

2008

Child Prostitute or Victim of Trafficking?

Wendi J. Adelson

Bluebook Citation

Wendi J. Adelson, *Child Prostitute or Victim of Trafficking?*, 6 U. St. Thomas L.J. 96 (2008).

This Article is brought to you for free and open access by UST Research Online and the University of St. Thomas Law Journal. For more information, please contact lawjournal@stthomas.edu.

ARTICLE

CHILD PROSTITUTE OR VICTIM OF TRAFFICKING?

WENDI J. ADELSON*

ABSTRACT

Is child prostitution a crime committed by minors, or against them? Federal laws on trafficking consider the prostitution of children to be akin to the crime of human trafficking, which raises questions about how states categorize child prostitution. At present, most jurisdictions' prostitution statutes fail to distinguish between adult and child prostitutes. Given the recent rise in state legislation geared toward punishing traffickers and protecting child victims of trafficking, it appears counterintuitive to retain state statutes that punish child prostitutes when the federal anti-trafficking statutes could protect those same minors.

Highlighting the dichotomy between criminal and protected treatment of children who are prostituted, this article identifies gaps in both the law and social services and assesses public policy solutions designed to aid this vulnerable and growing population of commercially sexually abused children. The article argues that state legislation criminalizing child prostitution should change in light of trafficking legislation that treats children who are prostituted as victims of crime. Moreover, states should divert available anti-trafficking resources toward the rehabilitation and care of prostituted children regardless of their immigration status.

“When the police are out on a sting and catch a pimp with his fourteen year old prostitute, they will consider her a victim of trafficking. Hypothetically, the police can arrest the same girl for the crime of

* Program Director of the Human Rights and Immigration Law Project, Center for the Advancement of Human Rights, Florida State University College of Law; BA, Brandeis University; MPhil, University of Cambridge; JD, University of Miami School of Law. For conversations and comments on this project, I owe thanks to: Dan Markel, Terry Coonan, Marisa Cianciarulo, Robin Thompson, Vania Llovera, Kelli Alces, Kathleen Kim, Sandy Skelaney, Sara Yousuf, and the members of the law review at the University of St. Thomas School of Law for convening this symposium.

prostitution. It's totally inconsistent. How can this girl be a victim and offender at the same time for the same thing?"¹

INTRODUCTION

Is prostitution a crime committed by minors, or against them? Is it both? These questions cut to the heart of this paper. In almost all fifty states, a minor's selling of him or herself for sex, or prostitution, is a criminal offense.² By contrast, the federal Trafficking Victims Protection Act (TVPA) considers all minors engaged in commercial sex acts as victims of trafficking.³ This inconsistency presents a problem because at the same time, federal and state statutes regarding prostitution do not distinguish between adult and child prostitution and criminalize both. Given the recent rise in state legislation geared toward punishing traffickers and protecting child victims of trafficking, there is now a deep tension between prostitution statutes and anti-trafficking statutes—at least as they pertain to the treatment of minors.

This inconsistency is important because any particular outcome could be contingent upon which regime a law enforcement agency adopted. Indeed, children could face very different outcomes depending on how the child's actions are categorized, whether the child is U.S. or foreign born, and whether the response is state or federal. By closely examining the relevant legal materials, this paper will begin in Part I by highlighting the dichotomy between criminal and protected treatment for prostituted children.⁴ Part II will identify the gaps in both the law and services, and Part III will look to public policy solutions for this vulnerable and growing population of children engaged in commercial sexual activity.

1. Interview with Sandy Skelaney, Program Coordinator, Commercially Sexually Exploited Children's Project, in Miami, Fla. (Nov. 2007).

2. Only one state, Michigan, treats prostituted children somewhat differently from prostituting adults. All other states make no differentiation based on age and punish the act of prostituting equally. See Christianna M. Lamb, *The Child Witness and the Law: The United States' Judicial Response to the Commercial, Sexual Exploitation of Children in Light of the UN Convention on the Rights of the Child*, 3 OR. REV. INT'L L. 63, 81–84 (2001).

3. See Trafficking Victims Protection Reauthorization Act of 2008, 22 U.S.C.A. §§ 7101–7112 (Supp. 2009).

4. The writer intentionally employs the term “prostituted children” instead of “child prostitute” to imply the lack of consent and the force, fraud or coercion often present when minors engage in the exchange of sex for money. Terms like “child prostitute” as compared to “prostituted child” connote images of different individuals. The discourse employed by advocates, legislators, law enforcement and others leads to similarly confusing, uncomfortable and divergent feelings on the topic of children and prostitution. The term “child prostitution” when used in this paper takes on the meaning that it carries in the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography: “child prostitution” is “the use of a child in sexual activities for remuneration or any other form of consideration.” Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography, G.A. Res. 54/263, art. 2, U.N. Doc. A/RES/54/263 (May 25, 2000).

I. Laws Regarding Human Trafficking and Prostitution

This section examines the current laws on both the federal and state level enacted to combat trafficking in human beings.

A. Human Trafficking

While human trafficking has become an increasingly well-known phenomenon, there is still widespread confusion as to what it is and how it may differ from other crimes such as smuggling.⁵ Human trafficking, often referred to as modern-day slavery, is the use of men, women and children for labor and commercial sexual exploitation through force, fraud or coercion.⁶ This paper will focus exclusively on sex trafficking and the legal and social responses to the overlapping laws concerning the inappropriately divided population of prostituted and trafficked children.

1. Federal law

This legislation establishes, for the first time, a bright line between the victim and perpetrator. Presently, most existing laws . . . fail to distinguish between victims of sexual trafficking and their perpetrators. Sadly and ironically, victims are punished more harshly than the traffickers, because of their illegal immigration status and lack of documents (which the traffickers have confiscated to control the victim).⁷

These statements were part of the legislative debates surrounding Congress' enactment in 2000 of the TVPA.⁸ The purpose of the TVPA is to "combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims."⁹ As noted in the debates, the legislation had a humanitarian purpose and sought espe-

5. The Department of Health and Human Services created a helpful fact sheet that differentiates between smuggling and trafficking. U.S. Department of Health and Human Services, Administration for Children & Families, Human Trafficking Fact Sheet, http://www.acf.hhs.gov/trafficking/about/fact_human2004.pdf (last visited Aug. 30, 2008).

6. See U.S. Department of Health and Human Services, Administration for Children & Families, About Human Trafficking, <http://www.acf.hhs.gov/trafficking/about/index.html> (last visited Sept. 1, 2008).

7. 146 CONG. REC. 16,713 (2000) (statement of Sen. Brownback).

8. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified at 22 U.S.C. §§ 7101-7110). The TVPA was subsequently reauthorized in 2003 (Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875), and 2005 (Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558) and on December 23, 2008 as the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044, 22 U.S.C.A. §§ 7101-7112 (Supp. 2009).

9. Trafficking Victims Protection Reauthorization Act, 22 U.S.C.A. § 7101(a) (Supp. 2009).

cially to provide additional protections for victimized children.¹⁰ The TVPA made it indisputable that victims who might otherwise have been in violation of U.S. law (through contravention of immigration law, or because of engagement in prostitution) were to be treated not as criminals, but instead as victims of crime.¹¹ It also discouraged the incarceration of trafficking victims and emphasized that their status as victims of crime was generally inconsistent with punishment and incarceration.¹² While incarceration as punishment for trafficked persons with immigration violations is anathema to the spirit of the TVPA, the quest to find safe and affordable housing for trafficked persons that will also facilitate close contact with law enforcement officials keen to prosecute the traffickers remains a significant challenge for advocates.¹³

The TVPA created a new non-immigrant visa, the T visa, to provide temporary immigration relief to victims of trafficking crimes who come from other countries and to encourage victims to testify against traffickers who were otherwise hesitant to do so because of deportation fears. The benefits related to the T visa underscore the human rights dimension of U.S. laws on human trafficking. To be eligible for a T visa, a trafficked person must meet several requirements. The individual must (1) be a victim of a “severe form of trafficking,” (2) be present in the U.S. because of the trafficking, (3) have complied with reasonable requests for assistance in the investigation or prosecution of trafficking, and (4) be able to show extreme hardship involving unusual and severe harm if removed.¹⁴ The federal Department of Health and Human Services (HHS) can certify a trafficked person who has satisfied the requirement for continued presence or obtained a T visa, allowing them to receive benefits and social services to the same extent as refugees, including federal and state assistance in the form of Medicaid, food stamps, and refugee cash/medical assistance.¹⁵

The T visa also offers a trafficked child’s family a chance at family reunification through derivative T visas, which include assistance for travel arrangements of family members to come to the U.S. to join a child victim.¹⁶ The T visa provides a child victim with temporary residency for three

10. Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977, 2990 (2006).

11. See 22 U.S.C. §§ 7101–7105.

12. See 22 U.S.C. § 7101(b)(19).

13. *Id.*; See, e.g., U.N. OFFICE ON DRUGS & CRIME (UNODC), TOOLKIT TO COMBAT TRAFFICKING IN PERSONS, Tool 8.8 at 375, U.N. Sales No. E.08.V.14 (2008), available at https://www.unodc.org/documents/human-trafficking/Toolkit-files/07-89375_Ebook%5B1%5D.pdf.

14. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(T) (2006).

15. U.S. Department of Justice Civil Rights Division, Trafficking in Persons – A Guide for Non-governmental Organizations, <http://www.usdoj.gov/crt/crim/wetf/trafficbrochure.html> (last visited Oct. 6, 2008).

16. See 8 U.S.C. § 1101(a)(15)(T) (relaying derivative visa eligibility). This program is funded by the Department of State to the International Organization for Migration.

years and potential permanent residency.¹⁷ While the T visa requires that adults cooperate with law enforcement, children need not collaborate with law enforcement to receive the T visa.¹⁸ In this way, the T visa, and trafficking laws in general, distinguish between adult and child victims of trafficking.¹⁹

If the U.S. Citizenship and Immigration Service (USCIS) grants a T visa before a child turns eighteen, the child becomes eligible for the Office of Refugee Resettlement's (ORR) Unaccompanied Refugee Minor (URM) program, which is a specialized foster care program for refugee, trafficked, and other foreign-born youth.²⁰ The URM program serves as a legal authority designated to act in place of the child's unavailable parents whereby children may stay in the program until they finish high school or reach the age of twenty-one. Through the program, children may receive intensive case management, education, health care, mental health counseling, and independent living skills training.²¹ The URM program also assists in family reunification and repatriation services when appropriate.²² In addition to the remedies provided to foreign-born victims of trafficking, U.S. born and Lawful Permanent Resident (LPR) children who are victims of trafficking and reside in the U.S. are also eligible for a variety of benefits to help ease their transition back into mainstream society.²³

During the Congressional debate surrounding the enactment of the original TVPA in 2000, the legislators discussed the problem of forced labor and highlighted the especially pernicious practice of commercial sexual exploitation of young women.²⁴ The late Senator Paul Wellstone identified the need to protect this vulnerable population and warned against the danger of conflating victim with offender: "The bitter, bitter, bitter irony, colleagues, is that quite often the victims are the ones who are punished, and these mobsters and criminals who are involved in the trafficking of these women and girls with this blatant exploitation get away with literally mur-

17. U.S. DEP'T OF LABOR, *TRAFFICKING IN PERSONS: A GUIDE FOR NON-GOVERNMENTAL ORGANIZATIONS* (2002), <http://www.dol.gov/wb/media/reports/trafficking.htm>.

18. *Id.*

19. Even though children are not required to work with law enforcement to obtain a T visa, practitioners around the U.S. have found that in some instances, children are forced to cooperate or pressured to testify against their traffickers in order to obtain the certification, a potentially traumatizing (or re-traumatizing) situation for a child who has experienced severe exploitation and abuse.

20. See U.S. CONFERENCE OF CATHOLIC BISHOPS *MIGRATION & REFUGEE SERVICES, THE UNACCOMPANIED REFUGEE MINOR PROGRAM OF THE U.S. REFUGEE PROGRAM* (2006), <http://www.nccbuscc.org/mrs/URMSummary02-23-2006.pdf>.

21. *Id.*

22. *Id.*

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

24. 146 CONG. REC. 16,712-14 (2000) (statements of Sen. Brownback and Sen. Wellstone).

der.”²⁵ The Congressional debates make clear that the TVPA sought to separate victim from offender to ensure that the law protects the victim and the culpable receive punishment. During these debates, Representative Smith acknowledged this need for protection rather than punishment: “Part of the problem is that current laws and enforcement strategies in the U.S. and other countries often punish the victims more severely than they punish the perpetrators.”²⁶ The legislators in favor of the TVPA did not just intend to punish the victims less severely—they desired to move away from a model of punishment for victims entirely.

The TVPA was enacted, at least in part, to combat the forced prostitution of children. Initially, these children were thought to come from the developing world, or at a minimum, from countries other than the United States.²⁷ Although most of the debates surrounding the enactment of the TVPA do not address the issue of U.S. born children forced or induced into prostitution, Representative Smith, a Republican from New Jersey, made the connection between the international trafficking of children into the United States, and the commercial sexual exploitation of U.S. born children. He asserted the following during the pre-TVPA legislative debates:

Even in the United States . . . American citizens and nationals who are trafficked domestically, often from one State to another,²⁸ are still viewed through the lens of juvenile delinquency, rather than as victims of crime, worthy of compassion and assistance. Enactment of this bill will begin to shift the paradigms so that these exploited girls and women will receive assistance that they so desperately need. It will make a difference for many American girls, mostly the runaways who are then victimized by the traffickers.²⁹

Although the TVPA was not enacted specifically to prevent the prostitution of U.S. born children, some of the legislative debates reflect that certain legislators had that goal in mind. For example, the late Senator Wellstone imagined that Congress designed the TPVA “to help federal law enforcement officials expand anti-trafficking efforts here and abroad; [and] to expand domestic anti-trafficking and victim assistance efforts.”³⁰ His use of the word “domestic” likely refers to efforts that take place on U.S. soil as well as actions geared toward the aid of “domestic” or U.S. born victims.

25. *Id.* at 16,714.

26. 146 CONG. REC. 7293 (2000) (statement of Rep. Smith).

27. Representative Pitts shared the following story during TVPA legislative debates: “I would like to share . . . the story of a young girl from a very poor family in a developing country who had hopes for a better life in a wealthier land.” *Id.*

28. Representative Smith’s categorization of trafficking actually differs from the current definition. There does not need to be any movement of a human being, either from one building or one state to another, to constitute trafficking.

29. 151 CONG. REC. H11574–11575 (daily ed. Dec. 14, 2005) (statement of Rep. Smith).

30. 146 CONG. REC. S7781 (daily ed. July 27, 2000) (statement of Sen. Wellstone).

As executed, the language of the TVPA is broad enough to extend its protective blanket to foreign born as well as LPR and U.S. children exploited in this manner.

The expansive language employed in the debates surrounding the TVPA's enactment and its subsequent reauthorizations³¹ has engendered potentially unintended results. The 2000 TVPA statute makes it unlawful to engage in sex trafficking by force, fraud or coercion *or* to cause a person less than eighteen years of age to engage in a commercial sex act.³² In essence, in the TVPA's language that details what particular actions constitute human trafficking, prostituted children—regardless of their countries of origin—can also be characterized as victims of human trafficking. The statute requires the elements of force, fraud or coercion to be present for an adult victim of trafficking, but not for a child. The result is similar to the effect reached with statutory rape laws: because force, fraud or coercion need not be present, if a child engages in a commercial sex act at the behest of another, such a situation legally is considered trafficking.³³ Therefore, because child prostitution is defined as his or her engagement in a commercial sex act at the behest of another, all prostituted children could be considered victims of human trafficking under the TVPA.

Consider, for example, how this scenario plays out in actual circumstances. If the TVPA labels a “trafficker” as someone who causes a person less than eighteen years of age to engage in a commercial sex act, then the statute broadens the group of people considered traffickers. Generally, prosecutors consider pimps the individuals “causing” a child to engage in commercial sex acts. The TVPA defines “commercial sex act” as “any sex act on account of which anything of value is given to or received by any person.”³⁴ In some instances, prostituted children, and more often male than female ones, do not have pimps and instead, prostitute themselves directly to the consumer.³⁵ Where no pimp is involved, the “john”³⁶ is arguably the person who “causes” a child to engage in a commercial sex act when he

31. *See supra* note 8.

32. 18 U.S.C. § 1591(a) (2006).

33. *See, e.g.*, CAL. PENAL CODE § 261.5(a)–(d) (West 2009) (making it a crime for anyone to have intercourse with a person under the age of eighteen who is not that person's spouse). For a summary of statutory rape laws in other states, *see* SHARON G. ELSTEIN & NOY DAVIS, *SEXUAL RELATIONSHIPS BETWEEN ADULT MALES AND YOUNG TEEN GIRLS: EXPLORING THE LEGAL AND SOCIAL RESPONSES* 17–20 (1997).

34. Trafficking Victims Protection Reauthorization Act, 22 U.S.C.A. § 7102(3) (Supp. 2009).

35. *See infra* notes 110–12.

36. “John” is slang terminology for “client” or purchaser of a prostitute's sexual services. The term “john” or “buyer” refers to “any person paying money or other non-monetary items of value (e.g. food, shelter, transportation, etc.) for the performance of sex acts.” SHARED HOPE INTERNATIONAL, *Rapid Assessment Methodology & Field Interview Tool: Domestic Minor Sex Trafficking in the United States* 4 (2008).

buys sex from a child prostitute.³⁷ Under this rubric, any “john” who causes a child to engage in sex acts for money should also be considered a trafficker under the TVPA and prosecuted accordingly.

Opponents of this position make three arguments. First, they assert that a trafficker would need to be someone who exerts some form of control over a child and that in the absence of this element of control, the “john” cannot be the trafficker. Second, some suggest that an actual “trafficker” character need not exist in order to find trafficking present. For example, if there is a link between anti-trafficking legislation and laws that criminalize child sex tourism, then perhaps “buy” could equal “cause” when purchasing sex from a child. Third, some argue that because this commercial sex act does not lead to a financial benefit for the individual soliciting sex from a minor, then the “john” could not simultaneously be the trafficker.³⁸ Such a reading begs the question of what the word “cause” actually means. According to *Black’s Law Dictionary*, the verb “to cause” has the same legal and plain meaning definition: “to bring about or effect.”³⁹ On one hand, one could argue that a “john” does not “cause” a prostitute to engage in sex for money; rather, a prostitute makes a choice to be a prostitute, and the “john” is strictly a consumer, instead of a person exerting any influence over the prostitute’s decision to exchange their sexual acts for money. Such an argument improperly ignores the existence of “survival sex,” which occurs when youth view bartering for sex as a necessity for continued existence.⁴⁰

Survival sex is frighteningly common. According to a three-year study, 8 percent of the 600 homeless minors interviewed had bartered sex in some form or another, often in return for food, shelter, clothing, and other amenities necessary to survive on American streets.⁴¹ From one perspective, “johns”—as the individuals who solicit sexual services from these youth—are capitalizing on the abject need of these minors, and their actions are equally exploitative as that of the pimps who prostitute children. On the other hand, one could argue that minors are prostituting themselves and,

37. Under the Model DOJ Statute, johns who buy sexual services from minors would be guilty of trafficking since they are securing the sexual services of a child in exchange for something of value. See U.S. DEPARTMENT OF JUSTICE, MODEL STATE ANTI-TRAFFICKING CRIMINAL STATUTE, http://www.usdoj.gov/crt/crim/model_state_law.pdf (last visited June 8, 2008).

38. “[T]he definition of ‘trafficker’ . . . can be a pimp, a boyfriend, father, mother, brother, uncle, coach, teacher, or anyone exerting physical or psychological control over a minor, even a peer.” SHARED HOPE INTERNATIONAL, *supra* note 36, at 3.

39. BLACK’S LAW DICTIONARY 235 (8th ed. 2004).

40. Jody M. Greene et al., *Prevalence and Correlates of Survival Sex Among Runaway and Homeless Youth*, 89(9) AM. J. PUB. HEALTH 1406, 1406 (1999).

41. See, e.g., Brahmani Houston, *Survival Sex: Why Many Homeless Youth Barter Sex for Necessities*, PORTLAND MERCURY, Dec. 7, 2000, <http://www.portlandmercury.com/portland/Content?oid=23504&category=22101>; see generally Press Release, Univ. of Pa. News Bureau, Commercial Child Sexual Exploitation: “The Most Hidden Form of Child Abuse,” Says Penn Professor (Sept. 10, 2001), available at http://www.sp2.upenn.edu/~restes/CSEC_Files/CSE_Final_Press_Release_010910.pdf.

through this “choice,” they must understand the consequences of their actions. Adults who began prostitution as minors, however, sometimes feel that they lacked the maturity to realize the magnitude of the harm they were causing themselves at the time.⁴² Therefore, even if it appears that commercial sexual self-exploitation is a choice, a child’s young age negates the ability to make that “choice” a free and educated one.⁴³ This reasoning possibly inspired the differentiation between commercially sexually exploited adults and children in the TVPA.

Two additional arguments exist to consider the “johns” who solicit prostituted children unrepresented by pimps as traffickers. Because the TVPA contains the presumption that consent to prostitution is impossible for a trafficked child, then all prostitution of children is essentially “caused” by an individual’s attempt to buy sexual services from these vulnerable minors. This TVPA provision is similar to many state laws that govern statutory rape, where engaging in sexual intercourse with a minor below a certain age is presumed to be rape, whether or not that minor insists that she either consented and/or encouraged the sexual encounter with an adult.⁴⁴ Second, the economic argument in support of considering “johns” as traffickers is that the supply would dry up without the demand; therefore, the prostituted child could not continue to put her or himself into the stream of commercial sex if the “john” did not “cause” this child’s business to exist and persist.⁴⁵

The TVPA also fails to address the question of the age of the trafficker. If a trafficker could be a minor, then a minor who seeks to pay another minor for sex would also be subject to criminal sanction under the TVPA. Here is another nexus, however, where the federal law on trafficking conflicts with the state criminal laws concerning prostitution. Although minors who prostitute themselves receive criminal punishment under some state laws, the federal law frequently diverts minors who purchase sex acts from either prostituted minors or adults instead to rehabilitative programs.⁴⁶ The federal and state laws therefore conflict on this question. Should the law consider a minor who buys sex from another minor a trafficker or a “john” soliciting an illegal service? Does that minor merit punishment or

42. See generally Susan S. Kreston, *Prostituted Children: Not an Innocent Image*, 34 PROSECUTOR 37–38 (2000) (noting that 80% of U.S. prostitutes began prostituting themselves as children).

43. See Pantea Javidan, Comment, *Invisible Targets: Juvenile Prostitution, Crackdown Legislation, and the Example of California*, 9 CARDOZO WOMEN’S L.J. 237, 251 (2003) (noting the lack of “choice” and inability to consent amongst child prostitutes and arguing that “the law should instead assume that a child’s entry into prostitution is non-consensual and indicative that better means are unavailable or inaccessible to her.”).

44. See *supra* note 33.

45. See BRIDGET ANDERSON & JULIA O’CONNELL DAVIDSON, *TRAFFICKING – A DEMAND LED PROBLEM?* 25–26, 29–30 (2002), available at <http://www.gaatw.net/publications/The%20Demand%20Side%20part1.pdf>.

46. Interview with anonymous public defender, in Miami, Fla. (Aug. 26, 2008).

need rehabilitative services to lead a lawful adult life? Once again, the categorization of victim or offender depends on whether a particular jurisdiction views minors who commit crimes as victims in need of rehabilitation, as criminals in need of punishment, or as some hybrid of the two depending on the crime in question. Federal and state laws differ in their approaches to these questions.

At both the federal and state level, law enforcement has exhibited confusion about the proper steps to follow when it discovers situations of child prostitution. Indeed, all too frequently “street-level law enforcement personnel do not understand” the likelihood that a prostitute could be a trafficking victim.⁴⁷ In some jurisdictions, federal law enforcement places children in immigration detention until they can better assess how to proceed with their cases; in other instances, they send prostituted children directly to rehabilitative care. In still other cases, federal agents have held prostituted children as material witnesses in their cases, which some advocates argue is basically akin to arrest and violative of the TVPA because children are not required to cooperate with law enforcement to receive a T visa.⁴⁸ Despite confusion on the ground with respect to any distinction between trafficked and prostituted children, the language of the TVPA is clear on child sex trafficking. Without explicitly saying so, under the TVPA, every prostituted child is, in fact, a victim of trafficking.

2. State Law

The DOJ recognized that states play an important role in identifying child victims of trafficking and prosecuting their traffickers. To increase uniformity across state lines and to minimize confusion regarding prosecutions and awarding benefits to victims, the DOJ created the Model Anti-Trafficking Criminal Statute (DOJ Model Statute), which the Senate endorsed for adoption in 2004.⁴⁹ The DOJ Model Statute describes three felony-level trafficking crimes, including the sexual servitude of a minor. Under this statute, any child under eighteen years of age who has been commercially sexually exploited—whether or not he or she had a pimp—would be considered a victim of human trafficking.⁵⁰ The DOJ Model Statute was an important first step, but certain gaps and inconsistencies re-

47. E. Benjamin Skinner, *People for Sale: Why There Are More Slaves Than at Any Time in History and What Can Be Done About It*, UTNE READER, July–Aug. 2008, available at <http://www.utne.com/2008-07-01/Politics/People-for-Sale.aspx>.

48. U.S. DEP’T OF LABOR, TRAFFICKING IN PERSONS: A GUIDE FOR NON-GOVERNMENTAL ORGANIZATIONS (2002), <http://www.dol.gov/wb/media/reports/trafficking.htm>.

49. UNITED STATES DEPARTMENT OF JUSTICE, MODEL ANTI-TRAFFICKING CRIMINAL STATUTE, http://www.usdoj.gov/crt/crim/model_state_law.pdf (last visited Jan. 25, 2009); S. Res. 414, 108th Cong., 2d Sess. (2004).

50. *Id.* at 2–3.

main.⁵¹ To address the gaps that exist in the DOJ Model Statute, the Freedom Network drafted the State Model Law on Protection for Victims of Human Trafficking.⁵² Significantly, this proposed law extended the DOJ Model Statute by defining a minor as a “person under the age of 18 years.”⁵³ In addition, the Freedom Network’s Model Law provides immunity from prosecution for “unlawful acts committed as a direct result of, or incident or related to, being trafficked,”⁵⁴ effectively preventing the punishments or penalties that often occur in conjunction with trafficking.⁵⁵

States have adopted a variety of approaches in response to the crime of child trafficking. Florida is one of about thirty states that has enacted anti-trafficking legislation that either criminalizes the trafficking of children into the commercial sex industry or seeks to provide services to this vulnerable group of commercially sexually exploited minors. The state of Indiana makes it a Class A felony for a parent, guardian, or custodian of a child⁵⁶ to knowingly or intentionally sell or transfer custody of a child for prostitution: Indiana calls this act the “sexual trafficking of a minor.”⁵⁷ The state of Oklahoma also treats the trafficking of children as a felony.⁵⁸ Virginia has declared it a legislative mandate to “provide services to victims, children and runaways.”⁵⁹ Illinois’ anti-trafficking statute follows the DOJ Model Statute and punishes anyone involved in the prostitution of a child, including a “john.”⁶⁰

Many states have enacted anti-human trafficking legislation.⁶¹ In many ways, these state statutes mirror the TVPA; however, some important differences persist. For one, federal law treats sex trafficking of a minor like statutory rape.⁶² In contrast, some state laws still require minors to prove that at least one of the elements of force, fraud or coercion was present to

51. See GLOBAL RIGHTS & FREEDOM NETWORK, STATE MODEL LAW ON PROTECTION FOR VICTIMS OF HUMAN TRAFFICKING 1 (2005), available at <http://www.urbanjustice.org/pdf/publications/FNStateModelLaw.pdf>.

52. *Id.*; Freedom Network USA, <http://www.freedomnetworkusa.org> (last visited Apr. 15, 2009).

53. GLOBAL RIGHTS & FREEDOM NETWORK, *supra* note 51, at 3; Freedom Network USA, *supra* note 52.

54. GLOBAL RIGHTS & FREEDOM NETWORK, *supra* note 51, at 6; Freedom Network USA, *supra* note 52.

55. See *infra* Section III.A.

56. Defined as a person less than eighteen years of age.

57. IND. CODE § 35-42-3.5-1(b) (2008).

58. OKLA. STAT. ANN. tit. 21, § 867A (2008).

59. VA. CODE ANN. § 30-290(7) (2008).

60. 720 ILL. COMP. STAT. 5/10-5 (2008).

61. For example: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia and Washington.

62. See Trafficking Victims Protection Reauthorization Act, 22 U.S.C.A. §§ 7101–7112 (Supp. 2009).

induce commercial sex. For example, New York's Anti-Human Trafficking Statute requires that minors establish some form of coercion, and children prostituting without pimps are unlikely to be considered victims of trafficking under that statute.⁶³ Given the young age and concomitant vulnerability of children, the TVPA, in contrast to its state counterparts, presumes coercion, since children are theoretically easier to coerce into commercial sexual activity than their more seasoned adult counterparts.

B. Prostitution

Child prostitution occurs when a minor performs sexual intercourse in exchange for money.⁶⁴ In the United States, no federal law exists regarding prostitution. Almost every state, however, has laws that prohibit and criminalize prostitution.⁶⁵ Only one state, Michigan, differentiates between adult and child prostitution by limiting the criminal liability of a minor who engages in commercial sexual activity.⁶⁶ The rest of the states make no differentiation based on the age of the prostitute.

States do, however, establish different ages at which minors can legally consent to sex, either with another minor or with an adult. An American Bar Association (ABA) survey of state legislatures found that, among other reasons, states provide an age of consent "to protect minors from sexual intercourse" and "to protect minors below a certain age from predatory, exploitative sexual relationships."⁶⁷ The minimum age of consent to a sexual relationship with an adult varies greatly by state. In some regions, the age of consent is as young as twelve years old⁶⁸ and as high as eighteen in others. For example, the statutory rape law in Alabama criminalizes sex between a child of twelve or under and an individual sixteen or older.⁶⁹ In almost every jurisdiction that punishes differently based on age, such distinctions appear to be based on the relative age of the plaintiff to the prospective defendant. For example, Mississippi assigns a greater penalty to

63. N.Y. PENAL LAW § 230.34 (2008).

64. See *Cleveland v. United States*, 329 U.S. 14, 17 (1946); *Depasquale v. Gonzales*, 196 F. App'x 580, 582 (9th Cir. 2006) ("The federal definition of prostitution is 'engaging in promiscuous sexual intercourse for hire.'" (citing 22 C.F.R. § 40.24(b)); see also MODEL PENAL CODE § 251.2.

65. Note that prostitution is legal in Nevada, but only if it occurs within a licensed house of prostitution. Otherwise, prostitution is a misdemeanor. NEV. REV. STAT. § 201.345 (2007).

66. Michigan's statute on prostitution states that if an individual aged sixteen or older "accosts, solicits or invites another person . . . to commit prostitution" then they are guilty of a crime. MICH. COMP. LAWS § 750.448 (2007).

67. OFFICE FOR VICTIMS OF CRIME, STATE LEGISLATORS' HANDBOOK FOR STATUTORY RAPE ISSUES 6 (2000), available at <http://www.ojp.usdoj.gov/ovc/publications/infores/statutoryrape/handbook/statrape.pdf>.

68. See KY. REV. STAT. ANN. § 510.040(1)(b)(2), which states that a person is guilty of first degree rape if he engages in sexual intercourse with another person under the age of 12 years old because of that person's incapacity to consent.

69. See ALA. CODE § 13A-6-61 (2008), which defines rape in the first degree.

the offense if the separation in age between an offender—who is at least seventeen years old—and victim is greater than thirty-six months.⁷⁰

While many states do not have a statutory rape statute *per se*, every state has a minimum age before which engaging in sex with a minor constitutes either rape or sexual assault. These laws make it a criminal offense for a minor to engage in sexual intercourse with a non-minor and assume that a minor under a certain age could never consent to sex.⁷¹ None of these statutes address the potentially commercial aspects of this sex. It is logically inconsistent that minors of a certain age are incapable of consenting to sex, but that they simultaneously can be punished for prostitution.⁷² The only difference between the two scenarios is that when money exchanges hands, these same children turn from victim to juvenile offender.⁷³

Several states have amended their criminal statutes to increase penalties meted out to those individuals who seek to commercially sexually exploit minors or who force them to engage in prostitution. Florida is one of several states that make it a worse offense to prostitute children rather than adults. For example, Florida makes it a second-degree felony to “recruit, entice, harbor, transport, provide or obtain a person knowing that force, fraud or coercion will be used to cause that person to engage in prostitution.”⁷⁴ The state elevates this offense to a first-degree felony if the prostituted person is under fourteen years old.⁷⁵ In addition, Florida makes it a third-degree felony to either procure for prostitution or cause to be prostituted a person under eighteen; the same offense merits a first-degree felony if the person prostituting the child had custody or control over the child in question.⁷⁶

Despite the lack of statutory differentiation between adult and minor prostitutes, one distinction is the nomenclature imposed by the juvenile justice system; whereas the system categorizes adult prostitutes as criminals, it considers child prostitutes delinquents and processes their cases in juvenile

70. MISS. CODE ANN. § 97-3-65: (1)(a)(ii) (2008).

71. See *supra* notes 33, 46.

72. The law exhibits confusion as to whether prostituted children are victims or offenders. Compare Pantea Javidan, Comment, *Invisible Targets: Juvenile Prostitution, Crackdown Legislation, and the Example of California*, 9 CARDOZO WOMEN'S L.J. 237, 238–39 (2003) (“[C]hild prostitutes. . . [a]re arrested, prosecuted, and incarcerated under laws such as California Penal Code section 647 for disorderly conduct, and viewed as wrongdoers from whom the public needs protection The laws against solicitation and prostitution punish individuals who need legal protection the most.”), with *People v. Yang*, 2003 WL 22793095, at 20 (Cal. App. 5 Dist. 2003) (“[W]e believe as a matter of public policy that child prostitutes are victims of conspiracies to procure/pimp/pander them and are not coconspirators or accomplices.”).

73. Bob Herbert, *The Wrong Target*, N.Y. TIMES, Feb. 19, 2008, at A25 (“If no money is involved, the youngster is considered a victim. But if the man pays for the sex—even if the money is going to the pimp, which is so often the case—the child is considered a prostitute and thus subject in many venues to arrest and incarceration.”).

74. FLA. STAT. § 796.045 (2007).

75. *Id.*

76. FLA. STAT. § 796.035 (2007).

court.⁷⁷ Whether a delinquent child receives rehabilitative treatment or punishment depends on the state.⁷⁸ Some states have progressed toward recognizing juvenile prostitutes as victims rather than offenders and are assisting these minors.⁷⁹ Therapeutic programs aside, as the law currently stands, almost every state in this country makes no distinction between juvenile and adult prostitutes. Legal scholar Mary Graw Leary suggests that modern criminal justice systems have recognized the dichotomy of viewing a prostituted child as both victim and offender and have moved beyond treating prostituted children as offenders.⁸⁰ Leary asserts that although prostitution remains an illegal act, many jurisdictions recognize that prostituted juveniles are really the victims of commercial sexual exploitation.⁸¹ While Leary may be correct about some jurisdictions, many others still actively arrest and detain young people for the crime of prostitution.⁸²

The differentiations that do exist between the punishment of minors and adults for ostensibly the same crime are those that arise from divergences between the adult penal and juvenile justice systems. Before the creation of a separate court system, juveniles were tried as adults.⁸³ Later, in the early twentieth century, child welfare advocates convinced state legislatures that a child's potential for reform and rehabilitation should militate against severe punishment.⁸⁴ The criminal justice system in place for adults has punishment, incapacitation, deterrence, rehabilitation and retribution as

77. See Howard T. Matthews, Jr., *Status Offenders: Our Children's Constitutional Rights Versus What's Right for Them*, 27 S.U. L. REV. 201, 202 (2000) (highlighting that a delinquency adjudication indicates that the child has committed an act that would be considered criminal if done by an adult).

78. For a comparative analysis of how Las Vegas, Boston and San Francisco address high incidences of commercially sexually exploited minors in their cities, see THE BARTON CHILD LAW AND POLICY CLINIC, COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN GEORGIA: SERVICE DELIVERY AND LEGISLATIVE RECOMMENDATIONS FOR STATE AND LOCAL POLICY MAKERS, 1, 35-60 (Jan. 2008), available at <http://childwelfare.net/activities/legislative2008/CSEC20080131.pdf>.

79. For example, the District Attorney's Office in Brooklyn has developed a comprehensive program called GRASP (Girls Re-entry Assistance Support Project), which is "a Faith Based Re-entry Initiative for female youth." Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL'Y & L. 131 n. 135 (2007). "Under GRASP, 13 to 18 year old girls who have been convicted of crimes and are '[c]urrently housed in various detention, placement, or correctional facilities' are given services to assist them in their transition back into the community." *Id.*

80. *Id.* at n. 29.

81. *Id.*

82. For example, Atlanta, Georgia, Las Vegas, Nevada, San Francisco, California, see *supra* note 78, at 15, 35, 47.

83. Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 143, 145 (2003).

84. See Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909), and Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 141 (1997).

some of its main objectives.⁸⁵ In contrast, the juvenile court system today places a greater emphasis on rehabilitation of offenders in an effort to provide treatment to delinquent children and to reintegrate them into society as productive citizens.⁸⁶ In response to child advocates' beliefs that the criminal behavior of children results from factors like poverty, parental neglect, and abuse, states created a juvenile court system that reflected the "best interest of the child" standard.⁸⁷ This standard advocates for an individualized view of justice that seeks a rehabilitative approach as the most likely to lead to the best outcome for a child.⁸⁸

Theories of rehabilitation imply that an offender needs to understand the nature of the wrong committed, internalize the gravity of the crime, and make a change in behavior and/or attitude in order to not repeat the offense.⁸⁹ If we view prostituted children as offenders rather than victims, then we must presume that they had agency when committing their crime and can learn from their mistakes to avoid repetition. Otherwise, our system of justice unfairly punishes the victim.

Over the years, the juvenile justice system has fluctuated in response to societal attitudes toward the alternating culpabilities and capabilities of minors.⁹⁰ In the last two decades, some states have changed their laws to allow for adult sentences for juvenile offenders.⁹¹ Advocates for commercially sexually exploited children have expressed dismay that this population of children is treated more like criminals and frequently subjected to punishment, incarceration, and detention. Indeed, an attorney with the Legal Aid Society in New York expressed frustration that sexually exploited youth are one of the few categories in the law "where we see if there's not a 100% detention rate, very, very close to a 100% detention rate."⁹²

85. See SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 101 (7th ed. 2001).

86. See, e.g., David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 *TEX. L. REV.* 1555, 1559–61 (2004); Barry C. Feld, *The Transformation of the Juvenile Court*, 75 *MINN. L. REV.* 691, 695–96 (1991).

87. See Candace Zierdt, *The Little Engine that Arrived at the Wrong Station: How to Get Juvenile Justice Back on the Right Track*, 33 *U.S.F. L. REV.* 401, 405 (1999).

88. Taylor-Thompson, *supra* note 83, at 147.

89. Leigh Goodmark, *The Punishment of Dixie Shanahan: Is There Justice for Battered Women Who Kill?*, 55 *U. KAN. L. REV.* 269, 294–95 (2007).

90. See SAMUEL M. DAVIS, *RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM* 1–8 (Thomson West 2005) (1974).

91. See, e.g., Gail B. Goodman, *Arrested Development: An Alternative to Juveniles Serving Life Without Parole in Colorado*, 78 *U. COLO. L. REV.* 1059, 1062 (2007) (stating that the current changes in the juvenile justice system run counter to its original rehabilitative aims); Thomas Grisso, *Society's Retributive Response to Juvenile Justice: A Developmental Perspective*, 20 *LAW & HUM. BEHAV.* 229 (1996) (examining a trend of punitive sentences in juvenile court).

92. END CHILD PROSTITUTION CHILD PORNOGRAPHY AND TRAFFICKING OF CHILDREN FOR SEXUAL PURPOSES, ALTERNATIVE REPORT TO THE INITIAL REPORT OF THE UNITED STATES OF AMERICA TO THE UN COMMITTEE ON THE RIGHTS OF THE CHILD CONCERNING THE OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY 17 (2007), <http://www.ecpatusa.org/pdfs/AlternativeRe->

In contrast, some jurisdictions have made concerted moves toward increased rehabilitative services for juvenile offenders.⁹³ Many states have turned to Missouri as an exemplary model of rehabilitative care for juvenile offenders, noting a marked decrease in recidivism amongst its juvenile offender population.⁹⁴ Missouri recognizes that punishing prostituted children ignores the root causes of the juvenile prostitution problem.⁹⁵ Indeed, many of these commercially sexually exploited children have often run away from home to escape physical and often sexual abuse only to be exploited in the commercial sex industry by pimps and traffickers who often use violence to extract obedience.⁹⁶ Reports filed with the National Child Abuse and Neglect Data System indicate that 105,000 new cases of child sexual abuse occur each year in the United States.⁹⁷ In addition, there appears to be a strong correlation between sexual abuse in the home and commercial sexual activity on the outside. A recent study found that up to 40 percent of girls and 30 percent of boys who are victims of commercial sexual exploitation have also been victims of physical or sexual abuse at home.⁹⁸ Even more striking are the estimates of the prevalence of incest among prostitutes, which range from 65 percent to 90 percent.⁹⁹ These statistics indicate that a large percentage of children in the commercial sex industry entered from abusive homes, and that their needs will not be met until our system of justice takes this prior abuse into account.

II. Prostituted Children are Victims of Human Trafficking

Since the advent of the TVPA in 2000,¹⁰⁰ the Bush administration has actively searched for trafficked persons to testify against their traffickers

portUSAFinal2007.pdf (citing REPORT OF THE NEW YORK CITY COUNCIL GOVERNMENTAL AFFAIRS & HUMAN SERVICES DIVISIONS (June 11, 2007)).

93. Pamela Trudo, *A Career Defending Children: Ned Chester of Portland Talks About Brain Research and Juvenile Law*, 22 ME. B.J. 178 (2007). Ned Chester, a juvenile law attorney, elaborated, "There is no formal isolation unit at the youth center any more. That's a big step. The use of restraints and isolation is way down. The probation officers are diverting a lot more kids than they used to . . . They're looking for ways to maintain kids in the community, looking to alternative sanctions as opposed to locking them up." *Id.* at 189.

94. Anna L. Benvenue, *Turning Troubled Teens into Career Criminals: Can California Reform the System to Rehabilitate Its Youth Offenders?*, 38 GOLDEN GATE U. L. REV. 33, 51 (2007).

95. *Id.*; see also Lamb, *supra* note 2, at 82, citing Jane Hanson, *Runaway Girls Lured into the Sex Trade Are Being Jailed for Crimes While Their Adult Pimps Go Free*, THE ATL. J. & CONST., Jan. 7, 2001, at A1.

96. Numerous studies have shown a link between child exploitation and emotional, physical, and/or sexual abuse by family members. Nicole Ives, Univ. of Penn. Sch. of Social Work, Background Paper for the North American Regional Consultation on the Commercial Sexual Exploitation of Children (Dec. 2001), http://www.sp2.upenn.edu/~restes/CSEC_Files/North_American_Regional_Report_2001.htm.

97. *Id.*

98. *Id.*

99. *Id.*

100. Trafficking Victims Protection Act, 22 U.S.C. §§ 7101–7112 (2000).

and to receive trafficking-related benefits.¹⁰¹ Traffickers prey on the most vulnerable people and employ all kinds of tactics to keep victims scared, dependent, and motivated not to report their traffickers. Pimps employ the same kinds of methods to ensnare and prostitute minors and to keep them under their control. Because commercially sexually exploited minors and other trafficking victims do not self-identify, law enforcement and victim advocates need to actively search for them. This desire to find victims has impelled the Bush administration to create more than forty-two DOJ task forces and spend more than \$150 million to identify and assist human trafficking victims in the U.S.¹⁰²

A. *Regardless of their Country of Origin*

Under the TVPA, U.S. born prostituted children are also technically victims of trafficking and correspondingly eligible for the benefits that flow from this status.¹⁰³ It appears a positive development that funding for anti-trafficking initiatives is increasingly directed toward “domestic” victims of trafficking, which covers U.S. born prostituted children. However, whether this new, more focused categorization amounts to a distinction without a difference remains to be seen.

U.S. citizen prostituted children, like their foreign-born trafficked counterparts, tend to be young people who have run away from any number of difficult circumstances, but who have often had an upbringing that involved some form of sexual and/or physical abuse as well as severe poverty.¹⁰⁴ This vulnerable group is surprisingly large.¹⁰⁵ The majority of these teens tend to be runaways from abusive homes who turn to the sex trade as a means of support.¹⁰⁶ Because the abuse that they endured often sparked them to leave home and prostitute themselves for survival, prostituted children are unlikely to choose returning home as an option for permanency. Instead, these individuals need a safe space—one that is neither in jail, nor

101. The government has had difficulty finding the victims. See Jerry Markon, *Human Trafficking Evokes Outrage, Little Evidence*, WASH. POST, Sept. 23, 2007, at A01, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/09/22/AR2007092201401_pf.html.

102. *Id.*

103. See Final Report and Recommendations, *supra* note 23.

104. See Lamb, *supra* note 2, at 82–83, for the proposition that prostituted children often grow up being physically or sexually abused.

105. Researchers at the University of Pennsylvania conducted a three-year study of children under 18 living in the U.S. and found that “roughly 400,000 children, or one in 100, are victims of commercial sexual exploitation.” Jessica Reaves, *Children and Commercial Sex: A Terrible Trend*, TIME, Sept. 10, 2001, available at <http://www.time.com/time/nation/article/0,8599,174482,00.html>.

106. *Safe Harbor Act Would Help Girls Escape Exploitation*, ASSOCIATED PRESS, Mar. 5, 2007, <http://www.wcbs880.com/pages/286208.php?contentType=4&contentId=361254>; see also ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW 1031 (3d ed. 1995) (stating that as many as two-thirds of child prostitutes are runaways fleeing physical or sexual abuse at home).

in their former homes—to regain their sense of purpose and retool for their next phase of life, which might involve school, mental and physical health care treatment,¹⁰⁷ or workforce preparation. The substantial funds allocated toward victims of trafficking¹⁰⁸ can properly be directed toward this population of prostituted children—characterized as victims of trafficking under the TVPA—in order to facilitate their readjustment and reintegration to society.

Some funds earmarked for anti-trafficking initiatives are now specifically directed toward U.S. born victims of human trafficking, whom the DOJ labels as “domestic” instead of “international” victims.¹⁰⁹ Trafficking was initially thought of as something that happened off of U.S. soil, or at least as a foreign problem imported into this country.¹¹⁰ The legislative debates surrounding anti-trafficking legislation recognized this needed paradigm shift in how lawmakers and society view trafficked children in the U.S.:

Despite the willingness of most governments today to address international trafficking, few have recognized the existence of INTERNAL trafficking within their own borders. By addressing internal trafficking in a bill that also addresses international trafficking, the U.S. again will lead by example in showing that *internal* trafficking victims must not be dismissed by the law enforcement community as prostitutes or as juvenile delinquents.¹¹¹

The proposed reauthorizations of the TVPA¹¹² would extend to accomplish this very point: that prostituted individuals will be viewed as trafficking victims, regardless of their countries of origin. This new attempted reauthorization reaches too far, however, and sacrifices more important concerns in its overinclusion.¹¹³ Some of this overreaching stems from an ideological rift amongst the anti-human trafficking community. This debate

107. See Christina Roache, *Trafficked*, HARV. PUB. HEALTH REV., Fall 2007, <http://www.hsph.harvard.edu/review/fall07/fall07trafficked.html> (stating that trafficked young women are both victims and then transmitters of HIV/AIDS) (last visited Jan. 19, 2009).

108. Letter from Condoleezza Rice, U.S. Sec’y of State, accompanying 2005 State Department Report (June 3, 2005), available at <http://www.state.gov/g/tip/rls/tiprpt/2005/46605.htm>. The amended letter revised the aid figure down from \$96 million to \$82 million.

109. DOJ has expressed this need to address “domestic” or “internal” or “interstate” trafficking. See U.S. Department of Justice, Child Exploitation and Obscenity Section, Child Prostitution, <http://www.usdoj.gov/criminal/ceos/prostitution.html> (last visited Feb. 29, 2009).

110. See Chacón, *supra* note 10, at 2991.

111. *Combating Human Trafficking: Achieving Zero Tolerance: Hearing Before the Subcomm. on Africa, Global Human Rights and International Operations of the H. Comm. on International Relations*, 109th Cong. 4 (2005) [hereinafter *Combating Human Trafficking*] (statement of Rep. Smith, Chairman of Subcomm., at 4) (emphasis added).

112. Trafficking Victims Protection Reauthorization Act of 2007, H.R. 3887, 110th Cong. (2007).

113. See Letter from the American Civil Liberties Union, et al. to Joseph Biden, U.S. Senator, et al. (Jan. 23, 2008).

as to whether all—or only some—prostitution is trafficking has enormous practical consequences outside the ivory tower.¹¹⁴ In terms of trafficked children, however, the TVPA has already carved out an exception for commercially sexually exploited minors, and this article suggests that state legislatures enact similar legislation and apportion services to respond to this vulnerable population that federal law has already marked for special treatment.

Missing in the latest reauthorization of the anti-trafficking legislation is some additional differentiation for states between the punishment meted out to adult and child prostitutes. As noted by Nesheba Kittling:

The laws surrounding this issue reflect the country's internal strife, as the United States takes two very distinct positions with respect to juvenile prostitution. On the one hand, the country has taken a strong stance against those who traffic juveniles across international borders. On the other hand, the Government criminalizes domestic juvenile prostitutes.¹¹⁵

Kittling's argument cuts to the core of this article: if trafficked and prostituted children are the same population, why do they receive different treatment under the law? Kittling suggests that this disconnect results because of the artificial international versus domestic divide.¹¹⁶ In reading the debates surrounding the enactment of the TVPA, for the most part, it appears as if at least some of the legislators did not consider U.S. born children as victims of commercial sexual exploitation when they spoke of this problem of child trafficking.¹¹⁷ Still, it would be a wasted opportunity not to expand protections and care to prostituted children in the U.S. in light of new laws on trafficking. Perhaps states, as the laboratories of democracy, must first enact anti-trafficking legislation that specifically addresses the needs of prostituted children and identifies them as the same population of trafficked minors.

Officials in the federal government now focus their efforts on assisting “domestic” victims of trafficking as opposed to “international” ones. Still, the day-to-day message about trafficking differs from the reality on the ground. Popular media and literature more often display human trafficking as being about sex, rather than labor, and involving poor, dark-skinned women being trafficked to carry out sex acts under severe duress with wealthy

114. When a shelter asserts that all prostitution is trafficking and consequently forces trafficked persons to attend group therapy (which trafficked persons tend to shy away from) with prostitutes, the shelter mimics the behavior of the traffickers by removing the trafficked person's free agency, much to their detriment.

115. Nesheba Kittling, *God Bless the Child: The United States' Response to Domestic Juvenile Prostitution*, 6 NEV. L.J. 913 (2006).

116. *See id.* at 918.

117. *See, e.g., Combating Human Trafficking, supra* note 111, at 3.

light-skinned men.¹¹⁸ While that particular scenario does occur, the reality of the spectrum of victims and traffickers, their origins and actions, is entirely more complex and varied.

One of the ways in which the actual population of trafficked persons differs from the previously held images is the existence of trafficked U.S. citizens. Along that vein, the latest direction from Washington is to focus increased amounts of time and money on what are termed “domestic” victims of trafficking.¹¹⁹ Certainly, the illegal sex market in the U.S. exploits individuals in vulnerable positions, both foreign nationals and American citizens. Still, how does one define a “domestic” victim of trafficking? What motivates this policy change? Perhaps, this directive emerges from the realization that the domestic and foreign-born population of commercially sexually exploited youth in the U.S. is legally indistinguishable under the TVPA.

An HHS US Domestic Trafficking in Persons Notification Pilot Program (Pilot Program) information sheet describes a new initiative that will focus on “domestic” victims of trafficking. As described in corresponding Pilot Program information sheets, the service providers have sole responsibility for determining what HHS calls a “client’s victim status.”¹²⁰ Such a moniker is a misnomer in that it fails to call the person’s status as a victim into question. The “victim status” actually refers to the victim’s *immigration* status—whether the victim is foreign born and not in the U.S. lawfully or is U.S. born or in lawful immigration status.¹²¹ The Pilot Program brings to the fore the increased focus on finding and caring for citizen victims of trafficking who reside lawfully in the U.S. and documenting what percentage of the overall trafficking victims served are in legal immigration status.

Such documentation in and of itself is a neutral endeavor. The language employed to explain the differences between this U.S. citizen-focused initiative and previous anti-trafficking programs funded with federal dollars, however, makes this new effort appear as if inspired by anti-immigrant intentions. The document refers to the trafficking of U.S. citizens or lawful permanent residents as “domestic” trafficking whereas it calls trafficking of non-citizens, or the foreign born, “international” trafficking.¹²² Such nomenclature is misleading, given that all of the aforementioned trafficking is “domestic” since it occurs within U.S. borders. This “domestic” versus “international” discourse creates an unnecessary division amongst trafficked persons, does not help to better identify and care for victims, and

118. See Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 162–66 (2007).

119. See U.S. Domestic Trafficking in Persons Notification Pilot Program, Sept. 2007.

120. *Id.*

121. *Id.*

122. *Id.*

was unanticipated when the TVPA was originally drafted and enacted in 2000.

Another example of a facially neutral policy that employs the “domestic” and “international” distinction to a potentially biased result is the “Summary of Services Available to Victims of Trafficking” chart prepared by the Senior Policy Operating Group (SPOG) on Domestic Trafficking.¹²³ This chart separates the different social service benefits that victims of trafficking are eligible for based on whether they are adults or children and whether they are U.S. citizens, Lawful Permanent Residents, or “international” victims.¹²⁴ The subtle, but noticeable, distinction on the chart is as follows: When the benefit is one that only applies to children, “N/A” (standing for “not applicable”) is placed in the boxes for any category that involves an adult.¹²⁵ When the category applies to lawful immigration status and only a refugee or “international” victim could receive the benefit, like Refugee Cash and Medical Assistance (RCMA), then the boxes for “domestic” victims have a “No” inside of them.¹²⁶ The chart uses the same “No” for “Services to Victims of Torture,” something that only those from another country are eligible for since the U.S. does not permit torture. If being an adult makes it “not applicable” to receive benefits marked for children, then a “domestic” victim with lawful immigration status is similarly “not applicable” to receive benefits carved out exclusively for refugees. The placement of “No” in the RCMA category instead of “not applicable” leads to the interpretation that individuals with lawful immigration status miss out on benefits given to “international” victims. The misuse of “No” where “N/A” should be used could be entirely accidental. Aside from this conflation of terms, the chart does a sufficient job of listing the multitude of services that both adult and child, legally and non-legally present victims of trafficking, are entitled to as a result of their status as victims. The chart’s misuse of the terms, however, offers at least one glimpse into the damaging effects of the misleading discourse that separates “domestic” from “international” victims.

Even though funding for anti-trafficking initiatives is now increasingly directed toward “domestic” victims of trafficking, it is unlikely that this new monetary reallocation was inspired by the fact that U.S. born prostituted minors are legally considered trafficking victims under the TVPA. As a result, unchanged state laws still consider prostituted minors as delinquent kids whose access to rehabilitative services depends on precarious funding

123. SENIOR POLICY OPERATING GROUP IN TRAFFICKING, SUBCOMMITTEE ON DOMESTIC TRAFFICKING, FINAL REPORT AND RECOMMENDATIONS, chart of Summary of Services Available to Victims of Trafficking (Aug. 2007), available at <http://www.acf.hhs.gov/trafficking/SPOGReport-Final9-5-07.pdf>.

124. *Id.*

125. *Id.*

126. *Id.*

streams. Consequently, prostituted children, regardless of their country of origin, also would benefit from therapeutic resources from both state and federal levels devoted to identifying their needs and resolving their plight.

B. Why Not Adults, Too? Debate: Consent v. Forced Prostitution

Sex trafficking involves more than just prostitution, and prostitution is not the only form of trafficking for sex. The law avoids such categorical imperatives and instead seeks to leave mitigating circumstances and similar nuances for adjudicators to decide. Given the way that advocates line up on both sides of the debate, prostitution is certainly not a one-sided issue. The collective loosely referred to as the “Christian Right” has in many instances aligned with “feminist abolitionists”¹²⁷ to argue that prostitution and trafficking are essentially indistinguishable.¹²⁸ Taking the opposite stance, Kathleen Kim and Grace Chang argue that this artificial linkage between prostitution and trafficking damages efforts to prevent trafficking and protect the rights of trafficked persons.¹²⁹ Indeed, journalist E. Benjamin Skinner has similarly argued that “Western policies based on the idea that all prostitutes are slaves and all slaves are prostitutes belittles the suffering of all victims.”¹³⁰ Kim and Chang also assert that the Bush administration’s focus on eliminating prostitution—as well as the de-funding of organizations that refuse to adopt a policy statement opposed to prostitution—as the cornerstone of its anti-trafficking agenda actually did great harm to anti-trafficking efforts.¹³¹ They argue convincingly that this almost exclusive attention to prostitution diverts attention from a needed assessment of the structural factors that facilitate trafficking such as poverty, discrimination, and civil and political unrest of certain developing regions.¹³²

As mentioned earlier, in terms of the adult context, this article by no means seeks to create further confusion by advocating for the conflation of trafficking and prostitution. In some circumstances, but certainly not all, prostitution can be trafficking when dealing with adults. To be trafficking under the TVPA, the prostitution must be a result of force, fraud or coer-

127. The term “feminist abolitionists” in this context refers to those individuals who believe that feminism proscribes any form of slave-like conditions and that prostitution represents such a condition or arrangement to which a woman would never fully consent.

128. Ronald Weitzer, *The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade*, *POLITICS & SOC’Y*, Sept. 2007, at 447, 449.

129. Grace Chang & Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)*, 3 *STAN. J. CIV. RTS. & CIV. LIBERTIES* 317, 321 (2007).

130. E. Benjamin Skinner, *A World Enslaved: There Are Now More Slaves on the Planet Than at Any Time in Human History. True Abolition Will Elude Us Until We Admit the Massive Scope of the Problem, Attack It in All Its Forms, and Empower Slaves to Help Free Themselves*, *FOREIGN POL’Y*, Mar.–Apr. 2008, at 62, 65, available at <http://www.utne.com/2008-07-01/Politics/People-for-Sale.aspx>.

131. See Chang & Kim, *supra* note 129, at 324.

132. See *id.* at 321.

cion.¹³³ The elements are disjunctive, and the presence of any one of the three is sufficient to categorize the crime as trafficking. Psychological coercion, often present in trafficking cases, suffices to constitute “coercive” enough conditions to be considered trafficking.¹³⁴ In sum, if an adult person engages in prostitution because someone fraudulently induced, forced, or coerced him or her to do so, then the TVPA considers that instance of prostitution trafficking.

On the other hand, if no element of force, fraud¹³⁵ or coercion exists in the prostitution, then an adult’s decision to prostitute is considered a voluntary one outside of the purview of the TVPA, in that the crime is not trafficking. The debate about whether prostitution is automatically trafficking turns on the questions of choice and consent. On one side, proponents who consider all prostitution as trafficking argue that a woman would never and could never consent to be a prostitute if she were not “forced” or impelled to by economic or other circumstances beyond her control.¹³⁶ Therefore, this kind of “force” could complete the necessary element to consider all prostitution to be trafficking.¹³⁷ In contrast, individuals who assert that only some, not all, prostitution amounts to trafficking counter that equating all prostitution with trafficking diminishes the gravity of trafficking as a human rights abuse by equating it with crimes that lack an international or interstate nature.¹³⁸

This article, however, concerns the question of prostituted children and child victims of trafficking, not trafficked persons over the age of eighteen. Trafficked children, by virtue of their age, are considered unable to consent to prostitution. Beverly Balos has taken issue with this age based distinction.¹³⁹ Balos believes that because many adult prostitutes actually enter the sex sector as children, their continued involvement in commercial sex tends

133. 22 U.S.C. § 7102(8)(A–B) (2000).

134. See Kathleen Kim, *Psychological Coercion in the Context of Modern-Day Forced Labor: Revisiting U.S. v. Kozminski and Understanding Human Trafficking*, 38 U. Tol. L. Rev. 941 (2007) (showing that the *Kozminski* case demonstrated how modern-day slavery could occur even without the use of physical force against a victim).

135. U.S. citizens, teenage runaways in particular, can prove as susceptible to fraudulent inducement as foreign-born immigrant victims. Virtually all human trafficking schemes are predicated upon some form of fraud.

136. See, e.g., Melissa Farley, *Prostitution, Trafficking and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly*, 18 YALE J.L. & FEMINISM 109 (2006).

137. The author is persuaded by the argument that “economically induced coercion” does not constitute forced prostitution. Instead, forced prostitution exists “whenever a person loses her freedom, and her body or its products belong to others.” See Tscahi Keren-Paz & Nomi Levenkron, *Clients’ Fault-Based Liability for Purchasing Sex from Forced Prostitutes*, Apr. 1, 2008, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1115331.

138. For a list of additional arguments, see Letter from Brian A. Benczkowski, Principal Deputy Assistant Attorney General, U.S. Dep’t of Justice, to Senator John Conyers, Jr., Chairman, Comm. on the Judiciary, U.S. House of Representatives (Nov. 9, 2007).

139. Beverly Balos, *The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation*, 27 HARV. WOMEN’S L.J. 137, 160 (2004).

to compound rather than minimize the trauma and problems they encountered as children.¹⁴⁰ Balos disagrees with any effort to make an arbitrary distinction between prostituted children and adults who were formerly prostituted children based on the differing concepts of an adult versus a child's ability to consent. She further argues that the International Labour Organization's findings that prostituted children continue on as prostitutes past the age of majority actually supports a conclusion that an adult no more "freely" chooses to engage in prostitution than does a prostituted child.¹⁴¹ Balos certainly presents a well-reasoned argument.

Nevertheless, Balos ignores the fact that not every adult prostitute engages in sex for money because of childhood abuse, nor does every adult prostitute start before the age of consent and continue afterward. More broadly, Balos and her supporters ignore the larger fact that the law privileges childhood.¹⁴² For example, the Universal Declaration of Human Rights specifically proclaimed that childhood is a status entitled to special care and assistance.¹⁴³ Correspondingly, "policy makers view children as a very special class of citizens, a group whose unique traits and circumstances warrant a different regulatory scheme from that which applies to adults."¹⁴⁴ In light of the law's special treatment of childhood and because Balos' broad generalizations make it harder for prostituted children who cannot legally consent to sex to be viewed as the victims of commercial sexual exploitation, her arguments must—for now—be acknowledged and placed aside. This article instead focuses on the nexus between federal trafficking law and needed reforms in state laws and provision of services to the overlapping population of exploited children.

III. *Proposed Legislative Changes to Law, Policies and Services*

Much like their federal counterparts, states also need a streamlined plan of action when encountering trafficking victims. To that end, several non-profit legal advocacy organizations in Florida have teamed up to create training materials to instruct Department of Children and Families (DCF) employees on how to best identify child victims of trafficking. A longtime official at DCF recently mentioned the need to communicate to hotline

140. *Id.* at 139.

141. *Id.*

142. See Franklin E. Zimring, *Juvenile Justice Standards Project. By the Institute of Judicial Administration and the American Bar Association*, 91 HARV. L. REV. 1934, 1936 (1978).

143. The International Bill of Rights is composed of the following instruments: The Universal Declaration of Human Rights, G.A. Res. 217A (III), GAOR, 3d Sess., U.N. Doc. A/810 at 71, Art. 25, Sec. 2 (1948).

144. Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 555 (2000).

workers that “All child prostitutes are not victims of trafficking.”¹⁴⁵ She stated that she might consider children as young as nine or ten years old as trafficking victims, but that young women who had reached sixteen years of age were prostitutes, not victims of trafficking.¹⁴⁶ Although some states distinguish between the pre-teen and later teen years to indicate differing abilities to consent to sexual acts, Florida does not differentiate between younger or older children to vitiate culpability. Instead, the state criminal law punishes adults and children similarly for prostitution.¹⁴⁷ This DCF official also stated the importance of distinguishing trafficking victims from voluntary prostitutes because the state has scarce resources and “prostitutes should not be taking up resources devoted to trafficking victims.”¹⁴⁸ This misconception is rampant and important to correct to ensure that the overlapping populations of trafficking victims and prostituted children receive appropriate care at both the state and federal levels.

This article argues against characterizing prostituted children as offenders because if the juvenile justice system did not perceive victimized children as criminals, then perhaps it would institute needed rehabilitative services. There is an alternative argument, however, that only when the juvenile justice system views prostituted children as delinquent will sufficient services flow to assist these children. In a case involving the prosecution of a child engaged in the promotion of explicit photographs of himself, the court found prosecution a positive step in that it “enables the state to prevent further illegal exploitation by supporting and providing any necessary counseling to the child” involved.¹⁴⁹ This perspective is potentially positive, especially if the legal system follows up with necessary rehabilitative services after a finding of delinquency. Problems would result, however, if services to the child failed to accompany prosecution in a cash-strapped state system like Florida.

Florida’s juvenile justice system currently diverts minors arrested for buying sex into rehabilitative programs, but labels children arrested for prostitution as delinquents.¹⁵⁰ Prostituted children then frequently spend time in jail-like conditions without the necessary services and treatment to prevent recidivism.¹⁵¹ If state laws treated child prostitution more like human trafficking, then the state social service network would play a differ-

145. The author uses the term “child prostitute” as opposed to “prostituted child” here to convey the language and tone expressed during the interview. Interview with anonymous official at Department of Children and Families (DCF) (Dec. 20, 2007).

146. *Id.*

147. *See, e.g.*, ALA. CODE § 13A-2-24 (2008); FLA. STAT. ANN. § 796.07 (2008).

148. *See infra* notes 151–52.

149. *A.H. v. State*, 949 So.2d 234, 236 (Fla. Dist. Ct. App. 2007) (prostitution is comparable to self-exploiting child pornography, especially if the commercial sex involved is survival sex and a pimp is not involved).

150. Interview with Miami Public Defender, Juvenile Division, Miami, Fla. (Oct. 7, 2007).

151. Interview with Sandy Skelaney, Program Coordinator of the Commercially Sexually Exploited Children’s Project, Kristi House, in Miami, Fla. (Dec. 21, 2007).

ent and important role in the provision of services to this vulnerable population.

In 2007, the Florida legislature gave DCF the task of providing services to child victims of human trafficking.¹⁵² Essentially, the expertise that DCF possesses in caring for children mark it as the agency most able to provide services to child victims of trafficking during the interim period before victims become eligible for HHS benefits. There is an immense need for victim care pre-certification; this period of time presents one of the most difficult phases of a human trafficking case for law enforcement officials because their victim witnesses have far more needs than they can meet. Local community service providers trained in the dynamics of human trafficking as well as versed in the particular and varied needs of child trafficking victims become essential partners in this early period to adequately respond to both victim and law enforcement needs in a trafficking case.

DCF fears that it would open the floodgates if the law viewed all prostituted children as trafficking victims. If there is an overwhelmingly large population of commercially sexually exploited children, should we not respond to their needs for care and rehabilitation, regardless of their countries of origin? Who should pay for the services prostituted children require? Which state agencies are best poised to rehabilitate this population? How can state agencies, service providers and law enforcement best converge to protect and rehabilitate prostituted children who qualify as trafficking victims under state and federal laws on trafficking?

The following proposed legislative reforms address some of these concerns. The aspirational aspects of a hypothetical bill to be proposed to state legislatures, as well as policies for USCIS to adopt and responses to anticipated opponents, are detailed below.

A. *Victim's Compensation*

As the law currently stands in Florida, an individual is only eligible for Victim's Compensation (VC) funding if the victimization does not occur while the person is engaged in criminal activity.¹⁵³ This policy results in almost complete ineligibility for prostituted children to access VC funding. For example, if a pimp forces a prostituted child to hold onto his drugs or weapons and she is discovered prostituting, then she becomes ineligible for funding. In another scenario, if a pimp or another individual rapes a prostituted minor while she is engaged in prostitution, then she becomes ineligible for VC monies because although rape constitutes a crime against the child, the law also considers prostitution a crime.

Child victims with HHS eligibility letters and certified victims of human trafficking are eligible for VC funding, but non-certified victims of

152. FLA. STAT. § 787.06(d) (2008).

153. FLA. STAT. § 960.065(2)(b) (2008).

trafficking are not.¹⁵⁴ Because U.S. citizens do not need to attain certification as trafficking victims (since they already have legal immigration status), HHS does not certify them. Since certification or eligibility as a victim of trafficking links U.S. citizens to VC funding, these trafficking victims become ineligible for VC money, which unfairly prevents U.S. born citizens from necessary funding. Non-certified trafficking victims are additionally ineligible for relocation funding associated with VC in order to escape their traffickers. An appropriate legislative solution would address these gaps.

B. State Funding for a Rehabilitative Residential Facility

Trafficked and prostituted children require different forms of treatment than similarly situated adults. Advocates suggest that children in this situation receive “live-in rehabilitation therapy which addresses their past and continuing needs” rather than punishment for their actions.¹⁵⁵ For a child exploited through commercial sexual activity, access to safe housing and safety from their traffickers and/or pimp(s) is a primary concern.¹⁵⁶ Safe housing, which seems like an obvious necessity for this population, is difficult to obtain for many reasons. First, prostituted children carry the burden of stigma. They have often fled abusive homes, only to have their pimps and traffickers harass them when attempting to stay in homeless shelters. Second, homeless shelters are notorious for having an undereducated staff with high turnover, and pimps often enter the shelters to prey upon vulnerable children with nowhere else to go.¹⁵⁷

U.S. born prostituted minors have many of the same needs and vulnerabilities as foreign-born child trafficking victims. These children often live many miles away from home and family and may have no immediate means of survival. Interviewed victims often declare that their most immediate needs post-trafficking were for personal safety and security.¹⁵⁸ Trafficking victims, children in particular, face tremendous threats to their lives from their traffickers and pimps, especially if the traffickers are part of organized crime networks. In some cases, the fact that the child victim’s sole relationship for months or longer may have been with the pimp or trafficker

154. In practice, the process for certification as a victim of trafficking can be complicated. For clarifying details, see the *Certification for Victims of Trafficking Fact Sheet*, U.S. DEP’T OF AGRICULTURE, http://www.fns.usda.gov/fsp/rules/Memo/04/cert_victims.pdf (last visited Dec. 22, 2008).

155. Lamb, *supra* note 2, at 82.

156. Interviews with service providers who provide care and assistance to victims of human trafficking in the United States, in Fla. (Fall 2007–Spring 2008).

157. Lucy Ward & Matthew Taylor, *Vanished: The Child Victims of Trafficking*, THE GUARDIAN, Sept. 20, 2007, available at <http://www.guardian.co.uk/uk/2007/sep/20/children.immigration> (highlighting the need for formerly trafficked children to have a safe and secure living situation).

158. CENTER FOR THE ADVANCEMENT OF HUMAN RIGHTS, FLORIDA STATE UNIVERSITY, <http://www.cahr.fsu.edu/the%20report.pdf> (last visited Dec. 19, 2007).

often means that his or her first instinct is to return to the trafficker even after the child has been removed from this commercially exploitative situation.

Children trafficked for forced labor and prostituted under the direction of their pimps first and foremost need a safe place to live. Prostituted and trafficked children require a housing facility with high security and intensively therapeutic services. The main difficulty with creating such a comprehensive rehabilitative shelter is money. Safe houses aimed at providing shelter and rehabilitative services for sexually exploited children are expensive. If we assume, however, that prostituted children and child victims of trafficking are similarly and equally exploited, and even arguably the same population under the TVPA, then anti-trafficking monies will be available to rehabilitate prostituted children, whether U.S. or foreign born.

Interviews with many different organizations that work with unaccompanied immigrant children and child trafficking victims have made clear that not all service providers working with this population have a readily-available, comprehensive net of services for children post-trafficking.¹⁵⁹ One current need is for specific training for local and federal law enforcement on how to recognize child victims of trafficking so that they do not send children back to their countries of origin, only to be re-trafficked and re-traumatized in the process.¹⁶⁰ Foreign-born children certified as victims of trafficking are eligible to matriculate into one of the URM programs around the country.¹⁶¹ Similarly, U.S. citizen children labeled as trafficking victims are often eligible for state foster care. On the other hand, children convicted of prostitution must first serve out whatever sentence awaits them or spend time in detention. After completing their sentence, the state releases them. At that point, a state can contract with preexisting Community-Based Care¹⁶² organizations that provide care to troubled youth. These agencies should have staff with the requisite training, or at least background capacity to absorb new training, to treat this vulnerable population.

Many states struggle with how to best care for minor trafficked persons. Seattle, a city becoming a major hub for child trafficking, also struggles to meet the needs of this vulnerable population. A local Seattle newspaper reports that despite the city's

[E]xtensive network of services for youths, there is one 15-bed temporary shelter, it is the only place, other than a jail cell, where children trapped in prostitution can find respite, albeit brief. There

159. Interviews with service providers, *supra* note 156.

160. Interview with Amy Thompson, Policy Analyst at the Center for Public Policy Priorities (Nov. 15, 2007) (Her Repatriation of the Unaccompanied Child Research Project has examined this issue and can be found at the Center for Public Policy Priorities website, <http://www.cppp.org/> (last visited Nov. 20, 2007)).

161. U.S. CONFERENCE OF CATHOLIC BISHOPS, *supra* note 20.

162. FLA. DEP'T OF CHILDREN AND FAMILIES, ABOUT COMMUNITY-BASED CARE, <http://www.dcf.state.fl.us/cbc/aboutcbc.shtml> (last visited Dec. 14, 2008).

is nothing in the city, or even in Washington State, dedicated to helping young people permanently free themselves from sex work.¹⁶³

Washington is not alone in its dearth of adequate services for surviving victims of human trafficking. When surveying practitioners who provide care to this vulnerable population, the consensus states that ideally services would consist of a comprehensive residential program with job skills training, available emergency and long-term housing, and someone to answer the phone twenty-four hours a day.¹⁶⁴ Prostituted children in the U.S. would benefit greatly from this kind of program that offers a holistic provision of care.

C. Decriminalization of Prostituted Children

Inconsistencies abound when labeling prostituted children simultaneously as both victim and offender. Policy confusion consequently leaves service providers and law enforcement officials with an unclear sense of how to enforce the law and provide aid to victims.

At the federal level, the U.S. Citizenship and Immigration Services (USCIS) frustrates effective legal representation for sexually trafficked minors. As it currently exists, an individual who has committed any crime—whether it be entering the country illegally, stealing gum, or engaging in prostitution (albeit forced)—must submit an I-192 waiver form to USCIS.¹⁶⁵ This form costs \$545 and USCIS rarely grants fee waivers for demonstrated indigency.¹⁶⁶ The juvenile court does not require that prostituted minors pay for their cases to be processed in juvenile court; similarly, USCIS should not charge trafficked children who have engaged in commercial sexual activity with a penalty based on their particular form of victimization. Requiring the payment of a waiver for the very activity that constitutes one's humanitarian immigration benefit thwarts the legislative purpose underlying the TVPA and criminalizes the behavior of victimized and trafficked children. To date, advocacy groups have made USCIS aware

163. 151 CONG. REC. H11574–79 (daily ed. Dec. 14, 2005) (statements of Rep. Smith).

164. GEMS (Girls Education and Mentoring Services) in New York City provides an excellent example of a long-term residential shelter with copious services offered to both children residing at their shelter, and various counseling, educational and training opportunities for non-residential children in need. For more information on this program see <http://www.gems-girls.org/services.html> (last visited June 7, 2008).

165. U.S. CITIZENSHIP & IMMIGRATION SERVS., APPLICATION FOR ADVANCE PERMISSION TO ENTER AS NON-IMMIGRANT, available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=68db2c1a6855d010VgnVCM10000048f3d6a1RCRD&vgnnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD>; letter to Michael Chertoff from Legal Momentum, Family Violence Prevention Fund and ASISTA, (Aug. 18, 2008).

166. *Id.* USCIS has recently responded to the requests of advocates to allow fee waivers in some cases. See 8 C.F.R. § 103.7(c)(5) (2009).

of this “glitch” and the agency has not taken action to decriminalize the prostitution engaged in by victims of sex trafficking.

Opponents to decriminalizing child prostitution argue that such a measure would render the state a haven for prostituted children, the pimps who prostitute them, and the johns who solicit their services. From a law enforcement perspective, it is nearly impossible to find the pimps in these cases without somehow first questioning the prostituted children that the pimps commercially exploit and forcing them to turn over their pimps. The law contains a carrot and stick tradeoff whereby law enforcement often will not arrest a prostituted child if she gives up the name of her pimp.¹⁶⁷ As previously mentioned, the federal TVPA explicitly exempts trafficked minors from having to comply with law enforcement to turn over their traffickers.¹⁶⁸ If a state adopted criminal legislation similarly differentiating between adult and child prostitutes, it would consider children victims rather than criminals and would similarly not force them to comply with either law enforcement or the prosecution. Such a model properly views prostituted children as victims instead of offenders or material informants.

Some state attorneys believe that decriminalizing the prostitution of children in one state rather than another would encourage pimps to flood that state, knowing that they could prostitute children with immunity since prostituted children rarely give up their pimps.¹⁶⁹ To counter such an argument, those in favor of decriminalizing the commercial sexual exploitation of minors argue for an across the board decriminalization, so that all states respond equally and encourage rehabilitation rather than punishment as a model for juvenile offenders, an idea more directly in line with the aims of the juvenile justice system. In response, prosecutors voice the same concerns—that decriminalization of commercially sexually exploited minors leads to the decriminalization of the pimps who manipulate them, further fueling the exploitative practice.

When responding to the argument against decriminalization, two examples come to mind. First, children exploited in the commercial sex industry by their pimps frequently display elements of Stockholm Syndrome.¹⁷⁰ This condition is often associated with kidnapped people who, after a period of time, develop strong attachment and even love for

167. Bob Herbert, *The Wrong Target*, N.Y. TIMES, Feb. 19, 2008, at A25, available at <http://www.nytimes.com/2008/02/19/opinion/19herbert.html>.

168. U.S. DEP'T OF LABOR, *supra* note 17.

169. *See infra* note 174.

170. *See generally* DEE L. R. GRAHAM WITH EDNA I. RAWLINGS & ROBERTA K. RIGSBY, *LOVING TO SURVIVE: SEXUAL TERROR, MEN'S VIOLENCE, AND WOMEN'S LIVES*, 1–29, 267–71 (1994) (describing the Stockholm Syndrome); THOMAS STRENTZ, *THE STOCKHOLM SYNDROME: LAW ENFORCEMENT POLICY AND HOSTAGE BEHAVIOR*, IN *VICTIMS OF TERRORISM* 149 (Frank M. Ochberg & David A. Soskis eds., 1982) (describing how victims of hostage situations come to positively associate themselves with their captors, often adopting a sympathetic view of the captor's ideals or joining the captor).

those who victimize and exploit them.¹⁷¹ Because commercially sexually exploited children are often vulnerable from the start and then further victimized and exploited by their pimps (who are frequently someone that a traumatized or victimized person feels is more of a boyfriend or a father figure), they are unlikely to turn over their pimps to law enforcement, regardless of whether they are threatened with jail or detention.

The second reason why a punitive approach toward commercially sexually exploited children is inappropriate is illuminated by the domestic violence context. When a woman explains to the police that her partner abuses her, the police, as a matter of practice, do not force her to turn over or name her abusive partner or threaten to withhold their support until she does so.¹⁷² Instead, they treat her like a victim and provide her with the concomitant care and services specific to her situation. In contrast, prosecutors hold the threat of jail over a prostituted child's head to coerce their testimony against their pimps: 'If you don't tell us who hurt you, little girl, we're going to put you in jail.'¹⁷³ When phrased in those terms, it becomes clear why this tactic is inappropriate at best and revictimizing at worst.

A few states have initiated efforts to decriminalize child prostitution and to provide increased care and protection for this vulnerable group, but until recently, they lacked legislation with teeth. New York recently passed the "Safe Harbor for Exploited Youth Act," which seeks to decriminalize child prostitution and to provide similar protections to children forced to engage in commercial sex acts by mandating that local social service agencies provide needed services to exploited youth.¹⁷⁴ Most encouragingly, the New York legislators found that:

Appropriate services [sic] for sexually exploited youth do not exist in the juvenile justice system and [sic] both federal and international law recognize that sexually exploited youth are the victims of crime and should be treated as such. Therefore, sexually exploited youth should not be prosecuted under the penal law for acts of prostitution. Instead, services should be created to meet the needs of these youth outside of the justice system.¹⁷⁵

Under this Act, children too young to legally consent to sex are no longer charged with prostitution or treated as criminals.¹⁷⁶ Instead, the "courts would be required to provide them with mental health counseling services, medical care and the long-term shelter they need to reclaim their

171. *Id.*

172. They may do so, however, when a criminal prosecution is involved.

173. Herbert, *supra* note 167.

174. Editorial, *A Victory for Exploited Children*, N.Y. TIMES, Sept. 27, 2008, at A20, available at <http://www.nytimes.com/2008/09/27/opinion/27sat3.html?partner=rssnyt&emc=rss>.

175. *Id.*

176. NEW YORK STATE, Governor Patterson Signs Law to Protect Sexually Exploited Youth, http://www.ny.gov/governor/press/press_0926082.html (last visited Feb. 18, 2009).

lives.”¹⁷⁷ The Act seeks to protect a broader category than trafficked children by reaching to guard the “sexually exploited child,” which includes prostituted minors, child victims of trafficking and otherwise abused children.¹⁷⁸ Additionally, the Act presumes that a minor charged with a prostitution offense has the status of a victim of human trafficking under the TVPA, not as a juvenile delinquent (JD).¹⁷⁹ Unfortunately, that same minor could lose JD status if found to have a prior prostitution offense—a policy that appears contrary to the purposes of this new legislation.¹⁸⁰ Despite this wrinkle, New York has taken a bold step forward in recognizing and addressing the needs of commercially sexually exploited children in the United States. We need more state laws to finish the job.

CONCLUSION

“We need to understand that those who are subject to trafficking are not criminals but are victims subject to one of the most devastating practices that leave them in a permanent state of shock.”¹⁸¹

This article explored the inconsistencies between laws that recognize commercially sexually exploited children as trafficking victims under federal law, but prosecute the same children as offenders under state criminal law. When dealing with prostituted minors, state legislation on prostitution should change to reflect the model put forth by the victim-oriented laws created to combat human trafficking. This need to decriminalize the actions of prostituted children stems from a desire to better care for their specific needs and to capitalize on the momentum of the anti-trafficking movement that seeks to protect and to rehabilitate abused and exploited children. Although the TVPA essentially categorizes all prostituted children as victims of child sex trafficking, state and federal laws regulating prostitution still punish child prostitutes the same as their adult counterparts. Whereas the TVPA characterizes prostitution as a crime committed against a child, state and federal laws on prostitution view it in the reverse—as a crime worthy of prosecution and punishment of the child. At present, only one state has moderately decriminalized a minor’s involvement in prostitution, despite the proliferation of state statutes that provide remedies for child victims of human trafficking. States need anti-prostitution statutes for minors that mirror their anti-human trafficking legislation, coupled with funding for intensely supportive programs specifically dedicated to child survivors of sex trafficking and prostitution.

177. Editorial, *Children in Need of Safe Harbor*, N.Y. TIMES, Sept. 15, 2007, at A16, available at <http://www.nytimes.com/2007/09/15/opinion/15sat4.html>.

178. NEW YORK STATE, *supra* note 176.

179. *Id.*

180. *Id.*

181. CONG. REC. H11574–79 (daily ed. Dec. 14, 2005) (statement of Rep. Lantos).

In sum, the TVPA, whether intentionally or not, essentially equates child prostitution with human trafficking. As a result, prostituted minors should receive the same benefits as children certified as victims of human trafficking. The federal government's current focus on identifying and caring for "domestic" victims of trafficking could lead to an unfortunate bias against undocumented immigrants for whom Congress originally intended the TVPA to cover. A focus on attending to the needs of commercially sexually exploited children in the U.S., regardless of their countries of origin, promotes the progressive anti-slavery policies that inspired the enactment of the TVPA.