Decriminalization and Expanding Safe Harbor to Adults

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Many thanks to the University of Saint Thomas School of Law and the Journal of Law and Public Policy for hosting this event and hosting me. I serve as a state representative, as a prosecutor, and also, I was until recently in the role of directing training and protocol development for the Safe Harbor system. I will describe what Safe Harbor is a little bit later.

I thought that it would be useful today to start by examining the issue of sexual exploitation and sexual trafficking as part of the broader fight against gender violence. I will also describe where we are and where we are going with regards to sexual exploitation by considering where we have been and where we are with respect to other forms of gender violence. We need to start by considering what I mean by gender violence. I hope that many of the terms I will be using do not upset the law students who are accustomed to carefully citing things and making sure we have cites for emphasis. These are just working terms I will be using throughout the presentation.

As you can see gender violence, I am using these terms of gender violence that are based in gender inequities. And where there is a disproportionate impact on women, but of course an impact on people of all genders. And so, when I talk about this I have three general areas. I come to this work as a prosecutor of domestic violence, which is my particular background before focusing on exploitation and trafficking. I think that we are fairly familiar with those top two circles and I will talk about the bottom circle in a bit.

Let’s consider how people traditionally thought about domestic violence and sexual assault. When I say traditionally, the time frame is

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1 Dave Pinot, Assistant minority Leader at the Minnesota House of Representatives and Assistant Ramsey County Attorney. These remarks were given at the Fall 2017 symposium, “Sex Trafficking: Addressing a Global Issue in our Backyard” at the St. Thomas Sch. of Law. (Oct. 27, 2017).
slippery. You can go back to the 1950’s, you can go back to pre-history, or back to really anywhere between there, but just speaking very generally [there was] this thought that women’s bodies and their sexuality really are male property. On the property of their fathers or property of their husbands. There was even this concept in English common law that when a woman marries a man, her body becomes part of his body in fact. Therefore, to a certain extent, traditionally, a level of spousal violence was acceptable. It may have even been encouraged as a means of some form of control. It can’t go too far. You will see this reference to “if permanent injury is caused,” that is going too far. That is from a North Carolina case from the 1860’s. But if we don’t have permanent injury, then that is not something that was a concern under the law.

Sexual assault similarly is a harmful thing to the extent that it interferes with male property rights. There was a Minnesota law for a long time that defined sexual assault as forced intercourse with a woman who is not the defendant’s wife. There was no such thing as sexual assault, sexual violence in the context of marriage, or marital rape. I mentioned the English common law earlier; that was one of the reasons the English common law said that marital rape was not possible. If the women’s body was part of the man’s body, then the rape would be the man assaulting himself, and the man sexually assaulting himself would not be possible. You can understand where this is coming from, and where these beliefs would lead to these conclusions.

Finally, relationship violence was not something that the government and society had a right to intrude in. You can see a case from 1910 in which the United States Supreme Court points out that we cannot have a woman sue her husband for assault because there could be accusations of all sorts back and forth. It was not society’s business what is going on inside of a domestic relationship. Coupled with that was the belief that a woman would leave a man or partner if he is being truly abusive, and if she does not, that must be a reason to believe the abuse is really not that bad. As a result of this, early on, there was no enforcement and no laws. But even as laws change,
even as there are more laws that are in place against domestic violence and against sexual assault in the context of a relationship, there is very little enforcement of these laws. There is a policy in the police departments in California and Michigan that are cited here that have actual policy directives saying officers should avoid arrest, and the policy favors keeping the people together. Perhaps you have to appeal to the victim’s “vanity,” which is the term that is used to say, “this is not something you would want other people to be involved in or your spouse to be arrested.” There are certainly no formalized services for victim survivors. This is again the traditional view over time.

We start having a paradigm shift and really fixing this moving into the 1970’s. Originally, we were judging victim-survivors and justifying the conduct of offenders. We were explaining why it was acceptable for them to be committing the violence they are. We have a real shift here into protecting victim-survivors and to holding offenders accountable. So, what does that mean? It means in terms of the services, we start having some services and support in place for victims. We have some individual heroes – this is the term I am using – that said: “I am going to found a domestic violence shelter. I am going to found a rape crisis center. I am a nurse and I am going to get some specialized training to be sure that I understand the dynamics of sexual assault and how I can help. I am a judge and I am going to go out of my way to impose a new kind of order to say that this person should not have contact with this person – that this husband should not have contact with his wife because of the violence he is putting into play.” We also have greater accountability for offenders. Mandatory arrest policies that say if an officer arrives at a home and believes there is violence from one party to another, from one member of a couple against another, then an arrest is required. Actually, that kind of policy is needed to tell the officer that you cannot say, “well its best for the family if we leave them alone.” Instead, if [an occurrence of domestic violence] is the determination you have made, you have to arrest.

To criminalize sexual assault in the context of marriage, it has to be that sexual assault laws are not just based on force. You saw previously the

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9 Id.
11 Id.
reference to forced intercourse with a man who is not the victim’s spouse, but actually recognizing consent is necessary. There may be situations that constitute sexual assault without there being force involved. There are even laws – which I was surprised to notice when I was researching this – as early as 1975, that are rape shield laws which state that victims’ past sexual history is not relevant, and may not be admitted in a current sexual assault case.\footnote{Minn. R. Evid. 412.} A number of these innovations were founded here in Minnesota. I think this is really important to realize. There is something called the “Duluth model” that is known around the country. It was founded in the 1980’s at a domestic abuse intervention project program that brought together a number of these innovations, such as having shelters in place, mandatory arrest, and having intervention projects for batterers and others.\footnote{What is the Duluth Model? DOMESTIC ABUSE INTERVENTION PROGRAMS (FEB. 16, 2018, 11:05 PM), https://www.theduluthmodel.org/what-is-the-duluth-model/.}

We start having another paradigm shift as we move closer to the present day in these other forms of gender violence. We have these individual heroes providing support for victim-survivors, and we got some basic accountability for offenders. Now, as we move to the present day, we institutionalize that support. We are really closing some of those gaps we see beyond the basic accountability to expand to really make sure we are holding offenders accountable, and leading them to stop doing the violence they are perpetrating. So, what does the institutional support mean? There is ongoing state and federal funding for services, as much as $35,000,000 a year in Minnesota, which is wonderful. That is a far step beyond the individual person founding a shelter and doing the type of fundraising, which I think in some cases, was bake sales and those types of things back in the day. Now, we are saying as a society that this is something that is worth providing public funding and funding from all of us to support.

The formalization of advocacy as a profession; this is not just an individual person trying to get any information they can, but having advocates be in a position to be recognized for the key role they are providing and have the kind of support and formalization that provides that. Related to that, instead of having those individual nurses, we now have Sexual Assault Nurse’s Examiner (SANE) programs that recognize some specialty nursing instead of showing up in the nursing room.\footnote{What is a SANE? OFF. FOR VICTIMS OF CRIME (March 24, 2018 12:07 PM), https://www.ovcttac.gov/saneguide/introduction/what-is-a-sane/}. If you are lucky, some individual nurse has received the training, and that is great, but maybe she is
gone that day. Now, we make sure we have 24/7 coverage. At least we are moving in that direction.

And then statutory orders for prohibiting contact. Instead of an individual judge saying “I am going to do this on my own,” we now have it in statute, and we have ongoing updates to laws. I just listed a number of things here that past evidence of interactions between the victim and defendant can be relevant in the current case more broadly than might be just under the rules of evidence. Past domestic crimes will increase the severity of the current crime. There’s a new crime for 2005 of domestic assault by strangulation and then expert testimony will come in. Now if you look at the dates, you will see we are building up: 1985, 1995, 2005, building up and building up. There are a lot of gaps to be filled, including having 24/7 SANE coverage. There are certainly many places in Minnesota that do not have that kind of coverage, but we are much further along than we were.

We need to keep on moving forward and we are, and I think that many of us are aware of this focus on homicide and domestic violence. The Minnesota the Coalition for Battered Women has really brought that out. A big focus on campus sexual assault, and I suspect a number of students are very familiar with that. A move towards requiring affirmative consent, which includes training for students and staff. In the news, especially recently, there has been a focus on assault and harassment that many women experience, almost all women have experienced at some point in their lives, and we are especially focused on that in the workplace. I think there is a lot new and a lot of awareness about that.

So, that brings us back to this: we’ve talked about these top two circles and where we’ve come, so let’s talk about this bottom circle, for which we probably need to set a few terms. I know a few folks have seen the training

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16 MINN. STAT. § 629.75 (2017).
18 MINN. STAT. § 609.2247 (2005).
video information that was provided before. When we talk about sexual exploitation, we are really talking about sex trafficking and some broader pieces of exploitation as well. Just to be sure that we are clear on this, Minnesota’s laws on sex trafficking contain a whole lot of terms (there is a citation here, and you will notice a series of statutory provisions cited), but it really boils down to this: when you have prostitution involving a third person in some way, that is sex trafficking under the law. Recognizing that, inherently, when a third person is benefitting from this exchange of sex for money, food, shelter, whatever it is, that is inherently coercive. As I hope you are already aware, it does not matter whether the victim-survivor consents, it does not matter the age, it does not matter whether force is used; under Minnesota law, it is very simple in that way.

Exploitation again has a number of definitions for my purpose. I am really talking about trafficking and prostitution and a broader set of circumstances where someone who is vulnerable – often a minor, though not exclusively a minor – is involved in some way with survival sex: having to do a sex act for a place to stay or for food, for pornography, stripping, or another form of sexual exploitation. I should note that a lot of Minnesota’s focus on sexual exploitation, as it has been the case with trafficking, has been exploitation of minors. So the definitions set their focus on exploitation of minors, but more broadly, if you have a vulnerable adult, that is exploitation and certainly sex trafficking and prostitution as well. Traditionally, the response to exploitation has been to believe that prostitution is a public nuisance, i.e, it is a problem or it’s a bad thing because it’s harmful to men and to society. We have not focused traditionally very much on the harm to the person who is being sold. The belief is that there is really no victim except for the man’s family and perhaps society, and this is to the extent we are even paying attention.

I should point out that exploitation of minors hasn’t garnered attention at all traditionally, and therefore the sale of sex is penalized more severely than the purchase. The latter, traditionally, may not have been penalized at all. The great majority of arrests focus on the person who is being sold rather than the person who is doing the purchasing. Traditionally, we

23 Id.
are very comfortable that if there is a minor who is prostituting, even in cases as young as nine years old, that child will be charged with prostitution in the juvenile delinquency statutes, if the situation is not ignored altogether. I’ve cited the delinquency statute pointing out that any crime committed by an adult, the child can be charged with except for some traffic offenses. Kids cannot be charged for traffic offenses, but children who are being prostituted can in fact be charged.

There has been a shift over time with a greater focus on traffickers. There have been some expanded definitions of sex trafficking, and just as recently as 2009, traffickers have had longer sentences. I should note a case that I worked on. The defendant’s name there was Antonio Washington Davis. He was convicted of sex trafficking in, I believe it was 2011, and received a probationary sentence. He was then convicted again of sex trafficking several years later, a larger number of victims, and got a 36-year sentence.

So there’s been a paradigm shift with respect to minor victim-survivors, and that’s been the area where we have had a real mind shift. Nationally, there have been safe harbor laws that have been adopted. Now, I will explain what that is. These laws redirect children who are being prostituted from the juvenile delinquency system to the child protection system and provide them with services and support. In addition, nationally, there’s been a focus on Internet Crimes Against Children (ICAC), which are crimes such as child pornography or solicitation, and a lot of support and funding and direction there for law enforcement. In Minnesota, we have adopted that ICAC model and have provided support there, but we also have adopted the Safe Harbor program and approach as well. This started in 2011, as you will see, where some county attorneys said we are not going to charge minors with prostitution any longer. Throughout the next couple of

25 MN. STAT. § 260B.141.
27 Id.
29 Id.
years we adopted the Safe Harbor model so now kids cannot be charged with prostitution, minors are directed to the child protection system, there are support services. We are up to more than ten million dollars. Professionals are being trained, so a lot is happening with respect to exploitation of minors.

This is a map of the Safe Harbor regions in the state divided by the number of regions. Each icon on the map is some kind of service and support that the state is funding that there’s support for.

There is a lot more to be done, but with respect to minors, we have a lot of impressive things going on. Some of that has expanded to trafficking and exploitation of adults as well. There have been trainings all over the state.


of thousands of law enforcement officers and other professionals. I was actually the director of that work. That training has included responding to and identifying exploitation of people at any age. It has been included as recently as 2015. Safe Harbor services have expanded really recently to include up to age 24, which is wonderful. Law enforcement is targeting buyers, but when you compare what is happening with adults with what is happening to minors, I think you’d agree, it is pretty weak.

We’ve got all these things going on for kids, but there is not a lot happening for adults. The fact is, our laws still treat the people who do the purchasing and the people who are purchased as equally culpable. It is important for me that folks see that it is a misdemeanor for prostitutions in a private place, to a gross misdemeanor in a hotel, a car, massage parlor whatever it is, but those are equal. It does not matter whichever direction you are going, and that is actually better than it is nationally. I was amazed in putting this together to realize that half the states still do not criminalize the buyer. They still criminalize only the person being sold, and still the great majority of arrests are of the person being sold.

Now, why is that a problem? I hope that folks took advantage of some of the preparatory materials to get a sense of the dynamics of exploitation. We now understand the basic model and dynamics of trafficking. In a typical trafficking situation, we have someone who is very motivated by money, in the form of the trafficker. We have someone who feels very entitled, in the form of the buyer. He has money, he’s entitled to have his sexual needs met, and it really doesn’t matter what the impact is on the human being who is supposed to be meeting those needs. We now know that that human being at the bottom of the triangle was targeted because of vulnerabilities that she has. I really cannot think of a survivor who I’ve gotten to know who has not had some just some really significant vulnerabilities in her life that someone was taking advantage of.

We separate out the traffickers from the buyers, but really what we have is exploiters on both of these sides, and we now understand that when

36 MINN. STAT. § 609.324 (2016).
37 Id.
38 Id.
40 Id.
you have money taking the place of consent, what is really happening is commercial sexual violence. And so, it doesn't fit this model where, at the very best, there is an equivalency between the buying and the selling, which doesn't fit our understanding of the real dynamics of this system.

Related to that, just to drive into the practicalities of the problem, this is very confusing for criminal justice professionals and for the public. Again, I've been around the state training thousands of our professionals and they get it. Yet we understand that we don't make a distinction between kids and adults when that dynamic kicks in place when it comes to trafficking, prostitution, and holding a third person responsible. It does not matter if it is a kid or adult, it is still sex trafficking. The person who is being sold or the person who's doing the buying are equally culpable. It ends up really being confusing.

It certainly sends a message to traffickers and it sends a message to buyers, to men considering buying to say, “well, you know, what I'm doing is wrong, but what she's doing is equally wrong, and I feel like doing it so I guess I'll pay the money. It can't be that harmful for her because you know it's the equivalent penalties, so it's the equivalent thing. We are both equally culpable.” It certainly sends a message to those who are prostituted and sold. Not only just the basic fact of, “you are a criminal via your exploitation, but you are equally criminal to the person who is being paid to violate you.” To the extent that our goal is to hold traffickers accountable on that piece, it hinders our ability to do that because the people who know the traffickers best and can best provide support in doing that work are those who are being exploited. We are certainly not engendering cooperation from someone who probably would not be inclined to be cooperative and engage with us in the first place, for all sorts of reasons.

So, there is a proposal. There are thoughts that this is the next step: the movement here to have a safe harbor for all. Just like we have redirected kids from the juvenile justice system to the child production system, to redirect adults from the criminal justice system to services and to support. That would involve repealing penalties for the sale of sex and recognize that the purchase of sex really is a form of gender violence. That means that we probably need to be increasing the penalties on the other side, offering treatment as appropriate and recognizing where that is. What this would do
is to communicate clearly and effectively about how we really view this to understand that triangle\textsuperscript{41} and make that communication.

Now this model is in use in a number of other countries and it's actually referred to as the Nordic Model. It was pioneered in Sweden, used in other Scandinavian countries and was recently adopted in Ireland. Canada has been making moves towards it as well.\textsuperscript{42} It has been proposed in Minnesota.\textsuperscript{43} It was proposed in the 2015-2016 legislative session.\textsuperscript{44} It had bipartisan support.\textsuperscript{45} I'm happy to say in 2017, this current session, there was funding that was passed to support a study by the Minnesota Department of Health to examine how can we have a comprehensive plan statewide to meet the needs of all sex trafficking victim-survivors,\textsuperscript{46} which may lead to something else but ends up giving us this consistent approach.

I want to point out that there are some real hurdles to our adoption of it, and one important distinction is the fact that we, as far as I can tell, would be coming at this from a different route than other jurisdictions, as you can see from the image below:

All the other jurisdictions have done this from a definite regime where they had full legalization and then made the decision to criminalize the purchase of sex. We are in a position of having full criminalization and so would be making the change potentially as part of all the other changes of decriminalizing the sale of sex, which can be very uncomfortable for some people to say, “well we're going to target this crime so strongly that we're going to actually decriminalize half of it.” But that is not the goal. We want

\begin{itemize}
\item \textsuperscript{41} Id.
\item \textsuperscript{42} What is the Nordic Model, Nordic Model Now!, https://nordicmodelnow.org/what-is-the-nordic-model/.
\item \textsuperscript{43} H.F.2355, 89th Leg., Reg. Sess. (MN 2015).
\item \textsuperscript{44} Id.
\item \textsuperscript{45} Id.
\item \textsuperscript{46} MINN. STAT. § 145.4716 (2016)
\end{itemize}
to recognize the victimization of the people who are experiencing it. That can be a hurdle and connected to that is what will the effect be on our communities. There is concern that that prostitution is happening in certain neighborhoods, and it is something that people are seeing on the streets because of course the vast majority is online now. I have heard some concerns about what the effect might be. There are questions about whether services and support for victim-survivors will be available. For the Safe Harbor system, there are housing and shelter and services all around the state. It would be terrific if we had that support for adult victim-survivors as well. I hope that we do, but there are a lot of claims on state funding, and a lot of challenges. We are not doing this in the same context as the other countries that have adopted the Nordic Model, and certainly not Scandinavian countries, which have the kind of social safety nets that we lack. 47

Consider the speed of change in domestic violence and sexual assault awareness and legislation. It began in the 1970s, and, to a certain extent, some of that began much earlier. When I talk about sexual assault and sexual exploitation, we're talking about 2008, 200948, the first Safe Harbor law adopted in New York in 2010.49 This is a very quick pace of change which can be difficult. Compare it to DWI (driving while intoxicated). In the 1950s, there was a view that driving while intoxicated was not a big deal; a person might just be a happy drunk. Over time, we realized that this is a serious public health issue. We've had decades to make those changes and have society and laws move. With sexual assault and exploitation, we're trying to move this very quickly, and we really are “building the plane while we fly” for this situation. Now that our eyes have been opened, which again, for many of us has been just in the last few years, we suddenly realize how prevalent this is – it is incredibly prevalent. And, at the same time, we're trying to create services and support for the people experiencing it and develop a new regime. We need to recognize that part of this work is grounded in gender inequities and vulnerabilities. Comparing again to those Nordic countries where this originated shows that those societies have fewer gender inequities and much more gender equity than ours does, and more support for those who've experienced trauma.50

50 See Matheison et al., supra note 30, at 409-410, 421-422.
A police sergeant and I interviewed a young woman, a 16-year-old girl, a number of years ago. She had been prostituted at age 15. We asked her, “What would have made a difference for you to not be prostituted?” She said, “Food. My dad locked the food in his room, away from my brother and me. I was hungry and it seemed to be something that I had to do.” There are so many stories like that that show so many ways in which vulnerability fuels exploitation. And I certainly saw in my work as a domestic violence prosecutor that exploitation is fueled by people who are “entitled” or have power, very often men, who can take advantage of women and young or vulnerable people. We need to focus our efforts on the center of those three circles, and it's my thesis and my thought we must move to a regime where we focus our law enforcement efforts, our justice efforts, and our societal efforts on holding offenders accountable. We must support the people who hold exploiters accountable and lift up and support those whom they exploit. That is the right way to go, and I'm hopeful that our society moves in that direction. Many thanks for the opportunity to speak with you today. I appreciate it.