CONSENT, COERCION, AND COMPASSION: CRAFTING A COMMONSENSE APPROACH TO COMMERCIAL SEXUAL EXPLOITATION OF MINORS

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Abstract: Within 48 hours of running away or being thrown out, a child on the streets will typically be approached for sex in exchange for money or enticed into a situation leading to exploitation. There are competing theories about the prosecution of youth for prostitution in the United States. Some states recognize that statutory rape and federal trafficking laws conflict with the prosecution of children for prostitution, but most do not. This leaves large numbers of minors eligible to be charged as criminals and with little access to appropriate medical and psychological care. Recent developments in courts and legislatures, however, have moved toward eliminating contradiction in the laws. Emerging state legislation has taken a new direction to harmonize laws and recognizes these children as survivors in need of treatment rather than offenders. Illinois recently ensured that children under age eighteen who are prostituted may not be charged as criminals under any circumstance. Model legislation should adopt a similar approach and should also focus on comprehensive services with a critical eye toward the important distinctions between methods of conditional diversion that can leave youth vulnerable to prosecution versus decriminalization which serves to more fully resolve existing legal tensions. New judicial and legislative developments provide a framework by which states can create effective responses to commercial sexual exploitation of minors instead of criminalizing them.

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Elana was thirteen when her mother kicked her out of the house. She landed in foster care in a group home operating under the Department of Social Services due to her mother’s neglect. Confused and distraught, Elana often spent time on the streets, frustrated by fights and bullying that she encountered at the group home. During this time, she met a man and woman who said that they would take care of her if she came to live with them, provide her with a comfortable home and nice clothes, and help her “make money.” Elana, enticed by the promise of things that she did not have at home or in foster care, agreed to go with them.

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

The legal status of children in Elana’s situation is currently unclear and inconsistent. On the one hand, our legal system views and treats them as offenders for prostitution and they are often detained and prosecuted. On the other hand, they are victims who have endured sexual exploitation and statutory rape, more readily recognized under federal sex trafficking laws, particularly if they are born outside of the United States. Many victims and survivors of this exploitation, upon discovery on the streets or otherwise, are arrested, prosecuted, locked up with an array of offenders

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

2 See, e.g., Ian Urbina, For Runaways, Sex Buys Survival, N.Y. TIMES, Oct. 27, 2009, at A1 (quoting Sgt. Byron A. Fassett of Dallas, Texas) (“If a 45-year-old-man had sex with a 14-year-old-girl and no money changed hands…he was likely to get jail time for statutory rape. . . [i]f 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.”).


4 See Domestic Minor Sex Trafficking: Hearing before the House Judiciary Subcomm. on Crime, Terrorism, and Homeland Security, 111th Cong. 1 (2010) [hereinafter “Domestic Minor Sex Trafficking Hearing”] (statement of Representative Rep. Bobby Scott) (noting that domestic minor victims of commercial sexual exploitation are often arrested and that the short term services they receive “do not even begin to address the
and offered little relevant treatment or care for their trauma. More recently, because of these opposing perspectives and conflicts, courts and legislators have begun to change course with the creation of new laws and interpretation of these competing laws.

This article discusses the competing legal practices addressing youth who are subjected to commercial sexual exploitation, or “domestic minor sex trafficking,” within the United States. The arrest of children for prostitution, a form of commercial sexual exploitation, illustrates the confused place of the status of adolescence in our society and raises several severe physical and psychological trauma that these girls have survived.”

See Stephanie Halter, Factors that Influence Police Conceptualization of Girls Involved in Prostitution in Six U.S. Cities: Child Sexual Exploitation Victims or Delinquents?, 15 CHILD MALTREAT. 152, 158 (2010) (noting deficiencies in the current approach to commercial sexual exploitation cases using detention as a penalty and noting that “youth’s experience in detention may not provide them with the necessary treatment and may impact their likelihood of engaging in crime in the future.”); see, e.g., FRANCINE SHERMAN, ANNIE E. CASEY FOUNDATION, Pathways to Juvenile Detention Reform: Detention Reform and Girls, 1 at 23-28, (2005) [hereinafter “Pathways”] (noting the lack of appropriate psychological and medical services available in girls’ juvenile detention facilities despite the fact that an overwhelming number of girls in detention have been subject to physical and sexual abuse). One study found that 56% of girls in the facility reported past sexual abuse but had little to no access to relevant programming to address their past traumas. Id. at 22. Put simply, “[i]f girls enter detention particularly vulnerable due to chaotic home lives, histories of trauma, and high rates of mental illness, conditions in detention often exacerbate their difficulties.” Id; see also, FRANCINE SHERMAN, Girls in the Juvenile Justice System: Perspectives on Services and Conditions of Confinement, 1, 6 (2003). This study of conditions of confinement for girls noted that lack of services addressing involvement in prostitution was a pressing issue among girls interviewed. Staff noted “that they lacked the gender and culturally responsive programming needed to address patterns of sexual exploitation and victimization common among detained girls,” despite housing a significant number of prostituted girls. Id. at 6. The failure to identify and address related medical issues, such as sexually transmitted diseases in the facilities, was also noted. Id. at 5.

The terms “commercial sexual exploitation of youth” and “domestic sex trafficking of minors” are used interchangeably by advocates and policymakers in the United States as this exploitation is now recognized as trafficking under federal law. In this Article, the terms are likewise used interchangeably. On the state level, the term “commercial sexual exploitation of youth” is used with slightly greater regularity. See, e.g. WASH. REV. CODE § 13.32A.030 (17) (2010) (defining “sexually exploited child” as a person under the age of eighteen who is a victim of the crime of commercial sexual abuse of a minor); FRANCES GRAGG, et al, New York Prevalence Study of Commercially Sexually Exploited Children: Final Report, 1 at i (prepared for Westat) (2007) [hereinafter the “New York CSEC Study”]. On the federal level, however, the emerging language in policy discourse is “domestic sex trafficking of minors.” Cf. Domestic Minor Sex Trafficking Hearing, supra note 4. This Article does not use the term “youth prostitute” or “teenage prostitute” as these are inaccurate and misleading descriptions of this social problem.
questions. When should society treat them as adults versus children? To what extent should society consider children’s developmental stage and capacity to give consent when shaping policy? Modern scientific research has shown that the underdevelopment in certain areas of the adolescent brain affect behavior, decision making and the ability to understand consequences.\(^7\) However, the justice system often determines culpability and punishment as if children possess adult capacities.\(^8\) Furthermore, to what extent are underlying gender and sex biases driving the current policies addressing youth who are sold for sex by perpetuating the early practices in juvenile courts? Finally, why should trafficking laws protect exploited minors who were born outside the United States and trafficked into the country for exploitation, but not those born and exploited in America, like Elana?

The juxtaposition of statutory rape laws with the prosecution of juveniles for prostitution demonstrates a literal clash in the way that American society addresses the sexual victimization of children, children’s ability to legally consent, and societal expectations about behavior according to gender. By prosecuting exploited children, current laws and practices contradict one another and fail to assist the significant numbers of youth sold on the street, on the internet, in strip clubs, and otherwise for sex. This Article discusses new laws that shed treatment of these children as “criminal prostitutes” and shift to a more appropriate understanding that they are survivors of exploitation. The Article considers the societal status of adolescence together with research on commercial exploitation and

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\(^7\) See generally Amicus Brief for the American Psychological Association, American Psychiatric Association, National Association of Social Workers, and Mental Health America in Support of Petitioners in Graham v. Florida, No. 08-7412, available at 2009 WL 2236778 (discussing comprehensive scientific studies of the adolescent brain and its comparative decision-making capabilities versus the fully developed adult brain). Furthermore, the adolescent brain is not fully developed in areas affecting risk evaluation, emotional regulation, and impulse control. Id. at 22; see generally Elizabeth Cauffman and Laurence Steinberg, (Im)Maturity of Judgment in Adolescents: Why Adolescents May Be Less Culpable than Adults, 18 BEHAV. SCI. & L. 741 (2000).

\(^8\) See, e.g., Neelum Arya, Using Graham to Challenge Juvenile Transfer Laws, 71 LA. L. REV. 99, 107-108 (2010) (noting that, every year, approximately 200,000 youth are prosecuted, tried, or incarcerated as adults in the U.S.); see Elizabeth S. Scott & Thomas Grisso, Developmental Incompetence, Due Process, and Juvenile Justice Policy, 83 N.C. L. REV. 793 (2005) (discussing how punitive criminal justice policies have obscured developmental differences between juveniles and adults). Scott & Grisso argue that, during the 1980’s and 90’s, concerns about youth crime created a public captured by the pithy phrase, “adult time for adult crime.” The resulting changes “are embodied in several legislative strategies under which juveniles facing criminal charges increasingly have been treated like their adult counterparts.” Id. at 806-07.
proposes uniform implementation and development of commonsense, consistent, and humane jurisprudence to promote recovery for exploited children.

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

Part III focuses on the emergence of recent legislation from various states and particularly on the unique protection afforded under the Illinois Safe Children Act. It analyzes the strengths and weaknesses of these varying approaches. Part IV explores how legislatures and courts can best reconcile conflicts between statutory rape and prostitution statutes. It concludes that judicial decision-making must be informed by considerations regarding adolescent development and must avoid the gender bias that has been documented in the juvenile and criminal justice systems. Furthermore, states considering legislative action should not leave certain categories of youth outside the umbrella of safe harbor protection; rather, states should take a clear stance on reform by passing laws that negate the possibility of children being prosecuted for prostitution.

Prosecution of youth for prostitution is not legally coherent, as articulated by the Texas Supreme Court, and is inconsistent with best practices developed under federal law.9 This Article calls for current state prosecution practices to change by using the Illinois Safe Children Act as a model, thereby avoiding language that can weaken the potential for such

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laws to affect change for exploited youth.

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

Commercial sexual exploitation of youth—also referred to as domestic minor sex trafficking—is the sexual abuse of a minor for economic gain.\(^{10}\) The FBI calls it the “most overlooked and under-investigated form of child sexual abuse” facing today’s society.\(^{11}\) The White Slave-Traffic Act (“Mann Act”) first addressed prostitution of juveniles in 1910.\(^{12}\) This law, and others passed in the 1970s and 80s, when the issue gained greater national attention, focused mainly on increasing penalties for certain sexually exploitive behaviors against minors. Deterrence through penalties for those who exploit minors was recognized by this early legislation and it continues to be an important part of strategies to address the issue.\(^{13}\) Federal prosecutions under the Mann Act continue for perpetrators of commercial sexual exploitation of children.\(^{14}\) However, the physical and psychological needs of the minors were not the focus of lawmakers at the time the Act was passed nor did the legislation address their legal status as victims or offenders. These are problems that still persist today.

**A. Background Information about Exploited Youth**

Statistics and research help shed some light on the fractured lives of young people who are prostituted but they do not tell the complete story. Estimates of the numbers of children prostituted each year vary greatly because this group of young people is a difficult population to reach. In addition, the confusion among law enforcement officials about how to respond to these youth when they do encounter them contributes to the

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\(^{10}\) JAY ALBANESE, U.S. Dep’t of Justice, Office of Justice Programs, National Institute of Justice, *Commercial Sexual Exploitation of Children: What Do We Know and What Do We Do about It?* 1 (2007).

\(^{11}\) Domestic Minor Sex Trafficking Hearing, *supra* note 4, at 16 (statement of Rep. Ted Poe (quoting Patrick Fransen, Special Agent, Federal Bureau of Investigation, Innocence Lost Task Force)).


\(^{13}\) Domestic Minor Sex Trafficking hearing, *supra* note 4, at 126 (statement of Francey Hakes, National Coordinator for Child Exploitation, Prevention and Interdiction, Office of the U.S. Deputy Attorney General, noting the necessity of a “multifaceted attack on child exploitation on three fronts: prevention, deterrence, and interdiction”).

dearth of reliable estimates because it impedes uniform data collection.\textsuperscript{15} As a result, the estimated number of commercially sexually exploited youth in the United States has ranged from only a few thousand to over two million.\textsuperscript{16} A much-cited study concludes that that over 300,000 children are “at risk of” commercial sexual exploitation each year.\textsuperscript{17} Some researchers dispute the scientific basis for this and other estimates, but all agree that more research is needed.\textsuperscript{18} The Department of Homeland Security and the National Center for Missing and Exploited Children estimate that 100,000 minors are “prostituted” in the United States per year.\textsuperscript{19}

While centralized arrest data is lacking,\textsuperscript{20} the most recent state data suggests that there were at least 1,500 arrests of juveniles for prostitution in 2008.\textsuperscript{21} The government notes, however, that law enforcement agencies

\begin{itemize}
\item \textsuperscript{15} David Finkelhor & Richard Ormrod, United States Department of Justice, \textit{Prostitution of Juveniles: Patterns from NIBRS, JUVENILE JUSTICE BULLETIN} 4 (2004) (noting that “uncertainty within law enforcement agencies about how to respond to the prostitution of juveniles and how to treat juvenile prostitutes has in turn contributed to a scarcity of reliable, consistent information about the problem.”).
\item \textsuperscript{16} RICHARD J. ESTES & NEIL ALAN WEINER, \textsc{Univ. of Penn, Commercial Sexual Exploitation of Children in the U.S., Canada, and Mexico}, at 11-12 (2002).
\item \textsuperscript{18} See Mitchell, et al., supra note 17, at 18.
\item \textsuperscript{19} Matt Korade, \textit{DHS Adviser: Government Needs Public's Help in Fighting Human Trafficking, CQ HOMELAND SEC.}, October 18, 2010; \textit{Domestic Sex Trafficking Hearing, supra note 4 at 137 (statement of the National Center for Missing and Exploited Children) (defending an estimate of 100,000 derived from Estes & Weiner, supra note 16, and noting that it is a conservative estimate). The National Center for Exploited and Missing Children works in partnership with the DOJ.}
\item \textsuperscript{20} See Finkelhor & Ormrod, supra note 15 at 2 (noting the limitations of the uniform data collection system used by the Federal Bureau of Investigation because not all states are fully compliant and large urban areas tend to be underrepresented).
\item \textsuperscript{21} See Charles Puzzanchera, \textit{OFFICE OF JUVENILE JUSTICE PROGRAMS AND DELINQUENCY PREVENTION, JUVENILES ARRESTS 2008, JUVENILE JUSTICE BULLETIN,} 1, 3 (2009). In most states, not all jurisdictions report their arrest data to the FBI. Id. at 11. The statistics that are recorded on juvenile arrests for prostitution have remained fairly constant between 1,200 and 1,400 from 1994 to 2000 before rising to a high of 1,800 in 2004. See
\end{itemize}
must keep better records of both arrests for prostitution and instances in which children engaging in sex acts in exchange for money are encountered but not arrested, as doing so will help determine the overall prevalence of the problem.22 In addition, Federal human trafficking law now mandates that incidents of domestic minor trafficking be collected and reported, though law enforcement agencies have not yet universally implemented the central reporting successfully.23 And often instances of youth prostitution are improperly excluded from this data where law enforcement does not properly consider them as instances of trafficking as the term has evolved.24

The personal histories and characteristics shared by many of these children are grim. Their pasts often reveal that the social systems that are supposed to protect them have already failed them. Some children are prostituted as early as age nine, while the average age of entry into prostitution is estimated to be between twelve and fourteen.25 Many of these children ran away from home, were abandoned by family members, are known as “throw away” youth, or are homeless.26 They often live on the streets or move from place to place, staying with “friends” and acquaintances. It is estimated that eighty to ninety percent of commercially


23 See UNITED STATES DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT: 10TH EDITION, 1 at 347 (2010) (noting that “despite the mandates in the 2005 and 2008 amendments of the Trafficking Victims Protection Act, uniform data collection of trafficking crimes or numbers of victims among federal, state and local law enforcement agencies did not occur during the reporting period . . . ”).

24 In the specific context of commercial sexual exploitation of minors, the Department of Justice has recognized the lack of definitive data and expects to provide the results of a study on the prevalence of the problem in 2011. See Domestic Minor Sex Trafficking Hearing, supra note 4, at 126 (testimony of Francey Hakes, National Coordinator for Child Exploitation, Prevention and Interdiction, Office of the U.S. Deputy Attorney General). The study will address the number of youth under eighteen who were victims of commercial sexual exploitation in the U.S. in 2008 and attempt to distinguish how many of these children became known to law enforcement. Id.

25 Id. (statement of Ernie Allen, cofounder of the National Center for Missing and Exploited Children, noting that the average age at which boys enter prostitution is between eleven and thirteen, which is younger than the overall average); Norma Hotaling, et al., The Commercial Sexual Exploitation of Women and Girls: A Service Provider’s Perspective, 18 YALE J. L. & FEMINISM 181, 187 (2006). A recent study tracking precinct arrest data found that, of all arrests for prostitution among juveniles, ten percent were age twelve or thirteen, thirty-three percent were age fourteen and fifteen, and fifty-five percent were age sixteen to seventeen. See Mitchell, et al., supra note 17, at 25.

26 ESTES & WEINER, supra note 16, at 11; see also, Mitchell, et al., supra note 17, at 18 (noting that youth who are homeless or without familial support are highly vulnerable to commercial sexual exploitation).
sexually exploited youth suffered sexual abuse earlier in their childhood prior to their initial encounter with prostitution. In addition, these youth are likely to have experienced poverty and to have been involved with the child welfare system; one study estimates that up to eighty-five percent of these exploited youth have been involved in the child welfare system. Often, youth turn to the streets when they run away from their homes because their own “home” situation becomes intolerable or are formally removed from them by child protective services. After leaving home, however, many children come to find that the alternative conditions they face are even worse. The risk of involvement in commercial sexual exploitation increases the longer youth remain homeless. Once subjected to this exploitation, children are at substantial risk of contracting sexually transmitted diseases, including HIV/AIDS. They also tend to be subjected to significant amounts of physical abuse in addition to sexual traumatization. As a result of this abuse, there is an increased likelihood that they will experience post-traumatic stress disorder (PTSD).

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28 See Gragg, et al., New York CSEC Study, supra note 6, 1 at i; see also Cassi Feldman, Report Finds 2,000 of State’s Children Are Sexually Exploited, Many in New York City, N.Y. Times, April 24, 2007, at B6.
29 See Clyde Haberman, The Young and Exploited Ask for Help, N.Y. Times, June 12, 2007, at B1 (noting testimony at a New York City Council hearing on the commercial sexual exploitation of youth in New York City, “‘I thought that my pimp was going to protect me…All he did was abuse me.’”). The difficulty of living without familial support makes them more likely to believe representations by pimps because promises of protection sound better than the current situations they face. See Lies Trap Children in Life as Prostitutes: Phoenix Boosts Effort to Save Victims, Punish Pimps, Johns, Arizona Republic, January 28, 2007, at A1; see also, Ric Curtis, et al., Center for Court Innovation, Commercial Sexual Exploitation of Children in New York City, Volume One: The CSEC Population in New York City: Size, Characteristics, and Needs (September, 2008) 1, 48 (discussing an interview with an adolescent girl who described how a pimp approached and recruited her when she was crying on the steps of her group foster care home. Id. In the girl’s own words “But once I started seein’ certain things and certain actions, it was like, I might as well have stayed in the hell I was in…”).
31 See Gragg, et al., supra note 6, at 5; Amanda Kloer, Sex Trafficking and HIV/AIDS: A Deadly Junction for Women and Girls, 37 SPG, Hum. RTS. 8, (2010) (detailing the increased risks of disease exposure for young people who are exploited).
32 Sheila Kershaw, Gender, Abuse, and Prostitution of Young People, in Child Sexual Assault 1, 56 (Pat Cox, Sheila Kershaw, & Joy Trotter eds., Palgrave, 2010).
33 The National Institute of Mental Health defines PTSD as “an anxiety disorder that can develop after exposure to a terrifying event or ordeal in which grave physical harm...
Nationally, estimates reporting the gender breakdown of commercially sexually exploited youth vary. Globally, females are reported to be the vast majority of the targets for this industry. Under the Trafficking Victims Protection Act (“TVPA”), federal law targeting the elimination of sexual exploitation and trafficking recognizes that the sex industry predominantly victimizes women and girls. In the United States, the most recent arrest data reports that females accounted for seventy-eight percent of juvenile arrests for prostitution. In comparison, females accounted for only thirty percent of juvenile arrests as a whole. While females comprise the majority of juveniles arrested for prostitution, male youth still account for a significant twenty-two percent of children victimized by commercial sexual exploitation, which is not insignificant. Moreover, according to some research, male youth engaging in acts of prostitution are more difficult to account for because they are more likely to act alone and tend to create their own protection groups. Conversely, female youth tend to be connected to a pimp at some point. Indeed, some data indicates that seventy-five occurred or was threatened. Traumatic events that may trigger PTSD include violent personal assaults . . . .”

34 ESTES & WEINER, supra note 16, at 75–89.


36 Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7101(2),(4) (2006) (noting that globally, traffickers “primarily target women and girls, who are disproportionately affected by poverty, the lack of access to education, chronic unemployment, discrimination, and the lack of economic opportunities in countries of origin”). These same factors can affect women from the United States. See infra Part I.A.

37 See Charles Puzzanchera, OFFICE OF JUVENILE JUSTICE PROGRAMS AND DELINQUENCY PREVENTION, JUVENILES ARRESTS 2008, JUVENILE JUSTICE BULLETIN, 1, 3 (2009). OJJDP findings reflect data that local law enforcement agencies nationwide report to the FBI’s Uniform Crime Reporting Program; see also, Howard N. Snyder, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE ARRESTS 2004, (2006) (reporting that in 2004, 76% of juvenile arrests for prostitution were of females); see also Mitchell, supra note 17, at 24 (reporting that an independent 2005 survey found that 90% of juvenile prostitution arrests were of females).

38 See Puzzanchera, supra note 21, at 3.


40 See Finkelhor & Ormrod, supra note 15, at 9; see also, GRAGG, et al., supra note 6,
percent of girls subject to domestic sex trafficking are associated with a pimp.\footnote{1} This Article mainly focuses on girls due to their higher arrest rate. However, male youth, specifically those identifying as homosexual and more vulnerable to encounter problems in the juvenile justice system, are also of considerable importance in this discussion.\footnote{2} Policy discussions about commercial sexual exploitation are incomplete without including and studying their needs.\footnote{3}

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

Some resist the notion that children born in the United States and forced into these situations, as opposed to children trafficked into the United States, experience so great a threat that they believe they have no way out. Still other people question whether exploited children sincerely desire a different life or are amenable to receiving help when they appear resistant to intervention by authority figures. But research and patterns identified by law enforcement illustrate how traffickers and pimps target vulnerable children, groom them, and then recruit them into prostitution often using violence, abduction, deception and coercion.\footnote{4}

\footnotetext[1]{Bear ES\&E, supra note 16, at 7.}

\footnotetext[2]{Randi Feinstein, et al., Urban Justice Center, Justice for All? 1, 40-41 (2001) (discussing the needs of gay youth in the justice system and instances); see also, Terry Coonan, The Trafficking Victims Protection Act: A Work in Progress, 1 INTERCULTURAL HUM. RTS. L. REV 99, 119 (2006) (noting that it is imperative to recognize that men and boys are also victims of trafficking).}

\footnotetext[3]{A disproportionate number of commercially sexually exploited male youth self-identify as gay, bisexual, or transgender/transsexual. See ES\&E, supra note 16 at 7-8. Advocates note the gay youth are more likely to encounter harassment and problems when subjected to detention. Peter A. Hahn, Note, The Kids are Not Alright: Addressing Discriminatory Treatment of Queer Youth in Juvenile Detention and Correctional Facilities, 14 B.U. PUB. INT. L.J. 117, 118-119 (2004); Valerie Gwinn, Locked in the Closet: The Impact of Lawrence v. Texas on the Lives of Gay Youth in the Juvenile Justice System, 6 WHITTIER J. CHILD. & FAM. ADVOC. 437, 442 (2007); see also, Domestic Minor Sex Trafficking Hearing, supra note 4 at 155 (statement of Suzanna Tiapula, Director, National Center for Prosecution of Child Abuse) (noting that victim services for boys and girls need to be available to provide housing, mental health, substance abuse screening and treatment, and educational or vocational training). Just as girls have been affected by stereotypes based upon perceptions of acceptable behavior that are assigned to them based on their gender, so gay male youth experience bias for not conforming to gender expectations for males. See generally, Gwinn and Hahn, (noting documented bias experience by gay youth in the juvenile justice system).}

\footnotetext[4]{CHILD EXPLOITATION AND OBSCENITY SECTION, UNITED STATES DEPARTMENT OF JUSTICE, ‘‘Child Prostitution,’’ (citing ES\&E, supra note 16, and the UNITED STATES TRAFFICKING IN PERSONS REPORT), available at
Typically, a trafficker, also referred to as a “third party exploiter” or pimp, ensnares young females by using a gradual process breaking down the younger person that culminates with the child’s sense of personal identity being destroyed. These pimps first seek out young girls at bus stations, shelters, malls, arcades, and on the internet, preying on those who may appear vulnerable. The pimp will act as a “boyfriend,” promising love and a better life and playing on young girls’ previously identified vulnerabilities. Gradually, when the pimp introduces the young girl into prostitution, she fails to recognize that she is a victim and becomes trapped. Many factors can prevent a young girl from realizing that she is being exploited or from recognizing the dangers she faces, including age, lack of knowledge or experience, poor judgment, the need for attention, previous abuse, and, in some cases, learning disabilities and limitations. To ensure control over the girls, traffickers often use a process analogous to “grooming,” the well-documented approach employed by people who sexually abuse children. The behavior is also compared to batterers who

http://www.justice.gov/criminal/cceos/prostitution.html; see, e.g., Domestic Minor Sex Trafficking Hearing, supra note 4, at 149 (testimony of Tina Frundt, Founder and Executive Director of Courtney’s House, a residential program designed specifically to serve girls who were involved in prostitution). A survivor of child prostitution herself, Ms. Frundt shared her account of being “gang raped, psychologically manipulated, sold for sex, and beaten” to ensure her compliance. After her arrest, she spent a year in juvenile detention without counseling or treatment and with no referrals for services upon her release. Id. See also CURTIS, et al., supra note 29, at 5 (describing interviews with prostituted youth revealing their reports of the daily violence they experienced at the hands of customers, pimps, and other youth, including stories of “being kidnapped and held hostage by customers.”).

45 Albanese, supra note 10, at 3; see also, CURTIS, et al., supra note 29, at 47 (discussing and including quotes of adolescents who were approached by pimps outside of shelters and group homes); ESTES & WEINER, supra note 16.


47 See KERSHAW, supra note 32, at 58; see also Exploiting Americans on American Soil Hearing, supra note 34; GRAGG, et al., supra note 6, at 4.

48 KERSHAW, supra note 32, at 56.

49 GRAGG, et al., supra note 6, at 4.

50 See KERSHAW, supra note 32, at 58; see also Urbina, supra note 2, at A1. “For those not already engaged in survival sex, the grooming process was gradual and calculated . . . . Before long, the girl is asked to turn occasional tricks to help pay bills.” Id.
control their victim through isolation, economic dependence, and physical and verbal abuse. These traffickers and pimps are fully aware of the process they are employing to manipulate or initiate a child. One convicted trafficker recently quoted from prison described chillingly, “With young girls, you promise them heaven, and they’ll follow you to hell.”

Experts explain that as a result of this careful manipulation, victims of commercial sexual exploitation often display symptoms of “traumatic bonding”—more commonly known as Stockholm syndrome—which makes it more difficult for them to separate themselves from the person responsible for their harm. Just as victims of domestic and family violence

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51 Urbina, supra note 2, at A1. “The goal is to get the girls as dependent as possible. Mentally you’ve gotta burn into their brains you’re the only one—you’re god. Once you’ve got that down and they’re ready to work . . . then you instill the fear—the wrath of god. If they mess up, there’s a price to pay and they know it’s a heavy price.” ROSALIND BENTLEY & RICHARD MERYHEW, Turning Girls into Prostitutes is an Easy Task, Experts Say, STAR TRIBUNE, August 15, 1999, at O1B; see, e.g., CURTIS, et al., supra note 29, at 48 (quoting one youth who stated, “I fell in love with this guy and thought he was the one . . . and he called himself a pimp. But he always told me I’m his bottom bitch and whatever. He put me out there on the stroll, out there with black eyes and broken noses. I was out there messed up.”). The term “bottom bitch” or “bottom girl” refers to a pimp’s “most senior prostitute, who often trains new prostitutes and collects their earnings until they can be trusted.” United States v. Brooks, 610 F.3d 1186, 1189 (2010) (explaining the meaning of the term “bottom girl” as described in expert testimony in a sex trafficking prosecution against a pimp who exploited minors).

52 Stockholm syndrome, originally used in the context of hostage situations, occurs when a victim develops an emotional attachment to his or her captor. See NATHALIE DE FABRIQUE, Understanding Stockholm Syndrome, FBI LAW ENFORCEMENT BULLETIN 1, 11 (July 1, 2007). The FBI has described Stockholm syndrome as a “paradoxical psychological phenomenon wherein a positive bond between hostage and captor occurs that appears irrational in light of the frightening ordeal endured by the victims.” Id. Research has shown that other groups, including people coerced into prostitution or otherwise subjected to physical or sexual abuse can exhibit these symptoms even if they do not qualify as having the syndrome. See Shirley Julich, Stockholm Syndrome and Child Sexual Abuse, 14 JOURNAL OF CHILD SEXUAL ABUSE 107, 108-109 (2005). Factors that contribute to the development of traumatic bonding occur when: 1) The victim perceives a threat to his or her survival and believes that the captor will carry out that threat; 2) the victim perceives some small kindness from the captor; 3) the victim is isolated from perspectives other than those of the captor; and 4) the victim perceives an inability to escape the situation. See id. at 112 (citing DL Graham, et al., LOVING TO SURVIVE: SEXUAL TERROR, MEN’S VIOLENCE AND WOMEN’S LIVES, (1994); see also Natasha Korecki, Operation Targets Child Prostitution, CHICAGO SUN TIMES, November 9, 2010 (quoting Gregg Wing, FBI Director of Crimes Against Children in Chicago noting the presence of Stockholm Syndrome symptoms among child victims discovered in law enforcement efforts to combat domestic sex trafficking of minors); JESSICA LUSTIG, The 13-year-old Prostitute: Working Girl or Sex Slave, N.Y. MAGAZINE, 1, 39 (April 9, 2007); United States Department of Health and Human Services, Child Victims of Human Trafficking,
may stay with the abuser, victims coerced into prostitution are often caught in the same dangerous pattern.\textsuperscript{53} A hierarchy of prostitutes developed by the pimp is designed to function as a kind of surrogate “family” among the girls who work for him.\textsuperscript{54} This formation makes it more difficult for girls to break away from the situation creating a kind of psychological paralysis even though an outsider would understand it to be abusive.\textsuperscript{55} If a girl does try to leave, she will usually endure physical violence as a result.\textsuperscript{56}

The sophistication of the criminal enterprise run by the pimp or other type of third-party exploiter varies, but research shows that many pimps involved with youth are “known” to law enforcement agencies and often have high levels of involvement with gangs or other organized criminal enterprises.\textsuperscript{57} Experts, law enforcement officials, and media reports cite gangs and organized crime as being involved in the commercial sexual exploitation of youth.\textsuperscript{58} Some suggest that gangs have shifted from drugs to

\textsuperscript{53} See Kershaw, supra note 32, at 58; Melissa Farley, Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order To Keep the Business of Sexual Exploitation Running Smoothly, 18 Yale J.L. & Feminism 109, 125 (2006).

\textsuperscript{54} Gragg, et al., supra note 6, at 46.

\textsuperscript{55} Gragg, et al., supra note 6, at 46; see also, Norma Hotaling, et al., supra note 25, at 186 (describing a psychological paralysis that can cause victims to “feel like they cannot escape the life of prostitution, even when offered other opportunities”).

\textsuperscript{56} Domestic Minor Sex Trafficking hearing, supra note 4, at 126 (statement of Francey Hakes, National Coordinator for Child Exploitation, Prevention and Interdiction, Office of the U.S. Deputy Attorney General) (testifying that attempted escapes for the child often result in brutal beatings or even death).

\textsuperscript{57} See Mitchell, supra note 17, at 25. The study revealed that in cases in which pimps were identified in connection with children arrested for prostitution, 41% of the pimps were reportedly affiliated with larger organized enterprises, such as gangs or businesses. Id. In The other 59% of those cases, the pimp appeared to be operating independently and exploiting two or three girls. The same study examined arrest histories of those who were arrested for trafficking or prostituting youth, where it was available, and found criminal histories that included sexual offenses, drug and weapons charges, homicide and other violent offenses, and theft, sometimes in combination with each other. Id.

\textsuperscript{58} “Some of these networks of pimps and their organizations are very sophisticated, they’re interstate, requiring wiretaps and undercover sting operations to bring charges.” CBS News, Child Prostitutes Rescued by FBI, Police, February 23, 2009, available at http://www.cbsnews.com/stories/2009/02/23/national/main4821773.shtml; see, e.g., James Walsh, David Chanen, & Allie Shah, More than 20 Arrested in Human-Trafficking Sweep, Star Tribune, November 8, 2010 (describing a federal law enforcement sweep involving gang members who were allegedly forcing girls into prostitution); Albanese, supra note 10, at 5 (noting the presence of local, regional, national and international organized networks trafficking in children); Karen Zraik, Eight Charged in Sex-Trafficking Case, NY Times (June 3, 2010), at A28 (discussing an investigation into the trafficking of fifteen girls who were forced into prostitution by members of a gang). The article also
prostitution because “selling girls” is “just as lucrative but far less risky.”

It is not necessarily just youth sold on the street corner: pimp control over juvenile prostitution is associated with escort and massage services, private dancing clubs, conventions and major sporting events. In addition, the internet now plays a growing role in both the recruitment of prostitutes and marketing to customers. The internet allows organized operations and others to advertise girls and solicit clients in a way that eludes detection on the streets. On-line advertising also increases the minors’ isolation from the public and the public’s view because they are not seen on the street or in a public place or business.

Unfortunately, the pattern of violence and coercion is practically universal in the commercial sexual exploitation of youth. Numerous accounts by mental health professionals, public defenders, police, federal prosecutors, advocates, and the media identify similar patterns of manipulation and abuse that lure young people into a life they did not contemplate. Promises of a better life quickly turn to threats and violence, quotes New York City District Attorney Charles Hynes, who stated that increased gang involvement in the trade of women for prostitution had resulted in the creation of a special Sex Trafficking Unit within the District Attorney’s Office. Id.

See Domestic Minor Sex Trafficking Hearing, supra note 4 at 137 (testimony of Ernie Allen, cofounder of the National Center for Missing and Exploited Children) (stating that “organized crime is drawn to . . . [child sex trafficking] because it offers relatively low risk and high profit”); Urbina, supra note 2, at A1; see also Domestic Minor Sex Trafficking Hearing, supra note 4 at 137 (testimony of Ernie Allen, cofounder of the National Center for Missing and Exploited Children) (noting the involvement of organized crime in child sex trafficking and that “organized crime is drawn to this illicit industry because it offers relatively low risk and high profit”)

Estes & Weiner, supra note 16, at 60.

Domestic Minor Sex Trafficking Hearing, supra note 4, at 137 (statement of Ernie Allen, cofounder of the National Center for Missing and Exploited Children) (noting that offenders “don’t just parade these children on city streets” anymore but can solicit “clients” on the internet who can purchase the children from home or a hotel). In particular, Craigslist came under fire in recent years for its inclusion of an “Erotic Services” section. See CLAIRE CAIN MILLER, Craigslist Says It Has Shut its Section for Sex Ads, N.Y. TIMES, Sept. 15, 2010 (noting the role of online ads on Craigslist and other internet sites in child sexual exploitation).

In cases in the study where the law enforcement identified the existence of a pimp or other third party trafficking the youth, clients were located not only on the streets but through escort services (26%), the Internet (20%), and through massage parlors (9%). See Mitchell, supra note 17, at 26. The use of Internet ads lessens the risk of arrest for men buying sex with children because the transactions can be more difficult for law enforcement officials to detect when they are organized outside of public view. See Domestic Minor Sex Trafficking Hearing, supra note 4, at 137 (statement of Ernie Allen, cofounder of the National Center for Missing and Exploited Children).

See, e.g., ATTORNEY GENERAL’S ANNUAL REPORT TO CONGRESS AND ASSESSMENT
leaving girls even more isolated from any sources of support they may have had. Soon, they are fully reliant on their abusers.\textsuperscript{64} Children involved in commercial sexual exploitation often endure coercive conduct and physical abuse.\textsuperscript{65} Similarly, depending on the age of the minor, in most instances the act is considered statutory rape. Yet, despite this coercion and abuse, the most common response from law enforcement agencies is to pursue prosecution and detention of the youth.\textsuperscript{66}

\textbf{C. The Gender Implications and Prosecution}

Broader issues of gender, sexuality, and the law are integral to this discussion when one considers the notion that girls are prosecuted for prostitution at the same time that the laws consider the same act to be statutory rape. In addition, they are prosecuted at reportedly higher rates

\begin{itemize}
  \item \textsuperscript{64} In Our own Backyard, Child Prostitution and Sex Trafficking: Hearing before the Senate Judiciary Subcomm. on Human Rights and the Law, 111th Cong. 14 (2010) [hereinafter “Child Prostitution and Sex Trafficking Hearing”] (statement of Rachel Lloyd, Executive Director and Founder, Girls Educational & Mentoring Services).
  \item \textsuperscript{65} See, e.g., \textsc{Shared Hope International}, The National Report on Domestic Minor Sex Trafficking, i, v (2009); Wendi J. Adelson, \textit{Child Prostitute or Victim of Trafficking?}, 6 \textsc{U. St. Thomas L. J.} 96, 97 (2008) (showing that state laws allow for the prosecution of youth for prostitution in nearly every state); ECPAT-USA, Law Project Fact Sheet (noting that police are likely to treat exploited youth as offenders, perpetuating the cycle of arrest and detention of youth), available at http://ecpatusa.org/what-we-do/helping-children-in-america/law-project/; Bob Herbert, \textit{The Wrong Target}, \textsc{N.Y. Times} (Feb. 19, 2008) at A25; see, e.g., Lustig, supra note 52, at 5 (discussing a case in which a 13-year-old girl who had been arrested for prostitution bravely testified against her abusive pimps to a grand jury, but was shortly thereafter sent to a juvenile detention facility on her 14\textsuperscript{th} birthday).
\end{itemize}
than even the men who exploit them.\textsuperscript{67} The problem of “blaming the victim”\textsuperscript{68} in rape cases is analogous to the prosecution of girls who are coerced into commercial sexual exploitation. Specifically, the idea that a rape victim “invited” the crime due to her behavior or lifestyle is similar to the argument that girls who are sold for sex choose their exploitation.

Scholars note that girls have traditionally been socialized to be chaste or to “use any strategy to avoid sexual intercourse.”\textsuperscript{69} In contrast, men have traditionally been conditioned to pursue sexual activity more aggressively.\textsuperscript{70} Just as these social norms deterred progress in the laws that address rape and sexual assault in other arenas, they have arguably prevented progress in the laws that affect trafficked youth. Failure to recognize the inherently coercive nature of the prostitution of youth—regardless of the exchange of money—creates conflict in our legal jurisprudence, especially at the state level where there has been resistance to changing prostitution laws. The lack of progress toward a better solution underscores underlying prejudices or cultural assumptions that “good girls” who are worthy of protection would not accept payment for their own exploitation and would somehow escape. Furthermore, it highlights the force of the assumption that even if


\textsuperscript{68}In “blame the victim” cases, if a woman’s “pre-rape behavior violated traditional norms of female prudence or morality, many people blame her instead of the rapist.” See David Bryden & Sonja Lengnick, Rape in the Criminal Justice System, 87 CRIM. L. & CRIMINOLOGY 1194, 1196 (1997). Criminologists have noted the continuing problem of “victim blaming” in the development of rape law in the United States. Id. at 1196. Cf. SÜZSANNA ADLER, RAPE ON TRIAL 1,17 (1987) (discussing institutional sexism wherein, historically, victims of rape were subjected to the argument that their behavior caused the crimes, known as “victim precipitation.”). They were often blamed and endured the acquittal of their rapists. Id.; see also Michelle Oberman, Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape, 48 BUFFALO LAW REV. 703, 710-11 (2000) (discussing the common law standards governing forcible rape, which required corroboration of the victim’s testimony by other evidence, required proof of resistance by the victim, permitted questioning of the victim about her sexual habits, and allowed “cautionary instructions regarding the ease of making false accusations”).


\textsuperscript{70}Oberman, supra note 68, at 715 (arguing that men are conditioned “to single-mindedly go after sexual intercourse with a female, regardless of how they do it”). See Katharine K. Baker, Sex, Rape, and Shame, 79 B.U. L. REV. 663, 675-84 (1999); Robin Warshaw & Andrea Parrot, The Contribution of Sex-Role Socialization to Acquaintance Rape, in Acquaintance Rape: The Hidden Crime 75 (Andrea Parrot & Laurie Bechhofer eds., 1991).
they did accept payment, if they were truly victimized, they would quickly acquiesce to and cooperate with authorities once encountered.\textsuperscript{71} Such assumptions overlook the reality that the difficulty in assisting these girls is exacerbated by their lack of trust in law enforcement and social services,\textsuperscript{72} as well as an attachment to their pimps that is caused by complex psychosocial factors.

The prosecution and punishment of youth, primarily girls, for prostitution stems from practices developed in the early years of the juvenile and criminal justice systems. Indeed, girls were often prosecuted and detained for certain kinds of behaviors. Almost all girls who appeared in family court during its early years were charged with “immorality or waywardness.”\textsuperscript{73} The sanctions were severe in that girls were more likely than boys to be sent to “reformatories” for this behavior.\textsuperscript{74} Both then and today, the juvenile justice system’s dual concerns with “adolescent criminality and moral conduct” have reflected a “unique and intense preoccupation” with girls’ sexuality and their obedience to “parental authority.”\textsuperscript{75} For example, non-criminal status offense statutes, which include habitual truancy, running away from home or residential care, and general “incorrigibility,” affect girls and are used to detain them at a higher rate than boys.\textsuperscript{76} This has a disproportionate effect on minority girls who are overrepresented in the juvenile detention population.\textsuperscript{77}

These same themes persist today and are demonstrated by resistance to the reform of prosecution of exploited youth. Girls in general continue to be detained for behavior, such as running away, that would not lead to

\textsuperscript{71} See, e.g., Hanna, supra note 67, at 26-27 (discussing the relationship between the criminalization of girls’ behavior and the role of social condemnation against girls, the lack of understanding about their needs, and the lack of enforcement against the men who exploit them).

\textsuperscript{72} Often, as part of the acculturation process, girls associated with pimps are taught to evade and mistrust law enforcement. See, e.g., Jennifer McKim, People Need to Know what these Guys Have Done, BOSTON GLOBE, Oct. 20, 2010.

\textsuperscript{73} See John A. MacDonald & Meda Chesney-Lind, Gender Bias and Juvenile Justice Revisited: A Multiyear Analysis, 47 CRIME AND DELINQUENCY 173, 174 (2001).

\textsuperscript{74} Id.

\textsuperscript{75} See id.

\textsuperscript{76} See id. at 173 (noting that status offenses are more likely to be used to detain girls than boys, in contradiction to the Juvenile Justice Delinquency and Prevention Act); see also Paul E. Tracy, Kimberly Kempf-Leonard, & Stephanie Abramoske-James, Gender Differences in Delinquency and Juvenile Justice Processing: Evidence from National Data, 55 CRIME AND DELINQUENCY 171, 210 (2009).

\textsuperscript{77} ABA & Nat’l Bar Assoc., JUSTICE BY GENDER, 1, 16-17, 19-21 (2001) (discussing that girls are disproportionately charged with status offenses and that minority girls are overrepresented in the juvenile justice system).
detention for boys.78 Female youth may also receive court interventions that are generally longer, harsher, and more restrictive than those given to their male counterparts.79 Scholars and practitioners attribute this treatment to paternalism among decision-makers, fear of adolescent girls’ expressions of sexuality, and efforts to protect girls from further sexual victimization.80 Opposition to reforming prosecution of exploited youth is often grounded in the same notion that girls need to be prosecuted for their own “protection” and to keep them from further victimization.81 However, this argument perpetuates itself without a strong relationship to the reality of girls’ experiences with the juvenile justice system and in detention.82

D. The Relationship between Adolescent Consent and Autonomy

Questions about mental capacity and an adolescent’s ability to consent to sex can create complexity within advocacy communities, such as feminists, that one might otherwise expect to mobilize against the prosecution of children for prostitution. In other words, an adolescent’s ability to consent to sex (or lack thereof) in the context of prostitution implicates broader issues of adolescent autonomy, including reproductive rights, early emancipation, and opposition to the criminalization of sexual activity between teenagers.83 Therefore, by arguing a youth does not consent to sex in the context of prostitution, there is a concern that her legal ability to make decisions in other areas could be affected. For example, some suggest that the lack of progress toward reform for girls who are prosecuted for prostitution has been affected by a division within the feminist community about the legality of prostitution and consent issues.84

78 See SHERMAN, Pathways, supra note 5, at 17.
79 See Tracy, et al., supra note 76, at 180.
80 See SHERMAN, Pathways, supra note 5, at 17. Other reasons that girls are detained include: “detention to obtain services for girls with significant needs; fear of teen pregnancy and societal costs; . . . and intolerance of girls who are non-cooperative and non-compliant.” Id.; see also, Tracy, et al., supra note 76, at 180.
81 See infra Part II.A.
82 See infra notes 127-129 and accompanying text; see also, Sherman, Pathways, supra note 5, at 23-28.
84 See Hanna, supra note 67, at 4 (noting that prostitution has traditionally “divided feminist scholars and activists,” and that feminists have “shied away from the question of the legal status of child sex workers” because there is no agreement on what the legal status of adult commercial sex work should be); see, e.g., Margaret A. Baldwin, Split at the Root: Prostitution and Feminist Discourse of Law Reform, 5 YALE J.L. & FEMINISM 47 (1992).
In addition, discussion about consent as it relates to prostitution has potential implications for autonomy in decision-making among adolescents with regard to their reproductive health, such as access to birth control, or criminalization of sexual behavior among peers.

Because of the way these issues interrelate, advocacy groups and courts, including the Supreme Court, have grappled with the treatment of adolescents in different legal contexts that relate to adolescent mental capacity and decision making. The tensions in laws regarding adolescent capacities were well demonstrated by the issues raised in two Supreme Court cases in which the American Psychological Association (APA) weighed in as amici. In the 2005 case of *Roper v. Simmons*, the APA argued in the context of a capital murder trial that minors are not as developmentally mature as adults and are thus less blameworthy for their criminal actions. Fifteen years earlier, the APA argued in *Hodgson v. Minnesota* that adolescents possess the same mental capability and maturity as adults to make reproductive health decisions about birth control and

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85 For example, Title X of the Public Service Health Act, a federal family planning program provides federal funds to organizations to provide for improvements in maternal and infant health, lower the incidence of unintended pregnancy, reduce incidence of abortion, and lower rates of sexual transmitted diseases, 42 U.S.C.§300 et seq.; 42 C.F.R. §59.5(a)(4). From the time it was passed in 1970, services were to be provided regardless of age and the reduction of teen pregnancy was. *Id.* Courts have held that parental consent may not be required as a condition to access of services by adolescents. See e.g., *County of St. Charles v. Missouri Family Health Council*, 107 F. 3d 682 (8th Cir. 1997), cert denied, 522 U.S. 859 (1997); *Planned Parenthood Assoc. of Utah v. Matheson*, 582 F. Supp. 1001, 1006 (D. Utah 1983). However, at times, legislators have attempted to require parental consent which would limit the ability of an adolescent to consent to care. See e.g., Parental Notification Act of 1998, H.R. 4721, 105th Cong. (1998). In 1998, the Parental Notification Act was passed by the House of Representatives and would have required notification to parents before a teenager could receive contraception. *Id.* A similar measure was defeated in 1978. See 124 Cong. Rec. H37, 044 (1978); see also Michele Goodwin & Naomi Duke, *Capacity and Autonomy: A Thought Experiment on Minors’ Access to Assisted Reproductive Technology*, 34 HARV. J.L.& GENDER 503, 537-543 (2011) (discussing reproductive health care debates about adolescents and their consent to health care services).


abortion.\textsuperscript{88} When the Court made its landmark decision in \textit{Roper} to abolish the death penalty for juveniles, developmental scientific data cited by the APA played a crucial role.\textsuperscript{89} However, the APA and advocates advancing its position in \textit{Roper} faced criticism and were accused of “flip-flopping” because of their prior assertions in \textit{Hodgson}.\textsuperscript{90} For instance, Justice Scalia noted in dissent the APA’s seemingly contradictory positions and other groups questioned the validity of the arguments.\textsuperscript{91}

In this way, the argument that youth cannot legally consent due to immaturity and lack of capacity in one arena—such as prostitution—invites the argument that they are not capable of decision making or consent in other areas.\textsuperscript{92} However, commercial sexual exploitation can be distinguished from other contexts involving juvenile decision making for two reasons. First, cognitive and psychosocial development occur along independent tracks for adolescents.\textsuperscript{93} This can have varying effects on decision-making, depending on the type of event at issue and the pressure or coercion that is present.\textsuperscript{94} Therefore, just as those who support the APA approach distinguish the contexts of the reasoning at issue in \textit{Hodgson} and \textit{Roper}, so, too, can one distinguish a minor’s inability to “consent” in the context of sexual exploitation versus other areas of decision making.

\begin{itemize}
\item \textsuperscript{88} 497 U.S. 417 (1990).
\item \textsuperscript{89} \textit{Roper}, 543 U.S. at 569-70.
\item \textsuperscript{90} \textit{Roper}, 543 U.S. at 617 (Scalia, J., dissenting) (arguing that the APA, “which claims in this case that scientific evidence show persons under 18 lack the ability to take moral responsibility for their decisions, has previously taken precisely the opposite position before this very Court” (citing \textit{Hodgson v. Minnesota}, 497 U.S. 417)); Cunningham, \textit{supra} note 67; \textit{But see} Laurence Steinberg, \textit{et al.}, \textit{Are Adolescents Less Mature Than Adults: Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA “Flip Flop.”} 64 \textit{American Psychologist} 583, 586 (2009) (reconciling the APA’s position on youth access to abortion with its position on eligibility for the death penalty based upon the important distinctions between psychosocial and cognitive maturity).
\item \textsuperscript{91} \textit{Roper}, 543 U.S. at 617 (Scalia, J., dissenting); \textit{see also} Mutcherson, \textit{supra} note 86 at 927-928 (noting the tension in the arguments); Steinberg, \textit{et al.}, \textit{supra} note 90, at 584 (reconciling the seemingly contradictory positions).
\item \textsuperscript{92} \textit{See, e.g.}, Cynthia Ward, \textit{Punishing Children in the Criminal Law}, 82 \textit{Notre Dame L. Rev.} 429, 433-437 (2006); Mutcherson, \textit{supra} note 86, at 928; \textit{see, e.g.}, Steinberg, \textit{et al.}, \textit{supra} note 69, at 584 (noting concerns raised by the Executive Committee of the Society for Research of Adolescence that adolescent autonomy could be threatened based upon misinterpretation of arguments that adolescents are less blameworthy in response to the APA’s request for endorsement of its amicus brief).
\item \textsuperscript{93} \textit{See generally} Steinberg, \textit{et al.}, \textit{supra} note 90 for a thorough discussion of these principles of adolescent brain development.
\end{itemize}
Research and laws acknowledge the implicit and explicit coercion of children in the sex trafficking industry; such knowledge distinctly sets it apart from situations where an adolescent is making a decision absent such coercion. The law and our law enforcement policies must be sufficiently nuanced to recognize the scientific and legal distinctions surrounding adolescent decision making. Specific to this issue, the recognized implicit coercion inherent in the trafficking of minors specifically differentiates it from whether or not youth have the ability to make other decisions affecting their lives. Concerns about other policies that apply to adolescents need not stymie trafficking reform, an area that federal law implicitly views as coercive.

II. THE PROSECUTION OF CHILDREN FOR PROSTITUTION AND RELATED LAWS

The practice of prosecuting minors for prostitution conflicts in two major ways with other laws relating to minors. First, prosecuting youth directly opposes the policies underlying statutory rape laws. Because these statutes implicitly recognize that minors cannot legally consent to sex with adults, prosecuting a minor for that same act for pay is inherently contradictory. Next, the prosecution of domestic minors perpetuates a dichotomy between domestic-born and foreign-born victims of sex trafficking. Although children—regardless of place—endure similar exploitive acts, they encounter different results when facing authorities.

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95 See Bus, supra note 94, at 494.

96 See infra, Part II. C. 1.


98 See infra, Part II.C.

99 See Child Prostitution and Sex Trafficking Hearing, supra note 64, at 14 (testimony of Rachel Lloyd, Founder and Executive Director of Girls Education and Mentoring Services); Kittling, supra note 97, at 913.
While the response of authorities is changing at the national level, states have been slower to follow suit. Therefore, in addition to conflicts within state laws, the prosecution of domestically trafficked youth under state law stands in contradiction to federal law and international protocols on human trafficking. This section will examine each contradiction in turn, beginning with a critical analysis of current prosecution practices.

A. Prosecution for Prostitution in Juvenile Courts

Under the Model Penal Code, prostitution occurs when “a person knowingly offers to engage, agrees to engage, or engages in sexual conduct for a fee.” All states criminalize prostitution except parts of Nevada, and most state laws define prostitution similarly to the Model Penal Code. In addition, most states incorporate their penal codes into their juvenile court or family court statutes. This incorporation subjects juveniles to essentially the same penal code provisions as adults—meaning that juveniles can be charged with prostitution and other offenses—with the difference being that juveniles face different penalty schemes depending on each state’s juvenile laws.

The majority of states retain juvenile court jurisdiction up to age eighteen, but many states have lowered the age of jurisdiction of the criminal court to seventeen. However, in a few states, sixteen-year-olds are tried as adults. A juvenile who is adjudicated for the crime of

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100 See infra, Part II.C (discussing the Trafficking Victims Protection Act and the Federal Innocence Lost Initiative).


102 MODEL PENAL CODE § 43.02(1).


104 See e.g., WASH. REV. CODE § 9A.88.030 (2009).

105 See e.g., NY FAM CT ACT §301.2.(1) (defining juvenile delinquent as “a person over seven and less than sixteen years of age, who, having committed an act that would constitute a crime if committed by an adult…”).

106 In some states youth are tried in adult criminal courts for acts of prostitution depending on the jurisdictional statutes governing juvenile court. Thirty-nine states allow youth under eighteen to be tried as juveniles, in nine states, juvenile court has jurisdiction until the youth turns seventeen; in New York and North Carolina, youth sixteen and older are tried as adults. See Mark Soler, Dana Shoenberg, & Marc Schindler, Juvenile Justice: Lessons for a New Era, 16 GEO. J. ON POVERTY L.& POL’Y 483, 496 (2010).
prostitution, typically a Class B misdemeanor,\textsuperscript{107} is then subject to disposition, the equivalent to sentencing in the adult context. Dispositions, available to a juvenile court judge include the choice to grant a range of alternatives;\textsuperscript{108} however, in some areas prostitution is one of the few offenses for which the detention rate at disposition is nearly one hundred percent.\textsuperscript{109} The common use of detention for these misdemeanor cases is reminiscent of the early days of the juvenile court and its preoccupation with regulating the sexual behavior of young females and punishing behavior viewed as “immoral.”\textsuperscript{110} Recognition of the relationship between this entrenched thinking in the juvenile justice system and modern courts is helpful to understand why changing current practices can prove difficult.\textsuperscript{111}

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

Those who favor prosecuting youth for prostitution are not necessarily unaware of nature of the exploitive behavior involved but often argue in favor of prosecution in order to “protect” children. First, many state law enforcement personnel view prosecution as the only way to “protect” minors from their own behavior.\textsuperscript{112} They express a belief that the juvenile

\textsuperscript{107} For comparison purposes, Class B misdemeanors in New York include offenses such as criminal possession of marijuana in the fifth degree, N.Y.P.L. 221.10; loitering in the first degree, N.Y.P.L. 240.26; criminal trespass in the third degree, N.Y.P.L. 140.10; possession of graffiti instruments, N.Y.P.L. 145.65; and fortune telling N.Y.P.L. 165.65, among others. Given the minor nature of some of these other offenses, it is more surprising that youth can serve a year in confinement for an offense that falls within this category.

\textsuperscript{108} These will vary but, for example, in New York, it can include anything from adjournment, where good behavior will result in dismissal, to detention in a secured detention facility. Options in between those extremes include probation; an adjournment in contemplation of dismissal, which generally grants an offender the ability to seal her case after a year without further arrests; and a conditional discharge which permits an offender’s case to be discharged after one year if no new arrests or bad behavior, such as truancy, occur within that year.


\textsuperscript{110} See supra notes 73-78 and accompanying text.

\textsuperscript{111} For example, depending on the jurisdiction, if a youth is confined as a result of prostitution, she can have a longer period of stay in detention than an adult would. A Class B misdemeanor in New York carries only a possible 6 month term of incarceration in adult criminal court while juveniles are subject to a period of twelve months or more when detained, regardless of the offense. N.Y.FAM.CT.ACT §§ 350.1–355.5 (McKinney 2011).

\textsuperscript{112} See e.g., State’s Response to Petition for Review at 7 In the Matter of B.W., 313 SW3d 818 (Tex. 2010) (arguing that prosecution is necessary because such children are in
prostitute “should be ‘locked down’ so that he or she can receive services and perhaps be persuaded to provide information against his or her pimp.”\footnote{113} They also argue that it is too difficult to ensure that children will not run away and return to their abusers if they cannot be arrested and detained. The argument concludes that, as a result, prosecution is the only way to provide them with assistance.\footnote{114}

Second, those who view prosecution as a viable method for dealing with children who engage in prostitution argue that precluding them from prosecution would “decriminalize” the act and make it more difficult to fight prostitution.\footnote{115} A lack of prosecution, in this view, would create a “loophole” for those who exploit minors for prostitution.\footnote{116} A third argument in support of prosecution is related to the testimony of such children. Because their testimony is often necessary to successfully prosecute those who exploit them, some argue the threat of youth prosecution and the subsequent ability to detain children is the most effective way to obtain their testimony.\footnote{117} Finally, some proponents of prosecution simply underestimate the reality of coercion in this industry.

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\footnote{113}{See NEW YORK CITY BAR ASS’N, Committee on Sex and Law, Safe Harbor Memo, undated, available at http://www.nycbar.org/pdf/report/Safe_Harbor_Memo.pdf. The State of Texas has argued that prosecuting children for prostitution is necessary to allow them to obtain “access to individual counseling” and the “use of an educational specialist.” See State’s Response to Petition for Review at 7 In the Matter of B.W., 313 SW3d 818 (Tex. 2010). Texas also argued that children would go without assistance if they are not prosecuted for engaging in sex acts for pay because “[i]n an age of deadly sexually transmitted diseases, [inability to prosecute] places young persons who are highly vulnerable, and most needful of protection, outside the authority of the juvenile justice system to aid them.” Id. (citing Matter of C.S., 591 N.Y.S. 2d 691 (1992)).}
\footnote{114}{See, e.g., State’s Response to Petition for Review, at 6–8. In re B.W., 313 S.W.3d 818 (Tex. 2010) (No. 01-07-00274-cv).}
\footnote{115}{See State’s Response to Petition for Review, at 7. In re B.W., 313 S.W.3d 818 (Tex. 2010) (arguing that “it would be absurd to rule juvenile girls and boys may engage in prostitution immune from any criminal liability” because “pimps would be encouraged to seek out juveniles to act as their prostitutes since there would be no criminal liability for the prostitute herself”); Clyde Haberman, Helping Girls as Victims, Not Culprits, N.Y. TIMES, July 8, 2008, at B1 (noting that the Criminal Justice Coordinator in the New York City Mayor’s Office opposed New York legislation banning the prosecution of minors for prostitution and argued that “the best way to reach [girls] is not through decriminalization but rather using the leverage of court-ordered services”).}
\footnote{116}{See, e.g., State’s Response to Petition for Review, In the Matter of B.W. at 6-7, 313 S.W.3d 818 (Tex. 2010) (No. 01-07-00274-cv).}
\footnote{117}{See Editorial, Safe Harbor for Exploited Children, N.Y. TIMES, June 5, 2007.}
\end{footnotes}
They suggest that the bulk of these children know that their behavior is illegal and yet freely choose to enter the life of a prostitute in order to profit financially. This last argument is commonly made by those who oppose legislation to amend laws that penalize children for prostitution. The belief also still persists among many in law enforcement. As one study observed, police officers as a whole still do not “conceptualize all youth involved in prostitution as victims of commercial sexual exploitation.”

These positions ignore two important points. First, even if the prosecution of prostituted youth were precluded, other laws would continue to prohibit patronizing a prostitute and continue to impose harsh consequences upon those who exploit children by coercing them into prostitution. Second, it is easier for law enforcement personnel to build a relationship of trust with children who are not at risk of prosecution. This encourages youth to seek help from police rather than fearing punishment, and can also benefit prosecutors who may need youth to cooperate with them in order to prosecute the exploiters. Additionally, youth might be better protected if they did not fear retribution from the authorities. For example, they may be more likely to seek assistance from the public health community when they are in need of medical care. When victims seek health care due to violence that they endured or for sexual health concerns, a vital point of intervention and opportunity to assist victims is created.

On the whole, opponents of reform argue that exempting minors from prosecution will undermine the State’s ability to protect children and misguidedly encourage the sexual exploitation of minors. With regard to the protection aspect of the argument, laws exist or can be amended to permit a child welfare agency to provide medical and therapeutic services to survivors of commercial sexual exploitation. Legislation could also be

118 Carrie Baker, Jailing Girls for Men’s Crimes, MS. MAGAZINE (December 2010).
119 Id.
120 Stephanie Halter, Factors that Influence Police Conceptualization of Girls Involved in Prostitution in Six U.S. Cities: Child Sexual Exploitation Victims or Delinquents?, 15 CHILD MALTREAT. 152 (2010); see also, Finkelhor & Ormrod, supra note 15, at 1.
122 See, e.g., In the Matter of B.W., 313 S.W.3d. 818, at [6] (Tex. 2010) Haberman, supra note 29, at B1; Wingfield, supra note 224, at A22 (describing the opposition to a safe harbor bill in Georgia by various groups).
123 See, e.g., Illinois Safe Children Act; see also HALTER, supra note 4 at 158 (arguing that “policy makers need to sort out [the] roles and responsibilities of the police and Child
passed to require law enforcement agencies and others currently required to do so to report the sexual abuse of children by any person to law enforcement, not just a parent or caretaker.\textsuperscript{124} Thus, an opportunity for partnership is already in place or can be created. With multi-disciplinary expertise and expanded specialized services, such partnerships could be effective, especially given the fact that eighty-seven percent of recorded exploited youth in one study reported a desire to exit prostitution if they had access to support systems.\textsuperscript{125} In addition, victim-centered approaches have been successful at the federal level.

Ultimately, there is little support for the argument that children should be detained so that they can “receive services” and protection from themselves. While it is true that some minors run away and return to a pimp if they are not locked up,\textsuperscript{126} this does not justify ignoring rational consent arguments. It also does not merit overlooking the effects of successful victim-centered approaches over time. Further, while prosecution is advocated in the name of “protecting” and “providing services,” the juvenile justice system has demonstrated that it is not an effective purveyor of those services and, in fact, can increase harm to children.\textsuperscript{127} In addition to reconciling the current incoherence of the law, then, these failures to assist children provide powerful argument in support of reform. Evidence is overwhelming that confinement is failing to assist juveniles, particularly the vulnerable population of sexually abused girls, by detaining them and failing to attend to their problems.\textsuperscript{128} Specifically, girls’ detention centers sorely lack relevant programming.\textsuperscript{129} In addition, sexual misconduct

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\item \textsuperscript{124} See, e.g., Ga. Code Ann.\textsection 19-7-5 (2009) (amending the mandatory reporting statute to require reports notifying Georgia’s Department of Human Resources when a person has “reasonable cause to believe that a child is being sexually exploited by any person”).
\item \textsuperscript{125} See Curtis, supra note 29, at 9.
\item \textsuperscript{126} See Brown, supra note 97, at 473.
\item \textsuperscript{127} See, e.g., SHERMAN, GIRLS IN THE JUVENILE JUSTICE SYSTEM, supra note 5, at 22 (discussing how poor conditions in detention often exacerbate the difficulties facing youth who have suffered sexual and other trauma). “[W]ith rare exceptions, the overall quality of services for girls in placement is poor.”) \textit{Id.}; see also, Tracy, \textit{et al.}, supra note 76, at 180 (noting that “[e]ven among those criminal justice agencies that do try to respond to females, there are many inappropriate services, interventions, and sanctions”).
\item \textsuperscript{128} See Sherman, Pathways, supra note 5, at 23-28; see also Soler, \textit{et al.}, supra note 106, at 502. Soler also notes that despite high rates of prior sexual abuse among girls in detention facilities, there are few evaluations determining which programs help girls most. \textit{Id.} at 502 (citing Dana Joes Hubbard & Betsy Matthews, Reconciling the Differences Between “Gender Responsive” and the “What Works” Literatures to Improve Services to Girls, 54 CRIME\& DELINQUENCY 225 (2008)).
\item \textsuperscript{129} See Sherman, Pathways, supra note 5, at 23-28; see also, Soler, \textit{et al.}, supra note
and harmful behavior by staff in these facilities is well documented. Often, girls are released from detention with few referrals for services that will help them build a healthy life.

2. The Conflict with Statutory Rape Laws

The application of prostitution statutes to juveniles raises the practical question about whether a juvenile can be guilty of an act of prostitution when he or she cannot legally consent to sex and when that same act includes his or her exploitation by definition. All states and the federal government have laws that prohibit sex between an adult and a minor. For purposes of this discussion, ―statutory rape‖ laws refer to laws that define the age below which a person is legally incapable of consenting to sexual activity with an adult. States vary in their implementation and definition of this principle, including the age and conditions under which the law will consider the presence of consent. The purpose of these laws in modern terms is to protect minors from sexual exploitation and ―those who would prey on their vulnerability.‖ Numerous studies and interdisciplinary scholarship note that that the development stage of
adolescence leaves youth vulnerable to coercive or abusive sexual conduct.\textsuperscript{134} The principle that an underage child cannot legally consent to sex originates in the common law.\textsuperscript{135} The age of consent is sixteen under federal law,\textsuperscript{136} in thirty-four states, and in the Model Penal Code; six states elect age seventeen as the age of consent and, in the remaining eleven states, the age of consent is age eighteen.\textsuperscript{137} Though the specific age varies among states, all of them have laws dictating that minors under a certain age cannot legally consent to sex.\textsuperscript{138}

Only twelve states have laws that define a uniform age of consent to sex.\textsuperscript{139} Most states apply a two-tiered approach when addressing adult sex with a minor.\textsuperscript{140} The law in those states distinguishes between sex with a younger child and sex with an older teen by allowing for some circumstances where “factual” consent may negate the prosecution of the

\textsuperscript{134} See id. at 704-705 (citing a myriad of studies dealing with the impacts of and issues raised by adolescent sexuality and abuses).
\textsuperscript{135} See, e.g., State v. Hazelton, 915 A.2d 224, 233-34 (Vt. 2006) (“The rule that an underage child cannot consent to sex need not derive from statute . . . but is a part of common law.”). While the age of consent was placed at age ten at common law, every state has raised this age by statute. See Payne v. Commonwealth, 623 S.W. 2d 867, 875 (1981); see also GLOSSER, et al., supra note 132, at 14, 15 (providing a table listing the age of consent for all fifty states).
\textsuperscript{137} See GLOSSER, et al., supra note 132, at 14, 15 (providing a table listing the age of consent for all fifty states). Under the Model Penal Code, statutory rape occurs when a person has sexual intercourse with another person who is “less than sixteen years old and the actor is at least four years older than the other person.” MODEL PENAL CODE § 21323(1)(a)(2001). BLACK’S LAW DICTIONARY uses a similar definition, stating that statutory rape is “[u]nlawful sexual intercourse with a person under the age of consent (as defined by statute), regardless of whether it is against that person’s will.” BLACK’S LAW DICTIONARY at 1288 (9th ed. 2009). It defines “age of consent” as “[t]he age, usually set by statute as 16 years, at which a person is legally capable of agreeing to marriage (without parental consent) or to sexual intercourse.” Id. at 66.
\textsuperscript{138} See United States v. Ebert, 561 F.3d 771, 776 (2009) (“Because the victims [in this commercial sexual exploitation case] were minors and could not legally consent [to sex], the government did not need to prove the elements of fraud, force, or coercion, which are required for adult victims.”); see also United States v. Abad, 350 F.3d 793, 797 (8th Cir. 2003) (recognizing that children cannot consent to sexual contact and stating that “‘[w]hen sexual assaults are committed upon children . . . consent is not a defense’” (quoting Guarro v. United States, 237 F.2d 578, 581 (D.C. Cir. 1956))).
\textsuperscript{139} See GLOSSER, et al., supra note 132, at 15, 16 (providing a table that identifies those twelve states and their respective ages of consent: age eighteen in California and Wisconsin; age seventeen in Illinois and New York; and age sixteen in Georgia, Kansas, Kentucky, Massachusetts, Michigan, New Hampshire, and Vermont).
\textsuperscript{140} MODEL PENAL CODE, §25.05; See GLOSSER, et al., supra note 132, at 15, 16.
alleged offender for statutory rape.\textsuperscript{141} Therefore, while it is a crime to have sex with any child under seventeen in most states, some states create exceptions if that child is above age fourteen.\textsuperscript{142} A common example of an exception occurs if the accused is no more than three or four years older than the victim.\textsuperscript{143}

In sum, the existence of statutory rape laws creates questions for courts and legislatures when considering prosecution. When a child explicitly lacks the capacity to consent to sex, as declared by state law how can that child still be eligible for prosecution for the same sexual act? Furthermore, if the law contains a two level approach that includes some forms of “factual consent” for older teens, to what extent does that negate the implicit coercion argument as applied to older teens who are prostituted? These and other questions are being raised and challenged in the court system. When the first question was raised in New York, the Court held that a child’s inability to consent to sexual acts did not prohibit the state from using prostitution statutes to prosecute her for those acts.\textsuperscript{144}

\textit{B. State Court Challenges to Prosecution of Minors for Prostitution}

Until recently, New York was the only state whose appellate court had considered a challenge to the prosecution eligibility of minors for prostitution.\textsuperscript{145} It held that a child’s inability to consent to sexual acts did not prohibit the state from using prostitution statutes to prosecute her for engaging in sex acts for pay.\textsuperscript{146} In 2010, however, the Texas Supreme Court took on the issue and reached the opposite conclusion, holding that a youth’s inability to consent to sexual acts \textit{does} prohibit the state from prosecuting the youth of a certain age for engaging in prostitution, in direct contrast to the New York ruling.\textsuperscript{147} This created a split in the two states whose appellate and supreme courts have ruled on the issue.

\textsuperscript{141} For example, in Pennsylvania, children under thirteen cannot consent to sex under any circumstances and, therefore, sexual relations with a thirteen-year-old is always considered statutory rape. PA CONS. STAT., Title 18 \$3121. However, a person between age thirteen and sixteen in Pennsylvania can factually consent to sex if the two parties are less than four years apart. PA CONS. STAT., Title 18 \$3125. Similarly, some laws allow for “factual consent” for sexual activity between a fifteen year old and a person who is less than four years older than him or her.

\textsuperscript{142} GLOSSER, et al., \textit{supra} note 132, at 14, 15.

\textsuperscript{143} Id.

\textsuperscript{144} \textit{In re Nicolette R.}, 9 AD 3d 270, 779 NYS 2d 487 (2004).

\textsuperscript{145} Id.

\textsuperscript{146} \textit{In re Nicolette R.}, 9 AD 3d 270, 779 NYS 2d 487 (2004).

\textsuperscript{147} \textit{In the Matter of B.W.}, 313 S.W, 3d 818, 821 (Tex 2010).
The Texas Supreme Court took a major step forward toward reconciling existing laws. The decision was the first of its kind to challenge current legal contradictions, holding that “[b]ecause a 13 year old child cannot consent to sex as a matter of law...[the minor] cannot be prosecuted as a prostitute.”

1. The Rejection of the Consent Argument by the New York Court of Appeals

The question of a minor’s consent in a prostitution case reached New York’s appellate court of appeals in 2004. There, a minor challenged the rationale of prosecuting children for prostitution if they are under the age of consent. The court rejected the minor’s argument. Nicolette R., the appellant, was a twelve year–old girl who had proffered to perform oral sex on an undercover police officer for $40. The court held that although her age made her incapable of consenting to any sexual act rendered unlawful by the penal code this circumstance was “irrelevant to the issue of whether she was properly found to have committed an act... which would constitute the crime of prostitution.” The court reasoned that the relevant statute defining prostitution contains no age requirement, and thus, minors could be subject to prosecution under it. The court also found that while underage status constitutes a lack of consent under the penal law sections dealing with statutory rape, those statutes did not bear any relationship to prostitution when it involved a minor. The appellant argued that the statutory rape laws declaring her incapable of consent dictated dismissal of the case, along with community interests in protecting children. The

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149 Nicolette R., 9 AD 3d at 779.
150 Id.
151 Id.
152 Id. (citing N.Y. PENAL LAW §230.00).
153 Id. (citing N.Y.PENAL LAW §130.05(3)(a)).
154 See SCHRANDT, Nicolette’s Story, PRACTICING LAW INSTITUTE LITIGATION AND ADMINISTRATIVE HANDBOOK SERIES: CRIMINAL LAW AND URBAN PROBLEMS (2009) (quoting appellant’s brief written by the child’s attorney, Katherine Mullen, who later was central in the passage of New York’s Safe Harbor Act). While the Court rejected her argument, it found that the lower court failed to consider the best placement and noted that the facility where she was placed by the court was not adequate to provide her with the specialized services that she needed. Nicolette R., 9 AD 3d at 271. This finding is illustrative of the disjunction between detention and the actual delivery of services to these
failure of the court to reconcile the incongruity between statutory rape laws and the prosecution of young people for prostitution led Nicolette’s attorney and advocates in New York to focus on legislative efforts to amend the law. It should be noted that Nicolette’s life experience reveals many of the signature characteristics of children involved in prostitution. This is relevant when considering legislation and court solutions that will best address the problem. As a young child, she suffered sexual abuse and abandonment by her parents. After running away from residence with her aunt where she was also abused, she became “under the control of an adult male pimp” and was forced into prostitution. Psychologist reports noted that she bore scars, burns, and recent wounds, indicating that she endured violence during the time she was exploited.

The court’s decision illustrates the common approach to this problem up to that point in time in state courts. While federal trafficking laws were in place before the Nicolette decision, they were only amended more recently to better address the needs of these children. In addition, a handful of states passed statutory reforms after Nicolette and focused on curbing commercial sexual exploitation and enhancing penalties for trafficking of children. The impact of this cultural shift was demonstrated by the Texas Supreme Court’s opinion, which embraced the same argument that the New York court had rejected.

2. The Texas Supreme Court’s Decision that Consent Matters

Six years after the New York court issued its decision in Nicolette, the Texas Supreme Court faced the same legal question in Matter of B.W. There, it held that a child could not be charged for prostitution because children under the age of fourteen cannot legally consent to sex. The court reasoned that where children lack the capacity to consent to sex as a matter of law, it is incongruous to charge that them with prostitution. The facts of B.W., were quite similar to those that were before the New York court in Nicolette. B.W., age thirteen, offered to engage in oral sex

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157 See infra Section III.A.
158 SCHRANDT, Nicolette’s Story, supra note 104.
159 Id.
160 Id.
161 See infra Part II.C.
162 See CONN. GEN. STAT. § 46a-170 (2004); FLA. STAT. § 796.035 (2004); HAW. REV. STAT. § 489N-2 (2004); MO. REV. STAT. § 556.203 (2004).
163 Matter of B.W., 313 S.W.3d 818 (Tex. 2010).
164 Id.
with an undercover police officer in exchange for twenty dollars. She was arrested and charged with prostitution.\textsuperscript{165} At trial, B.W. pled to the allegation that she “knowingly agree[d] to engage in sexual conduct. . . for a fee.”\textsuperscript{166} A court report described B.W.’s history of sexual and physical abuse, stating that she was “emotionally impoverished, discouraged and dependent.”\textsuperscript{167} B.W. had also run away from foster care the prior year.\textsuperscript{168} The court adjudicated her a juvenile delinquent and placed her on probation for eighteen months.\textsuperscript{169}

On appeal, B.W. argued that children under fourteen could not be prosecuted for engaging in prostitution because “the legislature cannot have intended to apply the offense of prostitution to children under fourteen because children below that age cannot legally consent to sex.”\textsuperscript{170} In Texas, sex with a minor under the age of fourteen is criminalized under any circumstance with differences for older minors depending on the age of the other party.\textsuperscript{171} The court held, therefore, that “[w]hile no statute explicitly states that children under fourteen are unable to provide consent for all purposes, the inability of children to consent to sex as a matter of law is both part of the common law and a necessary inference from [the relevant provision of the Texas Penal Code addressing statutory rape] and other statutes dealing with sexual exploitation of a child.”\textsuperscript{172}

The court agreed with the appellant’s argument about the intent of the legislature.\textsuperscript{173} The court reasoned that the state’s statutory rape and trafficking laws were designed to protect children from exploitation and concluded that prostitution laws could not be applied to children under

\textsuperscript{165} Id. at 819. B.W. was initially charged in criminal court, however when it was revealed that she was a juvenile, the charges were refiled in family court. Id.
\textsuperscript{166} Id.
\textsuperscript{167} Id. The psychologist’s report noted that B.W. was “preoccupied with self-doubt and perceptions of physical unattractiveness and reacts with deep frustration and unhappiness by becoming self-punitive, self-demeaning, and hypersensitive to her shortcomings. She yearns for acceptance and affection. . . .” See Amicus Curiae Brief of Children at Risk in Support of Petition for Review, Matter of B.W., 2010 WL 430061(internal citation omitted).
\textsuperscript{168} See State’s Response to Petition for Review at 1 In the Matter of B.W. 313 SW3d 818 (Tex. 2010) (No. 01-07-00274-cv).
\textsuperscript{169} Matter of B.W., 313 SW3d at 819. On appeal, the appellate court affirmed the trial court’s decision. B.W. sought relief with the Texas Supreme Court.
\textsuperscript{170} Id.
\textsuperscript{171} TEX. PENAL CODE §22.001.
\textsuperscript{172} Matter of B.W., 313 S.W.3d. at 823 (citing Helena Chem. Co. v. Wilkins, 47 S.W.3d 486, 493 (Tex. 2001) and noting that the court could “consider the common law and laws on the same or similar subjects in determining legislative intent”).
\textsuperscript{173} Id. at 821.
fourteen because prostitution of youth involves exploitation.\(^{174}\) It also found that recently enacted laws in Texas to address sexual trafficking and child exploitation supported its analysis of the legislative intent in the penal code.\(^{175}\) In doing so, the court found that related statutes provided examples of the legislature’s belief in “the importance of protecting children from sexual exploitation and the awareness that children are more vulnerable to exploitation by others even in the absence of explicit threats or fraud.”\(^{176}\)

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

> It is difficult to reconcile the legislature’s recognition of the special vulnerability of children and passage of laws for their protection, with an intent to find that children under fourteen understand the nature and consequences of their conduct when they agree to commit a sex act for money, or to consider children quasi-criminal offenders guilty of an act that necessarily involves their own sexual exploitation.\(^{177}\)

In its discussion about the nature of consent, the court acknowledged the rationale behind statutory rape laws that younger children cannot consent to sex because they lack the capacity “to appreciate the significance or consequences of agreeing to sex.”\(^{178}\) The court cited the 2005 Roper and 2010 Graham Supreme Court decisions as support for this notion, employing language that recognized the differences between adolescent and adult minds and the bearing of this developmental distinction on

\(^{174}\) Id. at 821. The court noted that under the Penal Code, a person who compels by any means a child under eighteen to commit prostitution has committed “a crime [that is] equivalent to” the use of force, threat or fraud to compel an adult to commit prostitution. Id. In addition, that person is charged with a second-degree felony when compelling a minor versus a misdemeanor for a perpetrator who compels an adult. Id. (citing TEX. PENAL CODE §§43. 05). The court cited other relevant statutes, finding it significant that the sexual assault of a child under age fourteen is considered “aggravated sexual assault” and is subject to the same consequences as the rape of an adult involving serious bodily injury or other aggravating circumstances. See id. (citing TEX. PENAL CODE §§22.011, .021). The court also included the imposition of harsher penalties for inducing a child under fourteen to engage in sexual conduct or performance under TEX. PENAL CODE §§43.25(e) and the imposition of harsher penalties for trafficking a child under eighteen for purposes of compelling prostitution or sexual performance under TEX. PENAL CODE §20A.02. Id.

\(^{175}\) Id.

\(^{176}\) Id.

\(^{177}\) Id. at 821-822.

\(^{178}\) Id.
culpability.\textsuperscript{179}

\textit{B.W.} represents significant progress toward realizing a coherent approach toward youth who are prostituted. However, it is not without limitations. Currently, children over thirteen remain eligible for prosecution for prostitution in Texas, based on the court’s analysis of the state’s two-tier statutory rape law. Just one year prior to the \textit{B.W.} decision, an appellate court in Texas upheld the prosecution of a sixteen year old for prostitution. The \textit{B.W.} decision would not dictate the outcome of this case if it were tried today,\textsuperscript{180} though; arguably it provides persuasive authority to decide against eligibility of all minors for prosecution, as well, given its reference to other state laws and Supreme Court language. The New York and Texas cases potentially signal a new era in the law’s treatment of the commercial sexual exploitation of youth. The differing outcomes highlight the developments in sex trafficking laws during the years between the decisions, the evolving status of domestic prostituted youth as victims, and the role of scientific information about adolescent development in the courts. Both of the U.S. Supreme Court cases relying on emerging science about adolescent development were decided after \textit{Nicolette} and cited in \textit{B.W.} Those decisions provided the Texas Supreme Court with significant additional support for its reasoning.\textsuperscript{181} Indeed, \textit{BW} was the first court decision to cite \textit{Graham} outside of the sentencing context that was at issue in the case, signaling its instructive discussion for courts considering questions that implicate adolescent behavior.

The Texas court also acknowledged that the state legislature’s passage of a strict anti-trafficking law had significantly influenced its decision.\textsuperscript{182} Notably, Texas was one of the first states to enact such a statute criminalizing trafficking.\textsuperscript{183} In contrast, New York had not yet passed anti-trafficking laws when New York grappled with consent and prosecution of youth for prostitution in 2004; the legislature subsequently passed such laws three years later in 2007.\textsuperscript{184} In fact, in 2004, only four states had anti-

\textsuperscript{179} Id. at 823 (citing \textit{Roper v. Simmons}, 543 U.S. 551, 569 (2005) and \textit{Graham v. Florida}, (2010) (citing the Supreme Court’s discussion of “the reduced mental capacity of minors as compared to adults”)).


\textsuperscript{181} \textit{Matter of B.W.}, 313 S.W.3d. at 823.

\textsuperscript{182} \textit{Id.} at 821.


\textsuperscript{184} Anti-Trafficking laws in New York passed in 2007. \textit{See N.Y. Penal Law §230.34} (creating the crime of “Sex Trafficking” as a Class B Felony); \textit{New York Soc.Ser.Laws §483-cc(b)} (incorporating the federal definition of “severe trafficking victim” to assess trafficking victims and including protocols for police encounters with minor victims).
trafficking legislation that allowed for the prosecution of domestic sex traffickers.\footnote{These states were Florida, Missouri, Texas, and Washington. Center for Women Policy Studies, Fact Sheet on State Anti-Trafficking Law, (February, 2011), \textit{available at} http://www.centerwomenpolicy.org/documents/FactSheetonStateAntiTraffickingLawsFebruary2011.pdf} Six years later, by 2010, forty-three states and the District of Columbia had passed anti-trafficking legislation;\footnote{\textit{Id.}} many states had increased penalties for exploitation of minors, as Texas did, and some had authorized victim restitution and services.\footnote{\textit{Id.}}

Finally, though the federal TVPA was passed in 2001, it had not yet proven to be a strong tool for protecting domestic minors in 2004 when New York decided the \textit{Nicolette} case. Indeed, it was not until 2005 that Congress amended the statute to recognize domestic minors and specifically direct funding to their needs.\footnote{\textit{Trafficking Victims Protection Reauthorization Act, 22 U.S.C. § 7102(3).}}

\section*{C. Federal Trafficking Laws Treating Juveniles as Victims}

\subsection*{1. Evolution of the TVPA}

Federal sex trafficking laws initially focused solely on addressing international trafficking issues.\footnote{The TVPA noted that 700,000 persons annually are trafficked within or across international borders, including 50,000 women and children trafficked \textit{into} the United States. \textit{See} 22 U.S.C. § 7101 (2006) (emphasis added); T.V.P.R.A. of 2005, ch. 22, sec. 7101, § 2(3), Pub. L. No. 109-164, 119 Stat. 3358 (acknowledging in its legislative findings that international victims had been the primary focus of federal efforts); Jennifer M. Chacon, \textit{Misery and Myopia: Understanding the Failures of United States Efforts to Stop Human Trafficking}, 74 \textit{FORDHAM L. REV.} 2977, 2991 (2006).} Only recently has the TVPA responded to the need to protect domestic youth. The protection of foreign-born persons subject to commercial sexual exploitation was considered the initial focus of the TVPA of 2000.\footnote{TVPA § 102(b)(24), 22 U.S.C. § 7101(b)(24); T.V.P.R.A. of 2005, ch. 22, sec. 7101, § 2(3), Pub. L. No. 109-164, 119 Stat. 3358 (acknowledging in its legislative findings that international victims were the primary focus of federal efforts).} The need to protect foreign-born non-citizens was more readily recognized by the public and federal law enforcement officials than the plight of domestic youth. There was appropriately, broad support for legislation improving the plight of foreign-born women and children, as this was considered a nonpartisan issue.\footnote{See Lindsey Strauss, \textit{Note, Adult Domestic Trafficking and The William Wilberforce"}
lack documentation that will enable them to remain in the U.S., they are particularly vulnerable, and their abusers exploit their fear of deportation and limited access to outside assistance. The TVPA thus sought to aid these victims by providing special immigration status and victim assistance. Even with this focused approach, however, the law’s initial effectiveness in assisting international sex trafficking victims in the U.S. was limited.

Later, as domestic minors gained attention, the TVPA was recognized by advocates as an instrument that could potentially address the needs of domestic youth, as well. Commonly viewed as blameworthy street youth “prostituting” themselves, domestic youth have gradually been included in the federal legislative discourse about sex trafficking in the U.S. From its inception, the language of the TVPA recognized that all children under age eighteen induced into sex trafficking are “severely trafficked persons.” Therefore, technically the language did not foreclose the protection of domestic minors at the start, however, its focus was on foreign born victims. Its definition ensures that child victims do not have to prove “coercion, duress, or fraud” to be considered “severely trafficked” for purposes of protection under the TVPA. In addition, the TVPA grants access to services, including medical care and safe housing. Therefore, even


Chacon, supra note 190, at 2991 (noting that “while there has been much discussion of trafficking, the issue has been cast as a foreign problem with unfortunate domestic manifestations”); April Rieger, Note, Missing the Mark: Why the Trafficking Victims Protection Act Fails to Protect Victims in the United States, 30 HARV. J. L. & GENDER 231 (2007); Charles Song & Suzy Lee, Between a Sharp Rock in a Very Hard Place: The Trafficking Victims Protection Act and the Unintended Consequences of the Law Enforcement Cooperation Requirement, 1 INTERCULTURAL HUM. RTS. L. REV. 133, 136-137 (2006).

See, e.g., Albanese, supra note 10; Domestic Minor Sex Trafficking Hearing, supra note 4; Child Prostitution and Sex Trafficking Hearing, supra note 64; Exploiting Americans on American Soil Hearing, supra note 46.

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

TVPA establishes that, to the maximum extent practicable, victims of severe trafficking shall not be detained in facilities inappropriate their status as crime victims, shall receive necessary medical care and assistance, and shall be provided with protection if
though children like Elana, Nicolette, and B.W. are “severely trafficked persons” under the TVPA, they are still eligible for prosecution under most state laws.

Rachel Lloyd, founder of one of the few residential programs in the United States that specializes in working with sexually exploited youth, has advocated against the prosecution of young female victims with whom she works. Arguing for uniform change at the state and federal level for youth charged with prostitution, Ms. Lloyd notes the contradiction and flaws in current practices wherein:

Katya from the Ukraine will be seen as a real victim and provided with services and support, but Keisha from the Bronx will be seen as a “willing participant”, someone who is out there because she “likes it” and who is criminalized and thrown in detention or jail.

The statement captures the contradiction in state and federal law and practice and the resistance to change the practice of prosecuting domestic youth. This resistance includes the position of some in law enforcement that prosecution is necessary, as well as the tendency of the juvenile justice system to punish girls for some behaviors based on a theory that it is the best way to protect them. While the TVPA and its enforcement did not initially focus on assisting domestic youth, Congress officially recognized their plight in 2005 when it reauthorized the law. The Innocence Lost Initiative was created by the U.S. Department of Justice in 2003 and dedicated to the needs of domestic minors who have been prostituted. With the 2005 TVPA reauthorization, the law specifically included new provisions that acknowledged the need to help children born in the U.S.

Of note, the TVPA set up a pilot program to establish residential rehabilitative services specifically to protect juvenile victims encountered their safety is at risk or if there is a danger of additional harm by recapture by traffickers. 22 U.S.C. § 7105, § 7107(a),(b),(c).

See Child Prostitution and Sex Trafficking Hearing, supra note 64, 14 (statement of Rachel Lloyd, Executive Director and Founder, Girls Educational & Mentoring Services).

Id.

See supra Part I.C.


United States Department of Justice, Office of the Attorney General, ATTORNEY GENERAL’S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF THE UNITED STATES GOVERNMENT’S EFFORTS TO COMBAT HUMAN TRAFFICKING IN THE FISCAL YEAR OF 2007, 1, 23 (2008).

by state law enforcement. In addition, it included express language that acknowledged—for the first time in the U.S. Code—that runaway and homeless children in the U.S. are vulnerable to exploitation. The explicit mention of funding appropriations for programs aimed at domestic victims demonstrated that the federal government officially recognizes that domestic-born victims are in need of protection and services, just as foreign-born sex trafficking victims are. The U.S. Department of Justice also provided additional training for federal and local law enforcement and social services providers. These providers are typically unaware of the accompanying relationship between youth prostitution cases and emerging developments about how to treat these youth instead as victims of commercial sexual exploitation. At the same time, however, there has been little practical reform for domestic-born victims of sexual exploitation who are prosecuted in juvenile courts.

2. The Conflict in Status of Minors under State and Federal Law

With respect to victims, federal policies recognize that “identifying, protecting, and gaining the trust of victims” are perhaps the most difficult but also the most important steps towards combating this type of exploitation. Criminalizing a victim and arresting her can make a minor more hostile and less willing to cooperate against a pimp. Advocates of a more “victim-centered law enforcement” approach note that not only is it “a matter of decency” to recognize prostituted children as victims instead of perpetrators, but it is also a more effective way to obtain their cooperation.

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204 42 U.S.C. §14011b.
206 See U.S. Dep’t of Justice, Assessment of U.S. Government Activities to Combat Trafficking in Persons in Fiscal Year 2005, 1, 37 (2006) (noting a one week intensive training seminar developed and provided in conjunction with the Innocent Lost Initiative and National Center on Missing and Exploited Children).
207 Child Prostitution and Sex Trafficking Hearing, supra note 64, at 9 (statement of Beth Phillips, United States Attorney for the Western District of Missouri); see supra, Part II. B, 2.
208 U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 1, 37 (2007).
209 See, e.g., Urbina, supra note 2, at A1 (similar to the federal approach viewing children as victims rather than criminals, the article discussed that police in Dallas, Texas reach out to youth instead of arresting them because “[i]f the girls are arrested for prostitution, they are at their least cooperative”). Cf. 42 U.S.C. § 14011(2)(A)(iv) (noting the importance of providing law enforcement personnel with training in how to establish trust with victims so that they will cooperate).
with law enforcement personnel.\textsuperscript{210} Thus, not only is victim-centered approach beneficial law enforcement, it is also consistent with the federal law enforcement position expressed by the F.B.I. that “children can never consent to prostitution. It is always exploitation.”\textsuperscript{211}

Experts in this area of federal law enforcement recognize that gaps in services result in detention for children instead of access to meaningful assistance.\textsuperscript{212} Federal officials report that this poor treatment can lead to difficulty in gaining a victim’s cooperation.\textsuperscript{213} Federal law mandates that treatment and appropriate medical attention be provided to victims of severe trafficking with the goal of gaining their trust and cooperation.\textsuperscript{214} This statutory and cultural shift at the federal level has improved policies and treatment of victims. There is a need for federal law enforcement officials to work in tandem with state officials on investigations of prostitution rings and instances of sexual exploitation of minors and also to find ways to safely house the victims. This need can be fulfilled most successfully if reform occurs at the state level to allow law enforcement approaches to be in sync with one another.\textsuperscript{215} The progress also continues to leave room for improvement at the federal level, as well. Even with the more sophisticated approach led by the federal government, girls who are not prosecuted may be instead held and detained for extended periods of time as material witnesses.\textsuperscript{216} This practice, while an improvement to prosecuting them, is

\begin{itemize}
\item \textsuperscript{211} See \textit{Exploiting Americans Hearing}, supra note 46, at 6 (statement of Chris Swecker, Assistant Director, Criminal Investigation Division, FBI) (discussing the federal government’s position regarding domestic sex trafficking of minors).
\item \textsuperscript{212} \textit{Domestic Minor Sex Trafficking hearing}, supra note 4, at 126 (statement of Francey Hakes, National Coordinator for Child Exploitation, Prevention and Interdiction, Office of the U.S. Deputy Attorney General).
\item \textsuperscript{213} \textit{Id.}
\item \textsuperscript{214} See \textit{Trafficking Victims Protection Act of 2000} § 107(c)(1)(a) (noting that victims should not be detained in facilities that are “inappropriate to their status as crime victims”).
\item \textsuperscript{215} See U.S. DEP’T OF JUSTICE, Annual Report on 2009, supra note 63, at 15 (stating that in 2010, the government seeks to “provide greater support and service for trafficking victims, including more full-time victim specialists and additional shelter options for minor victims”); see also, \textit{Domestic Minor Sex Trafficking hearing}, supra note 4, at 126 (statement of Francey Hakes, National Coordinator for Child Exploitation, Prevention and Interdiction, Office of the U.S. Deputy Attorney General) (describing a program to fund local services in for cities to assist domestic minors).
\item \textsuperscript{216} See e.g., U.S. v. Brice, ___ F. 3d ___ (3rd Cir. 2011) (noting that six or seven girls were held as material witnesses in trial against defendant for child sex trafficking and
not a model alternative as this area of the law develops. The legality of these extended detentions and the scope of the Material Witness Statute is, in fact, questionable. 

Due to this growing awareness that children born both in and outside of the United States are trafficking victims,

state legislators have begun to take action. To this end, a handful of states have adopted the concept born in federal law that “force, coercion or fraud” need not be demonstrated in order for a minor to be considered a victim and recognized their lack of consent to prostitution.

Furthermore, even though almost every state continues to prosecute commercially sexually exploited youth, there are signs of progress that the status quo is changing in some state legislatures. Recent legislation modeled after federal law creates safe harbors for children who would otherwise be eligible to be prosecuted.

III. State Legislative Responses

The Texas Supreme Court decision is significant because it recognizes the inconsistency of prosecuting exploited youth and because it reflects federal trafficking law under the TVPA which considers minors to be “severely trafficked persons.” The decision arrived shortly after the passage of so called “Safe Harbor” and “Safe Children” laws in four states – New York, Connecticut, Washington, and Illinois. Michigan also prohibits prosecution of minors for prostitution if they are under sixteen. With legislation similar to the Safe Harbor laws pending or attempted in other jurisdictions to negate prosecution of children for prostitution, it is clear that

transporting a minor for prostitution, among other offenses); see also, Brown, supra note 95, at 488 (discussing coercive use of material witness warrants, unresolved law surrounding their use and the detention of prostituted women and children under material witness warrants).


See infra, Section III.

Mich. Comp. Laws § 750.448 (2006) (“A person 16 years of age or older who accosts, solicits, or invites another person in a public place or in or from a building or vehicle, by word, gesture, or any other means, to commit prostitution or to do any other lewd or immoral act, is guilty of a crime.”). Initially, however, the age identified in the statute was eighteen and was lowered from eighteen to sixteen after 2002.
a growing number of states have begun to recognize current irrationalities in the law. New legislation supports the notion that exploited children should not be incarcerated as criminals, but rather treated as victims. The language in these laws is derived from federal trafficking regulations under the TVPA.²²¹

New York State led the way toward reform when it passed the Safe Harbor for Exploited Children Act (“Safe Harbor Act”)²²² in 2008. Indeed, the Safe Harbor Act took effect in April 2010, just two months before the Texas Supreme Court’s B.W. decision.²²³ Connecticut and Washington followed suit with the passage of their own versions of the Act and other states have introduced similar legislation, some without success.²²⁴ While New York provided a model for enumerating services that states should implement, the most comprehensive act to date regarding age of prosecution is the Illinois Safe Children Act of 2010.²²⁵

A. The New York Safe Harbor Act Takes the First Steps

The New York Safe Harbor Act was a long time in the making; its turbulent history reveals many of the deep divisions in constituencies and obstacles that stand in the way of more effective and humane responses to the domestic trafficking of children. Though the Safe Harbor Act was passed in 2008, it was first introduced in 2005. In fact, the bill was drafted in response to the New York court’s decision in Nicolette, which held that the plain language of the state penal code did not preclude prosecution of

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²²³ N.Y. CODE TITLE 8-A; N.Y. Fam. Court Act § 311.4.
²²⁴ H.R. 1256, 150th Gen. Assemb., Reg. Sess. (Ga. 2010) (creating a minimum age for prosecution for prostitution). Georgia’s bill was defeated by opponents. See Kyle Wingfield, Sex Trade Kids Truly Victims, ATLANTA JOURNAL AND CONSTITUTION, February 7, 2010, at A22 (noting the opposition to a safe harbor bill in Georgia by groups who argued that steps to change the age at which prostitution can be charged against a minor were “misguided” and equivalent to decriminalization of prostitution); H.R. 2687, 50th Leg., Reg. Sess. (Az. 2011) (barring minors from prosecution for prostitution and providing authority to take them into protective custody); H.R. 145, Gen. Assemb., Reg. Sess. (Fl. 2011) (died in committee); H.D. 2277, 187th Gen. Ct., Reg. Sess. (Mass. 2011); S. 1385, 87th Leg., Reg. Sess. (Minn. 2011) (amending the definition of “delinquent child” or “petty offender,” so that a child who is alleged to have engaged in acts which fall under prostitution are excluded). In Minnesota, this would include any child under the age of eighteen under jurisdictional statutes for delinquency.
individuals based on age. Thus, the proposed bill initially sought to amend the penal code so that only individuals age eighteen and older could be prosecuted for prostitution, consistent with the official age of consent in New York. In addition, the proposed bill mirrored the TVPA, which considers all prostituted minors to be severe trafficking victims. However, the New York legislature did not fully support this novel approach at the time. Furthermore, there was opposition from some law enforcement constituencies who believed that prosecution was a necessary tool to for law enforcement against prostitution.

When the attempt to amend the New York penal code failed, a revised bill proposed language that carved out an exemption from prosecution for prostitution in the Family Court Act. This way, children under sixteen could not be charged with prostitution. Though the State Assembly passed versions of the bill, it failed to pass in the Senate. Opposition came from some prosecutors, such as the District Attorneys’ Association of New York State, which argued that their ability to threaten youth with prosecution was crucial to ensuring testimony against their pimps. Some legislators opposed the bill because they felt that the counseling and other services it required would be too costly. Additionally, some law enforcement

226 See A.B. 6597, 2005 Leg., Reg.Sess. (N.Y. 2005); see also, S. 4423, 2005 Leg., Reg.Sess. (N.Y. 2005). Both the Assembly and Senate version amended NY Penal Code §230.00 to state that the code would require a person to be eighteen years or older to be found guilty of prostitution. Id.; NY Penal Code §130.05.

227 While the initial bill did not receive much media attention in 2005, reform efforts later received more publicity; and the media prominently presented opposing viewpoints to prosecution reform. See, e.g., Clyde Haberman, The Young And Exploited Ask for Help, N.Y. TIMES, June 12, 2007, at B1; See Nicholas Confessore, New Law Shields Children From Prostitution Charges, N.Y. TIMES, Sept. 27, 2008, at B2.

228 See A.B. 90250A, 2007 Leg., Reg. Sess. (N.Y. 2007) at §2. (amending Subdivision 1 of section 301.2 of the Family Court Act, as added by chapter 920 of the laws of 1982, to read as follows: 1. “Juvenile delinquent” means a person over seven and less than sixteen years of age, who, having committed an act that would constitute a crime, other than a violation of section 230.00 of the penal law...” if committed by an adult) (emphasis added). Section 230.00 of the New York penal law details prosecution for prostitution. Because the family court only has prosecutorial jurisdiction over children under the age of sixteen, such an amendment is not able to exclude older teens from prosecution in criminal court.

229 Thomas Adcock, Legal, Social Services Communities Prepare for Enactment of the Safe Harbor Act, NEW YORK LAW JOURNAL, (October 3, 2008).


231 See Editorial, Children in Need of Safe Harbor, N.Y. TIMES, Sept. 15, 2007. Early versions of the bill stated that “[e]very local social services district shall ensure that a crisis intervention service and community-based program designed specifically to serve sexually exploited youth is available to youth residing in that district.” A.B. 6597, 2005 Leg., Reg.Sess. at §447-b (N.Y. 2005). It also required that a determination of such need be made annually by the local social services entity charged with the task in consultation with
officials argued that the bill would make it “more difficult to crackdown on prostitution.” Finally, other detractors claimed that detention is necessary to prevent prostituted youth from running back to their pimps.

Many of these concerns were brought to the fore during a dispute among legislators over whether the law should contain language granting judges discretion to divert cases back into the delinquency system once diverted into children welfare. While the bill originally proposed an unequivocal bar to prosecuting youth for prostitution, many of the opponents sought to preserve a semblance of the punishment model, by giving the judge discretion to allow prosecution. Indeed, legislative disagreement over one word in the text became the main sticking point in the bill’s passage. State legislators disagreed over whether the bill would prescribe that a court “shall” or “may” convert the case from a delinquency petition to a child welfare matter. This important sticking point resulted in the bill’s earlier failure.

While the New York Safe Harbor Act underwent many changes to gain support during its four year evolution, its final 2008 passage was still considered “groundbreaking” and a “watershed” moment for this movement. The law challenged the legal framework employed by almost every other state at that time wherein prostituted children were consistently regarded as criminals, advocating instead for a treatment approach which recognized their victimization. Given the resistance and the four year campaign for the law’s passage, its success in reframing the issue was symbolic and began an important cultural shift. It is particularly significant given New York’s stringent approach to juvenile crime as one of two states

the relevant community stakeholders. Id.


234 See Haberman, supra note 233.

235 See NEW YORK CITY BAR ASS’N, Committee on Sex and Law, Safe Harbor Memo, undated, available at http://www.nycbar.org/pdf/report/Safe_Harbor_Memo.pdf ; The Assembly version stated the judge “shall” convert the case and the Senate version stated the judge “may” convert the case.


who prosecute all youth sixteen and older as adults.\textsuperscript{238} Advocates also anticipated its ability to increase the delivery of widely needed services.\textsuperscript{239}

First, the Act created a legal presumption that a person under the age of eighteen who is charged for prostitution is a “severely trafficked person” using the same definition and age included in the TVPA.\textsuperscript{240} The Safe Harbor Act includes a comprehensive definition of sexually exploited youth that provides broad protection.\textsuperscript{241} And, like federal law, the law assumes that children involved in prostitution have been subject to force, fraud or coercion; and such children do not have the burden to establish coercion as adults do under federal law.\textsuperscript{242}

Second, trafficked children under age sixteen will be treated under the Safe Harbor Act as status offenders, rather than being designated as delinquents. Status offenders are defined in the law as “persons in need of supervision” (PINS).\textsuperscript{243} Children receiving the PINS designation may obtain support through the Department of Social Services.\textsuperscript{244} It is significant

\textsuperscript{238} See N.Y. FAM CT.ACT §712[a]; Soler supra note 106, at 496. The other state is North Carolina. \textit{Id.}

\textsuperscript{239} US State News, \textit{Assembly Passes ‘Safe Harbour’ Legislation}, US State News, June 19, 2008 (citing attorney for juveniles, Katherine Mullen, “The passage by the Assembly of Safe Harbour For Exploited Children Act today is a recognition that domestically trafficked children deserve to be protected by New York State, and now will receive the services they so desperately need.”).

\textsuperscript{240} NY FAM CT. ACT. §311.4 (citing and incorporating the definition used in 22 U.S.C. § 7105). Severe sex trafficking under the TVPA is “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age. 22 U.S.C.§7102(8).

\textsuperscript{241} N.Y. FAM. CT. ACT § 735 (defining sexually exploited youth as “any person under the age of eighteen who may be subject to sexual exploitation because he or she has engaged in sexual conduct with another person in return for a fee, traded sex for food, clothing or a place to stay, stripped, been filmed or photographed doing sexual acts, traded sex for drugs, been paid for performing sexual acts of loitered for the purpose of engaging in a prostitution offense as defined in section 240.37 of the penal law.”

\textsuperscript{242} 22 U.S.C. § 7105; NY FAM CT. ACT. §311.4.

\textsuperscript{243} In New York, a “status offender” is a “Person in Need of Supervision,” defined as “[a] person less than eighteen years of age who does not attend school in accordance with the provisions of [the relevant provisions] of the education law or who is incorrigible, ungovernable, or habitually disobedient and beyond the lawful control of a parent or other person legally responsible for such child’s care, or other lawful authority, or who violates the provisions of sections 221.05, 230.00, or 240.37 of the penal law.”

\textsuperscript{244} N.Y. FAM CT.ACT §712[a]. The Family Court Act only provides jurisdiction for prosecution of children under the age of sixteen. Therefore, while the Safe Harbor Act models its definition of a “severely trafficked person” on the TVPA, changes to the Family Court Act do not have the authority to prevent prosecution of teens who are above age sixteen because they are charged in criminal court.

\textsuperscript{244} In New York, a child receiving services under the PINS statute may not be ordered
to note, however, that the court retains discretion to convert the PINS petition to a delinquency case if it determines that the minor meets one of the following four criteria:

1) The minor is not a severely trafficked person under the federal definition;
2) The minor has previously committed a prostitution offense;
3) The minor was previously placed with a local commissioner of social services as a PINS; or
4) The minor is unwilling to cooperate with specialized services ordered by the court.\(^{245}\)

This section was a late addition to the initial language of the proposed law.\(^{246}\) At least one commentator argued that the language allowing conditional diversion “defeats the whole purpose” of the bill by allowing large categories youth to be excluded from protection.\(^{247}\) A related provision also allows that if the petition is converted to a PINS docket, the court can also later revert the case to a juvenile delinquency petition if the youth is “out of compliance” with court orders.\(^{248}\)

Third, every local social services district is required by the Safe Harbor Act, “to the extent that funds are available,” to provide a short-term safe house, twenty four hour crisis intervention, and access to medical care to

| N.Y. FAM. CT. ACT § 311.4-(3) (2010). |
| Id. (noting that an “11th-hour change in the wording of the Senate version would allow individual judges to decide whether a sexually exploited child should be given shelter or be treated as a criminal. That defeats the whole purpose and needs to be dropped”). |
| The court must state its reasons for pursuing a delinquency petition on the record. N.Y. FAM. CT. ACT § 311.4-(3) (2008). |
sexually exploited children who live in its district. The law also recognizes that counties should plan for the separate and distinct needs of girls, boys, and transgendered youth. Additionally, the Act explicitly states that support services are an important component of treatment. The Act is meant to discourage the use of the prosecution as a means to curb existing behaviors by utilizing appropriate assistance instead; however, the Act itself provides no direct funding.

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

The first published decision applying Safe Harbor in New York illustrates the concern about the possible weakening effect of some of the conditional language and contradicts the intent of the law. In the initial stages of the case, the New York Family Court refused to substitute the juvenile delinquency petition with a PINS petition as it is required to do under the law unless certain conditions are present, namely a “current unwillingness to cooperate with specialized services.” The court conceded that the accused girl was a “victim of a severe form of trafficking” under federal and state law. Even though no prior delinquency or PINS adjudications disqualified her from diversion, the court expressed serious doubts as to her “current willingness to accept and cooperate with specialized services for sexually exploited youth.”

Instead of converting the case to a PINS matter, the court iterated a detailed account about the child’s history of running away from foster care. The Court made only a passing reference to the fact that the child, Bobby

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249 N.Y. SOC. SERV. LAW § 447-B(1).
250 N.Y. SOC. SERV. LAW § 447-B(4).
251 Id.
252 See, e.g., In the Matter of Bobby P., 2010 WL 2175937 (N.Y. FAM.Ct.) (refusing the respondent child’s request to convert the prostitution case from a delinquency case to a PINS case).
253 Carrie Baker, Jailing Girls for Men’s Crimes, Ms. Magazine, (December, 2010) (acknowledging that, as of July 2010 funds had not yet been allocated to support the New York Safe Harbor Act due to the budget crisis).
254 In the Matter of Bobby P., 2010 WL 2175937 (N.Y.FAM.Ct.).
255 In the Matter of Bobby P., 2010 WL 2175937.
256 Id. at *6.
257 Id. at *7.
P., was in foster care because her parents’ rights were terminated at some previous time.\textsuperscript{258} The court then gave a detailed list of the characteristics that are all too familiar for this population: Bobby allegedly entered into prostitution at age twelve when she was “already ‘introduced to the lifestyle,’”\textsuperscript{259} was “working with adult pimps,” and gave birth to a child who had been removed from her care.\textsuperscript{260} The court went on to note that Bobby had a prior arrest, and was “picked up at a pimp’s house” in previous months.\textsuperscript{261} The court described her previous inability to follow through with aid services in prior years. It also discredited the notion that she would assist the prosecution because previously, she left a meeting at the District Attorney’s Office about assisting in the prosecution of her pimp and did not return.\textsuperscript{262}

The irony of this decision is that most of the children who are charged with prostitution meet the precise description that the court provided of Bobby P.: it is the very desperation of her circumstances which led her to the choices—or left her with a perceived or real lack of choices—that the court uses as reasons to prosecute her instead of as reasons not to prosecute her.

First, involvement with an “adult pimp” is assumed to be coercive under the law and extremely common. Second, her early age of initiation left her without capacity to legally “consent” to sex and made it difficult for her to conceive that she could remove herself from the situation. And third, her runaway history was evidence of her isolation from support; such histories are routinely noted as the number one at-risk characteristic for commercial sexual exploitation.\textsuperscript{263} Yet, the court used all three factors as damning evidence. In addition, the notion of testifying against one’s pimp is complex and leaves a vulnerable young person in a dangerous position.\textsuperscript{264}

\textsuperscript{258} Id. at *1.

\textsuperscript{259} The average age of entry into prostitution for sexually exploited youth is between ages twelve and fourteen. See supra note 25 and accompanying text.

\textsuperscript{260} Cf. KERSHAW, supra note 32, at 56 (noting that young prostituted girls with children “have the added risk of being stigmatized and labeled as ‘unfit mothers’ and having their children removed from their care by the state”).

\textsuperscript{261} Bobby P., 2010 WL 2175937 at *2.

\textsuperscript{262} Id. at *9.

\textsuperscript{263} See supra notes 26-30 and accompanying text discussing the prevalence of foster care and runaway histories of prostituted youth.

\textsuperscript{264} See Karen Zraik, Eight Charged in Sex Trafficking Case, N.Y. TIMES, June 3, 2010, at A28 (noting that “victims, particularly minors, are fearful of testifying against their pimps” and need services and counseling to recover and to overcome the fear); Editorial, Children in Need of Safe Harbor, N.Y. TIMES (Sept. 15, 2007) (noting that “these are battered, terrorized children who are typically in no condition to confront their exploiters in court. By threatening to lock them up, we deepen their distrust of an adult world that has
year old pregnant minor would likely be daunted, if not terrified, by this task. This is especially true given the likelihood of post-traumatic stress and psychological issues common for someone in Bobby’s situation, who was also without parents to support her.\textsuperscript{265}

The decision also reveals another “elephant in the room” which is that there are so few “specialized services” actually available for children, even in an urban area with high numbers of youth in need of such services. For example, Bobby was referred to one of the model programs for such youth when she was in foster care. But it must be acknowledged that not even this program had received significant increases in funding when the effective date of the Safe Harbor Act arrived.\textsuperscript{266} In other words, for children to be successfully engaged in specialized services, those services must be effective and well supported. Nationally, it is reported that there are fewer than fifty beds with specialized services are available.\textsuperscript{267} What is available are juvenile detention beds. And as long as they are more readily available than “specialized services” contemplated, it is clear that they will be utilized instead.

\subsection*{B. Other States Implement Varied Approaches to Safe Harbor Legislation}

Subsequent laws passed in Connecticut and Washington continued to break down barriers to reform by amending the laws addressing prosecution of minors for prostitution. The laws bear share many of the positive reforms enacted by the New York Safe Harbor Act but also fail in substantive ways to comprehensively protect all youth, though Connecticut’s approach includes greater potential. Washington’s “Sex Crimes Involving Minors Act” includes all children under eighteen and states that a minor’s first offense of prostitution shall be diverted out of delinquency court.\textsuperscript{268}
However, if a youth has a prior prostitution offense, Washington’s law does not preclude prosecution, as a prosecutor is not required to divert her case out of the delinquency system. Therefore, a second allegation of prostitution may result in prosecution even though the same child, if under the age of sixteen, remains a victim of statutory rape under Washington law.

Washington’s law also has a services component similar to the New York Safe Harbor Act. The Washington law seeks to link sexually exploited youth to appropriate services by stating: “within available funding, when a youth has been diverted . . . for an alleged offense of prostitution or prostitution loitering is referred to the department, the department shall connect that child with services and treatment specified.” Unlike New York’s law, the Washington bill created a fund for these services. Monies for this fund are in part obtained by an increase in the fine, for redeeming any vehicle impounded in connection with a charge for commercial sexual abuse of a minor. Though the amount of funds available through this provision is not clear and would be unlikely to fund the extensive services required, it provides a starting point. The law explicitly states that these funds are to be used for programs providing mental health and substance abuse counseling, education and vocational programming, housing relief, and other services aimed at youth who have been diverted under the act after being charged with prostitution. Funds may also be used for sexually exploited youth living in residential centers with specialized staff.

Finally, the Act increases punishments for offenders who sexually exploit minors for commercial purposes making them eligible for between nine to twenty-three years in prison.

Connecticut’s law, which took effect October 1, 2010, takes a stronger approach to eliminating prosecution of youth for prostitution. Rather than using the possibility of diversion to child welfare services, Connecticut amended its penal code so that children below the age of sixteen simply cannot be prosecuted within the definition of prostitution, similar to Michigan’s penal code. This is consistent with the age of

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272 Wash. Rev. Code Ann.§43.63A.740 The fine increased from $500 to $2,500. These fines are deposited in a “prostitution prevention and intervention” account established to assist child victims. Id.
276 Id.
consent pursuant to its state statutory rape law.277 Previously, the Connecticut penal code section on prostitution did not include a minimum age and, therefore, any person committing the relevant acts could be prosecuted for prostitution. The new law also protects older teens age sixteen and seventeen by codifying the presumption that those teenagers charged with prostitution “were coerced by another person into committing the alleged offense.”278 Therefore, sixteen and seventeen year olds may be prosecuted only if this presumption is rebutted by the prosecution.

The Connecticut law is indeed noteworthy for its unequivocal removal of prosecution of children under sixteen for the offense of prostitution. By doing so, it reconciles the paradox in its laws governing prostitution and statutory rape. With the passage of this law, Connecticut’s youth are protected from being prosecuted for acts which involve their own exploitation. The Act’s novel two-tiered approach mirrors Connecticut’s statutory rape laws. Because the law is new and the reported prevalence of sexually trafficked minors is low in Connecticut, it is unclear how the “rebuttable presumption” language will be interpreted by the courts and whether prosecutors will pursue it. However, it could be a helpful model of compromise for legislators in other states, where there is strong resistance to decriminalizing the actions of older teens. Similar to New York, however, Connecticut’s law does not contemplate funding of specialized services for exploited youth.

C. The Illinois Safe Children Act Provides a Model

The most comprehensive legislation to address the prosecution of young victims of commercial sexual exploitation is the Safe Children Act in Illinois, signed into law in August 2010.279 Illinois is the first state to make all children under eighteen wholly immune from prosecution for prostitution. Put simply, Illinois’ children will not be prosecuted for prostitution under any circumstance. This is an important distinction from all of the other state laws to date. Those laws, while certainly reducing the prosecution of youth ultimately allow for prosecutions in certain circumstances.280 Illinois statutory rape laws apply to children under the age

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277 In Connecticut, children under the age of sixteen cannot consent to sexual acts pursuant to state statutory rape law. Sexual contact with a person less than fifteen years of age is illegal is Connecticut under any circumstance. CT. GEN. STAT. §53a-73a. Any person under age sixteen cannot consent to sexual intercourse when the other person is more than two years older than the minor. CONN. GEN. STAT., § 53a-70 and § 53a-71.
278 Id. at 10-115(1)(c).
280 See supra, Part III.A & B (discussing the approaches in New York, Washington,
of seventeen in most circumstances. But there is also a provision raising the age of consent to eighteen where the offender is in a position of authority over the child. 281 Similarly, the Safe Children statute recognizes that seventeen year olds remain vulnerable to coercion by certain third parties. In doing so, it is also consistent with the TVPA.

Under the Safe Children Act, a person suspected of a prostitution violation may be detained for a “reasonable” period of time for investigation. 282 However, once it is determined that such a detained youth is under age eighteen, the youth cannot be detained further and is subject only to temporary protective custody in the child welfare system. 283 During this time the police officer must report an allegation of trafficking, which is now viewed as abuse or neglect, to the Illinois Department of Children and Family Services to initiate an investigation. In addition, the Act includes provisions that attempt to connect these youth with appropriate services and a funding source. The funding provision is similar to that of Washington. The statute increased impoundment fees which are partially applied toward grants for non-governmental organizations that provide services to people who have been victims of commercial sexual exploitation. 284

The Illinois Safe Children Act is also comprehensive in its practical application but also makes a deliberate and symbolic change in statutory language. Specifically, it removes the term “juvenile prostitute” from the criminal code. 285 Such changes to the statutory language reinforce the identification and treatment of sexually exploited children as victims and survivors rather than as offenders. 286

It is important to note the great distinction between a law such as the Safe Children Act in Illinois and the Safe Harbor Act in New York. Early

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281 720 ILCS 5/12-14.1.
282 Safe Children Act, Ill. Pub. Act 96-1464 (2010) (enacting Senate Bill 6462). A “reasonable amount of time” is determined by statute and case law. In Chicago, forty-eight hours is the amount of time permitted as “reasonable” for such detention.
283 Temporary protective custody, if necessary, may not include a detention facility or a jail. It may include a hospital, other medical facility, foster home or other licensed facility. Safe Children Act, Ill. Pub. Act 96-1464 (2010) (enacting Senate Bill 6462).
284 The impoundment fee was raised from $200 to $1,000. Half of that fee will go toward the Violent Crime Victims Assistance Fund.§11-19.3.
285 For example, criminal solicitation was previously entitled “Soliciting for a juvenile prostitute” and was replaced to read “Soliciting for a minor engaged in prostitution.” Ill.Penal Code §11-15.1.
implementation of the law in New York reveals a substantial risk that youth may continue to be treated as offenders, depending on trial and appellate treatment of cases. Without a wholehearted prohibition of the prosecution of youth, there continues to be a culture waiting for the child to demonstrate that she is “is unwilling to participate in services ordered by the court.”

While these states are leaders in passing these laws and recognizing the needs of vulnerable survivors, Illinois’ removal of all minors under age eighteen from prosecution for prostitution provides a critical advance and distinguishes it from the other laws in Washington, Connecticut, and Michigan. The challenge for Illinois under this law will be the implementation of a response system with appropriate expertise to serve children who are identified as being vulnerable now that they will no longer enter the juvenile justice system.

IV. REFORM AND SOLUTIONS FOR SURVIVORS

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

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

State legislators should use lessons learned from pioneering legislative models in the states with exceptions for prosecuting minors for prostitute. Legislation must take a clear stance and be definitive about age limits on prosecution for prostitution. Additionally, it must fund appropriate and

287 See supra notes 254-262 and accompanying text discussing In the Matter of Bobby P., 2010 WL 2175937.
288 See supra notes 235-247 and accompanying text. Cf. Hornberger, supra note 244, at 17 (discussing related issues about locking up status offenders to provide services, a state judge put it simply, “[y]ou have to take that option off the table” to force communities to create meaningful alternative service delivery options).
289 Domestic Minor Sex Trafficking Hearing, supra note 4, at 14 (testimony of Rachel Lloyd, Executive Director and Founder, Girls Educational & Mentoring Services).
A. Judicial Decision Making

Judges must make decisions with a critical eye toward ensuring coherence within the laws relevant to commercial sexual exploitation of minors. They must consider common characteristics among exploited youth, relevant advances in our understanding of adolescent development, and make decisions with an eye toward elimination of gender bias. In states where the legislature has not acted in this arena, courts should follow the lead of the Texas Supreme Court and extend this reasoning to youth beyond age thirteen. Such a holding would reconcile some of the existing conflicts between prosecution of minors, new state trafficking laws geared toward protection of minors, and statutory rape laws. When courts examine circumstances like those presented in B.W., they may consider legislative intent in the context of related trafficking and statutory rape laws, as the court did in Texas. There is also a strong argument that “factual consent provisions” in statutory rape laws do not preclude older teens from court protection from prosecution. Judges should cautiously consider the implications of the implied coercion recognized under federal law for all minors under eighteen. Two-tiered statutory rape laws exist to protect older teens from prosecution where two consenting minors are close in age, recognizing “factual consent” rather than assuming meaningful legal consent. This distinction supports the conclusion that courts need not draw a line that separates protection of older and younger teens in states employing a two tiered statutory rape scheme. Knowledge about the adolescent brain, effects of traumatic bonding, post-traumatic stress, and society’s understanding of domestic minor sex trafficking all indicate otherwise. At the very least, that knowledge supports a presumption that older teens were coerced in trafficking situations. Recognizing that exploitation is coercive for all minors under eighteen is consistent with federal law that errs on the side of protection rather than allowing some

290 See supra Part II.B.2 (discussing Matter of B.W. and its rationale for overturning the lower courts based upon legislative intent to protect children).


292 See Julich, supra note 52, at 108-109.

293 See Jones, supra note Error! Bookmark not defined., at 327; see also, Todres, supra note 33, at 447, 464 and 467 (noting prevalence of symptoms consistent with post-traumatic stress disorder among victims of sex trafficking).
children to fall outside of its umbrella. This inclusive approach at the state level would notably shift the focus of the justice system and law enforcement to the needs of the child.

Additionally, the judicial role is critical where legislation limits but permits prosecution of youth based upon judicial determination about factors in the case such as the characteristics of the individual youth or the extent of the coercion. Where statutes do not fully preclude prosecution of minors and give discretion about which youth may be protected, interpretations of new statutes should consider the purpose of the laws to prevent prosecution instead of using a punitive approach. Some models, such as the statutes in Connecticut and New York place the court and prosecutors in a gatekeeper role, though in different ways. This occurs where: 1) conditional diversion grants judicial discretion about whether a child is amendable to treatment and services and 2) where the statute contemplates a “presumption of coercion” that permits prosecutors to challenge the implied existence of coercion. In both instances, courts should carefully consider the data that exists about the effects of the exploitation and surrounding circumstances on the child’s life. For example, data show that the clear majority of young people arrested for prostitution have been living on the streets or in unstable housing situations. They have been given little reason to trust authority and the foster care systems that have often failed them. While these circumstances and the adults they encounter are often ineffective and may harden them, they are not beyond intervention. Therefore, judges must not consider the manifestations of these past harms as de facto evidence against struggling youth and their willingness to participate in services offered.

If the laws aim to immunize the majority of children who have “committed sexual offenses” from criminal prosecution or juvenile delinquency prosecution, they cannot be applied only to children who have never run away, missed appointments, or cowered at the notion of testifying against a pimp. If most children with such histories are deemed

294 See, e.g., supra Part III.A (discussing New York’s Safe Harbor provisions).
295 See, e.g., supra Part III. B (discussing CT Pub. Act No. 10-115 (2010)).
296 See supra, Part I. A.
297 See supra, Part I. A.
298 Urbina, supra note 2, at A1 (citing Bradley Miles of the Polaris Project stating “[t]hese kids enter prostitution and they literally disappear…And in those rare moments that they reappear, it’s in these revolving-door situations where they’re handled by people who have no idea or training in how to help them. So, the kids end up right back on the street.”).
299 See, e.g., Family Court Act §732, Practice Commentary (McKinney’s 2010).
300 See, e.g., supra notes 254-265 (discussing the Matter of Bobby P and noting that
by the court as “unlikely to accept services” and thus forced to endure prosecution as a result, then the ultimate intent of the law will be ignored. \(^{301}\) Diversion applied in this way could become the culprit that critics feared it would be. \(^{302}\) It may take more than one intervention attempt to reach these children. If signs of rebelliousness preclude assistance, the law will fail many of the children it is intended to help. The judiciary must not interpret those common characteristics in a way that precludes their protection from prosecution.

Furthermore, judges must also be vigilant about gender stereotypes when making evaluations about whether a child has been coerced and whether that child is amenable to treatment under statutory schemes calling for judges to make these determinations. Studies show that bias in the justice system results in higher rates of punishment and harsher penalties for girls than similarly situated boys. \(^{303}\) Therefore, courts must ensure that they do not penalize girls or gay youth for lack of conformity with stereotypical gender roles. \(^{304}\) For example, often a girl has previously run away from foster care or rebelled against social services organizations that have demonstrated that the current system is ill equipped to help her; these failures and the impact of the exploitation she has suffered should be considered before the justice system assumes that she is simply a “bad girl” who is “incorrigible” and “not amenable to services.”

Finally, courts must consider cases in the context of adolescent development and emerging explanations of adolescent behavior. \(^{305}\) As has

\(^{301}\) \textit{See e.g.,} SEN. DALE M. VOLKER, NEW YORK STATE ASSEMBLY, 101ST CONG., MEMORANDUM IN SUPPORT OF LEGISLATION S. 3175-C THE SAFE HARBOR FOR EXPLOITED CHILDREN ACT (2007), available at http://www.brooklyn.cuny.edu/pub/departments/childrensstudies/documents/childrens_documents/safe_habor_act.pdf. The Memorandum recognized that the overwhelming majority of these youth have a history of psychological, physical, or sexual abuse and have endured “stark poverty and family dysfunction.” It states that the response by the state to arrest, prosecute, and detain these youth re-traumatizes them and impedes recovery and that appropriate services do not exist within the juvenile justice system. It concludes, therefore, that the youth should not be prosecuted. \textit{Id.}

\(^{302}\) \textit{See supra} notes 246-247 and accompanying text noting that certain language “defeats the whole purpose” by eliminating too many youth from protection from prosecution and needs to be dropped.

\(^{303}\) \textit{See supra} Section I.C.


\(^{305}\) \textit{See Mutcherson, supra} note 86, at 928 (noting the concern that judges and policy makers be provided with the necessary information to distinguish conflicting views about adolescent competence in the context of health care decision making and criminal
long been noted, juvenile court judges often the lack necessary specialized training to do this. Because of their impact, the seminal Supreme Court cases of *Roper* and *Graham* crystallize the need to reexamine issues of culpability when considering youth actions and to ensure that judges are informed of new developments in law and science. Scientific information can inform judges whether the court is considering challenges to the age of eligibility for prosecution as a conflict with state laws for statutory rape; rebuttals to the presumption of coercion; amenability to treatment; or crafting the disposition which is a juvenile sentence. Judges must recognize scientific data about the functioning of the adolescent brain as integral to decisions about culpability. This information affects decisions about the ability of children to “consent” and determines the impact of outside pressures and threats, as the Supreme Court has critically distinguished. This information is relevant and applicable to the complex issues presented by the prostitution of youth, as noted in *B.W.* Consideration of these factors will foster more nuanced decision-making and ensure that judges establish better coherence in the laws.

B. Comprehensive Legislative Remedies

“Children can never consent to prostitution, it is always exploitation.”

1. Exclusion from Prosecution

While the courts are an important arena for reform, ideally legislators should take steps to avoid the conflict that faced appellate courts of New York and Texas by amending the law. In doing so, they should be definitive in precluding prosecution of exploited minors and reconcile the legislative conflicts between protection for children under trafficking laws

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


309 *See Exploiting Americans Hearing, supra* note 46, at 6 (statement of Chris Swecker, Assistant Director, Criminal Investigation Division, FBI) (discussing the federal government’s position regarding domestic sex trafficking of minors).
and the prospect of prosecuting them under the penal code for prostitution that the court identified in B.W.\textsuperscript{310}

State legislators should explicitly exclude minors from prosecution following the model of the Illinois Safe Children Act. States should avoid carve-outs that automatically bar some children from exemption from prosecution\textsuperscript{311} and conditional diversion\textsuperscript{312} which can exclude even more from protection from prosecution.\textsuperscript{313} If children can “never consent to prostitution,” they should not be punished and allowed to be confined in detention facilities. Without a clear legislative stance, some minors – often the most vulnerable – will continue to be penalized. Legislation should harmonize the laws with regard to capacity to consent and prosecution.

Next, treating children like offenders can hinder law enforcement even when children are in custody and when they do not receive proper psychological and medical treatment.\textsuperscript{314} Failure to address post-traumatic stress and traumatic bonding implicates not only the well-being of the child but her potential cooperation with law enforcement.\textsuperscript{315} And finally, placing too many conditions on the availability of protection to a troubled young person can render the law meaningless.\textsuperscript{316} The first published decision applying New York’s Safe Harbor Act illustrates this point and belies the

\begin{itemize}
\item \textsuperscript{310} Matter of B.W., 313 S.W.3d at 823.
\item \textsuperscript{311} WASH. REV. CODE ANN. § 13.40.070 (7); N.Y. FAM. CT. ACT § 311.4-(3) (2010). See Toolsi Gowin Meisner, \textit{Shifting the Paradigm From Prosecution to Protection of Child Victims of Prostitution: Part I}, 43 JUN PROS. 22 (2009) (noting that laws that do not include for protection juveniles who have prior arrests for prostitution fail to consider that the reasons for their continued prostitution may be due to fear or control of a pimp).
\item \textsuperscript{312} By “conditional diversion,” the Article refers to statutory schemes that mirror drug court models where youth may still be criminalized dependent on “compliance” and where only certain youth qualify for diversion based upon factors iterated by the statute. See \textit{infra} notes 146-148 and accompanying text (discussing conditional diversion structure of the New York Safe Harbor Act).
\item \textsuperscript{313} See \textit{supra}, Part III. A and B (discussing legislation in New York and Washington).
\item \textsuperscript{314} See \textit{supra}, Part II.C. See \textit{e.g.}, \textit{U.S. v. Doss}, --- F. 3d ---, 2011 WL 117628. \textit{Doss} illustrates a practical reality that arrest of a minor can present. A defendant was able to threaten a minor girl through a metal divider in a van when they were both in custody and the girl was a prosecution witness against him for prosecution for trafficking a minor. \textit{Id.}
\item \textsuperscript{315} See \textit{supra} notes 214 to \textit{Error! Bookmark not defined.} and accompanying text.
\item \textsuperscript{316} See, \textit{e.g.}, \textit{In the Matter of Bobby P.}, 2010 WL 2175937.
\end{itemize}
well-reasoned intent of the law.\textsuperscript{317} States would be well advised to fully consider the implications of conditional diversion language going forward.\textsuperscript{318}

Unfortunately, statutory language that fully excludes youth from prosecution can face steep opposition. In Georgia, efforts to pass safe harbor legislation failed in 2010, despite critical awareness of the problem in Atlanta and elsewhere in the state.\textsuperscript{319} In New York, advocates labored for four years before passage of an amended version of their Safe Harbor Act.\textsuperscript{320} But subsequent to those battles, Illinois succeeded in fully protecting youth, building on the efforts in other states.\textsuperscript{321}

Arguments in favor of the status quo, or even diversion, fail to fully address the incoherence of the law, the lack of services for girls in juvenile justice, and the potential benefits even to law enforcement\textsuperscript{322} when proper

\textsuperscript{317} See supra notes Error! Bookmark not defined.-Error! Bookmark not defined. and accompanying text.

\textsuperscript{318} For example, the penal code in Michigan and Connecticut offers precludes all fifteen year olds from prosecution because only those sixteen and older in Michigan and Connecticut can ever be prosecuted. In contrast, the same is not true in New York. Furthermore, there is debate about whether classification as a status offender under a PINS statute in New York’s Safe Harbor is the optimal mechanism for reform because it stigmatizes children as status offenders. Susan Pollett, \textit{Child Prostitutes: Criminal or Victims?}, NEW YORK LAW JOURNAL, April 4, 2010; Kate Brittle, Note, \textit{Child Abuse by Another Name: Why the Child Welfare System is the Best Mechanism in Place to Address the Problem of Juvenile Prostitution}, 36 HOFSTRA L. REV. 1339, 1351 (2008). Many states still permit secure detention of status offenders under some circumstances which could also result in detention after all. See Hornberger, \textit{supra} note 244, at 18. While Juvenile Justice Delinquency Prevention Act provisions prohibit this practice, states utilize its loophole, allowing for secure detention if a person in need of supervision fails to comply with a court order. \textit{Id.}


\textsuperscript{320} See \textit{supra} Section IV.A (discussing opposition based upon law enforcement belief that prosecution is necessary to curb youth behavior, provide services in detention and obtain testimony, and objections to cost).


\textsuperscript{322} See \textit{supra} Section II. C. (discussing the benefits of the federal law enforcement
therapeutic services are created and appropriated under a non punitive regime. Therefore, advocates of reform must be prepared to respond to the claims of detractors of safe harbor laws preventing prosecution. They can do so by highlighting the irrationality in the current laws’ harmful effects on children and the potential to shift the approach of law enforcement. Reform does not change the ability to prosecute the perpetrators who continue to exploit youth under existing laws at the state and federal level. In addition, it supports the cultural shift required to build commitment to treatment.

2. Funding for Appropriate Therapeutic Services and Interdisciplinary Partnerships

In addition to clarity about age eligibility, legislation must also mandate the creation of and funding for appropriate professional therapeutic services. Failure to expand and create the necessary medical and psychological services contemplated by new laws undercuts successful implementation of legislation. Judges have reported that they feel forced to send some girls to detention because they have no other treatment options even though they know the girls present no danger to the community and would be better off in the community. The dearth of services available to keep victims safe is a barrier toward successful prosecutions of those who exploit youth, as well as recovery of the victims. In other words, the provision of safe and therapeutic environments for care of children who will also serve as witnesses is advantageous for recovery, the first priority, and also for law enforcement because they are better able to participate in court.

In New York, Michigan and Connecticut, for example, there is no legislative funding provision for therapeutic services in statutes related to safe harbor efforts. New York provides model language for other states that is specific and comprehensive about an ideal service delivery system but statutory language requires specialized services only to the extent funding is available because legislators feared the expense. The federal government acknowledges the need to create more community-based access to care at the local level such as safe housing. Because federal investigations are

beliefs in victim-centered approaches for victims of sexual exploitation).

323 Sherman, Pathways, supra note 5, at 37.

324 Domestic Minor Sex Trafficking Hearing, supra note 4, at 126 (statement of Francey Hakes, National Coordinator for Child Exploitation, Prevention and Interdiction, Office of the U.S. Deputy Attorney General), “The Department of Justice recognizes that secure housing and specialized services are critical to meet the needs of this unique population of child victims.”

325 N.Y. SOC. SERV. LAW § 447-B(1).

326 Domestic Minor Sex Trafficking Hearing, supra note 4 (statement of Francey
coordinated with state authorities, success assisting youth is limited when there is nowhere for domestic minors to go once they are discovered by law enforcement.\footnote{327} State can use reform as an opportunity to access federal funding for state services that supports the goal of helping communities “intervene appropriately with and compassionately serve victims including providing essential services.”\footnote{328} The few states taking action have made substantial progress, however lawmakers and advocates everywhere should incorporate lessons learned in these early implementation phases of safe harbor laws.

Community models providing services to sexually exploited youth, though scarce, do exist and have provided far greater assistance to sexually trafficked youth than the current model of detention.\footnote{329} Successful models}

Hakes, National Coordinator for Child Exploitation, Prevention and Interdiction, Office of the U.S. Deputy Attorney General) (noting that in FY 2009, the Department of Justice awarded funding under “Improving Community Response to the Commercial Sexual Exploitation of Children” to four cities in order to develop better community based approaches to domestic commercial sexual exploitation).

\footnote{327} Even where there is recognition that children are victims at the federal level, services are still lacking: While Federal Innocence Lost Initiative has “rescued” 1,100 children in their enforcement efforts, many had no access to relevant assistance in their local communities. See \textit{Domestic Minor Sex Trafficking Hearing, supra} note 4, at 137 (statement of NCEMC); Joe Markman, \textit{Girls Rescued from Sex Trade Have Few Options to Get Help, LA TIMES}, December 9, 2009, (noting that many girls in one Innocence Lost Initiative were sent back to abusive homes only to return to the streets while or even detained by Juvenile Justice.); see also, Moira Hedges, Note, \textit{From the Inside Out: Reforming State and Local Prostitution Enforcement to Combat Sex Trafficking in the United States and Abroad}, 94 MINN.L.REV.428, 440-441 (discussing various congressional testimony by the FBI and DOJ regarding failures in state practices prosecuting and punishing juveniles).

\footnote{328} \textit{Domestic Minor Sex Trafficking Hearing, supra} note 4, at 126 (statement of Francey Hakes, National Coordinator for Child Exploitation, Prevention and Interdiction, Office of the U.S. Deputy Attorney General).

\footnote{329} See Horberger, supra note 244, at 18 (citing study of nurse interventions by the University of British Columbia and Minnesota Clinics). Nurse intervention programs for sexually exploited runaway girls reported significant improvements in girls’ lives along with reductions in “emotional distress, substance use, suicide attempts and risky sexual behavior.” \textit{Id.} Girls Educational & Mentoring Services (“GEMS”) is one of the few residential care facilities with specialized services for victims of commercially and sexually exploited girls and young women. GEMS is survivor led and provides a range of services, including a Transitional Independent Living Program (TIL) and a Supportive Housing Program. See \texttt{http://www.gems-girls.org/what-we-do/our-services/transitional-supportive-housing}. Some are led by law enforcement and, though still operating under laws that permit prosecution, are developing infrastructures for services that attend to medical needs and safe housing. Rami S. Badawy, \textit{Shifting the Paradigm from Prosecution to Protection of Child Victims of Prostitution: Part II}, 44 JUN 40 (2010) (discussing Georgia’s child welfare and juvenile justice partnership and Texas collaborations). The article also
include multidisciplinary efforts to treat the mental and physical needs of these minors. Professionals in other disciplines with an emphasis on medical care should be integral to the intervention process because of their relevant expertise. In addition, a critical component of the services that should be provided to prostituted youth is access to safe housing. This housing must be off-limits to third party exploiters, particularly since young girls report being recruited at shelters or group homes that are known to pimps. Recent awareness of the plight of these girls by doctors and health care providers who come in contact with them is another helpful point of access to provide care and build partnerships. Girls who do not fear arrest may be more likely to confide in authorities, such as providers in the medical community.

The argument that specialized services are “too expensive” is difficult to accept when one evaluates the costs of existing models. For example, the national average annual cost of a detention bed in the juvenile justice system is estimated at $88,000, though this number can vary significantly. Indeed, the highest estimate in the nation reaches $265,000 a year per child. These costs have not proven themselves as worthy investments for states, considering the documented abuse, lack of basic programs, and high recidivism rates involved with the detention model.

discusses a progressive approach in Canada which does not prosecute youth, however, does securely detain them. Id. at 42-42.

330 See 42 U.S.C.§14044b (2008) (discussing the multiple types of professional services to be funded for juveniles); see also, N.Y.Soc. Serv. Law §447-b (listing services needed to effectively serve exploited children such as residential safe houses, medical care, counseling, crisis intervention and therapy, educational services, life skills, transitional planning provided by staff that is properly trained).

331 See Curtis, et al., supra note 29.

332 See e.g., Patricia Leigh Brown, In Oakland, Redefining Sex Trade Workers as Abuse Victims, NY TIMES, at A13 (May 24, 2011).

333 See Adcock, supra note 229 (noting a comment by a service provider about the excessive cost of incarceration versus community residential treatment).


335 Id. For example, in New York, the cost of detention is $210,000 per child per year with abysmal recidivism rates. See GOVERNOR’S TASKFORCE, CHARTING A NEW COURSE: A BLUEPRINT FOR TRANSFORMING JUVENILE JUSTICE IN NEW YORK STATE, 1, 10 (2009).

336 See generally, Douglas Abrams, Reforming Juvenile Delinquency Treatment to Enhance Rehabilitation, Personal Accountability, and Public Safety, 84 OREGON LAW REV 1001 (2005) (discussing numerous investigations finding abuse and inadequate medical and psychological care by the United States Department of Justice Civil Rights Division of at various juvenile detention facilities across the country.); NAT’L JUVENILE JUSTICE
Considering current detention models for prostituted youth, there are at least three areas where funds should be shifted in order to support better services and promote deterrence. First, diverting funds from detention beds toward appropriate services provides a viable source of funding for community based therapeutic programming.\(^{337}\) Effective programs are potentially more cost effective and certainly a more compassionate investment in the recovery of the children at issue. For example, a new safe house in Washington, D.C. estimated its annual cost to be $100,000 per child.\(^{338}\)

Given the provision of specialized services included in this estimate, this is a comparative bargain. A child who could have received safe house care and specialized services but instead sent to detention will likely prove to be more costly to society in the long term. The right therapeutic treatment, which may be only slightly more costly than a detention bed in the short term, prevents the likelihood that she will return to the same problems that plagued her past.

Second, the cost of prosecution in terms of resources and time could be diverted toward apprehension of the abusers who create the demand for young girls and pimps who cater to youth prostitution. Current efforts include the investigation time of police and prosecutors, police officers’ time to appear and provide testimony in court to prosecute each minor rather than being able to focus on the source of the problem, and court oversight and administration of the case. In the juvenile justice system, the resolution of a juvenile delinquency case resulting from prosecution for prostitution requires several court appearances by defense and prosecutors and can include police testimony, using scarce time and resources that could be spent on other criminal matters.

Third, there are funding sources at the federal level that can be applied toward state victims’ services to increase the effectiveness of legislation and enforcement.

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\(^{337}\) Nat’l Juvenile Justice Network, supra note 334, at 1; Soler, et al., supra note 106, at 501 (noting that conditions in juvenile facilities in the United States are “dangerous and abusive.”); Governor’s Taskforce, supra note 335, at 10 (noting the needed changes in response to an investigation by the United States Department of Justice, Civil Rights Division, Office of Special Litigation). The Taskforce discussed that because of the violence in youth facilities, “not only do youth leave facilities without having received the support they need to become law abiding citizens, but many are also more angry, fearful, or violent than they were when they entered.” Id; see also, Nat’l Juvenile Justice Network, supra note 334, at 2 (noting that current youth incarceration expenditures have yielded dismal results and “strikingly high recidivism rates.”).

\(^{338}\) Dom. Minor Sex Trafficking Hearing, supra note 4, at 149 (statement of Tina Frundt, survivor and founder of Angela’s House, Washington, D.C.).
prevention and intervention efforts. First, the national Runaway and Homeless Youth Act\(^{339}\) was reauthorized with increased appropriations in 2008.\(^{340}\) The Act’s purpose is to provide support for states to build an effective system of care for runaway and homeless youth outside the child welfare and law enforcement systems.\(^{341}\) It acknowledges the need to create long-term strategies, coordinate federal programs, and treat exploited youth as victims instead of criminals.\(^{342}\) These funds should continue to target prevention and fund specialized residential shelter beds for this population, in addition to supporting efforts to gather empirical evidence for best practices addressing their needs. Second, the Juvenile Justice Delinquency and Prevention Act provides financial incentives for states to keep children out of the delinquency system and juvenile detention placements.\(^{343}\) Therefore, legislation furthering these goals is cost effective because it responds to funding incentives.

Third, the TVPA earmarked money for local communities to expand resources aimed at assisting domestic minors. In addition, the Domestic Minor Sex Trafficking Victim and Deterrence Act\(^{344}\) gained significant support in 2010 even though it failed to pass. The Act would amend the TVPA to provide funds to support local service infrastructures, to assure training for law enforcement, and to make much-needed improvements to the National Crime Information Center system that tracks information about missing, exploited, and runaway children.\(^{345}\) These tracking improvements would coordinate state child welfare agency information with the national system.\(^{346}\) The changes would provide vital resources for improvements and coordination at the state and federal levels. Its passage in both the House and the Senate is significant and is another indicator of a cultural shift recognizing the severity of hardship experienced by many of these children.\(^{347}\) It is that cultural change, along with structural coordination and

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\(^{339}\) 42 U.S.C.§5701.


\(^{341}\) 42 U.S.C. 5701 §302(3), (4),(5).

\(^{342}\) Id. at §302(5).


\(^{344}\) S. 2925, H.R. 5575, 111\(^{th}\) Cong. (2010).

\(^{345}\) Domestic Minor Sex Trafficking Act, S. 2925, HR 5575, 111\(^{th}\) Cong. (2010). The Act specifies authorized use of grant funds for shelter to minor victims of sex trafficking, case management services, mental health counseling, legal services, and outreach and education programs to provide information about deterrence and prevention of sex trafficking of minors. It authorizes blocks grants of up to $2,500,000 to different entities for the creation of this comprehensive victim-centered approach.

\(^{346}\) Id.

funding, that is needed on a large scale to ensure progress.

CONCLUSION

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

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domestic-minor-sex-trafficking-bill-passes-senate-dec-13-2010 (quoting Mary Ellison, Director of Policy of the Polaris Project, commenting that passage by the Senate was “a sign that America is starting to realize that children in prostitution are victims of a horrific crime called human trafficking and are in need of service and support”).