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Bridge Over Troubled Water: Safe Harbor Laws for Sexually Exploited Minors

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BRIDGE OVER TROUBLED WATER: SAFE
HARBOR LAWS FOR SEXUALLY EXPLOITED
MINORS*

CHERYL NELSON BUTLER**

*When you're down and out
When you're on the street
When evening falls so hard
I will comfort you
I'll take your part
When darkness comes
And pain is all around
Like a bridge over troubled water
I will lay me down
Like a bridge over troubled water
I will lay me down¹*

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1. SIMON & GARFUNKEL, *Bridge Over Troubled Water*, on BRIDGE OVER TROUBLED WATER (Columbia 1970). This hit song has been ranked number forty-eight on *Rolling Stone’s* 500 Greatest Songs of All Time. See *500 Greatest Songs of All Time*, ROLLING STONE (Apr. 7, 2011), <http://www.rollingstone.com/music/lists/the-500-greatest-songs-of-all-time-20110407>.

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INTRODUCTION

Domestic child sex trafficking, the sexual exploitation of native minors in the United States for financial gain,² is a national crisis and growing epidemic.³ According to the U.S. Department of Justice

2. In the United States, minors are exploited in the commercial sex industry through a variety of means, including prostitution, stripping, pornography, and similar work in massage parlors. This Article focuses on the sexual exploitation of minors through prostitution. For scholarship on sexual exploitation of minors broadly or through other specific means, see generally Kimberly Kotrla & Beth Ann Wommack, *Sex Trafficking of Minors in the U.S.: Implications for Policy, Prevention and Research*, 2 J. APPLIED RES. ON CHILD.: INFORMING POL'Y FOR CHILD. AT RISK, no. 1, 2011, at art. 5, available at <http://digitalcommons.library.tmc.edu/cgi/viewcontent.cgi?article=1012&context=childrenatrisk>.

3. See S. Res. 340, 113th Cong. (2014), available at <https://www.congress.gov/113/bills/sres340/BILLS-113sres340ats.pdf> (noting one FBI estimate that put the number of individuals trafficked at over 200,000); Improving Outcomes for Youth at Risk for Sex Trafficking Act of 2013, S. 1518, 113th Cong. § 2 (2013) (“Recent reports on sex trafficking estimate that hundreds of thousands of children and youth are at risk for domestic sex trafficking.”); PRESIDENT’S INTERAGENCY TASK FORCE TO MONITOR & COMBAT TRAFFICKING IN PERS., COORDINATION, COLLABORATION, CAPACITY: FEDERAL STRATEGIC ACTION PLAN ON SERVICE FOR VICTIMS OF HUMAN TRAFFICKING IN THE UNITED STATES 2013–2017, at 5 (2014) [hereinafter COORDINATION, COLLABORATION, CAPACITY], available at <http://www.ovc.gov/pubs/FederalHumanTraffickingStrategicPlan.pdf> (“[T]he International Labour Organization estimates that more than 20 million men, women, and children are victimized by forced labor and sex trafficking worldwide, including in the United States.”); Cheryl Nelson Butler, *Kids For Sale: Does America Recognize Its Own Sexually Exploited Minors as Victims of Human Trafficking?*, 44

(“DOJ”), over eighty percent of the identified cases of human trafficking in the United States involve some form of sex trafficking.⁴ The U.S. government has estimated that between 200,000 and 300,000 minors are victims of commercial sexual exploitation in the United States each year.⁵ A current misconception is that many of these minors are foreigners.⁶ In fact, most minors who are prostituted in the United States are native-born, as opposed to foreign-born, youth.⁷

Unfortunately, the U.S. juvenile justice and child welfare systems have failed to provide consistent and effective legal responses to domestic child sex trafficking. Until recently, law enforcement and elected officials failed to even acknowledge child prostitution as a pervasive problem or to identify prostituted minors as crime victims.⁸ On the state level, the juvenile justice system has focused on

SETON HALL L. REV. 833, 834–35 (2014) (noting similar trafficking statistics); *see also* INST. OF MED. & NAT’L RESEARCH COUNCIL, CONFRONTING COMMERCIAL SEXUAL EXPLOITATION AND SEX TRAFFICKING OF MINORS IN THE UNITED STATES 42 (Ellen Wright Clayton et al. eds., 2013) [hereinafter NAT’L RESEARCH COUNCIL REPORT] (noting one estimate that the number of minors at risk is between 244,000 and 325,000).

4. U.S. DEP’T OF JUSTICE, NCJ 233732, CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS, 2008–2010, at 1 (2011), *available at* <http://www.bjs.gov/content/pub/pdf/cshti0810.pdf>.

5. S. Res. 340; S. 1518. For such reports, see NAT’L RESEARCH COUNCIL REPORT, *supra* note 3, at 42, and LINDA A. SMITH, SAMANTHA HEALY VARDAMAN & MELISSA A. SNOW, SHARED HOPE INT’L, THE NATIONAL REPORT ON DOMESTIC MINOR SEX TRAFFICKING 4 (quoting DVD: Prostituted Children in the United States: Identifying and Responding to America’s Trafficked Youth (Shared Hope Int’l and Onanon Productions 2008)).

6. INST. OF MED. & NAT’L RESEARCH COUNCIL, CONFRONTING COMMERCIAL SEXUAL EXPLOITATION AND SEX TRAFFICKING OF MINORS IN THE UNITED STATES: A LEGAL GUIDE FOR THE LEGAL SECTOR 1 (2014) (“However, much of this attention [on commercial sexual exploitation and sex trafficking of minors] has focused internationally. This international focus has overshadowed the reality that commercial sexual exploitation and sex trafficking of minors may also occur every day within the United States.”).

7. *See* S. Res. 340; Press Release, White House, Remarks by the President to the Clinton Global Initiative (Sept. 25, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-clinton-global-initiative>.

8. *See 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 Comm. on the Judiciary*, 111th Cong. 14 (2010) (statement of Rachel Lloyd, Executive Director and Founder, Girls Educational & Mentoring Services, New York, N.Y.), *available at* <http://www.gpo.gov/fdsys/pkg/chrg-111shrg58003/pdf/chrg-111shrg58003.pdf>; INST. OF MED. & NAT’L RESEARCH COUNCIL, *supra* note 6, at 1 (“Commercial sexual exploitation and sex trafficking of minors in the United States are frequently overlooked, misunderstood, and unaddressed domestic problems.”); Rick Halperin, *Sex Trafficking of Minors as a Human Rights Issue*, 2 J. APPLIED RES. ON CHILD.: INFORMING POL’Y FOR CHILD. AT RISK, no. 1, 2011, at art. 12, 1, *available at* <http://digitalcommons.library.tmc.edu/cgi/viewcontent.cgi?article=1034&context=childrenatrisk> (“[U]ntil recently, the crime has been out of sight and out of the minds of most people, including law enforcement and the judicial system.”).

criminalization, as opposed to the protection, of domestic prostituted minors.⁹ However, there is a changing perception in society and in the legal system that underaged prostitutes are crime victims.¹⁰ Scholars, advocates, and legislators have called upon the United Nations,¹¹ the U.S. government,¹² and the international corporate community¹³ to develop new legal approaches and partnerships to combat domestic child prostitution.¹⁴ With regard to the prostitution of American minors, change must also happen on the ground. As most child prostitution cases are handled by local law enforcement agencies, an effective response must include a major sea change in the way that the juvenile justice and child welfare systems address this issue; in particular, these local institutions must adopt a new, victim-centered approach.¹⁵

9. SHARED HOPE INT'L, *TRAFFIC STOP: A DISCUSSION ABOUT CHILD WELFARE AND JUDICIAL STRATEGIES FOR PREVENTING JUVENILE SEX TRAFFICKING AND HELPING ITS SURVIVORS* 18 (2014), available at <http://sharedhope.org/wp-content/uploads/2014/08/Traffic-Stop-FINAL.pdf>.

10. See INST. OF MED. & NAT'L RESEARCH COUNCIL, *supra* note 6, at 7, 25–26 (“Commercial sexual exploitation and sex trafficking of minors should be understood as acts of abuse and violence against children and adolescents.”). For scholarly treatment of these changing perceptions, see Megan Anitto, *Consent, Coercion, and Compassion: Emerging Responses to the Commercial Sexual Exploitation of Minors*, 30 YALE L. & POL'Y REV. 1, 21–25 (2011); Tamar R. Birckhead, *The “Youngest Profession”*: *Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1059 (2011).

11. See UNITED NATIONS OFFICE ON DRUGS & CRIME, *GLOBAL REPORT ON TRAFFICKING IN PERSONS* 6 (2009), available at <http://www.unodc.org/unodc/en/human-trafficking/global-report-on-trafficking-in-persons.html>.

12. Cheryl Nelson Butler, *Making the Grade: The U.S. TIP Report & the Fight Against Domestic Child Sex Trafficking*, 67 SMU L. REV. 341, 341–42 (2014) (discussing the emerging role of the U.S. Department of State in the fight against domestic sex trafficking); Jonathan Todres, *Moving Upstream: The Merits of a Public Health Law Approach to Human Trafficking*, 89 N.C. L. REV. 447, 451–53 (2011) [hereinafter *Todres, Upstream*].

13. Erika R. George & Scarlet R. Smith, *In Good Company: How Corporate Social Responsibility Can Protect Rights and Aid Efforts to End Child Sex Trafficking and Modern Slavery*, 46 N.Y.U. J. INT'L L. & POL. 55, 58–59 (2013); Jonathan Todres, *Human Trafficking and the Private Sector: A Role for Corporate Counsel*, 42 INT'L L. NEWS 18, 18–21 (2013).

14. For scholarly treatment on the need for safe harbor laws, see, for example, Anitto, *supra* note 10, at 21–25; Birckhead, *supra* note 10, at 1058–59, and Cheryl Nelson Butler, *Sex Slavery in the Lone Star State: Does the Texas Human Trafficking Legislation of 2011 Protect Minors?*, 45 AKRON L. REV. 843, 874–81 (2012).

15. In addition to scholars, advocates and state government officials have also begun to recognize the need for a victim-centered approach. See CTR. FOR THE HUMAN RIGHTS FOR CHILDREN, LOYOLA UNIV. CHI., *BUILDING CHILD WELFARE RESPONSE TO CHILD TRAFFICKING* 11–12 (Katherine Kaufka Walts et al. eds., 2011), available at <http://www.luc.edu/chrc/Monograph.shtml> (“[T]he majority of the victims [of human trafficking] are minors, yet support for this group has not been considered a priority. . . . [C]hild welfare field is only beginning to recognize the need to prepare for and address the

As a new and potentially innovative legal response, several states have enacted “safe harbor legislation” for sexually exploited minors.¹⁶ Safe harbor laws have been framed as a “paradigm shift” away from legal punishment for prostituted minors and toward protection of minors from prostitution and prevention of future sexual exploitation.¹⁷ Based on these perceived effects of eliminating

issue of child sex trafficking.”); KAMALA D. HARRIS, ATT’Y GEN., CAL. DEP’T OF JUSTICE, THE STATE OF HUMAN TRAFFICKING IN CALIFORNIA 75–83 (2012), available at <http://oag.ca.gov/sites/all/files/agweb/pdfs/ht/human-trafficking-2012.pdf> (discussing how a “victim centered approach” must include effective law enforcement training, comprehensive services for victims and witness assistance programs and strategic use of technology); SHARED HOPE INT’L ET AL., NATIONAL COLLOQUIUM 2012 FINAL REPORT: AN INVENTORY OF THE CURRENT SHELTER AND SERVICES RESPONSE TO DOMESTIC MINOR SEX TRAFFICKING 14 (2013), available at <http://sharedhope.org/wp-content/uploads/2012/09/National-Colloquium-2012-Report.pdf> (“A victim-centered approach is essential in crafting shelter and services delivery for victims of domestic minor sex trafficking and survivor needs do not stop at the age of 18.”); KATE WALKER, CAL. CHILD WELFARE COUNCIL, ENDING THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN: A CALL FOR MULTI-SYSTEM COLLABORATION IN CALIFORNIA 1 (2013), available at http://www.youthlaw.org/fileadmin/ncyl/youthlaw/publications/Ending-CSEC-A-Call-for-Multi-System_Collaboration-in-CA.pdf; see also U.S. Dep’t of Homeland Sec., *A Victim-Centered Approach*, BLUE CAMPAIGN, <https://www.dhs.gov/blue-campaign/victim-centered-approach> (last visited Feb. 26, 2015) (discussing federal efforts to promote a victim-centered approach to law enforcement’s response to human trafficking victims).

16. On the need for state safe harbor laws, see, for example, Wendi Adelson, *Child Prostitute or Victim of Trafficking?*, 6 U. ST. THOMAS L.J. 96, 96–97 (2008); Annitto, *supra* note 10, at 45–47; Tamar R. Birckhead, *supra* note 10, at 1067–74; Susan Crile, *A Minor Conflict: Why the Objectives of Federal Sex Trafficking Legislation Preempt the Enforcement of State Prostitution Laws Against Minors*, 61 AM. U. L. REV. 1783, 1787–94 (2012); Tessa L. Dysart, *The Protected Innocence Initiative: Building Protective State Law Regimes for America’s Sex-Trafficked Children*, 44 COLUM. HUM. RTS. L. REV. 619, 684–94 (2013); Krystle M. Fernandez, *Victims or Criminals? The Intricacies of Dealing with Juvenile Victims of Sex Trafficking and Why the Distinction Matters*, 45 ARIZ. ST. L.J. 859, 859–60 (2013); Darren Geist, *Finding Safe Harbor: Protection, Prosecution, and State Strategies to Address Prostituted Minors*, 4 LEGIS. & POL’Y BRIEF, Summer 2012, at 67, 71–72; Jill P. Rawal, Stephanie Kay Richard & Aradhana Tiwari, *State Safe Harbor Laws & Recommendations for Future Legislation*, 46 CLEARINGHOUSE REV. 525, 525–26 (2013); Linda Smith & Samantha Healy Vardaman, *A Legislative Framework for Combating Domestic Minor Sex Trafficking*, 23 REGENT U. L. REV. 265, 291–94 (2010); Jonathan Todres, *A Child Rights Framework for Addressing Human Trafficking*, 22 MICH. ST. INT’L L. REV. 557, 561 (2014).

17. See, e.g., Rami S. Badawy, *Shifting the Paradigm from Prosecution to Protection of Child Victims of Prostitution*, 22 UPDATE (Nat’l Ctr. for Prosecution of Child Abuse), no. 8, 2010, at 1, 1, available at http://www.ndaa.org/pdf/Update_V22N8.pdf (examining the effectiveness of new approaches to juveniles in prostitution); Toolsi Gowin Meisner, *Shifting the Paradigm from Prosecution to Protection of Child Victims of Prostitution*, 21 UPDATE (Nat’l Ctr. for Prosecution of Child Abuse), no. 8, 2009, at 1, 1, available at http://www.ndaa.org/pdf/update_vol_21_no_8.pdf (analyzing different approaches to the juvenile prostitution); Steve Lopez, *Getting Tough on Underage Prostitution*, L.A. TIMES (Sept. 2, 2013), <http://articles.latimes.com/2013/sep/03/local/la-me-0904-lopez-trafficking-20130904> (“There’s really nothing new about underage prostitution. What’s different,

punishment and creating more child-centered approaches, safe harbor laws have been hailed as a groundbreaking legal response to child prostitution in the United States.¹⁸ For example, New York enacted the first state safe harbor law in 2008.¹⁹ The Act took effect on April 1, 2010,²⁰ and received much acclaim.²¹

This Article contributes to the emerging legal scholarship on child sex trafficking by exploring the impact and the potential of recently enacted safe harbor laws. Scholars have already begun to explore the need for new legal responses to domestic child sex trafficking.²² But, few scholars have explored whether state safe

though, is what Ridley-Thomas and Supervisor Don Knabe have referred to as ‘a paradigm shift,’ in which juveniles in the sex trade are more commonly viewed as victims in need of being rescued rather than punished.”); Steve Marcin, *Prostitution and Human Trafficking: A Paradigm Shift*, FBI L. ENFORCEMENT BULL. (Mar. 5, 2013), <http://leb.fbi.gov/2013/march/prostitution-and-human-trafficking-a-paradigm-shift> (“The [Anaheim Police Department] dramatically changed its tactics. . . . This paradigm shift meant considering prostitutes as victims and identifying pimps as suspects.”).

18. See *supra* note 17; BEATRIZ MENANTEAU ET AL., ADVOCATES FOR HUMAN RIGHTS, SAFE HARBOR: FULFILLING MINNESOTA’S PROMISE TO PROTECT SEXUALLY EXPLOITED YOUTH 1 (2013), available at http://www.theadvocatesforhumanrights.org/uploads/sh_2013_final_full_rept.pdf (“Safe Harbor 2011 [the Minnesota Safe Harbor for Sexually Exploited Youth Act] reflects a sea change in how sexually exploited youth are treated in Minnesota.”).

19. See New York Safe Harbour for Exploited Children Act, ch. 569, 2008 N.Y. Laws 4076 (codified as amended in scattered sections of N.Y. SOC. SERV. LAW and N.Y. FAM. CT. ACT).

20. *Id.*

21. See Annitto, *supra* note 10, at 48 (“[The Safe Harbor Act] was . . . considered ‘groundbreaking’ and a ‘watershed’ moment for youth advocates’ efforts to address the commercial sexual exploitation of children in the United States.” (citations omitted)).

22. See, e.g., Adelson, *supra* note 16, at 96–97; Annitto, *supra* note 10, at 2–6; Birkhead, *supra* note 10, at 1065–67; Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1657–60 (2010); Crile, *supra* note 16, at 1787–94; Dysart, *supra* note 16, at 684–94; Fernandez, *supra* note 16, at 859–60; Cynthia Godsoe, *Contempt, Status and the Criminalization of Non-Conforming Girls*, 35 CARDOZO L. REV. 1091, 1111–15 (2014); Jonathan Todres, *Maturity*, 48 HOUS. L. REV. 1107, 1111–13 (2012) [hereinafter, Todres, *Maturity*]; Todres, *Upstream*, *supra* note 12, at 451–53; Anders Walker, *Strange Traffic: Sex, Slavery and the Freedom Principle*, 46 CONN. L. REV. 561, 585–88 (2013); Angela L. Bergman, Note, *For Their Own Good? Exploring Legislative Responses to the Commercial Sexual Exploitation of Children and the Illinois Safe Children Act*, 65 VAND. L. REV. 1361, 1362–65 (2011); 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 HOF. L. REV. 1339, 1339–42 (2008); Kristian Bryant Rose, Comment, *Looking for Love in All the Wrong Places: A Call to Reform State Law on Sex Trafficking*, 65 OKLA. L. REV. 303, 307 (2013).

For research articles focused on New York’s safe harbor law, see Shelby Schwartz, *Harboring Concerns: The Problematic Reorientation of Juvenile Prostitution Adjudication in New York*, 18 COLUM. J. GENDER & L. 235, 236–37 (2008), and Marihug Cedeño, Note, *Pimps, Johns, and Juvenile Prostitutes: Is New York Doing Enough to*

harbor laws are consistent with emerging best practices and model legislation such as the Uniform Act on Prevention of and Remedies for Human Trafficking.²³ Thus, several key questions remain ripe for scholarly debate. For example, do safe harbor laws effectively shift the paradigm from punishment to protection of sexually exploited minors? Do state safe harbor laws represent a new and improved legal approach to child prostitution? Do these safe harbor laws adequately protect sexually exploited children from further exploitation?

This Article argues that, while safe harbor laws for prostituted minors have great potential to protect sexually exploited minors in the United States, “prosecution-based models,” such as the New York Safe Harbour for Sexually Exploited Minors Act (“NYSHA”),²⁴ fail to address some of the key public policy goals behind safe harbor laws. First, because these laws still threaten all minors with prosecution or adjudication as delinquents, they fail to end the age-old practice of treating prostituted minors as the main or sole agents of their own commercial sexual exploitation. Safe harbor laws still allow for prosecution or punishment of prostituted minors if the minors fail to meet certain conditions. Second, safe harbor laws that condition rehabilitative services on criminal or juvenile justice adjudication undermine efforts to shift the paradigm. In order to protect minors from commercial sexual exploitation, safe harbor laws must adopt a protective, victim-centered approach.

Following this Introduction, Part I argues that prostituted minors are victims of exploitation, abuse, and neglect—conditions that push and pull them into the commercial sex industry. Thus, the legal response to child prostitution must focus on protection, not punishment, of prostituted minors. Part II explores the conflict among international, federal, and state laws. For example, on the one hand, prostitution laws presume that prostituted minors are consenting agents to commercial sex, but on the other hand, statutory rape laws presume that minors cannot provide legal consent to sex. Moreover, Part II argues that several state law approaches to child prostitution are at odds with the legal standards set forth in international and

Combat the Commercial Sexual Exploitation of Children?, 22 CORNELL J. L. & PUB. POL’Y 153, 155–56 (2012). See also Annitto, *supra* note 10, at 46–48 (discussing earlier versions of New York’s law); Geist, *supra* note 16, at 92–95 (comparing earlier versions of the New York law to safe harbor provisions in other states).

23. See *infra* Part IV.

24. New York Safe Harbour for Exploited Children Act, ch. 569, 2008 N.Y. Laws 4076 (codified as amended in scattered sections of N.Y. SOC. SERV. LAW and N.Y. FAM. CT. ACT).

federal legislation. These inconsistent approaches have failed to adequately protect minors from commercial sexual exploitation.

Part III explores the emergence of anti-trafficking laws and the movement toward incorporating safe harbor provisions into these laws. The first wave of sex trafficking laws criminalized human trafficking but did not reflect a consensus on whether such laws treated minors as victims or criminals. In a second wave, safe harbor provisions emerged with the promise of shifting the legal paradigm from punishment to protection of prostituted minors. However, a lack of uniformity among the standards for such safe harbor provisions has undermined the intent of protecting minors from harm.

Part IV explores the Uniform Act on Prevention of and Remedies for Human Trafficking (“Uniform Act”)²⁵ as the latest model statute setting forth standards for safe harbors. Part IV argues that the Uniform Act creates an effective victim-centered approach to human trafficking and sets forth effective safe harbor provisions that state legislatures and courts should follow.

Part V applies the standards set forth in the Uniform Act to evaluate the NYSHA. The NYSHA highlights how prosecution models of safe harbor laws fail to shift the legal paradigm for child sex trafficking. Some prosecution models unduly narrow the class of prostituted minors who are eligible for safe harbor. Moreover, while some safe harbor laws do not immediately prosecute or adjudicate minors as delinquents, other provisions still threaten minors with punishment if certain conditions are met. Finally, this Article concludes with a call for compliance with the safe harbor provisions of the Uniform Act.

I. TROUBLED WATERS: PROSTITUTED MINORS ARE VICTIMS

A. “No Teenage Girl Wants to Be a Teenage Prostitute.”²⁶

Too often, prostituted minors are misunderstood.²⁷ Indeed, myths about minors and consent drive the traditional legal responses to child prostitution. As discussed further in Part II, the myth that

25. UNIF. ACT ON PREVENTION OF & REMEDIES FOR HUMAN TRAFFICKING (2013).

26. Bridget Gavaghan, *Prioritizing Healthy Child Development Could Prevent Child Prostitution*, 2 J. APPLIED RES. ON CHILD.: INFORMING POL’Y FOR CHILD. AT RISK, no. 1, 2011, at art. 15, 1 (quoting Dr. Bob Sanborn, President and CEO of Children at Risk, a national child advocacy organization) (internal quotation marks omitted).

27. NAT’L RESEARCH COUNCIL REPORT, *supra* note 3, at 2 (“Numerous factors . . . contribute to a lack of understanding and awareness of . . . sex trafficking of minors in the United States.”).

most minors consent to commercial sex contradicts federal laws that recognize all prostituted minors as victims of human trafficking. Under the federal Trafficking Victims Protection Act, which was first enacted in 2000²⁸ and reauthorized in 2013,²⁹ minors can never legally consent to prostitution; therefore, proof of force, fraud, or coercion is not required in order to prosecute child prostitution as prima facie evidence of human trafficking.³⁰ Yet, stereotypes have been so pervasive that state sex trafficking laws often presumed that prostituted minors consented to sex and therefore, unless the presumption could be rebutted with proof of force, fraud, or coercion, the minors should be held criminally liable for prostitution.³¹ Furthermore, law enforcement and other first responders often perceive and identify prostituted minors—particularly American minors—as criminals or delinquents, instead of victims.³² Consequently, these minors have traditionally been placed in the juvenile justice or criminal justice system as punishment and have been denied victim services.³³

But, distressed kids are not the only ones at risk. All minors are vulnerable to sexual exploitation precisely because they are young and impressionable—sometimes unable to foresee the consequences

28. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of 22 U.S.C.) (amended 2013).

29. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 1251, 127 Stat. 54, 155–56 (codified as amended in scattered sections of 22 U.S.C.).

30. See 22 U.S.C. § 7102(8)(A) (2012); 18 U.S.C. § 1591(a) (2012) (“Whoever knowingly . . . recruits, entices, harbors, transports, provides, obtains, or maintains by any means a person; or (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing . . . that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).”).

31. SHARED HOPE INT’L, 2013 PROTECTED INNOCENCE CHALLENGE: A LEGAL FRAMEWORK FOR THE PROTECTION OF THE NATION’S CHILDREN 27 (2013), available at <http://sharedhope.org/wp-content/uploads/2014/02/2013-Protected-Innocence-Challenge-Report.pdf> (“To ensure identification of sexually exploited children as victims and to prevent traffickers from escaping criminal liability through manufactured evidence of consent, all minors under the age of 18 should be deemed unable to consent to involvement in commercial sex acts, this rendering the elements of force, fraud, or coercion irrelevant in domestic minor cases.”).

32. CTR. FOR THE HUMAN RIGHTS FOR CHILDREN, *supra* note 15, at 13 (“[C]hildren and youth who are U.S. citizens are often misidentified as juvenile prostitutes or criminals and placed in the juvenile justice system.”).

33. See *id.*

of trusting certain adults and peers.³⁴ As the Supreme Court stated in the landmark case *Roper v. Simmons*,³⁵ “the comparative immaturity and irresponsibility of juveniles” makes them less culpable than adults who commit crimes.³⁶ More recently, in *Graham v. Florida*,³⁷ the Court recognized the importance of new adolescent brain research that posits that minors have a limited ability to avoid negative influences and that the criminal justice system must consider this evidence.³⁸

Indeed, as advocates have long argued, “[n]o teenage girl wants to be a teenage prostitute.”³⁹ The same is true for boys.⁴⁰ These prostituted minors rarely consent to prostitution, but instead they are coerced by adults.⁴¹ The early age at which many minors enter prostitution should undercut misconceptions that they choose prostitution. The average age of entry into prostitution is between twelve and fourteen years old⁴²—well below the age at which the law recognizes a person as mature enough to enter into a contract,⁴³ to choose to work,⁴⁴ or to consent to sex.⁴⁵

The circumstances under which minors are pulled and pushed into prostitution reveal the layers of abuse, coercion, and victimization that prostituted minors endure. A significant number of minors in prostitution are victims of prior and current child abuse or neglect and, as a result, are prime targets for commercial sexual

34. See POLARIS PROJECT, DOMESTIC SEX TRAFFICKING: THE CRIMINAL OPERATIONS OF THE AMERICAN PIMP 3, available at https://www.dcjs.virginia.gov/victims/humantrafficking/vs/documents/Domestic_Sex_Trafficking_Guide.pdf.

35. 543 U.S. 551 (2005).

36. *Id.* at 569–70.

37. 560 U.S. 48 (2010).

38. *See id.* at 68–69.

39. Gavaghan, *supra* note 26, at 1 (quoting Dr. Bob Sanborn, President and CEO of Children at Risk, a national child advocacy organization) (internal quotation marks omitted).

40. *See generally* Samuel V. Jones, *The Invisible Man: The Conscious Neglect of Men and Boys in the War on Human Trafficking*, 2010 UTAH L. REV. 1143 (2011) (exploring “the systematic neglect of male victims in the publicity of human trafficking”).

41. *See* Cheryl Hanna, *Somebody’s Daughter: The Domestic Trafficking of Girls for the Commercial Sex Industry and the Power of Love*, 9 WM. & MARY J. WOMEN & L. 1, 2–3 (2010).

42. POLARIS PROJECT, CHILD SEX TRAFFICKING IN THE U.S.: CHILD SEX TRAFFICKING AT-A-GLANCE 1 (2011), available at http://www.ocwtp.net/PDFs/DL/HT/Child_Sex_Trafficking_At_A_Glance.pdf.

43. Todres, *Maturity*, *supra* note 22, at 1125; *see also* Butler, *supra* note 3, at 866–70 (discussing Supreme Court cases holding that minors have limited capacity to make life choices and to avoid bad influences).

44. Todres, *Maturity*, *supra* note 22, at 1130.

45. *Id.* at 1140.

exploitation.⁴⁶ Minors are especially vulnerable to commercial sexual exploitation precisely because they are dependent on adults and society for emotional well-being, food, shelter, and physical protection.⁴⁷ Prior sexual assaults groom minors for prostitution.⁴⁸ Norma Hotaling, a sex trafficking survivor who founded the SAGE (Standing Against Global Exploitation) Project a leading advocacy and recovery organization, argues that a history of child sexual abuse lowers a child's self-esteem to the point where he or she is made vulnerable for subsequent abuse.⁴⁹ Kids who flee incest or other forms of abuse in their homes often become runaways or throwaways, the perfect prey for sexually exploitative adults.⁵⁰ For these youth, prostitution is "survival sex"—they are not freely consenting to sell their bodies; rather, they are coerced into "trading sexual relations for basic needs, including shelter, food, and water."⁵¹ Here, too, "[p]ower disparities obscure consent to sex."⁵² Kids who are emotionally broken may seek love in all of the wrong persons, including the arms of pimps posing as boyfriends with false promises of love and support.⁵³

46. HARRIS, *supra* note 15, at 21 ("Many domestic victims of sex trafficking are underage runaways and/or come from backgrounds of sexual or physical abuse, incest, poverty, or addiction.").

47. See, e.g., Butler, *supra* note 3, at 856–57 (noting that "[a] variety of factors make minors more vulnerable to sexual exploitation" causing them to "trad[e] sexual relations for basic needs, including shelter, food, and water" (citations omitted)).

48. See *id.* at 858–59.

49. See Norma Hotaling, *The Commercial Sexual Exploitation of Women and Girls: A Survivor Service Provider's Perspective*, 18 YALE J.L. & FEMINISM 181, 182 (2006).

50. See *Domestic Minor Sex Trafficking: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec.*, 111th Cong. 137 (2010), available at http://www.missingkids.com/en_US/archive/documents/TestimonyErnieAllen9-10.pdf (statement of Ernie Allen, President and C.E.O. of National Center for Missing and Exploited Children) (testifying that many minors are recruited into the sex trade within forty-eight hours of running away from home); Butler, *supra* note 3, at 856–57.

51. Butler, *supra* note 3, at 857; EVA KLAIN & AMANDA KLOER, ABA, MEETING THE LEGAL NEEDS OF CHILD TRAFFICKING VICTIMS: AN INTRODUCTION FOR CHILDREN'S ATTORNEYS AND ADVOCATES 12 (2009), available at http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/Child_Trafficking.authcheckdam.pdf.

52. Butler, *supra* note 3, at 859.

53. POLARIS PROJECT, *supra* note 34, at 3; Butler, *supra* note 3, at 859.

B. “Pimps Up, Ho’s Down”⁵⁴

Many prostituted minors are controlled by a “pimp”⁵⁵ who applies the rules of “pimp subculture”—known methods of manipulation—to recruit minors into the prostitution lifestyle.⁵⁶ Traffickers apply a pattern of physical and psychological abuse to recruit and to trap kids in the prostitution lifestyle. Pimps and traffickers prey on a child’s need for romantic love, parental affection, and other forms of emotional support.⁵⁷ But, the grooming process often includes not only false promises of romantic love and parental affection, but also of protection.⁵⁸ Runaway youth often engage in “survival sex”—they will trade sex for food and a place to sleep.⁵⁹ As advocates have explained, “[t]raffickers prey upon runaway children because of their mental, physical, and financial vulnerability.”⁶⁰ Moreover, “[t]raffickers will talk about buying a house [or] having a family” in an effort to foster dependence from a minor who is otherwise deprived of attention.⁶¹

While some are lured by false promises by strangers, others are emotionally coerced or physically forced by family members, neighbors, or classmates.⁶² Even middle class kids are vulnerable to

54. POLARIS PROJECT, *supra* note 34, at 2 (internal quotation marks omitted). The phrase “Pimps Up, Ho’s Down” is also the title of an American documentary about prostitution and the lives of pimps, starring Ice-T, Don “Magic” Juan, and others. PIMPS UP, HO’S DOWN (Delta Entertainment 1999).

55. See, e.g., ELIZABETH G. HINES & JOAN HOCHMAN, N.Y. WOMEN’S FOUND., SEX TRAFFICKING OF MINORS IN NEW YORK: INCREASING PREVENTION AND COLLECTIVE ACTION 6 (2012), available at http://nywf.org/wp-content/uploads/2012/07/NYWF_Sex-Trafficking-of-Minors.pdf; Annitto, *supra* note 10, at 13 (defining an adult who negotiates sexual encounters between the prostituted person and a buyer as a “pimp”).

56. HARRIS, *supra* note 15, at 22; see POLARIS PROJECT, *supra* note 34, at 2.

57. See Butler, *supra* note 3, at 855.

58. See *id.*

59. See *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 Comm. on the Judiciary*, 111th Cong. 11–12 (2010) (statement of Anita Alvarez, State’s Attorney, Cook County) (“These juveniles are engaging in ‘survival sex’—exchanging sex for food, clothing, or a safe place to sleep.”); MENANTEAU ET AL., *supra* note 18, at 7.

60. MENANTEAU ET AL., *supra* note 18, at 27.

61. Stephen C. Parker & Jonathan T. Skrmetti, *Pimps Down: A Prosecutorial Perspective on Domestic Sex Trafficking*, 43 U. MEM. L. REV. 1013, 1026 (2013).

62. See U.S. DEP’T OF HEALTH & HUMAN SERVS., FACT SHEET: CHILD VICTIMS OF HUMAN TRAFFICKING 1–2 (2012), available at http://www.acf.hhs.gov/sites/default/files/orr/fact_sheet_child_victims_of_human_trafficking.pdf (“Family members, acquaintances, pimps, employers, smugglers, and strangers traffic children. They often prey upon the children’s vulnerabilities . . . and may use psychological intimidation or violence to control the children and gain financial benefits from their exploitation.”); Butler, *supra* note 14, at 859–61; see also Ronica Shannon, *Parents Indicted for Human Trafficking*, RICHMOND REG. (May 20, 2011), <http://www.richmondregister.com/news/>

this form of manipulation; in fact, several have testified to having been sexually coerced into prostitution by boyfriends and classmates, even while living in the sanctity of their homes.⁶³ In one case, for example, a teen raped a female high school classmate while “his cousins took photographs . . . making the entire event appear consensual.”⁶⁴ Ashamed and coerced by the photographs, the girl “decided she would do whatever it took to keep the pictures from reaching her parents, classmates and teachers—exactly what the men threatened unless she acquiesced to their demands” for her to prostitute for them.⁶⁵ Too often, pimps and “johns” (those who rent the minors’ bodies for sex) use violence or withhold economic and other emotional needs to trap minors in prostitution.⁶⁶

Once minors are recruited for prostitution, traffickers continue to use pimp subculture to groom victims for exploitation, and these methods are particularly effective on vulnerable children and teens. As discussed, pimps use physical violence and psychological manipulation to force and to coerce minors to engage in prostitution.⁶⁷ In fact, the essence of the pimp subculture applied to groom minors for prostitution is “Pimps Up, Ho’s Down”—complete subjugation, humiliation, and manipulation.⁶⁸ Pimps “season” their victims; they apply a process of “‘breaking down’ a girl from healthy adolescent sexual boundaries to commercial sex with strangers.”⁶⁹ Beatings, whippings, burnings, sexual assaults, and other torture techniques are inherent to the culture of pimp control.⁷⁰ The psychological coercion is also effective. To keep minors and others dependent upon the pimp for basic and emotional needs, the pimp must shame, create self-blame, and instill hopelessness and resignation.⁷¹ Other tactics used to manipulate minors include threats of harm to family members, physical and verbal abuse, and inducement into drug dependency.⁷²

local_news/parents-indicted-for-human-trafficking/article_491297c1-17a8-5140-8009-9764a57312f4.html. (discussing two parents indicted for soliciting sex with their teenage daughters).

63. See Rose, *supra* note 22, at 303–05.

64. *Id.* at 304.

65. *Id.*

66. See Parker & Skrmetti, *supra* note 61, at 1018–19, 1025–29.

67. See *supra* notes 56–66 and accompanying text.

68. POLARIS PROJECT, *supra* note 34, at 2 (internal quotation marks omitted).

69. *Id.* at 3.

70. *Id.*

71. *Id.* at 5.

72. *Id.*

Stripping the prostituted person of his or her identity and sense of self and enforcing loyalty is critical.⁷³ Hence, the “seasoning” is not complete without renaming with nicknames, removal from family members, constant guarding, and confiscation of documentation, among other techniques.⁷⁴ The pimp does not have to do all of this dirty work himself.⁷⁵ Instead, he can enlist the help from his “Bottom Bitch”—“the girl or woman who has the longest history with the pimp or who is favored by him”—to recruit other prostitutes or to exact punishments.⁷⁶ If a “wife-in-law”—any prostituted girl under his control—steps out of line, there are going to be consequences.⁷⁷ One of the worst infractions is the failure to make one’s quota—say, \$500 per night or \$1,000 per day, all of which must be turned over—because, as one pimp made clear, “my time is money.”⁷⁸

Victim testimonies reveal the grim consequences for breaking the rules; in one example, “[t]he [pimp] stated: ‘If I tell you something more than two times, you will take a swim and meet Newport.’ Daddy explained this meant that he would throw her in a scalding hot shower and then burn her with his Newport cigarettes.”⁷⁹ Victim testimonies such as this one should leave no doubt in our minds about the coercive, violent, fraudulent nature of child sex trafficking and should debunk myths about child prostitution and consent. Norma Hotaling further exposes how minors are coerced into prostitution by exploitative adults:

My story began in New York when I was just five years old. Older men in the neighborhood park would give me money to view pornography and do to them what was shown in the pornography. From ages five through thirteen, I was used as a “sexual plaything” by a group of older boys.⁸⁰

Hotaling’s story of sexual exploitation in New York City is not unusual.

73. See HARRIS, *supra* note 15, at 22–23.

74. POLARIS PROJECT, *supra* note 34, at 2–5.

75. HARRIS, *supra* note 15, at 22–23; POLARIS PROJECT, *supra* note 34, at 2.

76. HARRIS, *supra* note 15, at 22–23; POLARIS PROJECT, *supra* note 34, at 2.

77. HARRIS, *supra* note 15, at 22–23.

78. HARRIS, *supra* note 15, at 23 (noting one pimp’s comment to a woman: “I field my hustle so you can make \$1,000 a day. So, how much did you make today? \$680? That means you owe me \$340” (internal quotation marks omitted)).

79. Parker & Skrmetti, *supra* note 61, at 1015 (citing Transcript of Bond Hearing at 26, *United States v. Culp*, No. 11-20319-JPM (W.D. Tenn. Feb. 17, 2012), ECF No. 63).

80. Hotaling, *supra* note 49, at 182.

Indeed, several studies have found that in New York City, youth are particularly vulnerable to exploitation for commercial sex.⁸¹ A 2008 study commissioned by the U.S. Department of Justice identified an estimated 5,000 prostituted minors in New York City alone and predicted that the numbers of sexually exploited minors in that city is much larger.⁸² A 2012 study by the New York Women's Foundation echoed these findings, concluding that many of the youth sold for sex in New York have prior histories of child abuse and neglect, including homelessness, drug use, truancy, and mental illness.⁸³ The New York Women's Foundation study also echoes Norma Hotaling's memoir on how child prostitution is another form of child abuse by adults.⁸⁴ As the Women's Foundation report argued correctly, these risk factors obscure choice for the abused minors; in the words of one homeless youth service provider, "they've made these choices because they had no other choices. It seems dishonest to pretend otherwise."⁸⁵ New York is endemic of the entire United States. The Center for Missing Children has determined that at least 100,000 native minors are prostituted each year in the United States.⁸⁶

C. *Technology—the New Tool of Exploitation*

Once minors are initiated into the prostitution lifestyle, pimps use technology and social media to directly market and sell them for commercial sex. Technology and social media have facilitated the prostitution of minors, making solicitation and prostitution a more hidden crime.⁸⁷ Children are targeted through the use of social media

81. See, e.g., RIC CURTIS ET AL., CTR. FOR COURT INNOVATION, *Executive Summary for THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN NEW YORK CITY 2* (2008), available at http://www.courtinnovation.org/sites/default/files/CSEC_NYC_Executive_Summary.pdf ("Through application of RDS statistical techniques, we estimate that there are currently 3,946 CSEC victims citywide."); HINES & HOCHMAN, *supra* note 55, at III (discussing the results of an investigation into sex trafficking in New York). For a study of the prevalence of prostitution generally in New York City, see generally JUHU THUKRAL & MELISSA DITMORE, URBAN JUSTICE CTR., *REVOLVING DOOR: AN ANALYSIS OF STREET BASED PROSTITUTION IN NEW YORK CITY* (2003).

82. RIC CURTIS, *supra* note 81, at 2.

83. HINES & HOCHMAN, *supra* note 55, at 3–4.

84. *Id.* at 6 (discussing how minors are either lured into prostitution by a pimp or by some other adult—whether acquaintance or stranger).

85. *Id.* at 3.

86. Joseph Markman, *52 Children Rescued in Nationwide Sex-Trafficking Raids*, L.A. TIMES (Oct. 27, 2009), <http://articles.latimes.com/2009/oct/27/nation/na-child-prostitution27> (noting an estimate by Ernie Allen, President and CEO of the National Center for Missing and Exploited Children, that roughly "100,000 children are still involved in sex trafficking in the U.S., [and] that the problem is growing").

87. See Brief for Nat'l Crime Victim Law Instit. et al. as Amici Curiae Supporting Appellees at 4, 13–16, *J.S. v. Village Voice Media Holdings, L.L.C.*, No. 90510-0 (Wash.

websites like Backpage.com, Craigslist, Facebook, and MySpace.⁸⁸ For instance, “[o]ne oft cited statistic comes from the National Center for Missing and Exploited Children (‘NCMEC’), which reported 2,695 potentially suspect ads in the year 2011 alone.”⁸⁹ While Backpage.com has argued that it has taken steps to mitigate the use of its site for child sex trafficking purposes,⁹⁰ the National Association of Attorneys General (‘NAAG’) has disputed such claims. Instead, the NAAG determined that efforts by Backpage.com “ha[d] proven ineffective”:

In May, for example, a Dorchester, Massachusetts man was charged for forcing a 15-year-old girl into a motel to have sex with various men for \$100 to \$150 an hour. To find customers, the man posted a photo of the girl on Backpage.com. He was later found with \$19,000 in cash. In another example, prosecutors in Washington state are handling a case in which teen girls say they were coerced, threatened, and extorted by two adults who marketed them on Backpage.com.

We have tracked more than 50 instances, in 22 states over three years, of charges filed against those trafficking or attempting to traffic minors on Backpage.com. These are only the stories that made it into the news; many more instances likely exist.⁹¹

Sept. 4, 2014) [hereinafter NCVLI Brief] (noting that some websites facilitate sex trafficking), available at <https://www.courts.wa.gov/content/Briefs/A08/90510-0%20Amicus%20-%20National%20Crime%20Victim%20Law%20Institute,%20et%20al.pdf>; Mary Graw Leary, *Fighting Fire with Fire: Technology in Child Sex Trafficking*, 21 DUKE J. GENDER L. & POL’Y 289, 303–07 (2014) (“Technology is playing a role in a vast majority of child sex trafficking cases processed in federal court.”); see also Butler, *supra* note 3, at 860–61 (discussing the use of telephone chat-lines, Internet advertisements, and websites like Craigslist to recruit minors for commercial sex); Ann Gerhart, *Sex Trafficking Opponents Fight Craigslist’s ‘Adult Services’ Ads*, WASH. POST (Aug. 7, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/06/AR201008606376.html> (describing Craigslist’s lack of response to sex-selling ads placed on its site).

88. See, e.g., NCVLI Brief, *supra* note 87, at 4, 13–16 (arguing that “[w]ebsites such as Backpage.com are a significant means by which traffickers advertise child victims to potential customers, facilitating the sexual exploitation of children”); Wendi Adelson, *Child Trafficking and the Unavoidable Internet*, 19 SW. J. INT’L LAW 281, 282–84 (2013) (“Just how many of the ads on Backpage.com are safe and how many are facilitating the exploitation of children?”); Kotrla & Wommack, *supra* note 2, at 10.

89. Adelson, *supra* note 88, at 283.

90. See Letter from Samuel Fifer, Attorney for Village Voice Media, to Hedda Litwin, Nat’l Ass’n of Attorneys Gen. (Sept. 23, 2011), available at http://thestranger.com/images/blogimages/2011/09/27/1317168662-backpage_response_to_naag.pdf.

91. Letter from Rob McKenna, Nat’l Ass’n of Attorneys Gen., to Samuel Fifer, Counsel for Backpage.com, L.L.C. (Aug. 31, 2011), reprinted in HARRIS, *supra* note 15, at 105.

As the NAAG's letter suggests, technology, especially the Internet and cell phones, have all changed the nature of the game by making it easier for adults to sell girls as young as twelve on the street.⁹² Yet, while the Internet has proliferated access to commercial sex with minors, it has also made the crime more discreet and hidden.⁹³ Lawsuits and public outrage pressured Craigslist to close down its online sex shop,⁹⁴ but Backpage.com resisted such efforts, recognizing that Craigslist's loss would be Backpage.com's multi-million dollar gain.⁹⁵ It may take the recent filings of federal lawsuits to shut down Backpage.com.⁹⁶ U.S. Representative Chris Smith, who sponsored the Trafficking Victims Protection & Reauthorization Act, has called upon Congress to take note of the strong link between Internet advertising and child prostitution and to find strategies to use the Internet to identify and protect prostituted minors.⁹⁷

Law enforcement agencies are also using the Internet to trap perpetrators. For example, the American Bar Association reported on one case in which "[l]aw enforcement investigators collected 28 Internet ads and a Garmin GPS seized from one of the trafficker's vehicles. The investigators were able to study the information yielded by the GPS unit and establish locations of several of the trafficker's customers."⁹⁸

92. See Butler, *supra* note 3, at 860–61.

93. See Leary, *supra* note 87, at 291 (explaining that technology has drastically changed the environment in which trafficking normally occurs).

94. See Judge Herbert Dixon, Jr., *Human Trafficking and the Internet* (*and Other Technologies, Too)*, JUDGES' J., Winter 2013, at 36, 37.

95. See HARRIS, *supra* note 15, at 26 (discussing how sites such as Backpage.com have stepped in to fill Craigslist's online adult services void).

96. For examples of such recent litigation, see Amended Complaint at 2, Jane Doe No. 1 v. Backpage.com, L.L.C., No. 14-13870-RGS, (D. Mass. Nov. 6, 2014) ("In addition to knowing that all or nearly all of the advertisements being posted in the 'Escorts' section involve illegal offers of sex for money, the Backpage Defendants know that a significant percentage of the advertisements on the 'Escorts' section of their website (perhaps 10 percent or more) involve minors between ages 12 and 17, who are illegally trafficked through Backpage.com."); Nicholas Kristof, *Teenagers Stand Up to Backpage*, N.Y. TIMES (Nov. 1, 2014), http://www.nytimes.com/2014/11/02/opinion/sunday/teenagers-stand-up-to-backpage.html?_r=1 (discussing a lawsuit filed by two teens who argue that the Internet site facilitated their prostitution).

97. *Domestic Minor Sex Trafficking: Hearing Before the Subcomm. on Crime, Terrorism and Homeland Security*, 111th Cong. 21–22 (2010) (statement of Christopher H. Smith, U.S. Representative, N.J.), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg58250/html/CHRG-111hhrg58250.htm> (discussing proposed legislation and other policy initiatives aimed at addressing the "crisis of child sex trafficking in the United States" that is "fueled by the ease and secrecy of the Internet").

98. Dixon, *supra* note 94, at 37.

Despite these efforts to ensnare johns and traffickers, the business of child prostitution thrives. Minors are sold regularly for sex in discreet locations, including hotels, conventions, private clubs, and major sporting events, as well as in plain view on the street.⁹⁹ To maintain control and keep their crime hidden, pimps often isolate the victims from their families and communities. In particular, pimps frequently move groups of prostituted girls from city to city.¹⁰⁰ The constant movement keeps the girls disorientated, unfamiliar with their surroundings, thereby making it difficult to seek help.¹⁰¹ Moving girls around also helps pimps market their product, specifying in ads, for example, that young women are “‘new in town’ or ‘in town for the weekend,’ thus, maintaining an ever-changing ‘product-line.’”¹⁰²

The collateral consequences of these horrific and dehumanizing forms of abuse and exploitation are devastating. Prostituted minors suffer physical, emotional, and psychological harms as a result of prostitution.¹⁰³ The emotional harms include a myriad of mental disorders: mood disorders; paranoia; post-traumatic stress disorder (“PTSD”); self-harming; eating disorders; and even attempted suicide.¹⁰⁴ Prostituted minors also may evince a “heightened sense of fear or distrust of authority,” demonstrate an “[inability or unwillingness to] speak on [their] own behalf,” suffer “[g]aps in memory,” develop an “[i]nability or fear to make eye contact,” and in demeanor appear “fearful, anxious, depressed, submissive, tense

99. Anitto, *supra* note 10, at 17. On the particular problem of sex trafficking at major sporting events, see Victoria Hayes, Comment, *Human Trafficking for Sexual Exploitation at World Sporting Events*, 85 CHI.-KENT L. REV. 1105, 1105–06 (2010) (“The massive number of people attending world sporting events naturally increases the demand for prostitution in the host city.”); Interview by Clinton Global Initiative with Jane Wells, Director, *Tricked*, Documentary (Jan. 31, 2004), available at <https://www.clintonfoundation.org/blog/2014/01/31/sex-trafficking-and-super-bowl-interview-tricked-director-jane-wells> (“Human rights advocates have warned that Super Bowl XLVIII—expected to draw thousands of visitors to New Jersey—is ripe for perpetrators of human trafficking, including forced prostitution[.]”). *But see* Suzanne Grimes & Bradley Myles, *Sex Trafficking at the Super Bowl? It’s a Problem Every Day*, HUFFINGTON POST (Jan. 31, 2014), http://www.huffingtonpost.com/suzanne-grimes/sex-trafficking-at-the-su_b_4698686.html (“Although there is a market for commercial sex around the time of the Super Bowl, this market demand exists 365 days a year. . . . So, this isn’t just a Super Bowl problem. It’s a national problem.”).

100. HARRIS, *supra* note 15, at 24.

101. *Id.*

102. *Id.*

103. CHILDREN AT RISK, THE TEXAS SAFE HOUSE MOVEMENT: AN EXAMINATION OF RESTORATIVE SHELTER CORE COMPONENTS AND RECOMMENDATIONS 21 (Robert Sanborn et al. eds., 2013), available at <http://childrenatrisk.org/wp-content/uploads/2013/05/C@R-Safe-House-FINAL.pdf>.

104. *Id.*

[and] nervous.”¹⁰⁵ The physical scars have included “broken bones, wounds, malnutrition, drug addiction, and sexually transmitted diseases.”¹⁰⁶ These health risks have inspired policymakers to recognize sex trafficking as a major public health issue.¹⁰⁷

Additionally, the financial costs can wreak further havoc. Kids who have been trafficked sometimes lack education and vocational skills, the absence of which undermines their ability to find future employment.¹⁰⁸ They may be prosecuted for prostitution or other criminal activity.¹⁰⁹ The ensuing criminal record may undermine opportunities for lawful employment.¹¹⁰ Thus, these social and legal responses to child prostitution have perpetuated a cycle of victimization.¹¹¹ This vicious cycle exposes the need for a new legal response.

II. BUILDING A BRIDGE OR BURNING IT? CONFLICTING LEGAL RESPONSES

A. *The Limits of International and Federal Law*

International law supports the need to identify prostituted minors as victims of human trafficking and to protect them with safe harbor laws. For example, the International Labour Organization’s

105. CTR. FOR THE HUMAN RIGHTS FOR CHILDREN, *supra* note 15, at 39–40.

106. CHILDREN AT RISK, *supra* note 103, at 21.

107. *See, e.g.*, CTR. FOR THE HUMAN RIGHTS FOR CHILDREN, *supra* note 15, at 42 (listing possible physical indicators of prostitution); Laura J. Lederer & Christopher A. Wetzel, Comment, *The Health Consequences of Sex Trafficking and Their Implications for Identifying Victims in Healthcare Facilities*, 23 ANNALS HEALTH L. 61, 61–65 (2014) (describing the various health problems that trafficking victims face, such as STDs/STIs, substance abuse, and PTSD).

108. *See* CTR. FOR THE HUMAN RIGHTS FOR CHILDREN, *supra* note 15, at 39; CHILDREN AT RISK, *supra* note 103, at 48–49 (discussing the need for safe houses that provide educational and job training services for child survivors of commercial sexual exploitation).

109. *See, e.g.*, 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., 2013), available at <http://www.nycourts.gov/ip/womeninthecourts/pdfs/LMHT.pdf> (“[V]ictims of sex trafficking are induced to engage in illegal activities and therefore often are arrested and treated as criminals.”); Allison L. Cross, Comment, *Slipping Through the Cracks: The Dual Victimization of Human-Trafficking Survivors*, 44 MCGEORGE L. REV. 395, 395–97 (2013) (noting that one girl even asked the police to take her in because “[b]eing in jail was preferable to working on the street” (citation and internal quotation marks omitted)).

110. *See, e.g.*, Cross, *supra* note 109, at 397 (noting one case in which an individual was fired once her employer discovered her criminal record).

111. *See id.* (referring to this vicious cycle as “dual victimization” (citations and internal quotation marks omitted)).

Worst Forms of Child Labour Convention expressly prohibits child prostitution.¹¹² Furthermore, the U.N.'s Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ("U.N. Protocol") recognizes all prostituted minors as victims of human trafficking.¹¹³ Specifically, the U.N. Protocol requires that its member states criminalize child prostitution and other forms of child sexual exploitation.¹¹⁴ Moreover, the U.N. Protocol opposes "the exploitation, particularly sexual exploitation, of vulnerable human beings, even when the trafficked person has willingly participated or 'consented' to the forms of exploitation proscribed under the Protocol."¹¹⁵ Having ratified the U.N. Protocol in 2005,¹¹⁶ the United States is bound to adhere to this legal mandate.¹¹⁷ Indeed, the U.S. Department of State purports to use the U.N. Protocol as precedent for developing U.S. anti-human trafficking laws and policies.¹¹⁸

In addition to these international treaties, the U.S. government has enacted several federal laws that include safe harbor provisions. In 1910, Congress passed the White Slave Traffic Act (known as the Mann Act),¹¹⁹ the first federal legislation to proscribe the commercial sexual exploitation of American youth.¹²⁰ However, as scholars have noted, the Mann Act was limited in scope, focusing primarily on the prosecution of traffickers and leaving for future legislation the task of guaranteeing protective services for sexually abused youth.¹²¹

112. MENANTEAU ET AL., *supra* note 18, at 30 (citing Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour art. 1, June 17, 1999, 2133 U.N.T.S. 161).

113. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime art. 3(a)–(c), *opened for signature* Dec. 12, 2000, T.I.A.S. No. 13,127 (entered into force Dec. 25, 2003) [hereinafter "U.N. Protocol"]; *see also* Butler, *supra* note 12, at 364.

114. U.N. Protocol, *supra* note 113, at art. 5(1).

115. Kaethe Morris Hoffer, *A Response to Sex Trafficking Chicago Style: Follow the Sisters, Speak Out*, 158 U. PA. L. REV. 1831, 1834 (2010).

116. *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, U.N. OFF. ON DRUGS & CRIME, <http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html> (last updated Sept. 26, 2008, 11:45 AM) (showing list of signatories to the protocol as of September 26, 2008).

117. *See* Hoffer, *supra* note 115, at 1834.

118. *See* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 29 (2014); Butler, *supra* note 12, at 358.

119. White-Slave Traffic (Mann) Act, Pub. L. No. 61-277, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–24 (2012)).

120. *See* Annitto, *supra* note 10, at 6–7 (citing Pub. L. No. 61-277, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2012))).

121. *See, e.g., id.* at 7–8 (citing Pub. L. No. 61-277, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2012))).

Congress later passed the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (“PROTECT”) Act,¹²² which focuses on perpetrators by expanding jurisdiction abroad to prosecute Americans who exploit children.¹²³

These laws have had limited impact on domestic child prostitution. For example, the Mann Act also proscribes the sexual exploitation of minors but is limited because it requires movement across state lines.¹²⁴ Moreover, the Mann Act and the PROTECT Act focus on prosecuting perpetrators, but they neither offer victim services nor shift the juvenile justice system’s legal paradigm away from prosecution of sexually exploited minors.

To combat modern-day human trafficking, the federal government enacted the Trafficking Victims Protection Act¹²⁵ (“TVPA”) in 2000 and reauthorized this legislation as the Trafficking Victims Protection Reauthorization Act (“TVPRA”) in 2004,¹²⁶ 2006,¹²⁷ 2008,¹²⁸ and most recently, in 2013¹²⁹ (collectively, referred to herein as the “TVPRA”). The TVPRA has been heralded as the first comprehensive piece of federal anti-sex-trafficking legislation.¹³⁰ Under the TVPRA, any sexually exploited minor in the United States is recognized as a victim of human trafficking.¹³¹ For adults, on the

122. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act, Pub. L. No. 108-21, 117 Stat. 650 (2003) [hereinafter PROTECT Act] (codified as amended at 18 U.S.C. § 2252(B)(b) (2012)).

123. See PROTECT Act, § 2423(c).

124. See William Adams, Colleen Owens & Kevonne Small, *Effects of Federal Legislation on the Commercial Sexual Exploitation of Children*, JUV. JUST. BULL. (Office of Juvenile Justice and Delinquency Prevention, U.S. Dep’t of Justice), July 2010, at 1, 3.

125. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of 22 U.S.C.).

126. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003) (codified as amended in scattered sections of 8 and 22 U.S.C.).

127. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (codified as amended in scattered sections of 22 and 42 U.S.C.).

128. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (codified as amended in scattered sections of 8, 22, 28, and 42 U.S.C.).

129. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified as amended in scattered sections of 8, 18, 22, 25, and 42 U.S.C.).

130. See, e.g., POLARIS PROJECT, TRAFFICKING VICTIMS’ PROTECTION ACT – FACT SHEET 1 (2008), available at http://www.rescue.org/sites/default/files/resource-file/trafficking%20victims%20protection%20act%20fact%20sheet_0.pdf (“The Trafficking Victims Protection Act (TVPA) of 2000 created the first comprehensive federal law to address human trafficking, with a significant focus on the international dimension of the problem.”).

131. The TVPRA does not proscribe all forms of human trafficking; instead, the statute distinguishes between human trafficking and “severe forms of trafficking” and

other hand, the TVPRA requires proof of force, fraud, or coercion in order to categorize the prostituted individual as a victim of human trafficking.¹³² In addition to legally recognizing prostituted minors as victims of human trafficking, federal law also forbids the prosecution of prostituted minors as criminals or their adjudication as delinquents.¹³³ Subsequent reauthorizations have added teeth to the TVPRA's commitment to minors. The TVPRA of 2013, for example, calls upon states to provide prostituted minors with immunity from prosecution¹³⁴ and provides block grants for assistance programs, shelters, and law enforcement efforts.¹³⁵

Yet, the TVPRA also has been criticized for its shortcomings with respect to combating domestic child prostitution.¹³⁶ In several respects, earlier provisions offered less than full protection for domestic minors.¹³⁷ Congress was slow to understand that victims of domestic trafficking are vulnerable to the same factors and risks as victims of international trafficking.¹³⁸ Indeed, implementation of the

guarantees certain legal protections only to victims within the latter group. *See* 22 U.S.C. § 7102(8) (2012).

132. *See id.*

133. *See id.* § 7101(b)(19) (“Victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked . . .”).

134. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 1243, 127 Stat. 54, 154 (2013) (codified as amended at 22 U.S.C. § 7101).

135. *See* §§ 1241, 1242; 127 Stat. at 149–53, 153–54.

136. *See* Birkhead, *supra* note 10, at 1058–61 (arguing that the bulk of American laws and resources “ha[ve] been directed at the international sex trafficking of adults and children, rather than the growing number of preteens and adolescents who are prostituted within [our] borders”); Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977, 2978–79 (2006); Chuang, *supra* note 22, at 1667–68; Shelly George, *The Strong Arm of the Law Is Weak: How the Trafficking Victims Protection Act Fails to Assist Effectively Victims of the Sex Trade*, 45 *CREIGHTON L. REV.* 563, 571–72 (2012).

137. *See* George, *supra* note 136, at 572 (describing the inability of earlier laws to address the supply side of the sex trade problem); Parker & Skrmetti, *supra* note 61, at 1041 (“[The TVPRA] required an offender to have actual knowledge that the victim was a minor. Thus, if the prosecution could prove beyond a reasonable doubt that the defendant was ever told or ascertained the victim’s true age, this was a prosecutable offense. [However,] [p]roving actual knowledge often posed a challenge since . . . many juvenile victims do not carry identification documents.”).

138. *See* CHILDREN AT RISK, *supra* note 103, at 7 (“Human trafficking once was thought to be a problem beyond America’s borders. This is, however, far from reality.”); Nesheba Kittling, *God Bless the Child: The United States’ Response to Domestic Juvenile Prostitution*, 6 *NEV. L.J.* 913, 913–14 (2006); Stephanie Richard, Pol’y & Legal Servs. Dir., Coal. to Abolish Slavery & Trafficking, Remarks on the ATEST National Call for Uniform Law Commissioners 2 (June 25, 2013), available at <http://www.endslaveryandtrafficking.org/sites/default/files/Written%20Transcript%20-%20June%2025%2C%202013.pdf> (“So, as we all know, human trafficking is a crime that’s happening in our backyard, but

TVPPRA initially focused on protecting sex trafficking victims who are foreigners and, thus, domestic victims did not receive the same legal protections.¹³⁹ This disproportionate focus on punishment undermines the effectiveness of state and federal anti-trafficking efforts.¹⁴⁰ The Department of Justice has acknowledged that, notwithstanding the enactment of federal legislation, law enforcement officials still fail to consistently identify and treat prostituted minors as crime victims instead of criminals.¹⁴¹ As one state-level task force explained the problem:

[There is] no universal agreement on what these youth should be labeled. Some agencies still use the term “prostitution,” others “abuse victims,” and others “sex trafficking victims.” This causes confusion because some victims receive a duality of services and others receive no services as the agencies are not clearly communicating with each other in a language that they all understand.¹⁴²

In other words, the Department of Justice has recognized that the U.S. criminal and juvenile justice systems continue to deny victim services to prostituted minors.¹⁴³ Furthermore, the TVPPRA has a limited impact on child prostitution cases, perhaps due to lack of resources. On the one hand, the FBI’s Innocence Lost National Initiative has made great strides in locating children stolen into prostitution.¹⁴⁴ On the other hand, the Department of Justice itself has acknowledged that a significant number of child sex trafficking cases are declined for prosecution.¹⁴⁵

that for a very long time individuals thought that slavery in the United States had been eradicated, and they really thought that was a problem that only happens in some other countries.”).

139. See Kittling, *supra* note 138, at 915–16.

140. See Todres, *supra* note 16, at 561 (critiquing anti-trafficking strategies that focus on prosecution instead of protecting survivors or preventing future abuses).

141. KRISTIN FINKLEA, CONG. RESEARCH SERV., R43677, JUVENILE VICTIMS OF DOMESTIC SEX TRAFFICKING: JUVENILE JUSTICE ISSUES 3 (2014).

142. KENDRA PENRY, HOUS. RESCUE AND RESTORE COAL., RAPID FIELD ASSESSMENT OF DOMESTIC MINOR SEX TRAFFICKING IN HARRIS AND GALVESTON COUNTIES, TEXAS: EXECUTIVE SUMMARY 8 (2011), available at <http://www.houstonrr.org/wp-content/uploads/2011/12/Executive-Summary-Domestic-Minor-Sex-Trafficking-Field-Assessment-Harris-Galveston-Counties.pdf>.

143. See FINKLEA, *supra* note 141, at 3.

144. Kevin L. Perkins, Assistant Dir. Criminal Investigative Div., Fed. Bureau of Investigation, Statement Before the Senate Judiciary Committee (Mar. 2, 2011), available at <http://www.fbi.gov/news/testimony/helping-law-enforcement-find-missing-children>.

145. KEVONNE SMALL ET AL., URBAN INST. JUSTICE POL’Y CTR., AN ANALYSIS OF FEDERALLY PROSECUTED CSEC CASES SINCE THE PASSAGE OF THE VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000, at 22 (2008), available at

In addition to the TVPRA, a wave of federal legislation has been proposed to supplement the federal government's legal protections for sexually exploited minors. On November 21, 2013, Congress passed House Committee Resolution 66 ("Resolution 66"),¹⁴⁶ arguably to call for a national paradigm shift in the legal response to child prostitution. Resolution 66 called upon the nation to recognize the legal contradictions in the way that America responds to child prostitution.¹⁴⁷ Specifically, Congress expressed "the sense . . . that children trafficked in the United States be treated as victims of crime, and not as perpetrators."¹⁴⁸ Here, Congress acknowledged that prostituted minors "who have not yet attained the age of consent are arrested and detained for juvenile prostitution or status offenses directly related to their exploitation."¹⁴⁹ In response, Resolution 66 "supports survivors of domestic child sex trafficking" by recognizing their need for services "to heal from the complex trauma of sexual violence and exploitation."¹⁵⁰ In particular, Congress suggested that the child welfare system, not the juvenile justice system, should identify and provide such services to these survivors.¹⁵¹

Congress also proposed Strengthening the Child Welfare Response to Human Trafficking Act of 2013,¹⁵² which echoes this call for a child-centered response by proposing to amend part of Title IV of the Social Security Act to increase the role of the child welfare system in combating this epidemic.¹⁵³ Senate Bill 1878¹⁵⁴ would give the federal government an increasing role in shaping legal policy with respect to child prostitution and sexual exploitation.¹⁵⁵ If enacted, this legislation will call upon various federal agencies, including the Department of Justice and the Department of Health and Human Services, to report to Congress with recommendations for creating safe housing and other assistance to youth who are trafficked.¹⁵⁶

<https://www.ncjrs.gov/pdffiles1/ojdp/grants/222023.pdf> (noting the rates between 1998 and 2005 at which prosecutors declined to move forward with child sexual exploitation cases at the federal level).

146. H.R. Con. Res. 66, 113th Cong. (2013).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *See id.*

152. Strengthening the Child Welfare Response to Human Trafficking Act of 2013, H.R. 1732, 113th Cong. (2013).

153. *Id.*

154. Protecting Youth At-Risk for Sex Trafficking Act, S. 1878, 113th Cong. (2013).

155. *Id.* § 401.

156. *Id.* § 302.

Furthermore, the Act would create a National Advisory Committee on Domestic Sex Trafficking whose duties would include advising both federal and state authorities on state and local policies regarding sexually exploited minors.¹⁵⁷ The Committee would also recommend best practices for states to follow.¹⁵⁸

Yet, the language of some proposed legislation continues to reflect ambivalence by federal lawmakers regarding their role in this fight. The proposed Stop Exploitation Through Trafficking Act of 2013¹⁵⁹ offers model guidelines for state safe harbor legislation. If passed, the Act would require states to enact safe harbor legislation within three years of the Act's enactment, and it provides guidelines for getting started.¹⁶⁰ The draft legislation seems to require that each state enact legislation that "treats" prostituted minors as human trafficking victims.¹⁶¹ However, the Act only "discourages the charging or prosecution of an individual . . . for a prostitution or sex trafficking offense" and "encourages [but does not require] the diversion of an individual . . . to child protection services."¹⁶² Perhaps the proposed legislation leaves Congress some room for arm-twisting: if states fail to comply with these requirements, the Act would reserve the right for the Attorney General to withhold federal funds.¹⁶³

In addition to these legislative efforts, the White House and the Obama Administration have authorized several initiatives that support the concept and spirit of safe harbor laws for minors. President Obama issued an Executive Order that prohibits federal contractors and others from adopting business-related practices that support human trafficking.¹⁶⁴ Proclaiming January 2015 as National Slavery and Human Trafficking Prevention Month, President Obama affirmed his administration's continued focus on compelling businesses to stomp out trafficking and calling upon society to stay focused on this epidemic.¹⁶⁵

President Obama's commitment to domestic child sex trafficking extends beyond proclamations to strategic action. Arguably, President Obama's initiatives include a continued focus on the safe harbor ideal—shifting the legal paradigm from prosecution to

157. *Id.* § 401.

158. *Id.*

159. Stop Exploitation Through Trafficking Act of 2013, S. 1733, 113th Cong. (2013).

160. *Id.* § 2(b).

161. *Id.*

162. *Id.*

163. *Id.* § 2(c)(1).

164. Exec. Order No. 13,627, 77 Fed. Reg. 60,029 (Oct. 2, 2012).

165. Proclamation No. 9225, 80 Fed. Reg. 4 (Jan. 7, 2015).

protection. For example, the Obama Administration adopted a “Strategic Action Plan for Victim Services,” which provides a “time-specific” five-year plan in which the federal government will create and implement victim services for survivors of human trafficking.¹⁶⁶ Arguably, the goals of the Strategic Action Plan coincide with the goal of safe harbor legislation. For example, the goal of the plan is to enhance the TVPRA by creating a “victim-centered” approach to human trafficking.¹⁶⁷ Similar to safe harbor goals, the Strategic Action Plan acknowledges that the provision of a myriad of protective and social services must be a central focus of the legal response to human trafficking.¹⁶⁸ The plan specifically calls for focus on and support for the issue of domestic child sex trafficking.¹⁶⁹

Because federal and state collaboration is a key strategy for addressing human trafficking, the federal government has encouraged states to take an active role in addressing human trafficking.¹⁷⁰ Thus, in Texas for example, multi-government collaboration has been a central part of the state’s strategy.¹⁷¹ The U.S. Department of Justice has also established state task forces in several target cities, including Houston and Dallas, to help state governments take action.¹⁷² These Human Trafficking Tasks Forces funded by the U.S. Department of Justice and operating in Texas have been recognized as some of the most active in prosecuting trafficking cases.¹⁷³ Likewise, California

166. Press Release, White House, Office of the Press Sec’y, The Obama Administration’s Record on Human Trafficking Issues (Apr. 9, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/04/09/obama-administration-s-record-human-trafficking-issues>. See generally COORDINATION, COLLABORATION, CAPACITY, *supra* note 3, at 1 (“The Plan lays out four goals, eight objectives, and contains more than 250 associated action items for victim service improvements that can be achieved during the next 5 years.”).

167. COORDINATION, COLLABORATION, CAPACITY, *supra* note 3, at 7.

168. *Id.* at 6–7 (“Trafficking victims typically require numerous types of emergency and long-term services. Needed services include intensive case management, victim advocacy, shelter/housing, food, medical and dental care, mental health treatment, substance abuse treatment, support groups, interpretation/translation services, immigration and other legal assistance, literacy education, and employment and training services. . . . Stakeholders identified housing and legal services as areas of particular concern.”).

169. *Id.* at 15 (“DOJ’s Office for Victims of Crime, in consultation with federal partners, will publish a survivor-created guide on developing culturally competent services for commercially sexually exploited and trafficked girls and young women.”).

170. See THE OFFICE OF THE ATTORNEY GEN. OF TEX., THE TEXAS HUMAN TRAFFICKING PREVENTION TASK FORCE REPORT 2011, at 8 (2011), *available at* https://www.texasattorneygeneral.gov/files/agency/human_trafficking.pdf.

171. *Id.*

172. *Id.* at 3.

173. Nancy Arrigona, *Juvenile Victims of Human Trafficking*, JUST. RES. & STAT. ASS’N (Oct. 2010), http://www.jrsa.org/events/conference/presentations-10/Nancy_Arrigona.pdf.

has collaborated with the federal government on interagency task forces to address human trafficking.¹⁷⁴

B. The State Law Dilemma: Punishment vs. Protection

Punishment plagues the traditional state law response to child prostitution. On the state level, this drive to punish minors stems in part from an unresolved legal debate about whether minors consent to commercial sex and therefore are legally culpable for prostitution. Unfortunately, on the state level, there is no consensus over whether the law should recognize a minor's ability to consent to sex.¹⁷⁵ On the one hand, statutory rape laws have presumed that, legally, minors cannot consent to sex.¹⁷⁶ When the first juvenile court was founded in 1899,¹⁷⁷ the age of sexual consent in some states was ten years old—reflecting the archaic view that a ten-year-old girl was capable of seducing an adult man.¹⁷⁸ Reformers successfully fought to increase the age of legal consent from ten years old to at least sixteen.¹⁷⁹ Today, all fifty states have some form of age-of-consent laws that presume that minors below that age cannot consent to sex.¹⁸⁰ On the other hand, state prostitution laws contradict the policy underlying age-of-consent laws, namely that minors cannot legally consent. State juvenile justice laws almost always have treated minors who engage in commercial sex as criminals instead of victims.¹⁸¹

The New York Penal Code, for example, has been plagued by contradictions in its legal treatment of a minor's ability to consent to sex. New York law provides that children under seventeen years old could not consent to sex, yet eleven- and twelve-year-olds were

174. HARRIS, *supra* note 15, at 33–39.

175. See Adelson, *supra* note 16, at 107 (noting that the age of consent varies greatly between states, ranging from as young as twelve years old in some states to as high as eighteen in others).

176. *Id.* at 108.

177. Joseph F. Yeckel, *Violent Juvenile Offenders: Rethinking Federal Intervention in Juvenile Justice*, 51 WASH. U. J. URB. & CONTEMP. L. 331, 335 (1997).

178. See Stephen Robertson, *Age of Consent Laws*, CHILD. & YOUTH HIST., <http://chnm.gmu.edu/cyh/teaching-modules/230> (last visited Jan. 23, 2015).

179. Bernardine Dohrn, *Schooling and the Vexing Social Control of Girls*, ABA, http://www.americanbar.org/groups/public_education/initiatives_awards/students_in_action/dohrn.html (last visited Jan. 23, 2015).

180. Adelson, *supra* note 16, at 108.

181. *Id.* at 107 (noting that most states' laws do not differentiate between adult and child prostitution); see also Ione Curva, *Thinking Globally, Acting Locally: How New Jersey Prostitution Law Reform Can Reduce Sex Trafficking*, 64 RUTGERS L. REV. 557, 566 (2012) (describing how prostitutes are often punished as harshly as johns and sometimes as harshly as pimps in state criminal justice systems).

incarcerated for prostitution.¹⁸² This conflicting treatment of sexual consent reflects the juvenile justice system's deeply embedded gender biases against girls.¹⁸³ From its inception, the juvenile court deemed prostituted girls as immoral, at fault, and incorrigible;¹⁸⁴ while boys who engaged in sexual transgressions could be rehabilitated, similarly situated girls deserved legal punishment.¹⁸⁵ These gender biases have a lasting legacy in modern day criminal and juvenile justice systems that revictimize sexually exploited minors.¹⁸⁶ Too often, when law enforcement officials encounter underaged prostitutes, it is the latter narrative—about immorality and punishment—that drives their response.

These legal ambiguities result in continued punishment and little protection for minors. Today, punishment remains the primary juvenile justice response to child prostitution.¹⁸⁷ When police encounter minors selling sex, they will often arrest and charge the minor with a crime.¹⁸⁸ In 2008, the Department of Justice noted that at least 1,500 kids were arrested for prostitution that year.¹⁸⁹ Law enforcement officials often treat these minors with disdain, disrespect, and a lack of empathy.¹⁹⁰ For example, in the words of one minor:

When I got arrested, everyone from the cops to the judge to my own public defender looked at me like I was a bug or

182. See N.Y. Juvenile Justice Coal., *The Safe Harbor for Exploited Children Act Facts & FAQ's*, GIRLS EDUC. & MENTORING SERVICES (GEMS), <http://www.gems-girls.org/about/mission-history> (last visited Jan. 23, 2015).

183. See Francine T. Sherman, *Justice For Girls: Are We Making Progress?*, 59 UCLA L. REV. 1584, 1586, 1611 (2012).

184. Schwartz, *supra* note 22, at 250. See generally Cheryl Nelson Butler, *Blackness as Delinquency*, 90 WASH. U. L. REV. 1335 (2013) (describing the stereotypes of Black women involved in prostitution in the early days of the juvenile court system).

185. Annitto, *supra* note 10, at 20–21.

186. See Bryan, *supra* note 109, at 184 (“It is far more likely that [trafficking victims] will be re-victimized by our criminal justice system and left at the mercy of their traffickers.”).

187. See SHARED HOPE INT’L, *supra* note 9, at 18 (2014), available at <http://sharedhope.org/wp-content/uploads/2014/08/Traffic-Stop-FINAL.pdf> (“Most states still have laws that criminalize trafficked youth, often resulting in arrest, prostitution-related charges and placement at a juvenile detention center.”).

188. SARA ANN FRIEDMAN, WHO IS THERE TO HELP US? HOW THE SYSTEM FAILS SEXUALLY EXPLOITED GIRLS IN THE UNITED STATES: EXAMPLES FROM FOUR AMERICAN CITIES 41 (2005).

189. Richard A. Hooks Wayman, Exec. Dir., Hearth Connection, Presentation at ABA Commission on Homelessness and Poverty Midyear Meeting 2013, *Safe Harbor Laws: Policy in the Best Interest of Victims of Trafficking* (2013), available at http://www.americanbar.org/content/dam/aba/events/homelessness_poverty/2013_Midyear_Meeting_Safe_Harbor_Laws/rich_hooks_wayman_powerpoint.authcheckdam.pdf.

190. See FRIEDMAN, *supra* note 188, at 41; Hooks Wayman, *supra* note 189.

something. And my god, when they found out I was pregnant it was like I must have killed one of their family members; like they had never known anyone as horrible as me. I think most people think that we like it and there is something wrong with us.¹⁹¹

Indeed, at every stage of their encounters with the legal system, prostituted minors often feel further victimized and stigmatized. In particular, prostituted minors feel stigmatized as criminals when they are held in lock-up awaiting adjudication.¹⁹² This hostility from law enforcement further exacerbates the problem in other ways; prostituted kids tend to lie about their age and otherwise refuse to cooperate, thereby undermining any potential opportunity to receive services or protection.¹⁹³

After the arrest, the minor must appear in criminal or juvenile court where, too often, the judges are unsympathetic to the child but sympathetic to the adults who pimp them or buy sex with them.¹⁹⁴ As one girl explained it: “[I] kept trying to leave the life [of prostitution] but would always go back. . . . Everyone knew me in the juvenile court,” she said. The staff looked down on her and the Judge could never see past her record. ‘I was a piece of shit.’¹⁹⁵

These humiliating encounters pit kids who are scared and abused against the justice system that is supposed to protect them.¹⁹⁶ Mistrusting youth, in turn, sometimes refuse to cooperate with police. Out of fear, anger, and mistrust, they fail to tell the truth about their age, refuse to disclose that they are in danger or are exploited by a pimp, and refuse to testify against their exploiters.¹⁹⁷

Sometimes the failure of lawyers and law enforcement officials to identify prostituted minors as victims stems not from disdain, but

191. FRIEDMAN, *supra* note 188, at 41.

192. *See id.* at 42–43.

193. *See id.* at 7.

194. *See id.* at 43–44.

195. *Id.* at 43.

196. Bryan, *supra* note 109, at 184.

197. Brittle, *supra* note 22, at 1344–45; Geist, *supra* note 16, at 73, 80–81 (“Frustrating identification efforts even further, prostituted minors are often coached to say they are older than they are so they can go into the adult system, pay a small fine, and be released back onto the streets and back to their pimps. . . . Treating minors as delinquents reduces the likelihood of cooperation as law enforcement is seen as the enemy. Successful prosecution (and thereby successful deterrence of pimps) requires working with the victims and ensuring the victims’ protection since many victims are severely threatened by the pimp against any cooperation with law enforcement.”).

from ignorance and lack of training.¹⁹⁸ As a former defense attorney explained, “[i]t is easy to miss the sex trafficking victims coming through our criminal courts arrested for prostitution offenses. . . . [C]riminal defense attorneys, prosecutors, and criminal court judges often know very little about trafficking.”¹⁹⁹ Regardless of the reasons, the misidentification of domestic minors as criminals instead of crime victims remains a major barrier to protecting these minors from future exploitation.²⁰⁰

III. SHIFTING PARADIGMS: THE PROMISE OF SAFE HARBOR LAWS

A. *The First Wave of State Human Trafficking Legislation*

The first wave of state human trafficking legislation has not completely resolved these conflicting legal approaches to child sex trafficking. Notwithstanding the growing international and federal support for increased protection for prostituted minors, state lawmakers have been slow to follow suit.²⁰¹ It took thirteen years after the passage of the TVPA in 2000 for all fifty states to enact human trafficking legislation.²⁰² In 2003, Texas and Washington became the first states to enact human trafficking legislation.²⁰³ A wave of state human trafficking legislation has been enacted in the past ten years.²⁰⁴

However, some of these state anti-trafficking laws have proven ineffective in addressing domestic child prostitution. Most of these state laws focus on the prosecution of pimps and their facilitators.²⁰⁵

198. See Dorchen A. Leidholdt & Katherine P. Scully, *Defining and Identifying Human Trafficking*, in *LAWYER’S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE FOR VICTIMS* 27, 32, 40 n.27 (Jill Laurie Goodman & Dorchen A. Leidholdt eds., 2013), available at <http://www.nycourts.gov/ip/womeninthecourts/pdfs/LMHT.pdf> (“Many fail to recognize trafficking due to lack of training and reliance on assumptions that trafficking is not present.”).

199. Bryan, *supra* note 109, at 184.

200. See U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT 7* (2013), available at <http://www.state.gov/documents/organization/210737.pdf>.

201. The U.S. Department of Justice determined, for example, that minors prostituted in Texas are too often misidentified by law enforcement as criminals, even though the federal TVPRA recognizes them as crime victims. Butler, *supra* note 14, at 878–79.

202. See *Wyoming Becomes 50th State to Outlaw Human Trafficking*, POLARIS PROJECT (Feb. 27, 2013), <http://www.polarisproject.org/media-center/news-and-press/press-releases/742-wyoming-becomes-50th-state-to-outlaw-human-trafficking>.

203. Butler, *supra* note 14, at 852; *Fact Sheet on State Anti-Trafficking Laws*, CENTER FOR WOMEN POL’Y STUD. 2 (2010), <http://www.centerwomenpolicy.org/documents/FactSheetonStateAntiTraffickingLawsJanuary2010.pdf>.

204. See *Fact Sheet on State Anti-Trafficking Laws*, *supra* note 203, at 2.

205. See, e.g., MENANTEAU ET AL., *supra* note 18, at 8. For example, under Minnesota law, sex trafficking of a child under eighteen years old is considered a felony with penalties including up to twenty years in prison and a fine of up to \$50,000. *Id.* The Minnesota state

In doing so, they have not focused on protecting minors from exploitation.²⁰⁶ In particular, state human trafficking and prostitution laws do not consistently identify prostituted minors as “trafficking victims” within the meaning of their statutes.²⁰⁷ As a result, prostituted minors still risk criminal prosecution if certain legal requirements are not met. For example, some state laws do not identify prostituted minors as trafficking victims within the meaning of the statute itself unless prosecutors prove that force, fraud, or coercion was involved in prostituting the minor.²⁰⁸ Even with respect to punishment of traffickers, these laws are inconsistent. For example, while Minnesota punishes adults who buy sex, the penalties depend on the age of the child.²⁰⁹ The U.S. Department of Justice determined, in another example, that minors prostituted in Texas too often are misidentified by law enforcement as criminals, even though the TVPRA recognizes them as crime victims.²¹⁰ Furthermore, several of these state laws maintain legal provisions that conflict over whether prostituted minors are victims or criminals.²¹¹

B. *The Second Wave: The Emergence of Safe Harbor Provisions*

Safe harbor provisions have emerged as an effort to fill in the gaps left by human trafficking legislation and other state laws addressing child prostitution. Safe harbor laws have been hailed as creating a major paradigm shift by focusing on protecting, as opposed to punishing, prostituted minors.²¹² Several public policy groups have

human trafficking law recognizes child sex trafficking as “receiving, recruiting, enticing, harboring, providing, or obtaining by any means an individual to aid in the prostitution of the individual” under eighteen years old. *Id.* (quoting MINN. STAT. § 609.3217 (2012) (internal quotation marks omitted)).

206. See Karen E. Bravo, *On Making Persons: Legal Constructions of Personhood and Their Nexus with Human Trafficking*, 31 N. ILL. U. L. REV. 467, 482 (2011).

207. Butler, *supra* note 12, at 344; Emily Harlan, *It Happens in the Dark: Examining Current Obstacles to Identifying and Rehabilitating Child Sex-Trafficking Victims in India and the United States*, 83 U. COLO. L. REV. 1113, 1141 (2012) (quoting the 2010 TIP Report as warning that “anti-trafficking approach of the TVPA has been slow to fully permeate the state child protection and juvenile justice systems”).

208. Butler, *supra* note 3, at 844–47.

209. See MENANTEAU ET AL., *supra* note 18, at 8–9 (citing MINN. STAT. 609.324, subd. 1 (2012)).

210. Butler, *supra* note 14, at 878–79.

211. For example, prior to the New York Safe Harbour for Exploited Children Act taking effect in 2010, New York incarcerated eleven- and twelve-year-olds for prostitution. See N.Y. Juvenile Justice Coal., *supra* note 182.

212. POLARIS PROJECT, 2013 ANALYSIS OF STATE HUMAN TRAFFICKING LAWS 33 (2013) [hereinafter POLARIS PROJECT, 2013 ANALYSIS], available at http://www.polarisproject.org/storage/2013_State_Ratings_Analysis_Full_Report.pdf.

advocated for standards and best practices for safe harbor laws.²¹³ While advocates suggest that safe harbors should address a variety of issues, there is a consensus that two are critical. First, the laws should alleviate the criminal penalties against prostituted minors.²¹⁴ Second, safe harbor laws should provide protective and rehabilitative services for prostituted minors.²¹⁵ Thus, a safe harbor law should shield a prostituted minor from criminal punishment and instead protect the minor by providing victim services.²¹⁶ To achieve these goals, safe harbors for sexually exploited minors should resolve the conflicting legal treatment of prostituted minors in favor of a child-centered protective approach that relieves the minor of legal punishment.²¹⁷

In 2008, New York was the first state to enact statewide safe harbor legislation.²¹⁸ The Safe Harbour for Exploited Children Act

213. See, e.g., KAREN WIGLE WEISS, ECPAT-USA, A REVIEW OF THE NEW YORK STATE SAFE HARBOR LAW 1 (2013), available at <https://d2jug8yyubo3yl.cloudfront.net/26999B2F-7C10-4962-918C-E964709E745D/8d5cfab4-a75e-4dd6-97c8-2f9752d16b5d.pdf> (advocating that safe harbor laws offer diversion, “treating minors like victims, not criminals,” provide services and other forms of protection); DARLENE LYNCH & KIRSTEN WIDNER, BARTON CHILD LAW & POL’Y CLINIC, COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN GEORGIA: SERVICE DELIVERY AND LEGISLATIVE RECOMMENDATIONS FOR STATE AND LOCAL POLICY MAKERS 35 (2008) [hereinafter 2008 BARTON CENTER REPORT] (providing recommendations for policies that treat minors like victims instead of criminals and that focus on provision of services); POLARIS PROJECT, OVERVIEW OF STATE LEGISLATIVE POLICY TO ADDRESS THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN – STATE “SAFE HARBOR” LAWS 1–3 (2008) [hereinafter POLARIS SAFE HARBOR REPORT], available at http://www.polarisproject.org/storage/documents/policy_documents/model%20laws/model%20safe%20harbor%20law%20overview%20final-1.pdf (“The basic objectives of the Safe Harbor laws are two-pronged: [r]emove minor victims of commercial sexual exploitation from the jurisdiction of the criminal justice and juvenile delinquency systems [and] . . . [p]rotect these children and provide them with specialized services, in recognition of their status as victims of crime and of the unique trauma that child victims of sex trafficking endure.”).

214. See, e.g., POLARIS SAFE HARBOR REPORT, *supra* note 213, at 1 (noting that a basic objective of safe harbor laws is to “[r]emove minor victims of commercial sexual exploitation from the jurisdiction of the criminal justice and juvenile delinquency systems”).

215. See, e.g., 2008 BARTON CENTER REPORT, *supra* note 213, at 20–21 (discussing necessary services like round-the-clock monitoring, trained counselors, and other specialized services).

216. See POLARIS PROJECT, HUMAN TRAFFICKING ISSUE BRIEF: SAFE HARBOR 2 (2014) [HUMAN TRAFFICKING ISSUE BRIEF], available at http://www.polarisproject.org/storage/documents/policy_documents/Issue_Briefs/2014/2014_Safe_Harbor_Issue_Brief_Final_1.pdf.

217. See *id.*

218. Emily Pasnak-Lapchick, *Critical Safe Harbor Legislation to Protect Children in New York State Passed!*, UNICEF USA (July 25, 2013), <http://fieldnotes.unicefusa.org/2013/07/critical-safe-harbor-legislation-to-protect-children-in-new-york-state-passed.html>.

was signed into law by Governor Paterson on September 25, 2008.²¹⁹ The Act took effect on April 1, 2010.²²⁰ Since the passage of the NYSHA, self-proclaimed safe harbor laws have been enacted by a handful of other states,²²¹ including Connecticut,²²² Florida,²²³ Illinois,²²⁴ Minnesota,²²⁵ Massachusetts,²²⁶ Nebraska,²²⁷ and North Carolina.²²⁸ While, as of 2013, virtually all states have enacted anti-trafficking laws, only eighteen states had enacted safe harbor laws for child victims of commercial sexual exploitation.²²⁹ These safe harbor laws should enhance pre-existing human trafficking laws. Safe harbor laws have taken a variety of forms. While most states have enacted state-wide legislation, California has seen enactment of county-wide safe harbor laws.²³⁰

219. Editorial, *A Victory for Exploited Children*, N.Y. TIMES (Sept. 27, 2008), <http://www.nytimes.com/2008/09/27/opinion/27sat3.html>.

220. New York Safe Harbour for Exploited Children Act, ch. 569, 2008 N.Y. Laws 4076 (codified as amended in scattered sections of N.Y. SOC. SERV. LAW and N.Y. FAM. CT. ACT).

221. These states include Arkansas, Connecticut, Florida, Illinois, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New York, North Carolina, Ohio, Tennessee, Vermont, and Washington. For information on the various state safe harbor laws, see POLARIS PROJECT, 2013 ANALYSIS, *supra* note 212, at 34–36; *Safe Harbor Resources By State*, ECPAT-USA, <http://www.ecpatusa.org/safe-harbor-resources-by-state> (last visited Feb. 28, 2015).

222. Connecticut Safe Harbor Act, Pub. Act No. 10-115, 2010 Conn. Acts 815 (Reg. Sess.) (codified at CONN. GEN. STAT. §§ 53a-82, 53a-86, & 53a-87 (2012)).

223. Florida Safe Harbor Act, ch. 105, 2012 Fla. Laws 1199 (codified as amended at FLA. STAT. ANN. §§ 39.001, 39.01, 39.401, 39.524, 409.1678, 796.07, 960.065, 985.115 (West 2010 & Supp. 2015)).

224. Illinois Safe Children Act, Pub. Act No. 96-1464, § 15, 2010 Ill. Laws 6931, 6941 (codified at 720 ILL. COMP. STAT. ANN. 5/11-14(d) (LexisNexis 2012)).

225. Act of July 20, 2011, ch. 1, 2011 Minn. Laws 693 (codified at scattered sections of MINN. STAT.).

226. Massachusetts Safe Harbor Act, ch. 178, § 23, 2011 Mass. Acts 723, 736–37 (codified at MASS. GEN. LAWS ch. 265, § 57 (Supp. 2011)).

227. Act of June 5, 2013, L.B. 255, § 2, 2013 Neb. Laws 578, 578–79 (codified as amended at NEB. REV. STAT. § 28-801 (2013)).

228. Act of July 29, 2013, ch. 368, § 5, 2013 N.C. Sess. Laws 1431, 1434–35 (codified at N.C. GEN. STAT. § 14-204(c) (2013)).

229. See POLARIS PROJECT, 2013 ANALYSIS, *supra* note 212, at 34.

230. Currently, only Alameda and Los Angeles counties have safe harbor provisions in place. Janet C. Sully, *Precedent or Problem?: Alameda County's Diversion Problem Policy for Youth Charged with Prostitution and the Case for a Policy of Immunity*, 55 WM. & MARY. L. REV. 687, 690–91 (2013); see also SHARED HOPE INT'L, PROTECTED INNOCENCE CHALLENGE: 2014 STATE REPORT CARDS (2014), available at http://sharedhope.org/PICframe4/reportcards/PIC_RC_2014_CA.pdf (discussing lack of uniform laws as one reason why California earned an “F” in prosecuting minor sex trafficking on its 2014 report card).

At least one safe harbor provision was created by judicial opinion.²³¹ In Texas, the judicial safe harbor decision highlighted a third goal of safe harbors—the need for safe harbors to resolve the conflicting laws with respect to the treatment of prostituted minors. This includes both conflicts between federal and state laws as well as conflicts within state law provisions themselves. The Texas Supreme Court decision in *In re B.W.*²³² highlighted how these legal conflicts undermine protection for sexually exploited minors. Even though Texas had enacted human trafficking legislation, juvenile court judges in Texas would adjudicate a prostituted child as delinquent on the grounds that the minor committed a misdemeanor under the Texas Penal Code.²³³ In a landmark decision, the Texas Supreme Court addressed this legal conflict between state statutory rape laws and prostitution laws regarding a minor’s ability to consent to sex.²³⁴ Under a statutory rape law, if a minor cannot consent to sex, then how can a prostitution statute recognize a minor’s consent to commercial sex?

With *In re B.W.*, the Texas Supreme Court answered this question, holding that the Texas state legislature did not intend to recognize a thirteen-year-old child as capable of consenting to commercial sex with an adult.²³⁵ In that case, a thirteen-year-old girl admitted to engaging in prostitution.²³⁶ The trial court found that the child had engaged in delinquent conduct, the Class B misdemeanor offense of prostitution, and then placed her on probation for eighteen months.²³⁷ The court of appeals affirmed the trial court decision.²³⁸

The Texas Supreme Court had to reconcile conflicting provisions of Texas family and criminal laws. On the one hand, the Texas Penal Code allowed for a thirteen-year-old to be punished as a delinquent

231. See generally *In re B.W.*, 313 S.W.3d 818 (Tex. 2010) (“In the absence of a clear indication that the Legislature intended to subject children under fourteen to prosecution for prostitution . . . we hold that a child under the age of fourteen may not be charged with [prostitution].”).

232. 313 S.W.3d 818 (Tex. 2010).

233. See, e.g., *id.* at 819 (reversing the court of appeals’ decision to “transform[] a child victim of adult sexual exploitation into a juvenile offender”).

234. See generally *id.* (addressing “whether the Legislature, by its wholesale incorporation of Penal Code offenses into the juvenile justice provisions of the Family Code, intended to permit prosecution of a thirteen-year-old child for prostitution considering its specific pronouncement that a child under fourteen is legally incapable of consenting to sex with an adult”).

235. *Id.* at 822.

236. *Id.* at 819.

237. *Id.*

238. *Id.*

for the crime of prostitution.²³⁹ On the other hand, the same statute made it a crime to have sex with a person under seventeen years old.²⁴⁰ The law provided no defenses for sex with a child under fourteen.²⁴¹ The court rejected the state's legal and policy arguments that the legislature intended to prosecute thirteen-year-olds for engaging in commercial sex with adults.²⁴² The court recognized that current state prostitution laws provide inadequate protection for commercially exploited minors, in part because the laws punish minors for their own exploitation.²⁴³ The court reasoned that recent anti-trafficking legislation enacted by the Texas legislature demonstrated the latter's intent to recognize that prostituted minors are victims, not criminals.²⁴⁴

Notwithstanding these efforts on both the federal and state levels, advocates have insisted that anti-trafficking laws must be strengthened.²⁴⁵ State anti-trafficking laws remain inconsistent.²⁴⁶ Several still do not follow the federal policy of granting all prostituted minors immunity from prosecution and providing victims services instead.²⁴⁷ Thus, the next wave of anti-trafficking laws must move more fervently toward a uniform approach.

239. *See id.* at 819–20.

240. *Id.* at 821.

241. *Id.* (“There are defenses available if the child is at least fourteen, such as when the accused is no more than three years older than the child, or when the accused is the child’s spouse. . . . There are no such defenses, however, when the child is under fourteen, irrespective of the child’s purported willingness.” (citations omitted)).

242. *Id.* at 822.

243. *See id.*

244. *Id.* at 821–22.

245. *See, e.g.,* Richard, *supra* note 138, at 1–2 (arguing that, although there is legislation on the federal level and in all fifty states to address human trafficking, “more still needs to be done”).

246. James Dold, Senior Pol’y Council, Polaris Project, Remarks on the ATEST National Call for Uniform Law Commissioners 3 (June 25, 2013), *available at* <http://www.endslaveryandtrafficking.org/sites/default/files/Written%20Transcript%20-%20June%2025%2C%202013.pdf> (explaining that a lack of uniformity among state laws led to the efforts to develop the Uniform Law Act).

247. In its 2014 Trafficking in Persons Report, the U.S. Department of State described this persistent inconsistency between federal and state law approaches to child prostitution:

While federal law applies across the United States, state laws form the basis of the majority of criminal actions, making adoption of state anti-trafficking laws key to institutionalizing concepts of compelled service for rank-and-file local police officers. All states and all U.S. territories have enacted anti-trafficking criminal statutes in recent years. All 50 states and the District of Columbia prohibit the prostitution of children under state or local laws that predate the TVPA; however, in some cases, trafficked victims, including those under the age of 18 years, continue to be treated as criminal offenders. . . . Although these laws reflect an

IV. THE THIRD WAVE: THE UNIFORM ACT OF 2013

A. *The Goals of the Uniform Act*

The third wave of the movement focused on developing a uniform approach and guidance for states. The Uniform Act on Prevention of and Remedies for Human Trafficking of 2013²⁴⁸ (“Uniform Act”) provides new breath into the movement to develop standards for state safe harbor legislation. Prior to the enactment of the Uniform Act, several government agencies and advocacy groups recommended model state anti-trafficking legislation.²⁴⁹ However, while these model laws advocated generally in favor of protections for sexually exploited minors, each had limitations. Leading advocacy organizations, including the Polaris Project, a major anti-trafficking advocacy and legal policy group, developed model safe harbor provisions.²⁵⁰ The Department of Justice’s original model law focused on the prosecution of traffickers and did not articulate standards for safe harbors.²⁵¹ In 2013, Congress modified the TVPRA’s Model State Criminal Law Protection for Child Trafficking Victims and Survivors to include safe harbor provisions that provide complete immunity from prosecution for prostitution for all minors under age eighteen.²⁵² However, relatively few state governments have followed the

increased effort by state legislatures, only 32 states and the District of Columbia provided designated victim assistance as part of their anti-trafficking framework.

U.S. DEP’T OF STATE, *supra* note 118, at 399. On the role of the Trafficking in Persons Report in formulating international and domestic anti-trafficking policy, see generally Butler, *supra* note 12.

248. UNIF. ACT ON PREVENTION OF & REMEDIES FOR HUMAN TRAFFICKING (2013).

249. See, e.g., POLARIS PROJECT, MODEL PROVISIONS OF COMPREHENSIVE STATE LEGISLATION TO COMBAT HUMAN TRAFFICKING 1–18 (August 2010) [hereinafter POLARIS MODEL PROVISIONS], available at http://www.polarisproject.org/storage/documents/Final_Comprehensive_ModelLaw__8_2010.pdf (suggesting model provisions for state legislation); SHARED HOPE INT’L, 2014 PROTECTED INNOCENCE CHALLENGE: A LEGAL FRAMEWORK OF PROTECTION FOR THE NATION’S CHILDREN 7–9, 21–26 (2014) [hereinafter SHARED HOPE LEGAL FRAMEWORK] (discussing the model standards/provisions used to grade state laws regarding child sex trafficking).

250. See POLARIS MODEL PROVISIONS, *supra* note 249, at 7 (“Model language is not included for this type of provision, because the language will vary considerably depending on existing state laws.”); SHARED HOPE LEGAL FRAMEWORK, *supra* note 249, at 10–17 (indicating that states receive various grades for compliance with best practices and that state safe harbor provisions vary widely).

251. See 2008 BARTON CENTER REPORT, *supra* note 213, at 26 (“As its name suggests, the Model Anti-Trafficking Criminal Statute focuses on the prosecution of traffickers.”)

252. See Violence Against Women Reauthorization Act of 2013, sec. 1243, § 225(b), 127 Stat. 154, 154 (codified as amended at 22 U.S.C. § 7101(2)(A)–(D)). In particular, subsection 2(B) “prohibit[s] the charging or prosecution of an individual described in subparagraph (A) for a prostitution offense.” *Id.*

TVPPRA's model by adopting any safe harbor provisions and, for those states that do have safe harbors, these provisions vary.²⁵³

Yet, the Uniform Act could hold greater promise because a broad coalition of legal institutions and advocates worked collectively for two years to find consensus on safe harbor standards.²⁵⁴ To encourage the inclusion of safe harbor provisions in state anti-trafficking laws, the American Bar Association and the National Conference on Commissioners on Uniform State Laws led the movement to create the Uniform Act.²⁵⁵ The Uniform Act has been hailed as a new phase in legal protection for commercially sexually exploited minors.²⁵⁶ This turning of the tide is marked by a publicized commitment by the Uniform Law Commission to lobby state governments to adopt the Uniform Act's model provisions.²⁵⁷

The Uniform Act is a comprehensive model statute that incorporates the best practices in state anti-trafficking legislation. According to the Uniform Commissioners, the Uniform Act reflects a

253. See SHARED HOPE LEGAL FRAMEWORK, *supra* note 249, at 10–17 (indicating that states receive various grades for compliance with best practices and that state safe harbor provisions vary widely).

254. Press Release, Unif. Law Comm'n, ABA Approves New Uniform Act to Combat Human Trafficking (August 12, 2013), available at <http://www.uniformlaws.org/NewsDetail.aspx?title=ABA%20Approves%20New%20Uniform%20Act%20to%20Combat%20Human%20Trafficking> (“A broad coalition of organizations joined the ULC in creating the uniform act, including the ABA, the ABA Center for Human Rights, the National Association of Attorneys General, the Polaris Project, LexisNexis, the U.S. State Department's Office to Monitor and Combat Trafficking in Persons, and other organizations committed to eradicating human trafficking.”).

255. See Andrew Hall, Note, *The Uniform Act on Prevention and Remedies for Human Trafficking*, 26 ARIZ. L. REV. 853, 873–74 (2014); Butler, *supra* note 12, at 367–68 (discussing the need for model state legislation); Press Release, Polaris Project, Polaris Project Hails Adoption of Uniform Act on Human Trafficking by the Uniform Law Commission (July 11, 2013), available at <http://www.polarisproject.org/media-center/news-and-press/press-releases/832-polaris-project-hails-adoption-of-uniform-act-on-human-trafficking-by-the-uniform-law-commission> (“The ULC drafting process was a herculean effort two years in the making.”).

256. See Press Release, Unif. Law Comm'n, *supra* note 254; Polaris Project, *supra* note 255 (“The ULC's uniform act on human trafficking is a major milestone in the fight against labor and sex trafficking in the U.S. It provides a solid foundation for state legislatures to fill in the gaps so they can more effectively hold traffickers accountable and provide necessary support for victims.” (internal quotation marks omitted)).

257. Press Release, Unif. Law Comm'n, *supra* note 254 (noting former ULC President Michael Houghton's comments that “[t]he ULC will now go state by state and work tirelessly with those who are already on the front lines to provide the criminal penalties and victim protections critical to turning the tide in the fight against human trafficking” (internal quotation marks omitted)).

consensus among state legislatures on the key provisions that anti-trafficking laws should adopt.²⁵⁸

A major policy goal of these key provisions is to create uniformity among state human trafficking laws. The Uniform Commissioners have argued that uniformity among anti-trafficking laws will create several advantages to states. First, uniformity will “promote collaboration among law enforcement officers, prosecutors, NGOs, lawyers and other stakeholders” committed to combating trafficking.²⁵⁹ Second, the Uniform Act “discourages ‘forum-shopping’ by traffickers who seek to operate in jurisdictions with fewer and/or lower criminal sanctions.”²⁶⁰ Third, uniformity among state laws will help lawyers and advocates advise victims of their legal rights.²⁶¹

The Uniform Act criminalizes both labor trafficking and sex trafficking.²⁶² The definitions section offers strong support for child sex trafficking victims. Furthermore, the Uniform Act is divided into four substantive components.²⁶³

First, the Uniform Act has several provisions aimed at catching and punishing traffickers. The Uniform Act calls for comprehensive penalties for human trafficking crimes.²⁶⁴ To support this commitment to punishing traffickers, the Uniform Act provides law enforcement with certain investigative tools, including authorizations for wiretapping as well as asset forfeiture.²⁶⁵ The Uniform Act’s adoption of “End Demand” provisions,²⁶⁶ which may discourage johns from

258. Dold, *supra* note 246, at 4 (“And so I think when we take a step back and look at some of the trends that we’ve seen just over the last couple of years, and really the direction that many states are moving, it is really to embrace a more comprehensive, uniform act like what’s included—all the provisions that are included in the Uniform Act right now.”).

259. UNIF. LAW COMM’N, UNIFORM ACT ON PREVENTION OF AND REMEDIES FOR HUMAN TRAFFICKING SUMMARY 3 (2013), available at http://www.uniformlaws.org/shared/docs/Prevention%20of%20and%20Remedies%20for%20Human%20Trafficking/UAPRHT_Act_Summary.pdf (internal quotation marks omitted).

260. *Id.*

261. *See id.*

262. *See* Richard, *supra* note 138, at 5.

263. Press Release, Uniform Law Commission, *supra* note 254.

264. *Id.*

265. Dold, *supra* note 246, at 3.

266. End Demand provisions are those aimed at curbing demand for commercial sex. *See* Stephanie Berger, Note, *No End in Sight: Why the “End Demand” Movement Is the Wrong Focus for Efforts to Eliminate Human Trafficking*, 35 HARV. J.L. & GENDER 523, 525 (2012) (“Abolitionist ideals have more recently taken hold in End Demand efforts, which focus on criminalizing, punishing, and shaming men who buy sex as purported solutions to both prostitution and human trafficking.”).

purchasing sex with minors, suggests that prosecution of traffickers remains an important goal for model state laws. The Uniform Act also extends the prosecutor's reach by including johns—the purchasers of commercial sex—as “traffickers” within the meaning of the Uniform Act.²⁶⁷ This policy choice is a controversial one. On the one hand, scholars have debated whether the adoption of such provisions by state legislators will function to lower the demand for sex with minors.²⁶⁸ On the other hand, the federal government has endorsed “End Demand” strategies as a means for combating prostitution and trafficking.²⁶⁹

Furthermore, the Uniform Act broadens the list of acts that are recognized as human trafficking. Specifically, the Uniform Act recognizes “survival sex” as a form of human trafficking.²⁷⁰ The Uniform Act proscribes sexual activity in which anything of value is “promised,” “given,” “traded,” or “received.”²⁷¹ This language can have the impact of broadening the definition of prostitution and sex trafficking to include sex acts in which adults trade sex with minors in exchange for food, shelter, and other basic needs.²⁷² Second, the Uniform Act encourages states to develop public awareness campaigns about all forms of human trafficking.²⁷³

Third, as discussed below, the Uniform Act shields minors from prosecution or legal punishment.²⁷⁴ One misconception is that by immunizing minors from prosecution, safe harbor laws are legalizing prostitution.²⁷⁵ Contrary to arguments advanced by some scholars and advocates,²⁷⁶ the diversion does not legalize prostitution. Arguably,

267. See UNIF. ACT ON PREVENTION OF & REMEDIES FOR HUMAN TRAFFICKING § 3 (2013).

268. See, e.g., Berger, *supra* note 266, at 524–26.

269. See *id.* at 557–59 (discussing the federal government's support for Johns' Schools and other methods of shaming purchasers of commercial sex).

270. See UNIF. ACT ON PREVENTION OF AND REMEDIES FOR HUMAN TRAFFICKING §§ 2(4), 2(6), 3 to 7 (2013).

271. *Id.* § 2(4).

272. On the need for shelters, see CAROL SMOLENSKI, ECPAT-USA, SUMMARY OF NATIONAL COLLOQUIUM REPORT RECOMMENDATIONS AND NEXUS TO FEDERAL INVOLVEMENT (2013), available at <https://d1qkyo3pi1c9bx.cloudfront.net/00028B1B-B0DB-4FCD-A991-219527535DAB/928b81f4-166b-4059-9014-ce7b45dde21a.pdf>.

273. Press Release, Unif. Law Comm'n, *supra* note 254.

274. See *infra* Part IV.C.

275. See N.Y. Juvenile Justice Coal., *supra* note 182.

276. See, e.g., Tessa L. Dysart, *Child, Victim, or Prostitute? Justice Through Immunity for Prostituted Children*, 21 DUKE J. GENDER L. & POL'Y 255, 279–88 (2014) (noting some of the major arguments against immunity provisions for minors); N.Y. Juvenile Justice Coal., *supra* note 182 (answering some frequently asked questions about the Safe Harbour Act).

immunizing minors from prosecution is not the same as legalization. Prostitution remains illegal as evidenced by the fact that the Uniform Act still imposes penalties on pimps and johns.²⁷⁷

Fourth, the Uniform Act focused on strong protection for victims of human trafficking.²⁷⁸ In particular, the Uniform Law Commissioners emphasized the importance of providing access to civil damages and creating crime compensation funds.²⁷⁹ According to the commissioners, another key example is the inclusion of section 15 of the Uniform Act, the goal of which is to eliminate the discrepancies in the way that state laws treat child prostitution with safe harbor provisions.²⁸⁰ Thus, the clear intent of the commissioners is that the Uniform Act support safe harbors for sexually exploited minors. As discussed below, several key provisions of the Uniform Act reflect the commissioners' intent.

B. *Definitions Matter*

Beginning with the way in which key terms are defined, the Uniform Act encourages the legal recognition of all prostituted minors as victims of human trafficking. The Uniform Act specifically recognizes the purchase of commercial sex with a minor as “human trafficking.”²⁸¹ The Uniform Act offers a broad definition of “victim” which will impact minors. In particular, the Uniform Act recognizes a minor as a “victim” regardless of whether a pimp or other exploiter is involved and whether or not the minor self-identifies as a victim.²⁸² This provision will address the trend in which the legal system fails to identify minors as trafficked when minors refuse to self-identify as victims out of trauma or fear of retaliation from pimps.

The Uniform Act includes several broad definitions that will increase public understanding of the nature of child sex trafficking. In particular, the Uniform Act encourages states to broadly define human trafficking in a way that reflects the broad means that traffickers use to exploit minors and others. The Uniform Act expands the definition of “coercion” within the meaning of human

277. See *supra* notes 264–69 and accompanying text.

278. *Id.*

279. Dold, *supra* note 246, at 4.

280. See Richard, *supra* note 138, at 9.

281. UNIF. ACT ON PREVENTION OF & REMEDIES FOR HUMAN TRAFFICKING §§ 2(6), 3–7 (2013).

282. *Id.* § 2(15).

trafficking.²⁸³ The Uniform Act does not advocate for proof of coercion as a requirement for proving child sex trafficking; yet, arguably, the broadening of the definition of coercion should help the public better understand the variety of means and circumstances under which pimps and traffickers coerce vulnerable persons to engage in commercial sex. This broader understanding of the nature of human trafficking should encourage legislators, judges, and society to sympathize with prostituted minors and to support a paradigm shift.

C. What Is Safe Harbor Under the Uniform Act?

In addition to key terms, the Uniform Act protects minors by offering express safe harbor provisions for minors.²⁸⁴ The Uniform Act offers three key standards for shifting the paradigm toward safe harbors for sexually exploited minors.

First, under the Uniform Act, a safe harbor provision is one that provides all prostituted minors under eighteen years old with complete immunity for criminal prosecution or juvenile delinquency adjudication.²⁸⁵ In the hearings regarding the Uniform Law's draft provisions, Commissioner Stephanie Richard, Policy and Legal Services Director of the Alliance to End Slavery and Trafficking, explained that the intent behind the Uniform Law's safe harbor provisions is to eliminate the discrepancies in the ways in which state laws treat prostituted minors:

And I wanted to say that we on the committee feel strongly that Sections 15, 16, and 17 kind of all work together to resolve issues that we're seeing at the states, as they deal with different populations of victims. And we're very careful to have different standards for minors vs. adults. So if you look at Section 15, we know that minors in sex trafficking are held to a different standard than adults, because of the idea that minors who are under 18 cannot consent to sex, and therefore they can't consent to commercial sex either. But there is sort of this discrepancy in state laws where most state laws just have prostitution offense, and there is no age limit. So you see 11, 12, 13, 14 year olds commonly arrested for prostitution. Because I think we've come to the area where we understand that just

283. *Id.* § 2(3); *see also* Hall, *supra* note 255, at 877 ("In broadening the definition of coercion, the drafters of the Uniform Act intended to include more types of conduct under the umbrella of human trafficking.").

284. UNIF. ACT ON PREVENTION OF & REMEDIES FOR HUMAN TRAFFICKING § 15(a)–(b).

285. *See id.*

because money exchanges hands doesn't make it less of rape of a child, we have significant protections for children in the ULC. And other states are taking leadership on this and this follows that model. So basically Section 15 acknowledges that a child cannot consent to commercial sex, and if it's related to the trafficking there's specific immunity. Additionally, that provision also says that there are other crimes that a trafficker forces them to commit. There could be loitering, truancy, they're forced to steal. So these are nonviolent offenses, and if they're shown to be directly related to the trafficking, then that minor isn't criminally liable.²⁸⁶

Similarly, the Comments section to the Uniform Act reemphasized the need for complete immunity:

[M]inor victims of human trafficking should not be viewed as legally capable of consenting to their own commercial sexual exploitation. Immunity in such cases recognizes the facts that (a) the real culpability for these offenses of the minor resides with the coercing or exploiting party; and (b) the minor is a child in need of counseling, treatment, and support rather than prosecution.²⁸⁷

Furthermore, complete immunity includes relief from criminal liability of delinquency adjudication for prostitution related offenses.²⁸⁸

Second, in addition to complete immunity, the Uniform Act recognizes minors as “CHINS”—“children in need of services”²⁸⁹—such that the minors can receive services without being adjudicated as delinquent.²⁹⁰ Indeed, the CHINS designation should operate as a

286. See Richard, *supra* note 138, at 9.

287. UNIF. ACT ON PREVENTION OF & REMEDIES FOR HUMAN TRAFFICKING § 15 cmt.

288. See *id.* § 15(a)–(b).

289. On the meaning of a “CHINS” designation, see ROSHAL ERSKINE & JESSICA SMITH, JUST GEORGIA, BUILDING JUSTICE AND SAFETY FOR CHILDREN, CHILDREN IN NEED OF SERVICES (CHINS): A BETTER FRAMEWORK FOR STATUS OFFENDERS 5–6 (2010) (“The definition of a ‘child in need of services’ is very similar to Georgia’s current definition of an ‘unruly child.’ While the courts currently treat these children in a manner similar to delinquent offenders, the new law would require a more holistic service-orientated approach.”); see also Brittle, *supra* note 22, at 1366 (“With many offenses falling within the scope of status offenses, terminology has developed to describe the class of status offenses and the juvenile status offenders as a whole. States frequently employ terms like ‘person in need of supervision’ (‘PINS’) and ‘children in need of services’ (‘CHINS’) to describe the class of status offenses.”).

290. UNIF. ACT ON PREVENTION OF & REMEDIES FOR HUMAN TRAFFICKING § 15(c); Hall, *supra* note 255, at 885–86.

pathway to services.²⁹¹ Safe harbor laws must protect minors by providing specialized services and safe houses. According to the Polaris Project, these services should include “medical and psychological treatment, emergency and long-term housing, education assistance, job training, language assistance, and legal services.”²⁹² Shifting the legal paradigm also means providing safe houses. By providing safe houses, safe harbor laws also can help alleviate the nationwide problem of overcrowding in prisons and juvenile court facilities.²⁹³

Third, safe harbor laws must offer training and education to law enforcement, legal professionals, and other community stakeholders.

The Uniform Act’s provisions for state harbor laws are consistent with model standards supported by several advocacy organizations and the federal government. For example, like the Uniform Act, the Polaris Project has suggested that safe harbor laws address four key goals: (1) state laws with legal definitions that identify *all* sexually exploited minors as victims; (2) immunization, in other words, removing sexually exploited minors from the jurisdiction of the criminal and juvenile justice systems; (3) protection, meaning recognition of sexually exploited minors as victims and provision of victim services; and (4) training law enforcement and raising public awareness.²⁹⁴ Likewise, the Uniform Act is consistent with the best practices and standards that the U.S. Department of State uses to judge the anti-trafficking efforts of other governments throughout the world.²⁹⁵ Indeed, a new focal point of the Department of State’s Trafficking In Persons Report (“TIP Report”) has been to set forth specific best practices for safe harbor legislation.²⁹⁶ First, the TIP Report encourages state governments to follow federal law; the TVPRA recognizes all prostituted minors as victims of human trafficking, regardless of the circumstances—*independent of proof of force, fraud, or coercion and regardless of whether a pimp or other facilitator is involved.*²⁹⁷ Second, the Department of State encourages states to ensure that anti-trafficking laws specifically include safe

291. See UNIF. ACT ON PREVENTION OF & REMEDIES FOR HUMAN TRAFFICKING § 15(c).

292. HUMAN TRAFFICKING ISSUE BRIEF, *supra* note 216, at 1.

293. See S. COMM. ON PUB. SAFETY, SEXUALLY EXPLOITED MINORS PILOT PROJECT—ALAMEDA COUNTY, A.B. 499, Reg. Sess. (Ca. 2008).

294. POLARIS SAFE HARBOR REPORT, *supra* note 213, at 1–3.

295. See Butler, *supra* note 12, at 342.

296. See *id.* at 357; *infra* note 298 and accompanying text.

297. See U.S. DEP’T OF STATE, *supra* note 118, at 397–99.

harbor provisions.²⁹⁸ Third, such safe harbor provisions must provide not only immunity from prosecution but also protective services for prostituted minors.²⁹⁹ Fourth, safe harbor laws must train law enforcement officials on proper victim identification and support.³⁰⁰ Yet, the TIP Report has had a limited impact on states, many of which have failed to adopt these standards and have undercut the efforts by the Department of State.³⁰¹ This is true even though the Department of State punishes other nations for their similar lack of acquiescence.³⁰²

V. APPLYING THE UNIFORM ACT STANDARDS TO CRITIQUE THE PROSECUTION MODEL

This Part applies the best practices outlined in the Uniform Act to determine whether current state safe harbor laws reflect these standards. In particular, safe harbors laws must shift the legal paradigm for child prostitution away from punishment by providing sexually exploited minors with complete immunity from prosecution and other collateral forms of legal punishment.³⁰³ Using New York law as a focal point, this Part argues that some state safe harbor laws have failed to shift the legal paradigm away from punishment and towards protection of minors exploited for commercial sex in the United States.

A. *New York's Safe Harbour for Sexually Exploited Minors Act*

New York's Safe Harbour for Sexually Exploited Minors Act ("NYSHA") has been hailed as one of the leading and highly praised safe harbor laws in the United States.³⁰⁴ New York has adopted a

298. *See id.* at 7 ("For governments to properly assist victims, they must broadly and effectively implement a strong, modern, comprehensive anti-trafficking law. Such a law includes criminal provisions treating human trafficking is a serious offense . . . and, just as important, victim protection measures that address needs such as . . . immunity for offenses they were forced to commit during the course of the victimization.").

299. *See id.* at 2 (noting Secretary of State John Kerry's remarks that "[o]nly when we start focusing on victims as survivors—not just as potential witnesses—can we provide them with a greater measure of justice"); *id.* at 7 (noting the remarks of Luis CdeBaca, Ambassador-at-Large to Monitor and Combat Trafficking in Persons, that "[w]ith the right support and services . . . victims can move beyond their suffering and forward with their lives. . . . Governments play a vital role in facilitating this process").

300. *See id.* at 2.

301. *See* Butler, *supra* note 12, at 344–45.

302. *Id.* at 349.

303. *See* HUMAN TRAFFICKING ISSUE BRIEF, *supra* note 216, at 1–2.

304. *Oversight—Implementation of the Safe Harbor Act: Hearing Before the Comm. on Youth Servs., the Comm. on Juv. Justice, and the Comm. on Women's Issues*, N.Y.C. Council (Dec. 5, 2011) (statement of End Child Prostitution and Trafficking ("ECPAT-

“prosecution model.”³⁰⁵ The New York law includes three main provisions. First, the NYSHA covers a broad class of minors under the Act.³⁰⁶ The NYSHA is consistent with the federal TVPRA by recognizing all prostituted minors under eighteen as trafficking victims regardless of whether there is proof of force, fraud, or coercion.³⁰⁷ Second, the Act amends the New York Family Code to offer diversion for a “sexually exploited children” except where certain exceptions, discussed below, are met.³⁰⁸ Third, the Act provides services for sexually exploited minors; however, diverted minors must remain on probation, under the jurisdiction of the juvenile court, until certain program requirements are met.³⁰⁹

However, as discussed below, there are several ways in which the NYSHA has departed from a key tenet of the Uniform Act, namely that the law fails to provide sexually exploited minors with complete immunity from prosecution. Some of these issues have been addressed by subsequent modifications of the NYSHA while others remain. Each provides important insight into the persistent threat of further punishment of prostituted minors by the legal system.

B. Granting Immunity Only to Some Minors, Based on Age

The NYSHA fails to adhere to the Uniform Act’s call to provide sexually exploited minors with complete immunity from prosecution. Safe harbor laws undermine the spirit of the Uniform Act where they provide access only to a limited number of prostituted minors. Under the NYSHA, any child who has engaged in prostitution or is otherwise a victim of sex trafficking is a “sexually exploited child.”³¹⁰

USA”)) (“New York is already being seen as a leader in this field, but we have to do much more to ensure that children are identified as victims, not criminals when they are involved in the commercial sex market, and to give them the care to which they are entitled.”).

305. See N.Y. FAM. CT. ACT § 311.4 (McKinney 2008 & Supp. 2015); see also 2008 BARTON CENTER REPORT, *supra* note 213, at 5 (“New York has a . . . bill, the Safe Harbor Act, which would allow courts to classify these children as people in need of supervision rather than as delinquents, but the children could still be arrested and initially detained.”); *id.* at 35–40, 46–47 (describing first the prosecution model and then the hybrid model).

306. See A.B. 08071, 2013 Assemb., Reg. Sess. (N.Y. 2013) (indicating that, in its present form, the Act covers all prostituted minors under eighteen years old).

307. Compare N.Y. SOC. SERV. § 447-a(1)(a)–(d) (McKinney 2010), with 22 U.S.C. §§ 7102(8), 7102(14) (2012).

308. N.Y. SOC. SERV. § 447-b(2) (McKinney 2010).

309. N.Y. FAM. CT. ACT § 754 (McKinney 2010 & Supp. 2015).

310. N.Y. SOC. SERV. LAW § 447-a (McKinney 2010). Under New York law, any child who has “engage[d] in any act as defined in Section 230.00 or 240.37 of the penal law” is a “sexually exploited child.” *Id.* § 447-a(1)(c).

On the one hand, this definition protects a broad range of victims by including minors who are sexually exploited through a variety of means.³¹¹ The Act also covers minors involved in commercial sexual exploitation other than prostitution, such as sexual performances, strip dancing, or pornography.³¹²

Even though the NYSHA recognizes a prostituted minor as a “sexually exploited child,” other provisions of the NYSHA unduly limit the protected class of minors. When enacted in 2008, the NYSHA only shielded minors in certain age groups from prosecution.³¹³ The NYSHA remained consistent with the federal TVPRA by recognizing all prostituted minors under eighteen as trafficking victims regardless of whether there is proof of force, fraud, or coercion.³¹⁴ The NYSHA also includes minors who are victims of other forms of child sexual abuse, such as rape by a family member.³¹⁵

Using age as a barrier, New York offered a safe harbor only for sexually exploited children between the ages of seven and sixteen.³¹⁶ Sexually exploited minors who are over sixteen could be tried in adult criminal court where they can be charged with a misdemeanor offense.³¹⁷ Advocates critiqued this approach, pointing out that “it

311. *Id.* § 447-a(1)(a)–(e). A “sexually exploited child” is defined as a minor under eighteen years old who has been sexually exploited by any of five specific means. These include a child who:

- (a) is the victim of the crime of sex trafficking as defined by section 230.34 of the penal law;
- (b) is an abused child as defined in paragraph (iii) of subdivision (e) of section 1012 of the family court act;
- (c) engages in an act as defined in section 230.00 or 240.37 of the penal law;
- (d) is a victim of the crime of compelling prostitution as defined in section 230.33 of the penal law; [or]
- (e) engages in actions or conduct described article 263 of the penal law.

Id.

312. *Id.* Subsection (a) covers children who have entered prostitution through specific types of force, fraud, or coercion as defined in section 230.34 of the New York penal code. *Id.* § 447-a(1)(a). Subsection (b) covers any child who has been sexually exploited by his or her parent or legal guardian. *Id.* § 447-a(1)(b). Subsection (c) covers a minor who has offered, engaged in, or agreed to engage in prostitution. *Id.* § 447-a(1)(c). Subsection (d) covers minors who have been compelled into prostitution. *Id.* § 447-a(1)(d).

313. *See supra* note 311 and accompanying text.

314. *See supra* notes 125–35, 306–312 and accompanying text.

315. *See* N.Y. SOC. SERV. LAW § 447-a(1)(b) (McKinney 2010).

316. *See* N.Y. FAM. CT. ACT § 301.2(1) (McKinney 2008 & Supp. 2015) (“‘Juvenile delinquent’ means a person over seven and less than sixteen years of age, who, having committed an act that would constitute a crime if committed by an adult, (a) is not criminally responsible for such conduct by reason of infancy . . .”).

317. *See id.*

puts 16- and 17-year-old survivors at risk of re-victimization through prosecution.”³¹⁸

By way of comparison, some states have followed suit. Minnesota and Connecticut adopted similar provisions.³¹⁹ The impact is limited protection: in Minnesota, sexually exploited minors, ages sixteen and seventeen, are still subject to delinquency proceedings and diversion schemes, while younger minors are protected.³²⁰ In stark contrast, other states such as North Carolina, Illinois, and Tennessee provide immunity from prosecution for all minors under eighteen.³²¹

Other states recognized the importance of broadly recognizing all prostituted minors as victims of sex trafficking regardless of age. In California, Bill 499³²² recognized all minors under eighteen years old as eligible for recognition as a “commercially sexually exploited minor.”³²³ Furthermore, supporters of Bill 499 explicitly rejected the policy of only recognizing as victims those minors who can prove force, fraud, or coercion.³²⁴ Further recognizing that titles matter, California legislators agreed that “the commercial sexual exploitation of minors is child abuse and modern day slavery whether or not force is used.”³²⁵ Thus, the legislature rejected language proposed by the state senate that would have required that minors protected by the safe harbor “must be employed, used, persuaded, induced or coerced” to engage in the commercial sex trade.³²⁶ District attorneys refer to these juveniles as “commercially sexually exploited youth” and do not refer to them as “prostitutes” as a way of

318. Swapna Venugopal Ramaswamy, *N.Y. Set to Expand Protection for Exploited Children*, LOHUD (Dec. 14, 2013), <http://archive.lohud.com/article/20131214/NEWS02/312140037/N-Y-set-expand-protection-exploited-children>.

319. See CONN. GEN. STAT. ANN. § 53a-82 (West 2012); MINN. STAT. § 609.321(a) (2012); MENANTEAU ET AL., *supra* note 18, at 20.

320. See MINN. STAT. § 609.322(a) (2012); see also MENANTEAU ET AL., *supra* note 18, at 20.

321. See 720 ILL. COMP. STAT. ANN. 5/11-14 (LexisNexis 2012); N.C. GEN. STAT. ANN. § 14-204 (West 2013); TENN. CODE ANN. § 39-13-513(d) (West 2012).

322. Act of Sept. 27, 2008, ch. 359, § 2, 2008 Cal. Stat. 2803, 2803–04 (codified at CAL. WELF. & INST. CODE § 18259 (West 2012 & Supp. 2015)).

323. CAL. WELF. & INST. § 18259.3 (West 2012 & Supp. 2015); see also CAL. PENAL §§ 647(a)–(b), 653.23(a), 653.23(b) (West 2010).

324. See Press Release, Alameda Cnty. Dist. Attorney Nancy E. O’Malley, Alameda County District Attorney’s Office Unveils H.E.A.T. Watch 4 (Jan. 31, 2010) http://www.alcoda.org/about_us/files/heat02212010.pdf.

325. *Id.*

326. Bill Analysis, A.B. 499, 2008 Assemb. (Cal. 2008), ftp://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0451-0500/ab_499_cfa_20080806_181820_asm_floor.html.

“acknowledg[ing] their victimization” and shifting responsibility back to the exploiter.³²⁷

Fortunately, New York eventually followed California’s approach and recognized that limiting safe harbor to only some minors based on age is bad policy. By 2013, a coalition of advocates and policymakers acknowledged that by failing to protect sixteen- and seventeen-year-olds from prosecution, the first version of the NYSHA reflected a weakness that needed to be cured.³²⁸ In 2013, the New York legislature voted to expand its safe harbor law to protect sixteen- and seventeen-year olds from criminal punishment.³²⁹ If arrested, these minors, like their younger counterparts, will avoid prosecution and remain eligible for services.³³⁰ These revisions align the NYSHA with Governor Cuomo’s concurrent efforts to raise the age of criminal responsibility generally (for a variety of crimes).³³¹ New York’s efforts to revise these provisions reflect a growing understanding that safe harbor laws must provide increased protections for minors in order to achieve the goal of a true legal paradigm shift. Such arbitrary line drawing fails to shift the paradigm and instead leaves sexually exploited minors vulnerable to prosecution and ineligible for services.³³²

C. *The Rebuttable Presumption of Victimization*

The threat of prosecution and the option to prosecute remain key features of New York’s safe harbor legislation. The NYSHA’s use of a rebuttable presumption of victimization is another means in which the law fails to provide complete immunity from prosecution. Specifically, the NYSHA protects some minors by permitting the reclassification of some as a “person in need of supervision” (“PINS”) instead of as a “delinquent.”³³³ The NYSHA helps only *some* sexually

327. See Press Release, O’Malley, *supra* note 324, at 3.

328. Carol Smolenski, Exec. Dir., ECPAT-USA, Remarks on the ATEST National Call on Child Welfare 3 (April 25, 2013), available at http://www.endslaveryandtrafficking.org/sites/default/files/Written%20Transcript_0.pdf.

329. See A.B. 08071, 2013 Assemb., Reg. Sess. (N.Y. 2013).

330. See *id.*

331. See Yuval Sheer, *Governor Cuomo Establishes Commission on Raising the Age of Criminal Responsibility*, N.Y. CENTER FOR JUV. JUST. (Jan. 10, 2014), <http://www.nycjj.org/governor-cuomo-establishes-commission-on-raising-the-age-of-criminal-responsibility/>.

332. See, e.g., MINN. STAT. § 609.322(a) (2012); see also MENANTEAU ET AL., *supra* note 18, at 20 (noting gaps in the Minnesota law).

333. See N.Y. FAM. CT. ACT § 712 (McKinney 2010 & Supp. 2015). Under the prior and revised definition, a PINS included a person less than eighteen years of age who was “incorrigible, ungovernable or habitually disobedient.” *Id.* The jurisdictional age has been

exploited minors escape the stigma of criminality and does so only if certain conditions are met.³³⁴ The NYSHA *requires* that in certain juvenile court proceedings involving a minor detained for a prostitution-related offense, the juvenile court judge must substitute a PINS petition in place of a juvenile delinquency petition.³³⁵ Specifically, when a juvenile is brought before the family court for a hearing following an arrest for prostitution, the NYSHA affords “a *presumption* that the respondent meets the criteria for a certification as a victim of a severe form of trafficking as defined in section 7105 of title 22 of the United States Code (Trafficking Victims Protection Act of 2000).”³³⁶ Based on the presumption that the juvenile is a victim of severe trafficking, the juvenile respondent can make a motion to substitute a PINS petition in the place of a juvenile delinquency petition and can do so without the consent of the presentment agency.³³⁷

In other words, this presumption that the prostituted minor is a victim of human trafficking remains rebuttable. The family court may only designate sexually exploited children under age sixteen as a PINS instead of a delinquent if the court determines that none of the applicable exceptions apply.³³⁸ Thus, even after the motion to substitute petition has been made, the family court still maintains the discretion to proceed with a juvenile delinquency proceeding if the court finds that the following exceptions exist: (1) the juvenile does not meet the federal definition of a trafficking victim; (2) the juvenile

eighteen since 2002. Merrill Sobie, Practice Commentary, McKinney’s Cons. Laws of N.Y., Book 29A, FAM. CT. ACT § 712 (2010). The NYSHA also amends section 732 of the Family Court Act by further defining a PINS as someone who is not only delinquent but also one who requires supervision or treatment to cure the delinquency. N.Y. FAM. CT. ACT § 732 (McKinney 2010 & Supp. 2015). Under the revision, PINS now includes those minors in violation of section 230 (“prostitution”) or section 240.37 (“loitering for the purpose of engaging in a prostitution offense”) of the Penal Law. Merrill Sobie, Practice Commentary, *supra*.

334. *See, e.g.*, N.Y. FAM. CT. ACT § 712(a) (McKinney 2010 & Supp. 2015) (defining the conditions that must be met for a person under eighteen to be considered a PINS).

335. The NYSHA amends the Family County Act’s section 311.4 to require that the family court judge substitute a PINS petition in lieu of a juvenile delinquency petition for certain juveniles under certain circumstances. *See* N.Y. FAM. CT. ACT § 311.4(3) (McKinney 2008 & Supp. 2015) (providing that “[i]n a proceeding under this article based upon an arrest for an act of prostitution” and “[u]pon the motion of the respondent, without the consent of the presentment agency, a petition alleging that the respondent is in need of supervision shall be substituted for the delinquency petition”).

336. *Id.* § 311.4(3) (emphasis added).

337. *Id.* The safe harbor law deprives the agency of the right to consent to the petition. *Id.* In hearings involving other crimes, the agency must consent to the substitution of the petition. *See id.* § 311.4(1)–(2).

338. *See id.* § 311.4(3) (referencing the Trafficking Victims Protection Act of 2000).

has committed a prior prostitution offense; or (3) the juvenile was previously placed in a social service agency for treatment for prostitution-related offenses.³³⁹ If the court proceeds with the delinquency proceeding, its order must include written findings of fact to support the continuation of such a proceeding.³⁴⁰

The substitute petition requirement does not legalize prostitution. Case law interpreting the NYSHA affirms that the statute did not completely shield all youth from criminal prosecution or delinquency adjudication.³⁴¹ Although New York “expresses a preference that children who have been sexually exploited be spared criminal prosecution or adjudication under the juvenile delinquency statute in favor of receiving rehabilitative services,” the law does not provide an absolute shield against adjudication.³⁴² As New York’s case law makes clear, “a substitution of a PINS petition is not intended to provide automatic and complete immunity from prosecution.”³⁴³

These limitations on access to safe harbors undermine the policy goal of recognizing all prostituted minors as crime victims as opposed to criminals. The use of PINS proceedings to determine who is eligible for safe harbor undermines this goal. Some, but not all, prostituted minors will avoid the juvenile delinquency proceedings and the punitive punishments and stigmas associated with adjudication as a juvenile delinquent. By avoiding a finding of juvenile delinquency, these juveniles also avoid placement in a secure facility and the adjudication that they are guilty of crimes.³⁴⁴ They also avoid the stigma of having committed a sex offense, including the labeling as prostitutes or placement of their names on a registered list

339. *Id.* Section 311.4(3) was drafted to allow judges to forgo the PINS substitution where (a) the juvenile was not “a victim of a severe form of trafficking”; (b) the juvenile had been “previously adjudicated as a juvenile delinquent” for a prostitution offense; or (c) the juvenile is now an adult or “expresses a current unwillingness to cooperate with specialized services for sexually exploited youth.” *Id.*

340. *See id.* § 311.4(3) (stating that the “necessary findings of fact to support the continuation of the delinquency hearing proceeding shall be reduced to writing and made part of the record”).

341. *See In re Bobby P.*, 907 N.Y.S.2d 540, 547 (N.Y. Fam. Ct. 2010).

342. *Id.* (explaining that section 311.4(3) authorizes the substitution of a PINS hearing for a delinquency hearing for minors sixteen or younger).

343. *Id.*

344. N.Y. FAM. CT. ACT § 781 (McKinney 2010 & Supp. 2015) (stating that “no person adjudicated a person in need of supervision in this article shall be denominated a criminal”); *id.* § 756 (determining the placement of a juvenile after being designated as a PINS).

of sex offenders.³⁴⁵ But, through the PINS hearing, some minors may be deemed ineligible for such safe harbor.

Other states have taken a different approach. For example, Illinois does not condition immunity on certain conditions. The Illinois Safe Children Act³⁴⁶ recognizes all prostituted minors as sex trafficking victims and forbids criminal or juvenile penalties against such minors in all cases.³⁴⁷ Instead, when law enforcement determines that a minor in Illinois has been detained for prostitution, the minor is turned over to the child welfare system from temporary protective custody.³⁴⁸ The Safe Children Act then mandates that the state provide victim services to prostituted minors without subjecting them to the risk of criminal prosecution or adjudication as a delinquent.³⁴⁹

D. Prosecution as a Pathway to Services

In addition to eliminating legal punishment, shifting the legal paradigm also means providing services. Limited funding for services remains a major impediment to effective safe harbor protection for minors. Of the eighteen states that had enacted safe harbor laws as of 2013, only seven provided funding for services.³⁵⁰

The pathway to service also remains a controversial divide between the Uniform Act's principles and prosecution-based safe harbor models. Under New York's law, arrest is not the exclusive pathway to services; in other words, minors do not have to go through

345. See *id.* § 781; Schwartz, *supra* note 22, at 237, 258 (stating that adjudication as a PINS decriminalizes prostitution for juveniles and will “no longer be subject to registration and community notification requirements”).

346. Illinois Safe Children Act, Pub. Act No. 96-1464, 2010 Ill. Laws 6931 (codified in scattered sections of ILL. COMP. STAT. ANN.).

347. 720 ILL. COMP. STAT. ANN. 5/11-14(d) (LexisNexis 2012).

348. *Id.* For a definition of “temporary protective custody,” see 325 ILL. COMP. STAT. ANN. 5/3.

349. See 325 ILL. COMP. STAT. ANN. 5/2; 720 ILL. COMP. STAT. ANN. 5/11-14. Illinois was the first state to “make all children under the age of 18 immune from prosecution from prostitution.” END DEMAND ILL., INTRODUCTION TO ILLINOIS’ SAFE CHILDREN ACT 1 (Aug. 20, 2010), <http://www.enddemandillinois.org/sites/default/files/IL%20Safe%20Children%20Act%20Summary%20Nov%202010%20FINAL.pdf>; see also Press Release, Shared Hope Int’l, Shared Hope International Exposes Never-Before-Seen Look at Child Sex Trafficking Laws in America (Dec. 1, 2011), available at <http://sharedhope.org/2011/12/01/shared-hope-international-exposes-never-before-seen-look-at-child-sex-trafficking-laws-in-america/> (“Only four states have a full package of non-punitive child protective responses, including shelter and services: Illinois, Minnesota, New York, Washington.”). For a more detailed analysis of the Illinois Safe Child Act, see generally Bergman, *supra* note 22.

350. According to the Polaris Project, as of 2013, Arkansas, Florida, Illinois, Kansas, Kentucky, Louisiana, and Washington provide funding in connection with their safe harbor laws. POLARIS PROJECT, 2013 ANALYSIS, *supra* note 212, at 34–36.

the juvenile justice system to access these services.³⁵¹ The PINS hearing is not the only way that the New York law permits sexually exploited children to access these services. Children also can access the services voluntarily on their own or by a referral from a government agency.³⁵² While the NYSHA uses the juvenile justice system for case management, it mandates that expert nonprofit and social service agencies provide rehabilitative services for sexually exploited youth.³⁵³ For minors arrested or detained for prostitution, the court may order them to participate in rehabilitative services as a condition for dismissal of a charge in criminal court or through the juvenile court proceeding.³⁵⁴ An advantage of the New York law is that the services are administered through trained social service providers, as opposed to within the criminal justice or juvenile justice systems.³⁵⁵

New York law requires that its counties provide specialized services to survivors of child prostitution.³⁵⁶ The statute provides that minors receive individualized services instead of merely being placed in a social service agency with no expertise in meeting their particular needs.³⁵⁷ The law makes clear that the districts can use programs already operated by existing social service providers but ensures that the preexisting programs have staff trained by the Office of Children and Family Services on the specific needs of sexually exploited children.³⁵⁸

The NYSHA's lack of mandated funding for services highlights other problems with the "arrest as a pathway to services" model; namely, some may have no real alternatives other than services provided in a juvenile justice detention center or adult jail cell. One of the strongest criticisms of the NYSHA is that the law mandates services but does not guarantee adequate funding to create these services.³⁵⁹ The mandate is also a concern because New York has lacked the social service programs to implement the state mandate. Opponents of the NYSHA have also suggested that prostituted children could be served within the traditional framework by

351. See N.Y. SOC. SERV. LAW, § 447-b(1)–(2) (McKinney 2010).

352. See *id.* § 447-b(2).

353. *Id.* § 447-b(1).

354. *Id.* § 447-b(2).

355. See *id.* § 447-b(1).

356. *Id.* § 447-b(2).

357. See *id.* § 447-b(1).

358. *Id.*

359. See Schwartz, *supra* note 22, at 271–72 (describing the problems associated with unfunded mandates).

receiving mental health and other services that are provided to delinquent children.³⁶⁰

The recent creation of social service programs to address this population in New York should alleviate these concerns. Several nonprofit organizations in the state have established programs that address the specialized social services needs of sexually exploited children.³⁶¹ Furthermore, the placement of commercially sexually exploited minors with professional agencies may be a strong alternative to placing these children in the care of the child welfare system.³⁶²

An advantage to the New York law is that it gives some minors the opportunity to seek support in a safe house instead of a criminal facility. The NYSHA gives the child the right of access to such a “short-term safe house” immediately from the point in time that the minor “has first come into the custody of the juvenile detention officials, law enforcement, [or] local jails.”³⁶³ Significantly, the juvenile does not have to fulfill any prerequisite to reside at a “short-term safe house” instead of a juvenile detention facility.³⁶⁴ New York law mandates that, if a child is designated as a PINS, the child shall be placed in a social service facility administered through the child welfare system, as opposed to detention in a juvenile justice facility.³⁶⁵ The NYSHA requires that the State Office of Children and Family Services contract with at least one nonprofit organization to provide a safe house and other specialized services for sexually exploited children.³⁶⁶ This law does not require that agencies build new safe

360. *See id.* at 277–79.

361. *See Prostitution-Related Offenses Service Provider Director, in THE SAFE HARBOUR FOR EXPLOITED CHILDREN ACT: NEW YORK’S NEW PERSPECTIVE ON CHILD PROSTITUTION* 87, 87–88 (N.Y. Cnty. Lawyers’ Ass’n Continuing Legal Educ. Inst. ed., 2010), available at <http://www.nycla.org/pdf/Safe%20Harbour.pdf>. These organizations include Restore NYC, Safe Horizon, Girls Educational & Mentoring Services (“GEMS”), and two groups in association with the Kings County District Attorney’s Office—Ending Prostitution in Our Communities Project (“EPIC”) and Saving Teens at Risk (“STAR”). *Id.*

362. *See Safe Harbour Project*, N.Y. STATE OFF. CHILD. & FAM. SERVS., <http://ocfs.ny.gov/main/Safe%20Harbour%20Project/default.asp> (last visited Feb. 28, 2015).

363. N.Y. SOC. SERV. LAW § 447-a(2) (McKinney 2010).

364. *Id.*

365. *See id.* § 447-b(1)–(2).

366. *See id.* § 447-b(5). The Act further mandates that, “to the extent that funds are available,” the districts must ensure that children who reside in their district receive “preventative services including a short-term safe house or another short-term safe placement such as an approved runaway and homeless youth program, approved respite or crisis program providing crisis intervention or respite services or community-based program to serve sexually exploited children.” *Id.* § 447-b(1). The Act specifically defines

houses; rather, sexually exploited children can be placed in a preexisting runaway or homeless youth shelter.³⁶⁷

Arguably, shelters are also a good alternative to lock-up because they can potentially help address the nationwide problem of overcrowding in prisons and juvenile court facilities.³⁶⁸ In Bill 499, the California legislature acknowledged that the California prison population has “trippl[ed] since the mid-1980s.”³⁶⁹ Legislators considered a federal lawsuit against the Department of Corrections and Rehabilitation in which a three-judge panel had, three months earlier, “issued an order requiring the state [of California] to reduce its inmate population to 137.5 percent of design capacity—a reduction of roughly 40,000 inmates—within two years.”³⁷⁰ In 2014, a three-judge federal panel gave California extra time to do so, but the state still has to reduce its prison population.³⁷¹

By comparison, several counties in California have also adopted a “prosecution-as-a-gateway-to-services” approach.³⁷² While the California state legislature has yet to enact statewide safe harbor laws, they have approved county-wide measures.³⁷³ In 2008, the California State Assembly enacted Assembly Bill 499, which established the “Sexually Exploited Minors Pilot Project” for Alameda County.³⁷⁴ In 2008, the Alameda County District Attorney formally implemented the bill’s pilot program.³⁷⁵ The Alameda County safe harbor law (Bill

“short-term safe house” as a “residential facility” that provides, among other things, “food, shelter, clothing, [and] medical care” as well as specialized programs, such as “appropriate crisis intervention services.” *Id.* § 447-a(2).

367. *See id.* § 447-b(1).

368. *See* S. COMM. ON PUB. SAFETY, SEXUALLY EXPLOITED MINORS PILOT PROJECT—ALAMEDA CNTY., A.B. 499, Reg. Sess., at 6 (Cal. 2008).

369. *Id.* at 5 (citing BRIAN BROWN, EDGAR CABRAL & PAUL STEENHAUSEN, LEGIS. ANALYST’S OFFICE, CALIFORNIA’S CRIMINAL JUSTICE SYSTEM: A PRIMER 71 (2007)).

370. S. COMM. ON PUB. SAFETY, SEXUALLY EXPLOITED MINORS PILOT PROJECT—LOS ANGELES CNTY., S.B. 1279, Reg. Sess., at 2 (Cal. 2010).

371. Ian Lovett, *Court Gives California More Time on Prisons*, N.Y. TIMES, Feb. 11, 2014, at A12, available at <http://www.nytimes.com/2014/02/11/us/court-gives-california-more-time-to-ease-prison-crowding.html>.

372. 2008 BARTON CENTER REPORT, *supra* note 213, at 35–37.

373. *See* Press Release, O’Malley, *supra* note 324, at 3 (“In Alameda County, [sexually exploited] young girls are directed away from criminal prosecution and directed to specialized services through a diversion program run by the District Attorney’s Office and created by [state] legislation which passed as a result of the effective partnership between [California State] Assembly Member Swanson (Oakland) and Ms. O’Malley’s Office.”).

374. Act of Sept. 27, 2008, ch. 359, § 2, 2008 Cal. Stat. 2803, 2803–04 (codified at CAL. WELF. & INST. CODE § 18259 (West 2012 & Supp. 2015)).

375. CAL. WELF. & INST. § 18259 (West 2012 & 2015 Supp.); *see also* Janet C. Sully, Note, *Precedent or Problem? Alameda County’s Diversion Policy for Youth Charged with*

499) gives the Alameda County District Attorney broad discretion to develop safe harbor provisions and procedures for sexually exploited minors.³⁷⁶ To implement Bill 499, the Alameda County District Attorney's Office has created a pilot program known as the Human Exploitation and Trafficking ("H.E.A.T.") Watch Program.³⁷⁷ The program has five key components to combat sexual exploitation of minors: (1) education and engagement of the business community; (2) law enforcement training and intelligence sharing between law enforcement agencies; (3) aggressive prosecution of traffickers; (4) collaboration with legislators and policymakers; and (5) "wrap around services" and housing "designed to meet the unique needs of sexually exploited minors."³⁷⁸

As a "prosecution-as-a-gateway-for-services" model,³⁷⁹ access to these services is limited to sexually exploited minors who satisfy certain conditions with the criminal or juvenile justice system.³⁸⁰ These conditions include cooperation with the prosecution.³⁸¹ Once the minor agrees to cooperate with the prosecution, the district attorney's office immediately arranges for the provision of rehabilitative services for prostituted minors, albeit on a discretionary basis.³⁸²

As part of the "prosecution-as-a-gateway-to-services" component, minors must participate in rehabilitative service programs as a condition for avoiding delinquent or criminal adjudication.³⁸³ Through the H.E.A.T. Wrap Around Services and

Prostitution and the Case for a Policy of Immunity, 55 WM. & MARY L. REV. 687, 690 (2013) (discussing the implementation of the program).

376. See CAL. WELF. & INST. CODE § 18259.

377. Press Release, O'Malley, *supra* note 324, at 1.

378. *Id.* at 1–4.

379. 2008 BARTON CENTER REPORT, *supra* note 213, at 36.

380. *Id.* at 35–37.

381. *Id.* at 36–37.

382. See *id.* at 35–37.

383. See Thomas Carroll, *Gender and Juvenile Justice: New Courts, Programs Address Needs of Girls*, NAT'L CTR. FOR YOUTH LAW (2009), http://www.youthlaw.org/publications/yln/2009/july_september_2009/gender_and_juvenile_justice_new_courts_programs_address_needs_of_girls/. The juvenile court exercises its authority to compel prostituted minors to attend rehabilitative programs. See *id.* Under California law, for example, "punishment" for juvenile delinquency included both "[l]imitations on the minor's liberty" as well as "[c]ommitment of the minor to a local detention of[r] treatment facility, such as a juvenile hall, camp or ranch" or "[c]ommitment of the minor to the Department of the Youth Authority." S. RULES COMM., SEXUALLY EXPLOITED MINORS PILOT PROJECT—ALAMEDA CNTY., A.B. 499, Reg. Sess., at 2 (Cal. 2008). As part of the adjudication for delinquency, "[t]he juvenile court has broad discretion in imposing probation conditions." *Id.* (citing *In re Josue S.*, 84 Cal. Rptr.2d 796, 799 (Cal. App. 2 Dist. 1999)). As such, the judge "may make any and all reasonable orders for the care,

Housing Program,³⁸⁴ “[s]ervices are provided from point of first contact, on the street or at the [Safe Place Alternative], and continue through the court process and beyond. Efforts are currently underway to create and fund a regional Safe House.”³⁸⁵ The H.E.A.T. program has succeeded in its mission of inspiring other district attorneys to replicate the program in other counties. In February 2010, members of the California legislature introduced S.B. 1279, which called for an identical program for Los Angeles County.³⁸⁶ Accordingly, Las Vegas became another jurisdiction in which district attorneys have adopted a prosecution-based model for safe harbor policies. In Las Vegas, minors suspected of being prostituted are detained in “vice holds” for long periods of time as a means of keeping them off the streets and developing the detained minor into a prosecution witness.³⁸⁷

This provision of services during detention is seen as a means for maximizing witness cooperation from the sexually exploited minor. The Alameda County program has expressed its desire to ensure victims are supported during the investigation and prosecution of cases against their exploiters.³⁸⁸ Deputy District Attorney Sharmin

supervision, custody, conduct, maintenance, and support of the minor.” *Id.* (citing CAL. WELF. & INST. CODE § 727(a) (West 2008)).

384. Press Release, O’Malley, *supra* note 324, at 4. (“The Alameda County District Attorney’s Office is a leader in creating strong support systems, such as the SPA (Safe Place Alternative), the SEM (Sexually Exploited Minor) Network, the District Attorney’s Office H.E.A.T. Victim Witness Advocacy Program, and SEMRISE (Sexually Exploited Minors Reclaiming Innocence and Stemming the Epidemic).”).

385. *Id.*

386. S.B. 1279, Reg. Sess. (Cal. 2010) (codified at CAL. WELF. & INST. CODE § 18259.7 (2013)). On its face, the bill made clear that its purpose was to create an identical bill because the Alameda Safe Harbor Bill (A.B. 499) had been so successful. *See id.* Noting that A.B. 499 contained a sunset clause which terminated the program on January 1, 2012, legislators advocated that public policy reasons warranted that they enact a safe harbor bill for Los Angeles County that would assist victims indefinitely as long as funding was available. *Id.* The legislative history of S.B. 1279 indicates that legislators adopted verbatim some of the same policy arguments embraced by legislators for A.B. 499. *See* S. COMM. ON PUB. SAFETY, SEXUALLY EXPLOITED MINORS PILOT PROJECT—LOS ANGELES CNTY., S.B. 1279, Reg. Sess., at 2 (Cal. 2010). California S.B. 1279’s main lobbyist was the Children’s Advocacy Institute. *See id.* at 1. The bill had lots of support in the legislature—it passed unanimously in the Senate on April 22, 2010, and unanimously in the Assembly on June 24, 2010. *History*, CAL. LEGIS. INFO., <http://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml> (last visited May 5, 2015).

387. *See* 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, 472–74 (2008) (explaining that minors are required to cooperate with prosecutorial efforts).

388. Press Release, O’Malley, *supra* note 324, at 4 (stating that “[s]exually exploited children must be supported at every stage in the investigation and prosecution of these cases”).

Bock asserted that as a result of these programs, “H.E.A.T. victims in Alameda County feel supported, less vulnerable, and better able to face their exploiters in court. It takes a village to prosecute a trafficker and rescue a victim.”³⁸⁹ The Alameda District Attorney is determined to initiate vigorous prosecution of offenders. This office was the first to bring a state prosecution under California’s Trafficking Victims Protection Act.³⁹⁰ The district attorney has also collaborated with policymakers and community decision-makers on the need for stiffer penalties and effective legislation.³⁹¹ A unique component of the Alameda County diversion program is that a coalition of diverse stakeholders work together to divert minors away from criminal prosecution and towards specialized services.³⁹² The Interagency Children’s Policy Council, a collaboration of agencies that has worked since 1994 to implement a “system change” in the legal treatment of sexually exploited minors,³⁹³ works with the district attorney to implement the H.E.A.T. Watch Program. The coalition includes the district attorney, probation officers, a presiding juvenile court judge, the school superintendent, public defenders, and representatives from the Office of Children and Family Services and other agencies, such as Youth Justice Initiative.³⁹⁴ The Policy Council received funding through the City of Oakland and Alameda County to launch a Safe Place Alternative Program and administers the Sexually Exploited Minors (“SEM”) Rise Network.³⁹⁵

CONCLUSION

Safe harbor laws have tremendous potential for dramatically changing the way in which prostituted minors are treated under federal and state laws. One of the most important policy goals of safe harbor laws is to shift the legal paradigm to recognize prostituted minors as victims, not criminals. International and federal laws make

389. *Id.*

390. *See id.*

391. For example, the district attorney led the lobbying efforts to pass Bill 499 as well as Bill 559 for Sacramento. *Id.* The district attorney also sponsored Bill 17 to “hit[] the traffickers in the pocketbook.” *Id.* That bill imposes a \$20,000 fine and calls for forfeiture of the assets of persons convicted of trafficking. *Id.*

392. *Id.* at 2–4. Along with these services, efforts to refer to these children as commercially exploited youth, as opposed to prostitutes, will also help shift the responsibility of these acts onto that of the exploiter. *See id.* at 4.

393. *Our History*, INTERAGENCY CHILD. POL’Y COUNCIL–ALAMEDA CNTY., <http://www.acgov.org/icpc/pages/aboutus/history.html> (last visited Jan. 25, 2015).

394. *Council Members*, INTERAGENCY CHILD. POL’Y COUNCIL–ALAMEDA CNTY., <http://www.acgov.org/icpc/pages/aboutus/councilmembers.html> (last visited Feb. 28, 2015).

395. *See id.*

clear that prostituted minors should be legally recognized as crime victims as opposed to criminals. While state laws have been slow to adopt this approach, new safe harbor laws offer the opportunity for a uniform approach. The Uniform Act shields prostituted minors with complete immunity from prosecution or other forms of criminal punishment.³⁹⁶ But in addition to eliminating legal punishment, shifting the legal paradigm also means providing services. Several advocacy organizations support the granting of immunity as a major goal of safe harbor laws.³⁹⁷ This policy makes sense because most minors do not freely choose prostitution.³⁹⁸ Too often, prostituted minors are coerced or induced into prostitution.³⁹⁹ More than punishment, they deserve legal protection and victim services. Prosecution-based models for safe harbor laws still fail to embrace these policy perspectives. Addressing this gap must be part of the next wave of human trafficking legislation and policy.

396. UNIF. ACT ON PREVENTION OF & REMEDIES FOR HUMAN TRAFFICKING § 15(a)–(b) (2013); Hall, *supra* note 255, at 885.

397. See, e.g., POLARIS PROJECT, 2013 ANALYSIS, *supra* note 212, at 33 (“Such legal protections should . . . grant immunity from prosecution for prostitution-related offenses for any person under 18 . . .”).

398. Butler, *supra* note 3, at 840.

399. See HUMAN TRAFFICKING ISSUE BRIEF, *supra* note 216, at 1.