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## Finding Safe Harbor: Protection, Prosecution, and State Strategies to Address Prostituted Minors

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# FINDING SAFE HARBOR: PROTECTION, PROSECUTION, AND STATE STRATEGIES TO ADDRESS PROSTITUTED MINORS

DARREN GEIST\*

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INTRODUCTION

“There’s a suggestion that this is a type of prostitution.  
It’s not. It’s really the commercialized rape of our children.”<sup>1</sup>

C.S. was 13. She had recently been arrested for prostitution and faced a family court judge in New York County. It was not a new experience for her. She had already been convicted 14 times for prostitution.<sup>2</sup> In Atlanta, another defendant appeared before a family court judge. She had been in-and-out of detention for prostitution over the past three months. Dressed in standard jailhouse garb and leg shackles, she described how her adult pimp forced her to prostitute herself by threatening to kill her, pulling her hair, and punching her. She asked to be released to go home to her family. She was 10 years old.<sup>3</sup> Nicolette R. was 12 when she was arrested for prostitution. It was her first charge.

<sup>1</sup> Jessica Lustig, *The 13-Year Old Prostitute: Working Girl or Sex Slave?*, NY MAGAZINE, Apr. 1, 2007 (quoting Robert Flores, head of the Office of Juvenile Justice and Delinquency Prevention at the Department of Justice).

<sup>2</sup> In the Matter of C.S., 591 N.Y.S.2d 691, 692 (N.Y. Fam. Ct. 1992).

<sup>3</sup> Jane O. Hansen, *Selling Atlanta’s Children: Runaway Girls Lured into the Sex Trade are being Jailed for Crimes while their Adult Pimps go Free*, THE ATLANTA JOURNAL-CONSTITUTION, Jan. 7, 2001, at 1A (The 10-year old girl said, “[My pimp] forced me. He wouldn’t let me. . . . He told me he’d kill me if I left. . . . I was really scared. . . . He’d pull my hair, and he punched me.”).

Prosecutors argued she was a hardened criminal without remorse.<sup>4</sup> She was sentenced to 12 months in a secure juvenile delinquent detention facility to get “proper moral principles.”<sup>5</sup> Lucille appeared in family court in a blue jumpsuit, handcuffs and leg shackles. In a few months, she would turn 14. She described how at 12, her 17-year old half-brother “ended up taking [her] virginity, like forced it out of [her].”<sup>6</sup> He repeatedly raped her until she ran away and engaged in survivor sex for food and shelter.<sup>7</sup> After she turned 13, her pimp showed up as her “knight in shining armor,”<sup>8</sup> rescuing her from a brutal gang rape. He began pimping her out soon after that.<sup>9</sup> Under federal law – the Trafficking Victims Protection Act (TVPA), all of these girls would be considered victims of sex trafficking.<sup>10</sup> They would receive services and protection.<sup>11</sup> Under state law, they were juvenile delinquents and received detention or incarceration.<sup>12</sup>

The common policy of treating sexually exploited minors as criminals represents a fundamental failing of the justice system. Prostituted minors should not be treated as delinquents requiring discipline but rather as severely traumatized and abused victims requiring specialized services and counseling.<sup>13</sup> Yet, in most states, prostituted minors are re-traumatized through arrest, prosecution, and detention instead

<sup>4</sup> Leslie Kaufman, *Determining the Future of a Girl With a Past: Is the Answer to Child Prostitution Counseling, or Incarceration?*, N.Y. TIMES, Sept. 15, 2004, § B, at 1.

<sup>5</sup> In Matter of Nicolette R., 779 N.Y.S.2d 487 (N.Y. App. Div. 2004); Kaufman, *supra* note 4.

<sup>6</sup> Lustig, *supra* note 1.

<sup>7</sup> Survivor sex involves a male or female exchanging sex for money, food, or shelter. There is not a third-party involved in survivor sex; rather the person is a solo operator engaging in the transaction for basic necessities. See RICHARD J. ESTES & NEIL ALAN WEINER, THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA, AND MEXICO 11, 58, 131 (2001), available at [http://www.sp2.upenn.edu/restes/CSEC\\_Files/Complete\\_CSEC\\_020220.pdf](http://www.sp2.upenn.edu/restes/CSEC_Files/Complete_CSEC_020220.pdf).

<sup>8</sup> Lustig, *supra* note 1.

<sup>9</sup> *Id.*

<sup>10</sup> 18 U.S.C. § 1591; 22 U.S.C. § 7105; 22 U.S.C. § 7109.

<sup>11</sup> See generally CALIBER, FINAL REPORT: EVALUATION OF COMPREHENSIVE SERVICES FOR VICTIMS OF HUMAN TRAFFICKING: KEY FINDINGS AND LESSONS LEARNED (June 2007).

<sup>12</sup> See Kaufman, *supra* note 4 (describing Nicolette R.’s detention); see also Lustig, *supra* note 1 (discussing the detention of Lucille in upstate New York); Hansen, *supra* note 3 (discussing the detention of a 10-year old girl for prostitution in Atlanta).

<sup>13</sup> This article uses the term “prostituted minor” to refer to minors who work as prostitutes. They are considered victims of sex trafficking under federal law, but most cases are handled under state prostitution laws. Another common term is domestic minor sex trafficking (DMST). The term “prostituted minor” is used here because the paper focuses on prostitution rather than trafficking laws and argues that prostitution is something minors are compelled to do rather than something they choose to do. For discussion of the term DMST, see ESTES & WEINER, *supra* note 7; see also April Rand, *It Can’t Happen in My Backyard: The Commercial Sexual Exploitation of the Girls in the United States*, 31 CHILD & YOUTH SERVICES 138, 140 (2010), available at <http://dx.doi.org/10.1080/0145935X.2009.524480> (discussing the problem with referring to underage girls in the sex industry as prostitutes, which implies some degree of choice); see LINDA A. SMITH, SAMANTHA HEALY VARDAMAN & MELISSA A. SNOW, THE NATIONAL REPORT ON DOMESTIC MINOR SEX TRAFFICKING: AMERICA’S PROSTITUTED CHILDREN, 6, 50-55 (Shared Hope International 2009).

of receiving specialized services.<sup>14</sup> Besides being unjust, this policy is counter-productive. Arresting, prosecuting, and detaining minors hinders law enforcement efforts to go after the real criminals – the pimps<sup>15</sup> and the johns,<sup>16</sup> and misses an important opportunity to rescue minors from a system of commercial sexual exploitation.

Current state policy stands in stark contrast to the TVPA.<sup>17</sup> Passed in 2000,<sup>18</sup> the TVPA revolutionized the federal approach to trafficking victims<sup>19</sup> by effectively ending federal punishment of trafficking victims<sup>20</sup> in the immigration system,<sup>21</sup> in the labor market, and in the commercial sex industry.<sup>22</sup> The TVPA made protection of victims a central part of the new policy and recast many people who were traditionally seen as prostitutes, illegal immigrants, and illegal workers as victims of human trafficking instead.<sup>23</sup> Under the TVPA, force, fraud, or coercion needs to be proven in sex trafficking cases, unless the victim is a minor.<sup>24</sup> The TVPA treats minors engaged in commercial sexual activity as victims of sex trafficking, regardless of the use of force, fraud, or coercion,<sup>25</sup>

<sup>14</sup> See SMITH ET AL., *supra* note 13.

<sup>15</sup> This article uses the term “pimp” to refer to the person who runs the prostitution operation. Pimps often have multiple girls or boys in their “stable.” Pimps can be male or female (often referred to “madams”), but they are predominantly men. Pimps control between 50 to 90 percent of all girls in prostitution in the United States. See ESTES & WEINER, *supra* note 7, at 7-13; JAY ALBANESE, COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN: WHAT DO WE KNOW AND WHAT CAN WE DO ABOUT IT (NIJ Special Report – DOJ, 2007). Pimps are also one of many actors involved in sex trafficking of minors. Other players can include investors or “arrangers,” recruiters, transporters, public officials, informers, debt collectors, and money movers. *Id.* at 6.

<sup>16</sup> This article uses the term “john” to refer to people who purchase sexual acts from prostitutes. The clients for prostitutes are predominantly, but not exclusively, male. A variety of studies have been conducted into the reason why men buy sex. See, e.g., MELISSA FARLEY, JULIE BINDEL & JACQUELINE M. GOLDING, MEN WHO BUY SEX: WHY THEY BUY AND WHAT THEY KNOW (2009).

<sup>17</sup> See U.S. DEP’T OF STATE, U.S. LAWS ON TRAFFICKING IN PERSONS, available at <http://www.state.gov/j/tip/laws/> (last visited Apr. 6, 2012).

<sup>18</sup> The TVPA has also been amended during its reauthorization every several years (the TVPRA of 2003, 2005, 2008, 2011). See Trafficking Victims Protection Reauthorization Act of 2011, H.R. 2830, 112th Cong. (2011); Alison Siskin & Liana sun Wyler, CONG. RESEARCH SERV., RL34317, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 1 (2010).

<sup>19</sup> See U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT (11th ed. 2011), available at <http://www.state.gov/g/tip/rls/tiprpt/2011/index.htm>.

<sup>20</sup> See U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT (10th ed. 2010); see generally Sally Terry Green, *Protection for Victims of Child Sex Trafficking in the United States: Forging the Gap between U.S. Immigration Laws and Human Trafficking Laws*, 12 U.C. DAVIS J. JUV. L. & POL’Y 309 (2008). Trafficking victims can be treated as criminals in a variety of ways including being charged with prostitution or violating labor laws (when they were forced into the respective industries) or for illegal immigration (when they were trafficked across border). *Id.* at 331-33.

<sup>21</sup> 22 U.S.C. § 7101-7105; see also CALIBER, *supra* note 11.

<sup>22</sup> See, e.g., Wendi J. Adelson, *Child Prostitute or Victim of Trafficking?*, 6 U. St. Thomas L.J. 96, 111 (2008) (“Indeed, many of these commercially sexually exploited children have often run away from home to escape physical and often sexual abuse only to be exploited in the commercial sex industry by pimps and traffickers who often use violence to extract obedience.”).

<sup>23</sup> U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT, *supra* note 20, at 12-15.

<sup>24</sup> 18 U.S.C. § 1591.

<sup>25</sup> *Id.*

and gives them access to a wide range of services.<sup>26</sup> For the purposes of federal law, prostituted minors are not prostitutes but victims of sex trafficking.<sup>27</sup> Unfortunately, most minors are handled by the state justice system, and most states have not followed the lead of the TVPA. Instead, prostituted minors – victims of sex trafficking – are still treated as delinquents to be punished.<sup>28</sup>

A few states have begun to tackle this problem by passing Safe Harbor laws. Safe Harbor laws aim to remedy this situation and bring state law into line with the TVPA. Safe Harbor laws recognize prostituted minors as victims instead of delinquents, and are designed to provide prostituted minors with protection and services, instead of prosecution and detention.

Safe Harbor laws should have four central features. First, Safe Harbor laws need to focus on rescuing and protecting prostituted minors. Prostituted minors need to be protected from pimps, and from themselves. They are at serious flight risk and may need to be confined in a protective service or some variant of detention. Without the option of putting victims in secure facilities, they may simply run away and return to exploitation.<sup>29</sup> Second, minors have to be protected from the criminal and juvenile justice system which often treats them as criminals and delinquents. Police should be trained to approach potential cases of prostituted minors as rescues rather than arrests.<sup>30</sup> Juvenile detention can itself be traumatic and harmful, reinforcing the victim's sense of abandonment and shame, and the victims often return to life on the street upon release. These first two objectives are often at tension with one another, which will be explored later in this article. Third, prostituted minors are victims of sex trafficking and suffer from severe trauma and abuse. As a result, they can be difficult and troublesome victims.<sup>31</sup> There need to be specialized services to handle their unique needs. Regular services like shelters and foster homes are often insufficient.<sup>32</sup> Many of the prostituted minors have been failed by that system

<sup>26</sup> For a complete list, see SENIOR POLICY OPERATING GROUP ON TRAFFICKING IN PERSONS SPOG SUBCOMMITTEE ON DOMESTIC TRAFFICKING, FINAL REPORT AND RECOMMENDATIONS, SUMMARY OF SERVICES AVAILABLE TO VICTIMS OF TRAFFICKING 7A (2007), available at <http://www.acf.hhs.gov/trafficking/SPOGReport-Final9-5-07.pdf>.

<sup>27</sup> Adelson, *supra* note 22, at 97.

<sup>28</sup> See Joan A. Reid, *Doors Wide Shut: Barriers to the Successful Delivery of Victim Services for Domestically Trafficked Minors in a Southern U.S. Metropolitan Area*, 20 WOMEN & CRIMINAL JUSTICE 147, 148. (2010).

<sup>29</sup> JESSICA ASHLEY, THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN AND YOUTH IN ILLINOIS 30 (Illinois Criminal Justice Information Authority 2008).

<sup>30</sup> See generally Joseph S. Bova Conti & Thomas P. O'Connor, *The Role of the First Responder in the Criminal Investigation Process*, 2 MEDICAL, LEGAL & SOCIAL SCIENCE ASPECTS OF CHILD SEXUAL EXPLOITATION 603 (2005).

<sup>31</sup> Interview with Donna Hughes, Carlson Endowed Chair of Women's Studies Program at University of Rhode Island and Expert in Trafficking, at NYU School of Law (Oct. 13, 2010) (on file with author).

<sup>32</sup> ASHLEY, *supra* note 29.

time and time again.<sup>33</sup> Fourth, the law needs to deter the prostitution of minors through aggressive prosecution of pimps and johns. Once prostituted minors are recognized as sex trafficking victims, efforts must be made to arrest and prosecute their exploiters. Further, the prosecution of minors hinders victim cooperation, which is almost always necessary to convict pimps and johns.<sup>34</sup>

Safe Harbor laws are a paradigm-shifting approach still in their untested and nascent phases.<sup>35</sup> The first Safe Harbor was passed only in 2008 in New York.<sup>36</sup> New York's law was followed by Washington,<sup>37</sup> Connecticut,<sup>38</sup> Illinois,<sup>39</sup> Tennessee,<sup>40</sup> Vermont,<sup>41</sup> Minnesota,<sup>42</sup> and Massachusetts.<sup>43</sup> The Texas Supreme Court made a similar ruling in June 2010.<sup>44</sup> Section II addresses the general background of the problem and inconsistencies between federal and state approaches. Section III analyzes the theory behind Safe Harbor laws, using county pilot programs as examples. Section IV explains the content of the current Safe Harbor laws and the various models adopted. Section V explores how Safe Harbor laws have been implemented, looking at two New York cases. Section VI offers recommendations for future Safe Harbor laws.

## I. THE FAILURES OF THE JUVENILE JUSTICE SYSTEM AND THE LACK OF A BETTER OPTION

The experiences of C.S., Nicolette R., and Lucille are not abnormal. In 2007, the New York Police Department arrested 182 juvenile prostitutes.<sup>45</sup> Washington State arrested 50 juveniles for prostitution in 2007.<sup>46</sup> In Miami, 21 underage girls were prosecuted for prostitution in

<sup>33</sup> See Kate Brittle, *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, 1369 (2008); Heidi Evans, *Desperate Bid to Save Kids Who Sell Sex*, DAILY NEWS, Jan. 25, 2004, at 22; Lustig, *supra* note 1, at 38.

<sup>34</sup> U.S. DEP'T OF JUSTICE, MODEL ANTI-TRAFFICKING CRIMINAL STATUTE, 12, available at [http://pdba.georgetown.edu/Security/citizenssecurity/eeuu/documents/model\\_state\\_regulation.pdf](http://pdba.georgetown.edu/Security/citizenssecurity/eeuu/documents/model_state_regulation.pdf).

<sup>35</sup> This paper only relies on the Safe Harbor laws passed as of February 2012. At that time, several other states including Florida were considering Safe Harbor laws, but they had not been passed yet.

<sup>36</sup> A.B. 5258-C, 2007 Leg., 231st Sess. (N.Y. 2007). The New York Safe Harbor Act uses the British spelling of "harbour" but this has been modified for consistency throughout the piece.

<sup>37</sup> S.B. 6476, 61st Leg., Reg. Sess. (Wash. 2010).

<sup>38</sup> S.B. 153, Feb. Sess. 2010 (C.T. 2010).

<sup>39</sup> H.B. 6462, 96th Gen. Assembly, Spring Sess. (IL 2010).

<sup>40</sup> S.B. 0064, 107th Leg. Sess. 2011 (T.N. 2011).

<sup>41</sup> S.B. 272, 2009-2010 Gen. Assemb. Sess. (Vt. 2010).

<sup>42</sup> S.F. 1, 87th Leg., 1st Spec. Sess. (Mn. 2011).

<sup>43</sup> 2011 Mass. Acts Ch. 178, 187th Leg. Sess. (2011).

<sup>44</sup> In the Matter of B.W., 313 S.W.3d 818 (Tex. 2010).

<sup>45</sup> See Frances Gragg et al., NEW YORK PREVALENCE STUDY OF COMMERCIALY EXPLOITED CHILDREN: FINAL REPORT 10 (WESTAT 2007) (prepared for New York State Office of Children and Family Services) (juvenile is defined as a person under age eighteen).

<sup>46</sup> Debra Boyer, Boyer Research, WHO PAYS THE PRICE? ASSESSMENT OF YOUTH INVOLVEMENT IN PROSTITUTION IN SEATTLE 11 (June 2008) (report commissioned and funded by City of Seattle, Human Services Department, Domestic Violence and Sexual Assault Prevention Division).

just one year.<sup>47</sup> Dallas police detained 165 juveniles for prostitution in 2007.<sup>48</sup> Reliable national data is hard to come by, but in 2010, the most recent year data is available, approximately 804 minors were arrested for prostitution.<sup>49</sup> This is similar to previous years. For instance, the estimated number of arrests of minors under 18 for prostitution and commercialized vice was around 1,450 in 2005<sup>50</sup> and 859 in 2008.<sup>51</sup> These numbers are almost certainly low<sup>52</sup> because many agencies do not identify prostituted minors, placing them in the adult system instead.<sup>53</sup>

Frustrating identification efforts even further, prostituted minors are often coached to say they are older than they are so they can go into the adult system,<sup>54</sup> pay a small fine,<sup>55</sup> and be released back onto the streets and back to their pimps.<sup>56</sup> In many states, detained minors may be released to any adult without a background check. Minors are often released to pimps and traffickers, regardless of whether they are the minor's legal guardian.<sup>57</sup>

The number of documented arrests only hints at the scope of juvenile prostitution. The New York Office of Children and Family Services (OCFS) estimated 2,500 youth were engaged in commercialized sex in New York alone.<sup>58</sup> The National Center for Missing and Exploited Children estimates there are at least 100,000 children in prostitution in

<sup>47</sup> Hearing before Wash. State S. Human Serv. & Corr. Comm., 2010 Leg., 61st Sess. (Jan. 22, 2010) (testimony of Ms. Linda Smith, Founder and President of Shared Hope International).

<sup>48</sup> *Id.*

<sup>49</sup> Federal Bureau of Investigations, U.S. Department of Justice, *Crime in the United States, 2010*, "Table 39: Arrests, Males, by Age, 2010," released September 2011, available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s.-2010/crime-in-the-u.s.-2010/tables/10tbl39.xls>; Federal Bureau of Investigations, U.S. Department of Justice, *Crime in the United States, 2010*, "Table 40: Arrests, Females, by Age, 2010," released September 2011, available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s.-2010/crime-in-the-u.s.-2010/tables/10tbl40.xls> (the number 804 was calculated by adding the number of arrests for males (148) and females (656) in 2010).

<sup>50</sup> Kimberly J. Mitchell, David Finkelhor & Janis Wolak, *Conceptualizing Juvenile Prostitution as Child Maltreatment: Findings from the National Juvenile Prostitution Study*, Child Maltreatment 21 (SAGE Nov. 2009), available at <http://cmx.sagepub.com/content/15/1/18>.

<sup>51</sup> See Tamar Birkhead, *The "Youngest Profession": Consent, Autonomy, and Prostituted Children*, 88 WASH. L. REV. 1055, 1062 n.27 (2011).

<sup>52</sup> Gragg et al., *supra* note 45, at 10-11; Cassi Feldman, *Report Finds 2,000 of State's Children Are Sexually Exploited, Many in New York City*, N.Y. TIMES, Apr. 24, 2007, available at [www.nytimes.com/2007/04/27/nyregion/24child.html?pagewanted=print](http://www.nytimes.com/2007/04/27/nyregion/24child.html?pagewanted=print).

<sup>53</sup> Mitchell et al., *supra* note 50, at 5. See also Reid, *supra* note 28, at 155 (discussing the under-identification or misidentification of prostituted minors).

<sup>54</sup> Brittle, *supra* note 33, at 1344; Aina Hunter, *The Children's Hour: the fight for legislation to help young prostitutes*, VILLAGE VOICE, May 2, 2006, available at <http://www.villagevoice.com/2006-04-25/news/the-children-s-hour/>.

<sup>55</sup> Evans, *supra* note 33.

<sup>56</sup> Brittle, *supra* note 33.

<sup>57</sup> Reid, *supra* note 28, at 159.

<sup>58</sup> See Kate Mullin, Staff Attorney, Panel Presentation held by the Bar Assoc. of the City of NY: Legal Aid Soc'y Juv. Rts. Prac., *Teen Prostitutes: Victims or Defendants?* (Oct. 17, 2007).



the United States,<sup>59</sup> and the average age of entry into prostitution – for all prostitutes – has been put between 12 and 14.<sup>60</sup>

Treating prostituted minors as delinquents in the juvenile justice system has several problems which this section will explore in more depth. First, the isolation of detention and stigma of being treated as a delinquent often compounds feelings of guilt and shame common among prostituted minors and results in re-traumatizing the victims.<sup>61</sup> Second, without appropriate services, minors are released into the “revolving door” of exploitation and arrest.<sup>62</sup> The result is usually a recycling of the minors through the system: arrest, detention, probation, arrest, detention, probation.<sup>63</sup> Many prostituted minors report being arrested and charged on multiple occasions.<sup>64</sup> Third, detention compounds minors’ distrust for the law enforcement and social services<sup>65</sup> and hinders effort to prosecute the pimps and traffickers.<sup>66</sup> Last, state policy of detaining prostituted minors conflicts with both federal law and state laws already in place regarding statutory rape and child abuse that recognize that minors are unable to consent to sex and need special protection from adult sexual exploitation.<sup>67</sup>

### A. PROSTITUTED MINORS IN THE JUVENILE JUSTICE SYSTEM

The juvenile justice system is ill-equipped to handle prostituted minors suffering from layers of trauma. Prostituted minors usually have a history of abuse and neglect by family members. These minors have been in-and-out of various parts of the social services system

<sup>59</sup> *Testimony before Victim’s Rights Caucus, Human Trafficking Caucus*, U.S. H.R. July 19, 2010 (statement by Ernie Allen, President & CEO of National Center for Missing and Exploited Children), *available at* [http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en\\_US&PageId=4312](http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=4312).

<sup>60</sup> *See* ESTES & WEINER, *supra* note 7, at 3.

<sup>61</sup> Francine T. Sherman, Anne E. Casey Foundation, DETENTION REFORM AND GIRLS: 13 PATHWAYS TO JUVENILE DETENTION REFORM 12, 25 (2005), *available at* [http://www.aecf.org/publications/data/jdai\\_pathways\\_girls.pdf](http://www.aecf.org/publications/data/jdai_pathways_girls.pdf).

<sup>62</sup> Cynthia Godsoe, *Finally, There’s a Safe Harbor*, NAT. L. J. (Online) 1, Nov. 10, 2008, *available at* <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202425830988&slreturn=1>; *see also* Ian Urbina, *Running in the Shadows: For Runaways, Sex Buys Survival*, N.Y. TIMES, Oct. 27, 2009 (quoting Bradley Myles then Deputy Director of the Polaris Project); SMITH ET AL., *supra* note 13, at 55.

<sup>63</sup> Evans, *supra* note 33.

<sup>64</sup> *See* Boyer, *supra* note 46, at 19-25; Gragg et al., *supra* note 45, at 31-32, 46; *see also* SMITH ET AL., *supra* note 13, at 55 (describing the recidivism rates in some cities. One Dallas prosecutor claimed that prostituted minors have the highest recidivism rate of the juvenile detention population).

<sup>65</sup> *See* Gragg et al., *supra* note 45, at 46 (citing prostituted minors mistreatment and negative experiences with law enforcement, including two thirds of those surveyed being arrested multiple times).

<sup>66</sup> Urbina, *supra* note 62.

<sup>67</sup> NOY S. DAVIS & JENNIFER TWOMBLY, OFFICE FOR VICTIMS OF CRIME, OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, OFFICE FOR VICTIMS OF CRIMES, STATE LEGISLATOR’S HANDBOOK FOR STATUTORY RAPE (6th ed. 2000), *available at* <http://www.ojp.usdoj.gov/ovc/publications/infores/statutoryrape/handbook/statrape.pdf> (this Handbook was prepared for the Office for Victims of Crimes (OVC) by the ABA Center on Children and Law.).

including private NGOs, foster homes, and runaway shelters. In addition, they are victims of abuse by pimps and by johns. These layers of trauma make them vulnerable to exploitation and extremely difficult to deal with, even for trained professionals.<sup>68</sup> The following sections explore the types of abuse prostituted minors are subject to and weaknesses in the current approach through the juvenile justice system.

### 1. PROSTITUTED MINORS AS VICTIMS: LAYERS OF TRAUMA

Pimps use a powerful combination of fear and love to maintain control over minors in their “stable.”<sup>69</sup> Pimps have been described by service providers as the “most brilliant child psychologists on the planet,”<sup>70</sup> who understand that minors suffering from abuse and neglect are ripe for manipulation and exploitation. Pimps frequently recruit their victims by initially seducing them with love and hope, intentionally targeting minors with a history of abuse who “just want to be loved.”<sup>71</sup> As a result, prostituted minors often feel a strong psychological and emotional bond with their pimps.<sup>72</sup> As Cheryl Hanna commented, “Most girls are not motivated by lust or greed...; they are lured by love.”<sup>73</sup> One girl recounted how her pimp would “whisper sweet nothings to make me feel special and loved.”<sup>74</sup> Another said she mostly worried whether her pimp would still love her after she “slept” with other guys.<sup>75</sup> The initial hook is followed by other methods of control which can include beatings, burnings, cuttings, gang rape,

<sup>68</sup> See generally ESTES & WEINER, *supra* note 7.

<sup>69</sup> See DVD: VERY YOUNG GIRLS, (GEMS 2007), available at <http://documentaryheaven.com/very-young-girls/>; see also RONALD B. FLOWERS, RUNAWAY KIDS AND TEENAGE PROSTITUTION: AMERICA'S LOST, ABANDONED, AND SEXUALLY EXPLOITED CHILDREN 121 (Greenwood Press 2001). “Stable” refers to the group of girls that work for a single pimp.

<sup>70</sup> Reid, *supra* note 28, at 158 (quoting a child protective services provider).

<sup>71</sup> See, e.g. VERY YOUNG GIRLS, *supra* note 69 (depicting pimps seducing girls and survivors at GEMS explaining how the recruiting process worked).

<sup>72</sup> See Cheryl Hanna, *Somebody's Daughter: The Domestic Trafficking of Girls for Commercial Sex Industry and the Power of Love*, 9 WM. & MARY J. WOMEN & L. 1, 17 (2002); see also ASHLEY, *supra* note 29, at 28-29.

<sup>73</sup> Hanna, *supra* note 72, at 17.

<sup>74</sup> Gragg et al., *supra* note 45, at 45.

<sup>75</sup> Feldman, *supra* note 52, at 1.

and sodomy as enforcement strategies.<sup>76</sup> Many pimps tattoo the minors with the pimp's name or symbol in a form of modern-day branding.<sup>77</sup> The abuse can also lead to traumatic bonding and brainwashing similar to the Stockholm Syndrome.<sup>78</sup> Nola Brantley, Executive Director and Co-Founder of MISSEY,<sup>79</sup> described it as a five-step process: recruitment, seduction, isolation, coercion, and violence.<sup>80</sup> As a result, minors suffer from multiple traumas due to physical and psychological abuse and torture, as well as the emotional trauma of being in an extremely exploitative relationship. Rachel Lloyd, the founder and Executive Director of GEMS (Girls Education and Mentoring Services),<sup>81</sup> commented, "There's no methadone for a bad relationship."<sup>82</sup>

In addition, prostituted minors are often subject to abuse at the hands of the customers or johns. Many of the prostituted minors recounted stories of "bad dates": being "hung by the throat,"<sup>83</sup> "cut on

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<sup>76</sup> See Melissa Farley, *Sex for Sale: 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, 111 (2006); See also Rand, *supra* note 13, at 3. Rand notes,

... how and when a girl enters the life is dependent on the pimp. The pimp assesses his initial level of control and determines when the girl will start making money for sex... Initiation into the life varies depending on the pimp. The girl has no choice in the actions that take place before her body is being sold on the street. The pimp may have sex with the girl to gain her emotional and financial dependence and then persuade her into having sex for money. . . The pimp may portray a caretaker or paternal role with the girl to gain her trust and love, only to then become less emotionally supportive and adopt the view of their relationship as being a contractual one, with the pimp demanding the girl produce a minimum amount of daily revenue. . . A pimp may also take the girl to an abandoned building, have her gang-raped for indoctrination, and then turn her out on the street.

*Id.* at 142.

<sup>77</sup> See, e.g. Donna Hughes, *Tattoos of Girls Under Pimp Control & Pimps Rules for the Control of Victims*, CITIZENS AGAINST TRAFFICKING, Aug. 10, 2009, at 1 available at [http://www.citizensagainsttrafficking.org/uploads/Tattoos\\_and\\_Control\\_of\\_Victims.pdf](http://www.citizensagainsttrafficking.org/uploads/Tattoos_and_Control_of_Victims.pdf).

<sup>78</sup> Stockholm Syndrome describes the situation where a hostage or kidnap victim has positive feelings or even adulation for his or her captor. There is a tendency to justify the captor's actions, emphasize with them, and mistake lack of abuse as an act of kindness. See DEE L. R. GRAHAM WITH EDNA I. RAWLINGS & ROBERTA K. RIGSBY, *LOVING TO SURVIVE: SEXUAL TERROR, MEN'S VIOLENCE, AND WOMEN'S LIVES* 1-29, 267-71 (1994); see also Adelson, *supra* note 22, at 125.

<sup>79</sup> Motivating, Inspiring, Supporting, and Serving Sexually Exploited Youth (MISSEY). For more about MISSEY, see <http://www.misseey.org/about.html>.

<sup>80</sup> Mary K. Flynn, *As more Oakland youth join the sex trade, law enforcement explores alternatives to incarceration*, OAKLAND NORTH, Mar. 13, 2010, at 3.

<sup>81</sup> About GEMS, Mission & History, available at <http://www.gems-girls.org/about/mission-history> (last visited on June 4, 2011) ("Girls Educational & Mentoring Services (GEMS) is the only organization in New York State specifically designed to serve girls and young women who have experienced commercial sexual exploitation and domestic trafficking. GEMS was founded in 1998 by Rachel Lloyd, a young woman who had been commercially sexually exploited as a teenager. GEMS has helped hundreds of young women and girls, ages 12-24, who have experienced commercial sexual exploitation and domestic trafficking to exit the commercial sex industry and to develop to their full potential. GEMS provides young women with empathetic, consistent support and viable opportunities for positive change.").

<sup>82</sup> VERY YOUNG GIRLS, *supra* note 69.

<sup>83</sup> Gragg et al., *supra* note 45, at 45.

my back,”<sup>84</sup> robbed, raped, gang-raped, bound and gagged.<sup>85</sup> One survivor described a client as “helpful” because he did not participate in a gang-rape and might have felt bad because she was crying.<sup>86</sup> Another survivor stated, “[j]ohns are even more dangerous than pimps,”<sup>87</sup> and described the various abuses she was subject to including videotaping anal rape, being beaten black and blue, and being covered in puke.<sup>88</sup> The abuse compounds feelings of isolation and despair, and despite the abuse at the hands of their pimp, minors can see the pimp as their only protector.<sup>89</sup>

The abuse at the hands of pimps and johns takes place against the background of a history of abuse.<sup>90</sup> In a pilot study of 130 prostitutes, 57 percent reported they had been sexually abused as a child, 32 percent reported that rape was first their sexual experience, and 26 percent reported that their first sexual experience was with a relative.<sup>91</sup> Another study by the Council of Prostitution Alternatives in Portland, Oregon, found that 98 percent of prostitution survivors reported being emotionally abused as children, 90 percent were physically abused, 85 percent were victims of incest, and 60 percent were sexually abused as children.<sup>92</sup> These studies covered all prostitutes. The numbers for just prostituted minors would probably be much higher. This history of abuse makes minors particularly vulnerable to exploitation and psychological manipulation.<sup>93</sup> As Joan Reid noted, “Child sexual abuse victims frequently seek out a rescuer, and if that person is another abuser,

<sup>84</sup> *Id.*

<sup>85</sup> See Brittle, *supra* note 33, at 1369 (“Reports of sexual torture, including being burned, gagged, bound, hung, and physically mutilated are not uncommon.”); Susan Kay Hunter, *Prostitution is Cruelty and Abuse to Women and Children*, 1 MICH. J. GENDER & L. 91, 92-94 (1993); see also Landesman, *The Girls Next Door*, N.Y. TIMES, Jan. 25, 2004, at 15, available at <http://www.nytimes.com/2004/01/25/magazine/25SEXTRAFFIC.html?pagewanted=all> (describing abuse young girls experience in sex trafficking, including special prices for the “damage group” where “they can hit you or do anything they wanted... Though sex always hurts when you are little, so it’s always violent, everything was much more painful once you were placed in the damage group.”).

<sup>86</sup> Gragg et al., *supra* note 45, at 45.

<sup>87</sup> Amy Fine Collins, *Sex Trafficking of Americans: The Girls Next Door*, VANITY FAIR, May 24, 2011, at 7, available at <http://www.vanityfair.com/politics/features/2011/05/sex-trafficking-201105>.

<sup>88</sup> *Id.*

<sup>89</sup> See SMITH ET AL., *supra* note 13, at 37-46.

<sup>90</sup> See generally Joan A. Reid, *An Exploratory Model of Girl’s Vulnerability to Commercial Sexual Exploitation in Prostitution, Child Maltreatment*, SAGE (May 2011), <http://cmx.sagepub.com/content/16/2/146.full.pdf+html> (discussing Agnew’s general strain theory and how a history of abuse is often a factor in the commercial sexual exploitation of young girls); see Robert Agnew, *Foundation for a General Strain Theory of Crime and Delinquency*, 30(1) CRIMINOLOGY 30, 47-87 (1992); see also H.W. Wilson & C.S. Widom, *The Role of the Youth Problem Behaviors in the Path from Child Abuse and Neglect to Prostitution: A Prospective Examination*, 20(1) J. OF RESEARCH ON ADOLESCENTS 210-236 (2010); ALBANESE, *supra* note 15, at 3-4.

<sup>91</sup> Melissa Farley & Howard Barkan, *Prostitution, Violence Against Women, and Posttraumatic Stress Disorder*, 27(3) WOMEN & HEALTH 37-49 (1998).

<sup>92</sup> Jessica Ashley, *THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN AND YOUTH IN ILLINOIS* 8 (Jan. 2008); Farley, *supra* note 76, at 106, 113.

<sup>93</sup> SMITH ET AL., *supra* note 13, at 37.

the cycle of victimization continues.”<sup>94</sup> The abuse can also make it more difficult for minors to try to escape their pimp. According to Melissa Farley, “One way that women end up ‘choosing’ prostitution is that they are paid for the abuse that they have already grown up with. They assume that’s all they are good for.”<sup>95</sup>

As a result of a history of psychological, physical and emotional abuse and torture, prostituted minors often suffer from severe trauma, psychological indoctrination, stigma, guilt, and shame.<sup>96</sup> A study by Farley and Howard Barkan found that 68 percent of prostituted minors suffered from Post-Traumatic Stress Disorder (PTSD)<sup>97</sup> and are at increased risk for depression and suicide.<sup>98</sup> Other common disorders for prostituted minors include attachment disorder, anxiety and stress disorder (panic attacks, agoraphobia, and social phobia), attention deficit/hyperactivity disorder (ADHD), conduct disorder, developmental disorders, eating disorders (bulimia and anorexia nervosa), learning disorders, acute stress disorders, dissociative disorders, impulse control disorders, mood disorders (major depression, dysthymia, bipolar, and hypothyria), personality disorders (borderline, histrionic, narcissistic, paranoid, anti-social, avoidant, dependent, and obsessive compulsive P.D.), self-harming disorders (self-mutilation), sleep disorders (insomnia, hypersomnia), somatic disorders, and substance abuse disorders.<sup>99</sup> In this situation, treating minors as delinquents and criminals, or even providing them with improper services poses a grave threat to minors.<sup>100</sup>

## 2. INABILITY OF THE CURRENT SYSTEM TO HANDLE THE PROBLEM

The juvenile justice system was designed to be an alternative to the adult justice system, and, through the late 1800s, had a “protective, rehabilitative attitude towards juveniles in the system.”<sup>101</sup> The reforms of the 1974 Juvenile Justice and Delinquency Prevention (JJDP) Act emphasized rehabilitation and services rather than incarceration

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<sup>94</sup> Reid, *supra* note 28, at 151.

<sup>95</sup> Farley, *supra* note 76, at 111.

<sup>96</sup> *Id.*

<sup>97</sup> Farley & Barkan, *supra* note 91, at 37-49.

<sup>98</sup> MARY P. ALEXANDER ET AL., COMMUNITY AND MENTAL HEALTH SUPPORT OF JUVENILE VICTIMS OF PROSTITUTION, 1 MEDICAL, LEGAL, AND SOCIAL SCIENCE ASPECTS OF CHILD SEXUAL EXPLOITATION 397, 398 (2005).

<sup>99</sup> See SMITH ET AL., *supra* note 13, at 42.

<sup>100</sup> Albanese, *supra* note 15, at 8.

<sup>101</sup> See Christianna Lamb, *Child Witness and the Law*, 3 OR. REV. INT’L LAW. 63, 82 (2001); see also Sacha M. Coupet, *What to do with the Sheep in Wolf’s Clothing*, 148 U. PA. L. REV. 1303, 1308 (2000).

and punishment.<sup>102</sup> In practice, juvenile systems often fall far from that ideal. Systems vary widely between states, but in many states, prostituted children spend their detention isolated, in jail-like facilities, with minimal access to counseling and therapy.<sup>103</sup> Several states bring minors to court in handcuffs and leg shackles.<sup>104</sup> The post-1974 amendments to the JJDP<sup>105</sup> added a new emphasis on “moralism and discipline”<sup>106</sup> into the juvenile system through increased prosecution and punishment. “Promiscuous” girls such as prostitutes were seen as especially deserving of punishment and incarcerated at a higher rate.<sup>107</sup> Prostitution is one crime where detention often remains the norm rather than the exception,<sup>108</sup> and minors are frequently given harsher sentences for prostitution than for other misdemeanor charges.<sup>109</sup> The result is that instead of rehabilitation and services, prostituted minors face detention and discipline for a crime done to them.

In the juvenile justice system, prostituted minors are often treated as “bad kids”<sup>110</sup> who need to be punished and disciplined. Ms. Lloyd recounted how some police officers on the West Coast One “referred to picking up girls on the street as a ‘trash run.’”<sup>111</sup> Already stigmatized as “whores” and “criminals,” the juvenile justice system stigmatizes and traumatizes them further instead of approaching them as victims. As one survivor, Tiffany, put it, “Once you’re in jail, no one helps you, no one talks to you, no one asks you why you were out on the streets or what your family situation is.”<sup>112</sup> Another survivor, Norma Hotaling, who went on to found Standing Against Global Exploitation (SAGE),

<sup>102</sup> See Shelby Schwartz, *Harboring Concerns: The Problematic Conceptual Reorientation of Juvenile Prostitution in New York*, 18 COLUM. J. GENDER & L. 235, 248 (2008) (discussing the Juvenile Justice and Delinquency Prevention Act as setting up incentives for states to reform juvenile justice system to promote “prevention, diversion, and community based treatment” to support “rehabilitative intervention”); Juvenile Justice and Delinquency Prevention Act, Pub. L. No. 93-415, § 101, 88 Stat. 1109 (1974).

<sup>103</sup> Adelson, *supra* note 22, at 109, 126.

<sup>104</sup> Hansen, *supra* note 3, at 1.

<sup>105</sup> 42 U.S.C. § 5601(a)(1)(B), (a)(10)(A) (West 2011).

<sup>106</sup> Schwartz, *supra* note 102, at 249; see also HUMAN RIGHTS WATCH, NO MINOR MATTER: CHILDREN IN MARYLAND’S JAILS 1 (1999) (discussing increased focus on punishing instead of rehabilitating minors in the juvenile justice system); see also Pantea Javidan *Invisible Targets: Juvenile Prostitution, Crackdown Legislation, and the Example of California*, 9 CARDOZO WOMEN’S L.J. 237, 240 (2003).

<sup>107</sup> DAVID S. TENANHAUS, JUVENILE JUSTICE IN THE MAKING 51 (2004).

<sup>108</sup> Adelson, *supra* note 22, at 110 (quoting Legal Aid Society Attorney in New York regarding sexually exploited youth, “if there’s not a 100% detention rate, very close to a 100% detention rate.”). Smith et al., *supra* note 13 at 55.

<sup>109</sup> SMITH ET AL., *supra* note 13 at 55-57 (describing the various levels of punishment minors face for prostitution versus other charges).

<sup>110</sup> Jane Hansen, *Prostitutes Getting Younger as Sex Trade Grows, Judges Say*, THE ATLANTA JOURNAL-CONSTITUTION, Jan. 8, 2001 (quoting Florida Family Court Judge Julie Koenig).

<sup>111</sup> Rachel Lloyd, *Real Journalists Do Real Research*, GEMS NEWSLETTER, July 1, 2011.

<sup>112</sup> Valerie Bauman, *NY considers help to victims of child prostitution*, NEWSDAY, July 1, 2008, available at [www.correctionalassociation.org/press/download/fjjp/07-01-08\\_Newsday\\_NY\\_considers\\_help\\_to\\_victims\\_of\\_child\\_prostitution.pdf](http://www.correctionalassociation.org/press/download/fjjp/07-01-08_Newsday_NY_considers_help_to_victims_of_child_prostitution.pdf) (quoting Tiffany, a survivor who was pimped out at age 12 and now does outreach for GEMS).

commented, "No one asked me about my life, about prostitution, about being raped, or about being kidnapped... No one asked me if I hurt, or why I hurt. No one treated me like a person. I was just a whore, a drug addict, and a criminal."<sup>113</sup> Prostituted minors often feel no acceptance outside of the world of prostitution.<sup>114</sup> They can be considered "dirty," "sluts," "bad girls" by parents and peers, and arresting, charging, and detaining a minor as a delinquent only reinforces this feeling of isolation and dependence on the pimp.<sup>115</sup>

The limited services available through the juvenile justice system do little to address the unique needs of prostituted minors.<sup>116</sup> Even for social service agencies, prostituted minors' level of psychological and emotional trauma is difficult to handle, and improper services have been extremely harmful to traumatized minors.<sup>117</sup> This includes putting minors into mental hospitals (because they are seen as deviants in some way) rather than treating them as extremely exploited and brutalized children.<sup>118</sup> It would be unthinkable to treat a raped child in this way, but a prostituted minor is a just a child who has been subjected to repeated rapes for money. The trauma and the resulting need for services and treatment is, if anything, even greater.

Arresting and detaining minors has two additional negative consequences. First, law enforcement misses an opportunity to intervene and rescue the minor from the pimp's control. It sends the message that law enforcement was not there to help, "deepen[ing the] distrust of an adult world that has brutalized and mistreated them."<sup>119</sup> Second, it frustrates efforts to prosecute pimps, which usually requires that the victim testify.<sup>120</sup> Treating minors as delinquents reduces the likelihood of cooperation as law enforcement is seen as the enemy. Successful prosecution (and thereby successful deterrence of pimps) requires working with the victims and ensuring the victims' protection since many victims are severely threatened by the pimp against any coopera-

<sup>113</sup> Norma Hotaling, *The Commercial Sexual Exploitation of Women and Girls: A Survivor Service Provider's Perspective*, 18 YALE J.L. & FEMINISM 181, 182 (2006) (Norma Hotaling was first commercially sexually exploited when she was 5 years old. "Older men in the neighborhood park would give me money to view pornography and do to them what was shown in the pornography. From ages five through thirteen, I was used as a 'sexual plaything' by a group of older boys.").

<sup>114</sup> See Pamela Chen, Deputy of Public Integrity, Crim. Div., U.S. Att'y's Off., EDNY, Panel Presentation at Bar Assoc. of the City of N.Y., *Teen Prostitutes: Victims or Defendants?* (Oct. 17, 2007).

<sup>115</sup> See SMITH ET AL., *supra* note 13, at 60.

<sup>116</sup> *Id.*; see also Reid, *supra* note 28, at 156-57 (discussing the limited availability of services from domestic minor sex trafficking victims).

<sup>117</sup> Brittle, *supra* note 33, at 1368-69; Lois A. Weithorn, *Envisioning Second-Order Change in America's Response to Troubled and Troublesome Youth*, 33 HOFSTRA L. REV. 1305, 1344 (2005).

<sup>118</sup> ASHLEY, *supra* note 29, at 30; see also Lustig, *supra* note 1, at 3.

<sup>119</sup> Editorial, *Children in Need of Safe Harbor*, N.Y. TIMES, Sept. 15, 2007, at A16.

<sup>120</sup> See generally ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS, June 2009 (discussing importance of witnesses in bringing cases against sex traffickers); see also Lamb, *supra* note 101, at 84.

tion with law enforcement.<sup>121</sup> As the Department of Justice has found, “[f]ederal experience has shown that prosecution without victim protection is unworkable.”<sup>122</sup>

## B. THE CONTRADICTION LEGAL FRAMEWORK: TREATING VICTIMS AS CRIMINALS

### 1. TENSION WITH FEDERAL LAW

State policy towards prostituted minors conflicts with federal law. Passed in 2000, the Trafficking Victims Protection Act (TVPA) marked a major shift in federal policy, reorienting legal efforts against human trafficking towards a “3P” strategy of prosecution, protection, and prevention.<sup>123</sup> The TVPA and subsequent reauthorizations addressed prostituted minors as a special case. Under Section 1591, the government does not need to prove force, fraud, or coercion for minors under the age of 18 in commercial sexual exploitation.<sup>124</sup> Every minor in commercial sexual exploitation who has a pimp is a victim of sex trafficking.<sup>125</sup> As a result, federal law treats most, if not all minors in prostitution as victims of sex trafficking, with cases of survivor sex being a possible exception.<sup>126</sup> While the initial target of the statute was on international trafficking,<sup>127</sup> the language of the TVPA is broad enough to cover domestic sex trafficking, an outcome which was in the minds of several of the sponsors.<sup>128</sup> Representative Christopher Smith, a Republican from New Jersey, commented, “American citizens and nationals who are trafficked domestically . . . are still viewed through the lens of juvenile delinquency, rather than as victims of crime, worthy of compassion and assistance.”<sup>129</sup> The TVPA will “begin to shift the paradigms so that these exploited girls and women will receive assistance that they so desperately need.”<sup>130</sup> The late Senator Paul Wellstone likewise

<sup>121</sup> Reid, *supra* note 28, at 158. See also Collins, *supra* note 87 (describing some of the threats to girls for disobedience including “dragooning her little sister into becoming a replacement whore.”).

<sup>122</sup> U.S. DEP’T OF JUSTICE, *supra* note 34.

<sup>123</sup> U.S. DEP’T OF STATE, *supra* note 20.

<sup>124</sup> 18 U.S.C. § 1591 (West 2011).

<sup>125</sup> *Id.*

<sup>126</sup> It is unclear how cases of survivor sex should turn out. It is possible “johns” could be charged as traffickers under “obtain” language of section 1591, but this has not been done to date. It is questionable whether it should be done. This was probably not the intent of Congress and could be disproportionate, making johns open to 15 year minimum sentence even without any knowledge or intent to target minors. See Adelson, *supra* note 22, at 103 (arguing that under language of TVPA, “any ‘john’ who causes a child to engage in sex acts for money should also be considered a trafficker under the TVPA and prosecuted accordingly.”).

<sup>127</sup> See Lustig, *supra* note 1, at 2.

<sup>128</sup> See Adelson, *supra* note 22, at 101 (discussing the intent of some legislators to have the TVPA reach domestic sex trafficking as well as international trafficking).

<sup>129</sup> 151 CONG. REC. H11574-75 (daily ed. Dec. 14, 2005) (statement of Rep. Smith).

<sup>130</sup> *Id.*



emphasized that the TVPA could help “domestic anti-trafficking and victim assistance efforts.”<sup>131</sup>

As child victims of sex trafficking, prostituted minors would be protected from prosecution and could receive a wide range of federal benefits.<sup>132</sup> These benefits including food, clothing, medical services (including dental care), emergency and transitional housing, employment assistance, healthcare, mental health services, legal advocacy, crisis counseling, and treatment for trauma and depression.<sup>133</sup> They would be referred to NGOs and government agencies like Office for Victims of Crime within U.S. Department of Justice.<sup>134</sup> For foreign victims, prostituted minors could receive immigration benefits such as a T-visa without cooperating with law enforcement.<sup>135</sup>

## 2. TENSION WITH STATE LAWS

State law and policy of arresting and prosecuting prostituted minors also runs in tension with other state laws. Every state has laws on statutory rape and child abuse.<sup>136</sup> These laws are often justified by a need to “protect minors from sexual intercourse” and “predatory, exploitative sexual relationships.”<sup>137</sup> State laws maintain that under a certain age, minors cannot consent to sex.<sup>138</sup> Many states also recognize minors lack capacity to enter contracts or engage in commercial activities.<sup>139</sup> Yet once money changes hands, the legal system treats a victim of sexual abuse as a prostitute, as a criminal and delinquent.<sup>140</sup> Even the word “prostitute,” according to Sharmin Bock, Alameda County Deputy District Attorney, “implies a willingness and consent that isn’t legally sustainable.”<sup>141</sup> As Sgt. Bryon A. Fassett of Dallas Police Department described it, “If a 45-year old man had sex with a 14-year-old girl and no money changed hands, she was likely to get counseling

<sup>131</sup> 146 CONG. REC. S7781 (daily ed. July 27, 2000) (statement of Sen. Wellstone).

<sup>132</sup> 22 U.S.C. § 7105 (victims under 18 are not required to cooperate with law enforcement in order to receive benefits).

<sup>133</sup> CALIBER, *supra* note 11.

<sup>134</sup> *Id.*

<sup>135</sup> Immigration and Nationality Act §101(a)(15)(T)(III); 8 U.S.C. § 1101(a)(15)(T)(III); *see also* U.S. DEP’T OF JUSTICE, HUMAN TRAFFICKING AND THE T-VISA, VIOLENCE AGAINST WOMEN OFFICE, *available at* <http://www.vaw.umn.edu/documents/humantrafficking/humantrafficking.pdf>.

<sup>136</sup> U.S. DEP’T OF HEALTH & HUMAN SERVICES, STATUTORY RAPE: A GUIDE TO STATE LAWS AND REPORTING REQUIREMENTS (Dec. 15, 2004), 5-6, 10-12, *available at* <http://aspe.hhs.gov/hsp/08/sr/statelaws/summary.shtml>.

<sup>137</sup> OFFICE FOR VICTIMS OF CRIMES, STATE LEGISLATOR’S HANDBOOK FOR STATUTORY RAPE ISSUES 6 (2000), *available at* <http://www.ojp.usdoj.gov/ovc/publications/infores/statutoryrape/handbook/statrape.pdf>.

<sup>138</sup> *Id.*

<sup>139</sup> Darlene Lynch & Kristen Widner, *Commercial Sexual Exploitation of Children in Georgia: Service Delivery and Legislative Recommendations for State and Local Policy Makers*, EMORY LAW (Barton Child Law and Policy Clinic 2008) *available at* [http://bartoncenter.net/uploads/fall2011updates/status\\_other/CSEC-recs-for-policy-makers.pdf](http://bartoncenter.net/uploads/fall2011updates/status_other/CSEC-recs-for-policy-makers.pdf).

<sup>140</sup> ASHLEY, *supra* note 29, at 16-17.

<sup>141</sup> Flynn, *supra* note 80.

and 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.”<sup>142</sup>

States also recognize that prostituting minors is an especially egregious crime. The majority of states increase penalties for pimping minors or for soliciting minors into prostitution.<sup>143</sup> Almost half of the states have no force, fraud, or coercion requirement to prove trafficking of minors in the sex industry,<sup>144</sup> which means that in these states every minor in prostitution who has a pimp is a trafficking victim and all of their pimps are sex traffickers. The fact that money has changed hands does not make the child a criminal. It means a child victim of sexual abuse and statutory rape is also a victim of sex trafficking. But only one of those states, Maryland, defines a minor in prostitution as a victim of human trafficking,<sup>145</sup> and even Maryland continues to arrest minors for prostitution, including taking 23 into custody in 2009.<sup>146</sup> Despite all these laws protecting minors from sexual exploitation, most

<sup>142</sup> Urbina, *supra* note 62.

<sup>143</sup> The following states have increased penalties for pimping, soliciting, or patronizing prostituted minors. Alabama (ALA. CODE § 13A-12-112; ALA. CODE § 13A-12-111); Alaska (ALASKA STAT. § 11.66.110), Arizona (ARIZ. REV. STAT. ANN. § 13-3213), California (CAL. CODE § 266h), Delaware (DEL. CODE tit. 11 §§, 1352, 1353), Florida (FLA. STAT. ANN. § 796.03-035), Georgia (GA. CODE ANN. § 16-6-13), Idaho (IDAHO CODE ANN. §§ 18-5609, 5610), Illinois (720 ILL. COMP. STAT. ANN. § 5/11-15.1; 720 ILL. COMP. STAT. ANN. § 5/11-18.1), Kansas (KAN. STAT. ANN. § 21-3516, KAN. STAT. ANN. § 21-3510), Kentucky (KY. REV. STAT. ANN. § 529.030), Louisiana (LA. REV. STAT. ANN. § 14:82.1; LA. REV. STAT. ANN. § 14:86), Maine (ME. REV. STAT. ANN. § 17-A 852; ME. REV. STAT. ANN. § 17-A 855), Maryland (MD. CODE ANN. § 11-324), Massachusetts (MASS. GEN. LAW §§ 272 4A, 272 4B), Michigan (MICH. STAT. ANN. § 750.462), Minnesota (MINN. STAT. §§ 609.322, 609.324), Missouri (MO. ANN. STAT. § 567.050, MO. ANN. STAT. § 567.030), Montana (MONT. CODE ANN. § 45-5-603), Nebraska (NEB. REV. STAT. § 28-805), Nevada (NEV. REV. STAT. ANN. §§ 201.300, 201.340, 201.360, 201.354), New Hampshire (N.H. REV. STAT. ANN. § 645:2), New Jersey (N.J. STAT. ANN. §§ 2C:34-1(3), (4); N.J. STAT. ANN. § 2C:34-1(7)), New Mexico (N.M. STAT. ANN. § 30-6A-4, N.M. STAT. ANN. § 30-6A-4, 30-9-1), New York (N.Y. PENAL LAW §§ 230.32, 230.30, 230.25, 230.33; N.Y. PENAL LAW §§ 230.06, 230.05, 230.04), North Carolina (N.C. GEN. STAT. ANN. § 14-190.16, 14-190.18, N.C. GEN. STAT. ANN. § 14.190.19), Ohio (OHIO REV. CODE ANN. § 2907.21), Oregon (OR. REV. STAT. ANN. § 167.017), Pennsylvania (18 PA. CONS. STAT. ANN. § 5902(b)), Rhode Island (R.I. GEN. LAWS § 11-37-8.8, R.I. GEN. LAWS §§ 11.34.1-3, 11-9-1, 11-34.1-7), Texas (TEX. PENAL CODE ANN. § 43.05), Utah (UTAH CODE § 76-10-1306), Washington (WASH. REV. CODE § 9A.88.070, WASH. REV. CODE § 9.68A.100), West Virginia (W. VA. CODE ANN. § 61-8-8), Wisconsin (WIS. STAT. ANN. § 948.08).

<sup>144</sup> The following States do not require proving force, fraud, or coercion for sex trafficking of minors. Arizona (ARIZ. REV. STAT. ANN. § 13-1307), Delaware (DEL. CODE tit. 11 §, 787), Georgia (GA. CODE ANN. § 16-5-46), Idaho (IDAHO CODE ANN. § 18-8602), Illinois (720 ILL. COMP. STAT. ANN. § 5/10-9), Iowa (IOWA CODE § 701A.2), Kansas (KAN. STAT. ANN. § 21-3447), Kentucky (KY. REV. STAT. ANN. § 529.100), Maine (ME. REV. STAT. ANN. § 302), Maryland (MD. CODE ANN. §§ 11-303(b),(d)), Michigan (MICH. STAT. ANN. § 750.462g), Mississippi (MISS. CODE ANN. § 97-3-107), Missouri (MO. ANN. STAT. § 566.212), Nebraska (NEB. REV. STAT. § 28-831), North Dakota (N.D. CENT. CODE § 12.1-40-01), Tennessee (TENN. CODE ANN. § 39-13-309), Vermont (VT. STAT. ANN. tit.13, § 2635a), Wisconsin (WIS. STAT. ANN. § 948.051).

<sup>145</sup> MD. CODE ANN., CRIM. LAW § 11-303(b)(1) (LexisNexis 2002) (defining any minor being placed in prostitution as a victim of sex trafficking without having to prove force, fraud, or coercion). For more analysis, see SHARED HOPE INTERNATIONAL, Analysis and Recommendations – Maryland, available at [http://www.sharedhope.org/Portals/0/Documents/AR-PDF/Maryland\\_AR\\_FINAL.pdf](http://www.sharedhope.org/Portals/0/Documents/AR-PDF/Maryland_AR_FINAL.pdf).

<sup>146</sup> CENTRAL RECORDS DIVISION, CRIME IN MARYLAND, 2009 UNIFORM CRIME REPORT 122 (2010).

minors in the commercial sex industry are still treated as criminals or delinquents.<sup>147</sup> Most will be arrested rather than rescued.<sup>148</sup> Most will receive detention rather than services. Most will simply be recycled through the system,<sup>149</sup> quickly returning to the streets and to the pimps and traffickers.

### C. THE STORY OF NICOLETTE R. AND THE LACK OF OPTIONS

The counter-argument to all of these critiques of arresting and detaining prostituted minors is that there may not be a better option. Anthony Biello, former head of Atlanta's vice unit, queried, "Call it tough love. Would you rather scrape them up dead?"<sup>150</sup> A Seattle social worker described how prostituted juveniles would plea out the charges only to be "released to 'uncles' who were pimps."<sup>151</sup> Much well-intentioned NGO work – for instance through Legal Aid – initially focused on getting prostituted minors released without charges, but this generally resulted in the minors being returned to pimps or traffickers.<sup>152</sup> Public defender Courtney Bryan commented that the "jargon of criminal court" called these cases "disposables,"<sup>153</sup> because no one cared what happened to the girls after they were released. Freedom from detention often meant returning to a life of exploitation.

Diverting prostituted minors to shelters may be little better. Most minors have been in and out of the system already, whether in shelters, child welfare system, or foster homes.<sup>154</sup> Brantley noted, "We're talking about heavily system-involved kids . . . children who've already been part of the public system, that have already had systems and institutions and families fail them."<sup>155</sup> The system was not able to meet their needs before. It is even less likely that, after even worse abuse and trauma, the system would be equipped to handle them now.

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<sup>147</sup> Brittle, *supra* note 33.

<sup>148</sup> *Id.* at 1341; *see also* Mitchell et al., *supra* note 50, at 19.

<sup>149</sup> *See* Boyer, *supra* note 46 (describing cycling of prostituted minors through the system of arrest, detention, probation, arrest, detention, probation); *see also* MICHIGAN FAMILY IMPACT SEMINARS, PROSTITUTED TEENS: MORE THAN A RUNAWAY PROBLEM, BRIEFING REPORT No. 2002-2 (Nancy E. Walker ed., 2002) (discussing problem of teen prostitution and making recommendations for the state of Michigan).

<sup>150</sup> Jane O. Hansen, *Special Report: Selling Atlanta's Children: Feds, Police Elsewhere Finding Solutions*, THE ATLANTA JOURNAL-CONSTITUTION, Jan. 8, 2001 (quoting Lt. Anthony Biello, head of Atlanta's vice unit).

<sup>151</sup> Boyer, *supra* note 46, at 19.

<sup>152</sup> *See* Courtney Bryan, *Representing and Defending Victims of Commercial Sexual Exploitation in Criminal Court*, LAWYER'S MANUAL ON HUMAN TRAFFICKING, PURSUING JUSTICE FOR VICTIMS 183, 183 (Jill Laurie Goodman & Dorchon A. Leidholdt eds., 2010) (providing advice for lawyers representing victims of sexual exploitation).

<sup>153</sup> *Id.* at 184.

<sup>154</sup> Editorial, *supra* note 119 ("A study ordered by the Legislature estimated that about eighty-five percent of the state's exploited children are from families that have been involved with the child welfare system, while in New York City, three-quarters of the children had been placed in foster homes.").

<sup>155</sup> Flynn, *supra* note 80 (quoting Nola Brantley, executive director of MISSEY).

The story of Nicolette R. is indicative of some of these challenges. Hers was a high profile case that generated support for New York's Safe Harbor Act.<sup>156</sup> Nicolette had a long history of sexual and physical abuse<sup>157</sup> and fell under the control of an adult pimp.<sup>158</sup> She was arrested at age 12 for offering oral sex to an undercover officer for \$40. According to her doctor, she suffered from post-traumatic stress disorder and had "multiple scars including cigarette and iron burns and a recently fractured rib."<sup>159</sup> In what became an infamous decision by Judge Lynch and a rallying cry for activists, she was adjudicated as a delinquent and sent to a secure detention facility to get "proper moral principles."<sup>160</sup> Legal Aid Attorney Katherine E. Mullen appealed, arguing what has been described as the fundamental philosophy of the Safe Harbor Act:<sup>161</sup> "It is hard to find a more compelling argument for a dismissal in the interest of justice . . . than the result (of) a child who has been abandoned and victimized being adjudicated a juvenile delinquent for an alleged single act of prostitution. . . ."<sup>162</sup> Mullen's emphasis on "a single act of prostitution" will be discussed later as it became important in the drafting of New York's Safe Harbor law.<sup>163</sup> On appeal, the Supreme Court of New York upheld Nicolette's adjudication as a delinquent,<sup>164</sup> but in September 2004, the Appellate Division, First Department, reversed and decided to transfer her to a private facility for counseling and treatment.<sup>165</sup>

Her story illustrates some principle concerns with Safe Harbor laws. First, Nicolette had a history of being failed by shelters. She first ran away from a shelter when she was 10, and had been recruited by an adult pimp in front of Covenant House when she was 11.<sup>166</sup> Returning her to a shelter could just lead to the same result and same cycle of prostitution. Second, Nicolette's lawyers had difficulty finding any

<sup>156</sup> Thomas Adcock, *Nicolette's Story*, N.Y. L.J.J., Oct. 3, 2008, available at <http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202424988298&slreturn=1>. See also SMITH ET AL., *supra* note 13, at 60.

<sup>157</sup> Kaufman, *supra* note 4.

<sup>158</sup> *Id.* (describing how she was previously arrested in Chicago but her adult pimp immediately paid her fine to get her released).

<sup>159</sup> Adcock, *supra* note 156.

<sup>160</sup> Kaufman, *supra* note 4.

<sup>161</sup> Adcock, *supra* note 156.

<sup>162</sup> *Id.* (quoting Mullen).

<sup>163</sup> This will be explained in detail in Section IV, but PINS certification in New York, which prevents adjudication as a delinquent, can be denied if a prostituted minor have a prior conviction for prostitution. This means that a single act of prostitution would result in PINS certification, but multiple acts might not. Arguably, Safe Harbor (and protection from prosecution) only extends to minors who are engaging in their first act of prostitution.

<sup>164</sup> *In the Matter of Nicolette R.*, 779 N.Y.S.2d 487, 488 (N.Y. App. Div. 2004) (pointing out that the statute did not have an age requirement for the offense of prostitution).

<sup>165</sup> *Id.* at 488-89 (holding that lower court "erred in failing to consider the least restrictive available alternative in fashioning an appropriate dispositional order").

<sup>166</sup> Kaufman, *supra* note 4. Covenant House is one of the major shelters for runaway youth in New York. *Id.* It is also known to be targeted by pimps as prime recruiting grounds for minors. *Id.*

private facility to take her after her successful appeal. In searching for a residential facility that could meet her needs for security and specialized services, five facilities turned them down,<sup>167</sup> illustrating that there may simply not be sufficient services available to deal with the special needs of prostituted minors. Mandating non-existent specialized services does not solve the problem.<sup>168</sup> Detention may be the only viable option to provide a minor with secure facilities. Third, Nicolette R. was a victim of sex trafficking, young enough to still engage in “self-soothing behaviors like thumb-sucking.”<sup>169</sup> At the same time, she was, according to her doctor, “oppositional,”<sup>170</sup> “often unable to control her aggression,”<sup>171</sup> and carried a knife and razor blade.<sup>172</sup> Her psychologist recommended a locked facility as the only way to control her and protect others.<sup>173</sup> Nicolette was traumatized and brutalized. The question was whether detention was the only way to protect her both from her pimp and from herself.

Safe Harbor laws are meant to step into that gap. The next section will explore how Safe Harbor laws try to do that.

## II. SAFE HARBOR LAWS — THEORY AND PRACTICE

### A. ELEMENTS OF SAFE HARBOR FOR EXPLOITED CHILDREN LAWS

Safe Harbor laws come in a variety of forms, but they generally share some features. They can serve some combination of four functions: 1) decriminalizing prostitution for anyone under a specified age so they cannot be charged with a crime or adjudicated as a delinquent; 2) diverting prostituted minors from delinquency proceedings into other forms of services or specialized programs; 3) providing specialized or regular services for prostituted minors; and 4) reclassifying minors as victims or sexually exploited children. Safe Harbor laws can also increase penalties against pimps and johns, establish training requirements for law enforcement and service providers, contain funding provisions, require investigations into cases of prostituted minors, and connect minors to protective services within secure or semi-secure facilities.

A few cities and counties implemented programs with similar goals for the treatment of prostituted minors. They have created a

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<sup>167</sup> *Id.*

<sup>168</sup> See Schwartz, *supra* note 102, at 270-273.

<sup>169</sup> Kaufman, *supra* note 4 (quoting Dr. Adam Bloom, the psychologist who worked with Nicolette and eventually recommended that she be prosecuted in order to detain her for her own safety).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

theoretical backdrop for the state Safe Harbor laws. For instance, in Atlanta, the Fulton County Juvenile Court adopted a no-prosecution policy for prostituted minors,<sup>174</sup> and Fulton County law enforcement officers have also received training to approach prostituted minors as victims instead of criminals.<sup>175</sup> In 2008, Alameda County, California, received authorization<sup>176</sup> to implement a pilot “diversion program” for minors in “commercial sexual exploitation,” so they receive services rather than detention and punishment in the juvenile system.<sup>177</sup> Suffolk County, Massachusetts, implemented a Support to End Exploitation Now (SEEN) initiative,<sup>178</sup> and San Francisco developed a diversion program with Standing Against Global Exploitation (SAGE).<sup>179</sup> While this is not an exclusive list, these select programs will be used to explain some of the theory behind Safe Harbor laws and why certain aspects of the law are important.

### 1. DECRIMINALIZATION

Safe Harbor laws can prevent the arrest and prosecution of prostituted minors. In one sense, Safe Harbor is a decriminalization statute, where minors cannot be held criminally liable for prostitution. Michigan was actually the first state to do this because its prostitution statute has an age requirement.<sup>180</sup> But Safe Harbor laws do not result in complete decriminalization.<sup>181</sup> Decriminalization does not extend to the pimp or john. Safe Harbor laws protect the prostituted minor from punishment,

<sup>174</sup> Lynch & Widner, *supra* note 139, at 15.

<sup>175</sup> *Id.*

<sup>176</sup> A.B. 499, Leg. Sess. 2008 (Ca. 2008); CAL. WELF. & INST. CODE § 18259-18259.5 (West 2010).

<sup>177</sup> See Thomas Carroll, *Gender and Juvenile Justice: New Courts, Programs Address Needs of Girls*, National Center for Youth Law, available at [http://www.youthlaw.org/publications/yln/2009/july\\_september\\_2009/gender\\_and\\_juvenile\\_justice\\_new\\_courts\\_programs\\_address\\_needs\\_of\\_girls/](http://www.youthlaw.org/publications/yln/2009/july_september_2009/gender_and_juvenile_justice_new_courts_programs_address_needs_of_girls/) (last visited Mar. 26, 2012) (explaining the need for and design of the programs being instituted to provide services for prostituted minors).

<sup>178</sup> See Lynch & Widner, *supra* note 139, at 41 (explaining a program designed to intervene and prevent adult offenders from committing their crimes); Daniel F. Conley, District Attorney, Suffolk County, Mass., Remarks at the 15<sup>th</sup> National Conference on Child Abuse and Neglect (Apr. 25, 2005), available at <http://web.archive.org/web/20100206014008/http://www.mass.gov/dasuffolk/docs/Speech042105.html>. (discussing efforts to provide victimized children with assistance rather than prosecuting them). SEEN was formerly known as Teen Prostitution Prevention Project or TPPP.

<sup>179</sup> See Lynch & Widner, *supra* note 139, at 46; Nancy Latham et al., SAN FRANCISCO JUVENILE PROBATION DEPARTMENT, 2 FRESH DIRECTIONS 239-41 (2005); Heather Knight, *A Home for Ex-Child Prostitutes*, S.F. CHRON., Oct. 4, 2005, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/10/04/BAGVPF26H31.DTL> (describing the group’s goal of serving victims of commercial sexual exploitation).

<sup>180</sup> MICH. COMP. LAWS ANN. § 750.448 (2003).

<sup>181</sup> See Thomas Adcock, *Legal, Social Services Communities Prepare for Enactment of Safe Harbor Act*, N.Y.L.J., <http://www.legal-aid.org/en/mediaandpublicinformation/inthenews/legal,socialservicescommunitiesprepareforenactmentofsafeharboract.aspx> (last visited March 26, 2012) (explaining that prostitution is only decriminalized for those below a certain age).

not the pimps and johns. The prostitution of minors remains a crime, but Safe Harbor laws clarify that the minor is not the criminal.

The “child abuse” model set up in Suffolk County (Boston, Massachusetts) effectively adopted this approach by making the “policy decision” that “youth picked up in sex-for-fee cases would no longer be treated as ‘prostitutes’ or criminally charged” but “treated as victims of sexually exploitation and abuse.”<sup>182</sup> In the last few years, Fulton County Court in Atlanta also moved towards this system by deciding not to prosecute minors for prostitution.<sup>183</sup> Minors are often charged with a lesser offense such as disorderly conduct instead.<sup>184</sup>

## 2. DIVERSION

Another approach is to charge the prostituted minor with a crime but to divert the minor into a separate proceeding rather than delinquency hearings. Alternatively, after delinquency hearings, the minor could be diverted into some form of services program rather than juvenile detention. Depending on the approach, minors could be sent to private facilities or put into detention with access to special services. This model is partially justified by the need to detain victims in semi-secure or secure facilities because they are at flight risk and could escape shelters and return to abuse on the streets.<sup>185</sup> For instance, a criticism of the child abuse model in Suffolk County is that “it can only serve children who want help”<sup>186</sup> because it does not have the ability to detain children. Diversion programs serve to address this problem because courts can “sentence” or “force” children to receive treatment.

This approach has been tried in several places. The STOP (“Stop Turning Out Child Prostitutes”) program within a special vice unit in Las Vegas focused on arresting prostituted minors and detaining them as material witness<sup>187</sup> or in an automatic “vice hold.”<sup>188</sup> The goal was to detain a minor long enough to separate them from the pimps (detention averaged around three weeks) and obtain her cooperation.<sup>189</sup> If the minor cooperates, the prostitution charge is dropped and she is

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<sup>182</sup> See Conley, *supra* note 178.

<sup>183</sup> Lynch & Widner, *supra* note 139, at 15 (describing Fulton County’s decision to stop prosecuting children and train officers to treat them as victims).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 45 (discussing the tendency of girls to refuse help and return to the streets).

<sup>187</sup> 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, 496-97 (2008) (explaining the practice of holding prostitutes to secure their cooperation).

<sup>188</sup> See Molly Ball, *Authorities Clash over handling of teens arrested for prostitution*, LAS VEGAS SUN, Apr. 5, 2005, <http://www.lasvegassun.com/news/2005/apr/05/authorities-clash-over-handling-of-teens-arrested-/> (last visited Mar. 27, 2012) (describing the controversy over holding prostituted minors to protect them and help prosecute their pimps).

<sup>189</sup> *Id.*; see also, Brown, *supra* note 187, at 473-74, 487.

released to a specialized program for victims of commercial sexual exploitation: WestCare Nevada in Las Vegas or Children of the Night in California.<sup>190</sup> San Francisco also arrests and detains prostituted minors but provides them with a special in-custody program administered by SAGE, which uses former prostitutes or survivors to provide counseling and services to the victims.<sup>191</sup> The program was expanded in 1998 to an out-of-custody service for girls on probation.<sup>192</sup> In Brooklyn, the District Attorney's Office set up a similar program called GRASP (Girls Re-Entry Assistance Support Project), which provided services to girls convicted and housed in detention, placement, or correctional facilities.<sup>193</sup> Alameda County's pilot program diverts prostituted minors from Juvenile Hall detention into a community-based treatment program for underage victims of commercial sexual exploitation.<sup>194</sup> Prostitution charges are dropped after the successful completion of the program.<sup>195</sup>

### 3. RECLASSIFICATION

Safe Harbor can be about reclassifying prostituted children as victims instead of delinquents. Prostituted minors can be put into existing categories such as victim of child abuse or by creating a special category of treatment. Suffolk County does this by classifying prostituted minors as abused children.<sup>196</sup> The new approach led to an increase in child abuse referrals from 7 (2001-2003) to 400 (2005-2010)<sup>197</sup> because law enforcement was more likely to view a prostituted minor as a victim of child abuse.<sup>198</sup>

### 4. PROVIDING SERVICES

Safe Harbor laws can provide rehabilitation, counseling, and other victim services. Prostituted minors can either be diverted in regular services or specialized services. The creation of new specialized services is especially important given the unique trauma associated with commercial sexual exploitation. Survivor-based services, in particular, have been effective, and they generally provide a holistic approach including but not limited to shelter, physical and psychological therapy,

<sup>190</sup> Lynch & Widner, *supra* note 139, at 37 (WestCare runs a treatment program for runaway girls.).

<sup>191</sup> *Id.* at 46-48.

<sup>192</sup> MICHIGAN FAMILY IMPACT SEMINARS, *supra* note 149, at 37-38.

<sup>193</sup> See Mary Graw Leart, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. Soc. POL'Y & L. 131, n.135 (2007); Adelson, *supra* note 22, at 96, n.79.

<sup>194</sup> See Carroll, *supra* note 177.

<sup>195</sup> *Id.*

<sup>196</sup> Lynch & Widner, *supra* note 139, at 41-42 (Suffolk County prosecutors now treat child prostitutes as victims and witnesses).

<sup>197</sup> Conley, *supra* note 178.

<sup>198</sup> See Mitchell et al., *supra* note 50.



and education.<sup>199</sup> The pilot program in Alameda County provide specialized services,<sup>200</sup> and SAGE, which is now relied on in San Francisco, does the same.<sup>201</sup>

A variety of approaches can be used from NGO referrals to placing them within existing child abuse and neglect agencies. In Suffolk County, once a prostituted minor is identified a child abuse report must be filed rather than an arrest report.<sup>202</sup> The child abuse report becomes a “gateway”<sup>203</sup> to services by triggering a Multidisciplinary Team (MDT) response including a police officer, prosecutor, victim witness advocate, child welfare case workers and service provider familiar with the needs of children.<sup>204</sup> The MDT is then responsible for connecting the child to services such as Roxbury Youth Works (RYW) that specialize in working with prostituted girls.<sup>205</sup>

Whether the prostituted minors are given specialized or regular services, protective custody is extremely important. Children may not realize they are victims.<sup>206</sup> They may see themselves as in a relationship with the pimp and want to return as quickly as possible.<sup>207</sup> Pimps target the girls who are so desperate for love that they are willing to endure an almost unimaginable amount of abuse for even semblance of it.<sup>208</sup> As Harvey Washington, a pimp serving a four-year sentence in Arizona, put it, “With the young girls, you promise them heaven, they’ll follow you to hell. It all depends on her being so love-drunk off of me that she will do anything for me.”<sup>209</sup> Until that emotional bond is broken or weakened, minors will remain a flight risk and may need to be held in protective custody or detained in secure or semi-secure facilities to restrain them. To deal with this problem, the STOP pro-

<sup>199</sup> SMITH ET AL., *supra* note 13.

<sup>200</sup> Carroll, *supra* note 177 (girls are worked with in groups and treatment personnel meet with girl’s families as well).

<sup>201</sup> See MICHIGAN FAMILY IMPACT SEMINARS, *supra* note 149, at 37 (describing a program that provides education, health and mental care, and substance abuse treatment, among other services).

<sup>202</sup> Lynch & Widner, *supra* note 139.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> Olinka Briceno, *A Way Back: An Intervention Program for At-Risk Girls in The Teen Prostitution Prevention Project: A Multidisciplinary Approach in Understanding and Supporting Prostituted Girls*, 12 GIRL MATTERS 6-7 (2005).

<sup>206</sup> See Gragg et al., *supra* note 45, at 4 (stating that children sometimes do not understand that they are being exploited).

<sup>207</sup> See Cheryl Hanna, *Somebody’s Daughter*, 9 WM. & MARY J. WOMEN & L. 1, at 17 (2002) (stating that girls often lie about their age to be released as quickly as possible).

<sup>208</sup> See ALEXANDRA PRIEBE & CRISTEN SUHR, HIDDEN IN PLAIN VIEW: THE COMMERCIAL SEXUAL EXPLOITATION OF GIRLS IN ATLANTA 15 (2005) (Dr. Yolanda Graham, Medical Director, Inner Harbour and Angela’s House, noted, “When you are working with kids who were traumatized prior to engaging in acting out behaviors, you see that they are stuck emotionally and developmentally at the age at which they were traumatized. . . . Even though they may be in a 13- or 14-year-old body, there is really a 4-year-old kid who is trying to get her needs met in a very primitive 4-year-old way: ‘I’ll do whatever you want me to do so that you will love me.’”).

<sup>209</sup> Urbina, *supra* note 62.

gram in Las Vegas relies on detention as a necessary tool for breaking a pimp's control over a prostituted minor.<sup>210</sup> San Francisco's program combines detention with specialized services, which are not contingent upon cooperation.<sup>211</sup>

## 5. INCREASED PENALTIES AND DETERRENCE

Safe Harbor laws can also be about deterrence by increasing penalties on pimps and johns. This can be seen as a continuation of the strategic shift to identifying prostituted minors as victims of sexual abuse and exploitation. They can cast the pimps and clients, not as merely businessmen and customers, but as child abusers, rapists, and traffickers. Increasing pressure on pimps and johns by increased penalties and prosecutions can reduce demand and deter future exploitation of minors. Fulton, Alameda, and Suffolk County began to focus more efforts on targeting johns and pimps.<sup>212</sup> STOP in Las Vegas justified its approach as "tough love" required to get prostituted minors to "flip" on their pimp and assist with prosecution.<sup>213</sup>

## 6. REQUIRE AN INVESTIGATION

If prostituted minors are reclassified as exploited children, then it makes sense that an investigation should be opened. Since most prostituted minors have a pimp,<sup>214</sup> each child prostitution case is likely to be an instance of sex trafficking. At least, it is a case of child abuse and neglect. Requiring an investigation could increase pressure on johns and pimps, further reducing demand and targeting the cycle that minors are often caught in.

## 7. IMPLEMENTATION: TRAINING & FUNDING

Without implementation, safe harbor laws are meaningless, which means there has to be sufficient and effective training and funding. There needs to be training for first responders, such as police, EMTs, social workers, who may come into contact with prostituted minors

<sup>210</sup> See Lynch & Widner, *supra* note 139, at 36-37 (explaining the use of vice holds to keep teens in custody for at least eight days); see also Lisa Bach, *Juvenile Prostitution: Trafficking in children on increase*, LAS VEGAS REVIEW-JOURNAL, Mar. 19, 2006 at 1B (highlighting the efforts of police in Las Vegas to fight child prostitution); Jen Lawson, *Children of the Night*, LAS VEGAS SUN (Dec. 5, 2003), available at [www.Lasvegassun.com/news/2003/dec/05/children-of-the-night/](http://www.Lasvegassun.com/news/2003/dec/05/children-of-the-night/) (explaining Las Vegas police officer's attempts to rehabilitate abused children and arrest offenders).

<sup>211</sup> Hotaling, et al., *supra* note 113, at 181 (describing SAGE's work rehabilitating abused girls); see also Knight, *supra* note 179; see generally Lynch & Widner, *supra* note 139, at 46-50.

<sup>212</sup> See Carroll, *supra* note 177 (describing Alameda County's efforts); Lynch & Widner, *supra* note 139, at 40-45 (discussing Suffolk County); Lamb *supra* note 101, at 84.

<sup>213</sup> See Lynch & Widner, *supra* note 139, at 35 (describing efforts to use victims to prosecute pimps); see also Bach, *supra* note 210.

<sup>214</sup> See ESTES & WEINER, *supra* note 7, at 156; ALBANESE, *supra* note 15.

and who should be approaching the initial encounter as an opportunity for rescue and intervention. First responders also need to be trained in how to deal with traumatized minors. The Department of Homeland Security (DHS) developed training material for first responders on the identification and rescue of trafficking victims, including prostituted minors.<sup>215</sup> Relevant actors need to be trained to identify minors who may be lying about their age. They may not be prepared to deal with severely traumatized individuals or realize the extent of the abuse common in prostitution of minors. It is also important for Safe Harbor laws to include funding provisions. Funds need to be available to provide services for commercially sexually exploited minors and to train relevant actors on how to treat or identify victims.

All of these factors link back to the fundamental question of whether Safe Harbor is a paradigm shift or a modest change in the approach. The next section explores the specifics of the nine state Safe Harbor laws.

### III. SAFE HARBOR LAWS — STATE OF THE FIELD

“All of us recognized that this was a child that was in need of help. But the distinction was, do we throw her on a prosecution train or do we throw her on a protection train?”

Ann Johnson, appeals lawyer, *In the Matter of B.W.*<sup>216</sup>

On September 26, 2008, child rights activists and advocates were “over the moon.”<sup>217</sup> Governor Paterson had just signed the first Safe Harbor for Exploited Children Act into law in New York State (“New York’s Safe Harbor Act”).<sup>218</sup> The first of its kind, the Safe Harbor Act was meant to resolve some of the aforementioned problems by diverting prostituted minors away from the juvenile justice system into new specialized services.<sup>219</sup> Survivor advocacy played a large role in convincing legislators of the need for the law. Rachel Lloyd recalled how she had “seen legislators weep. They really saw what this law means. It means, Oh my god, these are children. They’re not bad, they’re not loose women, they’re not dirty, terrible girls.”<sup>220</sup> Assemblyman William Scarborough, one of the key sponsors of the Act, noted, “At first you

<sup>215</sup> See DEP’T OF HOMELAND SECURITY, Anti-Human Trafficking Resources: Law Enforcement, available at [http://www.dhs.gov/files/programs/gc\\_1298390940581.shtm](http://www.dhs.gov/files/programs/gc_1298390940581.shtm).

<sup>216</sup> Cynthia Cisneros, *Court Rules Child Prostitutes Victims, Not Criminals*, ABC13, June 13, 2010, available at <http://abclocal.go.com/ktrk/story?section=news/local&id=7514350>.

<sup>217</sup> Adcock, *supra* note 181.

<sup>218</sup> See Press Release, Office of the New York State Governor, Governor Paterson Signs Law To Protect Sexually Exploited Youth, (Sept. 26, 2008) available at [http://www.governor.ny.gov/archive/paterson/press/press\\_0926082.html](http://www.governor.ny.gov/archive/paterson/press/press_0926082.html) (last visited Mar. 28, 2012).

<sup>219</sup> Godsoe, *supra* note 62; see also Gragg et al., *supra* note 45, at 5-6.

<sup>220</sup> Adcock, *supra* note 181.

think, *Well, it's their own fault. . . . It relieves you of responsibility of having to do anything. So when I was introduced to the reality of these children's lives, I was shocked. The law discriminates against them. It just offended my sense of fairness.*"<sup>221</sup>

Ms. Lloyd described the Safe Harbor Act as "huge," a "tipping point" that "will impact other states."<sup>222</sup> After the passage of New York's law, several other states adopted similar Safe Harbor laws. Washington passed a Sex Crimes Involving Minors law in March 2010 ("Washington's Sex Crimes law").<sup>223</sup> Connecticut passed a Safe Harbor law in April 2010 ("Connecticut's Safe Harbor law").<sup>224</sup> The Texas Supreme Court prohibited prosecuting prostituted minors in June 2010,<sup>225</sup> in August 2010, Illinois passed the Safe Children Act ("Illinois' Safe Children Act").<sup>226</sup> In 2011, four more Safe Harbor bills became law: Tennessee's SB64 ("Tennessee's Safe Harbor law"),<sup>227</sup> Vermont's Act Relating to Human Trafficking ("Vermont Safe Harbor law"),<sup>228</sup> Massachusetts' Act Relative to the Commercial Exploitation of People ("Massachusetts' Safe Harbor law"),<sup>229</sup> and Minnesota's Safe Harbor for Exploited Children ("Minnesota's Safe Harbor laws").<sup>230</sup> Every state's Safe Harbor law has a different combination of elements. Three states have a decriminalization model while two states have a diversion model.<sup>231</sup> Illinois has a decriminalization plus diversion model with an emphasis on deterrence.<sup>232</sup> This section compares the various aspects of the state laws. A chart illustrating all the aspects of each Safe Harbor law follows this section.<sup>233</sup>

#### A. DECRIMINALIZATION: CONNECTICUT, TENNESSEE, AND TEXAS

Connecticut and Tennessee have the most straightforward Safe Harbor laws. In Connecticut, the Safe Harbor law makes prostitution only a crime for someone 16 and older, which prevents any minor

<sup>221</sup> Lustig, *supra* note 1 (quoting Assemblyman William Scarborough).

<sup>222</sup> Adcock, *supra* note 181 (discussing Mr. Lyold's assessment of the Safe Harbor Act).

<sup>223</sup> S.B. 6476, 61st Leg., Reg. Sess. (Wash. 2010).

<sup>224</sup> S.B. 153, Feb. Sess. 2010 (C.T. 2010).

<sup>225</sup> See *In the Matter of B.W.*, 313 S.W.3d 818 (Tex. 2010).

<sup>226</sup> See H.B. 6462, 96th Gen. Assembly, Spring Sess. (Ill. 2010).

<sup>227</sup> See S.B. 0064, 107th Leg. Sess. 2011 (Tenn. 2011).

<sup>228</sup> See Vermont Center for Crime Victim Services, Vermont Human Trafficking Task Force – NoMoreSlaves.org, available at [www.ccvv.state.vt.us/nomoreslaves](http://www.ccvv.state.vt.us/nomoreslaves) (last visited April 19, 2012).

<sup>229</sup> See Press Release, Governor Patrick Signs Anti-Human Trafficking Legislation, (Nov. 21, 2011), available at [www.mass.gov/governor/pressoffice/pressreleases/2011/111121-antihuman-trafficking-bill.html](http://www.mass.gov/governor/pressoffice/pressreleases/2011/111121-antihuman-trafficking-bill.html).

<sup>230</sup> See Highlights of Minnesota's Safe Harbor for Exploited Children Law, The Advocates for Human Rights, available at [http://www.theadvocatesforhumanrights.org/uploads/highlights\\_of\\_minnesota\\_safe\\_harbor\\_bill\\_2011.pdf](http://www.theadvocatesforhumanrights.org/uploads/highlights_of_minnesota_safe_harbor_bill_2011.pdf).

<sup>231</sup> See S.B. 153; S.B. 0064; N.Y. Soc. SERV. LAW § 447-b(2); S.B. 6476 § 8(2).

<sup>232</sup> See H.B. 6462.

<sup>233</sup> See table *infra* Part IV.E.

under 16 from being prosecuted for prostitution.<sup>234</sup> This makes it comparable to Michigan's law on prostitution.<sup>235</sup> The Connecticut law also creates a presumption of coercion for any prostitute between 16 to 18 years old,<sup>236</sup> which would make the trafficking provision<sup>237</sup> applicable. But minors still can be prosecuted for prostitution if that presumption is rebutted.<sup>238</sup> This is consistent with Connecticut's law on the age of consent, which is 16 years old.<sup>239</sup> Tennessee's law follows a parallel approach. The law decriminalizes prostitution for any minor under the age of 18 by making them "immune from prosecution for prostitution as a juvenile or adult."<sup>240</sup>

The Texas Supreme Court made a similar rule the law in Texas but approached it in a different way. Rather than amending current law, the Court ruled that the prostitution statute could not apply to minors under 14.<sup>241</sup> The Texas Supreme Court made its decision in the case of B.W. in the summer 2010. B.W. had been arrested for agreeing to engage in oral sex for \$20. After her arrest, police discovered that she was only 13 and had been missing for 14 months. She had run away from a Child Protective Services (C.P.S.) group home.<sup>242</sup> B.W. was prosecuted and then sentenced as a delinquent, which requires committing an offense that would be criminal and punishable by jail time if committed by an adult.<sup>243</sup> On appeal, B.W. noted that under Texas law, a child under 14 cannot consent to sex.<sup>244</sup> Her lawyers argued the prohibition of prostitution, which requires "knowingly" offering, agreeing, or engaging in sexual conduct for money,<sup>245</sup> should be interpreted to apply only to people over 14, namely those that could actually consent to sex. Otherwise, it would lead to an "absurd"<sup>246</sup> result that a child be held responsible for an act he or she could not consent to.<sup>247</sup> The District and Appeals court rejected this argument and held the "consent" require-

<sup>234</sup> See generally S.B. 153; CONN. GEN. STAT. ANN. § 53a-82(a). The chief State's Attorney, Kevin T. Kane opposed the bill as unnecessary because he argued since minors cannot consent to sex in Connecticut, they could not be prosecuted for prostitution anyway. See SELECT COMMITTEE ON CHILDREN, JOINT FAVORABLE REPORT, SB-153, Feb. 23, 2010.

<sup>235</sup> See MICH. COMP. LAWS ANN. § 750.448. (West 2002).

<sup>236</sup> See S.B. 153; CONN. GEN. STAT. ANN. § 53a-82(c) (West 2002).

<sup>237</sup> See generally CONN. GEN. STAT. ANN. § 53a-192 (West 2002).

<sup>238</sup> *Id.* § 53a-192(a), (c).

<sup>239</sup> See generally CONN. GEN. STAT. ANN. § 53a-71 (West 2002).

<sup>240</sup> See generally TENN. CODE ANN. § 39-15-513 at § 1; see also S.B. 0064 § 1, 107th Leg. Sess. 2011 (Tenn. 2011).

<sup>241</sup> See *In the Matter of B.W.*, 313 S.W.3d 818 (Tex. 2010).

<sup>242</sup> See *In the Matter of B.W.*, 274 S.W.3d 179, 181 (Tex. App. 2008).

<sup>243</sup> See generally TEX. FAM. CODE ANN. § 51.04(a) (West 2011), TEX. FAM. CODE ANN. § 51.03(a)(1) (West 2011); see also TEX. PENAL CODE ANN. § 12.22(2), 43.02(a) (West 2011) (prostitution offense punishable by jail time).

<sup>244</sup> *In the Matter of B.W.*, 274 S.W.3d at 181; see also TEX. PENAL CODE ANN. § 22.021 (West 2011).

<sup>245</sup> See generally TEX. PENAL CODE ANN. § 43.02(a) (West 2011).

<sup>246</sup> *In the Matter of B.W.*, 274 S.W.3d at 181-82.

<sup>247</sup> *Id.* at 182.

ment only applied to criminal behavior, meaning minors could still be charged as delinquents.<sup>248</sup> The Court of Appeals also emphasized the importance of rehabilitation through detention<sup>249</sup> and noted that the legislature could have excluded 43.02 (the prostitution statute) from delinquent conduct but did not do so.<sup>250</sup> The Court of Appeals reached a similar decision in *The Matter of B.D.S.D.*, another 2010 case involving a prostituted minor.<sup>251</sup>

The Texas Supreme Court reversed, essentially adopting B.W.'s argument. First, the Court ruled, "because a thirteen-year-old cannot consent to sex as a matter of law, we conclude B.W. cannot be prosecuted as a prostitute under section 43.02 of the Penal Code."<sup>252</sup> The Court further commented, "the Texas Legislature has determined children thirteen and younger cannot consent to sex. This necessitates the holding that these children cannot be tried for prostitution."<sup>253</sup> Second, the court argued the legislature's recognition of the special vulnerability of children could not be reconciled with prosecuting children for prostitution, and the court looked to provisions in family, penal, and common law.<sup>254</sup> The Court added, "transforming a child victim of adult sexual exploitation into a juvenile offender was not the legislature's intent."<sup>255</sup> The result is that minors under 14 cannot be prosecuted for prostitution but those over 14 still can be. Texas's legislative bypass approach could be adopted by other state courts to interpret existing law to prevent prostituted minors from prosecution.<sup>256</sup>

Connecticut, Tennessee, and Texas have Safe Harbor laws that prohibit the prosecution of minors for prostitution, but these laws do little else to protect prostituted minors.

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<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *In the Matter of B.D.S.D.*, 289 S.W.3d 889 (Tex. App. 2009).

<sup>252</sup> *In the Matter of B.W.*, 313 S.W.3d 818, 818 (Tex. 2010).

<sup>253</sup> *Id.* at 820.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 818.

<sup>256</sup> The specific reasoning in Texas could be applied by other state supreme courts due to the internal tension in state laws, which simultaneously maintain that minors are incapable of consent while also punishing them as delinquents or for criminal behavior. Other state supreme courts could also construe the prostitution laws, which do not specify an age requirement, as only applying to those capable of consenting to sex. Since a child cannot legally consent to sex, a child cannot commit the requisite act in prostitution if the court reads into the prohibition of engaging in sex for money a requirement that the act be consensual. Whether this is a good idea is, of course, a different issue. Interestingly, in practice, this is what Kevin T. Kane, Chief State's Attorney, argued Connecticut already did in expressing his opposition to the Safe Harbor law as unnecessary. See SELECT COMMITTEE ON CHILDREN, JOINT FAVORABLE REPORT, *supra* note 234.

## B. DIVERSION: WASHINGTON AND NEW YORK

Washington, New York, Vermont, and Massachusetts do not actually decriminalize prostitution for minors. Minors can still be arrested, charged, and prosecuted as delinquents after the passage of the Safe Harbor laws because the prostitution law is still neutral as to age. These Safe Harbor laws instead create a diversion program subject to the discretion of judges (New York),<sup>257</sup> prosecutors (Washington),<sup>258</sup> or combination of both (Vermont and Massachusetts).<sup>259</sup> Prostituted minors can still be arrested. They can even be charged as delinquents when a set of conditions are met. New York focuses on the minor's history with social services.<sup>260</sup> Washington focuses on the types of services available.<sup>261</sup>

Although New York's Safe Harbor Act was introduced as "decriminaliz[ing] child prostitution,"<sup>262</sup> the law actually still allows prostituted minors be charged and adjudicated as delinquents but diverts them into programs with specialized services.<sup>263</sup> By adding a new subdivision to the Family Court Act, the law creates a "presumption" that a minor "arrested for an act of prostitution" is a victim of "severe form of trafficking" as defined in the TVPA.<sup>264</sup> Based on this presumption, the minor receives Person In Need of Supervision (PINS) certification to replace the delinquency petition,<sup>265</sup> at which point they are diverted to receive specialized services.<sup>266</sup> But this is not an absolute guarantee.

A family court can deny PINS certification for four reasons. First, the prostituted minor must be found a victim of severe form of traf-

<sup>257</sup> See N.Y. SOC. SERV. LAW § 447-b(2) (McKinney 2011).

<sup>258</sup> See generally S.B. 6476 § 8(2), 61st Leg., Reg. Sess. (Wash. 2010).

<sup>259</sup> See VT. STAT. ANN. tit. 13, § 2652(c)(1)(A); H.B. 03808, 2011 Leg., 187th Gen. Ct. § 23 (Mass. 2011).

<sup>260</sup> See N.Y. SOC. SERV. LAW § 447-b(2).

<sup>261</sup> See S.B. 6476 § 8(2).

<sup>262</sup> See Press Release, *supra* note 218.

<sup>263</sup> The principal advocates behind New York's Safe Harbor Act – the Juvenile Justice Coalition of the Correctional Association of New York, the Juvenile Rights Practice of the Legal Aid Society, and GEMS – favored complete decriminalization by adding an age requirement for the offense of prostitution, where only someone over seventeen could be charged with the crime. But several factors – politicians not wanting to look soft on crime, prosecutor's worried about losing the "hammer" of a prosecution charge to coerce cooperation – meant that the provision was dropped from the Safe Harbor Act. See Katherine Mullen & Rachel Lloyd, *The Passage of the Safe Harbor Act and the Voices of Sexually Exploited Youth*, LAWYER'S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE FOR VICTIMS 129, 132 (Jill Laurie Goodman & Dorchen A. Leidholdt eds., 2011).

<sup>264</sup> See 28 U.S.C. 1100.25 (2001) ("Severe forms of trafficking in persons means 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").

<sup>265</sup> See A5258C § 2; see also N.Y. FAM. CT. ACT § 311.4(3).

<sup>266</sup> See A5258C § 2; N.Y. FAM. CT. ACT § 311.4(3); see also Susan Pollet, *Child Prostitutes: Criminals or Victims?*, N.Y.L.J., Apr. 16, 2010, available at <http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202448128247>.

ficking.<sup>267</sup> Under the TVPA, force, fraud or coercion is not required to establish that a minor is a victim of severe form of trafficking, and they are similarly not required under the Safe Harbor Act. Almost every minor in commercial sexual exploitation would meet that definition as a victim of severe form of trafficking, so this exception would not apply except in cases of survivor sex.<sup>268</sup> Second, PINS certification can be denied if the minor has been adjudicated a delinquent for a prior offense of prostitution.<sup>269</sup> Given that many prostituted minors have multiple convictions, this provision could be used to deny many minors PINS certification. Third, PINS can be denied if the minor has previously received PINS certification<sup>270</sup> and was placed by the commissioner of social services.<sup>271</sup> Last, PINS can be denied if the minor expresses unwillingness to cooperate with specialized services for sexually exploited youth.<sup>272</sup> If any of these four conditions is met, then delinquency proceedings can proceed “within the court’s discretion.”<sup>273</sup>

New York’s Safe Harbor Act actually hands a substantial amount of discretion to the courts. The last requirement in particular – a minor’s willingness to cooperate with specialized services – grants courts discretion even if a minor is a victim of a severe form of trafficking, has not been adjudicated a delinquent before, or previously received PINS certification.<sup>274</sup> New York’s law does redefine all minors in prostitution as “sexually exploited child[ren],”<sup>275</sup> but this does not, in itself, protect a prostituted minor from arrest or prosecution. Only a court determination under the Family Court Act can do that.

In addition, PINS certification is not comparable to treating prostituted minors as simply victims<sup>276</sup> but specifically applies to troubled or problem children. Under New York family law, PINS certification is for “a person less than eighteen years of age who does not attend school... or who is incorrigible, ungovernable or habitually disobedient.”<sup>277</sup> New York’s Safe Harbor Act added to the definition a minor who violates

<sup>267</sup> See generally N.Y. FAM. CT. ACT § 311.4(3) (2008).

<sup>268</sup> See 28 U.S.C. 1100.25 (2001).

<sup>269</sup> See N.Y. FAM. CT. ACT § 311.4(3) (McKinney 2010) (stating that if a juvenile has been adjudicated delinquent for a crime in article 230 of the penal law, the court has discretion as to whether to continue proceedings).

<sup>270</sup> See N.Y. FAM. CT. ACT § 752 (“If the allegations of a petition under this article are established in accord with part three, the court shall enter an order finding that the respondent is a person in need of supervision. The order shall state the grounds for the finding and the facts upon which it is based.”).

<sup>271</sup> N.Y. SOC. SERV. LAW § 447 (McKinney 2010); N.Y. FAM. CT. ACT § 311.4(3).

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> N.Y. SOC. SERV. LAW § 447-a(1)(c).

<sup>276</sup> See Toolsi Gowin Meisner, *Shifting the paradigm from Prosecution to Protection of Child Victims of Prostitution*, 21 NATIONAL CENTER FOR PROSECUTION OF CHILD ABUSE 1 (2009) (noting that PINS applies to juveniles that do not attend school, are incorrigible, ungovernable or habitually disobedient).

<sup>277</sup> Meisner, *supra* note 276; N.Y. FAM. CT. ACT § 7112(a) (McKinney 2010).



provisions of section 230.00 (the prohibition of prostitution), section 240.37 of the Penal Law (loitering for purpose of prostitution),<sup>278</sup> or “has been the victim of sexual exploitation” as defined by the Safe Harbor law in Social Services 447-a.<sup>279</sup> But a PINS certification still places some of the blame on the minor as a “troubled” child rather than simply a victim of abuse suffering from severe trauma.

Washington’s Sex Crimes Act takes a similar but slightly better approach than New York.<sup>280</sup> Washington redefines “sexually exploited child” to include a child who is a victim of a variety of commercial sexual abuses,<sup>281</sup> but like New York, this does not prevent a “sexually exploited child” from being prosecuted for prostitution.<sup>282</sup> As put explicitly in Sec. 6(b) of the Act, “a person identified as the ‘minor’ in the charge of commercial sexual abuse of a minor... is considered a victim of a criminal act for the purpose of the right to benefits... *even if* the person is *also charged* with prostitution under RCW 9A.88.030.” (Emphasis added).<sup>283</sup> The “sexually exploited child” may be granted the Child In Need of Services (CHINS) petition and detained by Department of Social and Health Services (DSHS) in a secure or semi-secure crisis residential center (CRC) without charges,<sup>284</sup> but the act does not prohibit charges altogether. What it does is defer the decision, with some limitations, to prosecutorial discretion.<sup>285</sup> New York’s Safe Harbor Act handed discretion to judges while Washington’s Sex Crime’s law gives it to prosecutors.<sup>286</sup>

For the first prostitution offense, a minor’s case must be diverted by the prosecutor,<sup>287</sup> so the minor can receive services under RCW 74.14B.060 (child victims of sexual assault or abuse) and RCW 74.14B.070 (sexually abused children).<sup>288</sup> If the alleged offense is not the minor’s first prostitution offense (which is often the case), then the “prosecutor

<sup>278</sup> N.Y. SOC. SERV. LAW § 447 (McKinney 2010); N.Y. FAM. CT. ACT § 712(3)(a).

<sup>279</sup> N.Y. FAM. CT. ACT § 712(4)(a); N.Y. SOC. SERV. LAW § 447-a(1)(a)-(e).

<sup>280</sup> S.B. 6476, 61<sup>st</sup> Leg., Reg. Sess. (Wash. 2010).

<sup>281</sup> *Id.* (the commercial sexual abuses covered by the term “sexually exploited child” are contained in RCW 9.68A.100, 9.68A.101, and 9.68A.102).

<sup>282</sup> See Mary Ahan, *Protecting Juveniles of Commercial Sexual Exploitation: Washington Shifts to a Child Protection Model*, 2 NATIONAL CENTER FOR PROSECUTION OF CHILD ABUSE (2010) (explaining that a prosecutor must initiate prosecution if the juvenile is accused of a class A or B felony or some class C felonies, previously committed to the DSHS or referred by a diversion unit, has two or more diversion agreements, or was armed with a firearm); see also SHARED HOPE, DOMESTIC MINOR SEX TRAFFICKING – CHILD SEX SLAVERY IN WASHINGTON (2010) (showing the numbers of prosecuted minors in 2009 and 2010).

<sup>283</sup> S.B. 6476.

<sup>284</sup> S.B. 6476 § 1(d)(6)-(7); see also S.B. 6476 § 3; SHARED HOPE, DOMESTIC MINOR SEX TRAFFICKING – CHILD SEX SLAVERY IN WASHINGTON (2010).

<sup>285</sup> S.B. 6476 § 8(1); see also Ahan, *supra* note 282.

<sup>286</sup> S.B. 6476, N.Y. SOC. SERV. LAW § 447.

<sup>287</sup> S.B. 6476 § 7(7).

<sup>288</sup> S.B. 6476 § 3; WASH. REV. CODE ANN. § 74.14B.060 (2009); WASH. REV. CODE ANN. § 74.14B.070 (2009).

may divert the offense if the county... has a comprehensive program" providing a set of specified services.<sup>289</sup> These services are "(a) safe and stable housing; (b) comprehensive on-site case management; (c) integrated mental health and chemical dependency services, including specialized trauma recovery services; (d) education and employment training delivered on-site; and (e) referrals to off-site specialized services, as appropriate."<sup>290</sup> These services are currently only available in King's County (Seattle), Washington.<sup>291</sup> Washington sets up a diversion program, subject to prosecutorial discretion, but only when services are sufficient to handle especially traumatized and problematic youth.<sup>292</sup>

The CHINS certification in Washington differs to some degree from New York. CHINS certification focuses on the threats posed to the child, so it doesn't impose any of the negative connotations regarding the child's behavior associated with PINS certification.<sup>293</sup> As a result, CHINS is a better classification for prostituted minors because it recognizes them as victims rather than perpetrators of a crime.

Vermont and Massachusetts' Safe Harbor laws, which were both passed in 2011, similarly do not decriminalize prostitution for minors.<sup>294</sup> In both states, while minors are insulated from criminal prosecution, they can still be charged, adjudicated, and detained as delinquents. Massachusetts created a rebuttable presumption that the matter should be handled under child protective services<sup>295</sup> and Vermont makes diversion a possibility based on a certification of CHINS by the court.<sup>296</sup>

Modeled after the program in Suffolk County, Massachusetts' Safe Harbor law has essentially five steps. First, the law modifies the definition of "sexually exploited child" to include prostituted children.<sup>297</sup> Second, the law creates a rebuttable presumption that a "care and protection petition" should be filed on behalf of the child, which any person may file.<sup>298</sup> Third, the law provides for a hearing to determine how to proceed – whether delinquency or not.<sup>299</sup> Diversion is not guaranteed. Fourth, the law lists factors to consider in the court's determination, which includes considerations of the available services and prior his-

<sup>289</sup> S.B. 6476 § 8(1).

<sup>290</sup> S.B. 6476 § 8(1)(a)-(e).

<sup>291</sup> See BOYER, *supra* note 46 (listing services offered for sex trafficked youth in Seattle).

<sup>292</sup> S.B. 6476.

<sup>293</sup> *Id.* at § 1(5)(a)-(c).

<sup>294</sup> See Press Release, Governor Patrick Signs Anti-Human Trafficking Legislation, (Nov. 21, 2011), available at [www.mass.gov/governor/pressoffice/pressreleases/2011/111121-antihuman-trafficking-bill.html](http://www.mass.gov/governor/pressoffice/pressreleases/2011/111121-antihuman-trafficking-bill.html); Report of the Attorney General, Pursuant to S. 272, An Act Relating to Human Trafficking, in the 2009-2010 General Assembly, (Jan. 2011), available at [www.leg.state.vt.us/reports/2011ExternalReport9rts/263725.pdf](http://www.leg.state.vt.us/reports/2011ExternalReport9rts/263725.pdf).

<sup>295</sup> H.B. 3808, § 9 (39)(L) (Mass. 2011).

<sup>296</sup> V.T. STAT. ANN. tit. 13, § 2652(c)(1) (2009).

<sup>297</sup> H.B. 3808, § 8.

<sup>298</sup> *Id.* § 9.

<sup>299</sup> *Id.*

tory of the minor.<sup>300</sup> Last, the law requires the filing of two reports: 1) 51A report (this is borrowed directly from the Boston program and is a child abuse report opening up services from Department of Child & Families (DCF))<sup>301</sup> and 51B report for sexual exploitation.<sup>302</sup>

Because of the structure of the law, the initial encounter with law enforcement is still in the context of arrest and detention. It is only at the hearing that a determination is made whether to treat them as a delinquent or not, and the presumption is only for the filing of a petition, not the granting of one. The protection then for prostituted children is actually fairly weak, and Massachusetts can be seen as neither entirely removing prostituted minors from criminal sanctions nor guaranteeing diversion into some non-punitive form of punishment within the juvenile system. The factors considered by the court, while fairly comprehensive,<sup>303</sup> also open the door for courts to reject many petitions. For instance, a key factor – similar to New York’s law – is the number of prior arrests.<sup>304</sup> Because many prostituted minors have been arrested multiple times, the number of previous arrests may cause judges to decide not to defer, when arguably, that fact should cut the other way. The number of arrests is not an indicator that the child needs detention, but an indicator of extensive abuse and, hence, that the child needs more services. If a child has already been arrested for prostitution and is arrested again, this is not evidence that detention is working, but that detention is failing. It suggests that a different of intervention – namely, rescue – is needed. In the end, while Massachusetts provides many services for sexually exploited children, prostituted children – victims of continuous and systemic sexual exploitation – are ironically still left vulnerable to further abuse, stigmatization, and trauma within the juvenile justice system.

Vermont’s Safe Harbor law also sets up a conditional diversion program but is stronger than Massachusetts’ program. The law grants absolute immunity from criminal prosecution,<sup>305</sup> but this is standard for minors regardless of the Safe Harbor law since most are treated within the juvenile system. Once inside the juvenile system, Vermont’s Safe Harbor law states that prostituted minors “may” be diverted and treated as children in need of care of supervision, but it is still possible they will be treated under the delinquency provisions.<sup>306</sup> Because Vermont’s Safe Harbor provision was passed as part of its general human trafficking law, there is an odd disjunction embedded

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<sup>300</sup> *Id.*

<sup>301</sup> *Id.* §§ 10, 13.

<sup>302</sup> *Id.* § 14.

<sup>303</sup> *Id.* § 14(c).

<sup>304</sup> N.Y. SOC. SERV. LAW § 447 (McKinney 2010).

<sup>305</sup> VT. STAT. ANN. tit. 13, § 2652(c)(1) (2009).

<sup>306</sup> *Id.* § 2652(c)(1)(A).

within it. On one hand, Vermont's Safe Harbor law parallels federal law where prostituted minors under 18 are victims of trafficking. At the same time, Vermont entertains the possibility that those victims of human trafficking should be treated as delinquents,<sup>307</sup> and in the very next provisions, requires them to raise it as an affirmative defense to delinquency proceedings that they are victims of human trafficking, where the burden would shift to them.<sup>308</sup> Massachusetts' Safe Harbor law has the same problem – that “in prosecution or juvenile delinquency proceeding of a person who is a human trafficking victim,” it is an affirmative defense that the person was “under duress or coerced into committing the offenses.”<sup>309</sup> In order to be properly recognized as a victim, a minor victim of sex trafficking should not have the burden placed on them to prove coercion or force, an element that is not even required to prove they are victims of human trafficking. Yet both Vermont and Massachusetts manage to do precisely this. Vermont's and Massachusetts' laws, in this sense, embody the internal contradictions within state law discussed in section II.

New York's, Vermont's, Massachusetts, and Washington's laws reject straight-out decriminalization; instead, they defer to judicial and prosecutorial discretion to determine the appropriate approach to each prostituted minor – whether services or detention. New York, Vermont, Massachusetts, and Washington differ in three ways. First, they give the discretionary authority to different institutions – predominantly judges in New York, Vermont, and Massachusetts, and prosecutors in Washington. Second, they differ in the conditions that need to be met. New York focuses on the particulars of the minor's history and willingness to receive help. Washington focuses on the services available. Massachusetts looks to a combination of those factors, and Vermont leaves it unspecified. New York seems to accept that even if specialized services are available, even they may not be sufficient to protect a minor victim of prostitution. This will become clearer in the case of Bobby P.,<sup>310</sup> which will be discussed in the next section. Third, PINS certification imposes some stigma to prostituted minors while CHINS certification does not.

In contrast to Connecticut, Tennessee, and Texas, prostituted minors can still be arrested and charged with prostitution in New York, Vermont, Massachusetts, and Washington. Interestingly, the reasoning of the Texas Supreme Court ruling could apply also to New York, Vermont, Massachusetts, and Washington Safe Harbor laws. Texas was unwilling to settle for anything short of decriminalization for

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<sup>307</sup> *Id.*

<sup>308</sup> *Id.* § 2652(c)(2).

<sup>309</sup> H.B. 3808, § 23, 57 (Mass. 2011).

<sup>310</sup> In the Matter of Bobby P., 907 N.Y.S.2d 540 (Fam. Ct. 2010).

minors under 14, even the delinquency adjudication for the purpose of rehabilitation that the Texas Court of Appeals favored.<sup>311</sup> If other state courts adopted the Texas Supreme Court's approach, it is possible that even the Safe Harbor laws in New York, Vermont, Massachusetts, and Washington would be partially struck down.

### C. DECRIMINALIZATION AND DIVERSION

Illinois' Safe Children Act and Minnesota's Safe Harbor law strike a balance between those two general approaches. Illinois and Minnesota have a decriminalization plus diversion model. In Illinois, after a "reasonable detention for investigative purposes,"<sup>312</sup> which usually means under 48 hours,<sup>313</sup> if a person charged with prostitution is determined to be under 18 years old, "that person *shall* be immune from prosecution for a prostitution offense."<sup>314</sup> The person "*shall* be subject to the temporary protective custody provisions... of the Juvenile Court Act."<sup>315</sup> The Department of Children and Family Services (DCFS) can include shelter at places such as hospitals and other medical facilities.<sup>316</sup> The designation of temporary protective custody does not constitute an arrest or create a police record,<sup>317</sup> but does enable DCFS to hold a minor for protection, including from oneself,<sup>318</sup> and admit him or her into secure facilities.<sup>319</sup>

Illinois' Safe Children Act also requires an investigation. The officer who took the minor into custody "*shall* immediately report an allegation in violation of section 10-9"<sup>320</sup> on trafficking<sup>321</sup> and DCFS "*shall* commence an initial investigation into child abuse or child neglect within

<sup>311</sup> In the Matter of B.W., 274 S.W.3d 179, at 181. (Tex. Ct. App. 2008).

<sup>312</sup> H.B. 6462 § 15(d), 2010 Leg., Gen. Ass. (Ill. 2010).

<sup>313</sup> See POLARIS PROJECT, PUBLIC ACT 96-1464: ILLINOIS' SAFE CHILDREN ACT – SUMMARY, END DEMAND ILLINOIS (2010) ("During committee consideration, it was clarified that the definition of 'reasonable detention' is neither expanded nor contracted by this law. That is, existing case law and regulatory provisions specifying the maximum length of reasonable detention remain unchanged. For example, within Chicago, the maximum length of reasonable detention is 48 hours."). See Lopez v. City of Chicago, 464 F.3d 711, 917 (7th Cir. 2006) (following the holding in County of Riverside v. McLaughlin, 500 U.S. 44 (1991), that persons arrested without a warrant must receive a judicial determination of probable cause within 48 hours).

<sup>314</sup> H.B. 6462, 96th Gen. Assemb., § 15(d) (Ill. 2010) (enacted) (emphasis added).

<sup>315</sup> *Id.* (emphasis added).

<sup>316</sup> 705 ILL. COMP. STAT. ANN. § 405/2-7 (West 2007).

<sup>317</sup> *Id.* § 405/2-5(3).

<sup>318</sup> *Id.* § 405/2-5(2).

<sup>319</sup> *Id.* § 405/2-27.1; see *id.* § 405/1-3(18) (defines secure facility as "child care facility licensed by (DCFS) to provide secure living arrangements. . . designed and operated to ensure that all entrances and exits from the facility, a building, or a distinct part of the building are under exclusive control of the staff of the facility.").

<sup>320</sup> H.B. 6264 § 15(d) (Ill. 2010) (emphasis added).

<sup>321</sup> 720 ILL. COMP. STAT. ANN. § 5/10-9 (West Supp. 2011); see also SHARED HOPE INTERNATIONAL, PROTECTED INNOCENCE INITIATIVE: ILLINOIS SAFE CHILDREN ACT – H.B. 6462 (2010).

24 hours.”<sup>322</sup> The investigation requirement in particular sets Illinois apart from other states. In Texas, the Court of Appeals held that there is no requirement to investigate whether a minor was prostituted by an adult.<sup>323</sup> In Illinois, an investigation is required because every case of a minor being prostituted is a case of child abuse and potentially of trafficking.<sup>324</sup>

In short, Illinois’ Safe Children Act does not make the decriminalization or diversion subject to judicial or prosecutorial discretion. Once a minor in prostitution is identified, the minor is immune from prosecution, is put into temporary protective custody, and an investigation into trafficking and child abuse or neglect is begun. Illinois’ approach provides the closest parallel to the TPVA by unequivocally treating the prostituted minor as a victim needing treatment and the crime demanding investigation.

Tennessee considered following a similar path as Illinois. The House version of the Safe Harbor bill contained provisions to divert minors into “protective custody” through the department of children’s services “as a possible victim of child sexual abuse.”<sup>325</sup> The law enforcement officer would then have to “immediately” report possible child abuse to that department, which would have to start an investigation within 24 hours of the report.<sup>326</sup> This approach would have provided some protection and services to the prostituted minor and would have started an investigation into the abuse. Yet, the Tennessee Senate decided to amend the bill, gutting it of its protective aspects. Instead, the law requires law enforcement to hand the minor over to “parents or legal guardian.”<sup>327</sup> This leaves minors with little protection. Many minors come from broken homes where they were neglected or abused by relatives, and even in the best case, parents will probably be ill-equipped to deal with minors’ trauma. The legal guardian provision is even more troublesome. As previously recounted, many pimps and traffickers pose as a minor’s guardian, and there tends to be minimal verification of a “guardian’s” identity.<sup>328</sup> This safe harbor provision may leave a minor in an even more tenuous position, by immediately returning him or her to the abusers and eliminating law enforcement’s ability to separate minors from their pimps. Lastly, the law requires

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<sup>322</sup> H.B. 6264 § 15(d) (emphasis added).

<sup>323</sup> In the Matter of B.D.S.D., 2899 S.W.3d 889, 899 (Tex. App. 2009) (the court reached this conclusion through a simple textual analysis of the statute and argued that police retained discretion about whether to pursue a case or not).

<sup>324</sup> See H.B. 6462 § 15(d) (providing blanket immunity and temporary protective custody for all prostituted minors).

<sup>325</sup> H.B. 0035, 106th Gen. Assemb., § 1 (Tenn. 2011) (Prostituted minors would then have a variety of protective services available to them under TENN. CODE ANN. § 37-1-605).

<sup>326</sup> *Id.*

<sup>327</sup> S.B. 0064, 106th Gen. Assemb., § 1; (Tenn. 2011); TENN. CODE ANN. § 39-13-513 (West Supp. 2011).

<sup>328</sup> Reid, *supra* note 28, at 159.

law enforcement to provide minors with the number for the National Human Trafficking Resource Center (NHTRC) hotline.<sup>329</sup> Based out of the Polaris Project in Washington, DC,<sup>330</sup> NHTRC is a great resource for victims, but one of its principal values is referring them to law enforcement and direct service providers.<sup>331</sup> Victims who are already in the system should not be referred to the hotline as a proxy for treatment. A phone number is not a sufficient replacement for actual protection and services.

Minnesota fortunately did adopt Illinois's approach towards Safe Harbor, passing a law in 2011 with both decriminalization and diversion.<sup>332</sup> Minnesota's Safe Harbor law amends the state penal code by making anyone under 16 immune from prosecution for prostitution and preventing them from being treated as delinquents as well.<sup>333</sup> For prostituted minors between 16 and 17, the law creates a mandatory diversion for first-time offenses if the minor also agrees to complete the diversion program for specialized services. If the minor fails to complete the program, he or she may be brought back to the court for further proceedings.<sup>334</sup> The law also amends two definitions – "delinquent child" and "juvenile petty offender" – to exclude prostituted minors under 16,<sup>335</sup> and it amends the definition of sexually exploited children to ensure prostituted minors can receive appropriate services.<sup>336</sup>

The decriminalization and diversion model of Illinois and Minnesota proves the best approach for states to take. This model has a clear prohibition on criminal or delinquency proceedings, and amends the law to provide services for prostituted children as victims of sexual exploitation.

#### D. SPECIALIZED SERVICES

New York, Washington, Minnesota, Massachusetts, and Illinois all place strong emphasis on services, and the five laws lay out essentially two paths. Washington, Illinois, Vermont, and Massachusetts divert

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<sup>329</sup> TENN. CODE. ANN. § 39-13-315.

<sup>330</sup> See National Human Trafficking Resource Center, *available at* <http://www.polarisproject.org/what-we-do/national-human-trafficking-hotline/the-nhtrc/overview> (last visited Apr. 9, 2012).

<sup>331</sup> *Id.*

<sup>332</sup> See *Details on the Minnesota Law*, ECPAT-USA (July 20, 2011), [ecpatusa.org/2011/07/details-on-the-minnesota-law/](http://ecpatusa.org/2011/07/details-on-the-minnesota-law/).

<sup>333</sup> See H.F. 0056, 2011 Leg., 87th Sess., § 6; (Minn. 2011); see also ECPAT, *Highlights of Minnesota's Safe Harbor for Sexually Exploited Children Law*, (2011) <http://ecpatusa.org/wp-content/uploads/2011/08/Highlights-of-Minnesota-LawFINAL.pdf>.

<sup>334</sup> *Id.*

<sup>335</sup> H.F. 0056 § 1(6), § 2(16), § 4(11).

<sup>336</sup> *Id.*, § 5(31).

prostituted minors into existing service structures.<sup>337</sup> Washington's Sex Crimes law additionally requires licensed service facilities to have staff, or access to staff, trained to deal with sexually exploited youth.<sup>338</sup> Massachusetts creates a multidisciplinary team to assess needs of the child.<sup>339</sup> New York emphasizes the need for new specialized services tailored to prostituted minors' unique trauma and abuse,<sup>340</sup> and similarly, Minnesota mandates development of a plan to tackle specialized needs and establish a diversion program.<sup>341</sup>

The stated goal of New York's Safe Harbor Act is to provide services and, in particular, to provide and create specialized services for victims of commercial sexual exploitation.<sup>342</sup> The Sponsors of the Bill understood that commercially sexually exploited children required unique services. They realized that prosecution is "ineffective" and actually hinders efforts at "recovery" of sexually exploited children.<sup>343</sup> A "victim-centered philosophy" with counseling, emergency housing, and crisis intervention, rather than detention, provide the best chance to protect and restore children, instead of stigmatizing them through criminal penalties.<sup>344</sup>

New York's Safe Harbor Act accomplishes this in several ways. First, "every local social services district" must set forth in a "child welfare services plan" how it will provide for the needs of "sexually exploited children,"<sup>345</sup> including all minor victims of sex trafficking, prostitution, and compelling prostitution rather than general child abuse or neglect.<sup>346</sup> Second, the Act delineates specific types of "appropriate services" emphasizing the need for "short-term safe placement" and an "approved respite or crisis program. Sexually exploited children can only be housed in existing programs for homeless youth, human trafficking, and crisis centers if "the staff members have received appropriate training...regarding sexually exploited children."<sup>347</sup> Alternatively, local social services districts can also contract with qualified NGO

<sup>337</sup> See e.g., S.B. 6476, 2010 Leg., Reg. Sess., § 3 (Wash. 2010) (enacted) (same treatment as victims of child abuse or sexual abuse); H.B. 6462 § 15(d) (same treatment and counseling as victims of child abuse or child neglect in supervision of DFCS); Linda Smith, Testimony, Founder and President, Shared Hope International, Testimony before Washington State Human Serv. Comm. (Feb 28., 2010); SHARED HOPE INTERNATIONAL, *supra* note 321.

<sup>338</sup> S.B. 6476 § 4.

<sup>339</sup> H.B. 3808, 187th Gen. Court, § 13 (Mass. 2011) (enacted).

<sup>340</sup> NEW YORK STATE ASSEMBLY, SPONSORS' MEMO ACCOMPANYING S.B. A5258C, at 5 (2007) [hereinafter SPONSORS' MEMO].

<sup>341</sup> H.F. 0056 § 9(a).

<sup>342</sup> SPONSORS' MEMO, *supra* note 34, at 5.

<sup>343</sup> *Id.*

<sup>344</sup> See generally Brittle, *supra* note 33; see also Schwartz, *supra* note 102.

<sup>345</sup> N.Y. SOC. SERV. LAW § 447-b(1) (2010).

<sup>346</sup> *Id.* § 447-a(1)(a)-(d).

<sup>347</sup> N.Y. SOC. SERV. LAW § 447-b(1).



service providers<sup>348</sup> such as GEMS or the Restore NYC safe house.<sup>349</sup> The safe houses and community-based programs aim to provide sexually exploited children with protection, medical care support services, 24-hour crisis intervention, peer and individual counseling, family therapy and referrals to services for educational, vocation, health care, substance abuse services, therapeutic services, and short or long term housing.<sup>350</sup> Each local social services district is required to have at least one safe house.<sup>351</sup> These services must be “safe, secure, and appropriate”<sup>352</sup> for sexually exploited children.

There are three primary concerns about the law. First, New York’s Safe Harbor Act fails to provide any funding for support services<sup>353</sup> and has been criticized as an unfunded mandate.<sup>354</sup> Every local social service provider must address the needs of sexually exploited children, but there is no apparent source of revenue to create these specialized services.<sup>355</sup> Second, several of the specific service provisions, including preventive services such as safe housing and community-based programs, create conditional mandates, subject to availability of funds.<sup>356</sup> Section 4 states, “each local social services district shall recognize... sexually exploited youth have separate and distinct service needs according to gender and... *to the extent that funds* are available appropriate programming shall be made available.”<sup>357</sup> New York’s Safe Harbor Act authorizes some specialized services, but without the funding to back it up,<sup>358</sup> these specialized services may not end up being created at all. Third, PINS certification does not provide a prostituted minor with secure housing, meaning it does not prevent minors from running away from shelters and returning to pimps.<sup>359</sup> Prostituted minors may also be unable to get services in the future. Under New York’s Safe Harbor Act, a prior PINS certification can be grounds for denial the second time around. As a result, minors who run away the first time — from the non-secure facilities — may have lost their one chance at services.

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<sup>348</sup> *Id.* § 447-b(5).

<sup>349</sup> Kristi Oloffson, *New Aid for Sex Victims*, WALL ST. J., Oct. 26, 2010 at A24.

<sup>350</sup> SPONSORS’ MEMO, *supra* note 34, at 7.

<sup>351</sup> *Id.*; N.Y. SOC. SERV. LAW § 447-b(5).

<sup>352</sup> N.Y. SOC. SERV. § 447-b(1).

<sup>353</sup> Adcock, *supra* note 181 (quoting John Feinblatt, former criminal justice coordinator under Mayor Michael R. Bloomberg, “It is especially disturbing that the Safe Harbor Act carries with it no funding for support services. In fact, it only mandates the creation of one safe house for the entire state.”).

<sup>354</sup> *Id.*; see also Meisner, *supra* note 276 (describing the lack of funding sources).

<sup>355</sup> Meisner, *supra* note 276, at 1-2.

<sup>356</sup> N.Y. SOC. SERV. LAW § 447-b(1).

<sup>357</sup> *Id.* § 447-b(4) (emphasis added).

<sup>358</sup> See A 5258-C, 2007 Leg., Reg. Sess. (N.Y. 2007), 8, 15, available at [http://www.brooklyn.cuny.edu/pub/departments/childrensstudies/documents/childrens\\_documents/safe\\_harbor\\_act.pdf](http://www.brooklyn.cuny.edu/pub/departments/childrensstudies/documents/childrens_documents/safe_harbor_act.pdf) (Fiscal implications for State and Local Governments were left “to be determined” in the Bill).

<sup>359</sup> Editorial, *Help for Exploited Children*, N.Y. TIMES, June 20, 2008, at A20.

Minnesota's approach parallels New York's in many ways. A prostituted minor can be treated as "child in need of protection and services" and receive various traditional child protective services including counseling and medical treatment.<sup>360</sup> The law also provides for the "commissioner of public safety" to develop a "statewide model" by January 2013 to "address the needs of sexually exploited youth and youth at risk of sexual exploitation."<sup>361</sup> The model will be developed with recommendations from "prosecutors, public safety officials, public health professionals, child protection workers, and service providers"<sup>362</sup> and based on the state-funded pilot program Runaway Intervention Project, which approaches sexually exploited youth as victims rather than delinquents and has served over 1300 girls thus far.<sup>363</sup> The Safe Harbor law then recognizes the need for specialized services to prostituted minors above and beyond the traditional services available. Unfortunately, the law is contingent on "sufficient funding from outside sources" being "donated," leaving implementation on tenuous financial footing.

There are two other noteworthy aspects of Minnesota's Safe Harbor law. First, the Safe Harbor law has a section providing outreach to sexually exploited youth to ensure they receive housing, counseling, and medical care. The law does not make these services contingent on cooperation with law enforcement, such as providing evidence or testimony in investigations.<sup>364</sup> Second, the law has a funding provision for some of the child protective services. It allocates forty percent of fines from offenders – pimps and johns – to fund services for sexual exploited youth.<sup>365</sup>

Washington's Sex Crimes law and Illinois' Safe Children Act devote far less space to the question of the services. Rather than focusing on creating new specialized services, both Washington and Illinois primarily looked to existing social services to receive diverted minors. As previously mentioned, in Washington, the term "sexually exploited child" refers to three forms of commercial sexual abuse of a child already covered by prior legislation.<sup>366</sup> Diversion from a prostitution charge allows the child to be certified as CHINS, placed with DSHS,<sup>367</sup> and put into

<sup>360</sup> MN Safe Harbor Law § 3, 2011 Minn. Laws 16 (2011).

<sup>361</sup> 2011 Minn. Laws 20.

<sup>362</sup> *Id.*

<sup>363</sup> See ECPAT-USA, *Highlights of Minnesota's Safe Harbor for Sexually Exploited Children Law*, <http://ecpat-usa.org/wp-content/uploads/2011/08/Highlights-of-Minnesota-LawFINAL.pdf>.

<sup>364</sup> 2011 Minn. Laws 20.

<sup>365</sup> *Id.* at 19.

<sup>366</sup> See S.B. 6476, 61st Leg., Reg. Sess. (Wash. 2010); see also WASH. REV. CODE ANN. § 9.68A.100 (West 2009) (victim of commercial sexual abuse of minor), WASH. REV. CODE ANN. § 9.68A.101 (West 2009) (victim of promoting commercial sexual abuse of minor), WASH. REV. CODE ANN. § 9.68A.102 (West 2009) (victim of promoting travel for commercial sexual abuse of a minor).

<sup>367</sup> S.B. 6476 §§ 1(d), 3.

the existing social services for child victims of sexual assault and sexual abuse.<sup>368</sup> After the CHINS certification, DSHS is required to place the child for up to fifteen days in a secure or semi-secure crisis residential center or a specialized foster family home.<sup>369</sup> A secure or semi-secure facility is designed to ensure that “youth placed there will not run away.”<sup>370</sup> The Act also requires that all licensed secure and semi-secure residential centers must have or have access to “a person who has been trained to work with the needs of sexually exploited children.”<sup>371</sup> In short, CHINS connects prostituted minors to “services and treatment” for child victims of sexual abuse and assault and requires at least one staff member to be trained to handle victims of sexual exploitation.<sup>372</sup>

Washington’s Sex Crimes law has three funding provisions. The law imposes a \$5000 fine on all johns for soliciting and patronizing a minor.<sup>373</sup> A \$5000 fine is also imposed for pimping a minor. Vehicles used to commit commercial sexual abuse of a minor are impounded and the owner is charged \$2,500 to release the vehicle.<sup>374</sup> All the fees are deposited into a “prostitution prevention and intervention account” to provide (1) “mental health and substance abuse counseling, parenting skills training, housing relief, education, and vocational training” for youth diverted for prostitution offenses; (2) services for sexually exploited children “in secure and semi-secure crisis residential centers with access to staff trained to meet their specific needs”; (3) funding for services for child victims of sexual abuse and assault; and (4) funding for prostitution prevention and intervention services.<sup>375</sup>

Illinois’ Safe Children Act provides two services for minors arrested for prostitution. First, minors can be placed in temporary protective custody through the child protection system<sup>376</sup> that, as described earlier, allows for admission to a secure facility, and, second, any services already available for abused and neglected children.<sup>377</sup> Run by DCFS, the child protection system includes licensed foster homes, group homes, or secure facilities upon application and admission.<sup>378</sup> Illinois does have a limited funding provision for these services. Any pimp

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<sup>368</sup> *Id.* § 7(3).

<sup>369</sup> WASH. REV. CODE ANN. § 74.13.034 (West 2009).

<sup>370</sup> S.B. 6476 § 2(15), (16) (at a secure facility, youth cannot leave without facility staff permission and all doors and windows are locked. At a semi-secure facility, there are certain hours residents can come and go, but there are still restrictions on residents’ movement to prevent them from running away.).

<sup>371</sup> *Id.* § 10.

<sup>372</sup> *Id.* § 5; WASH. REV. CODE ANN. § 13.40 (West 2009).

<sup>373</sup> S.B. 6476 § 15.

<sup>374</sup> S.B. 6476 §§ 12, 15; WASH. REV. CODE ANN. § 9A.88.140(4)(a) (West 2009).

<sup>375</sup> S.B. 6476 § 18, WASH. REV. CODE ANN. § 43.63A.740(1)-(4).

<sup>376</sup> H.B. 6462, 2010 Leg., Reg. Sess. (Ill. 2010); ILL. COMP. STAT. ANN. § 5/3(3) (West 2010); 720 ILL. COMP. STAT. ANN. § 5/11-14(d) (West 2010).

<sup>377</sup> H.B. 6462 § 10; 720 ILL. COMP. STAT. ANN. § 405/2-3.

<sup>378</sup> 705 ILL. COMP. STAT. ANN. § 405/2-6; 705 ILL. COMP. STAT. ANN. § 405/2-7. *See generally* Illinois Jurisprudence, Family Law § 11:03 Limitations of scope of Juvenile Court Act.

or John arrested for violating the relevant provisions (which cover adult and juvenile prostitution) may have their vehicle impounded if it was used in commission of the offense and be fined \$1,000 to have the vehicle released.<sup>379</sup> Half of the fee goes to the police unit that made the arrest and the other half goes to Violent Victims Crime Fund, which can be used to provide services to victims of human trafficking or prostituted persons.<sup>380</sup> But overall, the Illinois Safe Children Act devotes very little space to the question of providing services.<sup>381</sup>

Massachusetts has three main innovations. First, the law creates special services for victims of human trafficking including counseling and protective care.<sup>382</sup> Unfortunately, these services might not reach prostituted children since, as previously described, it is possible many prostituted children will end up being treated as delinquents rather than victims of human trafficking. Second, Massachusetts provides for the filing of 51A, or child abuse reports, and 51B, or sexually exploited children reports.<sup>383</sup> Both of these reports refer the child to a multi-disciplinary team to assess the appropriate services.<sup>384</sup> Third, as part of the multidisciplinary team, the sexually exploited child will be assigned an advocate.<sup>385</sup> Massachusetts then develops a range of new services for victims of human trafficking, and supplements existing services with a multidisciplinary team, including a special advocate for the child. The main concern with the law is that, combined with the weak diversion program, many prostituted minors may not end up with access to the strong services established by the law. Vermont's law does not provide specialized services but diverts prostituted minors into the traditional services under a CHINS certification. Commercial sexual exploitation fits into child abuse under Vermont law, and makes the victim eligible for those services.<sup>386</sup> Vermont has a fairly robust system including counseling, medical care, and protective custody,<sup>387</sup> but without specialized services, even a strong child protective system may prove ill-equipped to handle the unique needs and trauma of a prostituted child.

<sup>379</sup> H.B. 6462; 720 ILL. COMP. STAT. ANN. § 5/11-19.3.

<sup>380</sup> H.B. 6462; 720 ILL. COMP. STAT. ANN. § 5/11-9.3(a)-(b); POLARIS PROJECT, *supra* note 313.

<sup>381</sup> See also Daria Mueller, *Gov. Quinn signs Illinois Safe Children Act*, CHICAGO COALITION FOR THE HOMELESS (Aug. 23, 2010, 7:54 AM), <http://www.chicagohomeless.org/gov-quinn-signs-illinois-safe-children-act/>; Press Release, Cook County State's Attorney's Office, Alvarez Applauds Governor's Signature of Illinois Safe Children's Act (Aug. 20, 2010) *available at* [http://www.statesattorney.org/index2/press\\_safchildrensact01.html](http://www.statesattorney.org/index2/press_safchildrensact01.html). There is very little discussion of service provision in press releases and news coverage around signing of the Safe Children Act because it did not feature heavily in the Act.

<sup>382</sup> H 3808, § 17, 2011 Leg., Reg. Sess. (Mass. 2011).

<sup>383</sup> *Id.*

<sup>384</sup> *Id.* §§ 10, 13.

<sup>385</sup> *Id.* § 9.

<sup>386</sup> V.T. STAT. ANN. t. 33 § 4912(2), (8) (2011).

<sup>387</sup> § 5102(3) (discussing CHINS petition and certification); § 5301 (discussing procedure for taking into custody); § 5308(a) (discussing temporary care orders); § 5253 (discussing emergency care orders).

The Texas Supreme Court does not mandate services for prostituted minors,<sup>388</sup> but it does open the door for services, arguing that prostituted minors should be identified as victims of sexual abuse and should receive relevant Child Protective Services under Texas Family Law.<sup>389</sup> Unfortunately, despite the invitation for services, prostituted minors may be in a worse situation than before in Texas. Under Texas juvenile code, prostituted minors could be directed into specialized services, but only if they were in juvenile justice system as delinquents.<sup>390</sup> By taking away the ability to prosecute minors, the Texas Supreme Court may have also taken away the ability to help them and contributed to strengthening the market for prostituted minors.<sup>391</sup> Texas has taken some steps to remedy this problem. Senate Bill 98, which became law in Texas in May 2011, makes minor victims of sex trafficking eligible for a protective order to receive services as sexual assault victims, and allows for some prostituted minors to be treated as sex trafficking victims.<sup>392</sup> While this is a step in the right direction, the bill does not define all prostituted minors as victims of sex trafficking,<sup>393</sup> does not mandate protection from prosecution for minors over 17 (who are not covered by the Texas Supreme Court decision), does not offer specialized services, and does not require even regular services for prostituted minors.<sup>394</sup>

Connecticut and Tennessee do not offer services to prostituted minors under their Safe Harbor laws.<sup>395</sup> Tennessee, as previously described, abandoned protective services and decided to simply hand

<sup>388</sup> In the Matter of B.W., 313 S.W.3d 818 (Tex. 2010).

<sup>389</sup> *Id.* at 825 (rejecting dissent's argument that the "juvenile justice system is the only portal to such services for children like B.W. . . . Even absent a report or investigation, a law enforcement officer may take possession of a child without a court order if a person of ordinary prudence and caution would believe there is an immediate danger to the physical health or safety of the child, or that the child has been the victim of sexual abuse . . . Presumably a thirteen-year-old girl walking the streets offering sex for money would meet this standard.").

<sup>390</sup> TEXAS JUVENILE PROBATION COMMISSION, ALTERNATIVES TO JUVENILE JUSTICE FOR YOUTH INVOLVED IN PROSTITUTION, REPORT TO THE 82<sup>ND</sup> LEGISLATURE 8 (2011) (noting that if "prostitution for juveniles" is decriminalized, "juvenile probation departments could no longer provides services as youth would no longer be referred and/or under their jurisdiction. . . . [and] could create a market for underage prostitutes due to decriminalization of the trafficked person.").

<sup>391</sup> *Id.*

<sup>392</sup> S.B. 98, 82<sup>ND</sup> Leg., Reg. Sess. (Tex. 2011) (Section 1.03 of S.B. 98 amends Texas's trafficking statute – Sec. 20A.03 – to include anyone who knowingly traffics a child under 17 into prostitution, but the law does not redefine prostituted minors as victims. The law does allow for a protective order to be filed by parent, guardian, or prosecuting attorney so that a minor victim of sex trafficking can be treated as a victim of sexual assault. In short, the law adds victims of sex trafficking to the list of victims eligible for protective custody. See Chapter 7A § 2.04(a), which amends Art. 7A.01(a) of Texas Code of Criminal Procedure.).

<sup>393</sup> *Id.*

<sup>394</sup> *Id.*

<sup>395</sup> S.B. 153, 2010 Leg., Reg. Sess. (Conn. 2010) (Connecticut Voices for Children advocated during the legislative hearings for all the prostituted minors to be eligible for "all protections and services provided to victims of human trafficking."). See also Connecticut Voices for Children, *Testimony Regarding S.B. 153*, (2010) (Unfortunately, the final bill did not adopt their recommendations.); S.B. 0064, 2011 Leg., Reg. Sess. (Tenn. 2011).

the minor back to parents or legal guardian, with a phone number as the only access to some form of specialized services.<sup>396</sup> Minors in Connecticut and Tennessee are likely to face a similar problem as in Texas. Decriminalization removes prostituted minors from the jurisdiction of the juvenile justice system but does not place them in any other jurisdiction. They are left even more vulnerable than before.

### E. INCREASED PENALTIES AND LAW ENFORCEMENT AID

Washington, Illinois, Connecticut, Tennessee, and Minnesota use the Safe Harbor laws to increase penalties for soliciting, patronizing, and pimping out a minor in prostitution.<sup>397</sup> Illinois in particular forwards a deterrence model by substantially increasing penalties in order to protect minors from prostitution.

Connecticut, Minnesota, and Tennessee's laws are the most basic. Connecticut's Safe Harbor law does two things. First, it creates a presumption that any minor between 16 and 18 was coerced in violation of the trafficking statute.<sup>398</sup> This opens the door to prosecuting pimps for sex trafficking, which subjects them to greater penalties.<sup>399</sup> Second, promoting prostitution in the first degree – defined as “advanc[ing] or profit[ing] from prostitution of a person less than eighteen years old”<sup>400</sup> – has a mandatory minimum sentence of nine months.<sup>401</sup> Connecticut does not increase penalties for soliciting or patronizing a prostituted minor. Tennessee's Safe Harbor law increases the promotion of prostitution of a minor to a Class E felony,<sup>402</sup> but once again, this was a step back from the House version of the bill. Under the House version, it would have increased to a Class D felony and would have imposed various fines to be applied to a child abuse fund.<sup>403</sup> These provisions

<sup>396</sup> See Bill Summary, S.B. 0064, available at <http://wapp.capitol.tn.gov/apps/billinfo/BillSummaryArchive.aspx?BillNumber=SB0064&ga=107> (describing the Senate amendments to the House version of the bill).

<sup>397</sup> See S.B. 6476, 61st Leg., Reg. Sess. (Wash. 2010); H.B. 6462, 2010 Leg., Reg. Sess. (Ill. 2010); S.B. 153, 2010 Leg., Reg. Sess. (Conn. 2010); S.B. 0064, 2011 Leg., Reg. Sess. (Tenn. 2011).

<sup>398</sup> S.B. 153, 2010 Leg. Reg. Sess. (Conn. 2010); CONN. GEN. STAT. ANN. § 53a-82(c) (West 2007).

<sup>399</sup> CONN. GEN. STAT. ANN. § 53a-192a (violating this section is a Class B felony — “(a) A person is guilty of trafficking in persons when such person commits coercion as provided in section 53a — 192 and the other person is compelled or induced to (1) engage in conduct that constitutes a violation of section 53a — 82, or (2) work.”)

<sup>400</sup> S.B. 153 § 2(a)(2); CONN. GEN. STAT. ANN. § 53a-86(a)(2).

<sup>401</sup> S.B. 153 § 2(b); CONN. GEN. STAT. ANN. § 53a-86(b).

<sup>402</sup> S.B. 0064 § 4; TENN. CODE ANN. § 39-13-515 (2010).

<sup>403</sup> Under the House version, any motor vehicle used in commission of the offense would be towed and impounded. It only could be recovered after a fine. Conviction for the offense of promoting prostitution of a minor would result in a \$1000 fine, \$500 of which would be paid to the child abuse fund. See Bill Summary, S.B. 0064 TENN. GEN. ASSEMBLY, <http://wapp.capitol.tn.gov/apps/billinfo/BillSummaryArchive.aspx?BillNumber=SB0064&ga=107> (last visited Mar. 26, 2012) (describing the Senate amendments to the House version of the S.B. 0064). This part was struck in the Senate version. *Id.*

were struck by the Senate version and did not become law.<sup>404</sup> Minnesota increases the fine for pimps and johns, but the fines remain insignificant.<sup>405</sup> Minnesota does provide a model for how to allocate the funds: 40 percent to law enforcement training to deal with sexually exploited youth, 20 percent to prosecuting agency for training and education, and 40 percent to victim services.<sup>406</sup>

Washington's Sex Crimes law does four things. First, the law increases the penalties for soliciting and patronizing a prostituted minor. The sentencing range for johns increases from between 1 and 68 months to between 21 and 144 months, and their fines from \$550 to \$5000.<sup>407</sup> Second, the penalty for pimping a minor increases from between 21 and 144 months to between 93 and 318 months and imposes a \$5000 fine.<sup>408</sup> Third, the law allows the impounding of the vehicle used to commit offense in the act.<sup>409</sup> Last, the law denies defendants, whether pimps or johns, the ignorance defense unless they can show they made a reasonable attempt to determine the age by checking driver's license, birth certificate, or some other form of identification.<sup>410</sup>

Vermont and Massachusetts passed their Safe Harbor laws as part of general human trafficking legislation, and consequently, have fairly strong penalties attached. In Vermont, johns can be prosecuted under laws against human trafficking,<sup>411</sup> aggravated human trafficking,<sup>412</sup> and under Vermont general solicitation provision<sup>413</sup> or solicitation from a victim of human trafficking.<sup>414</sup> While solicitation from a victim of human trafficking would give the strongest penalties, it is unlikely to apply to many situations, and unfortunately the general solicitation charge is age-neutral. The penalties for human trafficking match federal penalties and include up to life imprisonment, but it is unlikely that johns will be prosecuted under these laws. Solicitation could lead to an imprisonment of up to one year for the first charge and three years for future charges.<sup>415</sup> Pimps are more likely to be charged under

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<sup>404</sup> *Id.*

<sup>405</sup> See H.F. 0556.2, 2011 Leg., 87th Sess. § 7(a) (Minn. 2011) (fines are increased from a range of \$250-\$500 to \$500-\$750).

<sup>406</sup> *Id.* § 7(c).

<sup>407</sup> S.B. 6476 § 15, 61st Leg., Reg. Sess. (Wash. 2010); WASH. REV. CODE ANN. § 9.68A.105(1)(a), (2) (West 2010).

<sup>408</sup> S.B. 6476 § 15; WASH. REV. CODE ANN. § 9.68A.105(1)(a), (2) (West 2009).

<sup>409</sup> S.B. 6476 § 12; WASH. REV. CODE ANN. § 9A.88.140(41) (West 2009).

<sup>410</sup> S.B. 6476 § 17; WASH. REV. CODE ANN. § 9.68A.110(3) (West 2009).

<sup>411</sup> VT. STAT. ANN. tit. 13, § 2652(a)(1) (Supp. 2011) (stating that it is illegal to "obtain by any means a person under the age of 18 for the purposes of having the person engage in a commercial sex act").

<sup>412</sup> *Id.* § 2653(a)(1).

<sup>413</sup> VT. STAT. ANN. tit. 13, § 2632(a) (2009).

<sup>414</sup> VT. STAT. ANN. tit. 13, § 2655(a) (Supp. 2011) (solicitation requires that the john know the person is a victim of human trafficking).

<sup>415</sup> VT. STAT. ANN. tit. 13, § 2632(b) (2009).

the human trafficking provisions, and here the penalties are substantial and commensurate with federal penalties.<sup>416</sup>

Similar to Vermont, Massachusetts's Safe Harbor law is part of its general human trafficking legislation and the law contains strong punishments that could be used against both johns and pimps.<sup>417</sup> Unfortunately, johns are unlikely to be punished under these harsh penalties, and without separate provisions enhancing the punishment for solicitation the net result may be that johns are treated under the pre-Safe Harbor and pre-human trafficking legislation. Pimps will face increased penalties though, and that is a step in the right direction.<sup>418</sup> Massachusetts does have one special innovation that enables victims to bring civil actions for damages,<sup>419</sup> and this could have tremendous impact in the future.<sup>420</sup>

As advocated for by the End Demand Illinois Coalition,<sup>421</sup> the Illinois Safe Children Act places even greater emphasis on increasing penalties to reduce demand. In many ways, the Safe Children Act embodies a model focused less on services and more on protection and safety through deterrence. Johns face substantially higher penalties, and all sentences for patronizing, soliciting, or pimping a prostitute, minor and adult, have increased.<sup>422</sup>

Illinois' Safe Children Act takes three main steps. First, regarding johns, soliciting and patronizing a minor both become felonies subject to strong penalties. Soliciting a minor for a sexual act is increased to a Class 4 felony subject to one to three years in prison and up to a \$25,000 fine.<sup>423</sup> Patronizing a minor in prostitution is increased from a Class A misdemeanor to a Class 3 felony with a sentence of one to three years (with up to a \$25,000 fine) and subsequent offense being a Class 2 felony (three to seven years).<sup>424</sup> Second, the pimping of a minor remains a Class 1 Felony, and a Class X Felony when force, fraud, or coercion is used on a child or the child is under thirteen years old.<sup>425</sup>

<sup>416</sup> See SHARED HOPE PROTECTED INNOCENCE INITIATIVE, ANALYSIS AND RECOMMENDATIONS: VERMONT, 1-5 (2012), [http://www.sharedhope.org/Portals/0/Documents/AR-PDF/Vermont\\_AR\\_FINAL.pdf](http://www.sharedhope.org/Portals/0/Documents/AR-PDF/Vermont_AR_FINAL.pdf).

<sup>417</sup> See H.B. 03808, 2011 Leg., 187th Gen. Ct. § 23 (Mass. 2011).

<sup>418</sup> See *id.* §§ 22, 23.

<sup>419</sup> *Id.* § 20.

<sup>420</sup> See generally DANIEL WERNER & KATHLEEN KIM, CIVIL LITIGATION ON BEHALF OF VICTIMS OF HUMAN TRAFFICKING (3d ed. 2008) (discussing the growing importance of civil litigation in anti-human trafficking work).

<sup>421</sup> See POLARIS PROJECT, PA 97-0267: ILLINOIS' JUSTICE FOR VICTIMS OF SEX TRAFFICKING CRIMES ACT (2011).

<sup>422</sup> See H.B. 6462, *supra* note 39, § 15; 720 ILL. COMP. STAT. ANN. § 5/11-18(b) (West Supp. 2011) (increasing the penalty for patronizing a prostitute to a Class 4 felony); 720 ILL. COMP. STAT. ANN. § 5/11-19(b) (increasing the penalty for pimping a prostitute to a Class 4 felony); 720 ILL. COMP. STAT. ANN. § 5/11-15(b) (increasing penalties for soliciting a prostitute to a Class 4 felony).

<sup>423</sup> H.B. 6462 § 15, 96th Gen. Assembly, Spring Sess. (Ill. 2010); 720 ILL. COMP. STAT. ANN. § 5/11-14.1(b) (West 2011).

<sup>424</sup> H.B. 6462 § 15; 720 ILL. COMP. STAT. ANN. § 5/11-18.1(c).

<sup>425</sup> H.B. 6462 § 15; 720 ILL. COMP. STAT. ANN. § 5/11-19.1(d).



The solicitation for a prostituted minor provision covers pimps but could be read to also apply to johns. Solicitation for a minor is a Class 1 felony with a sentence of four to fifteen years (and up to a \$25,000 fine) and subsequent offenses are increased to a Class X felony (six to thirty years and up to a \$25,000 fine).<sup>426</sup> Third, the law also limits the available defenses. Pimps can no longer use a “mistake of age” defense if they have a “reasonable opportunity to observe” the minor, which borrows the language from the TVPA.<sup>427</sup> Johns can only use a “reasonable belief” as an affirmative defense for solicitation and patronizing a prostituted minor.<sup>428</sup> Illinois also has a provision on impounding vehicles used to commit any offense under the section.<sup>429</sup>

In addition, Illinois adopts two unique provisions to facilitate law enforcement efforts. First, Illinois allows law enforcement to use the same tools for human trafficking as it does in drug trafficking by adding human trafficking and pimping a minor to the list of crimes subject to court-ordered intercepts and wiretaps.<sup>430</sup> Second, Illinois protects undercover officers in dangerous sex-trafficking investigations by allowing for officer-safety recordings.<sup>431</sup>

New York has debated, but has not adopted, increased penalties and other approaches focused on reducing debate. The Study Advisory Group actually agreed that the severity of penalties on pimps should be increased since it currently amounted to little more than a “slap on the wrist.”<sup>432</sup> The Advisory Group also recommended greater efforts to target pimps, johns, strip clubs, and others for facilitating the exploitation of children, instead of targeting the exploited children.<sup>433</sup> These measures ultimately did not make it into the Safe Harbor Act, and another bill with these provisions also failed to pass in 2007.<sup>434</sup>

Washington, Massachusetts, and New York provide for training of law enforcement likely to encounter minor victims of prostitution.<sup>435</sup> The Washington law calls for the criminal justice training commission, in consultation with Washington’s association of sheriffs and police chiefs, to develop a model policy on law enforcement and curriculum based on the model policy to be included in the basic training academy

<sup>426</sup> H.B. 6462 § 15; 720 ILL. COMP. STAT. ANN. § 5/11-15.1(c).

<sup>427</sup> H.B. 6462 § 15; 720 ILL. COMP. STAT. ANN. § 5/11-19.1(c); 18 U.S.C. § 1591(c) (2006) (“In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained or maintained, the Government need not prove that the defendant knew that the person had not attained the age of 18 years.”).

<sup>428</sup> H.B. 6462 § 15; 720 ILL. COMP. STAT. ANN. § 5/11-14.1(b-5).

<sup>429</sup> H.B. 6462 § 15; 720 ILL. COMP. STAT. ANN. § 5/11-19.3(a).

<sup>430</sup> H.B. 6462 § 15; 720 ILL. COMP. STAT. ANN. § 5/14-3(g).

<sup>431</sup> H.B. 6462 § 15; 720 ILL. COMP. STAT. ANN. § 5/14-3(g-6).

<sup>432</sup> Gragg et al., *supra* note 45, at 92.

<sup>433</sup> *Id.*

<sup>434</sup> See S.B. 5455, 60th Leg., 2007 Reg. Sess. (Wash. 2007).

<sup>435</sup> S.B. 6476 § 16, 61st Leg., Reg. Sess. (Wash. 2010); N.Y. Soc. SERV. § 447-b(6) (McKinney 2010).

by January 1, 2011.<sup>436</sup> The New York law provides for training of law enforcement in the provisions of the Act and “how to identify and obtain appropriate services for sexually exploited children.”<sup>437</sup>

As the foregoing illustrates, Safe Harbor laws cover a wide range of approaches and strategies. Connecticut, Tennessee, and Texas have a straightforward decriminalization approach. New York, Vermont, Massachusetts, and Washington focus on diversion with specialized services. Illinois and Minnesota have a decriminalization plus diversion strategy, with Illinois placing extra emphasis on deterrence.

Of these models, Illinois and Minnesota have the best approach on diversion. The decriminalization but diversion model manages to protect prostituted minors both from unjust treatment by the criminal justice system and from further exploitation by pimps. The access to secure or semi-secure facilities provides minors with protection from themselves and enables them to receive specialized services. Illinois also places the strongest emphasis on deterrence by requiring an investigation into child abuse, increasing penalties, and providing law enforcement with new tools for targeting pimps and johns.

The New York, Massachusetts, and Washington approach are strongest in providing specialized services, and should be added in Illinois’s overall framework. The laws in Connecticut, Texas, and Tennessee may end up doing more harm than good, and must be supplemented by other efforts to ensure children are not simply fed back into the cycle of abuse. The following chart maps out the various provisions in each state law for comparison and reference.

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<sup>436</sup> S.B. 6476 § 16.

<sup>437</sup> N.Y. Soc. SERV. § 447-b(6); *see also* Hunter, *supra* note 54.

State	Year passed/ enacted	Location	Function	Reclassify	Age	Services	Investigation Required	Protective Custody	Discretion	Training /Funding	Increased penalties
<b>NY</b>	Sept. 25, 2008/ Enacted April 2010	Social Service Law – Title 8-A § 447-A, B  Subdivision three to Family Court Act § 311.4  Amends Fam. Ct. Act §§ 712(a); 732(a)	Provide specialized services to sexually exploited child  Divert through PINS certification. Fam. Ct. Act § 311.4(3)  Redefine prostituted minors as sexually exploited child. § 447-a(1)	Yes, define “sexually exploited child” as any minor in sex trafficking or involved in prostitution. § 447-a(1)	18	Yes – § 447-b	No	No	Judicial – § 311.4(3)	Yes, Law Enforcement – § 477-b(6)  No funding provisions	No
<b>CT</b>	February 2010/ Enacted October 1, 2010	Criminal Statute – § 53a-82 and § 53a-86.	Decriminalize prostitution for minors (under 16). § 53a-82(a)  16 and 17 – presumption victims of trafficking under § 53a-192. § 53a-82(c)  Increase penalties. § 53a-86.	No	16	No	No	No	None	None	Yes. § 53a-86(a) (2)
<b>WA</b>	April 2, 2010/ Enacted June 10, 2010 except section 1, which becomes effective July 1, 2011	Amends Criminal Statute (Title 9) and Juvenile Offender and Juvenile Courts (Title 13)	Redefine prostituted minor as victim. § 13.32A.030(1) (17)  Diversion for first offense; diversion for second offense if conditions are met. S.B. 6476 §§ 7(7), 8(1)  Provide specialized services. § 10.  Increase penalties. § 15.	Yes, as sexually exploited child. § 13.32A.030(1) (17)	18	Yes – S.B. 6476 § 10.	No	No	Prosecution – § 8(1)	Yes, Law Enforcement – § 16  Yes, funding provisions § 15.	Yes – § 15
<b>IL</b>	Aug. 23, 2010 (signed and effective)	Amends Abused and Neglected Child Reporting Act, Juvenile Court Act of 1987, and Criminal Code	Decriminalize. H.B. 6264 § 15(d).  Diversion. § 15(d).  Increase penalties. § 15(d).  Services. § 10.	Yes, as victim of child abuse. § 5.	18	Yes – § 10.	Yes – § 15(d).	Yes – § 15(d).	None	No  Yes, funding provision § 15(d).	Yes – § 15(d)
<b>TN</b>	June 1, 2011	Amends TCA, Title 37, 39, and 40	Decriminalize § 1  Increase penalties § 4	No	18	No	No	No	None	No	Yes — § 4
<b>TX</b>	June 18, 2010 (judicial decision)	In Matter of B.W., 2010	Decriminalize prostitution for minors	Yes	14	No	No	No	None	None	No
<b>VT</b>	July 2011	General human trafficking legislation	Decriminalize.  Diversion. § 2652(c)(1)(A)  Increase penalties. §§ 2652, 2653, 2655.  Services.	Yes. § 2652(c)(1)	18	Yes	No	Yes	Combined	No	Yes

State	Year passed/ enacted	Location	Function	Reclassify	Age	Services	Investigation Required	Protective Custody	Discretion	Training /Funding	Increased penalties
MA	Nov. 21, 2011	H 3803 – general human trafficking legislation	Diversion. Increase penalties. § 23. Services.	Yes, § 8.	18	Yes	Yes	Yes		No	Yes
MN	July 2011	HF0556.2 – amends penal and child & families services statutes	Decriminalize. § 6. Diversion. § 6. Increase penalties. § 7 Services.	Yes, §§ 1, 2, 4	16	Yes	No	Yes	Combined for ages 16 and 17; otherwise, no discretion for diversion	Yes	Yes

County/City	Year passed/ enacted	Name/Location	Function	Reclassify	Age	Services	Investigation Required	Type of Custody	Discretion	Training	Increased penalties
Alameda County, CA	2009 (until 2012)	AB 499 – authorized pilot program	Divert to treatment program	Yes	18	Yes	No	Community Treatment	District Attorney	Yes	No
San Francisco, CA	1998	Standing Against Global Exploitation (SAGE)	Detain and treat prostituted minors as victims	Yes	18	Yes (via SAGE)	No	Detention			John's School
Suffolk County, MA	2005	Support to End Exploitation Now (SEEN)	Treat prostituted minors as victims and divert into child abuse system	Yes	18	Yes (via 51A report)	Yes	No	Law Enforcement and District Attorney	No	No
Las Vegas, NV	1999	STOP (Stop Turning Out Child Prostitutes) – special unit in Vice Unit	Arrest and prosecute to “help the girls get out of prostitution for good and build cases against their pimps.” <sup>439</sup>	No	18	Yes, in return for cooperation	Goal is convince minors to cooperate with investigation of pimps	Detention – average stay 3 weeks <sup>440</sup>	Law Enforcement	No	No

<sup>438</sup> Molly Ball, *Authorities Clash over handling of teens arrested for prostitution*, LAS VEGAS SUN, (Apr. 5, 2005), available at <http://www.lasvegassun.com/news/2005/apr/05/authorities-clash-over-handling-of-teens-arrested-/>.

<sup>439</sup> *Id.*

#### IV. IMPLEMENTATION — THE CASES OF BOBBY P. AND LENA B.

“[She was] screaming, flailing her arms,  
and trying to get away . . . .”<sup>440</sup>

Detective Dror

All of the Safe Harbor laws have been enacted in the past two years, so how or whether they will be effectively implemented remains to be seen. New York’s Safe Harbor Act came into effect in April 2010, and has been applied in a handful of cases. In the first case, *In the Matter of Bobby P.*, the prostituted minor was adjudicated as a juvenile delinquent.<sup>441</sup> The second case, *In the Matter of Lena B.*, resulted in PINS certification and diversion into GEMS.<sup>442</sup> While the latter case has been described as the first implementation of the Safe Harbor Act,<sup>443</sup> both cases demonstrate how New York’s Safe Harbor Act plays out in practice.

##### A. THE CASE OF BOBBY P.

On May 18, 2010, Bobby P. was arrested for offering an undercover police officer oral sex for \$50.<sup>444</sup> She initially resisted arrest, fleeing the scene. Two detectives came to assist the undercover officer in subduing and arresting her as she was “screaming, flailing her arms, and trying to get away”<sup>445</sup> She eventually was handcuffed and taken to a police van. While being transferred from the police to the “prisoner van,” she “refused” and began “screaming and yelling” until “two police officers were required to physically remove her” to the prisoner van to be transferred to the precinct.<sup>446</sup> She told the detective escorting her that she was “eighteen years old.”<sup>447</sup> She was in fact fifteen at the time.<sup>448</sup>

Like many minors in her situation, Bobby P.’s history of prostitution began when she was 12 years old and began working for an adult pimp.<sup>449</sup> Bobby P. had several encounters with law enforcement. She had been arrested at least twice for prostitution, first, on February 6,

<sup>440</sup> *In re Bobby P.*, No. 20207, slip op. at 3 (Fam. Ct. 2010).

<sup>441</sup> *Id.* at 540.

<sup>442</sup> *New York Laws at Work: The New York Safe Harbor for Exploited Children Act Protecting NYC Youth*, GIRLS EDUC. & MENTORING SERV. (Aug. 16, 2010, 12:15 PM), <http://www.gems-girls.org/news/new-york-laws-at-work>.

<sup>443</sup> *Id.*

<sup>444</sup> *See In the Matter of Bobby P.*, No. 20207, slip op. at 2 (Fam. Ct. Queens Cty. June 1, 2010) (quoting deposition testimony of undercover officer).

<sup>445</sup> *Id.* at 4 (quoting arresting officer’s testimony as a witness at the probable cause hearing).

<sup>446</sup> *Id.*

<sup>447</sup> *Id.* at 5.

<sup>448</sup> *See id.* at 9.

<sup>449</sup> *See id.* at 3, 10 (noting that when Bobby P. came under the foster care of New York Foundling Hospital at the age of 12, her case workers found she had already been exposed to prostitution).

2010, and then in April 2010.<sup>450</sup> Police had also found her, along with another underage girl, in the home of a known pimp in March of that year.<sup>451</sup> But her problems had begun long before then. She “suffered deprivation” at the hands of her parents, who had neglected her and had their parental rights terminated.<sup>452</sup> She had bounced in-and-out of shelters and had previously been referred to GEMS, where she stayed only briefly before running away.<sup>453</sup> In October 2009, she gave birth to her daughter and was temporarily “in a ‘mother/daughter’ foster home in Brooklyn.”<sup>454</sup> Her daughter was eventually removed from her custody and the Administration for Children’s Services began child protection proceedings against her.<sup>455</sup> Bobby P. had been continuously failed by a system unable to deal with her troubled situation.

At her hearing, her law guardian argued for a PINS certification instead of delinquency proceedings based on New York’s Safe Harbor for Exploited Children Act.<sup>456</sup> According to the law guardian, Bobby P. was willing to cooperate and was already assisting Assistant District Attorney (ADA) Jessica Melton to prosecute Bobby P.’s pimp.<sup>457</sup> The presentment agency opposed the request.<sup>458</sup> The Family Court, in a June 1, 2010 decision by Judge John Hunt, denied the PINS petition and proceeded with the juvenile delinquency petition.<sup>459</sup>

In reaching its decision, the court applied the framework of the Safe Harbor Act,, which establish four grounds for the denying a PINS petition.<sup>460</sup> The court notes that the first three grounds did not apply.<sup>461</sup> The court addressed the first element by finding there was no evidence to rebut the presumption that Bobby P. was a victim of a severe form of trafficking under the TVPA.<sup>462</sup> She had not been previously adjudicated a delinquent for prostitution and she had not previously

<sup>450</sup> See *id.* at 9 (observing that these arrests came even after attempts by the state to intervene).

<sup>451</sup> *Id.* at 5.

<sup>452</sup> In the Matter of Bobby P., No. 20207, slip op. at 9.

<sup>453</sup> See *id.* (noting that Bobby P. ran from GEMS despite its reputation for effectiveness).

<sup>454</sup> *Id.* at 3.

<sup>455</sup> *Id.* at 26.

<sup>456</sup> See *id.* at 2 (noting law guardian’s citation of the law, Family Court Act § 311.4 (3), in court motions).

<sup>457</sup> *Id.* at 37.

<sup>458</sup> See *id.* (considering presentment agency’s argument that Bobby P. had “failed to express a genuine current willingness to accept and comply with services.”).

<sup>459</sup> *Id.* at 9 (concluding that “[g]reater control” over Bobby P. was needed, but expressing hope that “appropriate services in a controlled setting” might eventually lead to a different outcome).

<sup>460</sup> See *id.* at 5 (the conditions identified by the court are if respondent 1) “is not a victim of severe form of trafficking,” 2) “has been previously found under this article have committed an offense,” 3) “has been previously adjudicated . . . and placed with a commissioner or social services,” or 4) “expresses a current unwillingness to cooperate with specialized services for sexually exploited youth.”) (quoting Family Court Act § 311.4(3)).

<sup>461</sup> See *id.* at 7-8.

<sup>462</sup> See *id.* at 7 (reasoning that Bobby P. would be entitled to PINS substitution, regardless of the presentment agency’s non-consent, unless one of the other three elements was present).

received PINS certification and been placed in custody of a commissioner of social services, so the last of the four exceptions became the focus of the arguments.<sup>463</sup> The court could deny the PINS petition if “she expresses a current unwillingness to cooperate with specialized services for sexually exploited youth.”<sup>464</sup> If that exception applied, then the court had discretion to deny the substitution motion and proceed with delinquency petition.

The Court made three main arguments. First, the Court argued “claimed willingness cannot be considered *in vacuo*.”<sup>465</sup> The Court had to consider Bobby P.’s unique history. Second, based on her history, the Court questioned her willingness to assist the ADA, given that she had already misled the ADA on a prior occasion.<sup>466</sup> Bobby P. had previously agreed to assist the ADA with prosecution of her pimp. They had met in April 2010, and during the meeting she had excused herself to do some shopping for her baby and meet with representatives from GEMS. Instead, she disappeared for several weeks, leading to her arrest in May 2010.<sup>467</sup> Third, Bobby P. had a history of fleeing from precisely the specialized services that a PINS certification would provide her. She had previously been housed at GEMS and run away, fabricating a kidnapping story and returning to prostitution.<sup>468</sup> According to the Court, “attempts to correct (her) self-destructive and dangerous behavior have failed.”<sup>469</sup> This gave the Court “serious doubts as to (her) current willingness to accept and cooperate with specialized services for sexually exploited youth.”<sup>470</sup>

The Court decided, given Bobby P.’s history, she was not ready for even the specialized services available under the Safe Harbor Act, and “greater control over respondent’s movement and self-destructive behavior is required at this time.”<sup>471</sup>

### B. LENA B.

Several months after the case of Bobby P., Lena B. appeared in court. At age 16, she was facing criminal charges and detention on solicitation for prostitution charges before Queens Criminal Court Judge Serita. Lena B. was exonerated and recommended to GEMS to specialized

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<sup>463</sup> See *id.* at 8 (briefly touching on these elements before expressing “serious doubts” about Bobby P.’s receptiveness to services).

<sup>464</sup> *Id.* at 7 (citing Family Court Act § 311.4 (3)).

<sup>465</sup> *Id.* at 9 (appraising the current statements of willingness in light of the previously discussed difficulties Bobby P. had faced in her dealings with the state).

<sup>466</sup> See *id.*

<sup>467</sup> See *id.* at 5 (recounting a string of misleading statements and evasions undertaken by Bobby P. in response to state attempts to bring her off the street).

<sup>468</sup> See *id.* at 3.

<sup>469</sup> *Id.* at 9.

<sup>470</sup> *Id.* at 9.

<sup>471</sup> *Id.* at 8.

services for victims of commercial sexual exploitation.<sup>472</sup> Judge Serita also correctly decided to seal her file.<sup>473</sup> As a result, Lena B. not only receives safe harbor from prosecution but also from public scrutiny, by protecting her privacy as a victim of sexual abuse and exploitation.

Lena B.'s case has been described as the first case successfully impacted by the Safe Harbor Act, but both her case and Bobby P.'s are consistent with the Safe Harbor Act's framework for allowing judicial discretion.<sup>474</sup> One of the "services" the Safe Harbor Act retained was granting the court discretion to detain certain prostituted minors if the court decided it was necessary. The Safe Harbor Act effectively changes juvenile detention to a last resort. The Safe Harbor Act makes specialized services the default, with detention for only exceptional situations.<sup>475</sup>

The Safe Harbor Act makes it easier for courts to divert a minor to specialized services, as was the case for Lena B. Judges previously had power to defer prostituted minors into programs like GEMS. In the case of Nicolette R., Judge Lynch's decision was reversed on appeal and she was transferred to residential treatment facility instead with positive results.<sup>476</sup> Lucille, mentioned in the beginning of this piece, was also eventually transferred to GEMS after several stints in juvenile detention facilities like Leake & Watts in Yonkers, New York.<sup>477</sup> But in both of those cases, the victims were diverted only after lengthy appeals and several stints in juvenile detention.<sup>478</sup> The Safe Harbor Act shortens and simplifies this process.

Family courts in New York still retain the discretion to detain prostituted minors as delinquents. For some, like former New York Criminal Justice Coordinator John Feinblatt,<sup>479</sup> FBI Agent Dan Garrabrant,<sup>480</sup>

<sup>472</sup> *New York Laws at Work*, *supra* note 442.

<sup>473</sup> *See id.* (approvingly calling the court's decision an exercise of "the full extent of the law").

<sup>474</sup> *See id.*; *see also* *In the Matter of Bobby P.*, No. 20207, slip op. at 2.

<sup>475</sup> *See id.* at 22 (highlighting the law's emphasis on underage prostitutes as victims of crime rather than perpetrators).

<sup>476</sup> *See* Adcock, *supra* note 156 (observing that Nicolette responded well to counseling and treatment and has been described as living a "safe and productive life.").

<sup>477</sup> *See* Lustig, *supra* note 1, at 5 (describing how even after Lucilia had served her time at a juvenile facility, she was transferred to Leake & Watts because there was nowhere else for her to go).

<sup>478</sup> *See generally* Adcock, *supra* note 156; Lustig, *supra* note 1.

<sup>479</sup> *See* Adcock, *supra* note 181, at 3 (Mr. Feinblatt, criminal justice coordinator under Mayor Michael R. Bloomberg, opposed the Safe Harbor Act stating, "A bill that the legislature may pass in the next few days would inadvertently hand a big victory to pimps. Teen prostitutes who get arrested would be back on the streets with little or no consequence – and back making money for their pimps.").

<sup>480</sup> *See* Urbina, *supra* note 62 (Special Agent Garrabrant expresses concerns about not being able to detain girls which results in them running away from unsecure shelters and back to the pimps. He tells the story of Roxanne who was transferred to an unsecure shelter, ran away four hours later, and turned up stabbed to death by her pimp with Special Agent Garrabrant's card still on her.). *See also* note 479 for full story.



and trafficking expert Donna Hughes,<sup>481</sup> this is probably a comforting development. They worry that without at least the option of detention, prostituted minors will simply be returned to their pimps and to the same “revolving door” of abuse.<sup>482</sup> Even in GEMS’ *Very Young Girls* documentary, two of the girls left the program to return to their pimps.<sup>483</sup> As one of the pimps in the documentary commented, it is a game of “choice, never by force.”<sup>484</sup> The New York Safe Harbor Act leaves the courts discretion to take that choice away.

## V. THE WAY FORWARD

“Two days, that’s all I needed to get her to stay away from her pimp and I think things would’ve ended differently.”<sup>485</sup>

Dan Garrabrant, FBI Agent

Safe Harbor laws need to achieve four goals. First, Safe Harbor laws need to protect the victimized minors by separating them from the pimps and traffickers. They also need to protect the minors from themselves. Second, Safe Harbor laws need to protect minors from being traumatized and stigmatized in the criminal justice and juvenile delinquency system. This goal, at times, may run into tension with the first goal. Third, Safe Harbor laws need to provide specialized services designed to address prostituted minors’ unique trauma as child victims of commercial sexual exploitation. Fourth, Safe Harbor laws need to protect minors by increasing law enforcement efforts and criminal penalties against prostituted minors’ exploiters.

To achieve these goals, Safe Harbor laws should give courts, law enforcement, and social workers more options and tools at their disposal, not less. The following recommendations should also be accepted with a strong qualification. Safe Harbor laws and various pilot projects in counties and cities are very new, which means it is not clear how

<sup>481</sup> Donna Hughes, *The Case Against Legalizing Prostitution*, Lecture NYU School of Law, Oct. 13, 2010 (when asked, Professor Hughes opposed Safe Harbor laws because they may result in prostituted minors returning to pimps unless they are detained).

<sup>482</sup> Urbina, *supra* note 62 (quoting Bradley Myles, deputy director of the Polaris Project, expressing frustration with a system that sends children back onto the street after arrest).

<sup>483</sup> See *VERY YOUNG GIRLS*, *supra* note 69 (Carolina and Ebony are shown returning to their pimps in the documentary).

<sup>484</sup> *Id.*

<sup>485</sup> Urbina, *supra* note 62 (Special Agent Garrabrant speaking about Roxanne. Roxanne had been picked up for prostitution by NYPD, but in order to get her into protective custody, she needed to “flip” on her pimp. She had “all the signs of being controlled by a pimp — a tattoo with initials on her neck, a rehearsed script about how she was new to the work — she adamantly denied working for anyone.” Garrabrant had only an hour before police would take her to a shelter, which she was likely to run away from. Despite being one of the best at “flip” interviews, he was unsuccessful with Roxanne. She was taken to the shelter and ran away four hours later. Seventeen days later, she turned up dead, stabbed to death by her pimp.).

they will play out in practice. States should not be tied to one model at this stage. A rush to uniformity would prevent states from serving their role as laboratories for policy.

**A. DECRIMINALIZE PROSTITUTION FOR MINORS AND DIVERT THEM TO SPECIALIZED SERVICES, BUT ONLY IF PROTECTIVE SERVICES IN SECURE OR SEMI-SECURE FACILITIES ARE AVAILABLE**

Prostituted children should not be treated as criminals or delinquents, and in this area, Illinois and Minnesota's laws provide a model for how to proceed. Nevertheless, holding minors in detention is better than simply returning them to the streets and to the pimps. As a result, decriminalization alone is not the solution. Decriminalization should take place if three conditions are met. First, there are secure protective services available for victims of sexual exploitation. Second, there has to be sufficient beds and facilities available. Third, law enforcement and social workers must have the ability to divert and hold minors in secure protective services, even without the minor's consent. When those services are available, prostitution for minors should be decriminalized and prostituted minors diverted into those secure protective programs and receive specialized services. Diversion into secure facilities will help achieve several goals. It provides protection and separation from the pimps without the stigma and negative effects of detention as a delinquent. It provides a safe forum for specialized services. Last, it can facilitate cooperation with law enforcement and help with the prosecution of pimps.

**B. IF SECURE OR SEMI-SECURE PROTECTIVE SERVICES ARE NOT AVAILABLE, AN IN-CUSTODY PROGRAM WITH SPECIALIZED SERVICES SHOULD BE DEVELOPED.**

Most prostituted minors should still be diverted into social services, but prosecutors or courts should retain discretion to place a minor in a "detention plus" program. In addition, prostituted minors should be diverted regardless of prior arrests, prosecutions, or convictions for prostitution.

States unable to divert prostituted minors into secure or semi-secure protective facilities should not decriminalize prostitution for minors. Instead, prosecutors or judges should have discretion to keep minors in special detention programs when it is necessary to provide for the safety and welfare of the minor. In other words, states should move towards a model where all minors will be diverted into one of two options: 1) specialized social services, or 2) special "detention plus" programs that focus on providing prostituted minors with a variety of services and counseling. These "detention plus" programs

would be similar to models in San Francisco with SAGE and Brooklyn with GRASP,<sup>486</sup> where detention is used, first, to prevent minors from going back to the street and into the “revolving door” of abuse and, second, to ensure they receive some form of treatment and counseling. Although similar to the models in New York and Washington, this proposed diversion program would require detention to include access to special services. It would still be detention, but the focus would be providing victims with specialized services. The choice of prosecutorial or judicial discretion should hinge on which institution would be better equipped to know, first, the facts of a minor’s situation and, second, the appropriateness of available social services based on each minor’s unique circumstances.

Diversion should take place regardless of the number of prior prostitution convictions or prosecutions, which is not currently the case in Washington or New York. When diversion is dependent on absence of prior convictions or prosecutions, the minors with the greatest needs may be deprived of services and treatment. The sole issue should be how best to help the minor. The fact that they have previously been treated unjustly by the juvenile justice system should not be held against them.

### **C. PROVIDE SPECIALIZED SERVICES IDEALLY THROUGH SURVIVOR-BASED GROUPS PARTIALLY FUNDED BY FINES ON JOHNS AND PIMPS**

Both of the aforementioned approaches should provide specialized services. Specialized services requires more than just connecting victims with child abuse and sexual assault services, or even services for sexually exploited minors. Commercial sexual exploitation often involves very different dynamics and elements than other types of sexual abuse. The element of indoctrination, abuse from multiple parties (pimps, johns, family members), and the history of negative interactions with law enforcement all lead to a dynamic that requires specialized treatment preferably from survivor-based groups like SAGE and GEMS. Prostituted minors need holistic treatment including physical and psychological therapy for the variety of traumas they have experienced during their commercial exploitation. As modeled in New York, local districts should create specialized services to meet the needs in their community. The multidisciplinary teams – with an advocate assigned to the child – used in Massachusetts are a useful model. Depending on each state’s child protective services programs, it may be possible to divert them into existing programs as long as they supplemented with

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<sup>486</sup> Many NGOs and service providers have different models for treating prostituted minors. For instance, Safe Horizons and SAGE have contrasting approaches. It is beyond the scope of this paper to analyze the best model for treating prostituted minors. The point is just that some form of specialized service needs to be developed for in-custody treatment.

experts trained in dealing with victims of commercial sexual exploitation (as is the case now in Washington).

These specialized programs should be partially funded by increased fines on johns and pimps. Based on the approach in Washington, States should adopt both fines and aggressive asset forfeiture laws, and it should be clearly specified that the proceeds from both should be primarily devoted to victim services as with Washington's Prostitution Prevention and Intervention Account. Some of the funds should also be devoted to training of law enforcement, prosecutors, and other first responders similar to the model in Minnesota.

**D. SUBSTANTIALLY INCREASE PENALTIES OF PIMPS TO TREAT THEM AS SEX TRAFFICKERS AND INCREASE PENALTIES ON JOHNS. REQUIRE AN INVESTIGATION INTO SEX TRAFFICKING AND CHILD ABUSE OR NEGLECT TO BE OPENED**

Following the example of Illinois, minors must be protected from prostitution by aggressively targeting pimps and johns. The police should be required to open an investigation into sex trafficking and relevant agencies should investigate child abuse or neglect. Penalties for pimping a minor should be substantially increased and should be treated as sex trafficking to reflect the severity of the crime, as Vermont and Massachusetts do. As a point of reference, the TVPA has a mandatory minimum of 15 years for sex trafficking of a minor under 14 years of age. There is a mandatory minimum of 10 years for sex trafficking of a minor between 14 and 18 years of age. Both have a maximum of life in prison.<sup>487</sup> There should also be no force, fraud, or coercion requirement to prove prostituted minors are victims of sex trafficking, which would bring states' laws into line with the TVPA.<sup>488</sup> Only by targeting the demand will law enforcement begin to hit traffickers where it hurts – their profits.<sup>489</sup> Johns should also be aggressively prosecuted. This can include public shaming by publicizing photos, heavy fines, and possible charges for statutory rape and child abuse. Only one state, Missouri, specifies in its solicitation statute that johns could be charged with statutory rape.<sup>490</sup> More states should arrest johns and charge with statutory rape and child abuse if they discover the minor is under the age of consent. There should be an affirmative defense for "reasonable belief" about the age of the minor based on Washington's law, requiring requests for certain forms of identification. Johns should

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<sup>487</sup> See 18 U.S.C. § 1591 (2006).

<sup>488</sup> *Id.*

<sup>489</sup> See generally SIDDHARTH KARA, *SEX TRAFFICKING: INSIDE THE BUSINESS OF MODERN SLAVERY* (2009) (discussing the economics of sex trafficking and importance of targeting the demand side of the problem); DONNA HUGHES, *THE DEMAND FOR VICTIMS OF SEX TRAFFICKING* (2005) (discussing the demand for sex trafficking).

<sup>490</sup> See MO. REV. ANN. STAT. § 567.030.

not be treated as merely clients of prostitutes but as child molesters purchasing the right to engage in rape and sexual abuse. As a consequence, johns should also be subject to registration as sex offenders. Only by making the punishment match the crime will johns receive the message, and law enforcement will be able to reduce the demand that drives the market. Last, following the lead of Minnesota, states should facilitate civil action by victims against their exploiters – whether the johns or the pimps.

**E. PROVIDE TRAINING AND AWARENESS RAISING PROGRAMS  
FOR FIRST RESPONDERS AS WELL AS MEMBERS OF THE LEGAL,  
MEDICAL AND SOCIAL SERVICES PROFESSIONS LIKELY TO  
ENCOUNTER PROSTITUTED MINORS**

Policy is meaningless without implementation. Following the laws in Washington and New York, Safe Harbor laws need to provide for training programs for first responders including who will primarily be law enforcement. The training programs should educate first responders about the unique needs of prostituted minors and how to identify them. The goal should be to treat the encounter as an intervention rather than an arrest. The training should also extend to the legal and medical professions who are likely to encounter prostituted minors. This includes public defenders, prosecutors, social workers, nurses, and doctors.

**CONCLUSION**

One objection to redefining prostituted minors as victims of sex trafficking is a lack of resources. Defining all prostituted minors as victims of sex trafficking could swamp the criminal justice system of some major cities. But the alternative is not a morally honest solution. Most prostituted minors have pimps. Most, if not all, are victims of sex trafficking. It is wrong to simply define away the problem by calling them delinquents. Sex trafficking of minors is not a problem to be defined out of existence. Prostitution of children – modern-day sex slavery – represents a fundamental moral failing of our society. To ignore it, to deny it, is unjust and irresponsible. Recognizing that prostituted minors are victims of sex trafficking who need rescue and assistance will not solve the problem by itself, but the problem will never be solved, let alone addressed, unless we are honest about its scope and extent. The first challenge of any Safe Harbor law, then, is honesty.

All around America, in small towns and major cities, children are being sold as sex slaves. Until recently, the brunt of the law enforcement focus has been on the minors, treating them as delinquents rather than victims. Safe Harbor laws represent a paradigm shift, where states

are slowly beginning to identify the victims and target the perpetrators. At this stage, there cannot and should not be a uniform model. Every state is different, and every state should devote its unique resources and perspective to tackle the problem in the best way that can. It means experimentation in tactics and strategy, but the fundamental goals should be the same. Minor victims of sex trafficking should not be treated as criminals but as victims. They should not be punished but rescued and provided services and protection. Pimps should not be let off with a slap on the wrist but prosecuted as sex traffickers. America, as a country, should begin to live up to the promise of the TVPA by ensuring the resources are available to protect the most vulnerable members of our society. Minors – failed by the system again and again – should finally be able to find safe harbor.