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Pimps, Johns, and Juvenile Prostitutes: Is New York Doing Enough to Combat the Commercial Sexual Exploitation of Children

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NOTE

PIMPS, JOHNS, AND JUVENILE PROSTITUTES: IS NEW YORK DOING ENOUGH TO COMBAT THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN?

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Each year, there are between 100,000 to 300,000 youth at risk of commercial sexual exploitation in the United States. In 2003, the Federal Bureau of Investigation named New York City one of thirteen "High Intensity Child Prostitution Areas" in the country. New York legislators have since taken steps to help curtail this issue, such as the recent passage of an anti-trafficking law and the Safe Harbour for Exploited Children Act.

Despite these efforts, this Note argues that New York has failed to protect and adequately serve commercially sexually exploited children. There are four reasons why this is so. First, the Safe Harbour for Exploited Children Act is an unfunded mandate. Second, New York does not equally protect all commercially sexually exploited children. Third, New York's penalties for promoters are not as severe as federal penalties. Finally, although the child-sex industry is demand-driven, New York completely ignores the demand side. The purpose of this Note is to make New York policymakers aware of the state's legislative gaps concerning the protection of commercially sexually exploited children and to provide them with the necessary background and recommendations to make informed changes.

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INTRODUCTION

"'I'm a pimp, and you're a ho.' 'What do you mean I'm a ho?' she asked. She knew the word only as an insult, as in, you're nasty. 'No,' he said. 'You're a moneymaking ho.' 'Is that good?' she asked. 'Yeah,' he told her, '[t]hat's good.'"[1] This was the exchange between Lucilia, a beautiful half-Puerto Rican, half-Dominican girl from Flatbush, and her pimp after she serviced her first client. She was only thirteen years old. Each year, there are between 100,000 to 300,000 youth at risk of commercial sexual exploitation in the United States.[2] In a recent sting operation in Polk County, Florida, police arrested fifteen men for soliciting sex with minors in response to fake Craigslist advertisements selling sex with

[1] Jessica Lustig, *The 13-Year-Old Prostitute: Working Girl or Sex Slave?*, N.Y. MAG., Apr. 1, 2007, http://nymag.com/news/features/30018/.

[2] Shelby Schwartz, *Harboring Concerns: The Problematic Conceptual Reorientation of Juvenile Prostitution Adjudication in New York*, 18 COLUM. J. GENDER & L. 235, 239 (2008).

children ages eight to fourteen.[3] Although that was just fifteen men in one county, "[m]ultiply that by all the counties . . . [across the] the country, and men buying sex with kids isn't a problem. It's a plague."[4]

In 2003, the Federal Bureau of Investigation named New York City one of thirteen "High Intensity Child Prostitution Areas" in the country.[5] New York legislators have taken proactive steps to help combat the commercial sexual exploitation of children. For instance, New York has higher penalties for customers who solicit underage girls for sex in comparison to those who solicit sex from women over the age of nineteen.[6]

Trailing years behind Congress' comprehensive Trafficking Victims Protection Act,[7] New York enacted its own anti-trafficking law in 2007, making it a crime to use force, fraud, or coercion to profit from prostitution.[8] No longer is movement across state lines necessary for a conviction for sex trafficking in New York. Although in 2007 it became a crime to coerce anyone into prostitution, children, who tend to be the most susceptible to coercion, were still being arrested and charged criminally as adults for prostitution.[9] Presumably, New York's Safe Harbour for Exploited Children Act (hereinafter "Safe Harbour Act")[10] changed that.

Through the passage of the Safe Harbour Act, New York experienced a paradigm shift in recognizing that children who are sold for sex are victims rather than delinquents. The Safe Harbour Act classifies juveniles under the age of eighteen who engage in prostitution as "sexually exploited children."[11] Under the Safe Harbour Act, family court

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[3] *Craigslist Sex Sting Nabs 15 Men Looking for Sex with Children 8 to 14 Years Old*, HUFFINGTON POST (Aug. 16, 2010, 3:31 PM), http://www.huffingtonpost.com/2010/08/16/craigslist-sex-sting-nabs_n_683669.html?ref=twitter.

[4] Amanda Kloer, *The Real Faces of Demand for Child Prostitution*, CHANGE.ORG (Aug. 21, 2010), http://news.change.org/stories/the-real-faces-of-demand-for-child-prostitution (last visited May 2012).

[5] OFFICE OF THE INSPECTOR GEN. AUDIT REP. 09-08, THE FEDERAL BUREAU OF INVESTIGATION'S EFFORTS TO COMBAT CRIMES AGAINST CHILDREN (Jan. 2009), *available at* http://www.justice.gov/oig/reports/FBI/a0908/chapter4.htm#122.

[6] *See* N.Y. PENAL LAW § 230.04 (McKinney 2009) ("A person is guilty of patronizing a prostitute in the third degree when he or she patronizes a prostitute. Patronizing a prostitute in the third degree is a class A misdemeanor."). There are enhanced penalties for patronizing a child less than fourteen years old. *See id.* § 230.05 ("A person is guilty of patronizing a prostitute in the second degree when, being over eighteen years of age, he patronizes a prostitute and the person patronized is less than fourteen years of age. Patronizing a prostitute in the second degree is a class E felony.").

[7] Trafficking Victims Protection Act, 22 U.S.C.A § 7101 (West 2009) (enacted in 2000).

[8] N.Y. PENAL LAW § 230.34 (Penal Law that created the crime of "Sex trafficking").

[9] *Id.* § 230.00.

[10] Safe Harbour for Exploited Children Act, N.Y. SOC. SERV. LAW § 447 (McKinney 2009) (effective Apr. 1, 2010).

[11] *Id.* § 447-a(1).

judges have the discretion to defer prosecution of sexually exploited children by classifying them as "persons in need of supervision" (PINS).[12] As PINS, sexually exploited youth qualify for much needed social services, such as short-term housing through runaway or homeless youth programs, crisis intervention, and other community-based services that meet their needs.[13]

Are these measures enough or should New York do more to protect our youth from commercial sexual exploitation? How does New York's sex trafficking law measure up in comparison to the federal Trafficking Victims Protection Act? After being in effect for over a year, has the Safe Harbour Act really made a difference in the lives of children sold for sex? This Note argues that New York's legislative efforts have failed to protect and adequately serve commercially sexually exploited children. The intent of this Note is to make policymakers aware of the legislative gaps and to provide them with the necessary background and recommendations to make informed changes.

Part I introduces the dire issue of commercial sexual exploitation of domestic youth, what it is, and the prevailing factors that place children at risk of being sold for sex. Part II provides insight into the commercial child-sex industry, how children are lured, abused, and sexually groomed for profit, and the characteristics of the men who pay to have sex with them. Part III closely examines the New York legal landscape intended to protect children from sexual exploitation, including the state's most recent attempts to curtail the issue through the passage of an anti-trafficking law and the Safe Harbour Act. Part III is also intended to provide both legislators and advocates with a comprehensive look at the current laws to facilitate comparison and analysis.

Part IV discusses three specific reasons why New York's current efforts fail to protect commercially sexually exploited children. First, the Safe Harbour Act is an unfunded mandate. Second, New York does not equally protect all commercially sexually exploited children. Third, New York's penalties for promoters are not as severe as federal penalties. Finally, Part V argues that one of New York's biggest failures lies in the state's almost complete ignorance of the demand side of the industry and provides recommendations for filling the gap.

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12 N.Y. FAM. CT. ACT § 311.4(3) (McKinney 2009) (allowing the court to substitute a petition alleging that the respondent is in need of supervision for a petition alleging that the respondent is a juvenile delinquent).

13 N.Y. SOC. SERV. LAW § 447-b(1).

I. VERY YOUNG GIRLS: THE PROBLEM[14]

Each year, there are between 100,000 to 300,000[15] youth at risk of commercial sexual exploitation[16] in the United States. Although both boys and girls are sexually exploited for profit, there are significant differences between the two groups. In comparison to girls, boys tend to be somewhat older and operate alone or in small groups without pimps.[17] Because these differences have legislative and law enforcement implications, this Note focuses on New York's response to commercial sexual exploitation as it relates to girls.

Prostitution is one of the youngest professions. Approximately eighty percent of current adult prostitutes began their profession when they were younger than eighteen.[18] The average age of entry into the industry is between eleven and fourteen.[19] A 2007 New York study ("New York Prevalence study") revealed that forty-three percent of commercially sexually exploited children from upstate New York counties were as young as ten to eleven years old when they entered the industry.[20]

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14 Title adapted from the documentary VERY YOUNG GIRLS, "an exposé of the commercial sexual exploitation of girls in New York City." VERY YOUNG GIRLS (2007), *available at* http://www.gems-girls.org/get-involved/very-young-girls.

15 Schwartz, *supra* note 2, at 239. These figures are speculative since little statistical research exists on the prevalence of prostituted children. *See* RICHARD J. ESTES & NEIL ALAN WEINER, THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA AND MEXICO 142 (2001), *available at* http://www.sp2.upenn.edu/restes/CSEC_Files/Complete_CSEC_020220.pdf (stating that reliable estimates of prostituted children in the U.S. do not exist because of "gross under-reporting of known cases" by law enforcement and social service providers; the absence of state or national registries of known cases; the absence of "prevalence studies"; and "widespread societal disbelief concerning the nature, extent and severity" of domestic prostitution of children).

16 A "commercially sexually exploited child" (CSEC) is defined as a person under the age of eighteen who has been involved in any of the following acts: "[e]ngaged in, agreed to, offered, or was threatened or coerced to engage in sexual conduct or acts with another person in return for money, food, clothing, protection, drugs, or a place to stay; [s]tripped and performed in public or over the Internet; [w]as filmed, photographed, or tape recorded engaging in a sexual act; or [l]oitered for the purpose of engaging in prostitution." FRANCES GRAGG ET AL., N.Y. STATE OFFICE OF CHILDREN AND FAMILY SERVS., NEW YORK PREVALENCE STUDY OF COMMERCIALLY SEXUALLY EXPLOITED CHILDREN 7 (Apr. 18, 2007), *available at* www.ocfs.state.ny.us/main/reports/csec-2007.pdf. This Note will refrain from referring to youth as "prostitutes" because it masks the reality that these children are truly victims. *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, 10–17 (2002).

17 DAVID FINKELHOR & RICHARD ORMROD, U.S. DEP'T OF JUST. OFF. OF JUV. JUST. & DELINQ. PREVENTION, PROSTITUTION OF JUVENILES: PATTERNS FROM NIBRS 6 (June 2004), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/203946.pdf.

18 Tamar R. Birckhead, *The "Youngest Profession": Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1061 (2011).

19 *Id.*

20 GRAGG ET AL., *supra* note 16, at 40. This study is based on the weighted estimates of reported commercially sexually exploited children in seven upstate New York counties—

The Office of Juvenile Justice and Delinquency Prevention at the Department of Justice recognized that the sexual exploitation of children for profit in the United States occurs in various contexts, including: international and interstate criminal rings trafficking girls "with promises of employment and money;"[21] parents using the internet to advertise and prostitute their children;[22] runaway and homeless youths falling prey to pimps or engaging in "survival sex;"[23] and gangs requiring new members to sell their bodies as part of initiation.[24]

As noted by the Department of Justice, a number of factors place children at risk of commercial sexual exploitation, including homelessness, running away from home, and child victimization.[25] Out of the estimated 450,000 children who run away each year, "one out of every three . . . will be 'lured [into] prostitution within 48 hours of leaving home.'"[26] Some of these children are exploited based on necessity—nearly a third "engage in sex for food, drugs or a place to stay, . . . [a] dangerous barter system [that] can quickly escalate into more formalized prostitution."[27]

A vast majority of commercially sexually exploited children have a history of physical, emotional, and sexual abuse.[28] The New York Prevalence study revealed that approximately eighty-five percent of commercially sexually exploited children in New York City were in homes that had been involved in the child welfare system.[29] Seventy-five percent of these children had been placed in foster care, and sixty-nine percent of the child welfare cases involved abuse and neglect investigations.[30] An estimated eighty to ninety percent of exploited children had also been previously sexually abused.[31] The trauma of coming from broken homes, living on the streets, and being sexually exploited puts children at risk of a "number of mental health disorders, including Post Traumatic

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Chautauqua, Erie, Oneida, Onondaga, Schenectady, Warren, and Washington—and four New York City boroughs—Bronx, Brooklyn, Manhattan, and Queens. *Id.* at i.

21 FINKELHOR & ORMROD, *supra* note 17, at 2.

22 *Id.*

23 *Id. See also* Ian Urbina, *For Runaways on the Street, Sex Buys Survival*, N.Y. TIMES, Oct. 27, 2009, at A1, A22, *available at* http://www.nytimes.com/2009/10/27/us/27runaways.html?pagewanted=all.

24 FINKELHOR & ORMROD, *supra* note 17, at 2.

25 *See* Birckhead, *supra* note 18, at 1060–61 (identifying the youth most at-risk for sex exploitation as "including runaways, throwaways, victims of physical or sexual abuse, drug users and addicts, homeless youth, female gang members, transgender street youth, and unaccompanied minors who enter the United States on their own").

26 *Id.* at 1061.

27 Urbina, *supra* note 23. *See also* Schwartz, *supra* note 2, at 241.

28 Schwartz, *supra* note 2, at 240.

29 *See* GRAGG ET AL., *supra* note 16, at 31.

30 *Id.*

31 Schwartz, *supra* note 2, at 271.

Stress, Anxiety Disorder, Conduct Disorder, and Substance Abuse . . . ."[32] There should be no question that these children need the state's protection and support.

II. THE CHILD-SEX TRAFFICKING INDUSTRY

Although there is "widespread societal disbelief concerning the nature, extent and severity"[33] of domestic sex trafficking of children[34]—also known as commercial sexual exploitation[35]—the majority of this type of exploitation affects native women and children, not those foreign-born.[36] Unfortunately, the child-sex industry exists in the United States. This, however, should come as no surprise since we live "[i]n a culture that continuously objectifies girls and women and that sexualizes and commodifies youth."[37]

Similar to international sex trafficking rings, domestic child-sex industries perpetuate a cycle of abuse. Pimps lure vulnerable youth from broken homes and johns sexually exploit them. As activist Rachel Lloyd wrote in her memoir, "[i]n one way or another, through abuse, neglect, [and] abandonment, [children sold for sex have] been primed for predatory men [and] . . . an industry that would use [them] up and spit [them] out."[38]

A. The Pimp and Getting Into "the Life"

"Fast, I got to find out the secrets of pimping. I really want to control the whole whore. I want to be the boss of her life, even her thoughts. I got to con them that Lincoln never freed the slaves."[39]

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32 *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 117–18 (Dec. 5, 2011) [hereinafter *Oversight Hearing*] (statement of James Bolas, Dir. of Educ. for the Empire State Coal. of Youth and Family Servs.).

33 ESTES & WEINER, *supra* note 15, at 142.

34 Domestic sex trafficking of children "is the commercial sexual exploitation of American children within U.S. borders and is synonymous with child sex slavery, child sex trafficking, prostitution of children, and commercial sexual exploitation of children (CSEC). Congress, in the federal Trafficking Victims Protection Act (TVPA) . . . defines sex trafficking as the 'recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.'" SHARED HOPE INT'L, *The Protected Innocence Challenge: State Report Cards on the Legal Framework of Protection for the Nation's Children* 7 (2011), *available at* http://www.sharedhope.org/Portals/0/Documents/Report%20Cards_FINAL/PIIChallengeReport_FINAL2.pdf [hereinafter *Protected Innocence Challenge*].

35 ESTES & WEINER, *supra* note 15.

36 RACHEL LLOYD, GIRLS LIKE US: FIGHTING FOR A WORLD WHERE GIRLS ARE NOT FOR SALE, AN ACTIVIST FINDS HER CALLING AND HEALS HERSELF 10 (2011).

37 *Id.* at 108.

38 *Id.* at 27.

39 POLARIS PROJECT, *Domestic Sex Trafficking: The Criminal Operations of the American Pimp* 1, *available at* https://na4.salesforce.com/sfc/play/index.jsp?oid=00D300000006E4S

Pimps or "promoters," the legally recognized term in New York,[40] are skilled at scouting for vulnerable youth, assessing their needs and vulnerabilities, and preying on them.[41] They recruit young girls at malls, nightclubs, schools, group homes, homeless shelters, foster homes, bus stops, parks, and even hallways of court buildings.[42] Initially they befriend and woo them,[43] making promises of love, a better life, money, and luxury.[44] Gradually, pimps begin to exert control over the girls "through a combination of intense manipulation and feigned affection . . . ."[45] Pimps often use drugs and alcohol as tools to sedate the girls into submission.[46]

After gaining their trust and affection, pimps begin to "groom" or "season" the girls to have commercial sex with strangers.[47] This brutal process involves breaking the girls down in order to gain complete control over their identity or individuality.[48] Seasoning often involves physical and sexual abuse such as beating, slapping, whipping, bondage, confinement, rape and/or gang rape, and deprivation of food and water.[49] In order to create total dependency, pimps often subject the girls to emotional and psychological abuse by confiscating their personal identification documents, burning items of meaning, isolating the girls from their loved ones and community, re-naming them with nicknames, verbally abusing them, dictating how they can walk, talk, and dress, and forcing them to watch pornography to teach them how to have sex.[50]

Pimps engage in a myriad of other serious crimes. A study by the Coalition Against Trafficking in Women revealed that in the New York Metropolitan area, pimps commonly engage in "[e]xtortion, arms dealing, fraud, auto theft and export, robbery, money laundering, [and] immigration fraud."[51] Other typical crimes include tax evasion, check fraud,

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&d=6FuMhnn2HQpD2dARadzU1Ow7p6I%3D&viewId=05H60000000JDNk&v=068600000008UtA (last visited Nov. 23, 2011) (quoting Iceberg Slim, a local pimp).

40 *See* N.Y. PENAL LAW § 230.15 (McKinney 2008).

41 *See* GRAGG ET AL., *supra* note 16, at 4–5.

42 POLARIS PROJECT, *supra* note 39, at 3.

43 *See* JANICE G. RAYMOND & DONNA M. HUGHES, COALITION AGAINST TRAFFICKING IN WOMEN, SEX TRAFFICKING OF WOMEN IN THE UNITED STATES: INTERNATIONAL AND DOMESTIC TRENDS 50 (March 2001), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/187774.pdf (noting that "[pimps'] methods are to befriend women, create emotional and/or chemical dependencies, and then convince them to earn money for the pimp in prostitution.").

44 POLARIS PROJECT, *supra* note 39, at 3.

45 *Id.* at 2.

46 RAYMOND & HUGHES, *supra* note 43, at 50.

47 POLARIS PROJECT, *supra* note 39, at 3.

48 *Id.*

49 *Id.*

50 *Id.*

51 RAYMOND & HUGHES, *supra* note 43, at 47.

racketeering, child pornography, kidnapping, and falsifying business records.[52]

The sad reality is that pimps exploit youths because pimping is profitable.[53] A study in Oakland, California "identified 155 pimps who each generated an average revenue of approximately $200,000 per year by exploiting minors" ages eleven to fifteen.[54] An informal study by the Polaris Project revealed that a pimp controlling four girls, each forced to make $500 per night seven days a week, was making on average $632,000 per year.[55]

B. The Johns: Men Who Buy Sex

Men who buy sex with children, also known as johns or "patronizers,"[56] are of all ages, races, religions, and socio-economic backgrounds.[57] They "look like [our average] . . . grandfathers, brothers, neighbors, and co-workers."[58] In a recent sting operation in Polk County, Florida, police arrested fifteen men for responding to fake Craigslist advertisements offering sex with children ages eight to fourteen.[59] The ages of the perpetrators ranged from eighteen to sixty-seven years old, and included a karate instructor and a Little League coach.[60] Some of the perpetrators arrived at the agreed-upon location with condoms and Skittles on hand.[61] Fox News posted headshots of these average-looking men on the Internet for the world to see.[62]

With the growing demand for child prostitution, sexually exploited youth are commodified, with some johns viewing them as "just . . . bio-

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52 POLARIS PROJECT, *supra* note 39, at 2.

53 Moira Heiges, Note, *From the Inside Out: Reforming State and Local Prostitution Enforcement to Combat Sex Trafficking in the United States and Abroad*, 94 MINN. L. REV. 428, 434 (2009).

54 *Id.* at 434 n.43.

55 POLARIS PROJECT, *supra* note 39, at 4.

56 N.Y. PENAL LAW § 230.02 (McKinney 2008). "A person patronizes a prostitute when: (a) [p]ursuant to a prior understanding, he pays a fee to another person as compensation for such person or a third person having engaged in sexual conduct with him; or (b) [h]e pays or agrees to pay a fee to another person pursuant to an understanding that in return therefore such person or a third person will engage in sexual conduct with him; or (c) [h]e solicits or requests another person to engage in sexual conduct with him in return for a fee." *Id.*

57 Leslie Bennetts, *The John Next Door*, NEWSWEEK, July 18, 2011, *available at* http://www.thedailybeast.com/newsweek/2011/07/17/the-growing-demand-for-prostitution.html.

58 Kloer, *supra* note 4 (emphasis added).

59 *Craigslist Sex Sting*, *supra* note 3.

60 *Id.*

61 *Id.*

62 *Men Arrested and Charged with Seeking Sex with Minors*, FOX NEWS, http://www.foxnews.com/slideshow/us/2010/08/16/men-arrested-charged-seeking-sexcapades-minors/#slide=1 (last visited Dec. 20, 2011).

logical object[s] that charge[ ] for services."[63] Although men who buy sex may *look* average, a 2011 study comparing "sex buyers"[64] (hereinafter "johns") to "non-sex buyers,"[65] revealed startling results. Though the research team was eventually able to find one hundred non-sex buyers for their comparison group, they had "a shockingly difficult time locating men who really don't do it"[66] due to the pervasive nature and perceived normalcy of sex buying.

Unlike non-sex buyers, fifty percent of johns tended to justify their behavior as normal by suggesting that most men buy sex once in a while.[67] Both johns and non-sex buyers, however, had "extensive knowledge of the physical and psychological harms of prostitution."[68]

> Two thirds of both the [johns] and the non-sex buyers observed that a majority of women are lured, tricked, or trafficked into prostitution. Many of the men had an awareness of the economic coercion and the lack of alternatives in women's entry into prostitution. Almost all of the [johns] and non-sex buyers shared the opinion that minor children are almost always available for prostitution . . . .[69]

Despite their knowledge of the severely damaging consequences of purchasing sex, johns were not deterred, justifying their continued patronage with "their belief that women in prostitution are essentially different from non-prostituting women."[70]

Johns were also more likely to commit an assortment of crimes, including violent crimes against women, "substance abuse-related crimes, assaults, crimes with weapons, and crimes against authority."[71] They acknowledged being more sexually coercive towards women in

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63 MELISSA FARLEY ET AL., COMPARING SEX BUYERS WITH MEN WHO DON'T BUY SEX: "YOU CAN HAVE A GOOD TIME WITH THE SERVITUDE" VS. "YOU'RE SUPPORTING A SYSTEM OF DEGRADATION" 3 (July 15, 2011), *available at* http://www.prostitutionresearch.com/men_who_buy_sex/000311.html.

64 "Sex buyers were defined as men who in response to a question from a phone screener acknowledged that they have bought sex from a woman or man in prostitution, escort, sex worker, or massage parlor worker or have exchanged something of value (such as food, drugs, or shelter) for a sex act." *Id.* at 10.

65 "[N]on-sex buyers [were defined] as men who have not purchased phone sex or the services of a sex worker, escort, massage sex worker, or prostitute, have not been to a strip club more than one time in the past year, have not purchased a lap dance, and have not used pornography more than one time in the past week." *Id.*

66 Bennetts, *supra* note 57, at 1. Researchers had to expand their definition to the one noted above. FARLEY ET AL., *supra* note 63, at 10.

67 *See* FARLEY ET AL., *supra* note 63, at 4.

68 *Id.* at 5.

69 *Id.*

70 *Id.*

71 *Id.* at 4.

general, including non-prostituting women, than non-sex buyers.[72] Unlike non-sex buyers, johns enjoyed the power dynamic inherent in prostitution.[73] When prompted as to their reasons for engaging in prostitution, some johns admitted that it made them feel mentally superior, and others received satisfaction from beating women up.[74]

Pimps target vulnerable youth because people are willing to pay to have sex with children. Demand for sexual acts with children is therefore the driving force behind the child sex trafficking industry.[75] Given that johns are more prone to commit serious acts of violence against women than non-sex buyers and are the driving force behind the child sex trafficking industry, one would reasonably expect state and federal laws to adequately target the demand side of this illegal market. However, this is not the case in New York.[76]

C. *Locations of Exploitation*

Johns patronize sexually exploited youth in a variety of places. Sex enterprises come in both legally sanctioned and illegal forms, often operating as legitimate business enterprises to create a front.[77] The study by the Coalition Against Trafficking in Women found that in the New York Metropolitan area sex businesses are found in "street prostitution, strip clubs, go-go bars, peep or fantasy booth shows, massage parlors, after-hours clubs, private apartments, hotels, escort services and makeshift operations in beauty parlors, restaurants and warehouses."[78]

III. NEW YORK'S LEGAL LANDSCAPE

New York has a number of laws that protect children from sexual exploitation. This section begins by outlining statutes from New York's Penal Law that would seem to apply to all those who sexually exploit children. New York's prostitution statutes, however, separately categorize children that are sold for sex, and thus a different set of penalties and standards of proof apply to those who exploit them. This section ends by taking a closer look at New York's latest attempts to protect commercially sexually exploited youth through the passage of an anti-trafficking law and the Safe Harbour Act.

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72 *Id.*

73 *Id.*

74 *Id.* at 27.

75 *Protected Innocence Challenge*, *supra* note 34, at 35.

76 *See infra* Part V.

77 RAYMOND & HUGHES, *supra* note 43, at 6.

78 *Id.*

A. *Child Rape and Children's Inability to Consent*

According to the penal law of New York, a person under the age of seventeen is unable to consent to sexual intercourse.[79] If an adult engages in sexual intercourse[80] with a child who is under the age of seventeen, she is guilty of raping the child. The degree of the offense depends on the age of the child at the time of the rape.[81] Specifically, the rape of a child rises to the third degree when there is sexual intercourse between a child that is less than seventeen years old and a perpetrator that is twenty-one years old or more.[82] Second-degree rape of a child occurs when there is sexual intercourse between a child less than fifteen years old and a perpetrator that is eighteen years old or older.[83] Finally, a person is guilty of raping a child in the first degree if she has sexual intercourse with a child less than eleven years old, or if the perpetrator is eighteen years old or older and has sexual intercourse with a child that is less than thirteen years old.[84]

All degrees of child rape are serious offenses and are thus felonies. Third-degree rape of a child is a Class E felony, punishable by up to four years in prison.[85] Raping a child in the second degree is a Class D felony, punishable by up to seven years in prison.[86] Finally, first-degree rape of a child, the most serious of all, is a Class B felony with a maximum prison sentence of twenty-five years.[87]

B. *Criminal Sexual Act with a Child*

A criminal sexual act is limited to oral or anal sexual conduct and does not include sexual intercourse.[88] Like the child-rape statutes, the child's age at the time of the assault determines the degree of the offense. A person is guilty of engaging in a criminal sexual act with a child in the third degree when the child is less than seventeen years old.[89] Second-degree charges apply when the child is less than fifteen years old, and the perpetrator is eighteen years old or older.[90] Finally, a person is guilty of engaging in a criminal sexual act with a child in the first degree if the

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79 N.Y. PENAL LAW § 130.05(3)(a) (McKinney 2009 & Supp. 2012).

80 *Id.* §130.00 ("'Sexual intercourse' has its ordinary meaning and occurs upon any penetration, however slight.").

81 *See id.* §§ 130.25–.35 (McKinney 2009).

82 *Id.* § 130.25(2).

83 *Id.* § 130.30(1).

84 *Id.* § 130.35(3)–(4).

85 *Id.* §§ 130.25, 70.00(2)(e) (McKinney 2009 & Supp. 2012).

86 *Id.* §§ 130.30 (McKinney 2009), 70.00(2)(d) (McKinney 2009 & Supp. 2012).

87 *Id.* §§ 130.35 (McKinney 2009), 70.00(2)(b) (McKinney 2009 & Supp. 2012).

88 *See id.* §§ 130.40–.50 (McKinney 2009). "'Sexual intercourse' has its ordinary meaning and occurs upon any penetration, however slight.". *Id.* §130.00

89 *Id.* § 130.40(2).

90 *Id.* § 130.45(1).

child is less than eleven years old, or if the perpetrator is eighteen years old or older, and the child is less than thirteen years old.[91] Child rape and criminal sexual conduct with a child carry the exact same penalties,[92] with criminal sexual act in the third-degree being a Class E felony,[93] second-degree being a Class D felony,[94] and first-degree being a Class B felony.[95]

C. *Sexual Abuse and Aggravated Sexual Abuse of a Child*

The sexual abuse statutes deal with cases that fall short of sexual intercourse.[96] Sexual abuse in the third degree occurs when the perpetrator subjects a person to sexual contact without that person's consent.[97] The statute defines sexual contact as "touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party."[98] A person is guilty of sexual abuse of a child in the second degree when the child is less than fourteen years old.[99] Sexual abuse of a child in the first degree occurs when the child is less than eleven years old.[100] Effective as of November 1, 2011, the first-degree statute also applies to cases where the child is less then thirteen years old and the perpetrator is twenty-one years old or older.[101]

To rise to the level of aggravated sexual abuse, a perpetrator must have inserted a "foreign object in the vagina, urethra, penis, rectum or anus of another person."[102] Aggravated sexual abuse of a child in the third degree occurs when the child is less than eleven years old.[103] When a perpetrator uses a digit instead of a foreign object, she is guilty of aggravated sexual assault in the second degree.[104] Finally, aggravated sexual abuse in the first degree is very similar in language to the third-degree offense because both deal with the use of a foreign object on a

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91 *Id.* § 130.50(3)–(4).

92 *See id.* § 70.00(2) (McKinney 2009 & Supp. 2012).

93 *Id.* § 130.40 (McKinney 2009).

94 *Id.* § 130.45.

95 *Id.* § 130.50.

96 *See* People v. Vicaretti, 388 N.Y.S.2d 410, 419 (App. Div. 1976) (finding that "it appears that the legislative intent in drafting this section was to limit its applicability to cases of sexual contact which fall short of actual intercourse").

97 N.Y. PENAL LAW § 130.55.

98 *Id.* §130.00(3). *See also Vicaretti*, 388 N.Y.S.2d at 419 (finding that "the use of the term 'touching' in defining 'sexual contact' should . . . be strictly construed to apply to only those instances where there is digital manipulation or manual handling or fondling").

99 N.Y. PENAL LAW § 130.60(2).

100 *Id.* § 130.65(3).

101 *Id.* § 130.65(4) (McKinney 2009 & Supp. 2012).

102 *Id.* § 130.00(11) (excluding conduct undertaken for valid medical reasons).

103 *Id.* § 130.66(1)(c).

104 *Id.* § 130.67.

child less than eleven years old,[105] but aggravated sexual abuse in the first degree requires the child to have suffered physical injury as a result of the insertion.[106]

Unlike rape and engaging in a criminal sexual act with a child, sexual abuse tends to be a lesser offense, at least when dealing with third- and second-degree offenses. Specifically, sexual abuse in the third degree is only a Class B misdemeanor punishable by up to three months in prison,[107] and the second-degree offense is a Class A misdemeanor punishable by up to one year in prison.[108] Sexual abuse in the first degree, however, is more severe, classified as a Class D felony punishable with up to seven years in prison.[109] Unsurprisingly, aggravated sexual abuse is also a higher offense, with a third-degree offense being a Class D felony,[110] a second-degree offense being a Class C felony,[111] and a first-degree offense being a Class B felony.[112]

D. Predatory Sexual Assault Against a Child

The New York legislature recognizes that certain sexual offenses against children warrant higher penalties. For this reason, the legislature enacted section 130.96 of the Penal Law. This section provides that

> A person is guilty of predatory sexual assault against a child when, being eighteen years old or more, he or she commits the crime of rape in the first degree, criminal sexual act in the first degree, aggravated sexual abuse in the first degree, or course of sexual conduct against a child in the first degree, as defined in this article, and the victim is less than thirteen years old.[113]

Predatory sexual assault against a child is a Class A-II felony,[114] which is punishable by no less than ten years and up to twenty-five years of prison.[115]

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105 *See id.* §§ 130.66, –.70.

106 *Id.* § 130.70.

107 *Id.* §§ 130.55, 70.15(2) (McKinney 2009).

108 *Id.* §§ 130.60, 70.15(1).

109 *Id.* §§ 130.65, 70.00(2)(d) (McKinney 2009 & Supp. 2012).

110 *Id.* § 130.66. A class D felony is punishable by up to seven years in prison. *Id.* § 70.00(2)(d).

111 *Id.* § 130.67. A class C felony is punishable by up to fifteen years in prison. *Id.* § 70.00(2)(c).

112 *Id.* § 130.70. A class B felony is punishable by up to twenty-five years in prison. *Id.* § 70.00(2)(b).

113 *Id.* § 130.96 (McKinney 2009).

114 *Id.*

115 *Id.* § 70.00(3)(a)(ii) (McKinney 2009 & Supp. 2012).

E. Patronizing and Promoting Prostitution of a Child

Most applicable to the issue at hand are the statutes that directly deal with prostitution offenses. Although, technically, a child under the age of seventeen cannot consent to sex,[116] once money is exchanged the lack of consent presumption no longer applies and that same child could be charged with prostitution.[117] In New York, prostitution is a Class B misdemeanor punishable by up to three months of prison.[118] The child could also be charged with loitering for the purpose of engaging in prostitution, which is only a violation but could rise to a Class B misdemeanor if the child has previously been convicted of prostitution.[119]

In New York, the johns who solicit sex from children face higher penalties than those who solicit sex from adult women; patronizing a prostitute is only a Class A misdemeanor,[120] while patronizing a child under the age of fourteen is a Class E felony with a maximum sentence of four years and a possible fine of up to $5,000.[121] Those who solicit sex from children under the age of eleven face a Class D felony charge, which is punishable by up to seven years in prison and a fine of up to $5,000.[122] However, a john may assert the affirmative defense that he "did not have reasonable grounds to believe that the person was less than the age specified."[123]

Similarly, pimps who promote and profit from the sexual exploitation of children face higher penalties under New York law.[124] Promoting adult prostitution, like soliciting adults for sex, is only a Class A misde-

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116 *Id.* § 130.05(3)(a).

117 *Id.* § 230.00 (McKinney 2008) ("A person is guilty of prostitution when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee."). *But see* Safe Harbour for Exploited Children Act, N.Y. SOC. SERV. LAW § 447-b (McKinney 2009) (effective Apr. 1, 2010) (this Act gives family court judges the discretion to defer prosecution of sexually exploited children by classifying them as "persons in need of supervision"). *See also infra* Part III.G.

118 N.Y. PENAL LAW §§ 230.00 (McKinney 2008), 70.15(2) (McKinney 2009).

119 *Id.* § 240.37(2) (McKinney 2008). This section also applies to those who loiter for the purpose of soliciting prostitutes and promoting prostitution. *Id.* § 240.37(2)–(3)

120 *Id.* § 230.04.

121 *Id.* §§ 230.05 (McKinney 2008), 70.00(2)(e) (McKinney 2009), 80.00(1) (McKinney 2009).

122 *Id.* §§ 230.06 (McKinney 2008), 70.00(2)(d) (McKinney 2009), 80.00(1) (McKinney 2009).

123 *Id.* § 230.07 (McKinney 2008).

124 *Id.* § 230.15. The New York Penal code has an expansive definition of "promoting prostitution," including, for instance, hotel and motel owners who knowingly provide premises for prostitution. *See id.* § 230.15(1) (stating that a person advances prostitution when he or she "provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid or facilitate an act or enterprise of prostitution").

meanor.[125] Promoting the prostitution of a person under the age of nineteen, however, is a Class D felony.[126] When the exploited children fall under the age of sixteen, pimps face Class C felony charges with a maximum prison sentence of up to fifteen years.[127] When the minor is either less than eleven years old[128] or is less than sixteen years old but is compelled to engage in prostitution by force or intimidation,[129] Class B felony charges apply. A Class B felony is punishable by up to a sentence of twenty-five years.[130]

A pimp can also be charged with luring a child, if:

> he or she lures a child [under seventeen] into a motor vehicle, aircraft, watercraft, isolated area, building, or part thereof, for the purpose of committing against such child any of the following offenses: . . . an offense as defined in sections 230.30 [promoting prostitution in the second degree], 230.33 [compelling prostitution] or 230.34 [sex trafficking] of this chapter.[131]

Such an offense is a Class E felony; however, if the underlying offense intended by a pimp against the child constituted a Class A or B felony, then the offense of luring a child is a Class C or D felony, respectively.[132] All felonies may include a fine of up to $5,000 or "double the amount of the defendant's gain from the commission of the crime."[133]

F. *New York's Anti-Trafficking Law and the Federal Trafficking Victims Protection Act*

Although most people normally think of human trafficking as an international, cross-border phenomenon, domestic human trafficking is also illegal under New York law. The domestic sex trafficking of children is the "sexual exploitation of American children within U.S. borders [for profit] and is synonymous with child sex slavery, child sex trafficking, prostitution of children, and commercial sexual exploitation of children."[134] In 2007, New York enacted an anti-trafficking law, which

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125 *Id.* § 230.20. A class A misdemeanor is punishable by up to one year in prison. *Id.* § 70.15 (McKinney 2009).

126 *Id.* § 230.25(2) (McKinney 2008). A class D felony is punishable by up to seven years in prison. *Id.* § 70.00(2)(d) (McKinney 2009 & Supp. 2012).

127 *Id.* §§ 230.30 (McKinney 2008), 70.00(2)(c) (McKinney 2009 & Supp. 2012).

128 *Id.* § 230.32 (McKinney 2008).

129 *Id.* § 230.33.

130 *Id.* § 70.00(2)(b) (McKinney 2009 & Supp. 2012).

131 *Id.* § 120.70(1) (McKinney 2009).

132 *Id.* § 120.70(2).

133 *Id.* § 80.00(1).

134 *Protected Innocence Challenge*, *supra* note 34, at 7.

addresses both labor trafficking[135] and sex trafficking.[136] The law's provisions on sex trafficking are most applicable to this Note's discussion.

Under current law, a person is guilty of sex trafficking if she intentionally advances or profits from prostitution by doing the following: (1) providing the victim with certain drugs;[137] (2) making material false statements;[138] (3) withholding or destroying government identification documents;[139] (4) requiring repayment of a debt;[140] or (5) using force or engaging in any scheme, plan, or pattern to compel or induce such person to engage in prostitution by making that person fearful of one of eight enumerated actions or consequences against her.[141] Sex trafficking is a Class B felony with a maximum sentence of twenty-five years and fines up to $5,000 or "double the amount of the defendant's gain from the commission of the crime."[142]

Victims of sex trafficking are immune from accomplice liability.[143] Furthermore, if a person is convicted under section 230.00 of the Penal Law (prostitution), and the offense is the result of sex trafficking under section 230.34 or the federal Trafficking Victims Protection Act, she can move to vacate the judgment of those offenses.[144]

The New York legislature recognized that victims of sex trafficking also need specialized social services, and therefore entrusted the New York State Office of Temporary and Disability Assistance and the Division of Criminal Justice Services with ensuring that they receive such services.[145]

The Trafficking Victims Protection Act (TVPA) was enacted by Congress in 2000 during the Clinton Administration. TVPA defines sex trafficking as the "recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act."[146] The purpose of TVPA is "to combat . . . a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their vic-

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135 N.Y. PENAL LAW § 135.35 (new Penal Law section that created the crime of "Labor Trafficking").

136 *Id.* § 230.34 (McKinney 2008) (new Penal Law section that created the crime of "Sex Trafficking").

137 *Id.* § 230.34(1).

138 *Id.* § 230.34(2).

139 *Id.* § 230.34(3).

140 *Id.* § 230.34(4).

141 *Id.* § 230.34(5).

142 *Id.* §§ 230.34 (McKinney 2008), 70.00(2)(b) (McKinney 2009 & Supp. 2012), 80.00(1) (McKinney 2009).

143 *Id.* § 230.36 (McKinney 2008).

144 N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney 2005).

145 *See* N.Y. SOC. SERV. LAW § 483-cc (McKinney 2003).

146 Trafficking Victims Protection Act, 22 U.S.C. § 7102(9) (2006).

tims."[147] To accomplish these goals, Congress created a four-pronged approach that includes the following: (1) instituting preventative border measures, (2) providing tougher penalties for traffickers, (3) monitoring other nations' trafficking activities, and (4) providing assistance and protection to trafficked victims on United States soil.[148]

Only victims of "severe forms of trafficking in persons" are eligible to receive services and benefits under federal and state programs.[149] TVPA defines severe forms of trafficking as commercial sex acts "induced by force, fraud, or coercion," or those in which the person induced is under the age of eighteen.[150] Implicit in the TVPA is a presumption that persons under the age of eighteen cannot consent to sexual acts and are therefore victims. New York's sex trafficking law lacks such a presumption and instead requires that all victims of sex trafficking, regardless of age, establish some form of coercion in order to receive services.[151]

Under TVPA, sex traffickers whose victims are between fourteen and seventeen years of age are guilty of a Class A felony, so they face a mandatory minimum sentence of ten years to life imprisonment and fines up to $250,000.[152] If the child is under the age of fourteen or force, fraud, or coercion is used, the trafficker faces a mandatory minimum sentence of fifteen years to life imprisonment and a fine of up to $250,000.[153]

G. The Safe Harbour for Exploited Children Act

Until recently, youth arrested for prostitution in New York were subject to criminal proceedings and faced up to three months in prison.[154] For years, this legal standard has been at odds with New York's consent laws. Under New York's Penal Law, a person under the age of seventeen is unable to consent to sexual intercourse.[155] However, once money is exchanged for sexual acts, that same child faces criminal prostitution charges.[156] In 2008, Governor Paterson signed into law the Safe Harbour Act,[157] which decriminalized child prostitution and recog-

147 *Id.* § 7101(a).

148 *See* Schwartz, *supra* note 2 at 254.

149 22 U.S.C. § 7105(b)(1)(A) (2006).

150 *Id.* § 7102(8)(A) (2006).

151 *See* N.Y. PENAL LAW § 230.34 (McKinney 2008).

152 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3) (2006).

153 *Id.* §§ 1591(b)(1), 3559(a)(1), 3571(b)(3).

154 *See* N.Y. PENAL LAW §§ 230.00 (McKinney 2008), 70.15(2) (McKinney 2009).

155 *Id.* § 130.05(3)(a) (McKinney 2009 & Supp. 2012).

156 *Id.* § 230.00 (McKinney 2008).

157 *See* Safe Harbour for Exploited Children Act, N.Y. SOC. SERV. LAW § 447 (McKinney 2009). For a detailed look at the historical development of the Safe Harbour Act see Megan

nized that these children are victims—not criminals—in need of special social services.[158] Governor Paterson publicly noted that

> [f]or too long we have been disciplining young children who are the victims of brutal sexual exploitation instead of providing them with the necessary services to reintegrate them into society and ensure they receive adequate crisis intervention . . . . This law . . . will ensure that sexually exploited youth receive counseling and emergency services as well as long[-]term housing solutions.[159]

As of April 1, 2010, the Safe Harbour Act amended New York's Family Court Act and Social Services Law in order to provide specialized services and protection for sexually exploited children. A sexually exploited child is defined as

> any person under the age of eighteen who has been subject to sexual exploitation because he or she: (a) is the victim of the crime of sex trafficking . . . ; (b) engages in . . . [prostitution]; (c) is a victim of the crime of compelling prostitution . . . ; (d) engages in acts or conduct described in article two hundred sixty-three or section 240.37 of the penal law, [which includes stripping, appearing in a film doing sexual acts, and loitering for the purpose of engaging in prostitution].[160]

The Safe Harbour Act has four major provisions that help serve commercially sexually exploited youth, which include social services, planning, law enforcement training, and juvenile justice.[161]

1. Social Services

As discussed at length in Part I of this Note, homeless and runaway youth are at high risk of falling prey to "the life."[162] Further, commercially sexually exploited youth typically have a history of severe emotional and sexual abuse.[163] Shelter and social services are imperative to help these children regain their lives. The Safe Harbour Act requires, to

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Annitto, *Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors*, 30 YALE L. & POL REV. 1, 46 (2011).

158 Press Release, Governor Paterson, Governor Paterson Signs Law to Protect Sexually Exploited Youth (Sept. 26, 2008), *available at* http://www.governor.ny.gov/archive/paterson/press/press_0926082.html.

159 *Id.*

160 N.Y. SOC. SERV. LAW § 447-a.

161 *Id.* § 447-b.

162 *See* Birckhead, *supra* note 18, at 1060–61.

163 *See* Schwartz, *supra* note 2, at 240.

the extent that funds are available, that every local social services district provide for the welfare services needs of sexually exploited youth and secure short-term shelter or crisis intervention programs.[164] Districts can use existing shelters and programs so long as the staff receives training on sexually exploited youth that is approved by the Office of Children and Family Services (OCFS).[165]

Aside from short-term housing, the Safe Harbour Act requires OCFS to contract with a not-for-profit organization experienced in working with sexually exploited youth to operate at least one long-term safe house at a location not readily accessible by perpetrators of sexual exploitation.[166] This mandate only applies if funds are specifically appropriated by the state.[167]

2. Planning

There is currently no accurate measure of the number of sexually exploited youth in the United States, let alone in New York.[168] To better serve this population, service providers and legislators need this information. The Safe Harbour Act sought to address this problem by requiring the local commissioner of social services to determine the number of sexually exploited children in each district in 2010 and every five years thereafter.[169]

3. Law Enforcement Training

Because of the underground nature of the child sex industry and the widespread belief that this type of exploitation does not occur in the United States, commercially sexually exploited youth are often misidentified.[170] Furthermore, until New York passed the Safe Harbour Act, commercially sexually exploited youth were primarily viewed as juvenile delinquents and treated as such.[171] Therefore, the focus of law enforcement had been on arresting these girls to get them off the streets as opposed to helping them obtain much needed services. Misidentification also occurs because pimps train commercially sexually exploited youth to convince law enforcement officers that they are over eighteen.[172] As

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164 N.Y. SOC. SERV. LAW § 447-b(1).

165 *Id.*

166 *Id.* § 447-b(5).

167 *Id.*

168 *See* ESTES & WEINER, *supra* note 15, at 239.

169 N.Y. SOC. SERV. LAW § 447-b(3).

170 N.Y.C. COUNCIL HUMAN SERVICES & GOVERNMENTAL AFFAIRS DIVISIONS, OVERSIGHT: IMPLEMENTATION OF THE SAFE HARBOUR ACT 11 (Dec. 5, 2011) [hereinafter OVERSIGHT COMMITTEE REPORT].

171 *See supra* note 157 and accompanying text.

172 OVERSIGHT COMMITTEE REPORT, *supra* note 170, at 11–12.

part of their "grooming" process, pimps provide the girls with fake IDs and birth certificates.[173] If arrested, many girls slip through the system after spending the night in jail or after their pimps bail them out.[174]

The Safe Harbour Act gives the local social services commissioner the authority to contract with a not-for-profit organization, experienced in working with sexually exploited youth, to train law enforcement in recognizing and responding to the service needs of this vulnerable population.[175]

4. Juvenile Justice

Perhaps one of the most powerful changes brought about by the Safe Harbour Act is the paradigm shift that commercially sexually exploited youth are indeed victims. Under the amended Family Court Act, there is a presumption that a child who is charged with a prostitution offense is a victim of a severe form of trafficking under the TVPA.[176] This presumption allows the youth to motion the court to substitute a juvenile delinquent petition for a person in need of supervision (PINS) petition.[177] It is within the court's discretion, however, to continue with a juvenile delinquent petition if the youth 1) had been previously adjudicated as a juvenile delinquent for a prostitution offense, 2) was an adult, or 3) is currently unwilling to cooperate with the court's mandated services for sexually exploited youth.[178]

IV. NEW YORK'S EFFORTS TO PROTECT COMMERCIALLY SEXUALLY EXPLOITED CHILDREN FALL SHORT

Although New York has taken steps to combat the sex trafficking of children through the Safe Harbour Act and its own anti-trafficking law, there are a myriad of problems with both pieces of legislation that has prevented the state from truly making a difference. Even after it became

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173 *Id.* at 12.

174 ECPAT-USA, INC., WHO IS THERE TO HELP US? HOW THE SYSTEM FAILS SEXUALLY EXPLOITED GIRLS IN THE UNITED STATES 20 (2005), *available at* http://ecpatusa.org/wp-content/uploads/2010/11/Who-Is-There-to-Help-Us.3.pdf.

175 Safe Harbour for Exploited Children Act, N.Y. SOC. SERV. LAW § 447-b(6) (McKinney 2009).

176 N.Y. FAM. CT. ACT § 311.4(3) (McKinney 2009).

177 *Id.* A "Person in Need of Supervision" is "[a] person less than eighteen years of age who does not attend school in accordance with the provisions of part one of article sixty-five of the education law or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of a parent or other person legally responsible for such child's care, or other lawful authority, or who violates the provisions of section 221.05 or 230.00 [prostitution] of the penal law, or who appears to be a sexually exploited child[,] . . . but only if the child consents to the filing of a petition under this article." *Id.* § 712(a).

178 *Id.* § 311.4(3).

the first state to pass a safe harbor law,[179] Shared Hope International, an organization committed to eradicating sexual slavery, gave New York a "D" for its overall legal framework addressing domestic minor sex trafficking.[180] There are three critical problems with New York's current legal framework: 1) the Safe Harbour Act is an unfunded mandate, 2) New York does not protect all youth under the age of eighteen, and 3) the state penalties for those who promote child sex trafficking are not as severe as the federal penalties.

A. *The Safe Harbour for Exploited Children Act is an Unfunded Mandate*

On December 5, 2011, New York City Council Committees on Youth Services, Juvenile Justice, and Women's Issues, held a joint hearing titled "Oversight: Implementation of the Safe Harbour Act."[181] The committee report and the testimonies provided by the Empire State Coalition of Youth and Family Services, End Child Prostitution and Trafficking (ECPAT-USA), the Administration for Children's Services (ACS), and other service providers, all had a common critique—the Safe Harbour Act is an unfunded mandate.[182] As Council Member Ferreras, chair of the Committee on Women's Issues, put it, "[t]he bill itself was written in such a way that makes it possible for the state or local districts to wiggle out of their commitment to [commercially sexually exploited] children."[183]

Although the Safe Harbour Act requires local districts to provide short-term shelter[184] and OCFS to contract out for the operation of at least one long-term safe house,[185] these mandates only apply "to the extent that funds are available"[186] or are specifically appropriated.[187] In New York City alone, the number of emergency, transitional, and permanent housing programs that adequately meet the needs of sexually exploited youth are severely limited.[188] In fact, there are only two

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179 *Oversight Hearing*, *supra* note 32, at 141 (statement of Max Mayer, Assoc. Dir. at ECPAT-USA).

180 *Protected Innocence Challenge*, *supra* note 34, at 170. The study graded each state on the basis of its legal framework addressing critical principles of domestic minor sex trafficking: "eliminating demand, prosecuting the traffickers, identifying the victims, and providing protection, access to services, and shelter for victims." *Id.* at 17.

181 *See generally Oversight Hearing*, *supra* note 32.

182 *See id.* at 9 (statement of Chairperson Julissa Ferreras).

183 *Id.*

184 Safe Harbour for Exploited Children Act, N.Y. SOC. SERV. LAW § 447-b(1) (McKinney 2009).

185 *Id.* § 447-b(5).

186 *Id.* § 447-b(1).

187 *Id.* § 447-b(5).

188 *Oversight Hearing*, *supra* note 32, at 114 (statement of James Bolas, Dir. of Educ. for the Empire State Coal. of Youth and Family Servs.).

residential programs that provide intensive, specialized care for girls who have been sexually trafficked.[189] The Gateways program, operated by the Jewish Child Care Association,[190] serves girls ages twelve to sixteen but only has residential capacity for twelve girls.[191] Girls Educational Mentoring Services (GEMS), a nationally recognized community-based organization that specifically serves sexually exploited youth, also operates a transitional independent living program where girls ages sixteen to twenty-one can reside for up to eighteen months.[192]

Unfortunately, New York has yet to appropriate funds to create a long-term safe house.[193] In fact, since 2007 the state has cut eighty percent of the funding for runaway and homeless youth.[194] With current shelters at capacity, girls have to wait weeks, even months, at interim shelters that do not have the adequate services to meet their immediate needs, sometimes leaving girls with no alternative but to return to their exploiters.[195] Without adequate funding, the spirit of the Safe Harbour Act will never be fully realized, leaving New York's sexually exploited youth without the protection and services they so desperately need.

B. New York Does Not Equally Protect All Sexually Exploited Youth

Neither New York's anti-trafficking statute nor the Safe Harbour Act protect all sexually exploited youth under the age of eighteen. Additionally, inconsistencies with federal trafficking laws and between the Safe Harbour Act and New York's Family Court Act make it difficult to identify which youth qualify for needed services.

New York's sex trafficking law is not as protective as the federal TVPA. Unlike TVPA, New York's anti-trafficking law lacks the presumption that youth are *per se* coerced due to their inability to consent.[196] The law thus requires all victims of sex trafficking, including minors, to establish some form of coercion to receive services.[197]

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189 *See id.* at 20 (Exec. Dir. of the Family Assessment Program at the Admin. for Children's Servs.).

190 *Id.*

191 *Id.* at 72.

192 *Transitional & Supportive Housing*, GEMS-GIRLS.ORG, http://www.gems-girls.org/what-we-do/our-services/intervention/transitional-supportive-housing (last visited Dec. 21, 2011). GEMS also operates the Imani House for young women ages eighteen to twenty-three "who are fleeing domestic violence, dating violence, sexual assault, or stalking . . . ." *Id.*

193 *Oversight Hearing, supra* note 32, at 135 (statement of Nancy Downing, Dir. of Advocacy, Covenant House N.Y.).

194 *Id.*

195 *See id.* at 88–90 (statement of Lauren Hersh, Chief of the Sex Trafficking Unit, Kings County Dist. Att'y. Office).

196 *See* N.Y. PENAL LAW § 230.34 (McKinney 2008).

197 *Id.*

New York's coercion requirement is also contrary to the 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which the United States signed.[198] The protocol has a much more expansive definition of "trafficking in persons" and does not require a showing of force, fraud, or coercion when the victim is under the age of eighteen.[199] It is also applicable regardless of the child's consent.[200] Ultimately, in comparison, New York places a higher burden on exploited youth in order to receive needed services under its anti-trafficking law.

Equally concerning is the Safe Harbour Act's lack of protection for sixteen and seventeen year-olds caught up in the criminal system. Although the Act's definition of sexually exploited children includes those under the age of eighteen,[201] youth who are over the age of sixteen do not fall within the jurisdiction of the Family Court.[202] Therefore, the Act's presumption for converting a juvenile delinquent petition into a PINS petition does not apply to those over the age of sixteen. Unfortunately, this means that commercially sexually exploited youth ages sixteen and seventeen may still be tried as adults in the criminal justice system.

In order to ensure that all sexually exploited youth receive the services and protection that they deserve, New York should amend both its anti-trafficking statute and the Safe Harbour Act by eliminating the coercion requirement and by creating a path that allows all youth under the age of eighteen to qualify for PINS petitions.

C. *New York's Penalties for Promoters are Not as Severe as Federal Penalties*

Inconsistent penalties on the federal and state levels allow those who sexually exploit youth for profit to shop for states with weaker penalties. New York's sex trafficking statute and penal law provide weaker penalties for promoters than those provided in the federal TVPA. Furthermore, the Safe Harbour Act does not provide for enhanced penalties for promoters.[203]

As previously discussed, the federal government has taken a zero-tolerance approach to the commercial sexual exploitation of children by

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198 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, *opened for signature* Dec. 12, 2000, 2237 U.N.T.S. 319.

199 *Id.*

200 *Id.*

201 Safe Harbour for Exploited Children Act, N.Y. SOC. SERV. LAW § 447-a (McKinney 2009).

202 *See* N.Y. FAM. CT. ACT § 301.2 (McKinney 2009). "Juvenile delinquent" means a person over seven and less than sixteen years of age. *Id.*

203 *See generally* N.Y. SOC. SERV. LAW § 447.

making the crime of sex trafficking persons under the age of eighteen punishable by up to life imprisonment, regardless of consent.[204] Because penalties and standards are inconsistent amongst New York's sex trafficking and penal laws, it is unclear what stand the state is taking against promoters and traffickers.[205] Perhaps more telling is the fact that neither law subjects promoters to more than twenty-five years in prison, even if the exploited child is less than eleven years old.[206] In order to establish a clear standard and to deter traffickers from conducting their business within New York's borders, the state should adopt TVPA's penalties.

V. THE MISSING PIECE: NEW YORK MUST SERIOUSLY ADDRESS THE DEMAND SIDE

Earlier this year, former sportscaster Marvell Scott pled guilty to misdemeanor endangering the welfare of a child after being charged with statutory rape and patronizing a prostitute.[207] Although a Manhattan Supreme Court judge found that Scott had engaged in sexual intercourse with a fourteen-year-old, Scott was only required to serve twenty days of community service.[208] Simply put, Scott got a slap on the wrist for paying to have sex with an exploited minor. Aside from the problems discussed in Part IV, New York's biggest failure in protecting commercially sexually exploited youth is the state's ignorance of the demand side of the industry. By taking a lax approach to the demand side of child sexual exploitation, New York fails to break the supply and demand chain that allows traffickers to profit.

The sex trafficking of children is demand driven.[209] The laws of economics tell us that supply typically increases to meet a growing demand. "Evidence suggests that supply is becoming younger in response

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204 18 U.S.C. § 1591(b)(1)–(2) (2006). *See also* discussion *supra* Part III.F.

205 Under New York's sex trafficking statute, traffickers face at most twenty-five years' imprisonment, and even then coercion must be proven for victims to receive services. *See* N.Y. PENAL LAW §§ 230.34 (McKinney 2008), 70.00(2)(b) (McKinney 2009 & Supp. 2012). The penal law varies on the maximum sentence for promoters depending on the age of the sexually exploited child; if the child is under the age of eleven, the promoter faces up to twenty-five years and if the child is under the age of sixteen, the promoter faces up to fifteen years. *See id.* §§ 230.30 (McKinney 2008), 230.32 (McKinney 2008), 70.00 (McKinney 2009 & Supp. 2012). Promoters who exploit those who are sixteen to seventeen years old only face a maximum sentence of seven years. *See id.* §§ 230.25(2) (McKinney 2008), 70.00(2)(d) (McKinney 2009 & Supp. 2012).

206 *See* sources cited *supra* note 205.

207 Laura Italiano, *Former Sportscaster Marvell Scott Pleads Guilty in Child Prostitute Case*, N.Y. POST, Aug. 16, 2011, http://www.nypost.com/p/news/local/former_sportscaster_marvell_scott_7kv1ZSCjvJZK4FaXTZCz6L.

208 *Id.*

209 Linda A. Smith et. al., *The National Report on Domestic Minor Sex Trafficking: America's Prostituted Children*, SHARED HOPE INT'L 16 (May 2009), www.sharedhope.org/Portals/0/Documents/SHI_National_Report_on_DMST_2009.pdf.

to buyers' demands for youth due to perceptions of healthiness and vulnerability."[210] New York's legal framework merely focuses on two corners of the minor sex trafficking triangle, supply and distribution. Neither New York's sex trafficking statute nor the Safe Harbour Act penalizes the buyers.[211] Thus, prosecutors and law enforcement officers only have New York's Penal Law to turn to.

Although New York has higher penalties for johns who patronize children for sex, these penalties are not severe enough nor do they protect all commercially sexually exploited children. The maximum prison sentence that a john potentially faces for having sex with a minor is seven years, and that only applies if the child is under eleven years old.[212] Those who buy sex with fourteen- to eighteen-year-olds are prosecuted under the regular patronizing offense—a misdemeanor with a maximum sentence of one year and a fine of up to $1,000.[213] Furthermore, buyers of fourteen- to eighteen-year-olds are not required to register as sex offenders.[214] In comparison to the federal TVPA, these penalties are significantly less harsh. Under TVPA, buyers—much like traffickers—face ten years to life in prison if the victim is under the age of eighteen.[215] If the victim is under fourteen, buyers face fifteen years to life imprisonment.[216]

A study revealed that sex buyers are most deterred from buying sex if they are required to register as sex offenders, if their photo or name was publicized, and/or if they had to serve significant time in jail.[217] These findings suggest that New York is not doing enough to deter johns from exploiting children. If New York truly desires to combat this dire problem, legislators need to take a stronger stand against buyers. To do this, there are four legislative changes that New York can implement. First, New York should amend its anti-trafficking law to include penalties for buyers that match those under the federal TVPA. Second, New York should make sure that all of its laws dealing with this issue penalize those who buy sex with all children under the age of eighteen. Third, New York should require all buyers of child sex to register as sex offenders. Finally, New York should embark on a public service campaign that publicizes at least the names of those convicted for patronizing a minor.

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210 *Id.*

211 *See generally* N.Y. PENAL LAW § 230.34 (McKinney 2008); Safe Harbour for Exploited Children Act, N.Y. SOC. SERV. LAW § 447 (McKinney 2009).

212 N.Y. PENAL LAW §§ 230.06 (McKinney 2008), 70.00(2)(d) (McKinney 2009 & Supp. 2012).

213 *Id.* §§ 230.04 (McKinney 2008), 70.15(1) (McKinney 2009), 80.05(1) (McKinney 2009).

214 *See generally* N.Y. CORRECT. LAW § 168-a (McKinney 2011).

215 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3) (2006).

216 *Id.* §§ 1591(b)(1), 3559(a)(1), 3571(b)(3).

217 FARLEY ET AL., *supra* note 63, at 5.

CONCLUSION

The commercial sexual exploitation of children is a plague that effects our nation's most vulnerable youth. Children sold for sex are in a never-ending cycle of abuse and face many hurdles as they attempt to normalize their lives: lack of safe housing and adequate services, permanent criminal records, and exploiters that are not deterred by light penalties that contain a myriad of loopholes.

The federal government has taken a zero-tolerance approach to fighting the child sex trafficking industry through comprehensive legislation that addresses the needs of victims and significantly penalizes both traffickers and buyers.[218] Although New York has taken commendable steps to combat the issue within its borders, its legislative efforts fall short, thereby leaving commercially sexually exploited youth unprotected and underserved.

This Note explored the gaps in New York's legislative scheme and identified the four following recommendations for policymakers: (1) allocate adequate funding under the Safe Harbour Act for safe housing; (2) amend both the anti-trafficking statute and the Safe Harbour Act to protect all children under the age of eighteen; (3) adopt the TVPA's penalties against promoters and traffickers; and (4) target the demand side of the child sex industry by providing penalties that match the TVPA's and by embarking on a public service campaign to further deter buyers. Children are being sold for sex in our own backyards and unless New York takes a stronger stand against this dire problem, no child within its borders is safe.[219]

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218 This Note does not suggest that there are no gaps in the federal TVPA; that discussion is beyond the realm of this Note.

219 After this Note was written, the New York State Anti-Trafficking Coalition proposed the Trafficking Victims Protection and Justice Act that would improve the State's efforts to end human trafficking by enhancing protection for sexually exploited children. Many of the issues discussed in this Note are addressed by the bill. First, the bill creates the felony sex offense of "aggravated patronizing a minor," aligning the penalties for patronizing with those for statutory rape. Second, the bill eliminates the affirmative defense to patronizing that the defendant did not have reasonable grounds to believe that the victim was a minor. Third, the bill aligns New York with the Federal TVPA by removing New York's coercion requirement in prosecutions for the sex trafficking of children. Fourth, the bill amends the Criminal Procedure Law in order to provide protection for all minor trafficking victims including sixteen and seventeen-year-olds. Fifth, the bill significantly increases penalties for sex traffickers. These are just a few of the instrumental changes proposed by the bill. The bill passed the Senate on June 21, 2012 but failed in the Assembly. *See* N.Y. Assemb. B. 9804, 2011 Leg., 235th Sess. (N.Y. 2012).