also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 239–40 (1824) (holding that a state law that granted a monopoly on the operation of steamboats in a particular harbor was preempted by a federal statute regulating coastal trade).

99. *E.g.*, Medtronic, Inc. v. Lohr, 518 U.S. 470, 485, 490 (1996) (holding that Congress enacted a statute for the purpose of enhancing the safety of medical devices and that this purpose did not support the petitioners claim that the statute preempted state law negligence actions against medical device manufacturers); Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516, 519–20 (1992) (holding that the purpose of a federal statute regarding tobacco advertising was not to preempt state common law claims but rather only positive enactments of state law).

100. *See* English v. Gen. Elec. Co., 496 U.S. 72, 78–79 (1990) (explaining that

explicit preemption language, courts can infer congressional intent to preempt.[101]

The Court has recognized two categories of implied preemption: field preemption and conflict preemption.[102] Field preemption occurs when Congress creates a federal scheme "so pervasive" that there is "no room" for state law,[103] or when the area in which a state regulation operates is so dominated by federal interests that a court may infer Congress's intent to regulate exclusively within that field.[104] Conflict preemption, on the other hand, occurs when state and federal legislation are in conflict, either because compliance with both laws is impossible or because the state law frustrates the federal law's purposes.[105] Conflict preemption analysis therefore involves two

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preemption is a matter of deciphering congressional intent, and noting that sometimes Congress's intent is explicit); *see also* Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008) (explaining that express preemption language does not end the preemption inquiry because its scope must still be determined).

101. *See* Arizona v. United States, 132 S. Ct. 2492, 2501 (2012) (stating that Congress's intent to displace state law can be inferred from a regulatory framework); *Medtronic, Inc.*, 518 U.S. at 486 (explaining that congressional intent to preempt is inferred not only from text but also "the structure and purpose of the statute as a whole"); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984) (distinguishing between preemption where Congress expresses its explicit intent to "occupy that field" and where the purposes of Congress are in conflict with the purposes of state law).

102. *See Altria Grp.*, 555 U.S. at 76–77 (noting that in field and conflict preemption cases, Congress's preemptive intent is inferred); *English*, 496 U.S. at 79 (describing the three categories of preemption—express, field, and conflict—but refusing to recognize a rigid distinction between them); Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (refusing to define a strict formula for determining when state law is impliedly preempted).

103. Pennsylvania v. Nelson, 350 U.S. 497, 502 (1956) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

104. *See Rice*, 331 U.S. at 230 (reasoning that when a law is "so pervasive," it is inferred that Congress meant to leave no room for state laws); *see also* United States v. Locke, 529 U.S. 89, 99 (2000) (holding that state maritime regulations were preempted where the state "enacted legislation in an area where the federal interest has been manifest since the beginning of our Republic"); *Davidowitz*, 312 U.S. at 67–68 (discerning field preemption based on the federal government's pervasive scheme of immigration regulation); S. Ry. Co. v. R.R. Comm'n of Ind., 236 U.S. 439, 447 (1915) (finding field preemption on the basis of extensive federal regulations of freight cars operating in interstate railways).

105. *See Arizona v. United States*, 132 S. Ct. at 2501 (describing impossibility and obstacle preemption as subcategories of conflict preemption); Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963) (rejecting avocado growers' impossibility claim based on an asserted conflict between state maturity standards and federal avocado regulations); McDermott v. Wisconsin, 228 U.S. 115, 137 (1913) (concluding that a state syrup labeling law was preempted because its provisions conflicted with a federal law); *see also* Perez v. Campbell, 402 U.S. 637, 651 (1971) (finding that an Arizona law governing motor vehicle safety was preempted because it conflicted with the Bankruptcy Act); *cf.* Geier v. Am. Honda Motor Co., 529 U.S. 861, 873–74 (2000) (dismissing as unnecessary the artificial division the Court had seemingly created in striking down state statutes that conflicted with federal law with either an impossibility or frustration of purpose label). *See generally* Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085 (2000) (locating conflict

steps: first, ascertaining the proper construction of the federal statute, and second, determining whether the state law is in conflict with the federal law.[106] If the analysis reveals a conflict, the Supremacy Clause indicates that federal law trumps state law.[107]

1. Step one of conflict preemption analysis: Statutory interpretation

The first step of a conflict preemption analysis is to identify the meaning or purpose of the federal statute. This is an exercise in statutory construction and requires that courts interpret the text and the structure of the statute's provisions,[108] and in some cases, the statute's legislative history.[109] The Supreme Court has often stated that there is a "presumption against preemption" informing the inquiry into legislative purpose; however, the presumption is inconsistently applied.[110] This presumption is an expression of the federalism concerns that underlie questions of federal preemption of

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preemption on a spectrum of mechanisms by which congressional action or inaction displaces state law).

106. *See Perez*, 402 U.S. at 644 (outlining the two steps in a proper implied conflict analysis); Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 970 (2002) (noting that conflict preemption is the most controversial of the implied preemption models because of the uncertainty involved in the task of inferring congressional objectives); Dinh, *supra* note 105, at 2092 ("[T]he task for the Court is to discern what Congress has legislated and whether such legislation displaces concurrent state law . . . .").

107. *See* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992) (observing that a state law in conflict with federal law is "without effect").

108. *See, e.g.*, Medtronic, Inc. v. Lohr, 518 U.S. 470, 485–86 (1996) (examining the language of the statute, the purpose of the legislation, and the legislative history to determine that there was no preemption); Barnett Bank of Marion Cnty., N.A. v. Nelson, 517 U.S. 25, 30, 34–35 (1996) (finding that a federal statute preempts local laws because the law contains no indication of Congress's intent to allow local laws to restrict the statute); *see also* Dinh, *supra* note 105, at 2104–05 (describing implied preemption analysis as a form of statutory construction).

109. *See Lohr*, 518 U.S. at 490 (relying on legislative history to conclude that Congress did not intend a federal law regulating medical devices to preempt common law negligence actions). *But see* Wyeth v. Levine, 555 U.S. 555, 583 (2009) (Thomas, J., concurring) (expressing skepticism at the Court's "'purposes and objectives' pre-emption jurisprudence" and especially its reliance on legislative history to identify Congress's purposes).

110. *See* Maryland v. Louisiana, 451 U.S. 725, 746 (1981) (asserting that a preemption analysis begins with the presumption that Congress does not intend to preempt state law); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (clarifying that there is an assumption that Congress did not intend to preempt the states' police powers absent a clear expression of this intent); *see also* English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990) (discussing the need for a clear statement of intent when the federal government legislates in a field traditionally occupied by the states); Robert R. Gasaway, *The Problem of Federal Preemption: Reformulating the Black Letter Rules*, 33 PEPP. L. REV. 25, 35 (2005) (describing the presumption against preemption as one of three black letter rules of preemption doctrine). *But see generally* Davis, *supra* note 106 (arguing that although the Court has long referred to the presumption *against* preemption, its decisions reflect a presumption *in favor* of preemption).

state law.[111] It presumes that Congress does not intend to preempt state law, especially when it legislates in an area that states traditionally occupy.[112] On the other hand, the Supreme Court has suggested that the presumption against preemption does not apply when the state law in question regulates an area where the federal government already has a strong regulatory presence.[113] As such, the presumption should only apply when Congress legislates in an area of law traditionally within the states' police powers.

In practice, the presumption against preemption is applied inconsistently.[114] For example, the Supreme Court has upheld findings of preemption in such zones of traditional state authority as domestic relations,[115] products liability law,[116] cigarette advertising,[117] and insurance regulation.[118] This record has led some scholars to suggest that the Supreme Court's decisions, if not its words, reveal a presumption *in favor* of preemption.[119] Moreover, regardless of the

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111. *See Lohr*, 518 U.S. at 485 (explaining that the presumption reflects respect for the states as "independent sovereigns in our federal system"); Davis, *supra* note 106, at 968 (suggesting that commentators approve of the presumption because it is consistent with federalism principles).

112. *See, e.g.*, Hillsborough County. v. Automated Med. Labs, Inc., 471 U.S. 707, 715 (1985) (noting that health and safety standards are considered state matters); Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) (recognizing that laws regarding domestic relations are traditionally a matter of state authority).

113. *See, e.g.*, United States v. Locke, 529 U.S. 89, 106 (2000) (insisting that a state is not entitled to a presumption against preemption for laws regulating maritime commerce); Hines v. Davidowitz, 312 U.S. 52, 67–68 (1941) (considering it significant that the preempted state legislation concerned international relations, an area in which the national government is considered to have plenary power).

114. *See, e.g.*, Jones v. Rath Packing Co., 430 U.S. 519, 545–49 (1977) (Rehnquist, J., concurring in part and dissenting in part) (arguing for stronger adherence to the presumption against preemption); City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 643 (1973) (Rehnquist, J., dissenting) (referring to the presumption in arguing that a city ordinance prohibiting jets from taking off during certain hours was valid because it should have been preempted by federal regulations); *see also* Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1318–24 (2004) (arguing that in practice the Court often applies a presumption in favor of preemption); Dinh, *supra* note 105, at 2086 (citing cases where dissenting justices have accused the majority of ignoring the presumption against preemption).

115. *See* McCarty v. McCarty, 453 U.S. 210, 235–36 (1981) (holding that a federal military retirement scheme preempted state community property rules in a dispute concerning division of assets upon divorce).

116. *See* Geier v. Am. Honda Motor Co., 529 U.S. 861, 869 (2000) (deciding that a plaintiff's no-airbag lawsuit against a car manufacturer could not go forward because federal vehicle safety regulations preempted the state tort claims).

117. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 550–51 (2001) (ruling that federal law preempted a Massachusetts law regulating certain cigarette advertising).

118. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 420–23 (2003) (finding preemption of a California law that required insurance companies to disclose Holocaust-era insurance policies).

119. *See* Davis, *supra* note 106, at 1013 (arguing that the Supreme Court has surreptitiously impacted state tort law in part by misrepresenting the presumption against preemption). *But see* David C. Vladeck, *Deconstructing* Wyeth v. Levine*: The*

Supreme Court's actual practice, scholars have expressed doubt about whether the presumption against preemption is ever appropriate in the specific context of conflict preemption.[120] One scholar suggests that when a conflict exists between a validly enacted federal law and a state law, a court would "disrupt the constitutional division of power" if it were to "favor one result over another" by applying a presumption against preemption.[121] Similarly, a recent opinion in *PLIVA, Inc. v. Mensing*[122] suggested that the presumption should not apply in cases of actual conflicts between federal and state laws because the Supremacy Clause "plainly contemplates" conflict preemptions.[123] Thus, although the Court frequently refers to the presumption against preemption, its force in any given case is not obvious.

The effect of a savings clause is another element courts frequently encounter in the statutory interpretation stage of conflict preemption analysis. In the context of preemption, savings clauses preserve the effect of state laws that otherwise would be preempted by operation of the Supremacy Clause.[124] The Supreme Court, however, has inferred conflict preemption even in cases where a federal statute contains a savings clause.[125] For example, in *Geier v. American Honda Motor Co.*,[126] a woman injured in a car crash sued the automobile manufacturer, claiming it was negligent in failing to equip its cars

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New Limits on Implied Conflict Preemption, 59 CASE W. RES. L. REV. 883, 886 (2009) (contending that recent Supreme Court decisions reflect greater adherence to the presumption against preemption).

120. *See* PLIVA, Inc. v. Mensing, 131 S. Ct. 2567, 2579–80 (2011) (plurality opinion) (arguing that the Supremacy Clause anticipates conflict preemption, and therefore, the presumption against preemption is unwarranted in cases of direct conflicts between federal and state law); Dinh, *supra* note 105, at 2105 (arguing that the Court's reasoning in Felder v. Casey, 487 U.S. 131 (1988), suggests that the presumption against preemption should not apply in cases where state law stands as an obstacle to the accomplishment of federal objectives).

121. *See* Dinh, *supra* note 105, at 2092 (writing that the Constitution and the structure of American federalism do not permit the wholesale application of a presumption against preemption).

122. 131 S. Ct. 2567 (2011).

123. *See id.* at 2579–80 (plurality opinion) (stating that the Framers understood the Supremacy Clause to contain a "*non-obstante*" clause directing courts when to disregard the traditional presumption against implied repeals, and as such, courts "should not strain to find ways to reconcile federal law with seemingly conflicting state law"). Justice Kennedy did not join this part of the opinion. As such, this part of the opinion did not garner a majority of the Court.

124. *See* Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1978 (2011) (holding that an Arizona law was not preempted by a federal immigration law because it fell within the meaning of a savings clause in the federal law that preserved states' options to enact licensing laws that impose sanctions for immigration violations).

125. *See* Geier v. Am. Honda Motor Co., 529 U.S. 861, 865 (2000) (finding that despite a savings clause, the contested federal act preempts state safety regulations).

126. 529 U.S. 861 (2000).

with driver-side airbags.[127] The Supreme Court held that her state tort claim was preempted by federal vehicle safety standards, even though the federal law authorizing the regulations contained a seemingly broad savings clause.[128] The Court explained its decision by noting that the existence of a savings clause in a federal statute does "*not* bar the ordinary working of conflict pre-emption principles."[129] Instead, the Court explained that the Supremacy Clause mandates courts to read federal statutes as preempting those state laws that conflict with the federal statute, regardless of whether the statute contains a savings clause.[130]

The Court recently confirmed this rule in *Chamber of Commerce v. Whiting*.[131] In *Whiting*, the Court found that a provision of an Arizona law allowing suspension and revocation of business licenses fell within the federal Immigration Reform and Control Act's (IRCA) savings clause.[132] Despite this, however, the Court went on to consider whether IRCA *impliedly* preempted the Arizona provision.[133] Although the Court found that IRCA did not impliedly preempt the Arizona provision,[134] the mere fact that the Court engaged in the implied preemption analysis demonstrates that a state law, despite falling under the umbrella of a savings clause, can nevertheless be impliedly preempted.

Additionally, in previous preemption cases, the Supreme Court has interpreted savings clauses narrowly to prevent them from destroying the meaning of the statute itself.[135] For example, in *AT&T Mobility LLC v. Concepcion*,[136] the Court rejected an interpretation of the Federal Arbitration Act's (FAA) savings clause[137] that would have

127. *Id.* at 865.
128. *See id.* at 868 (quoting the savings clause as stating "[c]ompliance with" federal motor vehicle safety standards in this federal statute "does not exempt any person from any liability under common law").
129. *Id.* at 869. While the statute in *Geier* contained an express preemption provision, the Court held that the provision did not preempt the tort action, rather "ordinary preemption principles applied." *Id.* at 867, 869.
130. *See id.* at 869 (holding that a savings clause cannot trump the Supremacy Clause when the laws conflict).
131. 131 S. Ct. 1968 (2011).
132. *Id.* at 1978.
133. *Id.* at 1981–85 (plurality opinion).
134. *See id.* at 1985 (finding that the threshold for preemption was not met here).
135. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011) (stating that savings clauses should not be read to allow state laws that would prevent the accomplishment of the federal law's objectives); Davis, *supra* note 106, at 994 (providing examples of cases where the Court struggled to read savings clauses in ways that would not prevent the preemptive effect of federal regulatory statutes).
136. 131 S. Ct. 1740 (2011).
137. *See* 9 U.S.C. § 2 (2006) (stating that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract").

preserved a California judicial rule requiring that class-wide arbitration be available in consumer contracts.[138] The Court explained that the California rule frustrated the FAA's policy of encouraging speedy and efficient dispute resolution[139] by requiring a form of arbitration lacking these beneficial qualities.[140] Therefore, the Court rejected the proffered interpretation of the FAA's savings clause and held instead that the California rule was preempted.[141] This shows that despite a federal savings clause, preemption occurs when a state law is found to be so inconsistent with the Court's interpretation of a federal law that the federal savings clause essentially destroys itself.[142]

2. Step two of conflict preemption analysis: Identifying a conflict

Once the federal law's purpose has been identified, the second step in an implied conflict preemption analysis is to determine whether the federal and state laws conflict.[143] The Supreme Court has not articulated a strict definition of what constitutes a conflict for preemption purposes.[144] Instead, the Court has identified two broad categories of conflict: "impossibility" conflicts and "frustration of purpose" or "obstacle" conflicts.[145] Although the Court sometimes refers to these as separate categories of preemption, both are forms of conflict preemption.[146]

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138. *Concepcion*, 131 S. Ct. at 1746 (citing Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005)).

139. *See id.* at 1749 (stating that the FAA reflects a policy in favor of arbitration as an "efficient, streamlined," and informal way to resolve consumer disputes).

140. *See id.* at 1751–52 (asserting that class-wide arbitration displays none of the traditional positive attributes of bilateral arbitration, but instead raises the stakes in arbitration, is lengthy and complicated, and requires procedural formality in order to bind absent members of the class).

141. *See id.* at 1753 (holding that because the California rule stands in the way of Congress's purposes, the rule is preempted by the FAA).

142. *See id.* at 1748 (explaining that the Court should not interpret the act to be self-destructive, which would result from the continued existence of absolutely inconsistent provisions).

143. *See* Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (listing expressions the Court has used to describe the types of conflict that can require preemption: "conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference").

144. *See id.* (cautioning against strict adherence to any test for identifying conflicts because "none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick").

145. *See supra* note 105 and accompanying text (explaining conflict preemption as encompassing state laws that make compliance with federal law impossible or work against its intended function).

146. See Arizona v. United States, 132 S. Ct. 2492, 2501 (2012) (explaining that conflict preemption can occur when compliance with state and federal law is impossible and when a state law obstructs federal law).

In cases of impossibility preemption, the Court asks if the regulated entity could "do under federal law what state law requires of it."[147] If compliance with both federal and state regulations is a physical impossibility, then the state law is preempted.[148] For example in *PLIVA*, the Court held that it was impossible for generic drug manufacturers to comply simultaneously with a state law duty to change a drug label and a federal law duty to maintain the existing label.[149] As such, the Court held that the federal law preempted the state law duty.[150]

Frustration of purpose conflicts occur when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[151] While no formula has been established to determine when tension between state and federal law reaches the level of frustration of purpose,[152] these conflicts may arise when state and federal laws have divergent objectives,[153] or when the laws share a common goal but the actual effects of the state law frustrate the accomplishment of federal objectives.[154] For example, in *Crosby v. National Foreign Trade Council*,[155] the Court held that a Massachusetts law restricting state agencies' ability to trade with Burma was preempted by federal trade restrictions imposed on Burma.[156] Although both laws had a common purpose, the Court

147. PLIVA, Inc. v. Mensing, 131 S. Ct. 2567, 2579 (2011).
148. Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963).
149. *PLIVA*, 131 S. Ct. at 2577–78.
150. *Id.*
151. Perez v. Campbell, 402 U.S. 637, 649 (1971) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
152. *See, e.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000) (stating that the act as a whole, as well its purposes and intended effects, should be considered in determining whether a conflict exists and that this decision is a matter of judgment); Felder v. Casey, 487 U.S. 131, 138 (1988) (noting that the importance of the law to the state is irrelevant for the purposes of determining whether a frustration of purpose conflict exists).
153. *See, e.g.*, *Felder*, 487 U.S. at 153 (holding that § 1983 preempted a state notice-of-claim rule because its purpose and effect was to limit claims against state officers).
154. *See, e.g.*, Int'l Paper Co. v. Ouellette, 479 U.S. 481, 494–96 (1987) (stating that even though the Clean Water Act and state nuisance law have the same goals, state causes of action could undermine the Clean Water Act by interfering with the Act's operation); *Perez*, 402 U.S. at 641–48 (finding that a state law providing that certain debts arising out of vehicle accidents survive a discharge of bankruptcy conflicts with federal bankruptcy law even though it was passed without intent to conflict because the effect of the state law frustrates the federal law's purpose to provide a new opportunity to debtors).
155. 530 U.S. 363 (2000).
156. *See id.* at 373–74 (finding that the state law undermined three aspects of the federal law: its delegation to the President of control over economic sanctions against Burma, its limitation of sanctions to individuals and new investment, and its emphasis on proceeding diplomatically).

held that a conflict existed because they used distinct methods to achieve that end.[157]

Alternatively, when a state law's objective stands in clear opposition to federal law, the state statute is accordingly preempted. For example, in *Felder v. Casey*[158], the Court held that a state law requiring plaintiffs to file notice before suing state officials was preempted because it stood as an obstacle to the objective of 42 U.S.C. § 1983, which provides a remedy for federal rights violations committed by state actors.[159] The Court explained that the central objective of § 1983 is "to provide compensatory relief to those deprived of their federal rights by state actors," while the central purpose of the state notice requirement was to minimize governmental liability.[160] The Court decided that a frustration of purpose conflict existed because while the federal law aimed to get claims into courts, the state law aimed to prevent claims from reaching courts.[161] Therefore, in light of the conflict, the Court held that the state law was preempted.[162] The conclusion that can be drawn from this is that a state statute should be preempted when its meaning can be construed to expressly conflict with the object of federal law, or if it frustrates the purpose of federal law.

Thus, federal law preempts conflicting state laws by operation of the Constitution's Supremacy Clause. In particular, a state law that frustrates a federal law's purpose is necessarily displaced because the Constitution makes federal law supreme. In the following sections of this Comment, conflict preemption principles will be applied to determine that the TVPA preempts certain applications of state prostitution laws.

II. THE TVPA PREEMPTS APPLICATIONS OF STATE CRIMINAL PROSTITUTION LAWS TO MINORS BECAUSE ENFORCING THESE LAWS AGAINST MINORS CONFLICTS WITH THE TVPA

Under conflict preemption doctrine, the TVPA preempts the application of state criminal prostitution laws to minors because enforcing prostitution laws against minors frustrates the purposes of the TVPA. Express preemption does not apply in this case because

157. *See id.* at 379–80 ("The fact of a common end hardly neutralizes conflicting means.").
158. 487 U.S. 131 (1988).
159. *Id.* at 138.
160. *Id.* at 141.
161. *See id.* at 153 (stressing that the state law alters the outcome of § 1983 cases depending on whether the claim is filed in federal or state court).
162. *Id.* (preventing the creation of inconsistent intrastate application of the law).

the TVPA contains no explicit preemption language.[163] Since the federal government has not "occupied the field" of prostitution law enforcement or sex trafficking enforcement, and has in fact encouraged states to enact sex trafficking penal laws,[164] field preemption also does not apply.[165] Impossibility preemption probably also does not apply because the TVPA does not explicitly regulate state law enforcement actors. Since state law enforcement officers are not technically obligated to act under the TVPA, there is no question about the impossibility of their compliance with two sets of obligations. Instead, the preemptive effect of the TVPA is implied by the conflict between the federal law's purposes and enforcement of state criminal prostitution laws against minors.[166]

Conflict preemption doctrine calls for a two-step analysis involving first, the interpretation of the federal statute to identify its purpose, and second, the determination of whether the state law frustrates the purpose of the federal law.[167] Applying this analysis to determine that the TVPA preempts state prostitution laws, the first step indicates that the TVPA has two purposes—one protective and one prosecutorial—and that the accomplishment of these purposes requires that prostituted minors be recognized as victims.[168] The second step of the analysis reveals that enforcing criminal prostitution laws against minors frustrates the TVPA's two objectives regarding prostituted minors by contributing to the misidentification of victims, by discouraging victims from cooperating in anti-trafficking law enforcement efforts, and by re-traumatizing victims without addressing their actual needs.[169] Therefore, the existence of this conflict implies that the TVPA preempts the application of state criminal prostitution laws to minors.

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163. *See* English v. Gen. Elec. Co., 496 U.S. 72, 78–79 (1990) (observing that express preemption occurs when the statute's language explicitly states Congress's intent to preempt state law).

164. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 225(b), 122 Stat. 5044, 5072 (directing the Attorney General to draft a model state criminal statute that "furthers a comprehensive approach to investigation and prosecution through modernization of State and local prostitution and pandering statutes").

165. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (explaining that field preemption occurs when Congress creates a pervasive federal scheme indicating intent to exclusively occupy the field); Franklin, *supra* note 13, at 364 (noting that there is no federal prostitution statute).

166. *See supra* notes 102–07 and accompanying text (identifying impossibility and frustration of purpose as the two general categories of conflicts recognized by the Court).

167. *See supra* Part I.C (detailing the two steps of a conflict preemption analysis).

168. *See infra* Part II.A.

169. *See infra* Part II.B.

A. The Purposes of the TVPA Are To Protect Victims and Prosecute Traffickers

Because congressional purpose is the "ultimate touchstone in every preemption case,"[170] the first step of this analysis is to interpret the TVPA in order to identify its purpose. This inquiry reveals that the TVPA's broad purpose to combat trafficking involves two particular objectives. First, the TVPA seeks to protect victims of severe sex trafficking, and it defines that category to include anyone under the age of eighteen who is induced to engage in a commercial sex act.[171] Second, the TVPA seeks to enhance the government's ability to punish traffickers by engaging victims to assist in investigations and prosecutions.[172] Finally, although the TVPA may appear to suggest a lack of intent to preempt, neither the TVPA's savings clause nor the presumption against preemption limit the TVPA from preempting the enforcement of state prostitution laws.[173]

1. The TVPA seeks to protect prostituted minors by recognizing them as victims of sex trafficking

A central purpose of the TVPA is to protect prostituted minors by recognizing and treating them as victims rather than criminals. That is why the TVPA categorically defines anyone under the age of eighteen who engages in a commercial sex act as a per se victim of a severe form of trafficking.[174] The legislative history of the TVPA and its reauthorizations also reflect the understanding that the definition is categorical.[175] For example, in the House Committee report on the 2005 reauthorization of the TVPA, one of the Act's sponsors stated

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170. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (quoting Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn, 375 U.S. 96, 103 (1963)) (internal quotation marks omitted).

171. 22 U.S.C. § 7102 (8)(A), (13) (2006); *see* H.R. REP. NO. 109-317, pt. 2, at 23 (2005) (affirming that any person younger than eighteen-years-old who is induced to perform a commercial sex act is considered a victim of severe trafficking under the TVPA); *infra* Part II.A.1 (discussing the TVPA and its purposes).

172. *Infra* Part II.A.2.

173. *Infra* Part II.A.3.

174. *See* 22 U.S.C. § 7102(8)(A), (13) (defining severe forms of sex trafficking); *id.* § 7105(b)(1)(C)(3)(ii) (defining minors engaged in commercial sex as victims of a severe form of trafficking in persons and therefore eligible for certain benefits and services); *see also* SISKIN & WYLER, *supra* note 16, at 21 (observing the consensus that prostitution by minors constitutes a form of severe sex trafficking under the TVPA whether the minor acted voluntarily or was forced); *cf.* Brittle, *supra* note 6, at 1346 (asserting that the TVPA implicitly acknowledges that minors cannot consent to commercial sex).

175. *See, e.g.*, *In Our Own Backyard*, *supra* note 1, at 2 (statement of Sen. Richard Durbin, Chairman, S. Subcomm. on Human Rights & the Law) (confirming Congress's view that "all children who were involved in commercial sex crimes are victims and should be treated accordingly").

unequivocally that "under the TVPA any person younger than eighteen-years-old 'induced to perform' a commercial sex act is considered a victim of a 'severe form of trafficking.'"[176] Both houses of Congress also held hearings on sex trafficking of minors, and in each case, testimony from subcommittee members and witnesses reflected an understanding that minors involved in commercial sex are victims of sex trafficking per se.[177]

While the TVPA does not require minors to show proof of compulsion to establish their status as victims of severe sex trafficking, the language of the Act does require that a minor victim be "induced" to engage in a commercial sex act.[178] Therefore, some might argue that an individual must meet the element of recruitment, harboring, transportation, provision, obtaining, or maintaining of a person for the purpose of a commercial sex act to qualify as a victim of severe trafficking.[179] However, this does not change the categorical nature of the under-eighteen prong of the severe sex trafficking victim definition, since any commercial sex act involving a minor will necessarily meet the inducement standard.[180] Under the TVPA, a commercial sex act is defined as the exchange of sex for something of value.[181] When a person provides a minor with something of value in exchange for sex, this exchange is a form of "obtaining" sex with a minor.[182] That exchange itself satisfies the

176. H.R. REP. NO. 109-317, pt. 2, at 23; *see also Domestic Minor Sex Trafficking Hearing*, *supra* note 25, at 2 (statement of Rep. Robert C. Scott, Chairman, H. Subcomm. on Crime, Terrorism, & Homeland Sec.) (emphasizing that child prostitutes are some of the most vulnerable victims and that they should be treated as such).

177. *See Domestic Minor Sex Trafficking Hearing*, *supra* note 25, at 2 (statement of Rep. Robert C. Scott, Chairman, H. Subcomm. on Crime, Terrorism, & Homeland Sec.) (discussing a documentary that depicted sexually exploited children as victims and survivors, rather than criminals); *id.* at 227 (testimony of Suzanna Tiapula, National District Attorneys Association) (discussing the inappropriate criminalization of juvenile victims); *In Our Own Backyard*, *supra* note 1, at 2 (statement of Sen. Richard Durbin, Chairman, S. Subcomm. on Human Rights & the Law) (charging the states with exacerbating the problem of child prostitution by initiating prosecution); *see also* HUMAN SMUGGLING & TRAFFICKING CTR., DOMESTIC HUMAN TRAFFICKING: AN INTERNAL ISSUE 3 (2008), *available at* http://www.state.gov/documents/organization/113612.pdf (clarifying that if a person under eighteen is used to commit a commercial sexual act, nothing more is required to show that the person is a victim); NAT'L INST. OF JUSTICE, U.S. DEP'T. OF JUSTICE, COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN: WHAT DO WE KNOW AND WHAT DO WE DO ABOUT IT? 8 (2007), *available at* https://www.ncjrs.gov/pdffiles1/nij/215733.pdf (urging that "it is important that victims of child sexual exploitation are not mistaken for offenders").

178. 22 U.S.C. § 7102(8)(A).

179. *Id.* § 7102(8)(A), (13).

180. *See id.* § 7102(8)(A) (criminalizing any inducement of a minor to perform a commercial sex act).

181. *Id.* § 7102(3).

182. *See* Linda Smith & Samantha Healy Vardaman, *A Legislative Framework for*

element of inducement regardless of whether or not a third party, such as a pimp or trafficker, is involved. Indeed, the DOJ relies on this understanding of the TVPA's criminal provisions to obtain convictions of individuals who attempt to purchase sex with a minor.[183]

In enacting the TVPA, Congress did not merely intend to define prostituted minors as victims—it sought to protect them. Careful interpretation of the TVPA indicates that protection means, at a minimum, ensuring that victims are not treated as criminals.[184] Thus, the Act states that victims should not be incarcerated or otherwise penalized for committing unlawful acts as a result of being trafficked,[185] underscoring the idea that for trafficking victims, these acts are essentially involuntary. The TVPA also calls for regulations to ensure that victims in federal custody are provided with medical assistance and are informed of their rights as crime victims.[186] In short, it calls on the relevant agencies to treat trafficking victims in a manner consistent with their status as victims.[187] In addition, the Act calls for research on the best practices for identifying and assisting victims and declares that these should be disseminated to state and local law enforcement,[188] indicating Congress's expectation that all levels of government will engage in efforts to protect trafficking victims.

The TVPA's legislative history also confirms this understanding of

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Combating Domestic Minor Sex Trafficking, 23 REGENT U. L. REV. 265, 275 (2011) (noting a federal prosecutor in Kansas who pursued purchasers of sex with minors relied on the words "obtain" and "entice" to satisfy the elements of a TVPA criminal provision).

183. *See* Press Release, Office of the U.S. Att'y, Undercover Sting Leads to First-Ever Human Trafficking Charges for Attempting to Pay for Sex with Children (Mar. 10, 2009), *available at* http://www.justice.gov/usao/mow/news2009/childers.ind.htm (describing a sting operation where a "John" was charged under the TVPA for attempting to pay a child for sex). This point suggests that a prostituted minor qualifies as a victim of severe sex trafficking whether or not he or she has a pimp or trafficker. Nevertheless, most children involved in commercial sex have pimps. *See* Sherman & Grace, *supra* note 25, at 338 (detailing methods pimps use to target girls).

184. *See, e.g.*, 22 U.S.C. § 7101(b)(19) (describing victims as not culpable for crimes committed as result of being trafficked); *id.* § 7105(c) (directing the Attorney General to implement regulations ensuring proper treatment of victims in federal custody).

185. *See id.* § 7101(b)(19) (providing the use of false documentation and illegal entrance into the country as examples of crimes that might be committed solely as a result of being trafficked).

186. *See id.* § 7105(c) (directing that regulations should require that victims be treated as crime victims and protected from intimidation and threats of reprisal); 28 C.F.R. § 1100.29 (2011) (setting forth DOJ regulations pursuant to 22 U.S.C. § 7105(c)).

187. 22 U.S.C. § 7105(c).

188. *See* 42 U.S.C. § 14044(a) (calling for research and statistical review to be delivered at a trafficking conference).

"protection." For example, a House Judiciary Committee report states that, "as a result of the TVPA . . . victims of severe forms of trafficking in the United States are *legally required* to be treated as victims, rather than as criminals."[189] Another member of Congress also characterized the TVPA as a national statement that "trafficking victims must not be dismissed by the law enforcement community as prostitutes or juvenile delinquents."[190] In summary, the plain language and legislative history of the TVPA and its subsequent reauthorizations shows that a central purpose of the Act is to protect prostituted minors by ensuring that they are recognized and treated as victims of severe sex trafficking instead of criminals.

2. The TVPA seeks to prosecute traffickers and relies on victims' assistance to accomplish that goal

The TVPA's second central objective is to enhance the government's ability to investigate and punish traffickers.[191] This goal is not entirely independent of the objective to protect victims. In fact, Congress addressed protection and prosecution jointly in the TVPA in recognition of the critical role that victims play in the investigation and prosecution of traffickers.[192] Evidence of this recognition is found in the provisions of the TVPA itself. Not only did the TVPA criminalize the sex trafficking of minors[193] and other trafficking-related conduct,[194] it also gave federal law enforcement agencies authority to provide certain protections to victims who cooperate in trafficking prosecutions.[195] For example, the TVPA includes immigration remedies that are available to non-citizen victims who cooperate with law enforcement.[196] These provisions show that a central goal of the TVPA is investigation.

In practice, moreover, law enforcement officers echo the

189. H.R. REP. NO. 109-317, pt. 2, at 22 (2005) (emphasis added).
190. 151 CONG. REC. 4174 (2005) (statement of Rep. Christopher Smith).
191. *See supra* note 35 and accompanying text (discussing the TVPA's objective to prosecute sex traffickers).
192. *See* 22 U.S.C. § 7101(b)(20) (recognizing that, without protection or provision of services to counter the harmful physical and psychological effects of trafficking, victims are unable or unwilling to assist in the investigation or prosecution of their traffickers).
193. *See* 18 U.S.C. § 1591(a) (prohibiting sex trafficking of a minor and sex trafficking through means of force, fraud, or coercion).
194. *See, e.g.*, *id.* § 1592 (criminalizing the confiscation of identity documents as part of trafficking activity).
195. *E.g.*, 8 U.S.C. § 101(a)(15)(T)(i)(III)(aa) (requiring T visa applicants to show they have complied with any reasonable law enforcement requests).
196. Victims who are under the age of eighteen are not required to cooperate with law enforcement to receive immigration relief. *Id.* § 101(a)(15)(T)(i)(III)(cc). This distinction between adult and minor victims is yet another indication of Congress's particular concern for prostituted minors.

observation that a successful prosecution of trafficking crimes depends on the ability to identify and gain the cooperation of victims.[197] For example, a survey funded by the DOJ found that federal prosecutors believe a cooperating victim witness is the single most important factor in successfully prosecuting a TVPA case.[198] Thus, while prosecuting traffickers is itself a central objective of the TVPA, the achievement of that objective is closely tied to the goal of victim protection.

3. The savings clause and the presumption against preemption do not materially limit the interpretation of the TVPA's purposes with regard to prostituted minors

The TVPA's savings clause and the so-called "presumption against preemption" are two additional factors that could affect whether the TVPA is interpreted as preempting the application of state prostitution laws to minors. However, while both may appear to suggest the absence of congressional intent to preempt, neither one materially limits the TVPA's goals regarding prostituted minors. First, the so-called "presumption against preemption" does not apply in these circumstances. Scholars and members of the Supreme Court have called into question the constitutional justification for applying a presumption against preemption in cases involving conflict preemption, the form of preemption thought to exist here.[199]

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197. *See* U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS ON U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS FISCAL YEAR 2005, at 5 (2006) (asserting that the success of the federal government's anti-trafficking efforts "hinges" on the victim-centric approach).

198. *See* HEATHER CLAWSON ET AL., ICF INT'L, PROSECUTING HUMAN TRAFFICKING CASES: LESSONS LEARNED AND PROMISING PRACTICES 19–20 (2008), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/223972.pdf (reporting findings from interviews with federal prosecutors in jurisdictions with the greatest percentages of trafficking cases).

199. *See* PLIVA, Inc. v. Mensing, 131 S. Ct. 2567, 2579–80 (2011) (plurality opinion) (asserting that courts should not attempt to reconcile federal law with seemingly conflicting state law because the Constitution's Supremacy Clause mandates the displacement of state law when a conflict exists); Dinh, *supra* note 105, at 2087, 2092 (arguing that the Constitution and the structure of American federalism do not permit the wholesale application of a presumption against preemption).

Elsewhere, Justice Thomas, the author of the *PLIVA* plurality opinion, has expressed the view that frustration of purpose preemption is unwarranted under the Supremacy Clause and that only impossibility conflicts are valid. *See* Williamson v. Mazda Motor of Am., Inc., 131 S. Ct. 1131, 1142 (2011) (Thomas, J., concurring in the judgment) (characterizing "purposes-and-objectives" preemption as based on "judicial suppositions"). Although this Comment uses the language of "frustration of purpose" rather than "impossibility" to describe the conflict between the TVPA and applications of state criminal prostitution laws to minors, the plurality opinion's argument in *PLIVA* is still relevant. First, the Court has noted that the lines between the various types of conflicts are fluid. *See* Hines v. Davidowitz, 312 U.S. 52, 67 (1941)

Nevertheless, even if the presumption is applicable in implied conflict preemption cases, it can be overcome in this case because of the text, the legislative history, and the fact that states have not traditionally occupied the relevant area of law—trafficking.

The strength of the presumption against preemption increases when the area in which the federal law operates is one traditionally reserved to the states.[200] As such, determining the significance of the presumption in any case depends on properly identifying the relevant area of law.[201] With the TVPA, one might argue that the question at issue is whether the presumption applies when the federal government attempts to regulate prostitution. Upon this framing of the issue, the TVPA would seem a classic case for the presumption, since criminal enforcement of prostitution laws is precisely the type of historic police power reserved to the states that the presumption against preemption is supposed to protect.[202] This Comment, however, does not argue that the TVPA preempts prostitution laws per se, but rather, that states' applications of prostitution laws interfere with the regulation of sex trafficking of minors. Thus, the more accurate way to frame the question at issue is whether the presumption applies when the federal government attempts to regulate sex trafficking of minors.

Identifying sex trafficking of minors as the relevant area of law reveals the inappropriateness of applying the presumption against

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(observing that the diversity of expressions used by the Supreme Court in conflict preemption cases results in the lack of a clear constitutional standard). Second, Justice Thomas's view of frustration of purpose preemption has never been accepted by a majority of the Court, and that form of preemption was not asserted in *PLIVA*. Third, Justice Thomas's specific objections to frustration of purpose conflicts may not apply to this case, since the criticism is primarily a rejection of the use of atextual sources to determine congressional intent. *See* Wyeth v. Levine, 555 U.S. 555, 594 (2009) (Thomas, J., concurring in the judgment) (criticizing the use of "legislative history, broad atextual notions of congressional purpose, and even congressional inaction in order to pre-empt state law"). For example, in *Crosby National Foreign Trade Council*, Justice Scalia and Justice Thomas refused to join a majority opinion because of its reliance on legislative history even though they reached the same conclusion that the federal act preempted the state law at issue. 530 U.S. at 388–91 (Scalia, J., concurring in the judgment). Since the argument in this Comment relies at least as much on statutory text as on legislative history, this criticism may not apply.

200. *See, e.g.*, *Wyeth*, 555 U.S. at 565 (describing the presumption against preemption as applying particularly where a federal law regulates an area traditionally occupied by the states); Gasaway, *supra* note 110, at 35 (noting the applicability of the presumption against preemption depends on whether states have traditional authority in the relevant area of law).

201. *See* Gasaway, *supra* note 110, at 35 (explaining how the framing of the traditional authority issue can alter conclusions about the applicability of the presumption against preemption).

202. *See* United States v. Wolf, 787 F.2d 1094, 1097 (7th Cir. 1986) (recognizing that the states, not the federal government, have primary responsibility for policing sexual misconduct).

preemption to the TVPA because states do not have traditional authority over sex trafficking of minors.[203] Instead, the federal government has an established role in regulating commercial sex trafficking and the sexual exploitation of minors.[204] For example, the Mann Act,[205] enacted in 1910, prohibits the interstate transport of individuals for the purpose of prostitution or illegal sexual acts.[206] Prior to the TVPA, the Mann Act was the federal government's primary prosecutorial tool for fighting sex trafficking.[207] In addition, there are numerous federal laws regulating the sexual abuse and exploitation of minors.[208] For example, the Child Abuse Prevention and Treatment Act of 1974[209] lists sexual exploitation among the categories of abuse that must be reported by teachers, doctors, and child services providers.[210] Also, the PROTECT Act[211] prohibits U.S. citizens abroad from engaging in illicit sexual activity with minors,[212] and various other federal laws prohibit aspects of child

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203. *See* Moira Heiges, Note, *From the Inside Out: Reforming State and Local Prostitution Enforcement to Combat Sex Trafficking in the United States and Abroad*, 94 MINN. L. REV. 428, 455–56 (2009) (arguing that federal involvement in state prostitution enforcement is "historically appropriate" due to its regulation of sex trafficking).

204. *See* Birckhead, *supra* note 28, at 1074–75 (noting pre-TVPA federal laws prohibiting child pornography and sexual abuse proved insufficient to combat the prostitution of minors); Franklin, *supra* note 13, at 365 (discussing federal laws that regulate interstate pimping and prostitution).

205. White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–24 (2006)).

206. 18 U.S.C. § 2421 (2006). Unlike the TVPA, the Mann Act does not provide for protection of victims of sex trafficking. *See* Schwartz, *supra* note 31, at 243 (noting that the Mann Act's focus is on traffickers, pimps, and madams, and not those individuals actually engaging in commercial sex).

207. *See* ADAMS ET AL., *supra* note 9, at 3 (commenting that the Mann Act was enacted with the purpose of fighting forced prostitution); Schwartz, *supra* note 31, at 242–43 (noting that the Mann Act deals directly with the trafficker, not those trafficked).

208. *See, e.g.*, 18 U.S.C. § 2251(a) (prohibiting the interstate transport of a minor to engage in sexually explicit conduct); *id.* § 2251A (criminalizing the sale of transfer of a minor for the purpose of obtaining a visual depiction of the minor engaging in sexually explicit conduct); *see also* KEVONNE SMALL ET AL., URBAN INST., AN ANALYSIS OF FEDERALLY PROSECUTED COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN (CSEC) CASES SINCE THE PASSAGE OF THE VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000, at 18 (2008) (listing the three categories of federal CSEC offenses as sexual exploitation of children, child pornography, and child prostitution).

209. Pub. L. No. 93-247, 88 Stat. 5 (codified as amended at 42 U.S.C. §§ 5101–5107, 5116–5116i (2006)).

210. 42 U.S.C. § 13031(a)–(b).

211. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18 and 42 U.S.C. (2006 & Supp. II 2009)).

212. 18 U.S.C. § 2423(c). Illicit sexual conduct is defined in part as "any commercial sex act (as defined in section 1591) with a person under [eighteen] years of age." *Id.* § 2423(f).

pornography.[213] Therefore, the presumption does not have significant force in the area of sex trafficking of minors because federal law has occupied this area, as demonstrated by the large extent of federal legislation relating to sexual exploitation of minors.

In addition, the TVPA's savings clause is not dispositive of the preemption question because *Geier*,[214] *Whiting*,[215] and *Concepcion*[216] all indicate that ordinary principles of conflict preemption apply even when a federal statute contains a savings clause. In this case, although the language of the TVPA's savings clause indicates that the Act does not preempt state prostitution laws *generally*,[217] ordinary principles of conflict preemption indicate that certain applications of state prostitution laws conflict with the TVPA, and therefore are preempted. As demonstrated below, the conflict exists because the accomplishment of the TVPA's protective and prosecutorial purposes require prostituted minors to be recognized and treated as victims.[218] States' enforcement of criminal prostitution laws against minors ultimately frustrates the TVPA's purposes by treating prostituted minors as criminals and by making it harder to identify victims and prosecute traffickers.[219] Thus, although the TVPA's savings clause may be interpreted to preserve state prostitution laws generally, it cannot preserve states' enforcement of those laws against minors.

This interpretation is consistent with Supreme Court precedent because it gives effect to the savings clause without destroying the meaning and purpose of the TVPA itself.[220] In previous implied

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213. *See, e.g.*, *id.* § 2251 (prohibiting the use, enticement, employment, coercion, or inducement of any minor to engage in any sexually explicit conduct for the purpose of producing any visual depiction of that conduct); *id.* §§ 2252–2252A (prohibiting knowingly transporting, shipping, receiving, distributing, or possessing any visual depiction involving a minor in sexually explicit conduct).

214. Geier v. Am. Honda Motor Co., 529 U.S. 861, 869 (2000) (finding conflict preemption despite the existence of a savings clause in the federal statute at issue).

215. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1981–85 (2011) (plurality opinion) (conducting an implied conflict analysis despite having already decided that the state law in question was covered by the federal statute's savings clause).

216. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011) (holding that it would be irrational for a federal statute's savings clause to be construed as allowing a state law totally inconsistent with the act).

217. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 225(a)(2), 122 Stat. 5044, 5072 (stating that nothing in the TVPA and its reauthorization shall be interpreted to "preempt, supplant, or limit the effect of any [s]tate or [f]ederal criminal law").

218. *See infra* Part II.B (explaining that treating prostituted minors as offenders instead of victims does not address their specialized needs and discourages their cooperation with law enforcement to help prosecute their traffickers).

219. *See* SHARED HOPE REPORT FROM THE U.S. MID-TERM REVIEW, *supra* note 36, at 15–16 (finding that sex trafficked minors are frequently misidentified because of confusion stemming from the criminal law).

220. *See Concepcion*, 131 S. Ct. at 1747–48 (suggesting savings clauses should be interpreted consistently with the whole act).

preemption cases, the Supreme Court has avoided interpreting savings clauses in ways that would destroy the meaning of a federal statute or frustrate its purpose.[221] For example, in *Concepcion*, the Court rejected the proposition that a savings clause in the FAA preserved a state judicial rule that contradicted the FAA's core policies.[222] "[T]he act cannot be held to destroy itself," the Court explained.[223] Here, construing the TVPA's savings clause to preserve states' enforcement of criminal prostitution laws against minors would deny the categorical nature of the TVPA's definition of a minor victim of severe sex trafficking[224] and frustrate its protective and prosecutorial purposes.[225] As such, *Concepcion* indicates that the clause should be read as *not* preserving those applications.

Interpreting the savings clause so that it does not protect states' enforcement of criminal prostitution laws against minors is likely in accordance with Congress's intent regarding the TVPA's savings clause.[226] Congress located the savings clause in a section of the 2008 TVPA reauthorization entitled "Promoting Effective State Enforcement."[227] The location of the savings clause suggests that it should be read in light of Congress's broader effort to engage states in the anti-trafficking project.[228] In addition to the savings clause, this

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221. *See, e.g.*, *id.* at 1750–51 (rejecting an interpretation of the savings clause in the Federal Arbitration Act (FAA) that would save a state rule, because this rule would destroy the FAA's purpose of promoting arbitration); Geier v. Am. Honda Motor Co., 529 U.S. 861, 869 (2000) (deciding that a savings clause in the National Traffic and Motor Vehicle Safety Act removed some tort actions from preemption, but not those that conflicted with federal regulations enacted pursuant to the Act).

222. *See Concepcion*, 131 S. Ct. at 1751–53 (asserting that the state judicial rule would have destroyed the purpose of the FAA by imposing a form of arbitration stripped of its traditional beneficial characteristics).

223. *Id.* at 1748 (quoting AT&T Co. v. Cent. Office Tel., Inc., 524 U.S. 214, 228 (1998)).

224. 22 U.S.C. § 7102(13) (2006); *see also supra* notes 174–77 and accompanying text (explaining that all individuals under age eighteen who are involved in commercial sex constitute "victims of severe sex trafficking" under the TVPA definition).

225. *See supra* Part II.B (describing the conflict between state laws and the purposes of the TVPA).

226. *See supra* Part II.A.1 (arguing that Congress's central purpose in passing the TVPA was to protect prostituted minors); *see also* Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008) (noting that congressional intent is "the ultimate touchstone" of implied conflict preemption analysis (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996))).

227. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 225, 122 Stat. 5044, 5072.

228. *See* 42 U.S.C. § 14044(a)(2) (directing the Attorney General to hold a conference with state and local law enforcement to discuss best practices for identifying trafficking victims, investigating and prosecuting traffickers, and working with service providers to optimize assistance to victims); *see also* ATTORNEY GENERAL'S 2010 REPORT, *supra* note 85, at 72–82 (describing training activities and joint state-federal law enforcement operations).

section also contains a provision directing the Attorney General to draft a model state criminal statute that "furthers a comprehensive approach to investigation and prosecution through modernization of State and local prostitution and pandering statutes."[229] The explanatory statement note from the House of Representatives states that issuing a model statute is necessary because many state statutes in the area of prostitution enforcement are "antiquated."[230] Therefore, the savings clause in this context suggests that the likely purpose of the savings clause is to preserve state prostitution laws that further, but do not conflict with, the federal anti-trafficking agenda.[231]

Therefore, despite the savings clause and the presumption against preemption, the first step of the conflict preemption analysis makes clear that the TVPA has two objectives regarding prostituted minors: it seeks to protect prostituted minors, whom it defines as victims of severe sex trafficking, and it seeks to punish traffickers by engaging victims' assistance in investigations and prosecutions. Neither the savings clause nor the presumption against preemption prevents the TVPA from preempting the application of state prostitution laws to minors. Supreme Court jurisprudence in implied conflict preemption does not allow a savings clause to save a state law that would defeat the purpose of the federal law.[232] Supreme Court jurisprudence also leads to the conclusion that the presumption should only apply when Congress legislates in an area of law traditionally within the states' police powers.[233]

B. The Enforcement of State Criminal Prostitution Laws Against Minors Frustrates the Purposes of the TVPA

The second step of the conflict preemption analysis, determining whether a conflict exists, illustrates that regardless of states' rationales

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229. William Wilberforce Trafficking Victims Protection Reauthorization Act § 225(b). The latest Senate reauthorization bill includes a provision that would explicitly instruct the Attorney General to draft a model statute with protections for persons under eighteen-years-old who have been arrested for engaging in commercial sex acts. S. 1301, 112th Cong. § 233 (2011).

230. 154 CONG. REC. 24,602–03 (2008).

231. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011) (suggesting that a proper interpretation of a savings clause makes it consistent with the whole act); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 386–88 (2000) (finding the absence of explicit language in the federal act as an insufficient indicator of any congressional intent to preempt state laws that frustrate the act's purposes).

232. *See supra* Part II.A.3 (discussing how applying state prostitution laws to minors conflicts with the TVPA's goals of treating prostituted minors as victims and obtaining their cooperation in prosecuting their traffickers).

233. *See supra* Part II.A.3 (illustrating the extensiveness of the federal government's legislative activity in the area of sex trafficking).

for enforcing criminal prostitution laws against minors, doing so conflicts with the TVPA in two ways. First, states' enforcement of criminal prostitution laws against minors frustrates the achievement of the TVPA's protective goal because treating prostituted minors as offenders re-traumatizes them and fails to address their actual needs.[234] Second, states' enforcement of criminal prostitution laws against minors frustrates the TVPA's prosecutorial goal by discouraging victim witnesses from cooperating with law enforcement and by contributing to misidentification of victims.[235]

1. Enforcing criminal prostitution laws against minors frustrates the TVPA's protective purpose

States' enforcement of criminal prostitution laws against minors conflicts with the TVPA by frustrating its goal to protect victims of severe sex trafficking. The TVPA clearly and categorically defines prostituted minors as victims and aims to protect them rather than criminalize them.[236] When states apply criminal prostitution laws to minors, however, they instead treat those minors as criminals and juvenile delinquents.[237] Thus, the enforcement of criminal prostitution laws against minors conflicts with the TVPA by penalizing the very individuals whom Congress has declared are deserving of protection rather than punishment.[238]

This conflict is similar to the one presented in *Felder*.[239] There, the Supreme Court held that the state law notice requirement, the

234. *See infra* Part II.B.1 (explaining how the TVPA's protective goal includes providing victims with specialized services, most of which are generally unavailable to victims charged with prostitution offenses).

235. *See infra* Part II.B.2 (elaborating on how the TVPA's prosecutorial goal is greatly hindered by charging prostituted minors as offenders because this only turns the minors further against the law enforcement system).

236. The TVPA uses a rehabilitative approach to protect prostituted minors and focuses on providing understanding and specialized services, such as psychological counseling. *See, e.g.*, 42 U.S.C. § 14044b (2006) (establishing a pilot program for residential treatment facilities for minor victims); U.S. DEP'T OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS 35 (2010), [hereinafter DOJ NATIONAL STRATEGY] *available at* http://www.justice.gov/psc/docs/natstrategyreport.pdf (noting that the abuse prostituted minors experience results in their need for specialized recovery programs); *see also* SENIOR POLICY OPERATING, *supra* note 92, at 7A (listing services available to victims of severe sex trafficking).

237. *See* People v. Samantha R., No. 2011KN092555, 2011 WL 6303402, at *2, *4 (N.Y. Crim. Ct. Dec. 16, 2011) (reasoning that dismissal of a sixteen-year-old's prostitution charge was justified because criminal prosecution of such defendants is inconsistent with the ameliorative aims of state and federal laws aiming to protect prostituted minors).

238. *See* KENNEDY & PUCCI, *supra* note 30, at 20 ("The fact that hundreds of children are being processed through the juvenile justice system as delinquents simply does not recognize their victim status.").

239. 487 U.S. 131 (1988).

purpose of which was to limit suits against government officials, was in conflict with the compensatory goals of § 1983, the purpose of which was to provide a remedy for plaintiffs with claims against government officials.[240] The dichotomous aims of the state and federal laws concerning prostituted minors present a similar conflict. One law seeks to protect prostituted minors as victims, while the other law treats them as criminals and delinquents.

Proponents of criminal prostitution laws as applied to minors argue that the criminalization is in place to *protect* minors,[241] and therefore, the purposes of the state and federal laws do not conflict. For example, supporters of states' enforcement of criminal prostitution laws against minors have argued that prosecution and detention of prostituted minors can be beneficial because prostituted minors can thereby be temporarily removed from the street and the control of their pimps or traffickers, and can be linked with service providers.[242]

In response, even assuming that states apply criminal prostitution laws to minors for protective purposes—the fact that the TVPA shares the same goal, to protect prostituted minors, would not eliminate the conflict.[243] As illustrated in cases like *Crosby v. National Foreign Trade Council*, a federal law can preempt a state law that shares its purpose if the state's methods interfere with federal efforts enough to frustrate them.[244] In the case of prostituted minors, even if states aim to protect prostituted minors, their use of criminal and delinquency adjudication to achieve that goal interferes with the TVPA's effort to protect prostituted minors by not treating them as offenders.[245]

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240. *Id.* at 138.

241. *See supra* notes 34–35, 37 and accompanying text (discussing states' non-punitive rationales for enforcing criminal prostitution laws against minors).

242. *See, e.g.*, Annitto, *supra* note 33, at 26–27 (relaying arguments made by some state legislators and prosecutors that prosecution is a necessary tool to convince prostituted minors to stop engaging in destructive behavior).

243. *See supra* notes 153–57 and accompanying text (discussing how laws with the same goals can still conflict); *see also, e.g.*, Int'l Paper Co. v. Ouellette, 479 U.S. 481, 500 (1987) (holding that even though a state nuisance claim and federal regulation had the same goal of controlling water pollution, the state tort claim was preempted because it interfered with the methods that the federal law designed to reach that goal).

244. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373–74 (2000) (finding that a state law limiting trade with Burma was preempted by federal trade limits).

245. *See* SMITH ET AL., *supra* note 2, at vi (noting that prostituted minors who are detained cannot access services they critically require); Birckhead, *supra* note 28, at 1085 (claiming that the argument that prosecution and detention are somehow helpful for prostituted minors ignores the many collateral consequences that result from being processed in the criminal justice system).

The federal law's approach reflects what is known about the harmful consequences of prosecuting prostituted minors. Adjudication is often stigmatizing and marginalizing.[246] It often re-traumatizes victims,[247] increasing their sense of powerlessness and making the process of recovery more difficult.[248] Moreover, as a result of being criminally charged, a prostituted minor may be left with a criminal record, and even juvenile adjudications can be used to enhance sentences in future adjudications.[249] In addition, prosecution may disqualify them from eligibility for crime victim funds in some states, and they may face other undesirable consequences, such as expulsion from school.[250] These facts demonstrate that the actual effects of adjudication are harmful to prostituted minors, and as such, enforcing criminal prostitution laws against minors conflicts with the TVPA's protective purpose regardless of states' rationales.

2. Enforcing criminal prostitution laws against minors frustrates the TVPA's prosecutorial purpose

States' enforcement of criminal prostitution laws against minors also conflicts with the TVPA's goal of prosecuting traffickers by interfering with victim identification[251] and discouraging victims from

246. *See Oversight: Combating Sex Trafficking in NYC: Examining Law Enforcement Efforts—Prevention and Prosecution*: *Hearing Before the Comm. on Women's Issues & the Comm. on Pub. Safety*, 2011 Leg., 2009–2013 Sess. 1–2, 5 (N.Y. City Council 2011) (statement of Kate Mogulescu, Legal Aid Society Attorney) (noting that even after victims manage to escape trafficking, their criminal records preclude them from obtaining necessities, such as housing and employment); *see also In Our Own Backyard*, *supra* note 1, at 18 (statement of Shaquana, youth outreach worker and trafficking survivor) (describing her experience being jailed in juvenile detention and being made to feel ashamed and embarrassed); DOJ NATIONAL STRATEGY, *supra* note 236, at 35 (noting that the stigma of being placed in criminal facilities can cause prostituted minors to return to their pimps and traffickers).

247. *See* SMITH ET AL., *supra* note 2, at 50–51 (stating that arrest re-traumatizes prostituted minors and providing an example of a prostituted minor's experience with arrest and prosecution); *see also Domestic Minor Sex Trafficking Hearing*, *supra* note 25, at 2 (statement of Rep. Robert C. Scott, Chairman, H. Subcomm. on Crime, Terrorism, & Homeland Sec.) (noting that the particular importance of treating prostituted minors as victims and not criminals is due to the fact that they are the most vulnerable victims and are "in need of understanding and specialized treatment").

248. *See* Birckhead, *supra* note 28, at 1086 (citing research finding that labeling prostituted minors as offenders increases their experience of trauma).

249. *See id.* at 1085 & n.158 (characterizing arguments in favor of prosecution of prostituted minors as unpersuasive because of collateral consequences).

250. *See* Sherman & Grace, *supra* note 25, at 344 (reporting that minor victims of sexual exploitation who are treated as offenders and prosecuted for certain sex acts may even have to register on state sex offender lists).

251. *See* H.R. REP. NO. 109-317, pt. 2, at 18–19 (2005) (suggesting that the lack of reliable data highlights the need for law enforcement to participate in gathering information); Sherman & Grace, *supra* note 25, at 331 (explaining that reporting a

cooperating with law enforcement.[252] Misidentification frustrates both the prosecutorial and the protection goals.[253] State laws that criminalize prostituted minors impede identification efforts by providing state law enforcement with conflicting guidance on whether minors should be considered victims or criminals.[254] As a result, prostituted minors go unidentified, and opportunities to investigate traffickers are potentially lost.[255]

In addition, enforcing criminal prostitution laws against minors makes them less likely to cooperate usefully with law enforcement officers investigating and seeking convictions of criminal traffickers.[256] This is particularly problematic because successful

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prostituted minor as an offender rather than a victim triggers an entirely different set of system responses).

252. *See* Annitto, *supra* note 33, at 42–43 (asserting that a victim-centered approach is a good law enforcement strategy because criminalizing prostituted minors makes them hostile to law enforcement agents and reduces chances of cooperation); *see also* Lamb, *supra* note 30, at 84–85 (suggesting that courts' punitive philosophies toward prostituted minors makes victims more likely to refuse to testify out of fear that they will be prosecuted or that they will not be protected from the retribution of their pimps).

253. *See Domestic Minor Sex Trafficking Hearing*, *supra* note 25, at 116 (statement of former Rep. Linda Smith) (describing misidentification as the primary barrier to implementing an effective response to domestic minor sex trafficking). The fact that some prostituted minors are processed by state law enforcement as offenders rather than victims also interferes in the collection of national statistics on trafficking incidents. *See* 2011 TRAFFICKING IN PERSONS REPORT, *supra* note 69, at 373 (commenting on FBI and Department of Defense efforts to address the lack of uniform nationwide reporting protocols for sex trafficking).

254. *See* Heiges, *supra* note 203, at 450–51 (labeling the conflicting federal and state laws "schizophrenic" and reasoning that, when faced with a choice between criminal or victim classification of a prostituted minor, state law enforcement agents are more likely to choose criminal classification because it is a more familiar route); Sangalis, *supra* note 76, at 416 (noting that part of the identification problem stems from law enforcement's confusion as to the definition of a trafficking victim); *see also* VT. ATT'Y GEN., REPORT OF THE ATTORNEY GENERAL PURSUANT TO S. 272, AN ACT RELATING TO HUMAN TRAFFICKING, IN THE 2009–2010 GENERAL ASSEMBLY 8 (2011), *available at* http://www.leg.state.vt.us/reports/2011ExternalReports/263725.pdf (relaying that a state trafficking task force heard testimony that local law enforcement was failing to identify victims of trafficking due to lack of training and confusion).

255. *See* SHARED HOPE REPORT FROM THE U.S. MID-TERM REVIEW, *supra* note 36, at 15–16 (describing the need to educate state judges and law enforcement about why prostituted minors are victims); TEX. JUVENILE PROB. COMM'N, ALTERNATIVES TO JUVENILE JUSTICE FOR YOUTH INVOLVED IN PROSTITUTION: REPORT TO THE 82ND LEGISLATURE 3 (2011), *available at* http://www.tjjd.texas.gov/publications/reports/rptoth201103.pdf (advancing the lack of training and the continued criminalization as factors that prevent local law enforcement from identifying minors as victims of sex trafficking).

256. *See* INT'L ASSOC. OF CHIEFS OF POLICE, THE CRIME OF HUMAN TRAFFICKING: A LAW ENFORCEMENT GUIDE TO IDENTIFICATION AND INVESTIGATION 8 (2006), *available at* http://www.theiacp.org/LinkClick.aspx?fileticket=W7b9hV6wn%2bA%3d&tabid=372 (quoting a trafficking victim as expressing her lack of trust for police); NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, U.S. DEP'T OF JUSTICE, CHILD PORNOGRAPHY AND PROSTITUTION: BACKGROUND AND LEGAL ANALYSIS 61–62 (1987) (commenting on evidence showing that under a prohibition regime, prostitutes are reluctant to seek

trafficking investigations and prosecutions rely substantially on victims' cooperation.[257] Advocates of enforcing criminal prostitution laws against minors sometimes argue the contrary, stating that detention and the threat of criminal prosecution are useful tools for convincing prostituted minors to cooperate in investigations and prosecutions of traffickers.[258] This argument, however, conflicts with the TVPA's protective goal,[259] and nothing in the TVPA suggests that the protection goal should be sacrificed for the sake of the prosecution goal.

Moreover, the argument that enforcing criminal prostitution laws against minors helps effectuate the TVPA's goal of prosecuting traffickers ignores sex traffickers' tactics and the traumatic psychological and emotional effect that those tactics have on minors.[260] Traffickers and pimps are known to target vulnerable young people who they exploit and control in large part through the formation of complex emotional and psychological relationships.[261]

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police protection against pimps); LINDA A. SMITH ET AL., SHARED HOPE INT'L, DOMESTIC MINOR SEX TRAFFICKING: CHILD SEX SLAVERY IN ARIZONA 34 (2010), *available at* http://www.sharedhope.org/Portals/0/Documents/ArizonaRA.pdf (opining that state prosecutors struggle to obtain victim-witness testimony because minors who have contact with the criminal justice system are skeptical of law enforcement).

257. *See In Our Own Backyard*, *supra* note 1, at 10 (statement of Beth Phillips, United States Attorney, Western District of Missouri) (describing the time and effort needed for law enforcement to gain the trust of victims, whose testimony is often necessary to ensure successful prosecutions); DOJ NATIONAL STRATEGY, *supra* note 236, at 34 (stating that obtaining a conviction against a pimp is much more difficult without a cooperating victim witness).

258. *See supra* notes 34–35, 37 and accompanying text (discussing the argument that, without threat of prosecution, victims will not be willing to give much-needed testimony against their pimps).

259. *See supra* Part II.B.1 (discussing how the many adverse repercussions of being detained or criminally prosecuted do not further the TVPA's protective goals). It is of course true that prosecuting traffickers helps to protect victims. However, my argument is that whatever benefit victims gain from the prosecution of traffickers does not justify subjecting them to criminal prosecution. Prosecution of traffickers should be pursued without relying on coercive prosecution of prostituted minors.

260. *See* United States v. Carreto, 583 F.3d 152, 154–55 (2d Cir. 2009) (illustrating how three defendants who pled guilty to sex trafficking had used a combination of violence, rape, threats, and feigned affection to control their victims); United States v. Jimenez-Calderon, 183 F. App'x 274, 276–77 (3d Cir. 2006) (describing how defendant traffickers lured young women with false promises of love, and used a combination of affection, threats and physical violence to force them to engage in prostitution); United States v. Pipkins, 378 F.3d 1281, 1285–86 (11th Cir. 2004) (detailing elaborate rules enforced by pimps in Atlanta), *vacated*, 544 U.S. 902 (2005). *See generally* RACHEL LLOYD, GIRLS LIKE US (2011) (providing stories about prostituted girls' experiences in "the life" and the difficulties and lack of understanding they encounter in the "straight" world).

261. *See* DOJ NATIONAL STRATEGY, supra note 236, at 31 (contending that children who become involved in prostitution are often runaways or "throwaways" who are targeted by pimps and traffickers because they lack self-esteem and outside support systems); SMITH ET AL., *supra* note 2, at 37–40 (describing traffickers' recruitment tactics as a form of brainwashing).

Their tactics have been described as similar to those used by perpetrators of domestic violence, in that both involve the use of "interlocking systems of reward and punishment"[262] to develop dependence and ensure submission and obedience.[263] As a result of these tactics, minor victims are often initially unable or unwilling to assist with law enforcement efforts to prosecute their traffickers.[264] Thus, the evidence about the effect of trafficking on prostituted minors suggests that enforcing criminal prostitution laws against minors is not effective as a tool for enhancing the success of trafficking prosecutions. Instead, the TVPA represents the more effective approach, which is to gain victims' cooperation by recognizing their complex needs and ensuring that they have access to the appropriate services.[265]

CONCLUSION

This Comment has argued that the TVPA preempts the enforcement of state criminal prostitution laws against minors because such enforcement conflicts with the TVPA's prosecutorial and protective purposes. As demonstrated above, the TVPA's protective and prosecutorial purposes each require prostituted minors to be recognized as victims rather than to be treated as criminals. Although states may offer various rationales for enforcing criminal prostitution laws against minors, enforcement of such laws conflicts with the TVPA's purposes. Criminalizing prostituted minors frustrates the achievement of the TVPA's protective goal by treating

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262. *See* 2011 TRAFFICKING IN PERSONS REPORT, *supra* note 69, at 25 (stating that the TVPA recognizes these subtle methods of psychological control forms of coercion).

263. *See* DOJ NATIONAL STRATEGY, *supra* note 236, at 32 (explaining that once a child becomes dependent, the pimp or trafficker may introduce the idea of prostitution as a way to help contribute to their "street family"); Amy Barasch & Barabara C. Kryszko, *The Nexus Between Domestic Violence and Trafficking for Commercial Sexual Exploitation*, *in* LAWYER'S MANUAL ON HUMAN TRAFFICKING, *supra* note 31, at 83, 84–86 (comparing the control tactics of traffickers with the tactics of perpetrators of domestic violence); Sherman & Grace, *supra* note 25, at 339 (describing prostituted minors as experiencing a form of Stockholm Syndrome).

264. *See In Our Own Backyard*, *supra* note 1, at 45–46 (statement of Anita Alvarez, Cook County State's Attorney) (stating that law enforcement faces a serious challenge in prosecuting trafficking of minors because victims' vulnerabilities often lead them to view their pimp or trafficker as someone they rely on and love); DOJ NATIONAL STRATEGY, *supra* note 236, at 32 (noting that the difficulty of ending exploitation by traffickers is partly due to traffickers' psychological hold on minors); Lauren Hersh, *Sex Trafficking Investigations and Prosecutions*, *in* LAWYER'S MANUAL ON HUMAN TRAFFICKING, *supra* note 31, at 256 (stating that victims' complex relationships with their traffickers often render them too frightened and traumatized to participate in building a case against their traffickers).

265. *See* DOJ NATIONAL STRATEGY, *supra* note 236, at 139 (observing that victim-assistance is part of DOJ's strategy for maintaining progress in prosecuting trafficking cases).

prostituted minors as criminals, thereby re-traumatizing them, and by contributing to the misidentification of victims. Criminalizing prostituted minors also frustrates the TVPA's prosecutorial goal by encouraging misidentification of victims, thereby squandering opportunities to investigate and prosecute traffickers, and by discouraging victim witnesses from cooperating with law enforcement.

Under the principles of implied conflict preemption, these conflicts indicate that states are prohibited from enforcing criminal prostitution laws against minors. Indeed, the growing state-level embrace of Safe Harbor laws suggests that states may already be prepared to acknowledge that enforcing criminal prostitution laws against minors is untenable due not only to its conflict with federal law, but also due to what is now known about the reality of sex trafficking of minors.