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# YALE LAW & POLICY REVIEW

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## Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors

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## INTRODUCTION

Elana was thirteen when her mother kicked her out of the house.<sup>1</sup> As a result of her mother's neglect, she landed in foster care in a group home run by the city. Frustrated by the fights and the bullying that she encountered at the group home, Elana often spent time on the streets. During this time, she met a man and woman who said that they would take care of her if she came to live with them. They said they would provide her with a comfortable home, nice clothes, and would help her "make money." Elana was enticed by the promise of things that she did not have at home or in foster care and agreed to go with them.

Soon, Elana found herself in unfamiliar surroundings and away from the city she knew. She was forced to perform sexual acts for payment with multiple adult males per day, enduring threats and abuse by the couple, from whom she was afraid to flee. With no familial support, she was further isolated, unsure where to go, and feared repercussions for having run away from foster care. She was finally discovered after enduring six months of this abuse, when authorities were alerted to a child prostitution ring being perpetrated by the couple, essentially her abductors.

The legal status of children in Elana's situation currently varies widely among states. Most states view and treat them as offenders for prostitution, and they are often detained and prosecuted.<sup>2</sup> However, feder-

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1. This story is a real case vignette, unfortunately not uncommon, from the author's previous work representing juveniles at the Juvenile Rights Division of the Legal Aid Society of New York. Elana's real name has been changed to protect her privacy.

2. See Ian Urbina, *For Runaways, Sex Buys Survival*, N.Y. TIMES, Oct. 27, 2009, at A1 ("If a 45-year-old man had sex with a 14-year-old girl and no money changed hands, . . . he was likely to get jail time for statutory rape . . . . If the same man left \$80 on the table after having sex with her, she would probably be locked up for prostitution and he would probably go home with a fine as a john." (quoting Byron A. Fassett, Sergeant, Dallas Police Dep't)).

al law<sup>3</sup> and a few states<sup>4</sup> have begun to recognize these children as victims who have endured sexual exploitation and statutory rape. Indeed, these children have been more readily recognized as victims under federal sex trafficking laws, particularly if they are born outside of the United States.<sup>5</sup> Many victims and survivors of this exploitation, upon discovery on the streets or otherwise, are arrested, prosecuted, locked up with an array of offenders, and offered little relevant treatment or care for their trauma.<sup>6</sup> Recently, because of these opposing

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3. Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7102 (2006). Federal trafficking law defines one form of severe trafficking in persons as “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age.” *Id.* § 7102(8)(A) (2006); *see infra* Subsection II.C.1.
  4. *See infra* Part III (describing four recent state legislative approaches to reduce or eliminate the prosecution of minors for prostitution within those states).
  5. *See infra* Subsection II.C.1 (discussing the statutory history of the Trafficking Victims Protection Act of 2000 (TVPA) and its original focus on foreign-born victims of commercial sexual exploitation).
  6. *See Domestic Minor Sex Trafficking: Hearing on H.R. 5575 Before the Subcomm. on Crime, Terrorism, & Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 17 (2010) [hereinafter *Domestic Minor Sex Trafficking Hearing*] (statement of Rep. Ted Poe) (noting that domestic minor victims of commercial sexual exploitation are often arrested and that the short-term services they receive “do not even begin to address the severe physical or psychological trauma that these girls have encountered”); FRANCINE T. SHERMAN, DETENTION REFORM AND GIRLS: CHALLENGES AND SOLUTIONS 23-28 (Pathways to Juvenile Det. Reform Ser. No. 13, 2005) (noting the lack of appropriate psychological and medical services available in girls’ juvenile detention facilities despite the fact that an overwhelming number of girls in detention have been subject to physical and sexual abuse); Stephanie Halter, *Factors That Influence Police Conceptualizations of Girls Involved in Prostitution in Six U.S. Cities: Child Sexual Exploitation Victims or Delinquents?*, 15 CHILD MALTREATMENT 152, 158 (2010) (identifying deficiencies in the current approach to commercial sexual exploitation cases, which uses detention as a penalty, and noting that “youth’s experience in detention may not provide them with the necessary treatment and may impact their likelihood of engaging in crime in the future”). One study, which interviewed girls in detention centers across four California counties in 1998, found that 56% of the girls interviewed reported past sexual abuse, SHERMAN, *supra*, at 21; however, juvenile detention systematically provides little to no access to relevant programming to address past sexual abuses and traumas, *id.* at 24-25. Put simply, “[i]f girls enter detention particularly vulnerable due to their chaotic home lives, histories of trauma, and high rates of mental illness, conditions in detention often exacerbate their difficulties.” *Id.* at 24. Another study, which interviewed girls in detention and residential programs in five cities, examined girls’ confinement conditions and found that, in one facility, the lack of services to address the girls’ involvement in prostitution was a pressing issue amongst the girls interviewed. *See GIRLS’ JUSTICE INITIATIVE, GIRLS IN THE JUVENILE JUSTICE SYSTEM: PERSPECTIVES ON SERVICES AND CONDITIONS OF CONFINEMENT* 1, 6 (2003). Staff members

perspectives and legal conflicts, courts and legislators have begun to change course and advance novel interpretations of otherwise competing laws as well as entirely new legal frameworks.

This Article discusses the competing legal practices that affect youth who are subjected to commercial sexual exploitation, or “domestic minor sex trafficking,”<sup>7</sup> within the United States. The arrest of children for prostitution, a form of commercial sexual exploitation, illustrates the confused legal status of minors in our society and raises several questions. When should society treat adolescents as children versus as adults? To what extent should society consider children’s developmental stages and their limited capacity to consent when shaping policy or laws in general that affect them? Modern scientific research has shown that underdevelopment in certain areas of the adolescent brain affects behavior, decision making, and the ability to understand consequences.<sup>8</sup>

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at one facility noted that they “lacked the gender and culturally responsive programming needed to address patterns of sexual exploitation and victimization common among detained girls,” despite housing a significant number of prostituted girls. *Id.* at 8. Attorneys, judges, and girls noted the failure by staff members in facilities to identify and address related medical issues, such as sexually transmitted diseases. *Id.* at 5.

7. The terms “commercial sexual exploitation of youth” and “domestic sex trafficking of minors” are used interchangeably by advocates and policymakers in the United States as this exploitation is now recognized as trafficking under federal law. In this Article, the terms are likewise used interchangeably. On the state level, the term “commercial sexual exploitation of youth” is used with slightly greater regularity. *See, e.g.*, WASH. REV. CODE § 13.32A.030(17) (2010 & Supp. 2011) (defining “sexually exploited child” as a person under the age of eighteen who is a victim of the crime of commercial sexual abuse of a minor); FRANCES GRAGG ET AL., N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., NEW YORK PREVALENCE STUDY OF COMMERCIAL SEXUALLY EXPLOITED CHILDREN: FINAL REPORT 1 (2007). On the federal level, however, the emerging language in policy discourse is “domestic sex trafficking of minors.” For example, this is demonstrated by terms in federal hearing titles, such as the Domestic Minor Sex Trafficking Hearing, *supra* note 6. This Article does not use the term “youth prostitute” or “teenage prostitute” as these are inaccurate and misleading descriptions of this social problem. This Article does, however, explain that youth are “prostituted,” as that captures the common understanding of the practice whereby a third party, often referred to as a pimp, causes a girl to be prostituted within the meaning of the applicable penal code.
8. *See generally* Brief for the American Psychological Ass’n et al. as Amici Curiae Supporting Petitioners, *Graham v. Florida*, 130 S. Ct. 2011 (2010) (No. 08-7412), *Sullivan v. Florida* (2010) (No. 08-7621), 2009 WL 2236778 (discussing comprehensive scientific studies of the adolescent brain and its comparative decision-making capabilities versus the fully developed adult brain). Furthermore, the adolescent brain is not fully developed in areas affecting risk evaluation, emotional regulation, and impulse control. *Id.* at 23; *see also* Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable than Adults*, 18 BEHAV. SCI. & L. 741 (2000).

However, the justice system often determines culpability and punishment as if children possess adult capacities.<sup>9</sup> Further questions related to the prosecution of children like Elana involve the extent to which gender and sex biases drive current policies. Finally, why should trafficking laws protect minors who were born outside the United States and trafficked into the country for exploitation, but not those born and exploited in America, like Elana?

The juxtaposition of statutory rape laws with the prosecution of juveniles for prostitution illustrates a literal clash in the way that American society addresses the sexual victimization of children, children's ability to legally consent, and societal expectations about behavior according to gender. By prosecuting exploited children, current laws and practices contradict one another and fail to assist the significant number of youth sold for sex on the street, on the Internet, in strip clubs, and otherwise. This Article discusses new laws that shed the practice of treating these children as "criminal prostitutes" and shift to the more appropriate understanding that they are survivors of exploitation. The Article considers the societal status of adolescence together with research on commercial sexual exploitation and proposes the development and implementation of commonsense, consistent, and humane jurisprudence to promote recovery for exploited children.

Part I provides background information about the commercial sexual exploitation of domestic minors in the United States, examining the vulnerability of runaway and homeless youth, particularly girls. It also discusses gender stereotypes rooted in the past, within the juvenile justice system, and which relate to current punitive policies toward youth charged with prostitution. Finally, Part I analyzes the relationship between adolescent autonomy, adolescents' ability to consent, and current debates on exploitation. Part II explains the current prosecution practices that most states apply to commercially sexually exploited youth, and highlights the conflicts that arise with issues of consent under "statutory rape" laws. It also discusses existing legal tensions that allow a child to be both a victim and a "criminal" for the same act of sexual exploitation. Part II also focuses on a decision, the first of its kind, by the Texas Supreme Court to explicitly reject the prosecution of children under age fourteen for acts to which they cannot legally consent. It discusses the evolving federal responses to larger international trafficking problems, since these

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9. See, e.g., Neelum Arya, *Using Graham v. Florida To Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 107-08 (2010) (noting that, every year, approximately 200,000 youth are prosecuted, sentenced, or incarcerated as adults in the United States); see also Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793 (2005) (discussing the ways in which punitive criminal justice policies have obscured developmental differences between juveniles and adults). Scott and Grisso argue that, during the 1980s and 1990s, political sentiments concerning youth crime could be characterized by the pithy phrase, "adult time for adult crime." The resulting changes "are embodied in several legislative strategies under which juveniles facing criminal charges increasingly have been treated like their adult counterparts." *Id.* at 806-07.

policies influence state laws and practices. These federal efforts to combat international trafficking have gradually evolved over the last decade to include domestic youth, as well.

Part III focuses on the emergence of recent legislation in various states and, in particular, on the unique protection afforded by the Illinois Safe Children Act. It analyzes the strengths and weaknesses of these varying legislative approaches. Part IV explores how courts and legislators can best reconcile conflicts between statutory rape and prostitution statutes. It concludes that judicial decision making must be informed by considerations regarding adolescent development, as reflected in statutory rape laws, and must avoid gender biases that have been documented in the juvenile and criminal justice systems. It asserts that legislative action should not leave certain categories of youth vulnerable to criminal prosecution for prostitution; rather, states should take a clear stance on reform by passing laws that negate the possibility of prosecution of children for commercial sexual exploitation.

Prosecution of youth for prostitution is not legally coherent, and it is inconsistent with best practices developed under federal law.<sup>10</sup> This Article calls for current state prosecution practices to change by using elements of the Illinois Safe Children Act as a model, thereby avoiding loopholes that can weaken the potential for such laws to effect change for exploited youth.

## I. THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE UNITED STATES

Commercial sexual exploitation of youth—sometimes referred to as domestic minor sex trafficking—is the sexual abuse of a minor for economic gain.<sup>11</sup> The FBI calls it the “most overlooked and under-investigated form of child sexual abuse” facing American society today.<sup>12</sup> The White-Slave Traffic Act (Mann Act)<sup>13</sup> first addressed the prostitution of juveniles in 1910. This law, and others passed in the 1970s and 1980s when the issue gained greater national attention,<sup>14</sup> focused mainly on increasing penalties for certain sexually exploi-

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10. See, e.g., Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7101 (2006).

11. JAY ALBANESE, NAT'L INST. OF JUSTICE, COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN: WHAT DO WE KNOW AND WHAT DO WE DO ABOUT IT? 1 (2007), available at <http://www.ncjrs.gov/pdffiles1/nij/215733.pdf>.

12. *Domestic Minor Sex Trafficking Hearing*, supra note 6, at 18 (statement of Rep. Ted Poe (quoting Patrick Fransen, Special Agent, Fed. Bureau of Investigation's Innocence Lost Task Force)).

13. Ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (2006)).

14. See, e.g., Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (codified as amended at 18 U.S.C. §§ 2251-2252, 2256, 2423 (2006)) (originally enacted Feb. 6, 1978); U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (2010) (originally effective in 1987); see also D. KELLY WEISBERG, CHILD-

tive behaviors against minors. This early legislative emphasis on penalties was based on a strategy of deterrence—a strategy that remains an important part of policies addressing the issue today.<sup>15</sup> Federal prosecutions under the Mann Act continue against individuals alleged to have sexually exploited children for economic gain.<sup>16</sup> However, the physical and psychological needs of sexually exploited minors were not the focus of the Mann Act, nor did the legislation address the legal status of these minors as victims or offenders. These are two problem areas that still persist today.

#### A. Background Information About Exploited Youth

Statistics and research help shed some light on the prevalence of commercial exploitation of children, but they do not tell the complete story. Estimates of the numbers of children prostituted each year vary greatly because this group is a difficult population to reach. In addition, confusion among law enforcement officials about how to respond to these youth both impedes uniform data collection and contributes to the dearth of reliable estimates.<sup>17</sup> As a result, the estimates of commercially sexually exploited children in the United States have ranged from only a few thousand to over three million.<sup>18</sup> A much-cited study estimates that between 240,000 and 340,000 children were “at risk of” commercial sexual exploitation during the calendar year ending in December 2000.<sup>19</sup>

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REN OF THE NIGHT 1 (1985) (stating that “only since the mid-1970s has juvenile prostitution become an issue of widespread national attention”).

15. *Domestic Minor Sex Trafficking Hearing*, *supra* note 6, at 128 (statement of Francey Hakes, Nat’l Coordinator for Child Exploitation, Prevention, & Interdiction, Office of the U.S. Deputy Att’y Gen.) (noting the necessity of a “multifaceted attack on child exploitation on three fronts: [p]revention, deterrence, and interdiction”).
16. *See, e.g.*, *United States v. Williams*, 428 F. App’x 134, 139 (3d Cir. 2011).
17. David Finkelhor & Richard Ormrod, *Prostitution of Juveniles: Patterns from NIBRS*, JUV. JUST. BULL. (U.S. Dep’t of Justice, D.C.), June 2004, at 4 (“Uncertainty within law enforcement agencies on how to respond to the prostitution of juveniles and how to treat juvenile prostitutes has in turn contributed to a scarcity of reliable, consistent information about the problem.”). Indeed, the child’s variable status as victim or offender may cause officers to fail to record the event. *Id.*; *see also* U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT 340* (10th ed. 2010) (noting a lack of uniform data collection of the numbers of trafficking victims). This lack of data “remains an impediment to a comprehensive understanding of the enforcement and victim service response to trafficking in the United States.” *Id.*
18. *See* GRAGG ET AL., *supra* note 7, at 2 (citing YOUTH ADVOCATE PROGRAM INT’L, *CHILDREN FOR SALE: YOUTH INVOLVED IN PROSTITUTION, PORNOGRAPHY, AND SEX TRAFFICKING 1* (1998)).
19. *See* RICHARD J. ESTES & NEIL ALAN WEINER, *THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA AND MEXICO 144* (2002), *available at*

Some researchers dispute the scientific basis for this and other estimates,<sup>20</sup> and, overall, more concrete data and research is needed. The National Center for Missing and Exploited Children estimates that 100,000 minors are “prostituted” in the United States each year.<sup>21</sup>

While centralized arrest data is lacking, the most recent state data suggests that there were at least 1500 arrests of juveniles for prostitution across the United States in 2008.<sup>22</sup> Law enforcement agencies must keep better records of both arrests for prostitution and instances in which prostituted children are encountered but not arrested for prostitution, as recording will help determine the overall prevalence of the problem.<sup>23</sup> Though federal human trafficking law now

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[http://www.sp2.upenn.edu/restes/CSEC\\_Files/Complete\\_CSEC\\_020220.pdf](http://www.sp2.upenn.edu/restes/CSEC_Files/Complete_CSEC_020220.pdf). The authors are careful to note the limitations of their survey and data collection. *Id.* at 143-44 (stating that a different methodology and more resources would be needed to perform “a national prevalence and incidence survey” to produce “an actual headcount”). *But see* Kimberly Mitchell, David Finkelhor & Janis Wolak, *Conceptualizing Juvenile Prostitution as Child Maltreatment: Findings from the National Juvenile Prostitution Study*, 15 *CHILD MALTREATMENT* 18, 21 (2010) (citing MICHELLE STRANSKY & DAVID FINKELHOR, *CRIMES AGAINST CHILDREN RESEARCH CTR., HOW MANY JUVENILES ARE INVOLVED IN PROSTITUTION IN THE U.S.? (2008)* (critiquing the scientific methods used for Estes and Weiner’s estimate as well as other existing estimates), available at [http://www.unh.edu/ccrc/prostitution/Juvenile\\_Prostitution\\_factsheet.pdf](http://www.unh.edu/ccrc/prostitution/Juvenile_Prostitution_factsheet.pdf)).

20. *See, e.g.*, Mitchell, Finkelhor & Wolak, *supra* note 19, at 21.
21. *Domestic Minor Sex Trafficking Hearing*, *supra* note 6, at 137-38 (statement of Ernie Allen, President and CEO, Nat’l Ctr. for Missing & Exploited Children) (defending an estimate of 100,000 derived from Estes & Weiner, *supra* note 19, and noting that it is a conservative estimate). The National Center for Missing and Exploited Children works in partnership with the U.S. Department of Justice. *Id.* at 142.
22. *See* Charles Puzzanchera, *Juvenile Arrests 2008*, *JUV. JUST. BULL.* (U.S. Dep’t of Justice, D.C.), Dec. 2009, at 3. In most states, not all jurisdictions reported arrest data to the FBI. *Id.* at 11. The statistics that are recorded on juvenile arrests for prostitution in the United States remained fairly constant (ranging from 1200 to 1400) between 1994 and 2000 before rising to a high of 1800 in 2004. *See* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *EASY ACCESS TO FBI ARREST STATISTICS: 1994-2007*, available at [http://www.ojjdp.gov/ojstatbb/ezaucr/asp/ucr\\_display.asp](http://www.ojjdp.gov/ojstatbb/ezaucr/asp/ucr_display.asp) (set “Display Options: Counts” to “Juveniles,” then select the time period “1994-2000” or “2001-2008”).
23. *See, e.g.*, Finkelhor & Ormrod, *supra* note 17, at 1, 4. The U.S. Department of Justice has recognized the lack of definitive data in the specific context of commercial sexual exploitation of minors and said it expects to provide the results of a study on the prevalence of the problem in 2011. *See Domestic Minor Sex Trafficking Hearing*, *supra* note 6, at 126 (statement of Francey Hakes, Nat’l Coordinator for Child Exploitation, Prevention, & Interdiction, Office of the U.S. Deputy Att’y Gen.). The study will address the number of youth under the age of eighteen who were victims of commercial sexual exploitation in the United States in 2008 and



mandates that incidents of domestic minor trafficking be collected and reported, law enforcement agencies have not yet universally implemented the central reporting requirement successfully.<sup>24</sup> Often, instances of youth prostitution are improperly excluded from data that records trafficking because law enforcement officials do not properly consider these occurrences to be “trafficking” as the term has evolved.<sup>25</sup>

The personal histories and characteristics shared by many of these children are grim. Their pasts often reveal that the social systems designed to protect them have already failed them. Some children are prostituted as early as age nine, while the average age of entry into prostitution by children is estimated to be between twelve and fourteen.<sup>26</sup> Many of these children ran away from home or were abandoned by family members; many are homeless and known as youth who have been “thrown away.”<sup>27</sup> They often live on the streets or move from place to place, staying with friends and acquaintances. Sexual abuse earlier in childhood is common among youth who are later commercially exploited.<sup>28</sup>

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attempt to ascertain how many of these children became known to law enforcement. *Id.*

24. See U.S. DEP’T OF STATE, *supra* note 17, at 340 (“Despite the mandates of 2005 and 2008 amendments to the TVPA, uniform data collection for trafficking crimes or numbers of victims among federal, state and local law enforcement agencies did not occur during the reporting period.”).
25. See HEATHER J. CLAWSON & NICOLE DUTCH, U.S. DEP’T OF HEALTH & HUMAN SERVS., IDENTIFYING VICTIMS OF HUMAN TRAFFICKING: INHERENT CHALLENGES AND PROMISING STRATEGIES FROM THE FIELD 2-3 (2008), available at <http://aspe.hhs.gov/hsp/07/humantrafficking/IdentVict/ib.pdf> (noting that law enforcement officials often do not view prostitution incidents as trafficking crimes).
26. See *Domestic Minor Sex Trafficking Hearing*, *supra* note 6, at 144 (statement of Ernie Allen, President and CEO, Nat’l Ctr. for Missing & Exploited Children) (noting that the average age at which boys enter prostitution is between eleven and thirteen, while, for girls, the average is between twelve and fourteen); Norma Hotaling, Kristie Miller & Elizabeth Trudeau, *The Commercial Sexual Exploitation of Women and Girls: A Survivor Service Provider’s Perspective*, 18 YALE J.L. & FEMINISM 181, 187 (2006). A recent study tracking precinct arrest data found that, among juveniles arrested for prostitution, 10% were age twelve or thirteen, 33% were age fourteen or fifteen, and 55% percent were age sixteen or seventeen. See Mitchell, Finkelhor & Wolak, *supra* note 19, at 25.
27. ESTES & WEINER, *supra* note 19, at 21 (the terms “throwaway” or “throw away” youth are sometimes used as catch-all phrases to describe children who are not permitted to return home); see also Mitchell, Finkelhor & Wolak, *supra* note 19, at 18 (noting that youth who are homeless or without familial support are vulnerable to commercial sexual exploitation).
28. ESTES & WEINER, *supra* note 19, at 11; see also HEATHER J. CLAWSON ET AL., U.S. DEP’T OF HEALTH & HUMAN SERVS., HUMAN TRAFFICKING INTO AND WITHIN THE UNITED STATES: A REVIEW OF THE LITERATURE 7 (2009), available at <http://aspe.hhs.gov/hsp/07/HumanTrafficking/LitRev/index.pdf>.

In addition, these youth are likely to have experienced poverty and to have been involved with the child welfare system. One study estimates that up to 85% of the exploited youth in New York have been involved in the child welfare system.<sup>29</sup> Often, youth turn to the streets because their own homes become intolerable, or they are formally removed from their homes by child protective services.

After leaving home, however, many children come to find that their new situation is even worse.<sup>30</sup> “The risk of involvement in . . . commercial sexual exploitation increases the longer youth remain homeless . . .”<sup>31</sup> Once subjected to this exploitation, children “are at substantial risk of [contracting] sexually transmitted diseases, including HIV/AIDS.”<sup>32</sup> They are also frequently victims of significant physical abuse in addition to sexual trauma.<sup>33</sup> Scholars note that

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29. See GRAGG ET AL., *supra* note 7, at ii; see also Cassi Feldman, *Report Finds 2,000 of State’s Children Are Sexually Exploited, Many in New York City*, N.Y. TIMES, Apr. 24, 2007, at B6.
30. See Clyde Haberman, *The Young and Exploited Ask for Help*, N.Y. TIMES, June 12, 2007, at B1 (quoting testimony at a New York City Council hearing on the commercial sexual exploitation of youth in New York City during which a witness who had formerly been sexually exploited explained, “I thought that my pimp was going to protect me. . . . All he did was abuse me.”). The difficulty of living without familial support makes these youth more likely to believe representations by pimps because promises of protection sound better than the current situations these youth face. See Judi Villa, *Lies Trap Children in Life as Prostitutes: Phoenix Boosts Effort To Save Victims, Punish Pimps, Johns*, ARIZ. REPUBLIC, Jan. 28, 2007, at A1; see also RIC CURTIS ET AL., THE CSEC POPULATION IN NEW YORK CITY: SIZE, CHARACTERISTICS, AND NEEDS 47-48 (Nat’l Inst. of Justice, The Commercial Sexual Exploitation of Children in New York City Ser. No. 1, 2008), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/225083.pdf> (discussing an interview with an adolescent girl who was approached and recruited by a pimp while she was crying on the steps of her group foster care home, and who later realized that her new life with the pimp was as bad as or worse than it was at the foster home; she explains, “But once I started seein’ certain things and certain actions, it was like, I might as well have stayed in the hell I was in . . .”).
31. See NAT’L ALLIANCE TO END HOMELESSNESS, HOMELESS YOUTH AND SEXUAL EXPLOITATION: RESEARCH, FINDINGS, AND PRACTICE IMPLICATIONS 8 (2009), available at [http://www.endhomelessness.org/files/2559\\_file\\_Sexual\\_Exploitation\\_of\\_Homeless\\_Youth\\_10\\_2009.pdf](http://www.endhomelessness.org/files/2559_file_Sexual_Exploitation_of_Homeless_Youth_10_2009.pdf); see also Mitchell, Finkelhor & Wolak, *supra* note 19, at 18 (noting that homelessness is a factor that contributes to children’s risk of involvement in commercial sexual exploitation).
32. See GRAGG ET AL., *supra* note 7, at 5; see also Amanda Kloer, *Sex Trafficking and HIV/AIDS: A Deadly Junction for Women and Girls*, 37 HUM. RTS. 8, 9 (2010) (detailing the factors that contribute to risks of disease exposure for young people who are exploited).
33. Sheila Kershaw, *Gender, Abuse and the Prostitution of Young People*, in CHILD SEXUAL ASSAULT 52, 56 (Pat Cox, Sheila Kershaw & Joy Trotter eds., 2010).

trafficking victims can experience post-traumatic stress disorder (PTSD) as a result of this abuse.<sup>34</sup>

Females are reported to compose the vast majority of targets for this industry both internationally and domestically.<sup>35</sup> The federal law that aims to eliminate sexual exploitation and trafficking, the Trafficking Victims Protection Act of 2000 (TVPA), identifies women and girls as the predominate victims of the sex industry.<sup>36</sup> Within the United States, estimates reporting the gender breakdown of commercially sexually exploited youth vary; however, the most recent arrest data indicates that females accounted for 76% of juvenile prostitution arrests in the United States.<sup>37</sup> In comparison, females accounted for only 30% of juvenile arrests as a whole.<sup>38</sup> While females compose the majority of juveniles arrested for prostitution, male youth still account for nearly a quarter of the children arrested for and victimized by commercial sexual exploitation, which is not insignificant. Moreover, male youth engaging in acts of prostitution are

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34. The National Institute of Mental Health defines post-traumatic stress disorder (PTSD) as “an anxiety disorder that some people get after seeing or living through a dangerous event.” Nat’l Inst. of Mental Health, *Post-Traumatic Stress Disorder (PTSD)*, NAT’L INSTITUTES HEALTH (Aug. 31, 2010), <http://www.nimh.nih.gov/health/publications/post-traumatic-stress-disorder-ptsd/complete-index.shtml>. Traumatic events that may trigger PTSD include physical and sexual assault or abuse. *Id.*; see Angela A. Jones, *Post-Traumatic Stress Disorder and Victims of Human Sex Trafficking: A Perpetuation of Chronic Indignity*, 4 INTERCULTURAL HUM. RTS. L. REV. 317, 327-28 (noting the presence of PTSD among victims of sex trafficking); see also Hussein Sadrudin, Natalia Walter & Jose Hidalgo, *Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 STAN. L. & POL’Y REV. 379, 382 (2005) (“Anxiety, insomnia, depression, and post-traumatic stress disorder are common psychological manifestations among trafficked victims.”); Jonathan Todres, *Moving Upstream: The Merits of a Public Health Law Approach to Human Trafficking*, 89 N.C. L. REV. 447, 464 (2011) (noting the prevalence of symptoms consistent with PTSD among women who were victims of sex trafficking).
35. Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7101(b)(2) (2006).
36. *Id.* § 7101(b)(2), (4) (noting that, globally, traffickers “primarily target women and girls, who are disproportionately affected by poverty, the lack of access to education, chronic unemployment, discrimination, and the lack of economic opportunities in countries of origin”).
37. See Puzzanchera, *supra* note 22, at 1, 3; see also Howard N. Snyder, *Juvenile Arrests 2004*, JUV. JUST. BULL. (U.S. Dep’t of Justice, D.C.), Dec. 2006, at 1, 2 (reporting that, in 2004, 72% of juvenile arrests for prostitution were of females); see also Mitchell, Finkelhor & Wolak, *supra* note 19, at 24 (reporting that an independent 2005 survey found that 90% of juvenile prostitution arrests were of females). Findings from the Office of Juvenile Justice and Delinquency Prevention reflect data that is reported by local law enforcement agencies from across the country to the FBI’s Uniform Crime Reporting Program. See Puzzanchera, *supra* note 22, at 1.
38. See Puzzanchera, *supra* note 22, at 3.

more difficult to account for because they are more likely than girls to act alone, rather than under a pimp arranging their exploitation, and to form protection groups among their peers.<sup>39</sup> Conversely, most female youth subject to domestic sex trafficking are connected to a pimp,<sup>40</sup> and some data indicates that this figure is as high as 75%.<sup>41</sup> While this Article mainly focuses on girls due to their higher arrest rate, exploited male youth—and specifically those identifying as homosexual, who are more likely to encounter problems in the juvenile justice system<sup>42</sup>—are also of considerable importance in this discussion.<sup>43</sup> Policy discussions about commercial sexual exploitation are incomplete without studying their needs.<sup>44</sup>

### B. *The Illusion of Choice and the Reality of Coercion*

The continued prosecution of children for prostitution seems to inherently reject evidence that they are often forced into their exploitation when they are prostituted or threatened such that it appears to them that they have no way

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39. See GRAGG ET AL., *supra* note 7, at 3 (citing YOUTH ADVOCATE PROGRAM INT'L, CHILDREN FOR SALE: YOUTH INVOLVED IN PROSTITUTION, PORNOGRAPHY, AND SEX TRAFFICKING 1 (1998)).
40. See Finkelhor & Ormrod, *supra* note 17, at 9; see also GRAGG ET AL., *supra* note 7, at 4.
41. ESTES & WEINER, *supra* note 19, at 7.
42. Gay youth are more likely to encounter harassment and other problems when subjected to detention. Valerie Gwinn, *Locked in the Closet: The Impact of Lawrence v. Texas on the Lives of Gay Youth in the Juvenile Justice System*, 6 WHITTIER J. CHILD & FAM. ADVOC. 437, 442 (2007); Peter A. Hahn, Note, *The Kids Are Not Alright: Addressing Discriminatory Treatment of Queer Youth in Juvenile Detention and Correctional Facilities*, 14 B.U. PUB. INT. L.J. 117, 118-19 (2004). Girls have been affected in the justice system by preconceptions of acceptable behavior assigned to them based on gender stereotypes, see *supra* Section I.C; similarly, gay male youth experience bias for not conforming to gender expectations for males. See generally Gwinn, *supra* (discussing documented experiences of bias toward gay youth in the juvenile justice system).
43. RANDI FEINSTEIN ET AL., JUSTICE FOR ALL?: A REPORT ON LESBIAN, GAY, BISEXUAL AND TRANSGENDERED YOUTH IN THE NEW YORK JUVENILE JUSTICE SYSTEM 40-41 (2001) (discussing the staff and service needs of gay youth in the New York juvenile justice system); see Terry Coonan, *The Trafficking Victims Protection Act: A Work in Progress*, 1 INTERCULTURAL HUM. RTS. L. REV. 99, 119 (2006) (noting that it is imperative to recognize that men and boys are also victims of trafficking).
44. A disproportionate number of commercially sexually exploited male youth self-identify as gay, bisexual, or transgender/transsexual. See ESTES & WEINER, *supra* note 19, at 7-8.

out.<sup>45</sup> When exploited youth appear resistant to intervention by authority figures, it can also influence the perception that they are less worthy of protection and should instead be prosecuted.<sup>46</sup> But empirical research and patterns identified by law enforcement officials illustrate how traffickers and pimps target vulnerable children, groom them, and recruit them into prostitution. Often, this process involves the use of violence, abduction, deception, and coercion.<sup>47</sup>

Typically a trafficker, also referred to as a “third-party exploiter” or pimp, ensnares young females by using a process that destroys the child’s sense of personal identity by gradually breaking her down. Pimps first seek out young girls at bus stations, shelters, malls, arcades, and on the Internet, preying on those who appear vulnerable.<sup>48</sup> A pimp will first act as a “boyfriend,” promising love and a better life while playing on a young girl’s previously identified vulnerabilities.<sup>49</sup> Gradually, when a pimp introduces a young girl into prostitution, she

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45. Cf. Cheryl Hanna, *Somebody’s Daughter*, 9 WM. & MARY J. WOMEN & L. 1 (2002) (discussing the perception that domestic minors exposed to sexual exploitation are not victims, and noting that they are often blamed for their own situation).
46. Cf. *id.* at 26-27 (“The mistaken societal attitude that prostituted children are somehow responsible for their exploitation and, therefore, are unworthy of the protection the law affords to other victims of child sexual abuse does nothing to alter this view. Attachment to their pimps and resulting non-cooperation from victimized children create untold difficulties at the investigation stage.” (citations omitted)).
47. Child Exploitation & Obscenity Section, U.S. Dep’t of Justice, *Child Prostitution*, U.S. DEPARTMENT JUST., available at <http://www.justice.gov/criminal/ceos/prostitution.html> (citing ESTES & WEINER, *supra* note 19, at 11-12); see, e.g., *Domestic Minor Sex Trafficking Hearing*, *supra* note 6, at 149 (testimony of Tina Frundt, Founder and Exec. Dir. of Courtney’s House, which is a residential program designed specifically to serve girls who were involved in prostitution). A survivor of child prostitution herself, Frundt shared her account of being “gang raped, psychologically manipulated, sold for sex, and beaten” to ensure her compliance. After her arrest, she spent a year in juvenile detention without counseling or treatment and with no referrals for services upon her release. *Id.*; see also CURTIS ET AL., *supra* note 30, at 47-48 (describing interviews with prostituted youth detailing the daily violence that they experienced at the hands of customers, pimps, and other youth, including stories of “being kidnapped and held hostage by customers”).
48. ALBANESE, *supra* note 11, at 3; see also CURTIS ET AL., *supra* note 30, at 47 (quoting adolescents who were approached by pimps outside of shelters and group homes); ESTES & WEINER, *supra* note 19, at 58.
49. See Kershaw, *supra* note 33, at 58; see also *United States v. Williams*, 428 F. App’x 134, 139, 141-42 (3d Cir. 2011) (describing how the defendants, acting as pimps, deliberately sought “lost girls,” and finding that they purposely chose and targeted particularly vulnerable youth to exploit); *Exploiting Americans on American Soil: Domestic Trafficking Exposed: Hearing Before the Comm’n on Sec. & Cooperation in Eur.*, 109th Cong. 22-23 (2005) [hereinafter *Exploiting Americans on American Soil Hearing*]; ALBANESE, *supra* note 11, at 5 (noting that promises of a better life are a

fails to recognize that she is a victim and becomes trapped.<sup>50</sup> Many factors can prevent a young girl from realizing that she is being exploited or from recognizing the dangers that she faces,<sup>51</sup> including age, lack of knowledge or experience, previous abuse, the need for attention, previous poor judgment, and, in some cases, learning disabilities and similar limitations.<sup>52</sup> To ensure control over young girls, traffickers often use a process analogous to “grooming,” the well-documented approach that is employed by people who sexually abuse children.<sup>53</sup> The behavior is also similar to that employed by batterers who control their victims through isolation, economic dependence, and physical and verbal abuse.<sup>54</sup> Research suggests that pimps and traffickers are fully aware of the process they employ to manipulate or initiate children.<sup>55</sup> As one convicted trafficker chillingly described, “With young girls, you promise them heaven, and they’ll follow you to hell.”<sup>56</sup>

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common recruitment tool employed by pimps and that, once exploited, children are often “threatened and assaulted to ensure obedience and prevent escape”).

50. See Kershaw, *supra* note 33, at 58; see also *Exploiting Americans on American Soil Hearing*, *supra* note 49, at 69-70; GRAGG ET AL., *supra* note 7, at 4.
51. Kershaw, *supra* note 33, at 56.
52. GRAGG ET AL., *supra* note 7, at 4.
53. See Kershaw, *supra* note 33, at 58; see also Urbina, *supra* note 2, at A1 (“For those not already engaged in survival sex, the grooming process was gradual and calculated. . . . Before long, the girl is asked to turn occasional tricks to help pay bills.”).
54. Wendi J. Adelson, *Child Prostitute or Victim of Trafficking?*, 6 U. ST. THOMAS L.J. 96, 126 (2008).
55. See *supra* note 49 and accompanying text (describing common recruitment tools to find the most vulnerable youth and approaches by those persons referred to as pimps or traffickers).
56. Urbina, *supra* note 2, at A1. “The goal is to get the girls as dependent as possible. According to one ex-pimp, ‘Mentally you’ve gotta burn into their brains you’re the only one—you’re god. Once you’ve got that down and they’re ready to work. . . . then you instill the fear—the wrath of god. If they mess up, there’s a price to pay, and they know it’s a heavy price.’” Rosalind Bentley & Richard Meryhew, *Turning Girls into Prostitutes Is an Easy Task, Experts Say*, STAR TRIB. (Minneapolis, Minn.), Aug. 15, 1999, at 1B; see also, e.g., CURTIS ET AL., *supra* note 30, at 48 (quoting one youth who stated, “I fell in love with this guy and thought he was *the one*. . . . and he called himself a pimp. But he always told me I’m his *Bottom Bitch* and whatever. He put me on the stroll, out there with black eyes and broken noses. I was out there messed up.” (citation omitted)). The term “bottom bitch” or “bottom girl” refers to a pimp’s “most senior prostitute, who often trains new prostitutes and collects their earnings until they can be trusted.” *United States v. Brooks*, 610 F.3d 1186, 1196 (9th Cir. 2010) (explaining the meaning of the term “bottom girl” as described in expert testimony in a sex trafficking prosecution against a pimp who exploited minors).

As a result of this careful manipulation, victims of commercial sexual exploitation often display symptoms of “traumatic bonding”—more commonly known as Stockholm syndrome—which makes it difficult for them to separate themselves from the person responsible for their harm.<sup>57</sup> Just as victims of domestic and family violence may stay with their abuser, victims who are coerced into prostitution are often caught in the same dangerous pattern.<sup>58</sup> A hierarchy of prostitutes developed by a pimp is designed to function as a kind of surrogate “family” for the girls who work for him.<sup>59</sup> This formation makes it challenging for girls to break away from the situation, creating a kind of psychological paralysis, even though an outsider would recognize the ongoing

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57. Stockholm syndrome, originally used in the context of hostage situations, occurs when a victim develops an emotional attachment to his or her captor. See Nathalie De Fabrique, *Understanding Stockholm Syndrome*, FBI L. ENFORCEMENT BULL. (Fed. Bureau of Investigation, D.C.), July 1, 2007, at 1, 11. The FBI has described Stockholm syndrome as a “paradoxical psychological phenomenon wherein a positive bond between hostage and captor occurs that appears irrational in light of the frightening ordeal endured by the victims.” *Id.* Research has shown that other groups, including people coerced into prostitution or otherwise subjected to physical or sexual abuse, can exhibit these symptoms even if they do not qualify as having the syndrome. See Shirley Julich, *Stockholm Syndrome and Child Sexual Abuse*, 14 J. CHILD SEXUAL ABUSE 107, 108-09 (2005). Factors that contribute to the development of traumatic bonding occur when: (1) The victim perceives a threat to his or her survival and believes that the captor will carry out that threat; (2) the victim perceives some small kindness from the captor; (3) the victim is isolated from perspectives other than those of the captor; and (4) the victim perceives an inability to escape the situation. See *id.* at 112 (citing DEE L.R. GRAHAM WITH EDNA I. RAWLINGS & ROBERTA K. RIGSBY, *LOVING TO SURVIVE: SEXUAL TERROR, MEN’S VIOLENCE, AND WOMEN’S LIVES* (1994)); see also U.S. HEALTH & HUMAN SERVS., *CHILD VICTIMS OF HUMAN TRAFFICKING* (2009), available at [http://www.acf.hhs.gov/trafficking/campaign\\_kits/tool\\_kit\\_social/child-victims.pdf](http://www.acf.hhs.gov/trafficking/campaign_kits/tool_kit_social/child-victims.pdf) (stating that trafficked youth experience traumatic bonding); Natasha Korcecki, *Operation Targets Child Prostitution*, CHI. SUN-TIMES, Nov. 9, 2010, at 15 (quoting Gregg Wing, FBI Supervisor of Crimes Against Children in Chicago, who noted the presence of Stockholm syndrome symptoms among child victims discovered in law enforcement efforts to combat the domestic sex trafficking of minors); Jessica Lustig, *The 13-Year-Old Prostitute: Working Girl or Sex Slave?*, N.Y. MAG., Apr. 9, 2007, at 36.
58. See Melissa Farley, *Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order To Keep the Business of Sexual Exploitation Running Smoothly*, 18 YALE J.L. & FEMINISM 109, 125 (2006); Kershaw, *supra* note 33, at 58.
59. GRAGG ET AL., *supra* note 7, at 46.

abuse.<sup>60</sup> If a girl does try to leave, she will usually endure physical violence as a result.<sup>61</sup>

The sophistication of the criminal enterprises run by pimps or other third-party exploiters varies. Yet research shows that many pimps involved with youth are known to law enforcement agencies and often are affiliated with gangs or other forms of organized crime.<sup>62</sup> Experts, law enforcement officials, and media reports cite gangs and organized crime as being extensively involved in the commercial sexual exploitation of youth.<sup>63</sup> Some law enforcement offi-

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60. *Id.* at 46; see also Hotaling, Miller & Trudeau, *supra* note 26, at 186 (describing a psychological paralysis that can cause victims to “feel unable to escape prostitution, even when offered other opportunities”).
61. *Domestic Minor Sex Trafficking Hearing*, *supra* note 6, at 126 (statement of Francey Hakes, Nat’l Coordinator for Child Exploitation, Prevention, & Interdiction, Office of the U.S. Deputy Att’y Gen.) (testifying that attempted escapes by the child often result in brutal beatings or even death).
62. See Mitchell, Finkelhor & Wolak, *supra* note 19, at 25. The National Juvenile Prostitution study, conducted by the Crimes Against Children Research Center of the University of New Hampshire and funded by grants from the U.S. Department of Justice, revealed that in cases in which pimps were identified in connection with children arrested for prostitution, 41% of the pimps were reportedly affiliated with larger organized enterprises, such as gangs, or businesses, or websites. *Id.* In the other 59% of those cases, the pimp appeared to be operating independently and exploiting one, two, or three girls. *Id.* The same study examined the available arrest histories of those who were detained for trafficking or prostituting youth and found criminal histories that included sexual offenses, drug and weapons charges, theft, homicide, and other violent offenses, sometimes in combination with each other. *Id.* at 29.
63. ALBANESE, *supra* note 11, at 5 (noting the presence of local, regional, national, and international organized networks trafficking in children); Karen Zraick, *Eight Charged in Brooklyn in Sex-Trafficking Case*, N.Y. TIMES, June 3, 2010, at A28 (discussing an investigation into the trafficking of about fifteen girls who were allegedly forced into prostitution by members of a gang). The article also quotes Charles Hynes, the District Attorney of Kings County, Brooklyn, who stated that increased gang involvement in the trade of women for prostitution had resulted in the creation of a special Sex Trafficking Unit within the District Attorney’s Office. *Id.* According to FBI Deputy Assistant Director Daniel Roberts, “Some of these networks of pimps and their organizations are very sophisticated, they’re interstate, requiring wiretaps and undercover sting operations to bring charges.” *Child Prostitutes Rescued by FBI, Police*, CBSNEWS, (Feb. 23, 2009), <http://www.cbsnews.com/stories/2009/02/23/national/main4821773.shtml>; see also James Walsh, David Chanen & Allie Shah, *29 Charged with Sex Trafficking*, STAR TRIB. (Minneapolis, Minn.), Nov. 9, 2010, at 1A. (describing a federal law enforcement sweep involving gang members who were allegedly forcing girls into prostitution).



cials suggest that gangs have shifted from drugs to prostitution because “selling girls” is “just as lucrative but far less risky.”<sup>64</sup>

Youth are often sold into sexual exploitation on street corners but are also sold through other means such as escort and massage services, private dancing clubs, conventions, and major sporting events.<sup>65</sup> In addition, the Internet now plays a growing role in both the recruitment of girls and the marketing to customers.<sup>66</sup> It allows organized crime operations and individuals to advertise girls and solicit clients in a way that more easily eludes detection.<sup>67</sup> Online advertising also increases the minors’ isolation from the public’s view because they are not seen on the street or in a public place or business.<sup>68</sup>

Unfortunately, the pattern of violence and coercion is practically universal in the commercial sexual exploitation of youth. Patterns of manipulation and abuse of young people who are exploited are reported repeatedly as more information about this topic comes to light.<sup>69</sup> What may start off as a promise of a better life by a pimp or trafficker quickly turns to threats and violence, leav-

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64. Urbina, *supra* note 2, at A1; see also *Domestic Minor Sex Trafficking Hearing, supra* note 6, at 144 (testimony of Ernie Allen, President and CEO, Nat’l Ctr. for Missing & Exploited Children) (noting that “organized crime is drawn to this illicit industry because it offers relatively low risk and high profit”).
65. ESTES & WEINER, *supra* note 19, at 60. For example, in cases where law enforcement officials identified a pimp or other third-party trafficker involved in commercial sexual exploitation, transactions took place not only on the streets but also through escort services (26%), at massage parlors (9%), and over the Internet (20%). Mitchell, Finkelhor & Wolak, *supra* note 19, at 26.
66. *Domestic Minor Sex Trafficking Hearing, supra* note 6, at 137 (statement of Ernie Allen, President and CEO, Nat’l Ctr. for Missing & Exploited Children) (noting that offenders “don’t just parade these children on city streets anymore” but can solicit “clients” on the Internet who can purchase the children from home or a hotel). In particular, Craigslist came under fire in recent years for its inclusion of an “Erotic Services” section. See Claire Cain Miller, *Craigslist Says It Has Shut Its Section for Sex Ads*, N.Y. TIMES, Sept. 16, 2010, at B1 (noting the role of online ads on Craigslist and other Internet sites in child sexual exploitation).
67. The use of Internet ads lessens the risk of arrest for men buying sex with children because the transactions can be more difficult for law enforcement officials to detect since they are organized outside of public view. See *Domestic Minor Sex Trafficking Hearing, supra* note 6, at 145 (statement of Ernie Allen, President and CEO, Nat’l Ctr. for Missing & Exploited Children).
68. *Id.*
69. See *Domestic Minor Sex Trafficking Hearing, supra* note 6, at 126 (statement of Francey Hakes, Nat’l Coordinator for Child Exploitation, Prevention, & Interdiction, Office of the U.S. Deputy Att’y Gen.); Lustig, *supra* note 57, at 36 (describing the abuse that children suffer at the hands of their pimps as reported by legal advocates and children); Susan Saulny, *Hundreds Seized in Sweep Against Child Prostitution*, N.Y. TIMES, June 26, 2008, at A16; Urbina, *supra* note 2, at A1 (discussing common themes of abuse and violence among children who are prostituted).

ing girls even more isolated from any sources of support that they may have had. Soon, they are fully reliant on their abusers and forced to endure coercive conduct and physical abuse.<sup>70</sup> Similarly, depending on the age of the minor, most instances of sexual exploitation are also considered statutory rape under relevant state laws. Yet, despite coercion and abuse, the most common response from law enforcement agencies is to pursue prosecution and detention of the youth for prostitution.<sup>71</sup>

### C. *The Gender Implications of Prosecution*

Broader issues of gender, sexuality, and the law are integral to this discussion for several reasons. First, gender biases are relevant to any discussion about why states prosecute girls when the same act that causes the prosecution is also considered statutory rape. Next, young girls are prosecuted at reportedly higher rates than even the men who exploit them.<sup>72</sup> The problem of “blaming the victim”<sup>73</sup> in rape cases is analogous to the prosecution of girls who are coerced into

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70. *In Our Own Backyard: Child Prostitution & Sex Trafficking: Hearing Before the S. Judiciary Subcomm. on Human Rights & the Law*, 111th Cong. 14 (2010) [hereinafter *Child Prostitution and Sex Trafficking Hearing*] (statement of Rachel Lloyd, Exec. Dir. and Founder, Girls Educ. & Mentoring Servs.); see also Press Release, U.S. Att’y’s Office for the Dist. of Md., Maryland U.S. Attorney’s Office Implements Attorney General’s New National Strategy To Prevent Child Exploitation (Aug. 5, 2010), available at [http://www.justice.gov/usao/md/PublicAffairs/press\\_releases/presso8/MarylandUSAOImplementsAttorneyGeneralsNewStrategyToPreventChildExploitation.html](http://www.justice.gov/usao/md/PublicAffairs/press_releases/presso8/MarylandUSAOImplementsAttorneyGeneralsNewStrategyToPreventChildExploitation.html) (describing a recent federal prosecution of a pimp that illustrates the most common pattern of manipulation and abuse).
71. See LINDA A. SMITH, SAMANTHA HEALY VARDAMAN & MELISSA A. SNOW, SHARED HOPE INT’L, *THE NATIONAL REPORT ON DOMESTIC MINOR SEX TRAFFICKING: AMERICA’S PROSTITUTED CHILDREN*, at v (2009), available at [http://www.sharedhope.org/Portals/o/Documents/SHI\\_National\\_Report\\_on\\_DMST\\_2009.pdf](http://www.sharedhope.org/Portals/o/Documents/SHI_National_Report_on_DMST_2009.pdf); Adelson, *supra* note 54, at 97 (showing that nearly every state allows for the prosecution of youth for prostitution); Bob Herbert, *The Wrong Target*, N.Y. TIMES, Feb. 19, 2008, at A25; *Law Project*, ENDING CHILD PROSTITUTION & TRAFFICKING-USA, <http://www.ecpatusa.org/what-we-do/helping-children-in-america/law-project/> (last visited Oct. 25, 2011) (noting that police are likely to treat exploited youth as prostitution offenders, perpetuating the cycle of arrest and detention of youth); see also, e.g., Lustig, *supra* note 57, at 5 (discussing a case in which a thirteen-year-old girl who had been arrested for prostitution bravely testified against her abusive pimps to a grand jury but was shortly thereafter sent to a juvenile detention facility on her fourteenth birthday).
72. See Hanna, *supra* note 45, at 26-27; 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, 437-38 (2009).
73. In blame-the-victim cases, if a woman’s “pre-rape behavior violated traditional norms of female prudence or morality, many people blame her instead of the rapist.” David Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J.

commercial sexual exploitation. Specifically, the idea that a rape victim “invited” the crime due to her behavior or lifestyle is similar to the argument that girls who are sold for sex choose their exploitation. In both instances, the sexual act committed—rape or statutory rape—is illegal, regardless of the extraneous behavior of the victim.

The law’s failure to recognize commercially exploited girls as victims is related to society’s different social norms regarding girls’ and boys’ sexuality. Scholars note that men and boys are “expected, if not encouraged, to engage in sex whenever the opportunity presents itself.”<sup>74</sup> Girls, in contrast, are expected to be chaste or to “use any strategy to avoid sexual intercourse.”<sup>75</sup> Just as these social norms deterred progress in laws that address rape and sexual assault in other arenas, they have arguably prevented progress in laws that affect trafficked youth. The lack of progress toward a better solution underscores underlying prejudices or cultural assumptions that “good girls” who are worthy of protection would not accept payment for their own exploitation and would somehow escape. Furthermore, these laws arguably stem from an assumption that if girls were truly victimized, they would quickly acquiesce to and cooperate with authorities once encountered.<sup>76</sup> However, these beliefs overlook the reality that coercive forces exacerbate young girls’ lack of trust in law enforce-

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CRIM. L. & CRIMINOLOGY 1194, 1196 (1997). In the past, criminologists have noted the problem of “victim-blaming” in the development of rape law in the United States. *Id.* at 1196. *Cf.* ZSUZSANNA ADLER, RAPE ON TRIAL 17 (1987) (discussing institutional sexism wherein, historically, legal institutions subjected victims of rape to the argument that their behavior caused the crimes against them, known as “victim precipitation”). Victims were often blamed and endured the acquittal of their rapists by the criminal justice process. *Id.*; *see also* Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 710-11 (2000) (stating that victim-blaming remained a “significant problem” in the late 1990s, even after legal reforms sought to remedy problematic features of the common law governing rape by removing the requirement of proof of resistance by the victim and disallowing jury instructions that cautioned about the “ease of making false accusations”).

74. Oberman, *supra* note 73, at 715 (arguing that men are conditioned “to single-mindedly go after sexual intercourse with a female, regardless of how they do it”); *see also* Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 675-84 (1999); Robin Warshaw & Andrea Parrot, *The Contribution of Sex-Role Socialization to Acquaintance Rape*, in ACQUAINTANCE RAPE: THE HIDDEN CRIME 75 (Andrea Parrot & Laurie Bechhofer eds., 1991).

75. Oberman, *supra* note 73, at 715 (citing Warshaw & Parrot, *supra* note 74, at 75).

76. See Hanna, *supra* note 45, at 26-27, for a related discussion about the relationship between the criminalization of girls’ behavior, the role of social condemnation against girls, the lack of understanding about their needs, and the lack of enforcement against the men who exploit them.

ment and social services, and that attachment to their pimps is caused by complex psychosocial factors.<sup>77</sup>

Indeed, the current failure to explicitly acknowledge the coercive nature of youth prostitution—regardless of the exchange of money—represents a conflict in our legal jurisprudence. Most state laws implicitly recognize the coercive nature of sexual activity with a minor through their statutory rape laws,<sup>78</sup> creating a tension with the continued prosecution of prostituted girls.

The prosecution and punishment of youth—primarily girls—for prostitution stems from practices developed in the early years of the juvenile and criminal justice systems. Girls were often prosecuted and detained for behaviors that carried negative social stigmas, including sexual activity. Almost all girls who appeared in family court during its early years were charged with “immorality or waywardness,” with the former potentially including evidence of sexual intercourse.<sup>79</sup> The sanctions were severe in that girls were more likely than boys to be sent to “reformatories” for this behavior.<sup>80</sup> The juvenile justice system’s dual concerns with “adolescent criminality and moral conduct” reflect a “unique and intense preoccupation” with girls’ sexuality and their obedience to “parental authority.”<sup>81</sup> For example, noncriminal status offense statutes, which include habitual truancy, running away from home or residential care, and general “incurability,” are used to detain girls at a higher rate than boys.<sup>82</sup> This has a disproportionate effect on minority girls, who are overrepresented in the juvenile detention population.<sup>83</sup>

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77. Often, as part of the acculturation process, girls associated with pimps are taught to evade and mistrust law enforcement. See, e.g., Jennifer McKim, *People Need To Know What These Guys Have Done*, BOS. GLOBE, Oct. 10, 2010, at 1.

78. See *infra* Subsection II.A.2.

79. See John A. MacDonald & Meda Chesney-Lind, *Gender Bias and Juvenile Justice Revisited: A Multiyear Analysis*, 47 CRIME & DELINQ. 173, 174 (2001).

80. See *id.*

81. See *id.*

82. See Paul E. Tracy, Kimberly Kempf-Leonard & Stephanie Abramoske-James, *Gender Differences in Delinquency and Juvenile Justice Processing: Evidence from National Data*, 55 CRIME & DELINQ. 171, 201-02, 210 (2009) (documenting the disproportionate effects based on gender and concluding that “girls are much more likely than boys to receive the harshest sanction available in juvenile court—namely, commitment to juvenile prison—for status offenses and even for technical violations of probation”).

83. AM. BAR ASS’N & NAT’L BAR ASS’N, JUSTICE BY GENDER: THE LACK OF APPROPRIATE PREVENTION, DIVERSION AND TREATMENT ALTERNATIVES FOR GIRLS IN THE JUSTICE SYSTEM 16-17, 19-21 (2001), available at [http://www.americanbar.org/content/dam/aba/publishing/criminal\\_justice\\_section\\_newsletter/crimjust\\_juvjus\\_justicebygenderweb.pdf](http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_justicebygenderweb.pdf) (discussing how girls are disproportionately charged with status offenses and that minority girls are overrepresented in the juvenile justice system).

These same themes persist today and are perpetuated when lawmakers fail to change laws that allow for the prosecution of exploited youth. Girls in general continue to be detained for behaviors that would not lead to detention for boys, like running away.<sup>84</sup> Female youth may also receive court interventions that are generally longer, harsher, and more restrictive than those given to their male counterparts.<sup>85</sup> Scholars and practitioners attribute this treatment to paternalism among decision makers, fear of adolescent girls' expressions of sexuality, and efforts to protect girls from further sexual victimization.<sup>86</sup> Opposition to reforming prosecution of exploited youth is often grounded in the same notion that girls need to be prosecuted for their own "protection"—that is, to keep them from further victimization.<sup>87</sup> However, these arguments are perpetuated without a strong relationship to the reality of girls' experiences in detention and with the juvenile justice system more broadly.<sup>88</sup>

*D. The Relationship Between Adolescent Consent and Autonomy*

Questions about mental capacity and an adolescent's ability to consent to sex give rise to complex tensions within advocacy communities, such as feminists, which one might otherwise expect to mobilize against the prosecution of children for prostitution. An adolescent's ability (or lack of ability) to consent to sex in the context of prostitution implicates broader issues of adolescent autonomy.<sup>89</sup> As a result, some activists may have concern that arguments about whether a minor can consent to sex in the context of prostitution may affect the legal ability of youth to make decisions in other areas implicating issues of autonomy, such as choices about reproductive health, access to birth control, or early emancipation,<sup>90</sup> or sexual behavior amongst peers. Some scholars suggest

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84. See SHERMAN, *supra* note 6, at 17.

85. See Tracy, Kempf-Leonard & Abramoske-James, *supra* note 82, at 180.

86. See SHERMAN, *supra* note 6, at 17. Other reasons that girls are detained include "obtain[ing] services for girls with significant needs; . . . fear of teen pregnancy and its societal costs; . . . [and] intolerance of girls who are non-cooperative and non-compliant." *Id.*; see also Tracy, Kempf-Leonard & Abramoske-James, *supra* note 82, at 180.

87. See *infra* Subsection II.A.1.

88. See *infra* notes 132-136 and accompanying text; cf. SHERMAN, *supra* note 6, at 23-28 (documenting the poor conditions for girls in detention).

89. Hanna, *supra* note 45, at 5-6; see, e.g., Jessica R. Arons, *Misconceived Laws: The Irrationality of Parental Involvement Requirements for Contraception*, 41 WM. & MARY L. REV. 1093 (2000).

90. For example, Title X of the Public Service Health Act, addressing federal family planning, provides federal funds to organizations to provide for improvements in maternal and infant health, lower the incidence of unintended pregnancy, reduce the incidence of abortion, and lower rates of sexually transmitted diseases. 42 U.S.C. §§ 201-300 (2006 & Supp. 2010); see also 42 C.F.R. § 59.5(a) (2010). Since

that the lack of progress toward reform for girls who are prosecuted for prostitution has been affected by a division within the feminist community about consent issues and the legality of prostitution in general.<sup>91</sup>

Because of the way these issues interrelate, advocacy groups and courts, including the Supreme Court, have grappled with the tensions in treatment of adolescents and adolescents' mental capacity and decision making in different legal contexts.<sup>92</sup> These tensions were acutely demonstrated in two Supreme Court cases in which the American Psychological Association (APA) weighed in as an amicus. In the 2005 case *Roper v. Simmons*,<sup>93</sup> the APA argued that, in the context of a capital murder trial, minors are not as developmentally mature as

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the time it was passed in 1970, the government has required that projects supported under the Act provide for pregnant individuals regardless of their age. *Id.* § 59.5(a)(4). Courts have also held that parental consent cannot be required as a condition to access of services by adolescents. *See, e.g.,* Cnty. of St. Charles v. Mo. Family Health Council, 107 F.3d 682 (8th Cir. 1997), *cert. denied*, 522 U.S. 859 (1997); Planned Parenthood Ass'n of Utah v. Matheson, 582 F. Supp. 1001, 1006 (D. Utah 1983). However, at times, legislators have attempted to require parental consent that would limit the ability of an adolescent to consent on her own to receive care. For example, in 1998, the Parental Notification Act was passed by the House of Representatives and would have required a minor's parents to be notified before the minor could receive contraceptive drugs or devices from projects supported by Title X funds, Parental Notification Act of 1998, H.R. 4721, 105th Cong.; however, the Act did not become law. A similar measure had been defeated in 1978. *See* 124 CONG. REC. 37,044 (1978); *see also* Michele Goodwin & Naomi Duke, *Capacity and Autonomy: A Thought Experiment on Minors' Access to Assisted Reproductive Technology*, 34 HARV. J.L. & GENDER 503, 537-43 (2011) (discussing reproductive health care debates about adolescents and their consent to services).

91. *See* Hanna, *supra* note 45, at 5 (noting that prostitution has traditionally "divided feminist scholars and activists," and that feminists have "shied away from the . . . question of the legal status of child sex workers" because there is "no agreement on what the legal status of adult commercial sex work" should be); *see, e.g.,* Margaret A. Baldwin, *Split at the Root: Prostitution and Feminist Discourses of Law Reform*, 5 YALE J.L. & FEMINISM 47 (1992).
92. *See generally* Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUV. L. & POL'Y 275, 285-363 (2006) (discussing controversies about the capacity of children to make decisions in differing legal contexts and identifying ways to treat them consistently); Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265 (2000); Kimberly M. Mutcherson, *Minor Discrepancies: Forging a Common Understanding of Adolescent Competence in Healthcare Decision-Making and Criminal Responsibility*, 6 NEV. L.J. 927 (2006) (discussing tensions related to adolescents' competence to make decisions about their health care as compared to their ability to be criminally culpable).
93. 543 U.S. 551 (2005).

adults and are thus less blameworthy for their criminal actions.<sup>94</sup> However, fifteen years earlier, the APA had argued in *Hodgson v. Minnesota*<sup>95</sup> that adolescents possess the same mental capability and maturity as adults to make reproductive health decisions about birth control and abortion.<sup>96</sup> When the Court made its landmark decision in *Roper* to abolish the death penalty for juveniles, scientific data about adolescent development cited by the APA played a crucial role.<sup>97</sup> However, the APA faced criticism in Justice Scalia's dissent, as it was accused of "flip-flopping" because of its prior assertions in *Hodgson*.<sup>98</sup> Justice Scalia specifically noted the APA's seemingly contradictory positions and the fact that other groups questioned the validity of the APA's arguments.<sup>99</sup>

In this way, the argument that youth cannot legally consent due to immaturity and lack of capacity in one area—such as prostitution—invites the argument that they are not capable of decision making or consent in other areas.<sup>100</sup> However, commercial sexual exploitation can be distinguished from other con-

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94. See Brief for the American Psychological Ass'n, & the Missouri Psychological Ass'n as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1636447.
95. 497 U.S. 417 (1990).
96. Brief for Amici Curiae American Psychological Ass'n, National Ass'n of Social Workers Inc., & the American Jewish Committee in Support of Petitioners/Cross-Respondents in Nos. 88-1125, 88-1309 and in Support of Appellees in No. 88-805 at 18-21, *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (Nos. 88-1125, 88-1309), *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990) (No. 88-805), 1989 WL 1127529 [hereinafter APA *Hodgson* Brief].
97. *Roper*, 543 U.S. at 569-70.
98. See *Roper*, 543 U.S. at 617 (Scalia, J., dissenting) ("[T]he American Psychological Association (APA), which claims in this case that scientific evidence shows persons under 18 lack the ability to take moral responsibility for their decisions, has previously taken precisely the opposite position before this very Court." (citing APA *Hodgson* Brief)); Cunningham, *supra* note 92, at 309-10. *But see* Laurence Steinberg et al., *Are Adolescents Less Mature than Adults?: Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop"*, 64 AM. PSYCHOLOGIST 583, 586 (2009) (reconciling the APA's position on youth access to abortion with its position on eligibility for the death penalty based upon important distinctions between psychosocial and cognitive maturity).
99. *Roper*, 543 U.S. at 617 (Scalia, J., dissenting); *see also* Mutcherson, *supra* note 92, at 927-28 (noting the tension in the arguments). *But see* Steinberg et al., *supra* note 98, at 586 (reconciling the seemingly contradictory positions).
100. See, e.g., Mutcherson, *supra* note 92, at 928; Steinberg et al., *supra* note 98, at 584 (noting that, when responding to the APA's request for an endorsement of its amicus brief, the Executive Committee of the Society for Research of Adolescence raised concerns that adolescent autonomy could be threatened based upon a misinterpretation of arguments that adolescents are less blameworthy); Cynthia Ward, *Punishing Children in the Criminal Law*, 82 NOTRE DAME L. REV. 429, 433-37 (2006).

texts involving juvenile decision making for two reasons. First, cognitive and psychosocial development occur along independent tracks for adolescents.<sup>101</sup> This can have varying effects on decision making, depending on the type of event at issue and the presence of pressure or coercion.<sup>102</sup> Therefore, just as the Supreme Court distinguished the types of adolescent reasoning at issue in *Hodgson* and *Roper*, so too can one distinguish a minor's inability to "consent" in the context of sexual exploitation from other areas of decision making that rely on cognitive, rather than psychosocial, capacities. Second, research and some laws acknowledge the implicit and explicit coercion of children in the sex trafficking industry. This sets commercial sexual exploitation apart from other situations in which an adolescent may make a decision in the absence of coercion. Our legal policies should be sufficiently nuanced to recognize the scientific and practical distinctions surrounding adolescent decision making. The inherent coercion in the trafficking of minors distinguishes it from other contexts in which juveniles may be able to safely make decisions. Therefore, concerns about other policies that apply to adolescents need not stymie reform addressing prosecution of minors. This is particularly true given that federal law recognizes that selling minors for sex is inherently coercive.

## II. THE PROSECUTION OF CHILDREN FOR PROSTITUTION AND RELATED LAWS

The practice of prosecuting minors for prostitution conflicts in two major ways with other laws relating to minors.<sup>103</sup> First, prosecuting prostituted youth

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101. See generally Steinberg et al., *supra* note 98, for a thorough discussion of these principles of adolescent brain development.
  102. See Emily Buss, *Rethinking the Connection Between Developmental Science and Juvenile Justice*, 76 U. CHI. L. REV. 493 (2009); Staci A. Gruber & Deborah A. Yurgelun-Todd, *Neurobiology and the Law: A Role in Juvenile Justice?*, 3 OHIO ST. J. CRIM. L. 321, 328 (2006); Steinberg et al., *supra* note 98.
  103. These conflicts and related issues have been discussed by other scholars as well, though there is scarce discussion and analysis of recent legislative and judicial developments. Examples of such discussion relating to these conflicts include, among others, Adelson, *supra* note 54, at 97; Tamar Birckhead, *The Youngest Profession: Consent, Autonomy, and Prostituted Youth*, 88 WASH. U. L. REV. 1055, 1095-96 (2011); 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, 502-05 (2008); Hanna, *supra* note 45, at 2-7; Hotaling, Miller & Trudeau, *supra* note 26, at 187; Nesheba Kittling, *God Bless the Child: The United States' Response to Domestic Juvenile Prostitution*, 6 NEV. L.J. 913, 920-22 (2006); Christianna M. Lamb, *The Child Witness and the Law: The United States' Judicial Response to the Commercial, Sexual Exploitation of Children in Light of the UN Convention on the Rights of the Child*, 3 OR. REV. INT'L L. 63, 81-84 (2001); and Shelby Schwartz, Note, *Harboring Concerns: The Problematic Conceptual Reorientation of Juvenile Prostitution Adjudication in New York*, 18 COLUM. J. GENDER & L. 235, 253-60 (2008). Outside of scholarly circles, however, these conflicts have final-



directly opposes the theory underlying statutory rape laws. Because these statutes implicitly recognize that minors cannot legally consent to sex with adults, prosecuting a minor for accepting money in conjunction with the very sex act that is considered statutory rape is inherently contradictory. Second, the prosecution of domestic minors perpetuates a dichotomy between domestic-born and foreign-born victims of sex trafficking. Although sexually exploited children may endure similar exploitative acts regardless of birthplace, they encounter different treatment under the law.<sup>104</sup> While the response of authorities is changing at the national level,<sup>105</sup> states have been slower to follow suit. Therefore, in addition to conflicts within state laws regarding consent and statutory rape, the prosecution of domestically trafficked youth under state law contradicts federal law and international protocols on human trafficking.<sup>106</sup> This Part will examine each contradiction in turn, beginning with a critical analysis of current prosecution practices.

A. *Prosecution for Prostitution in Juvenile Courts*

All states criminalize prostitution, except parts of Nevada.<sup>107</sup> In addition, states incorporate their penal codes into their juvenile court or family court statutes.<sup>108</sup> This incorporation subjects juveniles to essentially the same penal code provisions as adults—meaning that juveniles can be charged with prostitution and other offenses—though juveniles face different penalty schemes depending on each state’s juvenile laws.

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ly gained increased attention by advocacy groups like Shared Hope International and the Polaris Project.

104. See *Child Prostitution and Sex Trafficking Hearing*, *supra* note 70, at 14-16 (statement of Rachel Lloyd, Exec. Dir. & Founder, Girls Educ. & Mentoring Servs.); see also *infra* Subsection II.C.1.
105. See *infra* Section II.C (discussing the TVPA and the Federal Innocence Lost Initiative).
106. See Trafficking Victims Protection Act of 2000, 22 U.S.C. §§ 7101, 7103, 7105, 7106 (2006); Convention on the Rights of the Child, G.A. Res. 44/25, Annex, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49, at 167 (Nov. 20, 1989).
107. NEV. REV. STAT. ANN. § 201.354 (2010) (criminalizing prostitution and solicitation only when it occurs outside of a licensed facility); Nicole A. Hough, *Sodomy and Prostitution: Laws Protecting the “Fabric of Society”*, 3 PIERCE L. REV. 101, 113-14 (2004).
108. See, e.g., N.Y. FAM. CT. ACT § 301.2(1) (McKinney 2008) (defining a juvenile delinquent as “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, or (b) is the defendant in an action ordered removed from a criminal court to the family court pursuant to . . . the criminal procedure law”).

The majority of states retain juvenile court jurisdiction until age eighteen.<sup>109</sup> In only two states are sixteen-year-olds always tried as adults, regardless of the offense.<sup>110</sup> A juvenile who is adjudicated for the crime of prostitution, typically a Class B misdemeanor,<sup>111</sup> is then subject to disposition, the equivalent of sentencing in the adult context. In ordering dispositions, a juvenile court judge has discretion to issue a range of alternatives;<sup>112</sup> however, in some areas, prostitution is one of the few offenses for which the detention rate at disposition is nearly 100%.<sup>113</sup> The common use of detention for prostitution misdemeanor cases is reminiscent of the early days of the juvenile court and its preoccupation with regulating the sexual behavior of young females and punishing behavior viewed by society as “immoral.”<sup>114</sup> Recognizing this entrenched thinking in the modern juvenile justice system is helpful to understanding why reforms of the current practice have proven difficult.

### 1. Addressing Arguments in Favor of the Prosecution of Minors for Prostitution

Those who favor prosecuting youth for prostitution are not necessarily unaware of the exploitive behavior involved in youth trafficking, but they often advance several arguments in favor of prosecution in order to “protect” child-

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109. Thirty-nine states allow youth under the age of eighteen to be tried as juveniles. See Mark Soler, Dana Shoenberg & Marc Schindler, *Juvenile Justice: Lessons for a New Era*, 16 GEO. J. ON POVERTY L. & POL’Y 483, 496 (2010).
110. In New York and North Carolina, children age sixteen and older are tried as adults. See N.Y. FAM. CT. ACT § 301.2(1); N.C. GEN. STAT. 7B-1501(7) (2009).
111. For comparison purposes, Class B misdemeanors in New York include, among others, offenses such as criminal possession of marijuana in the fifth degree, N.Y. PENAL LAW § 221.10 (McKinney 2009); loitering in the first degree, *id.* § 240.26; criminal trespass in the third degree, *id.* § 140.10; possession of graffiti instruments, *id.* § 145.65; and fortune telling, *id.* § 165.35. Given the minor nature of some of these offenses, it is surprising that youth can serve a year in confinement for an offense that falls within this category.
112. These will vary by state, but in New York, for example, disposition can include anything from adjournment, where good behavior will result in dismissal, to detention in a secured detention facility. See N.Y. FAM. CT. ACT § 352.2. Options in between these extremes include probation; an adjournment in contemplation of dismissal, which generally grants an offender the ability to seal her case after a year without further arrests; and a conditional discharge, which permits an offender’s case to be discharged after one year if she has no new arrests or bad behavior, such as truancy, within that year. *Id.*
113. Solana Pyne, *Activists Push To Get Bill Protecting Exploited Girls Passed*, NY1 (April 20, 2007) (quoting Kim McLaurin, Legal Aid Soc’y), <http://www.ny1.com/content/68952/activists-push-to-get-bill-protecting-exploited-girls-passed>.
114. See *supra* notes 79-82 and accompanying text.

ren. First, many state law enforcement personnel view prosecution as the only way to protect minors from their own behavior.<sup>115</sup> Opponents also express a belief that an exploited youth “should be ‘locked down’ so that he or she can receive services and perhaps be persuaded to provide information against his or her pimp.”<sup>116</sup> Some law enforcement personnel also argue that it is too difficult to ensure that children will not run away and return to their abusers if law enforcement does not have the option of arresting and detaining them. They conclude that, as a result, prosecution is the only way to provide prostituted youth with assistance.<sup>117</sup>

Second, others argue that precluding prosecution would “decriminalize” the prostitution of youth and make it more difficult to fight prostitution in general.<sup>118</sup> Eliminating such prosecution, in this view, would create a “loophole” for those who exploit minors for prostitution.<sup>119</sup> A third argument in support of prosecution is related to the testimony of prostituted youth. Because their testimony is often necessary to successfully prosecute those who exploit them,

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115. See, e.g., State’s Response to Petition for Review at 7, *In re B.W.*, 313 S.W.3d 818 (Tex. 2010) (No. 01-07-00274-cv) (arguing that prosecution is necessary because exploited children are in need of protection); Thomas Adcock, *Legal, Social Services Community Prepare for Enactment of Safe Harbor Act*, N.Y. L.J., Oct. 3, 2008, at 23-24 (quoting John Feinblatt, New York City’s criminal justice coordinator, as saying that he opposed New York’s Safe Harbor Act because he viewed prosecution as necessary to be able to “get a child to stop destructive behavior”).

116. See Memorandum from the Sex & Law Comm., N.Y.C. Bar Ass’n, to Assemb. William Scarborough and Sen. Dale Volker 6, available at [http://www.nycbar.org/pdf/report/Safe\\_Harbor\\_Memo.pdf](http://www.nycbar.org/pdf/report/Safe_Harbor_Memo.pdf) (quoting opponents of the Safe Harbor Act). The State of Texas has argued that prosecuting children for prostitution is necessary to allow them to obtain “access to individual counseling” and the “use of an educational specialist.” State’s Response to Petition for Review, *supra* note 115, at 7. Texas also argued that children would go without assistance if they were not prosecuted for engaging in sex acts for pay because “[i]n an age of deadly sexually transmitted diseases, [the inability to prosecute] places young persons who are highly vulnerable, and most needful of protection, outside the authority of the juvenile justice system to aid them.” *Id.* (citing *In re C.S.*, 591 N.Y.S.2d 691 (N.Y. Fam. Ct. 1992)).

117. See, e.g., State’s Response to Petition for Review, *supra* note 115, at 6-8.

118. See *id.* at 7 (arguing that “it would be absurd to rule [that] juvenile girls and boys may engage in prostitution immune from any criminal liability” because “pimps would be encouraged to seek out juveniles to act as their prostitutes since there would be no criminal liability for the prostitute herself”); Clyde Haberman, *Helping Girls as Victims, Not Culprits*, N.Y. TIMES, July 8, 2008, at B1 (noting that the Criminal Justice Coordinator in the New York City Mayor’s Office opposed New York legislation banning the prosecution of minors for prostitution, arguing that “the best way to reach [girls] is not through decriminalization but rather using the leverage of court-ordered services”).

119. See, e.g., State’s Response to Petition for Review, *supra* note 115, at 6-7.

some argue that the mere threat of prosecution and the subsequent ability to detain children is the most effective way to obtain their important testimony.<sup>120</sup> Finally, some proponents of prosecution simply underestimate the reality of coercion in this industry. They suggest that some of these children freely choose to enter the life of a prostitute in order to profit financially.<sup>121</sup> This last argument has been made by those who oppose legislation that would amend laws that penalize children for prostitution.<sup>122</sup> This belief still persists among many in the law enforcement community. As one study observed, police officers as a whole still do not “conceptualize all youth involved in prostitution as victims of [commercial sexual exploitation].”<sup>123</sup>

These positions overlook two key points. First, even if legal reforms precluded the prosecution of prostituted youth, other laws would continue to prohibit individuals from purchasing sex with adults or children and would continue to impose harsh consequences on individuals who exploit children by coercing them into prostitution.<sup>124</sup> Second, it is easier for law enforcement personnel to build a relationship of trust with children when they are not at risk of prosecution. Pimps and traffickers often condition young girls to fear punishment by law enforcement so that they do not seek help.<sup>125</sup> But exploited youth may be more likely to seek assistance from police if they are not at risk of prosecution. This can ultimately benefit prosecutors who often need exploited youth to cooperate with them in their prosecution of pimps and traffickers. Reforms in this arena may also lead to better protection for exploited youth since they may be more likely to seek needed medical attention from the public health community if they do not fear retribution from authorities. When victims seek health care for the violence that they have endured or for sexual health concerns, a vital point of intervention and opportunity to assist victims is created.

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120. See Editorial, *Safe Harbor for Exploited Children*, N.Y. TIMES, June 5, 2007, at A22.

121. See, e.g., Hanna, *supra* note 45, at 26-27 (noting that some members of society blame sexually exploited children for the situations in which they find themselves); Carrie Baker, *Jailing Girls for Men's Crimes*, MS. MAG. BLOG (Dec. 8, 2010), <http://www.msmagazine.com/blog/blog/2010/12/08/jailing-girls-for-mens-crimes/> (quoting an individual who opposed Georgia's proposed safe-harbor law, which would have exempted minors from prosecution for prostitution).

122. See, e.g., Baker, *supra* note 121.

123. Halter, *supra* note 6, at 158; see also Finkelhor & Ormrod, *supra* note 17, at 1.

124. As of 2011, forty-three states have passed anti-trafficking laws, most of which impose more stringent fines when the victim is a minor. See CTR. FOR WOMEN POLICY STUDIES, FACT SHEET ON STATE ANTI-TRAFFICKING LAWS 3 (2011), available at <http://www.centerwomenpolicy.org/documents/FactSheetonStateAntiTraffickingLawsFebruary2011.pdf>; see also Trafficking Victims Protection Act of 2000, 22 U.S.C. §§ 7101-7109 (2006) (criminalizing attempts to engage in sex trafficking and increasing penalties for sex trafficking).

125. See *supra* note 77.

On the whole, opponents of reform argue that exempting minors from prosecution will undermine the State's ability to protect children and misguidedly encourage the sexual exploitation of minors.<sup>126</sup> With regard to the protection aspect of those arguments, laws already exist or can be amended to permit a child welfare agency to provide medical and therapeutic services to survivors of commercial sexual exploitation.<sup>127</sup> Lawmakers could also pass legislation that requires law enforcement and other personnel to report to public agencies when they encounter the suspected sexual abuse of a child by any person, not just by a parent or caretaker.<sup>128</sup> This scheme is already in place in some states and can be created in others. With multidisciplinary expertise and expanded specialized services, these services could provide effective protection: One study reported that 87% of exploited youth in the study had a desire to exit prostitution if given the opportunity, and many mentioned that support systems would be critical in helping them do so.<sup>129</sup> In addition, victim-centered approaches have promising potential at the federal level.

Ultimately, there is little support for the argument that children should be detained so that they can receive services and protection from themselves. While it is true that some minors run away and return to a pimp if they are not locked up,<sup>130</sup> this does not justify lawmakers' willingness to ignore rational consent arguments against prosecution. It also does not merit overlooking the effects of successful victim-centered approaches over time.<sup>131</sup> Further, while supporters advocate prosecution in the name of "protection" and "providing services," the juvenile justice system has demonstrated that it is not an effective

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126. See, e.g., *In re B.W.*, 313 S.W.3d 818, 824 (Tex. 2010); Haberman, *supra* note 30, at B1; Kyle Wingfield, *Child Prostitution, Sex Trafficking Back on Legislative Agenda*, ATLANTA J.-CONST. BLOG (Feb. 9, 2011, 7:03 PM), <http://blogs.ajc.com/kyle-wingfield/2011/02/09/child-prostitution-sex-trafficking-back-on-legislative-agenda/> (describing opposition to a Georgia safe harbor bill by various groups).

127. See, e.g., Illinois Safe Children Act, 2010 Ill. Laws 6931 (amending the Abused and Neglected Child Reporting Act, 325 ILL. COMP. STAT. 5/11-19.3 (2010)); see also Halter, *supra* note 6, at 158 (arguing that "policy makers need to sort out [the] roles and responsibilities of the police and Child Protection Services for youth involved in prostitution to create pathways for resistant youth to receive the necessary treatment and services").

128. See, e.g., GA. CODE ANN. § 19-7-5 (2009) (amending the mandatory reporting statute to require reports notifying Georgia's Department of Human Services when a person has "reasonable cause to believe that a child is being sexually exploited by any person").

129. See also CURTIS ET AL., *supra* note 30, at 102, 106-08.

130. See Brown, *supra* note 103, at 473.

131. See *infra* Subsection II.C.2.

purveyor of those services and, in fact, can increase harm to children.<sup>132</sup> In addition to exacerbating the current incoherence of the law, these failures to assist children provide powerful arguments in support of reform. There is overwhelming evidence that confinement does not succeed in assisting juveniles—particularly the vulnerable population of sexually abused girls—since it does not attend to their gender-specific problems.<sup>133</sup> In particular, girls’ detention centers sorely lack programming relevant to the experiences of sexually exploited youth.<sup>134</sup> In addition, sexual misconduct and harmful behavior by staff members in these facilities is well documented.<sup>135</sup> Often, girls are released from detention with few referrals for services that will help them build a healthy life.<sup>136</sup>

## 2. The Conflict with Statutory Rape Laws

Lawmakers’ application of prostitution statutes to juveniles raises the practical question of whether a juvenile can be guilty of prostitution if he or she

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132. See, e.g., GIRLS’ JUSTICE INITIATIVE, *supra* note 6, at 12 (discussing the ways in which poor conditions in detention centers often exacerbate the difficulties facing youth who have suffered sexual and other trauma). “With rare exceptions, the overall quality of services for girls in placement is poor.” *Id.*; see also Tracy, Kempf-Leonard & Abramoske-James, *supra* note 82, at 180 (noting that “[e]ven among those criminal justice agencies that do try to respond to females, there are many inappropriate services, interventions, and sanctions”).

133. See SHERMAN, *supra* note 6, at 24-28.

134. See *id.* Additionally, Soler, Schoenberg, and Schindler note that, despite high rates of prior sexual abuse among girls in detention facilities, there are few evaluations that determine which programs help girls most. Soler, Schoenberg & Schindler, *supra* note 109, at 502 (citing Barbara Bloom et al., *Improving Juvenile Justice for Females: A Statewide Assessment in California*, 48 CRIME & DELINQ. 526 (2002)).

135. See Soler, Schoenberg & Schindler, *supra* note 109, at 506 (noting that there is “growing documentation of sexual victimization of youth in custody across the country . . .”); see also Lustig, *supra* note 57, at 40 (quoting one girl who stated, “I had a male staff tell me, ‘I can give it to you better than any young boy’”); HOWARD SNYDER & MELISSA SICKMOND, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 231 (2006). While girls represented 11% of the overall youth population in detention facilities, girls accounted for 34% of the victims of substantiated incidents of sexual violence in state facilities. *Id.* The most recent juvenile detention facility investigation by the U.S. Department of Justice found flagrant examples of sexual abuse by staff members and concluded that that the “sexualized environment at the facility appears rampant.” CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE INDIANAPOLIS JUVENILE CORRECTIONAL FACILITY 10 (2010). Aside from abuse, the investigation revealed numerous reports filed by detainees regarding inappropriate sexual advances and comments made by staff. *Id.* at 9-11.

136. GIRLS’ JUSTICE INITIATIVE, *supra* note 6, at 7.

cannot legally consent to sex and when that same act of “prostitution” includes his or her exploitation, by definition. All states and the federal government have laws that prohibit sex between an adult and a minor.<sup>137</sup> For purposes of this discussion, “statutory rape” laws refer to laws that define the age below which a person is legally incapable of consenting to sexual activity with an adult.<sup>138</sup> States vary in their implementation and definition of this principle, including the age and conditions under which the law will consider the presence of consent. The purpose of statutory rape laws in modern terms is to protect minors from sexual exploitation and “those who would prey on their vulnerability.”<sup>139</sup> Indeed, numerous studies and interdisciplinary scholarship note that adolescent development leaves youth vulnerable to coercive or abusive sexual conduct.<sup>140</sup> Because statutory rape laws preclude legal consent to sexual activity, these laws implicitly attribute coercion or abuse to an adult who has sex with a minor. Indeed, statutory rape cases presume coercion, as does the TVPA with regard to people under eighteen when it defines who is a severe victim of trafficking.<sup>141</sup> Conversely, because adults can legally consent to sex with one another, adult victims of commercial sexual exploitation bear the legal burden of proving that they were subject to coercion or force to demonstrate that they are trafficking victims.<sup>142</sup>

The source of this tension—the principle that an underage child cannot legally consent to sex—originates in the common law.<sup>143</sup> The age of consent is

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137. ASAPH GLOSSER, KAREN GARDINER & MIKE FISHMAN, LEWIN GROUP, *STATUTORY RAPE: A GUIDE TO STATE LAWS AND REPORTING REQUIREMENTS* 3 (2004), *available at* <http://aspe.hhs.gov/hsp/o8/SR/StateLaws/report.pdf>. Under federal law, the prohibition of sex with a minor appears at 18 U.S.C. § 2243(a) (2006).

138. Only a few states have laws in force that define an offense actually titled “statutory rape”; instead, most states have statutes dictating “age-specific provisions addressing voluntary sexual acts and the age at which an individual can legally consent to such acts.” GLOSSER, GARDINER & FISHMAN, *supra* note 137, at 3.

139. Oberman, *supra* note 73, at 754 (noting, however, that at their inception, the laws were concerned with “a father’s interest in his daughter’s chastity”).

140. *See id.* at 704-05 (citing a myriad of studies dealing with the impacts of and issues raised by adolescent sexuality and abuses).

141. 22 U.S.C. § 7102(8). The TVPA defines “severe forms of trafficking in persons” as “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained eighteen years of age.” *Id.*

142. *Id.* (including persons under eighteen within the definition regardless of evidence of force, fraud, or coercion).

143. *See, e.g.,* State v. Hazelton, 915 A.2d 224, 233-34 (Vt. 2006) (“The rule that an underage child cannot consent to sex need not derive from statute . . . but is a part of common law.”). While the age of consent was placed at age ten at common law, every state has raised this age by statute. *See* Payne v. Commonwealth, 623 S.W.2d

sixteen under federal law<sup>144</sup> and in thirty-three states, the District of Columbia, and the Model Penal Code; six states elect age seventeen as their age of consent; and in the remaining eleven states, the age of consent is age eighteen.<sup>145</sup> Though the specific age varies by state, all of them have laws dictating that minors under a certain age cannot legally consent to sex.<sup>146</sup>

Only twelve states have laws that define a uniform age of consent to sex.<sup>147</sup> Most states apply a two-tiered approach when addressing adult sex with a minor.<sup>148</sup> The laws in those states distinguish between sex with a younger child and sex with an older teen. They often establish a provision for circumstances known as “factual consent” that may negate the prosecution of the alleged offender for statutory rape where there is less of an age difference between the two people in the relationship at issue.<sup>149</sup> Therefore, while it is a crime to have sex with a child under seventeen in most states, many create a factual consent

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867, 875 (Ky. 1981); *see also* GLOSSER, GARDINER & FISHMAN, *supra* note 137, at 6 (providing a table listing the age of consent for all fifty states as of 2006).

144. 18 U.S.C. § 2243(a)(1) (2006).
145. *See* GLOSSER, GARDINER & FISHMAN, *supra* note 137, at 6-7. Under the Model Penal Code, statutory rape occurs when a person has sexual intercourse with another person who is “less than sixteen years old and the actor is at least four years older than the other person.” MODEL PENAL CODE § 213.3(1)(a) (2001). Black’s Law Dictionary uses a similar definition, stating that statutory rape is “[u]nlawful sexual intercourse with a person under the age of consent (as defined by statute), regardless of whether it is against that person’s will.” BLACK’S LAW DICTIONARY 1374 (9th ed. 2009). It defines “age of consent” as “[t]he age, usually defined by statute as 16 years, at which a person is legally capable of agreeing to marriage (without parental consent) or to sexual intercourse.” *Id.* at 70.
146. For a description of this principle and its relationship with cases prosecuting those who traffic youth, *see United States v. Ebert*, 561 F.3d 771, 776 (8th Cir. 2009) (“Because the victims [in this commercial sexual exploitation case] were minors and could not legally consent [to sex], the government did not need to prove the elements of fraud, force, or coercion, which are required for adult victims.”). *See also* *United States v. Abad*, 350 F.3d 793, 797 (8th Cir. 2003) (recognizing that children cannot consent to sexual contact and stating that “[w]hen sexual assaults are committed upon children . . . consent is not a defense” (quoting *Guarro v. United States*, 237 F.2d 578, 581 (D.C. Cir. 1956) (internal quotation marks omitted))).
147. *See* GLOSSER, GARDINER & FISHMAN, *supra* note 137, at 6-7 (providing a table that identifies those twelve states and their respective ages of consent: age eighteen in California and Wisconsin; age seventeen in Illinois and New York; and age sixteen in Georgia, Kansas, Kentucky, Massachusetts, Michigan, New Hampshire, Nevada, and Vermont).
148. *See id.* (noting that thirty-eight states and the District of Columbia include differing ages of legal consent rather than choosing only one valid age of consent for purposes of prosecuting the other participant in the sexual act).
149. *See infra* note 150.



exception if the child is above a certain age, usually thirteen or fourteen. These provisions are generally limited to situations in which the accused is no more than three or four years older than the victim, and there are no allegations of force.<sup>150</sup>

The existence of statutory rape laws creates complicated questions when courts and legislatures consider them in parallel with the prosecution of prostituted youth. When state law explicitly precludes legal consent by a child to sex with an adult or otherwise, how can that child still be eligible for prosecution for the same act? Furthermore, if two-tiered statutory rape provisions include some forms of factual consent for older teens, to what extent does that negate the argument that older teens cannot consent to prostitution because of implied coercion? Courts now face these and other questions. When the first question was raised in New York by a victim of commercial sexual exploitation, Nicolette R., the court held that a child's inability to consent to sexual acts did not prohibit the state from using prostitution statutes to prosecute her for those acts.<sup>151</sup>

*B. State Court Challenges to the Prosecution of Minors for Prostitution*

Until recently, New York was the only state whose appellate court had considered a challenge to the prosecution eligibility of minors for prostitution. While New York rejected the argument against prosecution,<sup>152</sup> in 2010, the Texas Supreme Court took on the issue and reached the opposite conclusion. It held that a youth's inability to consent to sexual acts *does* prohibit the state from prosecuting children under age fourteen for prostitution,<sup>153</sup> in direct contrast to the New York ruling.

The Texas Supreme Court took a major step forward toward reconciling existing laws. The decision was the first of its kind to challenge current legal contradictions, holding that “[b]ecause a thirteen-year-old child cannot consent to sex as a matter of law . . . [the minor] cannot be prosecuted as a prostitute.”<sup>154</sup> This created a split between the two states where state appellate and supreme courts have ruled on the issue.

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150. See GLOSSER, GARDINER & FISHMAN, *supra* note 137, at 6-7. For example, in Pennsylvania, children under thirteen cannot consent to sex under any circumstances, and, therefore, sexual relations with a thirteen-year-old are always considered statutory rape. 18 PA. CONS. STAT. ANN. § 3121 (West 2011). However, a person between the ages of thirteen and sixteen in Pennsylvania can “factually consent” to sex if the two parties are less than four years apart. See *id.* § 3125. Factual consent is a term used commonly by courts in discussions related to these provisions of statutory rape law. See, e.g., U.S. v. Williams, 529 F.3d 1, 5 (2008).

151. *In re Nicolette R.*, 9 A.D.3d 270 (N.Y. App. Div. 2004).

152. *Id.*

153. *In re B.W.*, 313 S.W.3d 818, 821 (Tex. 2010).

154. *Id.*

### 1. The Rejection of the Consent Argument in New York

The question of a minor's consent in a prostitution case reached New York's intermediate court of appeals in 2004.<sup>155</sup> There, a minor challenged the rationale of prosecuting children for prostitution if they are under the age of consent.<sup>156</sup> The court rejected the minor's argument.<sup>157</sup> Nicolette R., the appellant, was a twelve-year-old girl who had offered to perform oral sex on an undercover police officer for forty dollars.<sup>158</sup> The court held that although her age made her incapable of consenting to any sexual act—including those rendered unlawful by the penal code—this was “irrelevant to the issue of whether she was properly found to have committed an act . . . which would constitute the crime of prostitution.”<sup>159</sup> It reasoned that the relevant statute defining prostitution contains no age requirement, and, thus, minors could be subject to prosecution under it.<sup>160</sup> The court found that while underage status constitutes a lack of consent under the penal law sections dealing with statutory rape, those statutes did not bear any relationship to prostitution involving a minor.<sup>161</sup> Nicolette R. argued that the statutory rape laws declaring her incapable of consent, along with community interests in protecting children, dictated dismissal of the case.<sup>162</sup> Because the court ultimately failed to reconcile the incongruity between statutory rape laws and the prosecution of young people for prostitution, reform advocates in New York focused on legislative efforts to amend the law.<sup>163</sup>

Nicolette R.'s life experience mirrors many of the signature characteristics of children involved in sexual exploitation, which is relevant to those considering legislative and court solutions to best address the problem. As a young child, Nicolette R. suffered sexual abuse and abandonment by her parents.<sup>164</sup>

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155. *In re Nicolette R.*, 9 A.D.3d at 270.

156. *Id.* at 271.

157. *Id.*

158. Thomas Adcock, *Nicolette's Story*, N.Y. L.J., Oct. 3, 2008, at 23-24.

159. *In re Nicolette R.*, 9 A.D.3d at 271.

160. *Id.* (citing N.Y. PENAL LAW § 230.00 (McKinney 2009)).

161. *Id.* (citing N.Y. PENAL § 130.05(3)(a)).

162. See Adcock, *supra* note 158, at 23 (quoting the appellant's brief, which was written by Katherine Mullen, the child's attorney, who later was central in the passage of New York's Safe Harbor Act). While the court rejected Nicolette R.'s argument, it found that the lower court failed to consider the best placement for her and noted that the facility where she was placed by the court was not adequate to provide her with the specialized services that she needed. *In re Nicolette R.*, 9 A.D.3d at 271. This finding is illustrative of the disjunction between detention and the actual delivery of services to these children through judicial remedies.

163. See Adcock, *supra* note 158; see also *infra* Section III.A.

164. Adcock, *supra* note 158, at 23.

After running away from her aunt's residence, where she was also abused, she came "under the control of an adult male pimp" and was forced into prostitution.<sup>165</sup> Psychologist reports noted that she bore scars, burns, and other recent wounds,<sup>166</sup> indicating that she endured violence during the time she was exploited.

The court's decision illustrates the common legal paradigm for prosecuting children for prostitution in state courts. While federal trafficking laws were in place before the *In re Nicolette R.* decision, they were only amended more recently to better address the needs of domestic-born children.<sup>167</sup> In addition, before *In re Nicolette R.*, most states had not yet passed related anti-trafficking reforms that focused on curbing commercial sexual exploitation and enhancing penalties for trafficking minors as they have in subsequent years.<sup>168</sup> The impact of this cultural shift was demonstrated by the Texas Supreme Court's opinion when it embraced the same argument that the New York court had rejected.

## 2. The Texas Supreme Court's Decision that Consent Matters

Six years after the New York court issued its decision in *In re Nicolette R.*, the Texas Supreme Court faced the same legal question in *In re B.W.* It held that a child could not be charged with prostitution because children under the age of fourteen cannot legally consent to sex.<sup>169</sup> The court reasoned that when children lack the capacity to consent to sex as a matter of law, it is incongruous to charge them with prostitution.<sup>170</sup> The facts of *In re B.W.* were quite similar to those that were before the New York court in *In re Nicolette R.* B.W., age thirteen, offered to engage in oral sex with an undercover police officer in exchange for twenty dollars. She was arrested and charged with prostitution.<sup>171</sup> At trial, B.W. pled that she "knowingly agree[d] to engage in sexual conduct . . . for a fee."<sup>172</sup> A court report described B.W.'s history of sexual and physical abuse, stating that she was "emotionally impoverished, discouraged and dependent."<sup>173</sup>

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165. *Id.*

166. *Id.*

167. *See infra* Section II.C.

168. *See infra* text accompanying notes 193-194 (explaining that, in 2004, only four states had anti-trafficking legislation as compared to forty-three states by 2010).

169. *In re B.W.*, 313 S.W.3d 818 (Tex. 2010).

170. *Id.*

171. *Id.* at 819. B.W. was initially charged in criminal court; however, when it was revealed that she was a juvenile, the charges were refiled in family court. *Id.*

172. *Id.*

173. *Id.* The psychologist's report noted that B.W. was "preoccupied with self-doubt . . . [and] yearns for acceptance and affection." Amicus Curiae Brief of Children at Risk in Support of Petitioner's Petition for Review, *In re B.W.*, 313

B.W. had also run away from foster care the prior year.<sup>174</sup> The court adjudicated her a juvenile delinquent and placed her on probation for eighteen months.<sup>175</sup>

On appeal, B.W. argued that children under fourteen could not be prosecuted for engaging in prostitution because “the legislature cannot have intended to apply the offense of prostitution to children under fourteen because children below that age cannot legally consent to sex.”<sup>176</sup> In Texas, sex with a minor under the age of fourteen is criminalized under any circumstance, with different treatment for older minors depending on the age of the other party.<sup>177</sup> The court recognized this distinct section of the state’s statutory rape law and held that “[w]hile no statute explicitly states that children under fourteen are unable to provide consent for all purposes, the inability of children to consent to sex as a matter of law is both part of the common law and a necessary inference from [the relevant provision of the Texas Penal Code addressing statutory rape] and other statutes dealing with sexual exploitation of a child.”<sup>178</sup>

The court agreed with the appellant’s argument about the intent of the legislature.<sup>179</sup> The court reasoned that the state’s statutory rape and trafficking laws were designed to protect children from exploitation and concluded that prostitution laws could not be applied to children under fourteen because prostitution of youth involves exploitation.<sup>180</sup> It also found that laws recently enacted in Texas to address sexual trafficking and child exploitation supported its analysis of the legislative intent in the penal code.<sup>181</sup> In doing so, the court found that related statutes provided examples of the legislature’s belief in “the extreme importance of protecting children from sexual exploitation, and the awareness that children are more vulnerable to exploitation by others even in the absence of explicit threats or fraud.”<sup>182</sup>

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S.W.3d 818 (Tex. 2010) (No. 01-07-00274-cv), 2010 WL 430061 (internal citation omitted).

174. See State’s Response to Petition for Review at 1, *In re B.W.*, 313 S.W.3d 818 (Tex. 2010) (No. 01-07-00274-cv).

175. *In re B.W.*, 313 S.W.3d at 819. On appeal, the court affirmed the trial court’s decision. B.W. sought relief from the Texas Supreme Court.

176. *Id.*

177. TEX. PENAL CODE ANN. § 22.011 (West 2011).

178. *In re B.W.*, 313 S.W.3d at 823 (citing *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001)) (noting that the court could “consider the common law and laws on the same or similar subjects in determining legislative intent”).

179. *Id.* at 821.

180. *Id.*

181. *Id.*

182. *Id.* The court noted that under the Penal Code, a person who compels by any means a child under eighteen to commit prostitution has committed “a crime [that is] equivalent to using ‘force, threat, or fraud’ to compel an adult to commit

In a key passage, the court summarized its analysis of the legislature’s intent and highlighted the significance of the Texas statutes’ protecting children from sexual exploitation:

It is difficult to reconcile the Legislature’s recognition of the special vulnerability of children, and its passage of laws for their protection, with an intent to find that children under fourteen understand the nature and consequences of their conduct when they agree to commit a sex act for money, or to consider children quasi-criminal offenders guilty of an act that necessarily involves their own sexual exploitation.<sup>183</sup>

In its discussion about the nature of consent, the court acknowledged the rationale behind statutory rape laws. Namely, such statutes preclude younger children from legally consenting to sex because they “lack the capacity to appreciate the significance or the consequences of agreeing to sex.”<sup>184</sup> The court cited the *Roper* and *Graham v. Florida*<sup>185</sup> Supreme Court decisions to support this notion, acknowledging the differences between adolescent and adult minds and how this developmental distinction bears on issues of culpability.<sup>186</sup>

*In re B.W.* represents significant progress toward realizing a coherent legal framework for prostituted youth. However, it is not without limitations. Currently, children over age thirteen remain eligible for prosecution for prostitution in Texas based on the court’s analysis of the state’s two-tier statutory rape law. Just one year prior to the *In re B.W.* decision, an appellate court in Texas upheld the prosecution of a sixteen-year-old for prostitution.<sup>187</sup> The *In re B.W.* decision would not dictate the outcome of that case if it were tried today. However, *In re B.W.* provides persuasive reasoning against prosecuting all mi-

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prostitution.” *Id.* In addition, that person is charged with a second-degree felony for compelling a minor to commit prostitution, as opposed to a misdemeanor for a perpetrator who compels an adult. *Id.* (citing TEX. PENAL CODE ANN. §§ 43.03, .05 (West 2011)). The court cited other relevant statutes, finding it significant that the “sexual assault of a child under fourteen is considered ‘aggravated sexual assault’ and is subject to the same consequences as the rape of an adult involving serious bodily injury or other aggravating circumstances.” *Id.* (citing PENAL §§ 22.011, .021). The court also noted the imposition of harsher penalties under PENAL § 43.25(e) for inducing a child under age fourteen to engage in sexual conduct or performance, and the imposition of harsher penalties under PENAL § 20A.02 for trafficking a child under age eighteen for purposes of compelling prostitution or sexual performance. *Id.* at 821.

183. *Id.* at 821.

184. *Id.* at 820.

185. 130 S. Ct. 2011 (2010).

186. *Id.* at 823 (citing the Supreme Court’s discussion of the reduced mental capacity of minors as compared to adults in *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005), and *Graham v. Florida*, 130 S. Ct. 2011 (2010)).

187. *In re B.D.S.D.*, 289 S.W.3d 889 (Tex. App. 2009).

nors based upon its reference to the purpose of the state's other laws addressing the exploitation of children<sup>188</sup> and its framing of Supreme Court language.

The contrast between the New York and Texas cases potentially signals a new era in the law's treatment of the commercial sexual exploitation of youth. The differing outcomes highlight the developments in sex trafficking laws during the years between the decisions, the evolving status of domestic prostituted youth, and the role of scientific information about adolescent development in the courts. Both of the U.S. Supreme Court cases that rely on emerging science about adolescent development were decided after *In re Nicolette R.*, and cited in *In re B.W.* Those decisions provided the Texas Supreme Court with significant additional support for its reasoning that was unavailable to the New York appellate court.<sup>189</sup> Indeed, *In re B.W.* was the first court decision to cite *Graham* outside of the sentencing context at issue in that case, signaling its instructive precedent for courts considering questions of adolescent behavior.

The Texas court also acknowledged that the state legislature's passage of a strict anti-trafficking law significantly influenced its decision.<sup>190</sup> Texas was notably one of the first states to enact a statute that criminalized trafficking.<sup>191</sup> In contrast, New York had not yet passed any anti-trafficking laws when its appellate court considered the *In re Nicolette R.* case in 2004. The New York legislature subsequently passed strict anti-trafficking laws three years later in 2007.<sup>192</sup> In fact, in 2004, only four states had specific anti-trafficking legislation that allowed for the prosecution of domestic sex traffickers.<sup>193</sup> By 2010, forty-three states and the District of Columbia had passed anti-trafficking legislation; many states had increased penalties for exploitation of minors, as Texas did; and some had authorized victim restitution and services.<sup>194</sup>

Finally, although the federal TVPA was passed in 2001, it had not yet proven to be a strong tool for protecting domestic minors when New York decided *In re Nicolette* in 2004. It was not until 2005 that Congress passed legislation, as

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188. *In re B.W.*, 313 S.W.3d at 821.

189. *Id.* at 823.

190. *Id.* at 821.

191. Act of June 20, 2003, ch. 641, sec. 2, § 20A.02, 2003 Tex. Gen. Laws 2045 (codified as amended at TEX. PENAL CODE ANN. § 20A.02 (West 2011)). Washington passed a similar law in 2003. Act of May 14, 2003, ch. 267, 2003 Wash. Sess. Laws 1436 (codified in scattered sections of WASH. REV. CODE).

192. See N.Y. PENAL LAW § 230.34 (McKinney 2009) (creating the crime of "sex trafficking" as a Class B felony); N.Y. SOC. SERV. LAW § 483-cc(b) (McKinney 2007) (incorporating the federal definition of "severe trafficking victim" to assess trafficking victims, and setting forth protocols for police encounters with minor victims).

193. These states were Florida, Missouri, Texas, and Washington. See CTR. FOR WOMEN POLICY STUDIES, *supra* note 124.

194. *Id.*

part of an effort that amended the TVPA, recognizing domestically trafficked minors and specifically directing funding to their needs.<sup>195</sup>

C. *Federal Trafficking Laws Treating Juveniles as Victims*

Federal sex trafficking laws initially focused solely on addressing international trafficking issues.<sup>196</sup> Only recently has the TVPA responded to the need to protect domestic youth. This evolution influenced the initiation of change at the state level. For example, definitions and concepts formed by the TVPA were incorporated into state law<sup>197</sup> and supported ideology that drove efforts to eliminate prosecution as a mechanism against children who were arrested for prostitution.

1. The Evolution and Influence of the TVPA

The need to protect foreign-born noncitizens was more readily recognized by the public and federal law enforcement officials than the plight of domestic youth, when the TVPA was enacted in 2000.<sup>198</sup> There was appropriately broad support for legislation to improve the plight of foreign-born women and children, as this was considered a nonpartisan issue.<sup>199</sup> Since trafficked foreigners often lack documentation that will enable them to remain in the United States, they are particularly vulnerable, and their abusers exploit their fear of deportation and limited access to outside assistance.<sup>200</sup> The TVPA thus sought to aid these victims by providing them with special immigration status and victim

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195. See Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, sec. 203(f)-(g), 119 Stat. 3558, 3570 (2006) (codified as amended at 42 U.S.C. § 14044b(f)-(g) (2006)).
196. See Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7101(b)(24) (2006); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, sec. 2(3), 119 Stat. 3558, 3558-59 (2006) (acknowledging in its legislative findings that international victims had been the primary focus of federal efforts).
197. See *infra* note 235 and accompanying text.
198. The TVPA noted that 700,000 persons are trafficked within or across international borders annually, including 50,000 women and children trafficked *into* the United States. See 22 U.S.C. § 7101(b)(1) (2006); cf. Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts To Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977, 2991 (2006) (noting that the issue has been cast mostly as a foreign problem).
199. See Lindsay Strauss, Note, *Adult Domestic Trafficking and the William Wilberforce Trafficking Victims Protection Reauthorization Act*, 19 *CORNELL J.L. & PUB. POL'Y* 495, 500 (2010) (noting that supporters included religious groups, feminists, and nonprofit organizations); see also Chacón, *supra* note 198, at 2991.
200. See 22 U.S.C. § 7101(b)(5), (19)-(20) (2006).

assistance.<sup>201</sup> Even with this focused approach, however, the law's initial effectiveness in assisting international sex trafficking victims in the United States was limited.<sup>202</sup>

Years later, as commercially exploited domestic minors gained societal attention, advocates recognized the TVPA as an instrument that could potentially address the needs of domestic youth in addition to foreign-born youth.<sup>203</sup> Previously viewed as blameworthy street youth "prostituting" themselves, advocates and policy makers gradually included domestic youth in the federal legislative discourse about sex trafficking in the United States.<sup>204</sup> From its inception, the language of the TVPA recognized that *all* children under age eighteen who are induced into sex trafficking are severely trafficked persons.<sup>205</sup> Therefore, technically, the language of the TVPA did not foreclose offering civil protection and services to domestic minors, despite the fact that legislators initially focused efforts on foreign-born victims. By definition, the TVPA ensures that child victims do not have to prove "coercion, duress, or fraud" to be considered "severely trafficked persons" for purposes of protection under the TVPA.<sup>206</sup> Advocates viewed the TVPA as a key potential tool to leverage protection for prostituted domestic youth because they meet the definition of being "severely

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201. See *id.* § 7105(b)(1)(A), (C) & (E) (granting a T-visa when victims cooperated with law enforcement as witnesses against traffickers).
202. See Chacón, *supra* note 198, at 2991 (noting that "[w]hile there has been much discussion of trafficking, the issue has been cast as a foreign problem with unfortunate domestic manifestations"); Charles Song & Suzy Lee, *Between a Sharp Rock and a Very Hard Place: The Trafficking Victims Protection Act and the Unintended Consequences of the Law Enforcement Cooperation Requirement*, 1 INTERCULTURAL HUM. RTS. L. REV. 133, 136-37 (2006); April Rieger, Note, *Missing the Mark: Why the Trafficking Victims Protection Act Fails To Protect Sex Trafficking Victims in the United States*, 30 HARV. J.L. & GENDER 231, 233 (2007).
203. See, e.g., *Child Prostitution and Sex Trafficking Hearing*, *supra* note 70, at 14 (statement of Rachel Lloyd, Exec. Dir. & Founder, Girls Educ. & Mentoring Servs.); ALBANESE, *supra* note 11, at 8-9.
204. See, e.g., ALBANESE, *supra* note 11, at 8-9 (noting the need to recognize as victims of exploitation prostituted young people, the common perception by the public that they are "teenage prostitutes" rather than victims, and the need to include them in the larger policy discourse). The U.S. government has held hearings with detailed testimony and attention to domestic youth that acknowledge the prostitution of youth as a form of trafficking. These hearings include the Domestic Minor Sex Trafficking Hearing, *supra* note 6, the Child Prostitution and Sex Trafficking Hearing, *supra* note 70, and the Exploiting Americans on American Soil Hearing, *supra* note 49.
205. 22 U.S.C. § 7102(8) (2006). The TVPA defines "severe forms of trafficking in persons" as "sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act *has not attained eighteen years of age.*" *Id.* (emphasis added).
206. *Id.*



trafficked.”<sup>207</sup> In addition, the TVPA grants victims access to protective services, including medical care and safe housing.<sup>208</sup> Therefore, the argument that children like Elana, Nicolette R., and B.W. are victims becomes more compelling when one considers that they are “severely trafficked persons” under the TVPA. This is arguably in direct contrast with the idea of prosecuting such children.

Rachel Lloyd, founder of one of the few residential programs in the United States that specializes in working with sexually exploited youth, has advocated against the prosecution of the young female victims with whom she works.<sup>209</sup> Arguing for uniform change at the state level that would be consistent with the TVPA’s view of trafficked minors as victims, Lloyd noted the contradiction and flaws in current practices, wherein “Katya from the Ukraine will be seen as a real victim and provided with services and support, but Keisha from the Bronx will be seen as a ‘willing participant’, someone who is out there because she ‘likes it’ and who is criminalized and thrown in detention or jail.”<sup>210</sup>

This statement captures the contradiction in state and federal law and practice. In addition, this common stereotype appears to be consistent with resistance to changing the practices of prosecuting domestic youth.<sup>211</sup> While the TVPA and its enforcement did not initially focus on assisting domestic youth, amendments to the law and concurrent steps by the federal government have slowly influenced states in a positive direction.<sup>212</sup>

Specifically, Congress recognized the plight of domestic youth subject to sexual exploitation when it reauthorized the TVPA in 2005.<sup>213</sup> Congress

207. *Id.*

208. The TVPA establishes that “to the extent practicable . . . [v]ictims of severe forms of trafficking” shall “(A) not be detained in facilities inappropriate to their status as crime victims; (B) receive necessary medical care and other assistance; and (C) be provided protection if [their] safety is at risk or if there is danger of additional harm by recapture” by traffickers. 22 U.S.C. § 7105(c)(1) (2006).

209. See *Child Prostitution and Sex Trafficking Hearing*, *supra* note 70, at 14 (statement of Rachel Lloyd, Exec. Dir. & Founder, Girls Educ. & Mentoring Servs.).

210. *Id.*

211. For example, societal blame placed on these children and the accompanying reasoning is discussed by Hanna, *supra* note 45, at 26-27.

212. See *infra* Section III.A (discussing the reference to the TVPA by a New York State statute offering protection to minors arrested for prostitution).

213. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, secs. 2(3)-(4), 203, 119 Stat. 3558, 3558-59 (2006). This was preceded by an FBI program called “The Innocence Lost Initiative,” which was dedicated to the needs of domestic minors who had been prostituted. See OFFICE OF THE ATT’Y GEN., U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS: FISCAL YEAR 2007, at 22-23 (2008), available at <http://www.justice.gov/archive/ag/annualreports/tr2007/agreporhumantrafficking2007.pdf>.

included new provisions that acknowledged the need to help trafficked children born in the United States.<sup>214</sup> Of note, in 2006, the reauthorized TVPA set up a pilot program to establish residential rehabilitative services for juvenile victims encountered by state law enforcement.<sup>215</sup> In addition, Congress expressly noted that runaway and homeless children in the United States are vulnerable to exploitation.<sup>216</sup> Furthermore, the reauthorized TVPA made direct mention of funding appropriations for programs aimed at domestic victims, which demonstrated the federal government's official recognition of domestic-born victims' need for protection and services, just like foreign-born sex trafficking victims. The U.S. Department of Justice also provided additional training for federal and local law enforcement and social services providers.<sup>217</sup> It did so because these law enforcement officials and social providers are typically unaware of the relationship between youth prostitution cases and emerging developments about how to treat the youth involved in those cases as victims of commercial sexual exploitation, rather than as criminals.<sup>218</sup> At the same time, there has been little practical reform for domestic-born victims of sexual exploitation who are prosecuted in juvenile courts.<sup>219</sup>

## 2. The Status of Minors Under State and Federal Law

Reform advocates now argue that identifying victims and gaining their trust can be the most difficult but also the most important steps toward combating commercial sexual exploitation.<sup>220</sup> Criminalizing and arresting young victims can make them more hostile and less willing to testify against their

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214. Trafficking Victims Protection Reauthorization Act of 2005, sec. 203(a)-(b), (d), (f) (codified as amended at 42 U.S.C. § 14044b(a)-(b), (d), (f) (2006)) (establishing a pilot program for residential treatment facilities for juvenile victims and including youth born in the United States in the definition of "juvenile subjected to trafficking").

215. *Id.*

216. *Id.* sec. 2(6) ("Runaway and homeless children in the United States are highly susceptible to being domestically trafficked for commercial sexual exploitation.").

217. See OFFICE OF THE ATT'Y GEN., *supra* note 213, at 32-33.

218. See OFFICE TO MONITOR & COMBAT TRAFFICKING IN PERSONS, U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 21 (2006), available at <http://www.state.gov/documents/organization/66086.pdf> (stating that "law enforcement must . . . train personnel to identify and direct trafficking victims to appropriate care").

219. See *supra* Section II.A.

220. See *Domestic Minor Sex Trafficking Hearing*, *supra* note 6, at 132 (statement of Francey Hakes, Nat'l Coordinator for Child Exploitation, Prevention, & Interdiction, Office of the U.S. Deputy Att'y Gen.); CLAWSON & DUTCH, *supra* note 25, at 2.

pimps.<sup>221</sup> Advocates of a more “victim-centered law enforcement” approach note that not only is it “a matter of decency” to recognize prostituted children as victims instead of perpetrators, but it is also a more effective way to obtain their cooperation with law enforcement personnel.<sup>222</sup> Thus, a victim-centered approach provides aid to law enforcement and, at the same time, is consistent with the position espoused by the FBI that “children can never consent to prostitution. It is always exploitation.”<sup>223</sup>

Experts in this area of federal law enforcement recognize that gaps in services often result in detention for children instead of access to meaningful assistance.<sup>224</sup> Federal officials report that proper treatment of minors such as access to secure housing and services is necessary to allow them to build a rapport with victims for assistance in prosecutions.<sup>225</sup> Recognizing the importance of assistance, federal law mandates that treatment and appropriate medical attention be provided to victims of severe trafficking with the goal of gaining their trust and cooperation.<sup>226</sup> This statutory and cultural shift at the federal level—away from state law enforcement emphases on criminalizing exploited youth—is a positive step. However, federal law enforcement officials must work in tandem with state officials to investigate prostitution rings and instances of sexual

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221. See, e.g., Urbina, *supra* note 2, at A1. Similar to the federal approach that views children as victims rather than criminals, the article discusses how police in Dallas, Texas, reach out to youth instead of arresting them because “[i]f the girls are arrested for prostitution, they are at their least cooperative.” *Id.*; cf. SMITH, VARDAMAN & SNOW, *supra* note 71, at 61.
222. See *Trafficking in Persons: The Federal Government’s Approach To Eradicate this Worldwide Problem: Hearing on H.R. 972 Before the Subcomm. on Human Rights & Wellness of the H. Comm. on Gov’t Reform*, 108th Cong. 46 (2004) [hereinafter *2004 House Hearing*] (statement of R. Alexander Acosta, Assistant Att’y Gen., U.S. Dep’t of Justice).
223. See *Exploiting Americans on American Soil Hearing*, *supra* note 49, at 6 (statement of Chris Swecker, Assistant Dir., Criminal Investigative Div., Fed. Bureau of Investigation) (discussing the position of federal law and international agreements on domestic sex trafficking of minors).
224. *Domestic Minor Sex Trafficking Hearing*, *supra* note 6, at 128 (statement of Francey Hakes, Nat’l Coordinator for Child Exploitation, Prevention, & Interdiction, Office of the U.S. Deputy Att’y Gen.); SMITH, VARDAMAN & SNOW, *supra* note 71, at vi.
225. *Domestic Minor Sex Trafficking Hearing*, *supra* note 6, at 132 (statement of Francey Hakes, Nat’l Coordinator for Child Exploitation, Prevention, & Interdiction, Office of the U.S. Deputy Att’y Gen.).
226. See Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7105(c)(1)(A) (2006) (providing that victims should not be detained in facilities that are “inappropriate to their status as crime victims”).

exploitation of minors and to find ways to safely house victims.<sup>227</sup> This need can be fulfilled most successfully if reforms occur at the state level to allow law enforcement approaches to be in sync with one another. There continues to be room for improvement at the federal level, as well. Even with the more sophisticated reforms led by the federal government, girls who are not prosecuted may instead be held and detained for extended periods of time as material witnesses.<sup>228</sup> This practice, while superior to prosecuting exploited youth, is not a model alternative as this area of the law develops. The legality of these extended detentions and the scope of the Material Witness Statute is, in fact, questionable and likely to be challenged, given language in a recent concurring opinion written by Justice Kennedy and joined in part by Justices Ginsburg, Breyer, and Sotomayor.<sup>229</sup>

Due to this growing awareness that children born both in and outside of the United States are trafficking victims in need of support,<sup>230</sup> state legislators have begun to take action. To this end, a handful of states have adopted the concept born in federal law that force, coercion, or fraud need not be demonstrated for a minor to be considered a victim and for the law to recognize her lack of consent to prostitution.<sup>231</sup> Though most states continue to prosecute commercially sexually exploited youth, there are signs of progress that the status quo is changing in some state legislatures. For example, recent legislation modeled after federal law creates safe harbors for children who would otherwise be eligible for prosecution.

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227. See *Domestic Minor Sex Trafficking Hearing*, *supra* note 6, at 126 (statement of Francey Hakes, Nat'l Coordinator for Child Exploitation, Prevention, & Interdiction, Office of the U.S. Deputy Att'y Gen.) (describing a program to fund local services in cities to assist domestic minors).

228. See, e.g., *United States v. Brice*, 649 F.3d 793 (3d Cir. 2011) (noting that six or seven girls were held as material witnesses in a trial against a defendant for child sex trafficking and transporting a minor for prostitution, among other offenses); see also *Brown*, *supra* note 103, at 488 (discussing the coercive use of material witness warrants, the unresolved law surrounding their use, and the detention of prostituted women and children under material witness warrants).

229. See *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2086 (2011) (Kennedy, J., concurring) (discussing with pointed concern the undetermined scope of the Material Witness Statute, 18 U.S.C. § 3144 (2006)). Justice Ginsburg's concurrence stated the importance of "vigilant exercise" of the discretionary role of a judge or magistrate determining its proper issuance and duration. *Id.* at 2088 n.2 (Ginsburg, J., concurring).

230. See Trafficking Victims Protection Reauthorization Act of 2005, 22 U.S.C. §§ 7101, 7102(3), 7105, 7109a (2006). See generally SMITH, VARDAMAN & SNOW, *supra* note 71 (recognizing the need to help domestic youth and include them in the trafficking reform movement).

231. See *infra* Part III (describing emerging state legal responses that move away from prosecuting minors for prostitution).

## III. STATE LEGISLATIVE RESPONSES

The Texas Supreme Court decision is significant both because it recognizes the inconsistency inherent in prosecuting sexually exploited youth and because it reflects federal trafficking law under the TVPA that considers minors to be “severely trafficked persons.”<sup>232</sup> The decision arrived shortly after the passage of so-called “safe harbor” and “safe children” laws in four states: New York, Connecticut, Washington, and Illinois. Michigan also prohibits prosecution of minors for prostitution if they are under age sixteen.<sup>233</sup> Subsequently, three more states took action.<sup>234</sup> With legislation similar to the Safe Harbor laws pending or attempted in other jurisdictions, which would bar or reduce prosecution of children for prostitution, it is clear that a growing number of states are recognizing current tensions in the law. The language in these laws is derived from federal trafficking regulations under the TVPA.<sup>235</sup>

New York State led the way toward reform when it passed the Safe Harbor for Exploited Children Act (Safe Harbor Act)<sup>236</sup> in 2008. The Safe Harbor Act took effect in April 2010,<sup>237</sup> just two months before the Texas Supreme Court’s *In re B.W.* decision. Connecticut and Washington followed suit with the passage of their own versions of the Act and other states have introduced similar legislation, some without success.<sup>238</sup> While New York provided a model for

232. 22 U.S.C. § 7102(8).

233. MICH. COMP. LAWS ANN. § 750.448 (2011) (“A person 16 years of age or older who accosts, solicits, or invites another person in a public place or in or from a building or vehicle, by word, gesture, or any other means, to commit prostitution or to do any other lewd or immoral act, is guilty of a crime.”). Initially, however, the age identified in the statute was seventeen or older, and it was lowered to sixteen in 2002. See MICH. COMP. LAWS ANN. § 750.448 (2001); Act of June 1, 2002, Pub. Act No. 45, 2002 Mich. Pub. Acts 124, 125.

234. See Act of Nov. 21, 2011, 2011 Mass. Legis. Serv., ch. 178 (H.B. 3808) (West) (to be codified in scattered sections of MASS. GEN. LAWS); Act of July 20, 2011, 2011 Minn. Sess. Law Serv., ch. 1, art. 4 (1st Spec. Sess., S.F. 1) (West) (codified at scattered sections of MINN. STAT.); Act of May 31, 2011, 2011 Vt. Legis. Serv., Act No. 55 (H. 153) (West) (codified at scattered sections of VT. STAT. ANN.).

235. For example, New York’s law specifically incorporated and referenced 22 U.S.C. § 7102(8) (2000). See N.Y. FAM. CT. ACT § 311.4 (McKinney 2008).

236. N.Y. SOC. SERV. LAW § 447-I.C (McKinney 2007) (effective Apr. 1, 2010); N.Y. FAM. CT. ACT § 311.4; A.B. 5258-C, 2007-2008 Leg., 231st Sess. (N.Y. 2007); S. 3175-C, 2007-2008 Leg., 231st Sess. (N.Y. 2007). While the formal title includes an alternative spelling of “Harbour,” it became known in media discussions as the Safe Harbor Act and will be referred to as such in this Article. See, e.g., Editorial, *Victory for Exploited Youth*, N.Y. TIMES, Sept. 27, 2008, at A20.

237. N.Y. FAM. CT. ACT § 311.4.

238. See, e.g., H.B. 2687, 50th Leg., 1st Reg. Sess. (Ariz. 2011) (barring minors from prosecution for prostitution and providing authority to take them into protective

enumerating the protective services that states should implement, the most comprehensive act to date to legally disallow prosecution is the Illinois Safe Children Act of 2010.<sup>239</sup>

#### A. *New York Legislation Takes the First Steps*

The Safe Harbor Act was a long time in the making; its turbulent history reveals many of the deep political divisions and other obstacles that stand in the way of more effective and humane responses to the domestic trafficking of children. Though the Safe Harbor Act was passed in 2008,<sup>240</sup> it was first introduced in 2005. In fact, the bill was drafted in response to the New York appellate court's decision in *In re Nicolette R.*, which held that the plain language of the state penal code did not preclude prosecution of individuals charged with prostitution based on age.<sup>241</sup> Thus, the proposed bill initially sought to amend the penal code so that only individuals age eighteen and older could be prosecuted for prostitution.<sup>242</sup> The proposed bill mirrored the TVPA, which considers all prostituted minors to be victims of severe trafficking. However, the New York legislature did not fully support this novel approach at the time. Furthermore, there was opposition from some law enforcement constituencies who believed that prosecution was a necessary tool for them to employ against prostitution.<sup>243</sup>

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custody); H.B. 145, 2011 Leg., Reg. Sess. (Fla. 2011) (unenacted); H.B. 1256, 2009-2010 Gen. Assemb., Reg. Sess. (Ga. 2010) (creating a minimum age for prosecution for prostitution, but suffering defeat by opponents); *see also* Wingfield, *supra* note 126 (noting opposition to the safe harbor bill in Georgia by groups who argued that efforts to change the age at which prostitution can be charged against a minor were "misguided" and equivalent to decriminalization of prostitution). In Minnesota, the first bill introduced in 2011 would have protected any child under the age of eighteen under jurisdictional statutes for delinquency. S.F. 1385, 87th Leg., Reg. Sess. (Minn. 2011) (amending the definition of "delinquent child" or "petty offender," so that a child alleged to have engaged in acts that fall under the definition of prostitution is excluded from prosecution).

239. Pub. Act. No. 96-1464, 2010 Ill. Laws 6931 (codified as amended in scattered chapters of ILL. COMP. STAT.).
240. 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).
241. *In re Nicolette R.*, 9 A.D.3d 270 (N.Y. App. Div. 2004).
242. *See* A.B. A06597, 2005-2006 Leg., Reg. Sess. (N.Y. 2005); *see also* S. S04423, 2005-2006 Leg., Reg. Sess. (N.Y. 2005).
243. While the initial bill did not receive much media attention in 2005, later reform efforts received more publicity, and the media prominently presented opposing viewpoints to prosecution reform. *See, e.g.*, Nicholas Confessore, *New Law Shields Children from Prostitution Charges*, N.Y. TIMES, Sept. 27, 2008, at B2; Haberman, *supra* note 30.

When this first attempt to amend the New York penal code failed, a revised bill was drafted by reformers to carve out a prosecution exemption for prostitution in the Family Court Act.<sup>244</sup> Under this approach, children younger than age sixteen could not be charged with prostitution, yet older teens would remain eligible for prosecution in criminal court because the family court only has prosecutorial jurisdiction over children under the age of sixteen. Though the New York State Assembly passed versions of this bill, it failed in the State Senate. Opposition came from the District Attorneys Association of New York State,<sup>245</sup> which argued that prosecutors' ability to threaten youth with prosecution was crucial to ensuring testimony against pimps.<sup>246</sup> Some legislators opposed the bill because they felt that the counseling and other services it required would be too costly.<sup>247</sup> Additionally, some law enforcement officials argued that the bill would make it "harder to crackdown on prostitution."<sup>248</sup> Finally, other detractors claimed that detention was necessary to prevent prostituted youth from running back to their pimps.<sup>249</sup>

Many of these concerns were brought to the fore during a dispute among state legislators over whether the law should contain language granting judges the discretion to divert cases back into the delinquency system once they had

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244. See A.B. A03778, 2007-2008 Leg., Reg. Sess. § 1 (N.Y. 2007). This bill would have amended subdivision 1 of section 301.2 of the Family Court Act to define "juvenile delinquent" as a person between ages seven and sixteen who commits "an act that would constitute a *crime, other than a violation of section 230.00 of the penal law,*" if committed by an adult. *Id.* (emphasis added). Section 230.00 of the New York Penal Law details prosecution for prostitution.

245. Adcock, *supra* note 115.

246. See Editorial, *supra* note 120, at A22.

247. See Editorial, *Children in Need of Safe Harbor*, N.Y. TIMES, Sept. 15, 2007, at A16. Early versions of the bill stated that "[e]very local social services district shall ensure that a crisis intervention service and community-based program designed specifically to serve sexually exploited youth is available to youth residing in such district." A.B. A06597, 2005-2006 Leg., Reg. Sess. § 447-b (N.Y. 2005). The bill also required that a determination of need be made annually by the local social services entity charged with the task in consultation with relevant community stakeholders. *Id.*

248. See Confessore, *supra* note 243.

249. See *Oversight Hearing Before the Comm. for Youth Servs. & the Comm. for Juvenile Justice: New York's Sexually Exploited Youth*, 2007 N.Y. City Council 42-43 (June 11, 2007) (testimony of Katherine Mullen, Juvenile Rights Attorney, Legal Aid Soc'y) (discussing arguments made by opponents to the New York Safe Harbor Act during a hearing in consideration of New York City Council Resolution 863, which would have called upon New York State legislators to pass the Safe Harbor Act, A.B. A05258-C, 2007-2008 Leg., Reg. Sess. (N.Y. 2008) and S. S03175-C, 2007-2008 Leg., Reg. Sess. (N.Y. 2008)); Haberman, *supra* note 30.

been converted into child welfare matters.<sup>250</sup> While the bill originally proposed an unequivocal bar to prosecuting youth for prostitution, many of the opponents sought to preserve a semblance of the punishment model by giving judges discretion to allow prosecution.<sup>251</sup> Indeed, legislative disagreement over one word in the text became the main point of contention regarding the bill's passage. State legislators disagreed over whether the bill would prescribe that a court "shall" or "may" convert the case from a delinquency petition to a child welfare matter.<sup>252</sup> This important dispute had resulted in the bill's earlier failure.<sup>253</sup>

While the Safe Harbor Act underwent many changes to gain support during its four-year evolution, a revised version was finally passed in 2008. It was still considered "groundbreaking"<sup>254</sup> and a "watershed" moment for youth advocates' efforts to address the commercial sexual exploitation of children in the United States.<sup>255</sup> The law challenged the legal framework employed by almost every other state at that time wherein prostituted children were consistently regarded as criminals; it instead advocated for a treatment approach that recognized their victimization. Given the resistance to, and the four-year campaign for, the law's passage, its success in reframing the issue was symbolic and began an important cultural shift. This reform is also particularly significant given New York's stringent approach to juvenile crime; it is one of only two states that prosecutes all youth age sixteen and older as adults.<sup>256</sup> Advocates also anticipate the law's ability to increase the delivery of widely needed services.<sup>257</sup>

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250. Internal Meetings at the Legal Aid Society, Brooklyn, N.Y. (June 2006-July 2007). Katherine Mullen, who lobbied for the passage of the bill, provided updates about legislative efforts and opposition leveled against the bill.

251. *Id.*

252. See Memorandum from the Sex & Law Comm., *supra* note 116, at 4-5. The assembly version stated that the judge "shall" convert the case, and the senate version stated that the judge "may" convert the case. *Id.*

253. Internal Meetings at the Legal Aid Society, *supra* note 250 (Katherine Mullen discussing legislative efforts and opposition leveled against the bill).

254. See Press Release, Assembly Speaker Sheldon Silver, Assembly Passes 'Safe Harbour' Legislation (June 19, 2008), <http://assembly.state.ny.us/Press/20080619/>.

255. See POLARIS PROJECT, OVERVIEW OF STATE LEGISLATIVE POLICY TO ADDRESS THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN (2008), available at [http://www.polarisproject.org/storage/documents/policy\\_documents/model%20law/model%20safe%20harbor%20law%20overview%20final-1.pdf](http://www.polarisproject.org/storage/documents/policy_documents/model%20law/model%20safe%20harbor%20law%20overview%20final-1.pdf).

256. See N.Y. FAM. CT. ACT § 301.2(1) (McKinney 2008); N.C. GEN. STAT. § 7B-1501(7) (2009) (defining the age of jurisdiction for delinquency as juveniles under age sixteen); Soler, Schoenberg & Schindler, *supra* note 109, at 496 (citing CHRISTOPHER HARTNEY, NAT'L COUNCIL ON CRIME & DELINQUENCY, FACT SHEET: YOUTH UNDER AGE 18 IN THE ADULT CRIMINAL JUSTICE SYSTEM 2 (2006), available at [http://www.nccdrc.org/nccd/pubs/2006may\\_factsheet\\_youthadult.pdf](http://www.nccdrc.org/nccd/pubs/2006may_factsheet_youthadult.pdf)) (noting that "[i]n 2007, Connecticut raised the age of juvenile court jurisdiction from 16 to 18 for all but the most serious and violent offenders," leaving only North Caro-



First, the Act creates a legal presumption that any person under the age of eighteen who is charged with prostitution is a “severely trafficked person” using the same definition and age as the TVPA.<sup>258</sup> The Safe Harbor Act includes a comprehensive definition of sexually exploited youth and provides broad victim protections.<sup>259</sup> And, like the TVPA, the Act explicitly assumes that children involved in prostitution have been subject to force, fraud, or coercion. Thus, these children do not have the legal burden of establishing coercion in cases where they are arrested for prostitution.<sup>260</sup>

Second, the Safe Harbor Act mandates that trafficked children under age sixteen be treated as status offenders, rather than designated as delinquents. Status offenders are defined in New York law as “persons in need of supervision” (PINS).<sup>261</sup> Children receiving the PINS designation may obtain support

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lina and New York with sixteen as the age of juvenile court jurisdiction); *see also supra* notes 108-110 and accompanying text.

257. *See* Press Release, Assembly Speaker Sheldon Silver, *supra* note 254 (“The passage by the Assembly of Safe Harbour For Exploited Children Act today is a recognition that domestically trafficked children deserve to be protected by New York State, and now will receive the services they so desperately need.” (quoting Katherine Mullen, Juvenile Rights Attorney, Legal Aid Soc’y) (internal quotation marks omitted)).
258. N.Y. FAM. CT. ACT § 311.4 (incorporating the definition used in 22 U.S.C. § 7102(8) (2006)). “Severe forms of trafficking in persons” is defined under the TVPA as “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age.” 22 U.S.C. § 7102(8).
259. N.Y. FAM. CT. ACT § 311.4; *id.* § 735 (describing services for youth, such as safe houses, “counseling and therapeutic services, educational services including life skills services and planning services to successfully transition residents back to the community”); N.Y. SOC. SERV. LAW § 447-a (McKinney 2007).
260. N.Y. FAM. CT. ACT § 311.4 (“In any proceeding under this article based upon an arrest for an act of prostitution, there is a presumption that the respondent meets the criteria 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).”). *See* 22 U.S.C. § 7102(8) (referenced in 22 U.S.C. § 7105(b)(1)(C) in order to fully define “victim of a severe form of sex trafficking,” a category that specifically includes persons under eighteen subject to trafficking behavior).
261. In New York, a “status offender” is a “person in need of supervision” (PINS), defined as “[a] person less than eighteen years of age who does not attend school in accordance with the provisions of [the relevant sections] 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 sections 221.05 or 230.00 of the penal law.” N.Y. FAM. CT. ACT § 712(a). However, the Family Court Act provides jurisdiction only for prosecution of children under the age of sixteen. Therefore, while the Safe Harbor Act models its definition of a “severely trafficked person” on the TVPA, changes to the Family Court Act do not prevent prosecu-

though the Department of Social Services.<sup>262</sup> It is significant to note, however, that when the Safe Harbor Act finally passed, the court retained discretion under the statute to convert the PINS petition to a delinquency case if it determined that the minor satisfied one of four conditions: (1) The minor is not a severely trafficked person under the federal definition; (2) the minor has previously committed a prostitution offense; (3) the minor was previously placed with a local commissioner of social services as a PINS; or (4) the minor is unwilling to cooperate with specialized services ordered by the court.<sup>263</sup>

This section was a late addition to the initial language of the proposed law.<sup>264</sup> At least one commentator argued that the language allowing conditional diversion “defeats the whole purpose” of the bill by allowing large categories of youth to be excluded from protection.<sup>265</sup> A related provision allows that, if the petition is converted to a PINS docket, the court can also later revert the case to a juvenile delinquency petition if the youth is “out of compliance” with court

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tion of teens who are above age sixteen because they are charged in criminal court. But it does provide persuasive reasoning against doing so and allows them to receive services in Family Court. *See* *People v. Samantha R.*, No. 2011KN092555, 2011 WL 6303402 (N.Y. Crim. Ct. Dec. 16, 2011) (dismissing, in the interest of justice, a petition against a sixteen-year-old girl in criminal court who was arrested for loitering for the purpose of prostitution, and citing the reasoning advanced in the Safe Harbor Act).

262. In New York, a child receiving services under the PINS statute may not be ordered into a secure detention facility. While the Federal Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. §§ 5601-5792, prohibits the practice of detaining status offenders, some states employ the “valid court order” exception in the statute to place status offenders in detention. This means that if a child violates a court order, courts in some states would order that child to be detained in secure facilities with youth who have committed crimes. In those jurisdictions, the use of a status offense provision in a safe harbor law would provide less protection from detention for children charged with prostitution. *See* Nancy Gannon Hornberger, *Improving Outcomes for Status Offenders in the JJDPA Reauthorization*, JUV. & FAM. JUST. TODAY, Summer 2010, at 15. As one study revealed, “[G]irls are more likely to receive harsh dispositions for relatively minor offenses, particularly for running away from home,” which is a status offense. *See* MacDonald & Chesney-Lind, *supra* note 79, at 189. Furthermore, use of the valid court order exception tends to affect girls more harshly. *Id.* at 173.
263. *See* Safe Harbour for Exploited Children Act, ch. 569, sec. 2, 2008 N.Y. Laws 4076, 4078 (codified as amended at N.Y. FAM. CT. ACT § 311.4(3)).
264. *See* Editorial, *Better Protecting the Vulnerable*, N.Y. TIMES, June 28, 2007, at A20.
265. *Id.* (noting that an “11th-hour change in the wording of the Senate version would allow individual judges to decide whether a sexually exploited child should be given shelter or be treated as a criminal. That defeats the whole purpose and needs to be dropped.”); *see also infra* note 336.

orders.<sup>266</sup> Notably, close to the Act’s effective date two years later, legislators amended the criteria that enabled continued prosecution.<sup>267</sup> As a result, a child who had a previous placement with a local commissioner as a PINS is no longer disqualified from protection under the Safe Harbor Act. In addition, the presumption that the child is a severely trafficked person may no longer be rebutted.<sup>268</sup>

Third, the Safe Harbor Act requires every local social services district to provide, “to the extent that funds are available,” a short-term safe house, twenty-four-hour crisis intervention, and access to medical care for sexually exploited children who live in the district.<sup>269</sup> The law also recognizes that counties should plan for the separate and distinct needs of girls, boys, and transgendered youth.<sup>270</sup> Additionally, the Act explicitly states that support services are an important component of treatment.<sup>271</sup> The Act is meant to discourage the use of prosecution as a means to curb existing behaviors by utilizing appropriate assistance tools instead. However, the Act itself provides no direct funding for support services.<sup>272</sup>

It is possible that, despite the Act’s powerful language, some of its intended purposes will be diminished by its provisions that allow for the continued prosecution of these youth,<sup>273</sup> as well as a lack of funding to provide for services. For example, despite the fact that the Act’s effective date was deliberately set for over a year after enactment for funding planning purposes, safe housing and therapeutic services remained scarce when the effective date arrived.<sup>274</sup>

The first published decision to apply the Safe Harbor Act in New York both demonstrates the possible weakening effect of the Act’s conditional language and arguably contradicts the intent of the law. In the initial stages of the case, the New York Family Court refused to substitute the juvenile delinquency petition with a PINS petition as it is required to do under the law unless certain

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266. The court must state its reasons for pursuing a delinquency petition on the record. N.Y. FAM. CT. ACT § 311.4(3).

267. See Act of July 2, 2010, 2010 N.Y. Sess. Laws, ch. 58, pt. G, sec. 4 (West) (codified as amended at N.Y. FAM. CT. ACT § 311.4).

268. N.Y. FAM. CT. ACT § 311.4.

269. N.Y. SOC. SERV. LAW § 447-b(1) (McKinney 2007).

270. *Id.* § 447-b(4).

271. *Id.* § 447-b(1).

272. *Id.* § 447-b(4).

273. See, e.g., *In re Bobby P.*, 907 N.Y.S.2d 540 (N.Y. Fam. Ct. 2010) (refusing the respondent child’s request to convert the charge of prostitution from a delinquency case to a PINS case).

274. See Baker, *supra* note 121 (referencing the fact that, as of July 2010, funds had not yet been allocated to support the New York Safe Harbor for Exploited Children Act because of a budget deficit).

conditions are present, such as a “current unwillingness to cooperate with specialized services.”<sup>275</sup> The court conceded that the accused girl, Bobby P., was a “victim of a severe form of trafficking” under federal and state law.<sup>276</sup> Even though no prior delinquency or PINS adjudications disqualified her from diversion, the court expressed serious doubts as to her “current willingness to accept and cooperate with specialized services for sexually exploited youth.”<sup>277</sup>

Instead of converting the case to a PINS matter, the court provided a detailed account of the child’s history of running away from foster care. The court made only a passing reference to the fact that Bobby P. was in foster care because her parents’ rights were terminated at some previous time.<sup>278</sup> The court then gave a detailed list of the characteristics that are all too familiar for this population: Bobby P. allegedly was first prostituted when she was twelve and was “already introduced to the lifestyle,”<sup>279</sup> was “working with adult pimps,” and gave birth to a child who was removed from her care.<sup>280</sup> The court went on to note that Bobby P. had a prior arrest, and was “picked up at a pimp’s house” in previous months.<sup>281</sup> The court described Bobby P.’s previous inability to follow through with aid services in prior years. It also discredited the notion that she would assist the prosecution because she had left a meeting at the District Attorney’s Office “about assisting in the prosecution of her pimp” and did not return.<sup>282</sup>

The irony of this decision is that most of the children who are charged with prostitution meet the precise description that the court noted in *In re Bobby P.*: It was Bobby P.’s desperate circumstances that led her to make the choices she did—or left her with a perceived or real lack of choices—but the court nonetheless used her circumstances as reasons *to* prosecute her, rather than reasons *not* to prosecute her.

First, involvement with an “adult pimp” is assumed to be coercive under the Safe Harbor Act and is extremely common for prostituted youth. Second, Bobby P.’s early age of entry left her without the capacity to legally “consent” to sex at that time and made it difficult for her to conceive of the notion that she could remove herself from the situation. And third, her runaway history was

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275. *In re Bobby P.*, 907 N.Y.S.2d. at 545.

276. *Id.* at 546-47.

277. *Id.* at 547.

278. *See id.* at 549.

279. *Id.* at 542 (internal quotation marks omitted); *see supra* note 26 and accompanying text.

280. *In re Bobby P.*, 907 N.Y.S.2d at 542; *cf.* Kershaw, *supra* note 33, at 56 (noting that young prostituted girls with children “have the added risk of being stigmatized and labeled . . . as ‘unfit mothers’” and facing removal of their children).

281. *In re Bobby P.*, 907 N.Y.S.2d at 544.

282. *Id.* at 541-42.

evidence of her isolation from support; runaway histories are routinely noted as the number one at-risk characteristic for commercial sexual exploitation.<sup>283</sup> Yet the court used all three of these factors as damning evidence against Bobby P. In addition, the notion of testifying against one's pimp is complex and would leave a vulnerable young person like Bobby P. in a dangerous position.<sup>284</sup> A fourteen-year-old pregnant minor would likely be daunted, if not terrified, by this task. This is especially true given the likelihood of post-traumatic stress and psychological issues common for someone in Bobby P.'s situation who does not have parents to support her.<sup>285</sup>

*In re Bobby P.* also reveals another "elephant in the room": There are few specialized services actually available for prostituted youth, even in an urban area with high numbers of youth in need of such services. For example, Bobby P. was referred to one of the model programs for such youth when she was in foster care. But even this program had not received necessary increases in funding when the Safe Harbor Act became effective.<sup>286</sup> In other words, for children to be successfully engaged in specialized services, those services must be effective and well supported. Nationally, it is reported that there are fewer than fifty beds with specialized services available for trafficking victims.<sup>287</sup> What *are* available are juvenile detention beds. And as long as they are more readily available than the specialized services contemplated by the statute, it is clear that they will be utilized instead.

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283. See *supra* notes 27-29 and accompanying text (discussing the prevalence of foster care and runaway histories among prostituted youth).

284. See Zraick, *supra* note 63, at A28 (noting that "victims, particularly minors, are often fearful of speaking out against their pimps" and need services and counseling to recover and to overcome the fear); Editorial, *supra* note 120 (noting that "these are battered, terrorized children who are typically in no condition to confront their exploiters in court. By threatening to lock them up, we deepen their distrust of an adult world that has brutalized and mistreated them."); see also *United States v. Doss*, 630 F.3d 1181, 1190 (9th Cir. 2011) (discussing a conviction for witness tampering in a minor sex trafficking case wherein the defendant threatened the minor while his case was pending, telling her that it would be bad for her to testify). In *Doss*, the defendant threatened the minor through a metal divider as they were being transported back to jail from court during his trial. *Id.* This case evidences the practical implications of treating minors who have been prostituted as offenders.

285. See *In re Bobby P.*, 907 N.Y.S.2d at 549 (noting Bobby P.'s history in the child welfare system and that her parents' rights had been terminated); see also Todres, *supra* note 34, at 464, 467 (noting the presence of symptoms consistent with PTSD among sex trafficking victims).

286. See Baker, *supra* note 121.

287. KRISTIN M. FINKLEA, ADRIENNE L. FERNANDES & ALISON SISKIN, CONG. RESEARCH SERV., SEX TRAFFICKING OF CHILDREN IN THE UNITED STATES: OVERVIEW AND ISSUES FOR CONGRESS 4 (2011).

### B. Other States Implement Varied Approaches to Safe Harbor Legislation

Subsequent laws passed in Connecticut and Washington in 2010 and in three other states in 2011 continued the process of reform by amending statutes to address the prosecution of minors for prostitution. The laws share many of the positive reforms enacted by the New York Safe Harbor Act but also fail in substantive ways to comprehensively protect all youth, though some approaches, such as Connecticut's, have greater protective potential.

Washington's Sex Crimes Involving Minors Act applies to all children under age eighteen and provides that a minor's first offense of prostitution shall be diverted out of juvenile court.<sup>288</sup> However, if a youth has a prior prostitution offense, Washington's law does not preclude prosecution since a prosecutor is not required to divert the youth's case out of the delinquency system.<sup>289</sup> Therefore, a second allegation of prostitution may result in prosecution even though the same child, if under the age of sixteen, remains a victim of statutory rape under Washington law.<sup>290</sup>

Like New York's law, Washington's law seeks to link sexually exploited youth to appropriate services by stating: "[W]ithin available funding, when a youth who has been diverted . . . for an alleged offense of prostitution or prostitution loitering is referred to the department, the department shall connect that child with services and treatment specified."<sup>291</sup> Unlike New York's law, the Washington law created a fund for these services. Monies for this fund are in part obtained by an increase in the fine for redeeming any vehicle that is impounded in connection with a charge of commercial sexual abuse of a minor.<sup>292</sup> Though the amount of funds available through this provision is not clear and would be unlikely to fund the extensive services required, it provides a starting point. The law explicitly states that these funds are to be used for services aimed at youth who have been diverted under the Sex Crimes Involving Minors Act after being charged with prostitution. Such services include mental health and substance abuse counseling, education and vocational programming, and housing relief. Funds may also be used to support sexually exploited youth who live in residential centers with specialized staff.<sup>293</sup> Finally, the Act increases punishments for offenders who sexually exploit minors for commercial purposes by making them eligible for ten years in prison.<sup>294</sup>

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288. 2010 Wash. Sess. Laws 2301.

289. WASH. REV. CODE § 13.40.070(7) (2010).

290. *Id.* § 9A.44.079.

291. *Id.* § 13.32A.270.

292. *Id.* § 43.63A.740. The fine increased from \$500 to \$2500. These fines are deposited into a "prostitution prevention and intervention" account established to assist child victims. *Id.*

293. *Id.*

294. *Id.* § 9.68A.100 (stating that penalties are provided under § 9A.20.021).

Connecticut's law, which took effect October 1, 2010,<sup>295</sup> takes a stronger approach to eliminating the prosecution of youth for prostitution. Rather than including only the possibility of diversion to child welfare services, Connecticut lawmakers amended the penal code so that children younger than age sixteen simply cannot be prosecuted for prostitution, similar to Michigan's penal code.<sup>296</sup> This is consistent with the age of consent in Connecticut's statutory rape law.<sup>297</sup> Previously, the Connecticut penal code section on prostitution did not include a minimum age, and, therefore, any person committing the relevant acts could be prosecuted for prostitution. The new law also protects sixteen- and seventeen-year-olds by codifying the presumption that teenagers in that age range who are charged with prostitution "[were] coerced into committing such offense by another person in violation of section 53a-192a."<sup>298</sup> Therefore, sixteen- and seventeen-year-olds may be prosecuted for prostitution only if prosecutors rebut this presumption.

The Connecticut law is indeed noteworthy for its unequivocal prohibition of the prosecution of children under age sixteen for the offense of prostitution. By doing this, it reconciles the paradox in its laws governing prostitution and statutory rape. The law's novel two-tiered approach mirrors Connecticut's statutory rape laws. Because the law is new, it is unclear how the "rebuttable presumption" language will be interpreted by courts and utilized by prosecutors. However, it could be a helpful model of compromise for legislators in other states where there is strong resistance to decriminalizing the actions of older teens. Similar to New York, though, Connecticut's law does not contemplate funding specialized services for exploited youth.

Finally, in 2011, Massachusetts, Minnesota, and Vermont also passed safe harbor laws.<sup>299</sup> Although not as comprehensive as they could be, their passage recognizes that sexually exploited youth are in need of specialized services and that the use of prosecution against them should be reduced. But the laws also illustrate the challenges that different political climates present for comprehen-

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295. 2010 Conn. Acts 815 (Reg. Sess.).

296. *Id.*; MICH. COMP. LAWS ANN. § 750.448 (West 2011).

297. Connecticut uses a two-tiered approach to the age of consent in its statutory rape law. *See supra* Section II.B (discussing approaches to these laws by various states). Under Connecticut law, a child under the age of sixteen cannot consent to sex, except under circumstances in which the other person is within three years of the child's age. Any child under age thirteen cannot consent to sexual intercourse when the other person is more than two years older than the child. CONN. GEN. STAT. § 53a-70 (2011).

298. CONN. GEN. STAT. § 53a-82(c).

299. Act of Nov. 21, 2011, 2011 Mass. Legis. Serv., ch. 178 (H.B. 3808) (West) (to be codified in scattered sections of MASS. GEN. LAWS); Act of July 20, 2011, 2011 Minn. Sess. Law Serv., ch. 1, art. 4 (1st Spec. Sess., S.F. 1) (West) (codified at scattered sections of MINN. STAT.); Act of May 31, 2011, 2011 Vt. Legis. Serv., Act No. 55 (H. 153) (West) (codified at scattered sections of VT. STAT. ANN.).

sive and uniform reform efforts across states as each safe harbor law takes a different approach. For example, like in Connecticut, minors under age sixteen in Minnesota will not be prosecuted for prostitution due to a change in the definition of juvenile delinquency by the safe harbor law.<sup>300</sup> In contrast, in Massachusetts, protection from prosecution will be made conditional upon agreement by the prosecutor and upon the child's completion of court-ordered services.<sup>301</sup> Illustrating yet another approach, in Vermont, the law protects all minors under age eighteen from prosecution if they are deemed victims of sex trafficking, but curiously appears to contemplate that some minors who are prostituted may not qualify as such victims under the law.<sup>302</sup>

### C. *The Illinois Safe Children Act Provides a Model*

The most comprehensive legislation to address the prosecution of young victims of commercial sexual exploitation is the Safe Children Act in Illinois, signed into law in August 2010.<sup>303</sup> Illinois is the first state to make all children under age eighteen wholly immune from prosecution for prostitution. This is an important distinction from all other state laws to date. Those laws, while certainly reducing the prosecution of youth, ultimately allow for prosecutions in certain circumstances.<sup>304</sup>

Illinois's statutory rape laws apply to children under the age of seventeen in most circumstances, but there is a provision in Illinois law that raises the age of consent to eighteen where the offender is in a position of authority over the child.<sup>305</sup> Similarly, by excluding them from prosecution for prostitution, the Safe Children Act appears to implicitly recognize that seventeen-year-olds remain vulnerable to coercion by certain third parties. In doing so, the Act is consistent with the TVPA and statutory rape laws in Illinois.

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300. MINN. STAT. ANN. § 260B.007(6)(b)(1) (West 2007 & Supp. 2012).

301. Act of Nov. 21, 2011, 2011 Mass. Legis. Serv., ch. 178 (H.B. 3808) (West) (to be codified in scattered sections of MASS. GEN. LAWS).

302. VT. STAT. ANN. tit. 13, § 2652(c)(1)(A) (2011) (exempting from prosecution minors who are victims of sex trafficking). *But see id.* § 2652(c)(1)(B) (providing that minors under eighteen, notwithstanding other provisions of the law, will be "immune from prosecution in the criminal division of the superior court" for prostitution, *but may be treated as juvenile delinquents* or children in need of services under VT. STAT. ANN. tit. 33, chs. 52, 53) (emphasis added)).

303. Safe Children Act, Pub. Act No. 96-1464, 2010 Ill. Laws 6931 (codified as amended in scattered chapters of ILL. COMP. STAT.).

304. *See supra* Sections III.A-B (discussing the approaches in New York, Washington, Connecticut, and Michigan). For example, unlike Connecticut, Illinois does not use a two-tiered approach to age.

305. 720 ILL. COMP. STAT. ANN. 5/12-16(f) (West 2011).



Under the Safe Children Act, a person suspected of a prostitution violation may be detained for a “reasonable” period of time for investigation.<sup>306</sup> However, once law enforcement officers determine that a detained youth is under age eighteen, the youth cannot be detained further; she is subject only to temporary protective custody in the child welfare system.<sup>307</sup> During this time, a police officer must report an allegation of trafficking—which is viewed under the Act as abuse or neglect—to the Illinois Department of Children and Family Services, which then initiates an investigation. In addition, the Act includes provisions that attempt to connect youth suspected of prostitution with appropriate services. The funding provision for these services is similar to the provision established in the Washington Sex Crimes Involving Minors Act. The Illinois statute increased impoundment fees and partially applies the proceeds toward grants for nongovernmental organizations that provide services to victims of commercial sexual exploitation.<sup>308</sup>

While the Illinois Safe Children Act is comprehensive in its practical application, it also makes a deliberate and symbolic change in the statutory language. Specifically, it removes the term “juvenile prostitute” from the criminal code.<sup>309</sup> Such changes to the statutory text reinforce the identification and treatment of sexually exploited youth as victims and survivors, rather than as offenders.<sup>310</sup>

It is important to note the significant distinction between a law like the Safe Children Act in Illinois and the Safe Harbor Act in New York. Early implementation in New York reveals a substantial risk that youth may continue to be treated as offenders, depending on the trial and appellate treatment of cases involving the Safe Harbor Act subsequent to *In re Bobby P.*<sup>311</sup> Without a

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306. Safe Children Act, Pub. Act No. 96-1464, § 11-14(d), 2010 Ill. Laws 6931. A “reasonable amount of time” that police may hold a person before charging her with a crime is determined by statute and case law. Forty-eight hours is generally the amount of time permitted as “reasonable” for detention. *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

307. Temporary protective custody, if necessary, may not include a detention facility or a jail. It may include a hospital, other medical facility, foster home, or other licensed facility. 325 ILL. COMP. STAT. ANN. 5/3 (West 2011).

308. The impoundment fee was raised from \$200 to \$1000. Half of that fee will go toward the Violent Crime Victims Assistance Fund. 720 ILL. COMP. STAT. ANN. 5/36.5-5 (West 2011) (replacing 720 ILL. COMP. STAT. ANN. 5/11-15 (West 2010)).

309. For example, the Illinois criminal code previously included a title on “[s]oliciting for a juvenile prostitute,” 720 ILL. COMP. STAT. ANN. 5/11-15.1 (West 2003), yet this was replaced to read “[s]oliciting for a minor engaged in prostitution.” Safe Children Act, Pub. Act No. 96-1464, § 11-15.1, 2010 Ill. Laws 6931, 6945. However, this section of the criminal code was repealed in full roughly one year later. See Act effective July 1, 2011, Pub. Act No. 97-1551, art. 2, sec. 6, 2010 Ill. Laws 8100.

310. Cf. SMITH, VARDAMAN & SNOW, *supra* note 71.

311. See *supra* notes 275-285 and accompanying text (discussing *In re Bobby P.*, 907 N.Y.S.2d 540 (N.Y. Fam. Ct. 2010)).

wholehearted prohibition of the prosecution of youth, a culture persists that is waiting for the child to demonstrate that she is “is unwilling to participate in services ordered by the court.”<sup>312</sup> This kind of sentiment may lead judges with discretionary authority to divert a case back into the delinquency system. While states that have taken action with safe harbor laws are all leaders in the movement to better protect sexually exploited youth, Illinois’s removal of all minors under age eighteen from prosecution for prostitution provides a critical advance in the law and distinguishes it from all other states. The challenge for Illinois will be the implementation of a response system with the appropriate expertise to serve the children who are identified as vulnerable under the Safe Children Act, particularly since these children will no longer enter the juvenile justice system.

#### IV. REFORMS AND SOLUTIONS FOR SURVIVORS

*“It is my hope that in ten years, we will look back and consider it ludicrous that we ever prosecuted children for prostitution.”*<sup>313</sup>

Implementation of a commonsense, rational approach to help youth who are exposed to exploitation relies on appropriate action by legislators and on the proper statutory interpretation of new laws. When statutory language in safe harbor laws allows diversion from prosecution at the discretion of the court, judges should adhere to the *intention* of such laws to protect children, particularly the most vulnerable of them, from prosecution. Where legislators do not act and the applicability of prostitution laws for minors are challenged in courts, judges must reconcile conflicting statutory rape and penal laws. Finally, judges should consider relevant information about adolescent development when grappling with issues of consent, coercion, and blameworthiness.

State legislators should use lessons learned from pioneering legislative models in the states that have reformed their laws. Instead of continuing to allow prosecution, as some do, legislation must take a clear stance and be definitive about age limits on prosecution for prostitution. Additionally, it must fund appropriate and professional interventions and training.

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312. *In re Bobby P.*, 907 N.Y.S.2d at 547; see *supra* notes 276-282 and accompanying text; cf. Hornberger, *supra* note 262, at 17 (discussing related issues about imprisoning status offenders so that the justice system may provide them with services, and quoting a state judge who simply stated that “[y]ou have to take that option off the table” to force communities to create meaningful alternative service delivery options).

313. *Child Prostitution and Sex Trafficking Hearing*, *supra* note 70, at 16 (statement of Rachel Lloyd, Exec. Dir. and Founder, Girls Educ. & Mentoring Servs.).

A. *Judicial Decision Making*

In all cases relating to the prostitution of exploited youth, judges must make decisions with a critical eye toward ensuring coherence within the laws that are relevant to the commercial sexual exploitation of minors. They must consider common characteristics among exploited youth, relevant advances in our understanding of adolescent development, and factors that would eliminate gender bias in the justice system. In states where the legislature has not acted in this arena, courts should follow the lead of the Texas Supreme Court and extend its reasoning to youth older than age thirteen. A holding of this nature would reconcile some existing conflicts between the prosecution of minors, statutory rape laws, and new state trafficking laws geared toward the protection of minors. When courts examine circumstances like those presented in *In re B.W.*, they should consider legislative intent in the context of related trafficking and statutory rape laws, as did the Texas Supreme Court.<sup>314</sup>

There is also a strong argument that factual consent provisions in statutory rape laws do not preclude older teens from protection against prosecution. In this regard, judges should consider the implications of the implied coercion recognized by federal law for *all* minors under eighteen who are trafficked. Two-tiered statutory rape laws exist to protect older teens from prosecution when two “consenting” minors are close in age and engage in sexual activity; the framework allows teens to assert factual consent, rather than assuming meaningful legal consent. This distinction supports the conclusion that courts need not draw a line separating the protection of older and younger teens in states that employ a two-tiered statutory rape scheme. Knowledge about the adolescent brain,<sup>315</sup> effects of traumatic bonding,<sup>316</sup> post-traumatic stress,<sup>317</sup> and society’s understanding of domestic minor sex trafficking similarly support that conclusion. At the very least, that knowledge supports a presumption that older teens are coerced in trafficking situations. An approach that presumes that exploitation is coercive for all minors under the age of eighteen is also consistent with federal law, which errs on the side of safety, rather than allowing some children to fall outside of the umbrella of protection. An inclusive approach

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314. See *supra* Subsection II.B.2 (discussing *In re B.W.*, 313 S.W.3d 818, 821 (Tex. 2010), and its rationale for overturning the lower courts, which was based upon legislative intent to protect children).

315. See Brief for the American Psychological Ass’n et al. as Amici Curiae Supporting Petitioners, *Graham v. Florida*, 130 S. Ct. 2011 (2010) (No. 08-7412), 2009 WL 2236778.

316. See Julich, *supra* note 57, at 108-09.

317. See Jones, *supra* note 34, at 327; see also Todres, *supra* note 34, at 447, 464, 467 (noting the prevalence of symptoms consistent with PTSD among victims of sex trafficking).

would notably shift the focus of the justice system and law enforcement to the needs of the child.

Additionally, the judicial role is critical where legislation limits but still permits prosecution of youth based on judicial determinations about factors in each case, like characteristics of individual youth or the extent of coercion. In this situation, interpretations should consider the purpose of the laws to prevent prosecution, in place of a punitive approach. Some models, such as the statutes in Connecticut and New York,<sup>318</sup> place the court and prosecutors in a gatekeeper role, though in different ways. This occurs where: (1) conditional diversion grants judicial discretion about whether a child is amenable to treatment and services,<sup>319</sup> and (2) where the statute contemplates a “presumption of coercion” that permits prosecutors to challenge the implied existence of coercion.<sup>320</sup> In both instances, courts should carefully consider the data that exists about the effects of the exploitation and surrounding circumstances of the child’s life. For example, data shows that the clear majority of young people arrested for prostitution have been living on the streets or in unstable housing situations.<sup>321</sup> They have been given little reason to trust authority and the foster care systems that have often previously failed them.<sup>322</sup> While these circumstances may harden such youth, they are not beyond intervention. Therefore, judges must not consider the manifestations of these past harms as *de facto* evidence against struggling youth and their willingness to participate in services offered.

If reformed laws aim to immunize the majority of children who have “committed sexual offenses” from criminal prosecution or juvenile delinquency prosecution,<sup>323</sup> they cannot be applied only to children who have never run away, missed appointments with care providers, or cowered at the notion of testifying against a pimp.<sup>324</sup> If most children with these histories are deemed by courts as “unlikely to accept services” and are thus forced to endure prosecution as a result, then the ultimate intent of reforms in this arena will be ignored. Diversion applied in this way could become the culprit that critics feared it

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318. See *supra* Part III.

319. See, e.g., *supra* Section III.A (discussing New York’s Safe Harbor Act provisions).

320. See, e.g., *supra* notes 295-298 and accompanying text (discussing 2010 Conn. Acts 815 (Reg. Sess.)).

321. See *supra* Section I.A.

322. See *supra* Section I.A.

323. See, e.g., N.Y. FAM. CT. ACT § 732 (McKinney 2008).

324. See, e.g., Zraick, *supra* note 63, at A28 (noting that victims are often fearful of speaking out against their pimps); *supra* notes 278-282 and accompanying text (discussing *In re Bobby P.*, 907 N.Y.S.2d 540 (N.Y. Fam. Ct. 2010), and noting that involvement with an adult pimp, difficulty with teen motherhood, and failure to cooperate with the prosecutor’s office was used against Bobby P. in the court’s evaluation of amenability to services).

would be.<sup>325</sup> It may take more than one intervention attempt to reach these young people. If signs of rebelliousness preclude assistance, the reforms will fail many of the children that they are intended to help. The judiciary must not interpret these common characteristics in a way that perpetuates the prosecution of these minors.

Furthermore, judges must be vigilant about gender stereotypes when making evaluations about whether a child has been coerced and whether that child is amenable to treatment. Studies show that bias in the justice system results in higher rates of punishment and harsher penalties for girls than similarly situated boys.<sup>326</sup> Therefore, courts must ensure that they do not penalize girls or gay youth for lack of conformity with stereotypical gender roles.<sup>327</sup> In these cases, judges often encounter girls who have previously run away from foster care or rebelled against social services organizations.<sup>328</sup> In many instances, such behavior demonstrates that the current system is ill equipped to help exploited youth. These failures and the impact of exploitation on children should be considered before the justice system assumes that a child is simply beyond help. Finally, courts must consider cases in the context of adolescent development and emerging explanations of adolescent behavior.<sup>329</sup> Juvenile court judges often lack the necessary specialized training to do this.<sup>330</sup> The seminal Supreme Court cases *Roper*<sup>331</sup> and *Graham*<sup>332</sup> crystallize the need for courts to reexamine issues of culpability when considering youth actions, and for judges to understand

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325. See *supra* note 265 and accompanying text (noting that conditional diversion “defeats the whole purpose” of safe harbor acts by precluding too many youth from protection from prosecution, and that such language should therefore be eliminated).

326. See *supra* Section I.C.

327. Cf. Meda Chesney-Lind & Francine Sherman, *Gender Matters in Juvenile Justice*, N.Y. L.J., Dec. 7, 2010, at 6 (discussing the treatment of girls in juvenile courts).

328. See *supra* Sections I.A-B (discussing the prevalence of youth who have been in foster care or who have run away and the ways in which they become entrenched in commercial sexual exploitation).

329. See Mutcherson, *supra* note 92, at 928-29 (noting that judges and policy makers must be provided with necessary information to distinguish between conflicting views about adolescent competence in the context of health care decision making and criminal punishment).

330. This concern is not new and its relevance persists. Indeed, in *McKeiver v. Pennsylvania*, when the issue of jury trials for juveniles reached the Supreme Court, a plurality of the Justices noted that the Court had previously expressed concern regarding juvenile court judges who are “untrained and less than fully imbued with an understanding approach to the complex problems of childhood and adolescence.” 403 U.S. 528, 534 (1971).

331. *Roper v. Simmons*, 543 U.S. 551 (2005).

332. *Graham v. Florida*, 130 S. Ct. 2011 (2010).

new developments in law and science. Scientific information can inform judicial decision making, whether a court is considering (1) conflicts between the age of eligibility for prosecution for prostitution and the age of consent for statutory rape laws, (2) prosecutorial rebuttals to the legal presumption of a youth's coercion, (3) a youth's amenability to treatment, or (4) various disposition options for a juvenile sentence. Judges must recognize that scientific data about the adolescent brain should be integral to their decisions about minors' culpability. This information could influence judicial perceptions about decision making by minors and could help determine the impact of outside pressures and threats on minors' actions, as the Supreme Court has critically noted. Such information is relevant and applicable to the complex issues presented by the prostitution of youth, as found in *In re B.W.*<sup>333</sup> Consideration of these factors will foster more nuanced decision making and ensure that judges establish more coherence in the law.

### B. Comprehensive Legislative Remedies

"[C]hildren can never consent to prostitution. It is always exploitation."<sup>334</sup>

#### 1. Exclusion from Prosecution

While the courts provide an important frontier for reform, ideally legislators should take steps to avoid the conflicts that faced the appellate courts of New York and Texas by amending youth prosecution laws. In doing so, legislators should definitively preclude the prosecution of exploited minors. This would reconcile statutory conflicts between the treatment of children under trafficking laws, statutory rape laws, and state penal codes, as displayed in *In re B.W.*<sup>335</sup>

State legislators should explicitly exclude minors from prosecution, following the model of the Illinois Safe Children Act. Accordingly, states should avoid conditional diversion<sup>336</sup> and carve-outs that automatically bar some children

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333. 313 S.W.3d 818, 821 (Tex. 2010).

334. *Exploiting Americans on American Soil Hearing*, *supra* note 49, at 6 (statement of Chris Swecker, Assistant Dir., Criminal Investigative Div., Fed. Bureau of Investigation) (discussing the federal government's position regarding domestic sex trafficking of minors).

335. 313 S.W.3d 818.

336. "Conditional diversion" refers to statutory schemes that mirror drug court models in which youth may be criminalized depending on their "compliance," and in which only certain youth qualify for diversion based upon factors listed in the statute. *See, e.g., supra* notes 263-266 and accompanying text (discussing the conditional diversion structure of the New York Safe Harbor Act).

from exemption from prosecution.<sup>337</sup> If children can “never consent to prostitution,” they should not be punished or be allowed to face confinement in detention facilities for acts of prostitution. Without a clear legislative stance, some minors—often the most vulnerable—will continue to be penalized. New legislation should harmonize existing laws with regard to capacity to consent and prosecution.

Conditional diversion, while appealing to hesitant lawmakers who are seeking to appease opposing constituencies, presents three significant problems and perpetuates “blaming the victim.” First, under that regime, commercial sexual exploitation is still framed as a “criminal” or “delinquency” problem. It fails to ensure appropriate treatment or foster the cultural shift necessary for reform to succeed. Next, treating children as offenders can hinder law enforcement even when children are in custody, especially when they do not receive proper psychological and medical treatment.<sup>338</sup> Failure to address post-traumatic stress and traumatic bonding implicates not only the well-being of the child but also her potential cooperation with law enforcement.<sup>339</sup> And finally, placing too many conditions on the availability of protection from prosecution to a troubled young person can render a law meaningless.<sup>340</sup> The first published decision applying New York’s Safe Harbor Act illustrates this point and confounds the well-reasoned intent of the law.<sup>341</sup> States would be well advised to fully consider the implications of conditional diversion language as opposed to language that fully removes the child’s eligibility for prosecution.<sup>342</sup>

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337. Washington’s Sex Crimes Involving Minors Act bars children from exemptions from prosecution if they have previously been arrested for prostitution. WASH. REV. CODE § 13.40.070(7) (2010); *see also* N.Y. FAM. CT. ACT § 311.4(3) (McKinney 2008); Toolsi Gowin Meisner, *Update: Shifting the Paradigm from Prosecution to Protection of Child Victims of Prostitution* (pt. 1), 21 NAT’L CENTER PROSECUTION CHILD ABUSE (Nat’l Dist. Atty’s Ass’n, Alexandria, Va.), 2009, at 2 (noting that laws that do not include protection for juveniles who have prior arrests for prostitution fail to consider that the reasons for their continued prostitution may be due to fear or control of a pimp).

338. *See supra* Section II.C; *supra* note 284 (explaining that *United States v. Doss*, 630 F.3d 1181 (9th Cir. 2011), illustrates one problem associated with arresting a minor).

339. *See supra* notes 225-226 and accompanying text.

340. *See, e.g., In re Bobby P.*, 907 N.Y.S.2d 540 (N.Y. Fam. Ct. 2010) (holding that, despite Bobby P.’s qualifying as a severe victim of trafficking, her prosecution would proceed based upon a provision in the Safe Harbor Act that allowed denial of protection from prosecution).

341. *Id.*; *see supra* notes 275-285 and accompanying text.

342. For example, the penal codes in Michigan and Connecticut now provide that only people age sixteen and older in Michigan and Connecticut can ever be prosecuted for prostitution. *See supra* Part III for complete discussions of these laws. The same is not true in New York. Furthermore, there is debate about whether classification as a status offender under a PINS statute within New York’s Safe Harbor

Unfortunately, statutory language that fully excludes youth from prosecution can face steep opposition. In Georgia, efforts to pass safe harbor legislation failed in 2010, despite widespread critical awareness of the sexual exploitation of youth in Atlanta and elsewhere in the state.<sup>343</sup> In New York, advocates labored for four years before state legislators passed an amended version of their Safe Harbor Act.<sup>344</sup> But subsequent to those battles, Illinois succeeded in passing legislation similar to New York's initial proposal, building on efforts in other states.<sup>345</sup>

Arguments in favor of the status quo, or even diversion, fail to fully address the incoherence of many states' laws, the lack of services for girls in the juvenile justice system, and the potential benefits to law enforcement<sup>346</sup> under a nonpunitive regime. Therefore, advocates of reform must be prepared to respond to the claims of detractors who are opposed to safe harbor laws preventing prosecution. Advocates can highlight the irrationality of the current laws' harmful effects on children, as well as the potential to shift the approach of law enforcement. Reforms for youth who are subject to prostitution do not change the state's ability to prosecute the perpetrators who continue to exploit youth

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Act is the optimal mechanism for reform since it stigmatizes children as status offenders. Kate Brittle, Note, *Child Abuse by Another Name: Why the Child Welfare System Is the Best Mechanism in Place To Address the Problem of Juvenile Prostitution*, 36 HOFSTRA L. REV. 1339, 1351 (2008); Susan Pollett, *Child Prostitutes: Criminals or Victims?*, N.Y. L.J., Apr. 16, 2010, at 4. Many states still permit secure detention of status offenders under some circumstances. See Hornberger, *supra* note 262, at 18. While provisions within the Federal Juvenile Justice Delinquency Prevention Act, 42 U.S.C. §§ 5601-5792 (2006), which funds state delinquency programs, prohibit this practice in most instances, the Act allows for secure detention if a person in need of supervision fails to comply with a court order. *Id.* Some states utilize that exception. *Id.*

343. Kyle Wingfield, *Change the Law To Protect Sexually Exploited Children*, ATLANTA J.-CONST. BLOG (Feb. 5, 2010, 7:00 PM), <http://blogs.ajc.com/kyle-wingfield/2010/02/05/change-the-law-to-protect-sexually-exploited-children/>.
344. See *supra* notes 246-249 (discussing opposition based on cost as well as opposition based upon law enforcement officials' belief that prosecution is necessary to curb negative youth behaviors, to provide services in detention, and to obtain testimony).
345. See POLARIS PROJECT, H.B. 6462: ILLINOIS' SAFE CHILDREN ACT—SUMMARY (2010), available at <http://www.enddemandillinois.org/sites/default/files/IL%20Safe%20Children%20Act%20Summary%20Nov%202010%20FINAL.pdf> (recognizing that the Illinois Safe Children Act “builds on the progress first made by the ground-breaking New York Safe Harbour for Exploited Children Act of 2008”); POLARIS PROJECT, *supra* note 255, at 1 (noting that the passage of the New York law and a pilot program in a county in California “helped spark the serious consideration of similar laws in other[] states”).
346. See *supra* Section II.C (discussing the benefits of federal law enforcement's belief in victim-centered approaches for victims of sexual exploitation).



under existing laws at the state and federal level. Such reforms do support the cultural shift required to build commitment to treatment.

## 2. Funding for Appropriate Therapeutic Services and Interdisciplinary Partnerships

In addition, legislation must also mandate the creation of and funding for appropriate professional therapeutic services. Failure to expand and/or create the necessary medical and psychological services as contemplated by new laws undercuts their successful implementation. Judges have reported that they feel forced to send some girls to detention because they have no other treatment options, even though they know that the girls present no danger to the public and would be better off in the community.<sup>347</sup> Additionally, the dearth of services and resources available to keep victims safe, such as secure housing, can be a barrier to the successful prosecution of those who exploit youth because it is more difficult to remove children from the control of pimps and to gain their trust without such services and resources.<sup>348</sup> In other words, the provision of safe and therapeutic environments for the care of children is advantageous for their recovery, the first priority, and also for law enforcement, because it would seem that when children are safely removed from their abusers, they will be better able to participate with law enforcement when they serve as witnesses.

Under the safe harbor statutes in New York, Michigan, and Connecticut, there is no legislative funding provision for therapeutic services. New York provides model language for other states that is specific and comprehensive about an ideal service delivery system, but statutory language requires specialized services only to the extent that funding is available,<sup>349</sup> given legislators' apprehension regarding the cost of new laws. The U.S. Attorney General's Office acknowledges the need to create more community-based access to care at the local level, such as safe housing.<sup>350</sup> But because federal investigators sometimes

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347. SHERMAN, *supra* note 6, at 37.

348. *Cf. Domestic Minor Sex Trafficking Hearing, supra* note 6, at 132 (statement of Francey Hakes, Nat'l Coordinator for Child Exploitation, Prevention, & Interdiction, Office of the U.S. Deputy Att'y Gen.) ("The Department of Justice recognizes that secure housing and specialized services are critical to meet the needs of this unique population of child victims."). Additionally, the testimony discusses the need to provide secure housing in conjunction with building trust for participation in investigations. *Id.*

349. *See* N.Y. SOC. SERV. LAW § 447-b(1) (McKinney 2007); Editorial, *supra* note 247.

350. *Domestic Minor Sex Trafficking Hearing, supra* note 6, at 133 (statement of Francey Hakes, Nat'l Coordinator for Child Exploitation, Prevention, & Interdiction, Office of the U.S. Deputy Att'y Gen.) (noting that in Fiscal Year 2009, "the Department of Justice awarded funding under a new program titled, 'Improving Community Response to the Commercial Sexual Exploitation of Children'" to four cities in order to develop better community-based approaches to responding to domestic commercial sexual exploitation).

coordinate trafficking and prostitution investigations with state authorities, their success in assisting youth is limited when the states have nowhere for domestic minors to go, and are unable to provide necessary services, once the youth are discovered by law enforcement.<sup>351</sup> States can reform their laws as an opportunity to access federal funding for state services that support the goal of helping communities “intervene appropriately with and compassionately serve victims including [by] providing essential services.”<sup>352</sup> The few states that are taking action have made substantial progress; however, lawmakers and advocates everywhere should incorporate into their own approaches lessons learned from the early implementation phases of safe harbor laws.

Community models for providing services to sexually exploited youth, though scarce, do exist and have provided far greater assistance to sexually trafficked youth than the current model of detention.<sup>353</sup> In order to meet the needs of minors, successful models should include interdisciplinary efforts to treat the

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351. Even though the federal government recognizes that children are victims, not criminals, services are still lacking: While the Federal Innocence Lost Initiative has “rescued” 1100 children in its enforcement efforts, many had no access to relevant assistance in their local communities. See Joe Markman, *Rescued, but Still in Peril: Child Prostitution Victims Freed in an October Crackdown Aren’t Getting the Help They Need, Experts Say*, L.A. TIMES, Dec. 8, 2009, at 26 (noting that many girls in one Innocence Lost initiative were sent back to abusive homes, with some returning to the streets or even being detained by a juvenile justice center); see also Heiges, *supra* note 72 (discussing failures in state practices of prosecuting and punishing juveniles).

352. *Domestic Minor Sex Trafficking Hearing*, *supra* note 6, at 133.

353. See Hornberger, *supra* note 262, at 18 (citing a University of British Columbia study of nurse interventions in Minnesota clinics). Nurse intervention programs for sexually exploited runaway girls reported significant improvements in girls’ lives along with “significant reductions in emotional distress, substance use, suicide attempts, and risky sexual behavior.” *Id.* Girls Educational and Mentoring Services is one of the few residential care facilities with specialized services for commercially and sexually exploited girls and young women. The facility is survivor-led and provides a range of services, including a Transitional Independent Living Program and a Supportive Housing Program. See *Transitional & Supportive Housing*, GIRLS EDUC. & MENTORING SERVS., <http://www.gems-girls.org/what-we-do/our-services/transitional-supportive-housing/> (last visited Dec. 6, 2011). Other programs are led by law enforcement and, though still operating under laws that permit prosecution, are developing infrastructures for services that attend to medical needs and safe housing. Rami S. Badawy, *Update: Shifting the Paradigm from Prosecution to Protection of Child Victims of Prostitution* (pt. 2), 22 NAT’L CENTER PROSECUTION CHILD ABUSE (Nat’l Dist. Atty’s Ass’n, Alexandria, Va.), 2010, at 1-6 (discussing Georgia’s child welfare and juvenile justice partnership and similar collaborations in Texas). The article also discusses a progressive approach in Canada that does not prosecute youth, but does securely detain them. *Id.*

mental and physical needs of these minors.<sup>354</sup> As these models are adopted more widely, professionals in disciplines with an emphasis on medical care should be integral to the intervention process because of their relevant expertise.<sup>355</sup> Doctors and health care providers who have come into contact with these girls have recently become aware of their plight and may be another helpful point of access to provide care and build partnerships.<sup>356</sup> Girls who do not fear arrest may be more likely to confide in authority figures, such as providers in the medical community. In addition, prostituted youth must be provided with access to safe housing. This housing must be off-limits to third party exploiters, particularly since young girls report that pimps recruit them at known shelters or group homes.<sup>357</sup>

The argument that specialized services are “too expensive” is difficult to accept when one evaluates the costs of existing models.<sup>358</sup> For example, the national average annual cost of a detention bed in the juvenile justice system is estimated at \$88,000, though this number can vary significantly.<sup>359</sup> Indeed, the highest estimate in the nation reaches \$265,000 a year per child.<sup>360</sup> Detention has not proven to be as worthy an investment for states, considering the docu-

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354. See Clawson et al., *supra* note 28, at 13-14, 21 (describing the varied needs of exploited minors as including mental health counseling, medical care, safe housing, legal assistance, life skills training, education, and substance abuse counseling). “Because trafficking victims’ needs are complex and extensive, it is impossible for a single agency to respond effectively to this population,” but rather requires collaboration. *Id.* at 21.
355. See 42 U.S.C. § 14044b (2006) (discussing the professional services to be funded for juveniles); see also N.Y. SOC. SERV. LAW § 447-b(1) (McKinney 2007) (listing services needed to effectively aid exploited children such as residential safe houses, medical care, counseling, crisis intervention and therapy, educational services, life skills, and transitional planning provided by properly trained staff).
356. See, e.g., Patricia Leigh Brown, *In Oakland, Redefining Sex Trade Workers as Abuse Victims*, N.Y. TIMES, May 24, 2011, at A13.
357. See also CURTIS ET AL., *supra* note 30.
358. See Adcock, *supra* note 115 (noting a comment by a service provider about the excessive cost of incarceration as compared to community residential treatment).
359. NAT’L JUVENILE JUSTICE NETWORK, THE REAL COSTS AND BENEFITS OF CHANGE: FINDING OPPORTUNITIES FOR REFORM DURING DIFFICULT FISCAL TIMES 13 (2010), available at <http://www.kidscounsel.org/NJJN%20Real%20Costs%20of%20Change%20Jun%202010.pdf> (citing AM. CORRECTIONAL ASS’N, 2008 DIRECTORY OF ADULT AND JUVENILE CORRECTIONAL DEPARTMENTS, INSTITUTIONS, AGENCIES, AND PROBATION AND PAROLE AUTHORITIES 19 (2008)).
360. *Id.* For example, in New York, the cost of detention is \$210,000 per child per year and recidivism rates are abysmal. See GOVERNOR’S TASKFORCE, CHARTING A NEW COURSE: A BLUEPRINT FOR TRANSFORMING JUVENILE JUSTICE IN NEW YORK STATE 10 (2009), available at <http://www.nicic.gov/Library/024149> (follow “Download/View (PDF)” hyperlink and then “Continue” hyperlink).

mented abuse, lack of basic programs, and high recidivism rates involved with the detention model.<sup>361</sup> In contrast, there is reason to believe that specialized services would be a better investment.

Given the state of current detention models for prostituted youth, there are at least three areas where funds should be shifted to support better services and promote deterrence. First, diverting funds from detention beds to appropriate services provides a viable source of funding for community-based therapeutic programming.<sup>362</sup> While estimates are sparse, specialized programs are potentially more cost effective and certainly a more compassionate investment in the recovery of the children at issue. For example, a new safe house in Washington, D.C., estimated its annual cost to be \$100,000 per child.<sup>363</sup> Given the provision of specialized services included in this estimate, this is a comparative bargain. A child who could have received safe house care and specialized services but is instead sent to detention will likely prove to be more costly to society in the long term. The right therapeutic treatment reduces the likelihood that the abused youth will return to the same problems that plagued her past.

Second, the cost of prosecuting youth in terms of resources and time could be diverted toward apprehending pimps and the abusers who create the demand for young girls. Current costs include the investigation time of police and prosecutors, police officers' time to appear and provide testimony in court, and court oversight and administration of the case. In the juvenile justice system, the resolution of a delinquency case resulting from prosecution for

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361. See generally GOVERNOR'S TASKFORCE, *supra* note 360, at 10 (noting the needed changes in response to a two-year investigation by the U.S. Department of Justice, Civil Rights Division, Office of Special Litigation); NAT'L JUVENILE JUSTICE NETWORK, *supra* note 359, at 1; Douglas Abrams, *Reforming Juvenile Delinquency Treatment To Enhance Rehabilitation, Personal Accountability, and Public Safety*, 84 OR. L. REV. 1001 (2005) (discussing numerous investigations by the U.S. Department of Justice Civil Rights Division that find abuse and inadequate medical and psychological care at various juvenile detention facilities across the country); Soler, Shoenberg & Schindler, *supra* note 110, at 501 (noting the dangerous conditions of juvenile facilities in the United States). The Governor's Taskforce stated that because of the violence in youth facilities, "not only do youth leave facilities without having received the support they need to become law abiding citizens, but many are also more angry, fearful, or violent than they were when they entered." GOVERNOR'S TASKFORCE, *supra* note 360, at 10; see also NAT'L JUVENILE JUSTICE NETWORK, *supra* note 359, at 2 (noting that "current expenditures on incarceration of youth have yielded 'dismal' results [and] strikingly high recidivism rates").

362. NAT'L JUVENILE JUSTICE NETWORK, *supra* note 359, at 3 (noting that smart downsizing can realize savings to states and provide youth with more effective community-based care).

363. *Domestic Minor Sex Trafficking Hearing*, *supra* note 6, at 149 (statement of Tina Frundt, commercial sexual exploitation survivor and founder of Angela's House, Washington, D.C.).

prostitution requires defense attorneys and prosecutors to appear in court several times and can include police testimony, all using scarce time and resources that could be spent addressing the root of the sex-trafficking tragedy.

Third, there are federal funds that states can access for state victims' services. The Federal Runaway and Homeless Youth Act was reauthorized with increased appropriations in 2008.<sup>364</sup> The Act's purpose is to provide support for states to build an effective system of care for runaway and homeless youth outside the child welfare and law enforcement systems.<sup>365</sup> It acknowledges the need to create long-term strategies, coordinate federal programs, and treat exploited youth as victims instead of criminals.<sup>366</sup> These funds should continue to target prevention and fund specialized residential shelter beds for this population, in addition to supporting efforts to gather empirical evidence for best practices. Further, the Juvenile Justice Delinquency and Prevention Act provides financial incentives for states to keep children out of the delinquency system and juvenile detention placements.<sup>367</sup> Therefore, legislation furthering these goals is potentially more cost effective because it responds to federal funding incentives.

Next, the TVPA earmarked money for local communities to expand resources aimed at assisting domestic minors. In addition, the Domestic Minor Sex Trafficking Victim and Deterrence Act<sup>368</sup> gained significant support in Congress. Though it ultimately failed to pass in 2010, it was reintroduced in 2011.<sup>369</sup> The Act would amend the TVPA to provide funds to support local service infrastructures, assure training for law enforcement, and make much-needed improvements to the National Crime Information Center system, which tracks information about missing, exploited, and runaway children.<sup>370</sup> These data-collection enhancements will help coordinate state child wel-

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364. 42 U.S.C.A. § 5701 (West 2011); *see* Soler, Shoenberg & Schindler, *supra* note 109, at 504 (stating that “[t]he Runaway and Homeless Act, recently reauthorized in 2008 with higher levels of appropriations, will help provide new resources to serve runaway youth outside of incarceration settings and improve the programs available to youth”). *Compare* 42 U.S.C.A. § 5751 (West 2011) *with* Runaway and Homeless Youth Act, Pub. L. No. 108-96, § 5751, 117 Stat. 1167 (2003) (effective Oct. 10, 2003 to Oct. 7, 2008).

365. 42 U.S.C.A. § 5701(4) (West 2011).

366. *Id.* § 5701(6).

367. 42 U.S.C. § 5633 (2006).

368. Domestic Minor Sex Trafficking Act, S. 2925, H.R. 5575, 111th Cong. (2010).

369. Domestic Minor Sex Trafficking Act, S. 596, 112th Cong. (2011) (enacted).

370. *Id.* The Act authorized the use of grant funds for shelter for minor victims of sex trafficking, case management services, mental health counseling, legal services, and outreach and education programs to provide information about deterrence and prevention of sex trafficking of minors. It also authorized block grants of up to \$2,500,000 to different entities for the creation of services under this comprehensive victim-centered approach. *Id.*

fare agency information with the national system.<sup>371</sup> The Act also specifically calls for states to refrain from treating these minors as defendants or delinquents. Support for the Act is significant and is another indicator of a cultural shift recognizing the severity of hardship that is experienced by many exploited youth.<sup>372</sup> It is that cultural change, along with structural coordination and funding, that is needed on a large scale to ensure progress.

## CONCLUSION

The commercial sexual exploitation of youth is a complex problem that affects many parts of our society. The growing sophistication with which these crimes are perpetrated, the deep wounds of the victims, and the failure of current systems to coordinate, recognize, and address this problem calls for change. The Texas Supreme Court's *In re B.W.* decision is symbolic for its recognition that current laws are flawed both in application and as written. The Illinois Safe Children Act also serves as a model for legislatures and advocates in guiding reform efforts. The Act builds on previous laws and recognizes that the legal system is not rational when it prosecutes victims for their own exploitation. While it is true that many victimized children may be resistant to initial efforts to assist them, this situation will not improve until our laws at the state and federal level become coherent and humane. When new laws are passed, they must stand firm and bar the prosecution of youth for prostitution and must not include restrictions about which children are immune from prosecution. They must also include funded mechanisms to create and provide continued support for appropriate professional interventions. While there are roadblocks to reform, legislative efforts modeled on the Illinois Safe Children Act will offer the most coherent solution.

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371. *See id.*

372. *See* Press Release, Polaris Project, *Domestic Minor Sex Trafficking Bill Passes Senate* (Dec. 13, 2010), <http://www.polarisproject.org/media-center/press-releases/310-domestic-minor-sex-trafficking-bill-passes-senate-dec-13-2010> (quoting Mary Ellison, Director of Policy of the Polaris Project, who commented that passage by the Senate was "a sign that America is starting to realize that children in prostitution are victims of a horrific crime called human trafficking and are in need of service and support").