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## The “Youngest Profession”: Consent, Autonomy, and Prostituted Children

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## **THE “YOUNGEST PROFESSION”: CONSENT, AUTONOMY, AND PROSTITUTED CHILDREN**

**TAMAR R. BIRCKHEAD\***

### ABSTRACT

*Although precise statistics do not exist, data suggests that the number of children believed to be at risk for commercial sexual exploitation in the United States is between 200,000 and 300,000 and that the average age of entry is between eleven and fourteen, with some as young as nine. The number of prostituted children who are criminally prosecuted for these acts is equally difficult to estimate. In 2008—the most recent year for which data is available—approximately 1500 youth under age eighteen were reported to the Federal Bureau of Investigation as having been arrested within United States borders for prostitution and commercialized sex. Anecdotal evidence suggests, however, that these numbers reflect only a small fraction of the children who face criminal charges as a result of their prostituted status. Research also reveals that because most states have laws that hold children criminally liable for “selling” sex, law enforcement and the courts readily pathologize these youth, a significant*

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*percentage of whom are runaways, drug addicted, or from low-income homes in which they were neglected and abused. Statistics additionally suggest that the number of American girls who are sexually exploited is increasing, particularly for those between the ages of thirteen and seventeen. Likewise, it is estimated that eighty percent of prostituted women began this activity when they, themselves, were younger than eighteen. Yet, nearly all states can criminally prosecute children for prostitution even when they are too young to legally consent to sex with adults, and very few communities have developed effective programs designed to prevent or intervene in the sexual exploitation of youth.*

*This Article critically examines the prevalence of laws allowing for the criminal prosecution of minors for prostitution. It argues that rather than maintain a legal scheme that characterizes and treats such juveniles as willing participants who, if harmed, are merely getting what they deserve, a more nuanced approach must be developed in which—at a minimum—criminal liability should be consistent with age of consent and statutory rape laws. It analyzes the range of ways in which states have addressed the problem of prostituted children, and it highlights those few that have successfully utilized strategies of intervention and rehabilitation rather than prosecution and incarceration. It contrasts the impact of state versus federal legislation as well as domestic versus international policy in this area and examines the ways in which these differences serve to perpetuate pernicious stereotypes vis-à-vis youth and crime. The Article addresses the historical treatment of prostituted children as criminals rather than victims by both American law and society, and critiques contemporary rationales for continuing a punitive approach toward these youth. The Article explores the conflicting statutory, common law, and colloquial meanings of the terms “prostitution,” “consent,” and “bodily autonomy” as they relate to children and sexuality. It also considers the extent to which the criminal offenses of prostitution and statutory rape address different sets of harms and explores how gender and sexual orientation are implicated in the discussion. The Article concludes by highlighting model programs directed at prevention, intervention, and rehabilitation, as well as proposing strategies for reform, such as decriminalization and diversion.*

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*“I can’t remember the first trick but I do remember the pain long after the years of being on the streets,” said Paula who began working at a massage parlor at the age of 12. “I remember having to make quotas before being able to come in the house. I remember lonely nights, wishing I was dead, wishing (that) if only my family would have been different, if only my brother didn’t sexually abuse me, if only my dad’s friend didn’t abuse me, my life would be different.” She said she had been bought, sold and traded by different pimps eight times, often ending up in hospital emergency rooms with broken bones and beatings. “No one told me that I was a traffick(ing) victim or a domestic (abuse) victim. Not only was I not seen as a victim, but I was seen as a criminal” . . . .<sup>1</sup>*

—Statement of former prostituted child, U.S. Congressional briefing on sexually exploited youth

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1. Jim Lobe, *Exploited Girls in U.S. Seek Same Protection Afforded Foreign Women*, COMMONDREAMS.ORG (Mar. 5, 2004), <http://www.commondreams.org/headlines04/0305-07.htm>.

*“There’s no doubt that it’s easier to prosecute someone arrested for prostitution than it is to investigate, indict, and convict the pimp who exploited her. . . . To do so, however, would only allow this phenomenon to stay hidden in the shadows where it will consume more girls and young women. Ethically and morally, we have to take a different course.”*<sup>2</sup>

—Statement of Daniel F. Conley, Suffolk County District Attorney,  
Massachusetts

## I. INTRODUCTION

Children have been prostituted<sup>3</sup> for centuries, if not millennia.<sup>4</sup> Yet, international recognition of the existence and proliferation of prostituted children did not take place until 1996 at the First World Congress Against Commercial Sexual Exploitation of Children in Stockholm, Sweden.<sup>5</sup> The Stockholm Congress was considered a “landmark event” resulting in the formal adoption of an agenda focused on protecting children from sexual exploitation, which as of 2006 had been signed by more than 160 countries.<sup>6</sup> While the United States is a signatory to this global Declaration

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2. Press Release, Suffolk Cnty. Dist. Att’y Off., *Girl’s Arrest Leads to Pimp’s Conviction* (July 23, 2007), <http://www.mass.gov/dasuffolk/docs/7.23.07.html> (reporting that a prostituted teen was referred to social service agencies for at-risk youth while the criminal case against her pimp proceeded, following which the prostitution charges against the girl were dismissed at the prosecution’s request).

3. While “child prostitute” and “teen prostitute” are the terms used colloquially to refer to a minor who exchanges sex for something of value—be it money, food, lodging, affection, or otherwise—I have chosen not to use them here, as they suggest a degree of agency that may not be justified and conflate an action with an identity. Likewise, I have chosen to utilize only sparingly the constructions “commercial sexual exploitation of children” and “domestic sex trafficking of minors,” although these are the terms most commonly used in state and federal legislation. Instead, I will primarily employ the phrases “prostituted child” and “children who have been prostituted,” which are not wholly satisfactory but connote the lack of judgment that I am after. In addition, the phrase “the youngest profession,” which appears in the Article’s title, is intended as a critical play on the oft-used description of prostitution as “the oldest profession” and is not meant to endorse the notion of prostitution as an appropriate livelihood for youth. *See also infra* Part IV (discussing the importance of terminology and “naming” as it relates to prostituted children).

4. D. KELLY WEISBERG, *CHILDREN OF THE NIGHT: A STUDY OF ADOLESCENT PROSTITUTION* 1 (1985) (“Childhood prostitution has its roots in antiquity. Historian Lloyd deMause notes that children growing up in ancient Greece and Rome often were used sexually by older men, although the form and frequency of the abuse varied by geographic area and date.”).

5. ECPAT INT’L, *GLOBAL MONITORING REPORT ON THE STATUS OF ACTION AGAINST COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN: UNITED STATES OF AMERICA* 6 (2006), available at [http://www.ecpat.net/A4A\\_2005/PDF/Americas/Global\\_Monitoring\\_Report-USA.pdf](http://www.ecpat.net/A4A_2005/PDF/Americas/Global_Monitoring_Report-USA.pdf).

6. *Id.* (stating that 122 countries formally adopted the agenda after the First World Congress, that 159 had adopted it following the 2001 Second World Congress held in Yokohama, Japan, and that

and Agenda for Action, the bulk of its attention and resources has been directed at the international sex trafficking of adults and children, rather than the growing numbers of preteens and adolescents who are prostituted within its borders.<sup>7</sup>

This failure to focus on the domestic sexual exploitation of children has been reinforced by the continued criminal liability of minors for prostitution, as the laws of nearly every state subject them to arrest, detention, and prosecution regardless of age or extenuating circumstances, limited only by the vagaries of enforcement discretion rather than by the statutory language itself.<sup>8</sup> Given this legal framework, it is not surprising that police officers, prosecutors, and judges are more likely to view prostituted youth as juvenile offenders<sup>9</sup> rather than crime victims.<sup>10</sup> Many police officers, however, are reluctant to bring prostitution charges against youth, preferring to charge them with criminal offenses other than solicitation out of a belief that secure custody will—at the very least—keep them off the streets.<sup>11</sup> This uncertainty on the part of law enforcement regarding how best to respond to prostituted children has contributed to the lack of a “reliable, consistent” approach that has, in turn, worked to exacerbate the problem.<sup>12</sup>

The number of prostituted children in the United States is difficult to estimate with precision because of the low-visibility nature of the sex

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by 2006, the number had risen to 161).

7. *Id.* at 12; see Lobe, *supra* note 1 (reporting that adults who had been prostituted as children testified at a congressional briefing that sexually exploited youth in the United States should receive the same enforcement and protection provisions that apply to foreign girls and women brought by traffickers to the United States); see also *infra* Part II.C (arguing that the United States has rigorously enforced laws directed at the international trafficking of women and children, while the problem of domestic prostituted children has been consistently overlooked).

8. ECPAT INT’L, *supra* note 5, at 17; see also NEV. REV. STAT. § 201.354 (2009) (establishing that in Nevada, engaging in or soliciting for prostitution outside of “a licensed house of prostitution” is illegal, punishable by a misdemeanor).

9. I use the legal term “juveniles” here to refer to those youth under the age of eighteen who are alleged to have violated a criminal statute and are, thus, either under the jurisdiction of juvenile delinquency court or adult criminal court, depending on the jurisdictional age cap of the state in which they are charged. See Tamar R. Birckhead, *North Carolina, Juvenile Court Jurisdiction, and the Resistance to Reform*, 86 N.C. L. REV. 1443, 1446 (2008) (stating that as of 2007, “thirty-seven states capped juvenile court jurisdiction at age eighteen, while ten did so at seventeen” and three at sixteen).

10. ECPAT INT’L, *supra* note 5, at 18; David Finkelhor & Richard Ormrod, *Prostitution of Juveniles: Patterns from NIBRS*, JUV. JUST. BULL. 1, 2 (2004) (“Police are more likely to categorize juveniles involved in prostitution as offenders than as crime victims, but those categorized as victims are more likely to be female and young.”).

11. Finkelhor & Ormrod, *supra* note 10, at 3; see also *infra* Part III.B (discussing the rationale for criminalization of prostitution regardless of age based on the premise that it is the only way to ensure that prostituted children and teens will be protected and cooperate with services).

12. Finkelhor & Ormrod, *supra* note 10, at 3.

industry,<sup>13</sup> although there is evidence that the total is growing.<sup>14</sup> While the data on which the estimates are based is incomplete and to some extent speculative,<sup>15</sup> an oft-cited study in 2002 found that between 200,000 and 300,000 children were believed to be “at risk” for commercial sexual exploitation.<sup>16</sup> Those minors deemed to be at the greatest risk include children who fall into one or more of fourteen categories, including runaways,<sup>17</sup> throwaways,<sup>18</sup> victims of physical or sexual abuse, drug

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13. *Id.* at 1 (stating that “[l]ittle statistical and research information exists” regarding prostituted children); see also RICHARD J. ESTES & NEIL ALAN WEINER, UNIV. OF PA., THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA AND MEXICO 142 (rev. Feb. 20, 2002), available at [http://www.sp2.upenn.edu/~restes/CSEC\\_Files/Complete\\_CSEC\\_020220.pdf](http://www.sp2.upenn.edu/~restes/CSEC_Files/Complete_CSEC_020220.pdf) (stating that reliable estimates of prostituted children in the U.S. do not exist because of “gross under-reporting of known cases” by law enforcement and social service providers; the absence of state or national registries of known cases; the absence of “prevalence studies”; and “widespread societal disbelief concerning the nature, extent and severity” of domestic prostitution of children); Ian Urbina, *For Runaways on the Street, Sex Buys Survival*, N.Y. TIMES, Oct. 27, 2009, at A1 [hereinafter Urbina, *Survival*] (stating that estimates of how many children are involved in prostitution “vary wildly . . . in part because the Department of Justice has yet to study the matter even though Congress authorized it to do so in 2005 as part of a nationwide study of the illegal commercial sex industry”).

14. NAT’L INST. OF JUST., U.S. DEP’T OF JUST., COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN: WHAT DO WE KNOW AND WHAT DO WE DO ABOUT IT? 1–2 (2007) (stating that the “number of known cases” is growing, and that the “greatest challenge” is assessing the number of cases that go unreported); Urbina, *Survival*, *supra* note 13 (“But many child welfare advocates and officials in government and law enforcement say that while the data is scarce, they believe that the problem of prostituted children has grown, especially as the Internet has made finding clients easier.”).

15. MICHELLE STRANSKY & DAVID FINKELHOR, CRIMES AGAINST CHILDREN RES. CTR., UNIV. OF N.H., HOW MANY JUVENILES ARE INVOLVED IN PROSTITUTION IN THE U.S.? 1, 6 (2008), available at [http://www.unh.edu/ccrc/prostitution/Juvenile\\_Prostitution\\_factsheet.pdf](http://www.unh.edu/ccrc/prostitution/Juvenile_Prostitution_factsheet.pdf) (stating that estimates of the number of prostituted youth within the United States are “based mostly on guesses or extremely imprecise and speculative methodologies”).

16. ESTES & WEINER, *supra* note 13, at 144–45; see also HOWARD A. DAVIDSON & GREGORY A. LOKEN, NAT’L CTR. FOR MISSING & EXPLOITED CHILDREN, U.S. DEP’T OF JUST., CHILD PORNOGRAPHY AND PROSTITUTION: BACKGROUND AND LEGAL ANALYSIS 51 (1987) (“[A]n estimate of between 100,000 and 300,000 children involved annually in prostitution seems, on the balance of the evidence, highly justifiable.”); cf. Susan S. Kreston, *Prostituted Children: Not an Innocent Image*, 34 PROSECUTOR 37, Nov.–Dec. 2000 (“There are estimated to be between 300,000 and 600,000 prostituted children in the United States.” (citing, *inter alia*, UNICEF and the National Resource Center for Youth Services)).

17. See HEATHER HAMMER ET AL., OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP’T OF JUST., RUNAWAY/TROWNAWAY CHILDREN: NATIONAL ESTIMATE AND CHARACTERISTICS 2 (2002) (defining a runaway episode as “one that meets any one of the following criteria: A child leaves home without permission and stays away overnight. A child 14 years old or . . . older . . . who is away from home chooses not to come home when expected to and stays away overnight. [Or a] child 15 years old or older who is away from home chooses not to come home and stays away two nights.”).

18. *Id.* (defining a “throwaway episode” as “one that meets either of the following criteria: A child is asked or told to leave home by a parent or other household adult, no adequate alternative care is arranged . . . , and the child is out of the household overnight. [Or a] child who is away from home is prevented from returning home by a parent or other household adult, no alternative care is arranged for the child . . . , and the child is out of the household overnight.”).

users and addicts, homeless youth, female gang members,<sup>19</sup> transgender street youth,<sup>20</sup> and unaccompanied minors who enter the United States on their own.<sup>21</sup> Other studies have estimated that 450,000 children run away from or are thrown out of their homes annually, and that one out of every three of these teens will be “lured toward prostitution within 48 hours of leaving home.”<sup>22</sup> Further, the data suggests that the average age of entry into prostitution falls between eleven and fourteen, with some children as young as nine.<sup>23</sup> Likewise, it is estimated that eighty percent of adult prostitutes began their activity when they, themselves, were younger than eighteen.<sup>24</sup> These numbers are compounded by the fact that the United States is both a source country for child sex tourism and a destination country for trafficking of children for sex; research also shows that a large percentage of sex tourists worldwide are Americans.<sup>25</sup>

19. ESTES & WEINER, *supra* note 13, at 67 (stating that “[t]his group includes approximately 27,000 girls between the ages of 10 and 17 years who are members of identifiable gangs—some portion of whom become victims of sexual exploitation as a result of their gang membership”); *see also* Urbina, *Survival*, *supra* note 13 (quoting a detective as stating: “‘Gangs used to sell drugs,’ . . . [n]ow many of them have shifted to selling girls because it’s just as lucrative but far less risky.”).

20. ESTES & WEINER, *supra* note 13, at 67 (describing this group as a “broad category of sexually exploited youth who identify themselves as members of the opposite sex to which they were born,” including “youth born with the sex organs of both genders”); *see also* NICHOLAS RAY ET AL., NAT’L GAY & LESBIAN TASK FORCE, LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS 1, 3, 53–58 (2006), *available at* <http://www.thetaskforce.org/downloads/HomelessYouth.pdf> (finding that twenty to forty percent of “homeless youth identify as lesbian, gay, bisexual, or transgender”); *infra* notes 198–201 and accompanying text (discussing the profile of gay male and transgender youth involved in prostitution).

21. ESTES & WEINER, *supra* note 13, at 142, 149.

22. SARA ANN FRIEDMAN, ECPAT-USA, INC., WHO IS THERE TO HELP US? HOW THE SYSTEM FAILS SEXUALLY EXPLOITED GIRLS IN THE UNITED STATES: EXAMPLES FROM FOUR AMERICAN CITIES 3 (2005), *available at* <http://ecpatusa.org/wp-content/uploads/2010/11/Who-Is-There-to-Help-Us.pdf>; *see also* JENNIFER BENOIT-BRYAN, NATIONAL RUNAWAY SWITCHBOARD 2008 REPORTER’S SOURCE BOOK ON RUNAWAY AND HOMELESS YOUTH: A GUIDE FOR MEDIA ABOUT RUNAWAY AND HOMELESS YOUTH 7 (2008), *available at* <http://www.nrscrisisline.org/media/documents/2008MediaSourcebook.pdf> (stating that twenty-eight percent of runaway or throwaway youth have engaged in “survival sex”); Urbina, *Survival*, *supra* note 13 (stating that of the estimated 1.6 million children who run away each year, nearly a third “engage in sex for food, drugs or a place to stay, . . . [a] dangerous barter system [that] can quickly escalate into more formalized prostitution”).

23. ESTES & WEINER, *supra* note 13, at 92; Kreston, *supra* note 16, at 39 n.11 (“Prostitution of children as young as nine has been documented.”); *see also infra* notes 192–97 and accompanying text (discussing the profile and characteristics of boys who enter prostitution).

24. Cheryl Hanna, *Somebody’s Daughter: The Domestic Trafficking of Girls for the Commercial Sex Industry and the Power of Love*, 9 WM. & MARY J. WOMEN & L. 1, 12 & n.62 (2002) (citing Kreston, *supra* note 16, at 37).

25. ECPAT INT’L, *supra* note 5, at 12 (stating that research shows that “a large percentage of sex tourists abusing children around the world are Americans,” and that between 14,500 and 17,500 people are trafficked into the United States annually for sexual purposes, one-third of whom are thought to be under eighteen).

The number of prostituted children who are criminally prosecuted for these acts is equally difficult to estimate. According to figures kept by the United States State Department, because of a lack of “uniform data collection” among federal, state, and local law enforcement agencies, the information gathered has been—and continues to be—incomplete.<sup>26</sup> In 2008, the most recent year for which data is available, approximately 1500 youth under eighteen years of age were reported to the Federal Bureau of Investigation as having been arrested within the United States for prostitution and “commercialized vice.”<sup>27</sup> Anecdotal evidence suggests, however, that these numbers reflect only a small fraction of the children who face criminal charges as a result of their prostituted status.<sup>28</sup> While many are ultimately charged with less serious offenses than solicitation, the numbers who are initially brought into the juvenile and criminal justice systems for prostitution are significant.<sup>29</sup> For instance, it has been

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26. See U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 340 (10th ed. 2010) [hereinafter 2010 TRAFFICKING IN PERSONS REPORT].

27. See Charles Puzzanchera, Off. of Juv. Just. & Delinq. Prevention, *Juvenile Arrests 2008*, JUV. JUST. BULL. 1, 3 (2009); cf. 2010 TRAFFICKING IN PERSONS REPORT, *supra* note 26, at 342 (“In 2008, the most recent year for which data is available, 206 males and 643 females under 18 years of age were reported to the Federal Bureau of Investigation as having been arrested [within United States borders] for prostitution and commercialized vice.”). According to the Federal Bureau of Investigation’s database of arrest statistics, the numbers of juveniles arrested for prostitution and commercialized vice have remained fairly constant between 1994 and 2007, with an average of 1400 youth arrested each year and a high of 1800 youth arrested in 2004. Charles Puzzanchera et al., *Easy Access to FBI Arrest Statistics: 1994–2007* (2009), available at [http://www.ojjdp.gov/ojstatbb/ezaucr/asp/ucr\\_display.asp](http://www.ojjdp.gov/ojstatbb/ezaucr/asp/ucr_display.asp).

28. See, e.g., Amanda Kloer, *In Massachusetts, Child Sex Slaves Go To Jail*, CHANGE.ORG (Dec. 7, 2010), <http://humantrafficking.change.org/blog/view/in-massachusetts-child-sex-slaves-go-to-jail> (“[C]hildren forced into prostitution are often arrested and sent to prison while the pimps who sell them and men who buy them walk free.”); Jessica Lustig, *The 13-Year-Old Prostitute: Working Girl or Sex Slave?*, N.Y. MAG., Apr. 1, 2007, <http://nymag.com/news/features/30018> (“‘We’re locking up girls,’ says Rachel Lloyd, the founder of GEMS (Girls Educational and Mentoring Services) a nonprofit in Harlem led by survivors of the sex trade, ‘for things that have been done to them.’”); Robin Shulman, *N.Y. Struggles to Aid Child Prostitutes: Bill Would Divert Girls to Social Programs; Opponents Say Threat of Jail is Needed*, WASH. POST, July 13, 2008, at A3 (reporting that a New York public defender who represents prostituted youth in criminal court stated that a decade ago she had two clients under sixteen in a given year, while now she represents approximately two hundred each year, many of whom are twelve or thirteen, with some as young as eleven).

29. See, e.g., Mark Hoerner, *Pro & Con: Should Prostitution be Decriminalized for Minors? YES: Jailing Teen Prostitutes Victimized Them Twice; Judges Need Alternatives*, ATLANTA J.-CONST., Mar. 23, 2010, at 13A (“Police agencies in Atlanta and in most of the five major metro counties have received training in avoiding arresting juvenile victims of prostitution on charges of solicitation but choose instead to arrest on less criminal offenses such as truancy, loitering and similar minor misdemeanor crimes. Unfortunately, these acts . . . obscure the truth—that victims of prostitution do not need jail time but rather counseling, care and restoration.”); Abbe Smith, *Bill To Shield Child Prostitutes Touted in Senate*, NEW HAVEN REG., Apr. 25, 2010, [http://www.nhregister.com/articles/2010/04/25/news/new\\_haven/doc4bd3b5e07a5fa364395395.txt?viewmode=default](http://www.nhregister.com/articles/2010/04/25/news/new_haven/doc4bd3b5e07a5fa364395395.txt?viewmode=default) (“[E]ven though not many minors get arrested for prostitution in the state [of Connecticut], children who are exploited

documented that “hundreds” of prostituted juveniles are arrested each year in one Nevada county, and that at any given time half of these girls are in juvenile detention for prostitution-related criminal offenses, which keep them in state custody for an average of two weeks, if not longer.<sup>30</sup>

Recent public interest in the plight of prostituted children calls to mind the mid-1970s when the mainstream media and popular press first labeled it as a “social problem.”<sup>31</sup> Thirty years ago, this construction resulted from a confluence of factors, including growing awareness of child abuse and neglect, the burgeoning children’s rights movement, and federal legislation that directed significant funding toward shelters and services for runaways and homeless youth.<sup>32</sup> This period also coincided with a painful economic recession in the United States, characterized by high rates of unemployment, inflation, and spending.<sup>33</sup> A similar pattern may be seen today, as the United States is once again experiencing a major economic downturn with little growth, skyrocketing job loss, and a credit crisis leading to record rates of foreclosures and homelessness.<sup>34</sup> A failing economy inevitably leads to a rise in the number of vulnerable youth,<sup>35</sup>

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through sex trafficking often get picked up for other offences. Instead of getting intervention and the help they need to get out [of] danger, these kids get lost in the legal system . . . . Being treated like a criminal sends victims spiraling deeper into despair.”).

30. Abigail Goldman, *What Should Clark County Do With Teenage Prostitutes?*, LAS VEGAS SUN, Mar. 22, 2010, <http://www.lasvegassun.com/news/2010/mar/22/what-should-clark-county-do-teenage-prostitutes/> (reporting that one family court judge gets three to five new child prostitution cases per week, that the girls are between twelve and seventeen years old, and that sixty percent of the girls are from outside of Nevada).

31. WEISBERG, *supra* note 4, at 1.

32. *Id.* at 1–12; *see also infra* Part II.B (discussing the Runaway and Homeless Youth Act of 1974).

33. *See* CHRIS J. DOLAN ET AL., *THE PRESIDENCY AND ECONOMIC POLICY* 181–83 (2008).

34. *See, e.g.*, Becky Gillette, *Staying at Home: Housing Relocation and Stabilization Program to Prevent Homelessness*, 31 MISS. BUS. J., no. 35, Aug. 31, 2009, <http://www.allbusiness.com/society-social-welfare-regulation-policy/13258107-1.html> (“[W]ith the current recession, high unemployment rates and record high levels of foreclosures in the first six months of 2009, there has been an increase in the number of families facing homelessness.”); Emily Kaiser, *Recession May be Deepest Since 1970s*, REUTERS, Oct. 16, 2008, *available at* <http://www.reuters.com/article/email/idUSTRE49F8NX20081016>; Press Release, Reader’s Digest, *Where’s My Stimulus Package? We Hear You America!* (Nov. 28, 2010) (“Escalating unemployment, record foreclosures, an increase in the poverty level. The bad economic news doesn’t seem to be stopping and the repercussions of the recession are being felt throughout the country.”); Juliann Walsh, *Latest Recession Will Have Lasting Effect on Children, Children’s Hospital of Philadelphia Policy Experts Say*, CHILDREN’S HOSP. OF PHILADELPHIA (Nov. 16, 2010), <http://www.chop.edu/news/latest-recession-will-have-lasting-effect-on-children.html> (“Approximately 43 percent of families with children are [currently] struggling to afford stable housing.”).

35. *See* Tracy Loew & Eunice Kim, *When Families, Teens Become Homeless: Youth Interrupted*, STATESMAN J. (Salem, Or.), Aug. 17, 2008, at A1 (stating that “as the economy tightens and foreclosures increase,” an “increasing number” of teens are becoming homeless because their families “just can’t make ends meet”); Ian Urbina, *Recession Drives Surge in Youth Runaways*, N.Y. TIMES,

which in turn leads to more children living on the streets and exchanging sex for money, food, and housing.<sup>36</sup> Furthermore, given the proliferation of Internet access and the greater ease with which people can identify and contact youth who are vulnerable to being prostituted, some have said that the situation is worse than ever—both domestically and internationally.<sup>37</sup> While there has been limited legal scholarship produced on the topic,<sup>38</sup> the

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Oct. 26, 2009, at A1 (“Foreclosures, layoffs, rising food and fuel prices and inadequate supplies of low-cost housing have stretched families to the extreme, and those pressures have trickled down to teenagers and preteens.”); Walsh, *supra* note 34 (stating that increased poverty has made it more difficult for families to afford stable housing and food, and stating “that the number of U.S. children living in poverty rose dramatically from 13.3 million children in 2007 to 15.5 million (or one in five children) by 2009”); Roy Wenzl, *Young Moms Gain Life Skills, Hope at Wichita Children’s Home: Wichita Children’s Home Guides Young Parents*, WICHITA EAGLE, May 11, 2009, at A1 (suggesting that because of the recession, there are “more young people needing shelter and help than ever before”); Paige Winfield, *Legislation aims to help homeless kids*, NAPERVILLE SUN (Chi.), Oct. 24, 2008 (reporting that as a result of “the economic downturn and [the] growing numbers of foreclosures,” homeless families are on the rise).

36. See David Rosen, *Teen Prostitution in America: Looking for Safe Harbor*, COUNTERPUNCH, Aug. 2, 2008, <http://www.counterpunch.org/rosen08022008.html> (citing Department of Justice reports that tens of thousands of runaway and throwaway children had spent time “with a sexually exploitative person” or were sexually assaulted while living away from home); Conchita Sarnoff, Op-Ed., *Runaways Need Support, Shelters, Not Penalty*, MIAMI HERALD, July 5, 2009, at L3 (“The economic crisis and the proliferation of Internet chat rooms have led to an enormous increase in the number of runaway children . . . [m]any [of whom] are turning to prostitution, pornography and drugs because there is no budget in the Miami-Dade Police Department to continue the monthly police sweeps that rescue [runaways].”).

37. See, e.g., INNOCENTI RES. CTR., UNICEF, HANDBOOK ON THE OPTIONAL PROTOCOL ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY 20–21 (2009), available at [http://www.unicef-irc.org/publications/pdf/optional\\_protocol\\_eng.pdf](http://www.unicef-irc.org/publications/pdf/optional_protocol_eng.pdf) (finding that “[t]he Internet has become a popular medium for those wishing to identify and contact children who may be vulnerable to sexual exploitation”); Susan Saulny, *Hundreds Seized in Sweep Against Child Prostitution*, N.Y. TIMES, June 26, 2008, at A16 (“But the rising popularity of Internet-based communication has made it easier for predators both to reach potential victims and to advertise victims to clients.”); see also Claire Cain Miller, *Craigslist Says It Has Shut Its Section for Sex Ads*, N.Y. TIMES, Sept. 15, 2010, at B1 (discussing Craigslist’s decision to permanently close the sex-related advertising section of its site after receiving criticism from state attorneys general and others that the section was helping to facilitate the sexual exploitation of children).

38. A Lexis search of law reviews and journals located only a few articles and several student notes that have focused in any depth on the subject of prostituted children. See, e.g., Wendi J. Adelson, *Child Prostitute or Victim of Trafficking?*, 6 U. ST. THOMAS L.J. 96 (2008); Libby Adler, *An Essay on the Production of Youth Prostitution*, 55 ME. L. REV. 191 (2003); Geneva O. Brown, *Little Girl Lost: Las Vegas Metro Police Vice Division and the Use of Material Witness Holds Against Teenaged Prostitutes*, 57 CATH. U. L. REV. 471 (2008); Hanna, *supra* note 24; Norma Hotaling et al., *The Commercial Sexual Exploitation of Women and Girls: A Survivor Provider’s Perspective*, 18 YALE J.L. & FEMINISM 181 (2006); Nesheba Kittling, *God Bless the Child: The United States’ Response to Domestic Juvenile Prostitution*, 6 NEV. L.J. 913 (2006); Kate Sutherland, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 WM. & MARY J. WOMEN & L. 313 (2003); Kate Brittle, Note, *Child Abuse by Another Name: Why the Child Welfare System Is the Best Mechanism in Place to Address the Problem of Juvenile Prostitution*, 36 HOFSTRA L. REV. 1339 (2008); Jennifer L. Cecil, Note, *Enhanced Sentences for Child Prostitution: The Most Hidden Form of Child Abuse*, 36 MCGEORGE L. REV. 815 (2005); Pantea Javidan, Student Essay,

American media has once again turned its attention to prostituted children.<sup>39</sup> Editorial boards, columnists, and advocates concerned with children’s rights are increasingly recognizing parallels and drawing comparisons between the international and domestic selling of sex by youth.<sup>40</sup>

Due in large part to the issue’s “social and legal complexity” and the “scarcity of reliable information on its nature and extent,” child prostitution within the United States has historically been a thorny problem for policy makers, as well as the general public, to confront.<sup>41</sup> On

*Invisible Targets: Juvenile Prostitution, Crackdown Legislation, and the Example of California*, 9 CARDOZO WOMEN’S L.J. 237 (2003); Paul Menair, Note, *Prostitution: Increase Penalties for Offenses of Pimping and Pandering of a Minor*, 18 GA. ST. U. L. REV. 32 (2001); Shelby Schwartz, Note, *Harboring Concerns: The Problematic Conceptual Reorientation of Juvenile Prostitution Adjudication in New York*, 18 COLUM. J. GENDER & L. 235 (2008).

39. See, e.g., *All Things Considered: Trafficked Teen Girls Describe Life in ‘The Game’* (Nat’l Pub. Radio broadcast Dec. 6, 2010), <http://www.npr.org/2010/12/06/131757019/youth-radio-trafficked-teen-girls-describe-life-in-the-game> (stating that “[t]he FBI estimates that 100 to 300,000 children are being [sexually] exploited” and that “[c]hild prostitution goes on in America every day and every night, despite the efforts of federal, state and local authorities”); see also Marian Wright Edelman, *The Girl Next Door May Now Be on the Corner*, HUFFINGTON POST, Mar. 16, 2009, [http://www.huffingtonpost.com/marian-wright-edelman/the-girl-next-door-may-no\\_b\\_175239.html](http://www.huffingtonpost.com/marian-wright-edelman/the-girl-next-door-may-no_b_175239.html) (discussing the “tens of thousands” of children who are “ensnare[d] . . . into the sex trade” each year); Editorial, *Prostitution and Prevention*, N.Y. TIMES, July 29, 2008, at A18; Judy Keen, *Child-Prostitution Cases Reveal Cruel Underworld*, USA TODAY, July 26, 2006, at 4A.

40. See, e.g., Editorial, *Better Protecting the Vulnerable*, N.Y. TIMES, June 28, 2007, at A20 (“The goal is to give American children the same protections as foreign-born people who are smuggled into the United States to be used as sex slaves.”); Editorial, *Help for Victimized Children*, N.Y. TIMES, July 19, 2008, at A16 (“And Congress must rework the federal Trafficking Victims Protection Act to make sure that states and localities provide sexually exploited children born in this country with the same protections and services that are routinely granted to international victims.”); Editorial, *Saving, Not Victimized, Children*, N.Y. TIMES, May 9, 2007, at A24 (“An Eastern European child smuggled into this country as a sex slave is offered protection under the federal Trafficking Victims Protection Act. An American child who flees abusive parents and ends up selling her body on the streets is labeled a criminal and sent to the juvenile equivalent of prison.”); Editorial, *The Issue: Teen Prostitution*, ARIZ. REPUBLIC, Jan. 22, 2008, at 4 (discussing domestic and international trafficking of minors for sexual purposes); Tom C. Rawlings, *Help End Child Sex Slavery*, ATLANTA J.-CONST., Feb. 21, 2008, at A15 (“By now, you have probably heard about the horrors of the child sex slave trade throughout Eastern Europe, Asia and Third World countries. Sadly, however, the victimization of young girls isn’t just taking place in a land far away.”); see also Nicholas D. Kristof, Op-Ed., *Girls on Our Streets*, N.Y. TIMES, May 7, 2009, at A33 (stating that while prostitution in the United States “isn’t as brutal” as it is in countries “where young girls are routinely kidnapped, imprisoned and tortured by brothel owners, occasionally even killed[,] . . . the scene on American streets is still appalling”).

41. Finkelhor & Ormrod, *supra* note 10, at 2; see also Lustig, *supra* note 28 (quoting a federal administrator of the Office of Juvenile Justice and Delinquency Prevention as stating, “‘There’s a suggestion that [sex trafficking of minors] is a type of prostitution . . . It’s not. It’s really the commercialized rape of our children.’ Yet . . . ‘[w]e don’t want to see child prostitution legalized . . . The fact that the conduct remains illegal serves as a warning for everybody, including the teenagers, that they are doing something that’s wrong. But that does not equate with treating that child as an offender.’”).

the most basic level, there are definitional quandaries and ambiguities. Is it fair, for example, to characterize these youth as knowing offenders who are motivated by the thrill of the activity and who, if harmed, are merely getting what they deserve?<sup>42</sup> Or are they innocent victims of commercial sexual exploitation, coerced into an inherently abusive dynamic with predatory adults?<sup>43</sup> What difficulties, if any, are posed by framing the question with these two extremes? Further, if children are not considered culpable for acts of prostitution, does this have significance for other illegal activity committed by minors? Similarly, by exempting children from criminal liability for prostitution, does this perpetuate the notion that adolescents do not or should not have sex or sexual thoughts?

This Article critically examines the prevalence of laws allowing for the criminal prosecution of minors for prostitution. It argues that rather than maintain a legal scheme that serves to pathologize such juveniles, a more nuanced approach should be developed, in which—at a minimum—criminal liability for prostitution should be consistent with each state’s statutory rape and age of consent laws. In order to provide a picture of existing conditions, Part II analyzes the range of ways in which states have addressed the problem of prostituted children and highlights those few that have successfully utilized strategies of intervention and rehabilitation rather than prosecution and incarceration. It contrasts the impact of state versus federal legislation as well as domestic versus international policy in this area and examines the ways in which these differences serve to perpetuate pernicious stereotypes vis-à-vis youth and crime. Part III addresses the historical treatment of prostituted children in the United States as criminals rather than victims by both law and society, and critiques contemporary rationales for continuing a punitive approach toward these youth. Part IV explores the conflicting statutory, common law, and colloquial meanings of the terms “prostitution,” “consent,” and “bodily autonomy” as they relate to children and sexuality. It considers the extent to which the criminal offenses of prostitution and statutory rape address different sets of harms and examines how matters of gender and sexual orientation are implicated in the discussion. Part V highlights model programs directed at prevention, intervention, and rehabilitation,

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42. *See, e.g.*, Brittle, *supra* note 38, at 1343–44 (discussing the legal treatment of and attitude toward prostituted youth within the United States).

43. *See id.* at 1348–49 (arguing that domestic prostituted children should be considered “forced into prostitution through manipulation, coercion, and deception . . . [and] repeatedly abused, exploited, and [in] need [of] help and protection [from] law enforcement and social service agencies” (footnote omitted)); Cecil, *supra* note 38, at 818 (“The author believes that treating child prostitutes as victims of sexual abuse rather than criminal marks a step toward ending child prostitution.”).

and proposes strategies for reform, such as decriminalization and diversion.

## II. THE STATUS QUO

### A. *State and Local Law*

The laws of the states regarding prostitution are a diverse amalgam; they reflect the myriad of ways in which legislatures have attempted to hold the various players in the prostitution industry criminally liable—those who promote prostitution or induce or entice others into prostitution (the “pimps”), those who solicit or patronize prostitutes (the “johns”), and the prostitutes themselves who perform sexual acts in exchange for money or something else of value.<sup>44</sup> Prostitution is illegal, without exception, in every state except Nevada, which allows it within licensed establishments in specified counties.<sup>45</sup> Just five states have decriminalized the offense for minors under a certain age<sup>46</sup>: Since 2002, Michigan has held only those who are sixteen and above criminally liable for prostitution.<sup>47</sup> New York, which passed the Safe Harbor for Exploited Children Act (SHA) in 2007,

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44. See 2010 TRAFFICKING IN PERSONS REPORT, *supra* note 26, at 339 (“Traffickers were also prosecuted under a myriad of state laws, but no comprehensive data is available on state prosecutions and convictions. Forty-two states have enacted specific anti-trafficking statutes using varying definitions and a range of penalties.”); see also *infra* Part IV.A (discussing the various meanings of “prostitution” and related terms).

45. Adelson, *supra* note 38, at 107 n.65; see NEV. REV. STAT. ANN. § 201.300 (West 2000) (criminalizing pandering or one who “[i]nduces, persuades, encourages, inveigles, entices or compels a person to become a prostitute or to continue to engage in prostitution”); NEV. REV. STAT. ANN. § 201.354 (West 2010) (criminalizing engaging in prostitution and soliciting prostitution when not in a “licensed house of prostitution”); see also Act of Nov. 3, 2009, ch. 186, 2009 R.I. Pub. Laws 596 (codified at R.I. GEN. LAWS § 11-34.1-1 (2009)); Edward Achorn, *New Landscape of the Sex Biz*, PROVIDENCE J.-BULL., Dec. 22, 2009, at 7 (reporting passage of state law in Rhode Island that explicitly outlaws prostitution); Ray Henry, *R.I. Considers Closing Prostitution Loophole*, BOS. GLOBE, Oct. 30, 2009, at 4 (reporting that Rhode Island, where prostitution had been legal since 1980 because there had been no law defining or outlawing it, was considering a law that would explicitly criminalize prostitution, although associated activities, such as solicitation and pimping, were already illegal).

46. See Jonathan Todres, *Change Exploited Kid Laws*, ATLANTA J.-CONST., July 13, 2010, at 11A; see also *Minnesota Legislature Introduces Safe Harbor Bill*, ECPAT-USA (Mar. 7, 2011), <http://ecpatusa.org/2011/03/minnesota-legislature-introduces-safe-harbor-bill/> (reporting on a bill pending before the Minnesota state legislature that amends the definition of “prostitute” to include only those who are eighteen years of age or older, and explicitly defines sexually exploited youth as children in need of protection or services, not delinquent juveniles).

47. See MICH. COMP. LAWS § 750.448 (West 2002) (“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 . . . .”); see also *infra* notes 228–34 and accompanying text (discussing in greater detail the two-tiered system of age of consent laws utilized in Michigan).

defines those under eighteen who engage in prostitution as “sexually exploited child[ren]”<sup>48</sup> and gives family court judges the discretion to convert juvenile delinquency petitions for prostitution offenses into petitions alleging that the child is a “person in need of supervision.”<sup>49</sup> Washington passed a similar bill to New York’s in June 2010, but its legislation—unlike New York’s—includes a specific funding source for specialized services for sexually exploited youth.<sup>50</sup> Illinois, whose Safe Children Act was signed into law in August 2010, decriminalized prostitution for all youth under eighteen, including repeat offenders,<sup>51</sup> and added the category of prostituted minors to the definition of abused youth.<sup>52</sup> Connecticut, whose Safe Harbor Act became law in October 2010, decriminalized prostitution for those under sixteen and created a presumption that sixteen- and seventeen-year-olds were “coerced” into committing the offense.<sup>53</sup>

This framework, in which the vast majority of states define the offense of prostitution without regard to the defendant’s age, is complicated by the fact that the minimum age at which states allow minors to consent to sexual intercourse varies, often exceeding the age at which teens are prosecuted for prostitution.<sup>54</sup> This results in situations in which children as young as twelve or thirteen are criminally prosecuted for prostitution under one set of laws despite the fact that they are too young to legally

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48. N.Y. SOC. SERV. LAW § 447-a(1) (McKinney 2010). Offenders who are sixteen or older are typically prosecuted in New York as adults in criminal court rather than in family court, but SHA broadens the jurisdiction of family court to include qualified youth charged with acts of prostitution who are between the ages of sixteen and eighteen and meet specified criteria. Schwartz, *supra* note 38, at 263–65.

49. N.Y. FAM. CT. ACT § 311.4(3) (McKinney 2010) (allowing the court to substitute a petition alleging that the respondent is in need of supervision for a petition alleging that the respondent is a juvenile delinquent); *see also id.* § 712(a) (defining “person in need of supervision”); *infra* notes 65–70 and accompanying text (discussing New York’s SHA in greater detail).

50. WASH. REV. CODE ANN. § 13.32A.030 (West Supp. 2011) (defining “sexually exploited child” as “any person under the age of eighteen who is a victim of the crime of commercial sex abuse of a minor”); WASH. REV. CODE ANN. § 43.63A.740 (West Supp. 2011) (increasing the fine from \$500 to \$2500 for the redemption of a vehicle impounded in connection with a charge of commercial sexual abuse of a minor, to be deposited in a “prostitution prevention and intervention account” that funds services for sexually exploited youth); Act of Apr. 1, 2010, ch. 289, § 9, 2010 Wash. Sess. Laws 2301, 2309 (creating presumption that minors engaged in prostitution are victims of commercial sex abuse); *see also Dan Rather Reports: Up To Their Ashes, Portland Update* (HDNet television broadcast May 25, 2010) (reporting on child prostitution in Oregon and discussing the Safe Harbor Act of Washington State).

51. Safe Children Act, Ill. Pub. Act 096-1464 (2010) (enacting House Bill 6462).

52. 705 ILL. COMP. STAT. 405/2-3(2) (2011).

53. Safe Harbor for Exploited Children Act, 2010 Conn. Acts 115 (Reg. Sess.) (codified at CONN. GEN. STAT. ANN. § 53a-82 (West 2010)); *see also* Jon Lender, *Quick Take: Law Recognizes Exploited Children*, HARTFORD COURANT, June 11, 2010, at B1 (reporting on the passage of the bill).

54. *See* Adelson, *supra* note 38, at 107.

consent to sex under another set, meaning that they may be considered both “offenders” and “victims” simultaneously.<sup>55</sup> The majority of states set the age of “ordinary consent” at sixteen or seventeen.<sup>56</sup> States typically require a specified age gap—generally three or four years—between the minor and the older actor charged with statutory rape<sup>57</sup> or a minimum age for the older actor<sup>58</sup> in order to avoid criminalizing sex between adolescent or teenage peers. To further the policy goal of deterring sex that could be considered coercive or not truly voluntary, a number of states set the age of consent at eighteen when the minor has sexual intercourse with someone deemed to be “in a position of familial or custodial authority.”<sup>59</sup>

The conflicts and inconsistencies posed by the criminal prosecution of minors for prostitution are further compounded by the fact that most states routinely deny basic legal rights to those under eighteen, including the right to vote, serve on a jury, and enter into a contract.<sup>60</sup> This results in a

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55. Compare ME. REV. STAT. ANN. tit. 17-A, §§ 851, 853-A (2006) (prohibiting prostitution without limiting the crime to persons of a certain age), with ME. REV. STAT. ANN. tit. 17-A, § 254 (2006) (prohibiting statutory rape or “sexual abuse of a minor age fourteen or fifteen” by an actor who is at least ten years older); compare OR. REV. STAT. § 167.007 (West 2003) (prohibiting prostitution without limiting the crime to persons of a certain age), with OR. REV. STAT. § 163.355 (West 2003) (setting the minimum age of consent at sixteen).

56. See OFF. FOR VICTIMS OF CRIME, U.S. DEP’T OF JUST., STATE LEGISLATORS’ HANDBOOK FOR STATUTORY RAPE ISSUES 8 (2000); see also ASAPH GLOSSER ET AL., STATUTORY RAPE: A GUIDE TO STATE LAWS AND REPORTING REQUIREMENTS ES-1–2 (2004), available at <http://www.4parents.gov/sexrisky/statutoryrapelaws.pdf> (stating that only twelve states have a single age of consent, which ranges from sixteen to eighteen, while in the remaining states, the age of consent depends on factors such as the age of the victim, the age of the defendant, or the difference in age between them); *infra* Part IV.B (defining “consent” and considering the implications of the various meanings and interpretations).

57. See OFF. FOR VICTIMS OF CRIME, *supra* note 56, at 8–9 (finding that “23 [s]tates have age differentials for at least one of their statutory rape offenses”); see also N.C. GEN. STAT. § 14-27.7A (2007) (requiring a four- to six-year age gap between the minor and the older actor); tit. 18 PA. CONS. STAT. § 3122.1 (2000) (requiring a four-year age gap); TEX. PENAL CODE ANN. § 21.11 (West 2003) (requiring a three year age gap).

58. OFF. FOR VICTIMS OF CRIME, *supra* note 56, at 8 (finding that “[t]wenty-six States have specified an age minimum for the defendant under at least one statutory rape” statute); see, e.g., FLA. STAT. ANN. § 794.05 (West 2007) (prohibiting a person twenty-four years or older from having sex with persons who are sixteen or seventeen years old); NEB. REV. STAT. §§ 28-319 to -319.01 (2008) (prohibiting sexual activity between persons younger than twelve and older than nineteen, as well as between those younger than sixteen and older than twenty-five).

59. OFF. FOR VICTIMS OF CRIME, *supra* note 56, at 9; see, e.g., CONN. GEN. STAT. ANN. §§ 53a-71, -73a (West 2007) (stating that if the actor is a coach or stands in certain positions of power over the child, the age of consent is eighteen); MINN. STAT. ANN. §§ 609.342–.345 (West 2009) (stating that if “the actor is more than 48 months older than the complainant and in a position of authority,” the age of consent is eighteen); N.H. REV. STAT. ANN. § 632-A:2 (2007) (stating that if the actor is in a position of authority and “uses this authority to coerce the victim to submit,” the age of consent is eighteen); see also Part IV.B (discussing the meaning and definition of consent, including the relevance of the nature of the relationship between child and partner).

60. See, e.g., N.C. CONST. art. VI, § 1 (limiting the right to vote to those over eighteen); N.C.

statutory scheme that holds minors criminally liable and competent to “choose” to exchange sex for something of value, while denying them any number of other rights, including the ability to marry without parental consent<sup>61</sup> or work in violation of child labor laws.<sup>62</sup> Such a scheme also raises resource and policy questions regarding how best to confront the problem of prostituted children while still recognizing their rights to physical and sexual autonomy and freedom of expression. In other words, if the legal system considers prostituted youth as victims who are not criminally responsible for their actions, what ramifications—if any—are there for minors in other contexts in which their physical autonomy is at issue, such as abortion or the refusal of medical treatment without parental consent?<sup>63</sup>

As referenced above, only a few states and localities have decriminalized child prostitution or are considering doing so, apparently persuaded by the argument that treatment is more appropriate than punishment.<sup>64</sup> New York’s Safe Harbor for Exploited Children Act (SHA), which became effective in April 2010, reclassifies prostituted children under age eighteen as “victims” and mandates rehabilitative treatment (if available) in short- or long-term safe houses.<sup>65</sup> SHA also calls for local law

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GEN. STAT. § 7B-3507(1) (2009) (stating that only sixteen- and seventeen-year-olds who have been emancipated have the same right to make contracts, to sue and be sued, and to transact business as adults); N.C. GEN. STAT. § 9-3 (2007) (limiting jury service to those over eighteen); RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981) (setting the minimum age to make a contract at eighteen); *see also* Martha Minow, *What Ever Happened to Children’s Rights?*, 80 MINN. L. REV. 267, 268–73 (1995) (describing the philosophy of child liberationists who “promoted children’s rights to vote, work for money, sign contracts, manage their own educations, travel, and form their own families”); Elizabeth S. Scott, Essay, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 547–49 (2000) (discussing the complexity of the legal regulation of children, which is compounded by the fact that “policy makers have no clear image of adolescence”).

61. *See, e.g.*, DEL. CODE ANN. tit. 13, § 123 (2009); *see also infra* notes 262–68 and accompanying text (discussing marriage laws and the need for parental content).

62. *See, e.g.*, N.Y. LAB. LAW §§ 142–43 (McKinney 2009) (prohibiting the employment of children who are fourteen and fifteen years old for over three hours per day, eighteen hours per week, six days per week, and between the hours of seven p.m. and seven a.m. when school is in session, and prohibiting more than an eight-hour day, six days per week, and forty hours per week when school is not in session).

63. *See infra* Part IV.C.

64. *See supra* notes 46–55 and accompanying text; *see also* Ian Urbina, *Legislators Work to Improve Laws on Runaways*, N.Y. TIMES, Jan. 3, 2010, at A10 [hereinafter Urbina, *Legislators*] (reporting that “lawmakers in Connecticut, Hawaii, New York, Pennsylvania, and North Dakota are considering bills to” fund services and improve the tracking of runaways and prostituted children).

65. N.Y. SOC. SERV. LAW §§ 447-a to -b (McKinney 2010); *see* Toolsi Gowin Meisner, Nat’l Ctr. For Prosecution of Child Abuse, *Shifting the Paradigm from Prosecution to Protection of Child Victims of Prostitution Part I of II*, 21 UPDATE 1 (2009) (describing the Safe Harbor Act); *see also* Clyde Haberman, *Helping Girls as Victims, Not Culprits*, N.Y. TIMES, July 8, 2008, at B1 (“Instead of being treated as criminals, as they are now, girls age 15 and under [in New York] would be viewed as

enforcement officials to be trained “to identify and obtain appropriate services” for prostituted youth consistent with the Act’s terms.<sup>66</sup> While some legal scholars have referred to SHA as “groundbreaking,”<sup>67</sup> others have criticized its one-size-fits-all mentality<sup>68</sup> and its exclusion of juveniles with prior arrests for prostitution-related crimes.<sup>69</sup> Connecticut and Washington have recently passed Safe Harbor laws that are similar to New York’s Act.<sup>70</sup> Illinois has taken perhaps the furthest step by enacting comprehensive legislation that immunizes all children under eighteen—without exception—from any possibility of prosecution for prostitution, providing perhaps the best model for other states.<sup>71</sup> In Atlanta, Georgia, however, one of the major hubs of commercial sex in the United States,<sup>72</sup>

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victims the first time they are arrested for prostitution.”); Press Release, N.Y. Governor David A. Paterson, Governor Paterson Signs Law to Protect Sexually Exploited Youth (Sept. 26, 2008), [http://www.governor.ny.gov/archive/paterson/press/press\\_0926082.html](http://www.governor.ny.gov/archive/paterson/press/press_0926082.html) (“For too long we have been disciplining young children who are the victims of brutal sexual exploitation instead of providing them with the necessary services to reintegrate them into society and ensure they receive adequate crisis intervention.”); Rosen, *supra* note 36 (reporting that the Safe Harbor Act requires New York to establish a variety of community-based services, including “housing, diagnostic assessment, individual case management, medical services including substance abuse services, counseling and therapeutic services, educational services including life skills services and planning services to successfully transition residents back to the community”); *infra* text accompanying notes 66–70 (discussing New York’s Safe Harbor Act).

66. N.Y. SOC. SERV. LAW § 447-b(6) (McKinney 2010).

67. *See, e.g.*, Shulman, *supra* note 28, at A3 (describing the Safe Harbor Act as “a groundbreaking bill that would divert young girls arrested for prostitution to social programs rather than punishing them”).

68. *See, e.g.*, Schwartz, *supra* note 38, at 237 (arguing for “a more tailored, philosophically- and developmentally-appropriate” approach to prostituted children than New York’s Safe Harbor Act); Elizabeth Anne Wood, *Will New York Stop Treating Teen Prostitutes as Criminals?*, SEX IN THE PUBLIC SQUARE (May 9, 2007, 2:31 PM), <http://sexinthepublicsquare.wordpress.com/2007/05/09/will-new-york-stop-treating-teen-prostitutes-as-criminals/> (questioning the provision in the Safe Harbor Act that mandates protective services for all those identified as prostituted teens, stating that “not all teen prostitutes are operating in the same conditions nor do they all have the same needs”).

69. *See, e.g.*, Meisner, *supra* note 65, at 2 (critiquing this aspect of SHA for “fail[ing] to appreciate the cycle of violence that sexually exploited teens experience”); *see also* Rosen, *supra* note 36 (critiquing SHA for its failure to comply with federal law that protects youth under eighteen from commercial sex acts without exception and New York law that sets the age of consent at seventeen).

70. *See supra* notes 50–53 and accompanying text.

71. Safe Children Act, Ill. Pub. Act 96-1464 (2010) (enacting House Bill 6462); POLARIS PROJECT, PUBLIC ACT 96-1464: ILLINOIS SAFE CHILDREN ACT—SUMMARY 1 (2010), <http://www.enddemandillinois.org/docs/ILSafeChildrenActSummary.pdf> (“This law makes Illinois the first state in the nation to make all children under the age of 18 immune from prosecution for prostitution, under any circumstances.”); *see also infra* Part IV.B (discussing statutory approaches to the decriminalization of the prostitution of children).

72. Kayrita M. Anderson, *Child Prostitution in Impoverished Communities: An Overlooked Consequence of an Absence of Opportunity*, SPOTLIGHT ON POVERTY AND OPPORTUNITY (Nov. 2, 2009), <http://www.spotlightonpoverty.org/ExclusiveCommentary.aspx?id=4f0ca668-4737-4db9-97ff-8f7c1d8a6e9f> (“The combination of thousands of visitors passing through and children growing up in desperate circumstances makes Atlanta a major national hub of child trafficking and exploitation—an

bills that would decriminalize prostitution for all minors under eighteen<sup>73</sup> and provide compensation, residential treatment programs, and other services to child victims of pimping, pandering, or trafficking,<sup>74</sup> have died in committee.<sup>75</sup> The legislation, championed by Atlanta's victim-services groups<sup>76</sup> and community-based movements aimed at ending the prostitution of children,<sup>77</sup> was to be funded in part by a surcharge assessed on customers of sexually oriented businesses.<sup>78</sup>

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unfortunate distinction few know about.”); Bob Herbert, *Bought and Sold*, N.Y. TIMES, Nov. 20, 2006, at A23 (“[Atlanta] is a full-fledged sex-tourism destination, with thousands of strippers, prostitutes and other sex workers accommodating an endless stream of johns from around the country. Under-age girls (some as young as 10 and 11) are a significant part of that trade.”).

73. H.R. 582, 150th Gen. Assemb., Reg. Sess. (Ga. 2009) (setting eighteen as the minimum age for the prosecution of the crimes of prostitution and masturbation for hire); Christopher Quinn, *Supporters Push Teen Prostitution Legislation*, ATLANTA J.-CONST., June 17, 2009, at 8B; *see also* S. Res. 642, 150th Gen. Assemb., Reg. Sess. (Ga. 2009) (establishing a Georgia Senate Study Committee on services for crime victims and explicitly defining crime victims as including “sexually exploited minors”).

74. S. 91, 150th Gen. Assemb., Reg. Sess. (Ga. 2009).

75. *See, e.g.*, Todres, *supra* note 46, at 11A; *see also* Jim Galloway, *Georgia's Christian Right Comes Out Against Bills Aimed at Child Prostitution*, ATLANTA J.-CONST. BLOG (Feb. 1, 2010, 2:59 PM), <http://blogs.ajc.com/political-insider-jim-galloway/2010/02/01/georgias-christian-right-comes-out-against-bills-aimed-at-child-prostitution/> (stating that Georgia's Christian right movement opposed the legislation because it “would lead to more [child] prostitution, not less,” and would create an “absolute cultural upheaval”).

76. *See, e.g.*, S.A. Reid, *Campaign Under Way to End Child Prostitution*, ATLANTA J.-CONST., Aug. 24, 2008, at 10D (reporting that “Georgia and Atlanta are at the forefront of addressing” the prostitution of children); Mashawn D. Simon, *Child Prostitution Crackdown Sees Success, Advocates Say*, ATLANTA J.-CONST., Sept. 4, 2009, <http://www.ajc.com/news/atlanta/child-prostitution-crack-down-sees-131059.html> (reporting on the work of Atlanta's Juvenile Justice Fund, a nonprofit organization that operates the Center to End Adolescent Sexual Exploitation (CEASE), which runs a residential treatment facility for prostituted children as well as an aftercare facility); *Center to End Adolescent Sexual Exploitation*, JUVENILE JUSTICE FUND, <http://www.juvenilejusticefund.org/programs/cease/index.aspx> (last visited Apr. 25, 2011). *But see* BARTON CHILD L. & POL'Y CLINIC, COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN GEORGIA: SERVICE DELIVERY AND LEGISLATIVE RECOMMENDATIONS FOR STATE AND LOCAL POLICY MAKERS 20–22 (2008), available at <http://childwelfare.net/activities/legislative2008/CSEC20080131.pdf> (finding that while Georgia has several high-quality programs and services for sexually exploited youth, the specialized care is limited and greater prevention efforts are needed).

77. *See, e.g.*, STREET GRACE: HELP END CHILDHOOD SEXUAL EXPLOITATION, <http://www.streetgrace.org/home> (last visited Apr. 25, 2011) (describing an Atlanta-based nondenominational alliance of churches that provides support to direct-service organizations that offer mentoring and aftercare to prostituted children, prevent sexual victimization through education, and reduce the environmental factors that lead to prostitution).

78. *Strip Club 'Pole Tax' Would Assist Abused: Legislators Call for \$3 to \$5 Fee*, AUGUSTA CHRON., Jan. 30, 2009, at B07 (stating that the proposal originated in a legislative study committee on prostituted children that “estimate[d] that 200 to 300 children are sexually exploited every month” in metropolitan Atlanta). *But see* *Combs v. Tex. Entm't Ass'n, Inc.*, 287 S.W.3d 852, 864 (Tex. App. 2009) (holding, under strict scrutiny analysis, that a tax imposed on the customers of sexually oriented businesses is unconstitutional under the First Amendment).

Prosecutors and lawmakers in other states have relied on strategies of intervention and rehabilitation in developing *discretionary* programs that utilize a victim-centered approach to the sexual exploitation of children, attempting to change the way in which prostituted teens are viewed by the criminal justice system.<sup>79</sup> Under the Teen Prostitution Prevention Project (TPPP), a multi-agency initiative launched in 2004 by the district attorney of Suffolk County, Massachusetts, rather than criminally prosecuting youth, the prosecutor’s office coordinates with over forty agencies—including “social service [and] medical providers, probation departments, victim-witness advocates, and . . . community youth and welfare organizations”—to ensure that prostituted youth have housing and education and that their physical and mental health needs are addressed.<sup>80</sup> Similarly, California’s Alameda County recently began a pilot project in which youth under eighteen are provided treatment and services through a diversion program, rather than being charged and detained in a juvenile hall.<sup>81</sup> The legislation that established the project also increased the financial and criminal penalties for those who buy or sell minors for sex, including categorizing such acts as serious felonies, which qualify as “strikes” under California’s recidivist statute.<sup>82</sup> Likewise, in San Bernardino County, the district attorney prefers to classify prostituted children as victims in need of rehabilitation rather than prosecute them for prostitution;<sup>83</sup> local law enforcement, school resource officers, and probation departments receive training on the most productive ways to

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79. See, e.g., *Alameda County Focuses on Child Prostitution Fight*, CONTRA COSTA TIMES (Walnut Creek, Cal.), Apr. 22, 2009, at 6A; Wesley G. Hughes, *Progress Made in Fight Against Child Prostitution*, SUN (San Bernardino, Cal.), Aug. 23, 2009, [http://www.sbsun.com/ci\\_13189444?iADiD=Search-www.sbsun.com-www.sbsun.com](http://www.sbsun.com/ci_13189444?iADiD=Search-www.sbsun.com-www.sbsun.com); Meisner, *supra* note 65, at 2; *infra* Part V.A.

80. Meisner, *supra* note 65, at 2; see also Daniel F. Conley & Lisa Goldblatt Grace, *As You Were Saying . . . Keeping Pimps from Prey*, BOS. HERALD, Dec. 1, 2007, at 14; Press Release, Suffolk Cnty. Dist. Att’y Off., Teen Prostitution Prevention Project Named Among Top 50 Innovative Government Programs (Apr. 4, 2007), <http://www.mass.gov/dasuffolk/docs/4.4.07C.html>.

81. CAL. WELF. & INST. CODE § 18259 (West Supp. 2010); Byron Williams, *Legislation Would Establish Child Prostitutes as Victims*, OAKLAND TRIB., Dec. 18, 2008, <http://democrats.assembly.ca.gov/members/a16/articles/20081218AD16AR01.htm> (reporting on the legislation and describing it as “a regional approach to a global problem”); see also *infra* Part V.B (discussing diversionary programs for prostituted children).

82. CAL. PENAL CODE ANN. § 266h(b) (West 2009) (setting out the penalties for “pimping of a minor”); CAL. PENAL CODE ANN. § 1170.12(c)(2)(A) (West 2009) (setting out the “three strikes” law); CAL. PENAL CODE ANN. § 1192.7(c) (West 2009) (defining “serious felony”).

83. Lori Consalvo, *Police Learn Ways to Identify and Prevent Child Prostitution*, INLAND VALLEY DAILY BULL., Aug. 12, 2009 (reporting that the district attorney began the Coalition Against Sexual Exploitation (CASE) to combat the prostitution of children and provide treatment for the victims).

identify and interact with this population and to deter and prevent the prostitution of children.<sup>84</sup>

While there is anecdotal evidence that such shifts in enforcement practice and the implementation of multi-agency responses have the potential to bring about systemic change,<sup>85</sup> success at this point has been described only in subjective—rather than empirical—terms.<sup>86</sup>

### B. Federal Law

Federal legislative efforts on the domestic front have been directed at child protection in general, with a focus on pornography and sexual abuse rather than the prostitution of children.<sup>87</sup> The Child Sexual Abuse and Pornography Act of 1986 (CSAPA),<sup>88</sup> which incorporated a substantial revision of the White-Slave Traffic Act of 1910 (more commonly known as the Mann Act),<sup>89</sup> included a provision to facilitate the prosecution of those who cause, coerce, or induce interstate travel by another person for the purpose of prostitution or other illegal sexual conduct.<sup>90</sup> While the CSAPA removed various obstacles to the Mann Act's heightened penalties for the interstate prostitution of children, including the requirement that a "commercial" motive be shown for the transportation of the child, it has resulted in relatively few convictions for Mann Act offenses.<sup>91</sup> Similarly,

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84. *Id.* (reporting that police officers are attempting "to curb prostitution . . . and educate others on a changing mentality" in which the child is seen as a victim and not a criminal); *see also* Kamika Dunlap, *Cops Shift Focus, Treat Child Prostitutes as Victims*, INSIDE BAY AREA, Apr. 23, 2008, [http://www.insidebayarea.com/ci\\_9024564](http://www.insidebayarea.com/ci_9024564) (reporting that officers in the police department in Oakland, CA, receive training "to understand the dynamics of physical and sexual abuse and to use that reasoning in dealing with prostitution cases").

85. *See, e.g.*, Hughes, *supra* note 79 ("We are building an army of people trained to recognize, intercept and treat these children and pull them out of that ugly parallel universe of pimps, johns, abuse, drugs, sexually transmitted diseases, pregnancy, abortion, hotels that charge by the hour, dark-alley interludes and constant danger.").

86. *See, e.g.*, Reid, *supra* note 76 (reporting that when asked about the "results" of a Georgia campaign to make the prostitution of children less profitable for pimps and more costly for johns, the coordinator stated, "If by results you mean more arrests, prosecutions or fewer victims, the answer is no. We have a long way to go. If by results you mean the mobilizing of a community, increased awareness of the issue and increased support with policy-makers, I would say yes."). *But see* Meisner, *supra* note 65, at 2 (finding that although Boston's TPPP received fewer than five referrals in its first year, it "identified almost ten times as many exploited youth than had been [previously] identified" by the few agencies that had been aware of the problem).

87. *See infra* notes 89–101 and accompanying text.

88. Pub. L. No. 99-628, 100 Stat. 3510 (codified as amended at 18 U.S.C. § 2251 (2006)).

89. 18 U.S.C. §§ 2421–2423 (2006); *see also infra* notes 141–43 and accompanying text (discussing the Mann Act).

90. *See* DAVIDSON & LOKEN, *supra* note 16, at 67–68.

91. *See* U.S. DEP'T OF JUST., ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS & ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS 42–43 (2010)

while the Racketeer Influenced and Corrupt Organizations Act (RICO) includes violations of the Mann Act among its definitions of “racketeering,”<sup>92</sup> it has led to few successful prosecutions of child prostitution rings,<sup>93</sup> the result of—at least in part—its rigorous technical requirement that the government prove participation in the commission of two or more RICO violations, constituting a pattern that was part of an organized enterprise.<sup>94</sup> A further drawback of these types of federal statutes is that their broad scope criminalizes the conduct of the children who have been prostituted as well as the pimps and the procurers. Another anomaly is that johns are often fully exempt from penalty.<sup>95</sup>

Even taking into account that the role of the federal government in such areas as prostitution is circumscribed, federal law enforcement has made little effort to facilitate cooperation among the states or guide coordinated action on a national level.<sup>96</sup> It has collected limited data on the domestic sexual exploitation of children, resulting in no “systematic and verifiable qualitative [or] quantitative information” that is available for dissemination to state or national organizations.<sup>97</sup> Further, federal data that

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(stating that in “2009, the FBI opened 167 human trafficking investigations, made 202 arrests, and filed 77 complaints[,]” and that coordinated task forces have led to the recovery of “over 891 children” and the convictions of “[o]ver 500 pimps, madams, and their associates” between 2003 and 2009); 2010 TRAFFICKING IN PERSONS REPORT, *supra* note 26, at 339 (stating that “a collaboration of federal and state law enforcement authorities and victim assistance providers” conducted a national operation in 2009 that led to “the identification of 306 children and 151 convictions of traffickers in state and federal courts”); *see also* Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977, 3016 (2006) (“In fiscal year 2001, 153 people were sentenced to prison under Mann Act offenses.” (citing U.S. DEP’T OF STATE, ASSESSMENT OF U.S. ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS (2003))); *Morning Edition: Atlanta Combats Child Prostitution* (Nat’l Pub. Radio broadcast May 9, 2001), <http://www.npr.org/templates/story/story.php?storyId=1122668> (reporting that the charging of several Atlanta pimps under RICO was “unprecedented”).

92. 18 U.S.C. § 1961(1)(B) (2006) (defining “racketeering activity”); DAVIDSON & LOKEN, *supra* note 16, at 68.

93. DAVIDSON & LOKEN, *supra* note 16, at 68.

94. *See* 18 U.S.C. § 1961(4)–(5) (2006) (defining “enterprise” and “pattern of racketeering activity”); 18 U.S.C. § 1962(c) (2006) (“It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity . . . .”); DAVIDSON & LOKEN, *supra* note 16, at 68.

95. *See* DAVIDSON & LOKEN, *supra* note 16, at 67–68 (explaining that johns are exempt from punishment; prostituted minors may be indicted as “accomplices to their own interstate transportation”; and federal penalties attach only if prostitutes cross state lines, enabling pimps to move freely from state to state as long as they are unaccompanied by prostitutes).

96. ECPAT INT’L, *supra* note 5, at 13.

97. *Id.* at 11. *But see Domestic Minor Sex Trafficking: Hearing before the House Judiciary Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 129, 133 (2010) (prepared statement of Francey Hakes, National Coordinator of Child Exploitation, Prevention, and Interdiction, Off. of the U.S. Deputy Att’y Gen.), *available at*

does exist fails to disaggregate the various ways in which youth have been victimized, “making it impossible to differentiate” between children who have been sexually exploited and those who have been forced into sweatshop labor or domestic servitude.<sup>98</sup> Given the particular challenge of identifying prostituted children, streamlining the process of collecting, integrating, and analyzing data on a national level and integrating reporting systems are critical to implementing effective laws and policies.

During the past three decades, there have been several federal statutes that have directed funding to the rehabilitation of sexually exploited children and to those most at risk for entering prostitution.<sup>99</sup> Growing public awareness of child physical and sexual abuse resulted in the Child Abuse Prevention and Treatment Act of 1974,<sup>100</sup> which includes “sexual exploitation” in its statutory definition of the categories of sexual abuse that must be reported by physicians, teachers, and others who work with children.<sup>101</sup> The Runaway and Homeless Youth Act of 1974<sup>102</sup> has underwritten nonprofit programs that offer shelter and services to displaced young people who are not already under the aegis of the juvenile justice or criminal justice systems.<sup>103</sup> The Missing Children’s Assistance Act, enacted in 1982,<sup>104</sup> led to the creation of a national resource center and information clearinghouse, as well as a national toll-free hotline that provides information on procedures for locating one’s lost or missing child, explicitly including prostituted children under its mandate.<sup>105</sup> Moreover, Democratic leaders in both houses of Congress introduced legislation in 2009 that would improve how police track runaways, “promote methods for earlier intervention,” and increase funding for services such as “drug treatment, counseling, and job training” for youth seeking to leave prostitution.<sup>106</sup>

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[http://judiciary.house.gov/hearings/printers/111th/111-146\\_58250.PDF](http://judiciary.house.gov/hearings/printers/111th/111-146_58250.PDF) (stating that the Department of Justice recognizes the lack of federal data in this area and is funding research that will determine how many youth under eighteen were the victims of commercialized sexual exploitation in the U.S. in 2008 and how many of these victims were known and unknown to law enforcement).

98. ECPAT INT’L, *supra* note 5, at 15.

99. DAVIDSON & LOKEN, *supra* note 16, at 67–69.

100. 42 U.S.C. §§ 5101–5107, 5111–5119 (2006).

101. *See* 42 U.S.C. § 5106g(4)(B) (2006); DAVIDSON & LOKEN, *supra* note 16, at 68; WEISBERG, *supra* note 4, at 6–7.

102. 46 U.S.C. § 5701 (2006).

103. DAVIDSON & LOKEN, *supra* note 16, at 68–69; WEISBERG, *supra* note 4, at 4.

104. 42 U.S.C. §§ 5771–5777 (2006).

105. *See* 42 U.S.C. § 5773(b)(1)(A)(B) (2006); DAVIDSON & LOKEN, *supra* note 16, at 69.

106. Urbina, *Legislators*, *supra* note 64 (reporting that the House bill requires law enforcement agencies to enter all missing children into the federal database and that the Senate “bill adjusts the national database so that it automatically flags repeat runaways,” “modeled after the methods used by

Yet, while these federal bills have provided much-needed financial support to a number of well-regarded programs, they have contributed little in the way of shifting the paradigm on the domestic level; assumptions that prostituted children should be treated as offenders continue to persist.<sup>107</sup> One potential bright spot lies with American Bar Association leaders who hope to persuade Congress to pass legislation that prevents minors from being charged with committing crimes—such as prostitution—that involve acts to which they are too young legally to consent.<sup>108</sup>

### C. Domestic vs. International Focus

While the United States has taken limited steps to address the commercial sexual exploitation of children domestically,<sup>109</sup> it has passed

the Dallas Police Department in tracking down repeat runaways, which has been successful in reducing teenage prostitution”); *see, e.g.*, Child Protection Improvements Act of 2009, S. 1598, 111th Cong. (2009) (indicating that this bill, introduced by Senator Charles Schumer to instruct the Justice Department to perform audits of local law enforcement agencies to ensure compliance with reporting requirements, was read twice and referred to the Committee on the Judiciary); Educational Success for Children and Youth Without Homes Act of 2009, S. 2800, 111th Cong. (2009) (indicating that this bill, which was introduced by Senator Patty Murray to increase federal money for services for homeless and runaway youth, was read twice and referred to the Committee on Health, Education, Labor, and Pensions); Runaway Reporting Improvement Act of 2009, H.R. 4129, 111th Cong. (2009) (indicating that on January 4, 2010, the bill was referred to the Subcommittee on Crime, Terrorism, and Homeland Security, which is currently deliberating, investigating, and revising it before it goes forward for general debate).

107. *See, e.g.*, Rickey Bevington, *Prostituted Children: Victims or Criminals?*, GA. PUB. BROAD. NEWS, Mar. 9, 2010, <http://www.gpb.org/news/2010/03/09/prostituted-children-victims-or-criminals> (reporting that a former Republican state senator expressed “that ‘decriminalizing’ child prostitution sends the message that it’s OK to prostitute oneself and and it’s OK to break the law”); Shulman, *supra* note 28 (stating that “prosecutors have argued that it is necessary to hold the threat of jail over young girls to encourage them to testify against pimps” and that one politician expressed that “the best way to keep girls from running away from services is to keep them in the criminal system”).

108. *See* ABA COMM’N ON HOMELESSNESS & POVERTY ET AL., RECOMMENDATION 105B 12–13 (2010), [http://new.abanet.org/homeless/PublicDocuments/105B\\_FINAL.pdf](http://new.abanet.org/homeless/PublicDocuments/105B_FINAL.pdf) (urging state and local governments to revise their laws and practices to assist children who have been engaged in prostitution as victims of crime instead of arresting them); *ABA Policy Positions and White Papers: American Bar Association Policy Positions on Homelessness and Poverty*, ABA, <http://new.abanet.org/homeless/Pages/abapolicypositions.aspx> (last visited Apr. 25, 2011) (indicating that The Runaway and Homeless Youth Act, which includes the recommendation that prostituted children be considered victims and not offenders, was adopted by the ABA House of Delegates in February 2010); *see also* Urbina, *Legislators*, *supra* note 64.

109. MIA SPANGENBERG, ECPAT-USA, PROSTITUTED YOUTH IN NEW YORK CITY: AN OVERVIEW 1 (2001), available at <http://www.hawaii.edu/hivandaids/Commercial%20Sexual%20Exploitation%20of%20Young%20People%20in%20New%20York%20City.pdf> (Although commercial sexual exploitation of children “is a recognized problem in regions such as South and Southeast Asia, Latin America and Western Europe, there is still little recognition of the problem here in the United States.”); *see also* ECPAT INT’L, *supra* note 5, at 20 (“[W]hile US legislation is comprehensive,

federal legislation and directed more significant resources toward fighting the international trafficking of children.<sup>110</sup> Federal law defines all persons under eighteen who are induced to perform a commercial sex act as victims of trafficking for which the crossing of borders is not required.<sup>111</sup> Enacted in 2000, the Trafficking Victims Protection Act (TVPA or Act) explicitly calls for the United States to give priority to the prosecution of trafficking offenses and to “protect[] rather than punish[] the victims of such offenses.”<sup>112</sup> It also calls for the humane treatment of those who have been taken into custody, holding that they shall “not be detained in facilities inappropriate to their status as crime victims.”<sup>113</sup>

In many ways, the TVPA is symbolic of the deep disconnect between coexisting domestic and international laws,<sup>114</sup> resulting in prostituted children being viewed as victims by one law enforcement entity and as criminals by another, depending on the jurisdictional reach of the agency, the citizenship status of the child, and the wording of the particular criminal statute.<sup>115</sup> The rationale for this dichotomy appears to be based squarely on geography, thereby serving to perpetuate pernicious stereotypes regarding youth and crime. Implicit in the practical application of the TVPA is the notion that sexually exploited youth from impoverished non-Western countries were coerced and enslaved into the international sex trade,<sup>116</sup> while American teen prostitutes are inherently immoral “bad kids” who are complicit in their own criminality and unworthy of society’s sympathy and support.<sup>117</sup>

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enforcement is inconsistent, and particularly for domestic child victims who are trafficked within the United States, as opposed to those who are trafficked into the United States from foreign countries.”).

110. See *infra* notes 112–17 and accompanying text.

111. Trafficking Victims Protection Reauthorization Act, 22 U.S.C. §§ 7102(3), (8)(A), (14) (2006); ECPAT INT’L, *supra* note 5, at 17.

112. 22 U.S.C. § 7101(b)(24) (2006).

113. 22 U.S.C. § 7105(c)(1)(A) (2006).

114. ECPAT INT’L, *supra* note 5, at 17; see also Haberman, *supra* note 65 (“Essentially, the [New York] Safe Harbor bill brings state law in line with federal statutes governing foreigners who make it to the United States in the clutches of sex traffickers. Those non-Americans are dealt with as victims, not criminals.”).

115. See Adelson, *supra* note 38, at 97.

116. See, e.g., Cynthia Godsoe, *Finally, There’s a Safe Harbor*, NAT’L L.J., Nov. 10, 2008, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202425830988&slreturn=1&hblogin=1> (stating that the TVPA treats American-born prostituted children as “juvenile delinquents or criminals” and prostituted children who cross international borders as victims, “ignor[ing] the reality that many juveniles are incapable psychologically of consenting to sex, and that they are frequently coerced and fraudulently induced into prostitution in a manner similar to trafficking victims”).

117. See, e.g., Javidan, *supra* note 38, at 241–44 (stating that prostituted children are “either vilified or lost” in morality debates regarding appropriate legal treatment and that “a spate of mean-spirited initiatives” have attempted to control the sexuality of young girls of color, who are “constructed as welfare cheats and violent, drug-addicted gang members”); Steve Visser, *Atlanta Still*

Interestingly, the language of the TVPA does not preclude its domestic use, and, in fact, the Act’s legislative history suggests that several members of Congress envisioned such an application.<sup>118</sup> Representative Christopher Smith, a Republican from New Jersey, stated that the bill “shines a new light on our own domestic trafficking problem” and expressed hope that prostituted children born in the United States would no longer be “viewed through the lens of juvenile delinquency,” but would instead “receive the assistance they so desperately need.”<sup>119</sup> Similarly, the late Senator Paul Wellstone, a Democrat from Minnesota, suggested that the TVPA was intended to assist federal law enforcement in prosecuting acts that take place on domestic soil and in expanding aid to victims born in the United States.<sup>120</sup>

Despite the promise of the TVPA, however, it has not catalyzed an expansion of anti-trafficking or victim-assistance efforts either within the United States or abroad.<sup>121</sup> Recent State Department statistics reveal that although 14,500 to 17,500 people are forcibly brought into the United States for sex or labor each year, there have been only 196 cases and 419 defendants convicted under the Act.<sup>122</sup> The fact that the United States has not ratified critical international treaties and instruments that address the rights of children and the commercial sexual exploitation of children is seen by some as further evidence of its ambivalence toward this

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*a Hub for Child Prostitution*, ATLANTA J.-CONST., May 2, 2010, <http://www.ajc.com/news/atlanta/atlanta-still-a-hub-511465.html> (“[Prostituted children] are not always soft and cuddly victims and a lot of the public holds the view that they are out there by choice . . .”).

118. 151 CONG. REC. H11,574 (daily ed. Dec. 14, 2005) (statement of Rep. Smith); 146 CONG. REC. S7781 (daily ed. July 27, 2000) (statement of Sen. Wellstone); see Adelson, *supra* note 38, at 101–02.

119. 151 CONG. REC. H11,574 (daily ed. Dec. 14, 2005) (statement of Rep. Smith).

120. 146 CONG. REC. S7781 (daily ed. July 27, 2000) (statement of Sen. Wellstone); see Adelson, *supra* note 38, at 101.

121. See ECPAT INT’L, *supra* note 5, at 17; Chacón, *supra* note 91, at 2978.

122. Joseph Berger, *Sex Trafficking Arrests are Few, Despite Laws*, N.Y. TIMES, Dec. 4, 2009, at A32; see CLAIRE RIBANDO SEELKE & ALISON SISKIN, CONG. RESEARCH SERV., RL34317, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 17 (2008), available at <http://fpc.state.gov/documents/organization/109559.pdf>; U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 23 (2004) [hereinafter 2004 TRAFFICKING IN PERSONS REPORT]; see also 22 U.S.C. § 7101(b)(1) (2006) (“Approximately 50,000 women and children are trafficked into the United States each year.”); FRANCIS T. MIKO & GRACE (JEA-HYUN) PARK, CONG. RESEARCH SERV., RL30545, TRAFFICKING IN WOMEN AND CHILDREN: THE U.S. AND INTERNATIONAL RESPONSE 1 (2002), available at <http://fpc.state.gov/documents/organization/9107.pdf> (“An estimated 50,000 persons are trafficked each year to the United States.”); Chacón, *supra* note 91, at 2982 n.17 (explaining that the State Department attributes the lower number to a more narrow definition of “trafficked persons,” as set forth in the TVPA, as well as to “improvements in data collection and methodology,” rather than to a decline in the actual numbers of trafficked persons).

population.<sup>123</sup> Although the United States signed the *Convention on the Rights of the Child (CRC)* in 1995, it is one of only two countries that has not ratified it.<sup>124</sup> Similarly, while it ratified the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Optional Protocol)* in 2002,<sup>125</sup> it did so only after extensive reservations.<sup>126</sup>

A compelling critique of the TVPA's implementation is that its overemphasis on the enforcement and prosecutorial components of anti-trafficking initiatives has undercut its stated goal of providing humanitarian assistance and protection to international trafficking victims.<sup>127</sup> Scholars have asserted that in order to break down the legal barriers to relief that trafficking victims encounter—including “[b]order interdiction strategies, harsh penalties for undocumented migrant workers, and insufficient labor protections for all workers”—the United States must first identify victims more efficiently and accurately.<sup>128</sup> When trafficked women and children are caught up in red tape resulting from their undocumented immigration status or intolerable labor conditions, the fact they have also been sexually exploited is overlooked and disregarded. Others have argued that before being able effectively to address the domestic manifestations of what is a global problem, the United States must first take responsibility for its role “in generating a viable market for trafficking.”<sup>129</sup> Similarly, it may be said that before the United States can

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123. See, e.g., ECPAT INT'L, *supra* note 5, at 16.

124. *Id.* (noting that the other country that has not yet ratified the CRC is Somalia); see also U.N. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990), available at <http://www2.ohchr.org/english/law/pdf/crc.pdf>.

125. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, *opened for signature* May 25, 2000, T.I.A.S. No. 13,095 (entered into force Jan. 18, 2002) [hereinafter *Optional Protocol*], available at <http://www2.ohchr.org/english/law/pdf/crc-sale.pdf>; *Databases: Status of Treaties*, U.N. TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11-c&chapter=4&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&lang=en#EndDec) (last visited Apr. 25, 2011) (stating that the United States signed the *Optional Protocol* on July 5, 2000 and ratified it on December 23, 2002).

126. *Databases: Status of Treaties*, *supra* note 125 (stating, *inter alia*, that the United States ratified the *Optional Protocol* subject to the reservation that it “assumes no obligations” under the CRC and that implementation will occur “to the extent that [the federal government] exercises jurisdiction over the matters covered therein”); see also ECPAT INT'L, *supra* note 5, at 16.

127. See, e.g., Chacón, *supra* note 91, at 2978–79; Joyce Koo Dalrymple, *Human Trafficking: Protecting Human Rights in the Trafficking Victims Protection Act*, 25 B.C. THIRD WORLD L.J. 451, 472–73 (2005) (reviewing CRAIG MCGILL, *HUMAN TRAFFIC: SEX, SLAVES & IMMIGRATION* (2003)); Hussein Sadruddin, Natalia Walter & Jose Hidalgo, *Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 STAN. L. & POL'Y REV. 379, 385–91 (2005); Note, *Developments in the Law—Jobs and Borders*, 118 HARV. L. REV. 2171, 2194 (2005).

128. Chacón, *supra* note 91, at 2979.

129. *Id.*

reduce the numbers of prostituted youth within its borders, it must first address the ways in which its law and policy render children vulnerable to exploitation—requiring an examination of the country’s legacy of criminally prosecuting children for prostitution and the rationales for continuing this practice.

### III. BACK STORY

Why does the United States persist in treating child prostitutes as offenders and not victims? Likewise, why are the vast majority of prostituted youth “stigmatized and trivialized by a system which often operates as if its main function” is merely to process offenders without regard to their needs?<sup>130</sup> A brief examination of the relevant legal history gives context to the current paradigm.

#### A. *Criminals Not Victims*

The history of child prostitution in the United States is in many ways subsumed by the history of adult prostitution, as the lines between “children” and “adults” were blurred for many decades. During the early to mid-1800s, prostitution was grudgingly tolerated in urban centers such as New York City as a result of the state’s fierce protection of property rights, which prostitutes themselves invoked when defending their right to sell their own bodies.<sup>131</sup> In fact, prostitutes used the availability of criminal prosecution, which was a private matter at the time, to bring charges against assaultive customers, “firmly entrenching their profession in the social fabric of the metropolis.”<sup>132</sup> During this period, Americans routinely worked or were married by age thirteen or fourteen, and in the antebellum South, most states treated children who were ten and older as adults.<sup>133</sup> Unless evidence of force had been established, the presumption was that sex was consensual.<sup>134</sup> Predictably, many of the youth who turned to prostitution were “orphaned or abandoned girls” or otherwise on society’s margins.<sup>135</sup>

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130. FRIEDMAN, *supra* note 22, at 7.

131. TIMOTHY J. GILFOYLE, *CITY OF EROS: NEW YORK CITY, PROSTITUTION, AND THE COMMERCIALIZATION OF SEX, 1790–1920*, at 82–83 (1992); *see* Brown, *supra* note 38, at 476–77.

132. GILFOYLE, *supra* note 131, at 82 (“Shrewdly bringing legal proceedings against their aggressors, prostitutes utilized the machinery of the state to defend their interests and property rights . . .”).

133. ALAN WERTHEIMER, *CONSENT TO SEXUAL RELATIONS* 216 (2003).

134. *Id.*

135. GILFOYLE, *supra* note 131, at 65.

Before the turn of the century, neither statutory nor common law provided protection to prostituted youth. Until 1885, the age of consent in New York was only ten, at which time the state “bowed to popular pressure” and along with many others raised the age—first to sixteen and by 1895 to eighteen.<sup>136</sup> However, before 1880, no legal obstacle prevented sexual intercourse between an adolescent and an adult as long as “the teenager was willing and her parents consented or were absent or ignorant.”<sup>137</sup> Such a circumstance was enabled, at least in part, by the fact that there was no common law crime of prostitution; prostitutes were charged under vagrancy laws, which were not specific as to whether an actual exchange of money for sex had taken place.<sup>138</sup> Moreover, because of the low level of punishment, few convictions were appealed.<sup>139</sup>

During the Progressive Era of the late nineteenth and early twentieth centuries, urbanization and immigration led moral reformers to fear that young women would be seduced and taken advantage of by immigrants in the cities.<sup>140</sup> This claimed fear of “white slavery” led to the passage in 1910 of the Mann Act, a law designed to reduce the trafficking of women across state lines for purposes of prostitution.<sup>141</sup> While the Act specifically targeted the pimps for prosecution, the government eventually began to prosecute women prostitutes themselves for aiding and abetting the act of prostitution.<sup>142</sup>

A century after the Mann Act’s passage, the belief that sexual conduct should be criminalized based on “presumed immorality” still persists in

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136. *Id.* at 69.

137. *Id.*

138. DAVID J. LANGUM, *CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT* 122 (1994).

139. *Id.* at 122.

140. Brown, *supra* note 38, at 478 (“The liberalization of sexual attitudes compounded by the overt sexuality of young women was troublesome for reformers. Writers portrayed the new generation of young white women—urban, single professionals—as easy prey for foreign men.” (footnotes omitted)).

141. Mann Act, Pub. L. No. 61-277, 36 Stat. 825 (1910) (codified at 18 U.S.C. §§ 2421–2423 (2006)); see Brown, *supra* note 38, at 479–80 (“The Mann Act was used to prosecute beyond the scope of its original legislative intent of commercial vice, and became a mandate for prosecuting sexually promiscuous women.”); Marlene D. Beckman, Note, *The White Slave Traffic Act: The Historical Impact of a Criminal Law Policy on Women*, 72 GEO. L.J. 1111, 1112 (1984) (“[T]he Act was so named because its central purpose was to halt what many believed was a serious and widespread practice: Commercial procurers taking innocent young girls and women by force and holding them captive with threats to their lives, a practice that resembled black servitude in its exploitative and barbarous nature.”); see also *supra* notes 89–92 and accompanying text (discussing the Mann Act).

142. Brown, *supra* note 38, at 480–81; Beckman, *supra* note 141, at 1125–26; see also *infra* notes 244–45 and accompanying text (discussing the use of aiding and abetting statutes to prosecute prostitutes).

some courtrooms, regardless of the offender’s age.<sup>143</sup> For instance, the routine practice of holding prostituted juveniles in secure detention because of their “criminal” behavior or “lack of remorse” sends a damaging message to all children who have been sexually exploited.<sup>144</sup>

### B. Rationales

Given that the vast majority of states continue to criminally prosecute minors for prostitution,<sup>145</sup> it is critical to consider contemporary rationales for sustaining a punitive approach to prostituted children, as one or more are invariably invoked when alternatives are proposed.<sup>146</sup> One of the most common rationales concerns the need to pressure youth to cooperate with the prosecution of their pimps by testifying against them.<sup>147</sup> Some prosecutors claim that without the threat of a criminal conviction or imprisonment, young prostitutes will fail to appear at court hearings, resulting in the dismissal of charges against pimps.<sup>148</sup> Law enforcement often echoes these concerns.<sup>149</sup>

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143. See Keith Burgess-Jackson, Essay, *Our Millian Constitution: The Supreme Court’s Repudiation of Immorality as a Ground of Criminal Punishment*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 407, 416–17 (2004) (distinguishing between those cases that involve public conduct such as prostitution, “which many people find seriously offensive,” and those cases in which “the real or presumed immorality of the conduct is irrelevant” to its constitutionality).

144. See, e.g., Goldman, *supra* note 30 (reporting on a fourteen-year-old girl who was kept in juvenile detention for thirty-eight days waiting to testify against her pimp and finding that the girl never testified because the pimp pleaded guilty but that she continued to be detained because of her “criminal” behavior); Schwartz, *supra* note 38, at 235–36 (describing a 2003 New York case in which prosecutors sought to sentence a twelve-year-old girl to secure detention in a juvenile facility for offering oral sex to an undercover officer because of her “lack of remorse and tendency to carry weapons”); see also Javidan, *supra* note 38, at 245 (“The truism that prostitution is an act against the morality of society is rooted in society’s assumptions about gender. While misbehaved boys are typically seen as threatening society with violence, misbehaved girls are perceived to threaten society’s moral standards with their sexuality.” (footnote omitted)).

145. See *supra* Part II.A.

146. See *infra* notes 147–67 and accompanying text.

147. See, e.g., Shulman, *supra* note 28 (reporting that prosecutors argue that it is “necessary to hold the threat of jail” over young girls to ensure that they cooperate with services and testify against pimps); see also Brown, *supra* note 38, at 496 (arguing that police and prosecutors in Las Vegas detain prostituted children not only to secure their testimony against pimps but also to convince them to disclose their true identity and age).

148. See Shulman, *supra* note 28.

149. See D. Kelly Weisberg & Bruce Fisher, *Community and Program Responses to Adolescent Prostitution*, in CHILDREN OF THE NIGHT: A STUDY OF ADOLESCENT PROSTITUTION, *supra* note 4, at 229, 230–31 (finding that young prostitutes are unwilling to testify against pimps because they view them as friends and sources of support and fear the consequences of reporting them, and noting that police believe that incarceration of suspected prostitutes is often ineffective, as the stay is short and the youth quickly return to the streets).

While the belief that youth will run away, not appear in court, or otherwise fail to cooperate with the arrest and prosecution of pimps is realistic, the same may also be said when criminal charges are brought against other types of abusers who have an intimate, familial, or coercive relationship with the abused. In fact, it is this classic cyclical pattern in which the victim reports an abusive episode, recants her story, and then reports the next abusive episode—mirroring the abuser’s behavior of assaulting the victim, expressing remorse, and then assaulting again—that lies at the heart of “battered women syndrome.”<sup>150</sup> Yet, the aggressive use of “no-drop” or “pro-prosecution” protocols, in which prosecutors have limited discretion to dismiss charges based on a complainant’s wishes and which have resulted in victims being threatened with criminal contempt and perjury charges to ensure their testimony,<sup>151</sup> has been called into question in recent years with the recognition that these policies can cause victims harm.<sup>152</sup> Although the evidence is somewhat mixed, studies suggest that arresting, charging, and punishing the abuser will increase the likelihood of future violence against the complainant.<sup>153</sup> The same risks arise when such policies and protocols are applied to youth charged with prostitution; moreover, there is a strong possibility that testifying in court against the person upon whom you were dependent (and likely believed you had loved and had loved you in return) will be traumatic and

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150. See Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 998 (1995) (discussing psychologist Lenore Walker’s initial formulation of Battered Women Syndrome, in which the “learned helplessness” model of depression was reinforced by a “cycle of violence” during which minor episodes of abuse are followed by severe episodes and then by the batterer’s contrition and the victim’s forgiveness); see also LENORE E. WALKER, *THE BATTERED WOMAN* 55–70 (1979); LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 95–97 (1984).

151. See Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1860–65 (1996).

152. See, e.g., Leigh Goodmark, *Law is the Answer? Do We Know that for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 23–28 (2004) (discussing the problems created for battered women by mandatory arrest and no-drop policies); Deborah M. Weissman, *The Personal Is Political—and Economic: Rethinking Domestic Violence*, 2007 BYU L. REV. 387, 399–401 (2007) (arguing that “vigorous law enforcement practices often raise safety concerns for women”); see also Hanna, *supra* note 151, at 1865–66 (discussing the dilemmas posed by no-drop policies, including the “unintended effect of punishing or ‘revictimizing’ the victim for the actions of the abuser by forcing the victim into a process over which she has no control”). But see Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 224–25 (2008) (“No-drop prosecution policies, though controversial from the start, have gained popularity in the United States because most jurisdictions have been able to demonstrate a significant decrease in dismissal rates since their implementation.”); E-mail from Laurie S. Kohn, Co-Director, Civil and Family Litigation Clinic, George Washington University Law School, to author (Sept. 30, 2010) (on file with author) (stating that despite the critiques, no-drop policies are still “flourishing”).

153. See Kohn, *supra* note 152, at 237–38; Weissman, *supra* note 152, at 399.

psychologically damaging, particularly in the case of children and adolescents.<sup>154</sup>

A second rationale is premised on the need to arrest, detain, and prosecute prostituted children in order to keep them off the streets and ensure their cooperation with social services.<sup>155</sup> Proponents of this view reason that because strategies of persuasion and common sense have failed with these youth, it is necessary to place them in secure custody for their own protection.<sup>156</sup> This rationale is frequently put forward by prosecutors and endorsed by juvenile court judges to justify the short-term incarceration of child status offenders—runaways, truants, and other “undisciplined” juveniles.<sup>157</sup> Yet, the justification of detention in the name of protection is less compelling when the penalty includes such negative consequences as a permanent criminal record or imprisonment with adult offenders, as it does for many youth charged with prostitution in adult court.<sup>158</sup> Advocates for decriminalization have urged legislators to rethink

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154. See Christianna M. Lamb, Note, *The Child Witness and the Law: The United States’ Judicial Response to the Commercial, Sexual Exploitation of Children in Light of the UN Convention on the Rights of the Child*, 3 OR. REV. INT’L L. 63, 70–71 (2001); see also Sewell Chan, *A Look at the Harrowing Lives of Child Prostitutes*, N.Y. TIMES, July 3, 2008, <http://cityroom.blogs.nytimes.com/2008/07/03/a-look-at-the-harrowing-lives-of-child-prostitutes/> (stating that the emotional ties between prostituted children and their pimps can be “even stronger” than the economic dependence and threat of violence).

155. See, e.g., John Feinblatt, *NY’s Pro-Pimp Bill*, N.Y. POST, June 21, 2008, [http://www.nypost.com/p/news/opinion/opedcolumnists/item\\_87qUXbwEx0zyLwrf2pH6GL](http://www.nypost.com/p/news/opinion/opedcolumnists/item_87qUXbwEx0zyLwrf2pH6GL) (arguing that decriminalizing teen prostitution merely places girls “back on the streets with little or no consequence,” as it lacks sufficient enforcement mechanisms to compel them to accept treatment and counseling).

156. See, e.g., BARTON CHILD L. & POL’Y CLINIC, *supra* note 76, at 35–40 (stating that prosecutors believe that “arrest and detention is necessary to force prostituted children off the streets and link them to services”); see also Earl L. Dunlap & David W. Roush, *Juvenile Detention as Process and Place*, 46 JUV. & FAM. CT. J. 3, 7 (1995) (discussing the various reasons for juvenile detention, including the need to protect the juvenile).

157. See Jessica R. Kendall, *Juvenile Status Offenses: Treatment and Early Intervention*, 29 TECHNICAL ASSISTANCE BULL. 1, 4–5 (2007), available at <http://www.abanet.org/publiced/tab29.pdf> (finding that states frequently use the court’s contempt powers to put juveniles labeled as status offenders in secure confinement for “custodial protection”); see also BARRY C. FELD, *CASES AND MATERIALS ON JUVENILE JUSTICE ADMINISTRATION* 123–58 (2d ed. 2004) (discussing status offenses); Kendall, *supra*, at 5 (stating that “the secure detention of accused status offenders, even for 24 hours pre-court, is an extreme and restrictive response to a nonoffending act”).

158. See Birkhead, *supra* note 9, at 1454–55 (“When sixteen- or seventeen-year-olds are convicted of crimes in adult court, however, the record will forever follow them, absent limited opportunities for expungement or pardon.”); *id.* at 1458–59 (finding that youth who are imprisoned with adult offenders receive “little or no” educational services, mental health treatment, and rehabilitative programming and “are more likely to be raped and assaulted” than adults); see also Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles about the Collateral Consequences of Adjudications*, 6 NEV. L.J. 1111, 1114–15 (2006) (finding that juvenile delinquency adjudications may be used to “enhance future sentences” and may “limit future employment opportunities”).

publicly labeling and locking up prostituted children as delinquents or criminals in the name of ensuring their safety and security; arrest “may ‘create an adversarial rather than a rehabilitative relationship with the court system,’” and detention has been found to increase children’s trauma and sense of powerlessness.<sup>159</sup>

A third rationale invokes the specter of the “slippery slope,” a metaphor most often used by opponents of legislation or legal rulings that arguably have the potential to lead to an extreme or untenable result.<sup>160</sup> The argument is that if child prostitution is decriminalized, it may usher in the decriminalization of more pernicious or violent conduct that can also result from the exploitation of juveniles by adults, such as drug distribution or armed robbery, for if youth are not culpable for “survival sex,” how can they be culpable for other acts that are arguably necessary for their survival? A variant of this argument is that if prostituted children are labeled as “victims,” this could lead to categorizing all juvenile offenders as victims, regardless of the nature of their criminal conduct, prior record, or background. Yet another slippery slope scenario involves the assertion that decriminalizing child prostitution will encourage and, thus, increase the number of prostituted teens because the act will no longer be a crime (at least for the youth, if not for the pimp and the john).<sup>161</sup>

Perhaps the most productive way of responding to these assertions is to draw a distinction based on the nature of the harm that is being perpetuated: youth engaged in acts of prostitution are the *objects* of acute harm, both from a psychosocial as well as a public health perspective, while youth engaged in other types of illegal acts are not undergoing the same harm to the self, whether in type or degree, but instead are (in many instances) causing harm to others as a result of physical damage to property or bodily harm to persons. Therefore, lawmakers as well as the general public are unlikely to object to privileging the former over the latter. Although public policy calls for preventing the harm experienced by

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159. BARTON CHILD L. & POL’Y CLINIC, *supra* note 76, at 40 (citing EVA J. KLAIN, ABA CTR. ON CHILD. AND THE LAW, PROSTITUTION OF CHILDREN AND SEX TOURISM: AN ANALYSIS OF DOMESTIC AND INTERNATIONAL RESPONSES 10–11 (1999)).

160. See generally Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1030 (2003) (analyzing how we can “sensibly evaluate the risk of slippery slopes”).

161. See Dale Austin, *Pro & Con: Should Prostitution be Decriminalized for Minors? NO: Don’t Create a Friendly Environment for Pimps and Johns*, ATLANTA J.-CONST., Mar. 23, 2010, at A13 (“Pimps can use this proposed bill as a recruiting tool by telling the kids, prostitution is OK; it’s not a crime for them.”); see also Quinn, *supra* note 73 (quoting a Georgia state representative who opposes decriminalization).

prostituted children, the same policy imperative does not support decriminalizing other illegal acts for which youth may have diminished culpability, for these acts cause identifiable harm to others. Under this argument, legislators, judges, and citizens will likely also consider it both rational and prudent to label prostituted children as “victims,” while continuing to categorize (and penalize) youth convicted of other crimes as either “juvenile delinquents” or “criminal offenders.”

On the other hand, the assertion (not yet addressed by empirical research) that decriminalizing the role of the child in prostitution will encourage its proliferation—because adults will have yet another motive to target minors for sexual exploitation and youth will have one fewer reason *not* to submit—may have some credence. Yet, given that most prostituted children are controlled by adult pimps (girls at higher rates than boys)<sup>162</sup> and thus have not made a voluntary “choice” to engage in prostitution,<sup>163</sup> and given that adolescents typically have limited intellectual and psychological capacity to weigh the likelihood of arrest and prosecution or consider the deterrent value of legal sanctions,<sup>164</sup> this concern has limited validity. Moreover, although there may be some risk that decriminalization could lead to greater numbers of prostituted children (at least in the short term), the fact that no legitimate constituency would support—or even countenance—such a result makes it less germane. The assertion is analogous to the claim that failing to hold children criminally liable for their role in statutory rape makes them more likely to engage in it and more vulnerable to exploitation. Legislatures have determined that while these risks may indeed be possible, their likelihood does not justify holding children culpable for such acts.<sup>165</sup>

Thus, as illustrated here, slippery slope arguments can be helpful as long as each step is carefully analyzed and evaluated.<sup>166</sup> However, when

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162. See *infra* notes 192–97 and accompanying text (discussing the differences between the profiles of prostituted girls and prostituted boys).

163. See *infra* Part IV.B (discussing what is meant by “consent” in the context of sex acts performed by children).

164. See *Roper v. Simmons*, 543 U.S. 551, 571–72 (2005) (stating that juveniles are less susceptible to deterrence than adults and that the likelihood that a teenage offender has engaged in cost-benefit analysis is “so remote as to be virtually nonexistent”).

165. See, e.g., GA. CODE ANN. § 16-6-3 (2007) (punishing the adult perpetrator for statutory rape without holding the child liable); N.C. GEN. STAT. § 14-27.7A (2010) (setting out North Carolina’s statutory rape provision that criminalizes the adult perpetrator and not the child).

166. See, e.g., Clay Calvert & Kelly Lyon, *Reporting on Child Pornography: A First Amendment Defense for Viewing Illegal Images?*, 89 KY. L.J. 13, 43–44 (2000) (thoughtfully analyzing the argument that the failure to recognize a “legitimate use” defense for journalists in the context of viewing child pornography would have a “slippery slope effect” on other groups that have a legitimate

the risk of the ultimate result is remote and arguably implausible or is not one that any group could legitimately support, the argument loses force and its proponents lose credibility.<sup>167</sup>

Having set out the current state of the law vis-à-vis prostituted children, as well as the history and grounds typically asserted for maintaining the status quo, a closer examination of the terms utilized in the debate is warranted for both practical and theoretical reasons. The next Part explores the various statutory, common law, and colloquial meanings of “prostitution,” “consent,” and “bodily autonomy” as they relate to children and sexuality; it examines specific definitional problems raised by the use of these terms, as well as the significance of naming itself.

#### IV. DEFINITIONS

Much has been written in both feminist theory and critical legal studies about the import of naming.<sup>168</sup> The naming of something within a specific context, “thereby interpreting its meaning and assessing the motives behind it, is an act of power.”<sup>169</sup> The same concept, phrase, or action can be interpreted differently depending in large part on the nature of the word(s) assigned.<sup>170</sup> Particularly in an area such as the prostitution of

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use, such as criminal defense attorneys and social scientists); Volokh, *supra* note 160, at 1032–39 (providing a sensible evaluation of the risk of slippery slopes).

167. See Volokh, *supra* note 160, at 1038 (suggesting that when advocacy groups advance “ad hominem” slippery slope arguments, this “may make them seem extremist”); see also Eugene Volokh & David Newman, *In Defense of the Slippery Slope*, LEGAL AFF. 21, 23 (2003) (discussing slippery slope arguments that are “too abstract to be helpful”).

168. See, e.g., CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 103–04 (1987) (“The existence of a law against sexual harassment has affected both the context of meaning within which social life is lived and the concrete delivery of rights through the legal system. The sexually harassed have been given a name for their suffering and an analysis that connects it with gender.”); VIRGINIA WOOLF, A ROOM OF ONE’S OWN 31–38 (1957) (describing the process of naming as one in which we reclaim our own world and our own experiences); Leslie Bender, *A Lawyer’s Primer on Feminist Theory and Tort*, in FEMINIST LEGAL THEORY: FOUNDATIONS 58, 61 (D. Kelly Weisberg ed., 1993) (“Men have had the power of naming our world and giving our words meanings. Naming controls how we group things together, which parts of things are noted and which are ignored, and the perspective from which we understand them. We also learn that “things” that are named somehow count, and that things without names do not merit our attention.”); Sally Engle Merry, *The Discourses of Mediation and the Power of Naming*, 2 YALE J.L. & HUMAN. 1, 5 (1990) (“Since names are part of discourses, the contest over naming is largely over which discourse will be applied to the problem at hand. Critical to the power of any participant in these disputes is his or her ability to determine the reigning discourse.”); see also Nancy A. Boxill & Deborah J. Richardson, *A Community’s Response to the Sex Trafficking of Children*, 3 LINK 1, 9 (2005) (“The philosophical underpinning of Angela’s House is simple and singular: The girls living [there] . . . are not *delinquent girls*. Rather, they are girls whose childhoods have been stolen.” (emphasis added)).

169. Merry, *supra* note 168, at 4.

170. See *id.*

children, in which the terms used to label the act are already so heavily laden with cliché and stereotype, it is essential to consider and choose one’s words carefully and deliberately.

One recent acknowledgement of the significance of naming in this context and the ways in which it can conflate an action with an identity occurred in Illinois. Upon enacting legislation that decriminalized prostitution for all youth under eighteen, the state amended its criminal code, replacing “minor engaged in prostitution” or “prostituted person” for every reference to “juvenile prostitute.”<sup>171</sup> Similarly, in the context of criminal statutory construction, the definition of a term or phrase can mean the difference between punishment as an offender and treatment as a victim. In this spirit, Illinois added a new category to the definition of “abused minor” in its Juvenile Court Act that encompasses youth with a parent or guardian who “allows, encourages, or requires [them] to commit any act of prostitution.”<sup>172</sup>

This discussion of the power of naming is not meant to suggest, however, that such explication is easy, straightforward, or without complication. Rather, it is to emphasize that the act of naming should not be undertaken without an appreciation and recognition of all its potential consequences—whether for good or ill.

#### A. Prostitution

When considering how to define “prostitution”—either for purposes of statutory interpretation, common law decision making, or colloquial expression—many overlapping questions are raised, each of which sets off another cascade of related and often interlocking questions. Is prostitution only the explicit exchange of sex for money? Should it include sex for food, clothing, or shelter?<sup>173</sup> Or sex for nonmaterial benefits, such as protection, attention, or affection?<sup>174</sup> Must the sale involve a contract that specifies the terms of exchange—the cost and services—or can the

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171. See, e.g., 720 ILL. COMP. STAT. 5/11-15.1 (2010); see also Press Release, Governor Pat Quinn, Governor Quinn Signs Law to Protect Children from Sexual Exploitation (Aug. 20, 2010), available at <http://www.illinois.gov/pressreleases/ShowPressRelease.cfm?SubjectID=3&RecNum=8790>.

172. 705 ILL. COMP. STAT. 405/2-3 (2) (vii) (2010).

173. See *Muse v. United States*, 522 A.2d 888 (D.C. Cir. 1987) (upholding solicitation conviction and finding that “fee” includes nonmonetary compensation when defendant proposed exchanging sex for a gold chain); Rosen, *supra* note 36 (citing a study that found that “650,000 American teenagers exchange sex for favors” like drugs, money, or other gifts).

174. See Hanna, *supra* note 24, at 26–27.

agreement be more oblique?<sup>175</sup> If an agreement is required, should it involve implicit or explicit understandings (or both) regarding access to the body, whether buyer's or seller's?<sup>176</sup> Does the act apply to both public and private settings? Does it encompass just the seller or can the buyer also be liable for prostitution?<sup>177</sup> Has the act taken place only upon completion of the "transaction" or when the offer or agreement is made?<sup>178</sup>

Furthermore, what exactly is meant by "sex" in this context? Should it be limited to sexual intercourse or to commonly defined "sex acts"?<sup>179</sup> Is it any act that causes sexual arousal in the buyer or should it be defined as the sale of physical access for a limited time and a specific purpose?<sup>180</sup> Is physical contact between persons required? If so, what kinds of touching are included?<sup>181</sup> If not, what type of interaction qualifies—when one person watches another masturbate, has a sex act been committed?<sup>182</sup> Does it depend on the motivation or effect the act has on the observer? If so, how is this determined? If verbal or visual services are included in the definition, will it cover the acts of strippers, phone sex operators, and pornographic actors?<sup>183</sup>

Defining "child prostitution" can be equally challenging, as it not only raises all the questions mentioned above, but also calls for an examination of the definition of "child." Should it be based on biological or chronological age? If so, what should the age cap be: Fifteen? Eighteen?

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175. LENORE KUO, PROSTITUTION POLICY: REVOLUTIONIZING PRACTICE THROUGH A GENDERED PERSPECTIVE 42 (2002).

176. *Id.*

177. *See, e.g.*, ALASKA STAT. § 11.66.100 (2007) (defining the act of prostitution to include both the person who accepts a fee in exchange for sex as well as the person who makes the offer); WIS. STAT. ANN. § 944.30 (West 2005) (defining the act of prostitution as applying equally to sellers and buyers).

178. *Compare* Garibay v. State, 658 P.2d 1350, 1357 (Alaska Ct. App. 1983) (defining the act of prostitution to include an agreement or offer to exchange sex for a fee), *with* Wooten v. Super. Ct. of San Bernardino Cnty., 113 Cal. Rptr. 2d 195, 197 (Cal. Ct. App. 2001) ("We will hold that the definition of 'prostitution' requires physical contact between the prostitute and the customer.").

179. *See, e.g.*, People v. Georgia A., 621 N.Y.S.2d 779, 780 (N.Y. Crim. Ct. 1994) ("[Sexual] conduct includes acts of masturbation, homosexuality, sexual intercourse, or physical contact of the person's clothed or unclothed genitals, buttocks or a woman's breast.").

180. KUO, *supra* note 175, at 42.

181. *See, e.g.*, Georgia A., 621 N.Y.S.2d at 780 (finding that in the context of prostitution, "sexual conduct" included "acts of . . . homosexuality, sexual intercourse, or physical contact of the person's clothed or unclothed genitals, buttocks or a woman's breast," but that sado-masochistic services, such as "foot licking, spanking, domination and submission [did] not appear to fit within the category of sexual conduct").

182. *See, e.g.*, Commonwealth v. Bleigh, 586 A.2d 450, 452–53 (Pa. Super. Ct. 1991) (finding that defendants who had masturbated for a fee without any physical contact with the buyers had not engaged in prostitution).

183. KUO, *supra* note 175, at 42.

Twenty-one? Or should the determination of whether someone is a “child” be premised on developmental, cognitive, or emotional factors?<sup>184</sup> Moreover, what of the person who has prostituted or trafficked the child? What if he, too, qualifies as a “child” under the chosen definition? Does this affect the nature of the act committed?<sup>185</sup>

Outside the universe of criminal law, a variety of definitions of “child prostitution” have been utilized, depending on the specific entity and its perspective and agenda. In one of its reports regarding the sale of children, the United Nations defined the act of prostituting children as “the *sexual exploitation of a child* for remuneration in cash or in kind, usually but not always organized by an intermediary (parent, family member, procurer, teacher, etc.).”<sup>186</sup> In the *Optional Protocol*, the United Nations defined the prostitution of a child as the “*use of a child in sexual activities* for remuneration or any other form of consideration,”<sup>187</sup> emphasizing the general “use” of the child, rather than the more narrow “sexual exploitation” of the child referenced in the former definition. “Child prostitution” has also been defined as the “act of engaging in sexual intercourse or performing other sex acts *with a child* in exchange for money, clothing, food, shelter, drugs, or other considerations” by the World Health Organization.<sup>188</sup>

Yet, these various definitions fail to answer some of the most basic questions that arise in the real-world settings in which the prostitution of children takes hold and thrives. Among these are how to approach scenarios in which the pimps who recruit children are, themselves, children?<sup>189</sup> Youth are increasingly being pressured by their equally young friends to make “fast money” by “turning tricks.”<sup>190</sup> Should these teenage

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184. See, e.g., Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL’Y REV. 143, 162–67 (2003) (arguing that “developmental negligence” defenses should be based on the defendant’s maturity and mental capacity as well as his chronological age).

185. See *infra* Part IV.B (discussing the meaning and definitions of “consent” and how these implicate the criminal culpability of pimps, johns, and others).

186. U.N. Secretary-General, *Promotion and Protection of the Rights of Children: Sale of Children, Child Prostitution and Child Pornography*, ¶ 117, delivered to the General Assembly, U.N. Doc. A/49/478 (Oct. 5, 1994) (by Vitit Muntarbhorn) (emphasis added), available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/065c0f85f3f952fe802566f8005209c5?Opendocument>.

187. *Optional Protocol*, *supra* note 125, art. 2(b) (emphasis added).

188. ESTES & WEINER, *supra* note 13, at 9 (emphasis added).

189. See Sherri Jefferson, *Stop Child Prostitution 3 of 4 Part Series: American Gangster Crime, Drugs and Violence* (Blogtalkradio broadcast July 16, 2009), <http://www.blogtalkradio.com/sherri-jefferson/2009/07/16/four-part-series-american-gangster-crime-drugs-and-violence-and-its-effect-on-the-commu> (discussing the increased numbers of children who are acting as pimps for other children).

190. See SPANGENBERG, *supra* note 109, at 12 (finding that the “new trend” is that pimps are getting younger and that “[k]ids are picking up kids and pimping them”).

recruiters also be criminally prosecuted and punished? What if the pimp is even younger than the prostituted child? Perhaps even more vexing, what ought to be done when a prostituted child recruits another child—her own peer—into “the Life”?<sup>191</sup>

Moreover, it is critical to consider issues of gender when analyzing these terms, as the stereotype of the young girl prostituted by an older male pimp has permeated United States culture, obscuring the reality. Data shows that while the majority of prostituted children are female, boys are also prostituted each year in the United States.<sup>192</sup> They have been found to enter prostitution at a slightly younger age than girls<sup>193</sup> and are typically initiated into prostitution by peers or other sex workers, while the pimp plays a much more significant role in the entry of girls.<sup>194</sup> Perhaps as a result of the diminished control by pimps, young prostituted males experience less physical abuse than do females.<sup>195</sup> Another difference is that males prefer the privacy of a customer’s car or home as the locus for the sex act, while females typically prefer the public nature of a street or a motel due to safety concerns.<sup>196</sup> One commonality between the genders is that at least ninety-five percent of the commercial sex engaged in by both boys and girls is provided to adult males between thirty and fifty years old, many of whom are married with children.<sup>197</sup>

Similarly, while the assumption is that prostituted children are heterosexual and female, the reality is that lesbian, gay, bisexual, and

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191. See ESTES & WEINER, *supra* note 13, at 44 (“Most of the young people whom we interviewed as part of this study were ‘recruited’ into sexually exploitative activities by same sex peers who already were engaged in pornography, prostitution, or trafficking, or all three.”); WEISBERG, *supra* note 4, at 155 (finding that while peer introduction occurs with both boys and girls, the percentage of boys who learn about prostitution from friends or other youth on the street is much higher than for girls); see also Bella English, *Leaving “the Life”; Now Seen as Victims of Abuse, Teen Prostitutes Get Help to Break Free*, BOS. GLOBE, June 21, 2006, at E1 (“‘The life’ is what the girls who engage in prostitution call it.”).

192. See Taya Moxley-Goldsmith, *Boys in the Basement: Male Victims of Commercial Sexual Exploitation*, 2 UPDATE 1 (2005) (“Adolescent males comprise a significant segment of the population at risk for involvement in [commercial sexual exploitation].”); see also ESTES & WEINER, *supra* note 13, at 92 (discussing the average age of entry into prostitution for boys).

193. ESTES & WEINER, *supra* note 13, at 92 (stating that the average age of entry into prostitution for girls is twelve to fourteen, while the average age of entry of boys is eleven to thirteen).

194. See WEISBERG, *supra* note 4, at 156, 160 (suggesting that pimps generally play a greater role in the prostitution of females than males because of “sex-role conditioning,” differences in the physical size of males and females, and a greater need for physical protection on the streets of females than males).

195. *Id.* at 160–61.

196. *Id.* at 161.

197. *Id.*; see also ESTES & WEINER, *supra* note 13, at 59 (finding that “[a]t least 95% of all the commercial sex engaged in by boys is provided to adult males” and that “[m]any of the adult male sexual exploiters of boys are married men with children”).

transgender youth (LGBT) also enter the sex trade, although more data is needed. Past research found that a significant percentage of young prostituted males identified themselves as homosexual.<sup>198</sup> It also found that this population of youth had initial sexual experiences that were homosexual in nature and that the decision to turn to prostitution was the result—at least partially—of a desire to interact with other gay males.<sup>199</sup> More recent research reveals that twenty-six percent of LGBT youth are told to leave their homes when they disclose their sexual orientation to their families, explaining in part why these adolescents are disproportionately represented in the homeless and runaway youth populations.<sup>200</sup> Once on the streets, LGBT youth often resort to prostitution or “survival sex” in exchange for money, food, clothes, or a place to stay.<sup>201</sup> As a result of “risk clustering,” in which one risky behavior tends to occur in tandem with or lead to others, homeless youth of all sexual orientations are therefore likely to suffer from a variety of adverse health conditions, including sexually transmitted diseases, unplanned pregnancy, and substance abuse.<sup>202</sup>

Given the degree of judgment and condemnation historically directed at prostitutes, it is also important when defining these terms to consider the reasons children enter the world of prostitution. Studies have shown that while the issue of causation is a complex one, there are common factors on both the macro and micro levels.<sup>203</sup> The external, contextual causes include homelessness and poverty, although a significant number of prostituted children identify themselves as coming from working or middle-class families.<sup>204</sup> Other causes include the pre-existence of an adult

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198. WEISBERG, *supra* note 4, at 167 (finding that studies have found that nearly fifty percent or more of prostituted male adolescents identified themselves as homosexual).

199. *Id.* at 160, 164–67; *see also* Wood, *supra* note 68 (lauding New York’s Safe Harbor Law for “recogniz[ing] that the needs of sexually exploited ‘boys, girls and transgendered youth,’ may be different [and distinct] from each other,” and for acknowledging that transgendered youth are often at high risk for family conflict that leads to living on the streets).

200. *See* RAY, *supra* note 20, at 16, 53.

201. KATAYOON MAJD, JODY MARKSAMER & CAROLYN REYES, HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN JUVENILE COURTS 71–73 (2009), *available at* [http://www.equityproject.org/pdfs/hidden\\_injustice.pdf](http://www.equityproject.org/pdfs/hidden_injustice.pdf); RAY, *supra* note 20, at 3, 53, 55–56 (finding that “survival sex” is the last resort for many LGBT homeless youth, that anywhere from one-third to one-half of all homeless adolescents have engaged in it, and that transgender homeless youth were three times more likely to have “survival sex” than any other group).

202. RAY ET AL., *supra* note 20, at 57–58.

203. *See, e.g.*, ESTES & WEINER, *supra* note 13, at 41–42.

204. *Id.*; WEISBERG, *supra* note 4, at 153–54; *see also* *Child Prostitution: Domestic Sex Trafficking of Minors*, U.S. DEP’T OF JUST., <http://www.justice.gov/criminal/ceos/prostitution.html> (last visited Apr. 25, 2011) (stating that children “often become involved in prostitution as a way to support themselves financially or to get the things they want or need. Other young people are recruited

prostitution market, as found in such cities as Chicago, Las Vegas, New Orleans, New York, and San Francisco;<sup>205</sup> inadequate systems for identifying and meeting the needs of prostituted children; and ineffective law enforcement and social service policies that “focus on children as the source of *the . . . ‘problem’* rather than on the adults that prey upon and profit financially from [them]” (including pimps and johns, motel operators, and sellers of forged identity documents).<sup>206</sup> On the microsituational level, data shows that the most frequent factors rendering children vulnerable to sexual exploitation are familial dysfunction, family history of substance abuse, and a personal history of physical or sexual abuse.<sup>207</sup> Of course, there are also individual, internal factors that make some children more likely to turn to prostitution than others, including low self-esteem, chronic depression, feelings of helplessness and lack of control, as well as drug dependency and mental illness.<sup>208</sup>

In sum, a lawmaker drafting legislation, a judge writing an opinion, or a police officer talking about a homeless teen will each have a different definition in mind for “child prostitution.” Model statutes,<sup>209</sup> policy briefs,<sup>210</sup> or anecdotal experiences<sup>211</sup> may inform the interpretive process, but before settling on a definitive meaning, it is useful to consider the act as existing across “a continuum”—both in terms of the nature and range of the activity as well as the profile of the children involved.<sup>212</sup>

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into prostitution through forced abduction, pressure from parents, or through deceptive agreements between parents and traffickers.” (citation omitted)).

205. ESTES & WEINER, *supra* note 13, at 42.

206. *Id.* at 43.

207. *See id.* at 44–57 (“A majority of these children seek release from the pain associated with this complex of problems through drugs and alcohol, by running away from home, by developing emotional (and sexual) relationships with age inappropriate adults, or by engaging in commercial sexual activities—including pornography and prostitution.” (citation omitted)); WEISBERG, *supra* note 4, at 159–60.

208. ESTES & WEINER, *supra* note 13, at 57–58; *see also Child Prostitution: Domestic Sex Trafficking of Minors*, *supra* note 204 (“The majority of American victims of commercial sexual exploitation tend to be runaway or thrown away youth who live on the streets who become victims of prostitution. These children generally come from homes where they have been abused, or from families that have abandoned them.” (citations omitted)).

209. *See, e.g.,* ABA COMM’N ON HOMELESSNESS & POVERTY, RUNAWAY AND HOMELESS YOUTH AND THE LAW: MODEL STATE STATUTES (Amy E. Horton-Newell, Katie Meyer & Casey Trupin eds., 2009) (providing model statutes on state laws that can assist homeless and runaway youth find safety, services, and stability).

210. *See, e.g.,* ECPAT INT’L, *supra* note 5, at 11–20.

211. *See, e.g.,* D. Kelly Weisberg & Bruce Fisher, *Community and Program Responses to Adolescent Prostitution*, in *CHILDREN OF THE NIGHT: A STUDY OF ADOLESCENT PROSTITUTION*, *supra* note 4, at 229, 229–33.

212. SPANGENBERG, *supra* note 109, at 2.

### B. Consent

Given that the voluntariness of a sexual act is typically premised on the degree to which it is found to be consensual, it is critical to consider what is meant by “consent” in the context of sex acts performed by children. Is it consensual as long as the act is not done in exchange for something of value? Or as long as the child and partner are “peers”? If so, how should such terms be defined? Further, should the child’s competence be taken into account—whether intellectual or developmental? What of the fact that the majority of youth who enter prostitution are involved in the child welfare system, often as a result of abuse or neglect, and most have been in foster care?<sup>213</sup> Can “consent” by children with this type of custodial history be truly voluntary? Similarly, does the motivation of the child matter, or is the youth’s minor status determinative, regardless of whether the act is done to survive or merely for the thrill? Moreover, is the legislature’s motivation upon drafting the bill of any consequence, particularly if there is evidence not only of intent to protect young women but desire to exert control over female sexuality?<sup>214</sup>

As discussed earlier, the majority of states criminally prosecute those who engage in sexual activity with someone who is below the age of consent as statutory rape.<sup>215</sup> While courts have explicitly held that a state’s sexual consent laws provide no defense when a child is prosecuted for prostitution,<sup>216</sup> the Texas Supreme Court has recently found that because of the “special vulnerability of children,” they cannot be held criminally liable for prostitution if they are below the age of consent.<sup>217</sup> *In re B.W.* has been heralded as “a turning point” and an “opinion . . . worth reading, as it methodically answers every question raised by skeptics.”<sup>218</sup> Perhaps

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213. See FRANCES GRAGG ET AL., *NEW YORK PREVALENCE STUDY OF COMMERCIAL SEXUALLY EXPLOITED CHILDREN: FINAL REPORT*, at ii (2007).

214. See generally J. Shoshanna Ehrlich, *You Can Steal Her Virginity but Not Her Doll: The Nineteenth Century Campaign to Raise the Legal Age of Sexual Consent*, 15 *CARDOZO J.L. & GENDER* 229 (2009) (arguing that nineteenth-century reformers pushed to raise the age of consent out of a desire to protect young women as well as to exercise control over female sexuality).

215. See *supra* notes 54–56 and accompanying text.

216. See, e.g., *In re Nicolette R.*, 779 N.Y.S.2d 487, 488 (N.Y. App. Div. 2004) (finding no evidence that New York’s statutory rape law was intended to have any relationship to its prostitution statute); *In re B.D.S.D.*, 289 S.W.3d 889, 899 (Tex. App. 2009) (distinguishing between age of consent and prostitution laws and holding that a sixteen-year-old girl may be adjudicated for engaging in delinquent conduct by committing the offense of prostitution, even though she cannot legally consent to sex).

217. *In re B.W.*, 313 S.W.3d 818, 820–21 (Tex. 2010) (finding that because children under fourteen cannot legally consent to sex, they cannot be held criminally liable for acts of prostitution).

218. Todres, *supra* note 46; see also Rick Casey, *When the Victim is the ‘Criminal,’* HOUS.

most significantly, the Texas Supreme Court held that prostitution belongs in the category of criminal offenses to which “minors of a certain age have a reduced or nonexistent capacity to consent, no matter their actual agreement or capacity.”<sup>219</sup> In so doing, the court relied on the landmark United States Supreme Court cases of *Roper v. Simmons*<sup>220</sup> and *Graham v. Florida*,<sup>221</sup> which respectively abolished the death penalty and life without parole sentences for nonhomicides when the offenders were minors at the time of the commission of their crimes.<sup>222</sup>

Judicial opinions regarding the capacity of children and adolescents to consent to sex, however, leave unanswered the matter of how best to define sexual consent if prostitution is decriminalized for all those under age eighteen. Should any sexual activity between a minor and an adult qualify as statutory rape? If this is too extreme, what is the appropriate age at which to deem youth capable of consenting to sex? Fifteen? Sixteen? Should statutory rape only be prosecuted when those under a certain age have sex with someone who is *not* a peer? How should “peer” be defined?

One way to approach the legal treatment of victims of statutory rape versus prostituted children is to consider whether and to what extent the criminal offenses of statutory rape and prostitution address different sets of harms. From a policy perspective, age of consent laws are intended to protect children from the coercion and manipulation of adults, while also establishing that youth below a certain age or involved in a certain power dynamic cannot voluntarily choose or agree to sexual activity.<sup>223</sup> In contrast, the criminalization of prostitution is intended to address a particular set of *moral* harms resting on a paternalistic “vision of women, their sexuality, and the role of marriage” that could conceivably threaten the institution of the family as well as the community at large.<sup>224</sup> Without

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CHRON., June 23, 2010, at B1 (quoting the child’s appellate lawyer as stating, “The Texas Supreme Court showed it’s leading the nation in juvenile protection”).

219. *In re B.W.*, 313 S.W.3d at 823.

220. 543 U.S. 551 (2005).

221. 130 S. Ct. 2011 (2010).

222. *In re B.W.*, 313 S.W.3d at 821, 823 (citing *Simmons* and *Graham*); see also Tamar R. Birckhead, *Graham v. Florida: Justice Kennedy’s Vision of Childhood and the Role of Judges*, 6 DUKE J. CONST. L. & PUB. POL’Y 66, 70–72 (2010) (discussing the parallels between the *Simmons* and *Graham* opinions).

223. See Kelly C. Connerton, Comment, *The Resurgence of the Marital Rape Exemption: The Victimization of Teens by Their Statutory Rapists*, 61 ALB. L. REV. 237, 254 (1997) (“The protection afforded minors by statutory rape laws is now grounded in the belief that immaturity makes children incapable of making adult decisions with regard to sexual relationships . . .”).

224. Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 542–45 (2000) (discussing the traditional moral defense of the criminal prohibition of prostitution); see also Robert P. George, *The Concept of Public Morality*, 45 AM. J. JURIS. 17, 25 (2000) (discussing public

addressing whether adult prostitution should also be decriminalized,<sup>225</sup> as it is beyond the scope of this Article, a distinction may be drawn between adults and minors engaged in prostitution, as children should not be morally culpable for acts to which they cannot legally consent.<sup>226</sup> Therefore, the harms addressed by statutory rape laws are comparable to those that impact prostituted children: both sets of youth are similarly situated in regard to their psychological and brain development, and, thus, both should be considered to lack the capacity to consent to sex. Further, the commercial sexual exploitation of youth is a type of victimization with potential public health implications that extend beyond the particular circumstances of the child and adult actor.<sup>227</sup>

Another strategy for analogizing between victims of statutory rape and prostituted children is through an examination of the transfer of blame. When the law addresses the statutory rape of a minor, blame is asserted against the adult actor and not the child, retaining the punitive nature of the policy. Similarly, blame for the prostituted child can be shifted to the pimp, john, or both, without necessitating the punishment of the child. In this way, the criminalization of the act of sexually exploiting children would not be jeopardized; blame would indeed be shifted, but the punitive nature of the legal scheme would not be abandoned, thus remaining consistent with the public policy against the act.

Michigan’s legal scheme offers an interesting example that may be useful in considering these questions. Michigan law sets the minimum age at which a person can be charged with soliciting prostitution at sixteen,<sup>228</sup>

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morals legislation and putting forth an argument for the criminalization of prostitution based on the view that “the availability of prostitutes is going to facilitate immoral acts by individuals—prostitutes and their customers,” which damages public interests by allowing men to “damage their own characters” and by weakening the institution of marriage).

225. *But see* Law, *supra* note 224, at 530–42 (considering arguments against criminalization of commercial sex from the perspective of moral philosophy, efficiency, and economics and discussing debates among feminists); *see also* Hanna, *supra* note 24, at 12 & n.62 (finding that eighty percent of adult prostitutes began their activity when they were younger than eighteen, supporting the assertion that many adults engaged in prostitution are not choosing it out of free or full agency).

226. *See* MODEL PENAL CODE § 213.1 cmt. at 276 (1980); *In re B.W.*, 313 S.W.3d at 820 (“The notion that an underage child cannot legally consent to sex is of longstanding origin and derives from the common law.”).

227. *See* U.S. DEP’T OF STATE, BUREAU OF PUB. AFF., THE LINK BETWEEN PROSTITUTION AND SEX TRAFFICKING 2 (2004), available at <http://www.servingourworld.org/PDF/trafficking/dos-prostitution-sex%20trafficking.pdf> (stating that “the public health implications of prostitution are devastating and include a myriad of serious and fatal diseases, including HIV/AIDS”); *see also* Law, *supra* note 224, at 545–52 (finding that female prostitutes are not a source of contagion for HIV and other sexually transmitted diseases, but rather they are at far greater risk of contracting the virus themselves).

228. MICH. COMP. LAWS ANN. § 750.448 (West 2004) (“A person 16 years of age or older who

and the state has two different tiers for the age of consent. Children who are under thirteen cannot consent to sex, making those who engage in sex acts with them criminally liable,<sup>229</sup> while children who are between thirteen and sixteen may consent to sex with those who are not more than five years older.<sup>230</sup> Children between the ages of sixteen and eighteen can generally consent to sex, but not with members of certain enumerated groups, including teachers and other school employees.<sup>231</sup> Thus, under Michigan law, children younger than sixteen are not considered offenders when found to have engaged in acts of prostitution, while those who are between thirteen and eighteen are still granted some degree of sexual autonomy.

Michigan's tiered system of consent laws focuses upon the extent to which coercion is present as well as age differentials between the child and partner.<sup>232</sup> Instead of setting just one specific age of consent, the state also makes use of the nature of the relationship as the proxy for coercion. This leaves open the question of what distinguishes the sexual activity of those thirteen and older from those who are younger than thirteen. If a state uses specific enumerated relationships rather than age as the indicator for lack of consent, what role does chronological age play? Could it be argued that Michigan's scheme addresses the different risks posed by—or simply believed to be posed by—the pathologies of adults who engage in sex acts with children of different age groups?<sup>233</sup> In other words, given the common understanding that younger children are more vulnerable to exploitation than older children, adults with desires and fantasies that culminate in sexual acts with prepubescent children are arguably more dangerous than those with sexual preferences for older, pubescent

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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 . . . .”).

229. MICH. COMP. LAWS ANN. § 750.520b(1)(a) (West 2004) (“A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person . . . [who is] under 13 years of age.”).

230. *See id.* § 750.520b(1)(b) (stating that criminal sexual conduct in the first degree occurs when the child is between thirteen and sixteen and the actor is a member of the same household; “related to the victim by blood”; in a position of authority and “used this authority to coerce the victim to submit”; or a teacher or administrator at the school); *id.* § 750.520e(1)(a) (stating that criminal sexual conduct in the fourth degree occurs when the child is “at least 13 years of age but less than 16 years of age, and the actor is 5 or more years older”).

231. MICH. COMP. LAWS ANN. § 750.520e(1)(f) (stating that criminal sexual conduct in the fourth degree occurs when the child is “at least 16 years of age but less than 18 years of age and a student at a public school” and the actor is a teacher or administrator at the school).

232. *Cf.* WERTHEIMER, *supra* note 133, at 218 (noting that “even if wide age spans are not inherently coercive, they might be a good proxy for coercion that is difficult to observe directly”).

233. *See* ESTES & WEINER, *supra* note 13, at 12 (defining “pedophile” and “hebephile”).

children; as a result, the use of thirteen may be justifiable as the minimum age for consent.

A tiered system could also address the power differentials that often exist between prostituted children and their pimps, both of whom are likely to come from the country's poorest urban neighborhoods.<sup>234</sup> This dynamic is compounded by the “changing profile of local crime,” in which local drug dealers are learning that selling and reselling a neighborhood girl is a “better business model” than a single sale of a rock of crack.<sup>235</sup> As suggested earlier, however, there may be inherent difficulties in judging where exactly the ultimate power lies in the relationship, such as in situations in which the pimps are also children or prostituted children are themselves recruiting their peers.<sup>236</sup>

When considering an appropriate age of consent, Professor David Archard has asserted that “society should strive to be consistent in its judgments of maturity. The reasoning by which it sets the age of sexual consent should not be at odds with that by which it sets other ages of majority.”<sup>237</sup> For instance, it may be reasonable to conclude that someone is mature enough to have sex before they are mature enough to marry; it may be unreasonable, however, to consider them mature enough to consume alcohol before they are mature enough to have sex.<sup>238</sup> Therefore, setting an age of sexual consent may by itself be inadequate without including provisions that account for the age of the child's sexual partner as well as the nature of the relationship between the two.<sup>239</sup> In this way, the social context should inform, but not control, the statutory age of consent.<sup>240</sup>

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234. See Shulman, *supra* note 28. *But see supra* note 204 and accompanying text (suggesting that some prostituted children come from working- or middle-class backgrounds).

235. Shulman, *supra* note 28; *see also* SPANGENBERG, *supra* note 109, at 12 (finding that girls are increasingly being pimped by gangs, placing them under the control of more than one person, exposing them to more violence, and putting them at greater risk of contracting sexually transmitted diseases); Kamika Dunlap & Barbara Grady, ‘A Dirty Secret’: City Comes to Grips with Teen Prostitution, *INSIDE BAY AREA*, Apr. 21, 2008, [http://www.insidebayarea.com/ci\\_9000424](http://www.insidebayarea.com/ci_9000424) (reporting that there is “increased economic incentive” for men to become pimps, and that underage girls can earn as much as five hundred dollars a day, all of which typically goes to the pimp).

236. *See supra* notes 189–91 and accompanying text; *see also* Comments from Lisa Goldblatt Grace, Co-Founder & Director, The My Life My Choice Project, to author (June 24, 2010) (on file with author) (“It feels dicey to me to suggest that the power lies with the prostituted girl, even when she is doing the recruiting as a result of her own chronic trauma. And even when the pimp is a minor, he still holds the power.”).

237. DAVID ARCHARD, *SEXUAL CONSENT* 124–25 (1998).

238. *Id.*

239. *Id.* at 129.

240. *Id.*

Thus, a tiered or bifurcated consent system is likely to provide the most appropriate result. Georgia, which sets the age of consent at sixteen,<sup>241</sup> has a scheme similar to Michigan, although sex between teens is still criminalized in Georgia, albeit as a misdemeanor rather than a felony offense.<sup>242</sup> Twenty-three states, however, exempt from criminality a person who has sex with a child when the two are close in age.<sup>243</sup> In this way, bifurcated consent schemes give adolescents a sizable degree of sexual autonomy in perhaps the most common scenario: teenagers having sex with their peers. Therefore, in relationships where coercion is more likely to be present, the statutory rape provisions would control, providing protection to the young person; meanwhile, the prostituted child would be protected from prosecution because the statutory definition of prostitution would apply only to those over a certain age.

Another factor in such schemes regards the potential exposure of juveniles to aiding and abetting or conspiracy statutes. For instance, underage girls whose male sexual partners are prosecuted for statutory rape may conceivably be prosecuted for aiding and abetting the commission of the offense.<sup>244</sup> The same logic could be extended to prosecute a prostituted child for aiding and abetting the criminal act committed by the john, even under statutory schemes in which the act of prostitution has been decriminalized. Michigan, which appears to have given careful thought to the policy considerations underlying its legislation in this area, criminalizes aiding and abetting prostitution, but, consistent with its age-limited definition of prostitute, the law applies only to persons sixteen and older.<sup>245</sup>

Thus, when debating the meaning of “consent” vis-à-vis prostituted children, there are a variety of definitions, meanings, and interpretations to consider, with Michigan perhaps providing one of the best models for achieving the goals of protecting both the child and the community.

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241. GA. CODE ANN. § 16-6-3(a) (2007) (“A person commits the offense of statutory rape when he or she engages in sexual intercourse with any person under the age of 16 years and not his or her spouse . . .”).

242. *Id.* § 16-6-3(c) (“If the victim is at least 14 but less than 16 years of age and the person convicted of statutory rape is 18 years of age or younger and is no more than four years older than the victim, such person shall be guilty of a misdemeanor.”).

243. See *supra* note 57 and accompanying text.

244. See, e.g., ALASKA STAT. § 11.41.436 (2007) (criminalizing “aid[ing], induc[ing], caus[ing], or encourag[ing]” the sexual penetration of someone thirteen, fourteen, or fifteen, when the defendant is at least sixteen and at least three years older than the victim); Sutherland, *supra* note 38, at 317.

245. MICH. COMP. LAWS ANN. § 750.450 (West 2004) (“A person 16 years of age or older who aids, assists, or abets another person to commit or offer to commit an act . . . is guilty of a crime . . .”).

### C. Autonomy

Questions of consent and voluntariness relate to other areas in which the bodily autonomy of children is at issue, such as having an abortion without parental consent;<sup>246</sup> having or refusing other types of medical procedures without parental consent;<sup>247</sup> and marrying.<sup>248</sup> If a legislature has determined that children between thirteen and sixteen *can* legally consent to sex with their peers, does this impact public policy in these other contexts? Likewise, if it is determined that minors *cannot* legally consent to sex with an adult, what are the ramifications for a “liberationist” agenda for youth?<sup>249</sup> In other words, if minors are prohibited from being held criminally liable for acts of prostitution based on their status as “abused children” or “exploited victims,” does this call into question their right to make other decisions that implicate their physical autonomy?

In comparing a minor’s capacity to consent to an abortion with her capacity to consent to sex (either with an adult or a peer), Professor Alan Wertheimer has convincingly asserted that three principle factors should be weighed.<sup>250</sup> First, given that chronological age by itself has little to do with capacity to consent but serves only as a proxy for such capacity, conducting a full-blown hearing in which the minor’s maturity and competence are judged by a neutral arbiter after the presentation of evidence would be ideal.<sup>251</sup> It is likely more feasible, however, to hold a so-called “judicial bypass hearing”<sup>252</sup> to determine a minor’s capacity to consent to an abortion than it would be to hold a “pre-coitus competency

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246. Typically, the decision as to whether to grant a teenager the right to have an abortion without parental consent is accomplished through “a regulatory scheme known as the judicial bypass process.” Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 414 (2009); *see also id.* at 421 n.39 (stating that twenty-two states require parental consent to abortion, “eleven require parental notification, and four require both”).

247. *See infra* notes 256–59 and accompanying text.

248. *See infra* notes 260–66 and accompanying text.

249. *See* Elizabeth F. Emens, *Aggravating Youth: Roper v. Simmons and Age Discrimination*, 2005 SUP. CT. REV. 51, 70–72 (2005) (discussing the attitude and beliefs of proponents of youth liberation who emphasize the self-determination of youth); *see also* Minow, *supra* note 60, at 268–78 (discussing the development of the children’s liberation movement during the 1960s and early 1970s).

250. *See* WERTHEIMER, *supra* note 133, at 222.

251. *Id.*

252. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36–2152 (2009); *see also* GUTTMACHER INST., STATE POLICIES IN BRIEF: AN OVERVIEW OF STATE ABORTION LAWS 1 (2011), available at [http://www.guttmacher.org/statecenter/spibs/spib\\_OAL.pdf](http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf) (finding that twenty-two states require one or both parents to consent to “a minor’s decision to have an abortion,” twelve “require that one or both be notified and 4 states require both parental consent and notification”).

hearing” to determine a minor’s capacity to consent to have sex.<sup>253</sup> This factor, therefore, weighs in favor of drawing bright lines for minors—whether based on age or nature of the relationship—in the context of sex but not abortion. Second, the “positive autonomy” costs are quite different for the two acts—refusing to recognize a minor’s consent in the context of sex leads to the sexual act not occurring, arguably an event of little long-term consequence.<sup>254</sup> Refusing to recognize a minor’s decision to have an abortion, however, leads either to a full-term pregnancy and the birth of a child or to compelling the minor to seek parental approval for the procedure, which could result in physical and emotional harm to the youth.<sup>255</sup> Again, this is a factor that supports the use of a proxy for consent in the context of a minor’s decision to have sex. Third, it is plausible—though perhaps unlikely—that because of the gravity of the situation, minors will make “better” decisions about whether to have an abortion than whether to engage in sex.<sup>256</sup>

Therefore, using Professor Wertheimer’s method of analysis, one may conclude, *inter alia*, that the propriety of judicial bypass hearings would not be called into question by laws that either prohibit child prostitution or govern a minor’s right to have sex based on age or the nature of the relationship. Moreover, there would not be any obvious contradiction or conflict of policy if a jurisdiction were to continue to allow for individualized assessments in the context of minors terminating pregnancy, while setting mandatory age caps under which juveniles would not be criminally liable for engaging in prostitution. Further, if a doctor performs an abortion on a minor in violation of a state statute in a jurisdiction that places legal limits on the ability of minors to have abortions, the doctor is the party held criminally liable and not the child.<sup>257</sup> Such an approach lends added support to the notion that the adults who induced the child into prostitution or engaged in sexual acts with the

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253. WERTHEIMER, *supra* note 133, at 222.

254. *Id.*

255. *See id.*

256. *Id.* *But see* Sanger, *supra* note 246, at 418 (arguing that bypass hearings “serve less to evaluate the quality of a young woman’s decision [to have an abortion] than to punish her for making it”).

257. *See, e.g.*, IND. CODE ANN. § 16-34-2-7 (LexisNexis 2007) (setting out the criminal sanctions for a physician who performs an abortion on a juvenile without proper parental or judicial consent). *But see* MD. CODE ANN., HEALTH-GEN. § 20-103(c) (LexisNexis 2009) (stating that a physician may perform an abortion on a minor without parental notification if notice “may lead to physical or emotional abuse”; “the minor is mature and capable of giving informed consent”; or “notification would not be in the best interest of the minor.” and also that “the physician is not liable for civil damages or subject to a criminal penalty for a decision under this subsection not to give notice”).

child—the pimps and the johns—should be the ones who are criminally prosecuted, rather than the child herself.

As for the ability of a child to consent to a particular medical procedure or course of treatment, this is generally prohibited based on the notion that children—as minors—are dependent upon their parents or guardians for guidance and support, and, thus, the responsibility for such decisions lies with the adults.<sup>258</sup> There are two noteworthy exceptions to this rule. The “mature minor” doctrine permits children to seek required medical treatment “when parental consent may cause intra-family conflict or be difficult to obtain.”<sup>259</sup> In order to overcome the presumption of immaturity, there must be clear and convincing evidence that “the minor is mature enough to appreciate the consequences of her actions, and that the minor is mature enough to exercise the judgment of an adult.”<sup>260</sup> Emancipation, a legal status that releases the parent from all obligations to and control over the child, enables the child to transact business, sign contracts, and make legal and medical decisions that otherwise would require the consent of an adult.<sup>261</sup> While both scenarios present situations in which a child, ordinarily presumed incapable of consenting to medical treatment, is shown to be capable, neither seems particularly applicable to the issue of the ability to consent to sex. Even assuming that the maturity and psychological capacities necessary to consent to both treatment and sex are the same, there is no state-sanctioned mechanism that allows a child to have sex with an adult, and, of course, parents cannot legally consent to sex on behalf of their minor children.

Weighing the factors enumerated above when comparing a child’s right to consent to medical treatment with her right to consent to sex with an adult is illustrative. As with the abortion scenario, it is likely more feasible to hold a hearing to determine if the child meets the criteria for status as an emancipated or mature minor than to hold one regarding the child’s ability to consent to sex; the positive autonomy costs of refusing to recognize a minor’s decision regarding a medical procedure will likely be more

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258. See 3-19 TREATISE ON HEALTH CARE LAW § 19.1(4) (2009); see also *Bellotti v. Baird*, 443 U.S. 622, 634–38 (1979) (holding that parents have decisional authority over their children based on the general propositions that children do not make sound decisions, that parents will decide wisely on their behalf, and that parents have a constitutionally based liberty interest in directing their children’s upbringing); *Meyer v. State*, 262 U.S. 390, 400 (1923) (upholding the authority of parents to make decisions on behalf of their children).

259. Lawrence Schlam & Joseph P. Wood, *Informed Consent to the Medical Treatment of Minors: Law and Practice*, 10 HEALTH MATRIX 141, 151 (2000); see 3-19 TREATISE ON HEALTH CARE LAW § 19.1(4) (2009).

260. *In re E.G.*, 549 N.E.2d 322, 327–28 (Ill. 1989).

261. See *supra* note 60 and accompanying text.

significant than refusing to recognize a minor's decision to have sex with someone who is not a peer; and it is conceivable that a minor will make a "better" decision in the context of medical treatment than sex acts.

The rule that minors cannot legally have sex with adults is altered only when marriage enters the equation. Some statutory rape laws except from applicability sexual relations between married persons, regardless of the age of the parties.<sup>262</sup> Although every state but one requires that people be at least eighteen to marry without parental consent,<sup>263</sup> if there is a pregnancy or the couple already has a child, several states will allow the marriage, though court authorization may be required.<sup>264</sup> Even when there is parental consent, if the minor is sixteen or younger, many states require court approval.<sup>265</sup> Courts have voided underage marriages in some of these cases,<sup>266</sup> but they have also held such unions merely "voidable,"<sup>267</sup> even without parental consent.<sup>268</sup>

Applying the three-step analysis set out above to the right to marry yields a result similar to the previously discussed scenarios. It is likely more feasible to hold a hearing to determine if marriage is warranted than to hold one regarding a youth's ability to consent to sex. The positive autonomy costs of refusing to recognize a minor's decision to marry will likely be more significant than refusing to recognize a minor's decision to have sex; and it is conceivable that a minor will make a "better" decision in the context of marriage than sex acts. Moreover, marriage rights for minors, like the right to have sex, are already heavily legislated using bright-line rules based on age and parental/pregnancy status; exceptions are permitted only under a narrow set of circumstances, and in such instances, a hearing and court approval are required.

The process of analyzing the potential ramifications of decriminalizing child prostitution while still allowing for the bodily autonomy of youth is

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262. *See, e.g.*, 65 AM. JUR. 2D *Rape* § 11 (2001) (citing *People v. Courtney*, 4 Cal. Rptr. 274 (Cal. Ct. App. 1960)).

263. *Teen Marriage Laws*, U.S. MARRIAGE LAWS, [http://www.usmarriagelaws.com/search/united\\_states/teen\\_marriage\\_laws/index.shtml](http://www.usmarriagelaws.com/search/united_states/teen_marriage_laws/index.shtml) (last visited Apr. 25, 2011) (stating that Nebraska sets the age of majority at nineteen); *see also* 52 AM. JUR. 2D *Marriage* § 17 (2000) ("[S]tatutory provisions in some jurisdictions require persons under a specified age to obtain the consent of parents to marry.").

264. *Teen Marriage Laws*, *supra* note 263 (stating that Florida, Georgia, Kentucky, and Maryland allow pregnant teens or teens with a child together to marry without parental consent; Florida and Kentucky require prior court authorization; and Maryland requires that the youth be at least sixteen).

265. *Id.*

266. 52 AM. JUR. 2D *Marriage* § 16 (2000) (citing *Tigner v. Tigner*, 282 N.W.2d 481 (Mich. Ct. App. 1979)).

267. *Id.* (citing *Taylor v. Taylor*, 355 S.W.2d 383 (Mo. Ct. App. 1962)).

268. 52 AM. JUR. 2D *Marriage* § 17 (2000) (citing *Greene v. Williams*, 88 Cal. Rptr. 261 (Cal. Ct. App. 1970)).

an important exercise. Further, it must be acknowledged that although the decriminalization of prostitution for minors may be overinclusive (just as there are some mature minors who cannot legally drive, vote, drink alcohol, etc.), this is a trade-off worth making for the protection of public safety. Whether the objective is defining child prostitution, drafting laws on consent, or ascertaining the autonomy costs of a policy that impacts minors, lawmakers must strive for consistency. Given the reality, however, that the majority of states will continue to hold youth criminally liable for prostitution, it is critical to identify alternate strategies for reform.

#### V. PROPOSALS

There are three basic service delivery models for the treatment of prostituted children. The first is criminal prosecution, which utilizes arrest and detention to determine the juvenile's needs, followed by some combination of incarceration, mandatory counseling, and residential treatment, typically resulting in a delinquency adjudication or criminal record. The second is prevention, intervention, and rehabilitation, in which youth at risk for, engaged in, or attempting to extricate themselves from prostitution are identified by law enforcement or service providers and provided counseling, treatment, and housing, often through state social service agencies. The third is decriminalization and diversion, a hybrid model in which prostituted youth are initially processed by the juvenile or criminal justice systems and then referred to counseling or residential treatment programs, the successful completion of which results in the dismissal of the criminal charge, while the failure to satisfactorily complete the program triggers the reinstatement of the conviction.<sup>269</sup> Illinois has extended this third model by decriminalizing prostitution for all youth under eighteen without conditioning the decision on the minor's completion of specific programs or cooperation with supervision.<sup>270</sup> Illinois's variation, however, is unlikely to be adopted by many states without first piloting the traditional hybrid scheme that combines decriminalization with diversion.

Critiques of these models have been leveled most frequently at the continued criminalization of prostituted children, as discussed earlier.<sup>271</sup> On the other side of the spectrum, some youth advocates have expressed

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269. See BARTON CHILD L. & POL'Y CLINIC, *supra* note 76, at 35–50.

270. See *supra* notes 52, 71, and 171 and accompanying text (discussing the Illinois Safe Children Act).

271. See *supra* Part III.B.

concern that if treatment programs “pathologize teens and their developing sexualities” by labeling them as abused victims, these options may “do more harm than good” by triggering feelings of inhibition, insecurity, and self-loathing.<sup>272</sup> This Part further analyzes the alternatives to criminal prosecution, highlighting those few programs that have demonstrated success and proposing a strategy for moving forward.

### A. *Prevention, Intervention, and Rehabilitation*

There are very few prevention efforts in the United States specifically aimed at prostituted children and sexual exploitation. Instead, the issue is treated within the broader context of generalized child safety, Internet safety, or human trafficking—with mixed results.<sup>273</sup> The NetSmartz Workshop, for example, is an interactive educational resource sponsored by the National Center for Missing and Exploited Children and the Boys and Girls Clubs of America, which is focused on teaching children basic practices of Internet safety with the goals of preventing victimization and increasing children’s self-confidence while online.<sup>274</sup> As discussed earlier, there are also nonprofit programs and organizations for runaway and homeless youth, two of the main groups at risk for sexual exploitation.<sup>275</sup> Many of these programs, however, are time limited, and although they receive federal funding, they are not institutionalized government initiatives.<sup>276</sup>

One of the most promising prevention models directed at prostituted children is the My Life, My Choice Project (MLMC) in Boston.<sup>277</sup> Founded in 2002, MLMC is a survivor-led nonprofit that provides a combination of gender-specific counseling and mentoring services, as well as curriculum, training, and case coordination for providers.<sup>278</sup> MLMC’s ten-week session for at-risk adolescent girls is aimed at conveying the

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272. Wood, *supra* note 68; see also Schwartz, *supra* note 38, at 236 (“An opposing normative view of adolescent prostitutes as victims in need of protection competes with these moral narratives in cultural discourse.”).

273. ECPAT INT’L, *supra* note 5, at 15.

274. *Id.* at 15; *About Us*, NETSMARTZ WORKSHOP, <http://www.netsmartz.org/overview/aboutus> (last visited Apr. 25, 2011).

275. See *supra* notes 94–98 and accompanying text.

276. See ECPAT INT’L, *supra* note 5, at 15–16.

277. See *About the My Life My Choice Project*, MY LIFE MY CHOICE PROJECT, <http://www.jri.org/mylife/index.php> (last visited Apr. 25, 2011).

278. *Id.*; see Joe Markman, *Girls Rescued from Sex Trade Have Few Options to Get Help; US Has Just Three Programs Offering Residential Therapy*, BOS. GLOBE, Dec. 9, 2009, at 16; Emily Shenk, *Keeping Girls Off the Street: The My Life My Choice Project Targets Girls at Risk of Sexual Exploitation*, 16 CHILD. VOICE 1 (2007), available at <http://www.cwla.org/voice/0709streets.htm>.

knowledge, skills, and shift in attitude necessary to decrease the likelihood of entering into the commercial sex industry. The curriculum focuses on the tactics of the recruitment process, the brutal realities of the Life, and the importance of recognizing one’s own vulnerabilities.<sup>279</sup> The project also offers programs for staff at group homes that house troubled youth, as well as for those at middle and high schools, juvenile detention centers, residential treatment facilities, and community-based agencies. MLMC trains adults who work with these populations to identify prostituted girls, recognize the manipulative strategies of pimps, and provide the appropriate response and referrals.<sup>280</sup> With funding from the federal Office of Juvenile Justice and Delinquency Prevention (OJJDP), MLMC reached over 700 girls in Massachusetts by the end of 2010, and its comprehensive curriculum, which is focused solely on preventing commercial sexual exploitation among youth, is being used in agencies across the United States.<sup>281</sup>

When considering best practices for the prevention of child prostitution and commercial sexual exploitation, a critical step is for federal, state, and local governments to approach adolescent sexuality with more openness and less shame and evasion, as demonstrated by the MLMC project. After years of gains in the teenage birth rate and declines in contraceptive use among sexually active youth,<sup>282</sup> it is evident that abstinence-only sex education has failed.<sup>283</sup> Common sense calls for a more comprehensive

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279. See Shenk, *supra* note 278, at 1; see also Comments from Lisa Goldblatt Grace, *supra* note 236.

280. See *My Life, My Choice: Preventing the Prostitution of Adolescent Girls*, THE HOME FOR LITTLE WANDERERS, Feb. 8, 2006, <http://www.thehome.org/site/News2?page=NewsArticle&id=7615>.

281. *The MLMC Curriculum*, MY LIFE MY CHOICE, <http://www.jri.org/mylife/Services-The-MLMC-Curriculum.php> (last visited Apr. 25, 2011) (stating that the curriculum is used by agencies in California, Connecticut, Georgia, Illinois, Kansas, Minnesota, and New York).

282. See Editorial, *Teenagers and Pregnancy*, N.Y. TIMES, June 18, 2009, at A36 (citing a report finding that since 2003, there has been a ten percent decline “in contraception use that is consistent with recent gains in the teenage birth rate”); John S. Santelli et al., *Changing Behavioral Risk for Pregnancy Among High School Students in the United States 1991–2007*, 45 J. ADOLESCENT HEALTH 25, 26 (2009) (“Data from U.S. high school students for 1991 to 2007 suggest that trends toward reduced sexual experience and increased condom use during the 1990s and early 2000s have reversed or flattened recently among certain groups.”).

283. See Ellen Goodman, Editorial, *Abstinence-Only Education is a Joke: It’s a Cruel and Expensive One, Too*, PITT. POST-GAZETTE, Jan. 2, 2009, at B5 (“[A]bstinence-only education has become emblematic of the rule of ideology over science.”); see also Editorial, *End to Abstinence-Only Fantasy*, N.Y. TIMES, Dec. 20, 2009, at WK6 (supporting a federal measure that redirects abstinence-only sex education resources to “medically accurate and age appropriate programs’ shown to reduce teen pregnancy”). But see Rob Stein, *Abstinence-Only Programs Might Work, Study Says*, WASH. POST, Feb. 2, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/01/AR2010020102628.html> (“Sex education classes that focus on encouraging children to remain abstinent can persuade a significant proportion to delay sexual activity, researchers reported Monday in a landmark

health education program for our middle- and high-school students, one that provides accurate information on contraception, safe sex practices, sexually transmitted diseases, pregnancy, and the continuum of sexual orientation.<sup>284</sup> In addition, teachers, administrators, police officers, and social workers must coordinate to identify youth who may be vulnerable to involvement in the sex trade. This at-risk cohort includes those who have a history of sexual abuse and involvement in child protective services, who have a reputation for being sexually active with multiple partners, whose families have suffered job loss or displacement from their homes or neighborhoods, and who have disengaged themselves from school or extracurricular programs. Referrals to mentors, drop-in centers, and peer-to-peer counseling services for this population should be routine.

Intervention involves even more carefully identifying those children who are or are likely to be involved in prostitution. Service providers should attune themselves to red flags that may indicate that a young person is being exploited, including “changes in appearance . . . , sleep habits . . . , loss of interest in . . . [regular] activities, and truancy.”<sup>285</sup> Although police pessimism regarding the ability to affect meaningful change among this population is understandable as it is reinforced by training that portrays child prostitutes as offenders, it can compromise intervention efforts.<sup>286</sup> Likewise, although exploited youth can be turned around through involvement in developmentally sound educational and

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study that could have major implications for U.S. efforts to protect young people against unwanted pregnancies and sexually transmitted diseases.”); *see also* *Abstinence-Only Program Shows Success In Reducing Teen Sex*, KAISER HEALTH NEWS, Feb. 2, 2010, <http://www.kaiserhealthnews.org/daily-reports/2010/february/02/abstinence-only.aspx> (“An experimental abstinence-only program without a moralistic tone can delay teens from having sex, a provocative study found . . .”).

284. *See* *End to Abstinence-Only Fantasy*, *supra* note 283; *see also* Alysson Russell, Note, *Future Incorporation of the U.N. Convention on the Rights of Children into the United States Education System: Case Study of Ohio Department of Education and Sex Education Battle*, 2001 BYU EDUC. & L.J. 391, 393–98 (2001) (describing the challenges of funding a comprehensive health education program as well as the public’s reluctance to support a curriculum that includes anything other than abstinence-based lessons).

285. Lisa Goldblatt Grace, *Understanding the Commercial Sexual Exploitation of Children*, 7 LINK 1, 5 (2009).

286. *See* Robert Flores, *Child Prostitution in the United States*, in *FORCED LABOR: THE PROSTITUTION OF CHILDREN* 41, 44 (1996) (“I talk to law enforcement officers all the time who say, ‘Look, these [child prostitution] cases aren’t worthwhile to me. I make the arrest. The pimp is back out on the street in a short amount of time, and then after two or three months go by the girl doesn’t want to talk to me anymore.’”); Weisberg & Fisher, *supra* note 211, at 229, 230–31 (“Some police who have dealt with cases of adolescent prostitutes are aware of the youth’s child abuse and neglect histories, parental rejection, and runaway histories, and many police are concerned that the courts and the rehabilitation agencies will probably be unsuccessful in short-term and long-term resolution of the youth’s problems. . . . Police fail to recognize that these youth need months, if not years, of therapeutic intervention before their behavior can be altered.”).

treatment programs,<sup>287</sup> there are few existing models of evaluation and ongoing monitoring that have been successful.

One potential model is the Interagency Children’s Policy Council (ICPC) in Alameda County, California.<sup>288</sup> ICPC is a coalition of government agencies that provide services to children and families, including programs for the stabilization of prostituted children in their own homes, shelters, or foster homes, as well as direct counseling and other support services.<sup>289</sup> This network of county and community partners emphasizes “cross-agency collaboration as a strategy for improving outcomes” for low-income and vulnerable children and their families, “while promoting institutional change on the county level.”<sup>290</sup> The Support to End Exploitation Now (SEEN) Coalition in Boston, Massachusetts, is another example of intervention through coordination of relevant agencies, “including law enforcement, child protective services, medical providers, and district attorneys.”<sup>291</sup> SEEN has established guidelines to ensure that within forty-eight hours after a child has been identified as exploited through prostitution, agency representatives have begun to collaborate together with the youth to develop a service plan aimed at safety and recovery.<sup>292</sup>

Prostituted youth who have been acutely harmed physically and psychologically (a group that arguably includes *all* children who have been prostituted) are in greatest need of rehabilitative care, counseling, and medical and legal services.<sup>293</sup> Intensive residential treatment is critical for

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287. See Goldblatt Grace, *supra* note 285, at 14 (“Adolescent females in the process of exiting the commercial sex industry need a service provision that emphasizes four main treatment themes: safety, trauma recovery, relationship development/consistency, and survivors involved in service development and provision.”).

288. INTERAGENCY CHILD. POL’Y COUNCIL OF ALAMEDA COUNTY, <http://www.acgov.org/icpc/index.htm> (last visited Apr. 25, 2011).

289. See *Mission Statement*, INTERAGENCY CHILD. POL’Y COUNCIL OF ALAMEDA COUNTY, <http://www.acgov.org/icpc/mission.htm> (last visited Apr. 25, 2011).

290. *Id.*; cf. Rami S. Badawy, *Shifting the Paradigm from Prosecution to Protection of Child Victims of Prostitution Part II of III*, 22 UPDATE 1, 3–4 (2010) (reporting on the Georgia Care Connection, a “single care coordination center for commercially sexually exploited girls” that “identif[ies] . . . [and] link[s] them to services without subjecting them to arrest” and “also tracks child sex trafficking victims as part of a state and national database”).

291. Goldblatt Grace, *supra* note 285, at 13–14.

292. *Id.* (noting that even if the child is not ready to receive services, the team will “convene to exchange information and provide support” to ensure that the child does not “fall through the cracks of the system”); cf. Badawy, *supra* note 290, at 1–3 (describing the Dallas Police Department’s Child Exploitation/High Risk Victims Trafficking Unit, which identifies prostituted juveniles, houses them at an emergency shelter, and provides medical care and substance abuse treatment as well as education and psychological services in coordination with the juvenile court system, the Dallas school district, and the state department of family and protective services).

293. SPANGENBERG, *supra* note 109, at 14.

this population, and long-term models, such as transitional living programs followed by supervised independent living programs, are ideal.<sup>294</sup> Moreover, as with all these groups, providing youth with survivor-led services, a support network of mentors, and pro-social activities is essential.<sup>295</sup>

According to specialists in the area of child sexual exploitation, however, there are very few programs in the United States that currently offer residential treatment or safe houses for prostituted children.<sup>296</sup> These nonprofits, which together can accept a total of fewer than 100 youth,<sup>297</sup> include such model programs as Girls Educational and Mentoring Services (GEMS), a New York based organization founded in 1999 that runs a residential facility, the Transition to Independent Living (TIL);<sup>298</sup> Angela's House, a residential treatment facility in Atlanta established in 2002 and operated by the Center to End Adolescent Sexual Exploitation (CEASE);<sup>299</sup> and Children of the Night, a Los Angeles based long-term residential treatment program founded in 1992.<sup>300</sup> Other safe houses, such

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294. *See id.*

295. *See* Carrie Baker, *Jailing Girls for Men's Crimes*, MS. MAG., Summer 2010, available at <http://www.ms magazine.com/Fall2010/SexTrafficking.asp> (discussing the success of programs for prostituted youth that are "survivor-led" and that offer "gender responsive services . . . within a social-justice framework").

296. *See* HEATHER J. CLAWSON & LISA GOLDBLATT GRACE, U.S. DEP'T OF HEALTH & HUM. SERVS., FINDING A PATH TO RECOVERY: RESIDENTIAL FACILITIES FOR MINOR VICTIMS OF DOMESTIC SEX TRAFFICKING 3, 10 (2007), available at <http://aspe.hhs.gov/hsp/07/humantrafficking/ResFac/ib.pdf> (finding that as of 2007, there were four residential treatment facilities for child sex workers); Markman, *supra* note 278; Reid, *supra* note 76.

297. *See* Dan Rather Reports, *supra* note 50 ("[T]here are fewer than 100 beds nationwide for the placement and protection of these young victims.").

298. *See* Haberman, *supra* note 65; Markman, *supra* note 278; Shulman, *supra* note 28 (describing GEMS as a nonprofit group that is "perhaps the best model in the state for delivering services and creating the safe and nurturing atmosphere envisioned in [New York's] Safe Harbor bill"); *see also* GEMS: GIRLS EDUC. & MENTORING SERVICES, <http://www.gems-girls.org> (last visited Apr. 25, 2011).

299. *See* Markman, *supra* note 278; Jill Young Miller, *A Haven of Healing: Angela's House Gives Prostituted Children a Safe, Nurturing Environment Where They Can Reclaim Their Stolen Childhood*, ATLANTA J.-CONST., Mar. 11, 2007, at 1F (reporting that Angela's House provides therapy and education for sexually exploited girls); Reid, *supra* note 76 (reporting that Angela's House is "one of only three safe houses in the United States"); Simon, *supra* note 76; *Angela's House*, JUV. JUST. FUND, <http://www.juvenilejusticefund.org/programs/cease/index.aspx#angelahouse> (last visited Apr. 25, 2011).

300. *See* Markman, *supra* note 278; CHILDREN OF THE NIGHT, <http://www.childrenofthenight.org/home.html> (last visited Apr. 25, 2001); *see also* THE HOPE HOUSE, <http://www.hopehouseenc.com> (last visited Apr. 25, 2011) (providing information regarding a restorative program near Asheville, North Carolina, for young female victims of sex trafficking); GRACEHAVEN, <http://gracehavenhouse.org> (last visited Apr. 25, 2011) (describing a safe house located in Ohio dedicated to rehabilitating girls who are victims of commercial sexual exploitation); *Programs*, GERMAINE LAWRENCE, <http://www.germainelawrence.org/programs/programs.html> (last visited Apr. 25, 2011) (describing the

as one operated in San Francisco by the multidisciplinary program Standing against Global Exploitation (SAGE) for survivors of abuse, prostitution, and trauma, no longer provide residential care because of lack of funding.<sup>301</sup>

### *B. Decriminalization and Diversion*

Diversion typically means that minors who are arrested for prostitution remain in the criminal system with a court-implemented protocol that calls for automatic referral and placement into treatment programs; if the juvenile successfully completes the diversionary period, the criminal or delinquency charge may be dismissed.<sup>302</sup> As referenced earlier, the few states and localities that have decriminalized prostitution for certain categories of minors and implemented a diversion program have done so using a variety of strategies.<sup>303</sup> Under New York’s scheme, youth younger than eighteen who are found to have engaged in acts of prostitution are considered “persons in need of supervision” and are referred by the court to treatment, therapy, and other rehabilitative services.<sup>304</sup> If the child is a repeat offender or does not cooperate with services, the judge has the discretion to issue a delinquency petition alleging prostitution.<sup>305</sup> Similarly, under New York’s Project SAFETY program, which refers juveniles in delinquency cases to specialized social, medical, and counseling services, the judge may dismiss pending prostitution charges if the youth successfully completes the programs and cooperates with services.<sup>306</sup> In contrast, Michigan, which has decriminalized prostitution for those under sixteen, has no statutory mandates for services to be

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“ACT” or Acknowledge, Commit, Transform Group Home in Arlington, Massachusetts, which serves female youth “who have been, or [are] at risk for being . . . sexually exploited” through prostitution).

301. See Markman, *supra* note 278; see also Norma Hotaling & Leslie Levitas-Martin, *Increased Demand Resulting in the Flourishing Recruitment and Trafficking of Women and Girls: Related Child Sexual Abuse and Violence Against Women*, 13 HASTINGS WOMEN’S L.J. 117, 117–18 (2002) (describing SAGE as a program in which “over 350 women and girls receive counseling and other services each week” from “peer counselors, drug treatment counselors, therapists, acupuncturists, social workers, therapist interns, and volunteers”).

302. See, e.g., Feinblatt, *supra* note 155.

303. See *supra* Part II.A.

304. N.Y. FAM. CT. ACT § 311.4 (McKinney 2008).

305. N.Y. FAM. CT. ACT § 311.4(3) (McKinney Supp. 2010).

306. See Feinblatt, *supra* note 155; Alison Gendar, *Lifeline for Street Girls: City Program Helps Teens Break Free from Pimps & Start Fresh*, N.Y. DAILY NEWS, June 26, 2008, at 24 (reporting that Project SAFETY requires that youth also “break ties with their pimps” before criminal charges will be dismissed); see also *supra* notes 81–82 and accompanying text (discussing the pilot program in Alameda County, California, which utilizes a similar approach by providing treatment and services rather than initiating criminal prosecutions against prostituted children).

imposed or alternative provisions that allow for delinquency petitions to be filed; those under sixteen can, however, be charged with such offenses as disorderly conduct and trespassing, providing the court with an alternative means of assuming jurisdiction over this population.<sup>307</sup> Meanwhile, the Safe Harbor laws passed in Washington and Connecticut provide yet another version of the decriminalization/diversion model; they employ certain aspects of the laws of both New York and Michigan, while also embracing sixteen- and seventeen-year-olds.<sup>308</sup>

A variation on the diversion theme focuses on the demand side of the prostitution equation. The First Offender Prostitution Program (FOPP), founded in 1995 by the San Francisco Police Department, the District Attorney's Office, and SAGE,<sup>309</sup> "divert[s] thousands of customers of prostitutes from the court system to an educational and rehabilitation experience in lieu of criminal prosecution."<sup>310</sup> After the john pays a fee and completes the daylong class, his first offense is dismissed, and the funds then go toward services for women and girls engaged in or trying to leave prostitution.<sup>311</sup> Through FOPP, researchers have gathered data on those who hire prostitutes, revealing that their profiles cut across racial, cultural, educational, and socioeconomic lines. Thirty to fifty percent do not use condoms, most "have between five and ten sexual partners per year," and the majority have little understanding or knowledge of sexually transmitted diseases.<sup>312</sup> The research shows that in its first four years of

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307. Compare MICH. COMP. LAWS ANN. § 750.448 (West 2004) (criminalizing prostitution for those sixteen years of age or older), with MICH. COMP. LAWS ANN. § 750.167 (West 2004) (providing no age limitations on whom the state can charge as a "disorderly person").

308. See *supra* notes 50–53 and accompanying text; see also Badawy, *supra* note 290, at 4–5 (describing Alberta, Canada's Protection of Sexually Exploited Children Act, which designates prostituted youth under 18 as "child[ren] in need of protection" and does not charge them criminally, but instead places them in "a secure facility with restricted access" and comprehensive services); Marie De Santis, *Sweden's Prostitution Solution: Why Hasn't Anyone Tried This Before?*, WOMEN'S JUST. CTR., [http://www.justicewomen.com/cj\\_sweden.html](http://www.justicewomen.com/cj_sweden.html) (last visited Apr. 25, 2011) (reporting that Sweden passed legislation in 1999 that criminalizes the buying of sex and decriminalizes the selling of sex, and stating, "In Sweden prostitution is regarded as an aspect of male violence against women and children. It is officially acknowledged as a form of exploitation of women and children and constitutes a significant social problem . . . gender equality will remain unattainable so long as men buy, sell and exploit women and children by prostituting them.").

309. Hotaling & Levitas-Martin, *supra* note 301, at 120–22.

310. *Id.* at 121 (footnote omitted).

311. *Id.* at 121.

312. *Id.* at 122; see also MELISSA FARLEY, JULIE BINDEL & JACQUELINE M. GOLDING, MEN WHO BUY SEX: WHO THEY BUY AND WHAT THEY KNOW 25–27 (2009), available at [http://www.eaves4women.co.uk/Documents/Recent\\_Reports/Men%20Who%20Buy%20Sex.pdf](http://www.eaves4women.co.uk/Documents/Recent_Reports/Men%20Who%20Buy%20Sex.pdf) (reporting the results of a research study of 103 men who describe their use of trafficked and nontrafficked women in prostitution and their awareness of coercion and violence).

operation, FOPP significantly reduced recidivism: out of 2200 men who completed the program, only eighteen were rearrested as johns.<sup>313</sup>

An option that has not yet been pursued by any state legislatures, but which is comparable to the Illinois Safe Children Act,<sup>314</sup> involves amending the statutory definition of juvenile status offenders to include those minors who have engaged in acts of prostitution.<sup>315</sup> This would allow for protective supervision by the juvenile or family court outside of the criminal and delinquency codes, the length of which would be shorter than is typical for probationary supervision of criminal or delinquent offenders—an average of ninety days rather than twelve months.<sup>316</sup> Unlike New York’s Safe Harbor Act, this scheme would not provide for discretionary delinquency prosecution when the terms and conditions of the supervisory period were violated. Instead, the juvenile could be held in contempt, and punishment for a first offense would be limited to no more than twenty-four hours in secure custody, similar to that of other status offenders.<sup>317</sup> One caveat, however, is that courts often fail to acknowledge the distinctions between status offenders and youth charged with criminal conduct, holding them in secure custody before less restrictive placement alternatives have been exhausted and treating them as juvenile offenders rather than children in need of services.<sup>318</sup>

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313. Hotaling & Levitas-Martin, *supra* note 301, at 122; *see also* Catherine Elton, *Dear John: Can You Teach Men Who Pick Up Prostitutes Not to Buy Sex? Part Education, Part Intervention, a “School” in Worcester Takes Aim at Reducing Demand on the Streets*, BOS. GLOBE, Oct. 11, 2009, [http://www.huntalternatives.org/download/1826\\_10\\_11\\_09\\_dear\\_john.pdf](http://www.huntalternatives.org/download/1826_10_11_09_dear_john.pdf) (discussing a daylong educational course in Massachusetts for “men who have been arrested and charged with soliciting sex on the streets or over the Internet”; by paying a fee and completing the course, the men avoid a misdemeanor conviction).

314. *See supra* notes 52, 71, 171, 270 and accompanying text (discussing the Illinois Safe Children Act).

315. *See, e.g.*, N.C. GEN. STAT. § 7B-1501(27)(a) (2009) (defining undisciplined juvenile as “[a] juvenile who . . . is unlawfully absent from school; or is regularly disobedient to and beyond the disciplinary control of the juvenile’s parent, guardian, or custodian; or is regularly found in places where it is unlawful for a juvenile to be; or has run away from home for a period of more than 24 hours”).

316. *Compare, e.g.*, N.C. GEN. STAT. § 7B-2503(2) (2009) (allowing the court to “[p]lace the [undisciplined] juvenile under the protective supervision of a juvenile court counselor for a period of up to three months, with an extension of an additional three months in the discretion of the court”), *with* N.C. GEN. STAT. § 7B-2510(c) (2009) (“An order of probation shall remain in force for a period not to exceed one year from the date entered. Prior to expiration of an order of probation, the court may extend it for an additional period of one year after a hearing, if the court finds that the extension is necessary to protect the community or to safeguard the welfare of the [delinquent] juvenile.”).

317. *See, e.g.*, N.C. GEN. STAT. § 7B-2505 (2009) (“The first time the [undisciplined] juvenile is held in contempt, the court may order the juvenile confined in an approved detention facility for a period not to exceed 24 hours.”).

318. *See* Kendall, *supra* note 157, at 5.

While each of these proposals has its drawbacks and shortcomings, few would disagree that a more streamlined and consistent approach to the legal regulation of the prostitution of children is desperately needed—both within each state and across state lines—and that, at the very least, comprehensive residential treatment programs should be available in every major city.

## VI. CONCLUSION

The United States has long approached the issue of children in conflict with the law with ambivalence.<sup>319</sup> This has resulted in youth who share the same developmental posture being questioned one way when they are believed to be “suspects” and another when they are labeled “victims.”<sup>320</sup> It has led to domestic policy that is inconsistent with international policy<sup>321</sup> and federal statutes that conflict with state statutes.<sup>322</sup> Sixteen-year-olds in one jurisdiction are treated as adults, but in another they are juveniles.<sup>323</sup>

United States policy regarding the prostitution of children is perhaps the most extreme example of this wrongheadedness. Despite evidence that a large number of children who engage in prostitution are homeless, runaways, or victims of abuse and neglect, their conduct continues to be criminalized, and the government persists in treating them as offenders.

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319. See Minow, *supra* note 60, at 277 (“Ambivalence here should not be misconstrued as a kind of wishy-washy balancing act. Ambivalence is that wonderful word for our simultaneous commitments and attractions to inconsistent things.”).

320. See Tamar R. Birckhead, *The Age of the Child: Interrogating Juveniles After Roper v. Simmons*, 65 WASH. & LEE L. REV. 385, 429 (2008) (arguing that in the context of interrogation, juvenile suspects should be provided the same protections as young victims, as both groups have the same developmental posture).

321. Compare, e.g., *U.S.: 1 in 10 Children in Juvenile Facilities Report Sexual Abuse by Staff: Justice Department Should Issue Prison Rape Standards*, HUM. RTS. WATCH, Jan. 7, 2010, <http://www.hrw.org/en/news/2010/01/07/us-1-10-children-juvenile-facilities-report-sexual-abuse-staff> (reporting that although United States government data suggests high levels of sexual abuse of confined youth, Attorney General Eric Holder has failed “to promulgate national prison rape elimination standards”), with 2004 TRAFFICKING IN PERSONS REPORT, *supra* note 122, at 11–13 (2004) (reporting that the United States has strengthened its ability to fight international child sex tourism through federal legislation with increased penalties for violators and quoting George W. Bush as stating, “There’s a special evil in the abuse and exploitation of the most innocent and vulnerable.”).

322. Compare, e.g., JOHN SCALIA, U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., *JUVENILE DELINQUENTS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 1* (1997) (stating that juveniles are adjudicated delinquent in federal court “by a U.S. district court judge or magistrate in a *closed* hearing *without* a jury” (emphasis added)), with N.C. GEN. STAT. § 7B-2402 (2009) (stating that all juvenile court hearings “shall be *open* to the public” (emphasis added)), and MASS. GEN. LAWS ch. 119, § 55A (West 2006) (stating that juveniles charged with delinquency shall have a right to *trial by jury*).

323. See Birckhead, *supra* note 9, at 1471–94 (discussing the history of juvenile court jurisdiction in North Carolina, one of only two states that sets the cap at sixteen, and describing the political resistance among legislators to raising the age to eighteen and joining the majority).

Given the relatively benevolent attitude of the United States toward children who are trafficked on the international sex market, maintaining a punitive approach toward similarly situated youth within its borders is, at best, difficult to defend. The country’s historical treatment of prostitution—in which the lines between children and adults were blurred for many decades until prostitution was deemed illegal and immoral—provides an explanation for the current status quo, but not a justification for it.

On the centennial anniversary of the Mann Act, it is especially appropriate for legislators, advocates, and policy makers to reform the ways in which the United States approaches prostituted children and to implement strategies of prevention and intervention as well as decriminalization and diversion.<sup>324</sup> Much of the work has already been done: best practices have been articulated, effective programs have been identified, and model statutes have been drafted. It is time now to adopt a more nuanced and less punitive approach to the world’s oldest—and youngest—profession.

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324. *See supra* Part V; *see also* Wood, *supra* note 68 (recognizing that “the comprehensive needs of abused,” neglected, and runaway youth will not be met by any one bill or program and that state and private funds should be directed toward prevention of these underlying conditions as well as at the proliferation of sexual exploitation itself).