

Child, Victim, or Prostitute? Justice through Immunity for Prostituted Children

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*Children are the victims, not the perpetrators, of child prostitution.*¹

INTRODUCTION

On January 12, 2007, “Cynthia” waved over an undercover Houston police officer and offered to give him a “blow job” for twenty dollars.² The officer agreed and then arrested “Cynthia” for prostitution when she entered his car.³ “Cynthia” was charged in criminal court for her actions; however, the case was dismissed and charges were refiled under the Texas Family Code when a background check revealed that “Cynthia” was only thirteen years old.⁴ Pursuant to an “agreed recommendation from the State,” the young girl “pleaded true to engaging in delinquent conduct by committing the offense of prostitution.”⁵ The trial court, upon finding that “Cynthia” had “engaged in delinquent conduct and was in need of rehabilitation,” ordered her to “be placed on probation for one and one-half years in the custody of the Chief Juvenile Probation Officer.”⁶ “Cynthia” appealed, claiming, among other things, that “‘a child cannot [legally] consent to sex with an adult’ and, therefore, ‘prosecution’ of a thirteen-year-old juvenile for the offense of prostitution leads to an absurd result, violates due process of law, and ‘offends public policy notions that children [suffering] sexual exploitation must be protected as victims.’”⁷ The appellate court affirmed the delinquency finding, but the Texas Supreme Court granted “Cynthia’s” petition for review and, in a six-to-three decision reversing the appellate court, found that the Texas Legislature did not specifically intend for children under the age of fourteen to be prosecuted for prostitution since they lack the capacity to consent to sexual activity under Texas law.⁸ According to the court, “Cynthia” and other prostituted children under the age of fourteen are

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1. *In re B.W.*, 313 S.W.3d 818, 826 (Tex. 2010).

2. *In re B.W.*, 274 S.W.3d 179, 180 (Tex. Ct. App. 2008), *rev'd*, 313 S.W.3d 818 (Tex. 2010).

3. *Id.*

4. *In re B.W.*, 313 S.W.3d 818, 819 (Tex. 2010).

5. *In re B.W.*, 274 S.W.3d 179, 180 (Tex. Ct. App. 2008), *rev'd*, 313 S.W.3d 818 (Tex. 2010) (footnotes omitted).

6. *Id.*

7. *Id.* (alterations in original).

8. *In re B.W.*, 313 S.W.3d 818, 819, 822, 826 (Tex. 2010).

victims, not perpetrators, and they should be treated as such.⁹

Whether minors should be prosecuted for prostitution is a contentious question. Although the federal Trafficking Victims Protection Act (TVPA) criminalizes the prostitution of minors under the age of eighteen¹⁰ the anti-trafficking community is split on how best to handle prostituted minors. Those who support immunity note that finding prostituted children delinquent for engaging in prostitution can further victimize them,¹¹ create inconsistencies between federal and state law,¹² and serve as an obstacle to full rehabilitation by saddling the victim with a record.¹³ Those opposed to immunity argue that prosecutors must retain the ability to charge a prostituted child to ensure the child's cooperation in the prosecution of her traffickers,¹⁴ and that providing immunity to prostituted minors both "leave[s] them at the mercy of pimps and johns and without the judicial system to advocate for their treatment and rehabilitation"¹⁵ and leads to increases in the prostitution of children.¹⁶

In this article, I will argue that justice requires minors to be immune from prosecution for prostitution.¹⁷ In Part I, I will discuss the history behind efforts to combat sex trafficking and prostitution, including the passage of the TVPA¹⁸ and the controversy surrounding the interplay between prostitution and sex

9. *Id.* at 826.

10. Victims of Trafficking & Violence Prot. Act of 2000, Pub. L. No. 106-386, § 112(a)(2), 114 Stat. 1464, 1486-88; *see also* *Child Exploitation & Obscenity Sec.*, U.S. DEP'T OF JUSTICE, available at <http://www.justice.gov/criminal/ceos/subjectareas/prostitution.html> ("A number of different phrases are used to describe the prostitution of children, including sex trafficking, a severe form of human trafficking, or the commercial sexual exploitation of children.").

11. Wendi J. Adelson, *Child Prostitute or Victim of Trafficking?*, 6 U. ST. THOMAS L.J. 96, 111 (2008); SHARED HOPE INT'L, PROTECTED INNOCENCE LEGISLATIVE FRAMEWORK: METHODOLOGY 3 (2011), available at http://sharedhope.org/wp-content/uploads/2012/09/SHI_ProtectedInnocence_Methodology_FINAL.pdf; *see also* Francesca Garrett, *Rescued Children Shouldn't Be in Handcuffs*, CNN (Aug. 8, 2013, 10:04 AM), <http://thecnnfreedomproject.blogs.cnn.com/2013/08/08/rescued-children-shouldnt-be-in-handcuffs/>.

12. In particular, prosecuting minors for prostitution is inconsistent with trafficking laws, child sex abuse laws, and laws that claim that minors cannot form the *mens rea* to commit these crimes. *See infra* notes 127-33 and accompanying text.

13. *See, e.g.*, Adelson, *supra* note 11, at 121 (discussing how Florida's treatment of child prostitutes as criminals blocks access to services for most victims); SHARED HOPE INT'L, *supra* note 11, at 3.

14. *See infra* Part IIIA.

15. BRENDA ZURITA, THE BEVERLY LAHAYE INSTITUTE, CHILDREN IN PROSTITUTION: WHAT TO DO? 3 (2012), available at http://www.cwfa.org/images/content/CWA_Decriminalization-of-Prostitution-for-Minors2012.pdf.

16. *See infra* Part IIIC.

17. While I also believe that adult prostitutes who are victims of trafficking should be immune from prosecution for prostitution, this article will focus only on prostituted minors because, as discussed below, all prostituted minors are trafficking victims. Victims of Trafficking & Violence Prot. Act of 2000, Pub. L. No. 106-386, § 112(a)(2), 114 Stat. 1464, 1486-88; *see also* *Child Exploitation & Obscenity Sec.*, *supra* note 10 ("Children involved in this form of commercial sexual exploitation are victims. Under federal law, children cannot consent to being prostituted.."). However, with respect to adult prostitutes, the TVPA requires the sex trafficking to be induced by "force, fraud, or coercion," making it more difficult to determine if an adult prostitute is a trafficking victim.

18. Victims of Trafficking & Violence Prot. Act of 2000 (codified as amended in scattered sections of Titles 8, 18, 20, 22, 27, 28 and 42 of the U.S.C.).

trafficking around the time of the TVPA's enactment. In Part II, I will discuss the need for states to enact provisions making minors immune from prosecution for prostitution. In Part III, I will look at the objections to prostitution immunity provisions for minors and explain why these objections are not sufficient to overcome the policy preference and justice concerns that favor making a minor immune from prosecution for prostitution.

I. PROSTITUTION, SEX TRAFFICKING, AND THE TRAFFICKING VICTIMS PROTECTION ACT

*No one defends trafficking. There is no pro-sex-trafficking position any more than there is a public pro-slavery position for labor these days. . . . Prostitution is not like this. . . . The[] views of prostitution lie beneath and surround any debate on sex trafficking*¹⁹

In this section, I will review the controversy surrounding the relationship between prostitution and sex trafficking and the efforts to conflate adult prostitution—absent some form of force, fraud, or coercion—and sex trafficking, focusing on the history of the United Nations Trafficking Protocol, the Trafficking Victims Protection Act, and the TVPA's reauthorizations. I will then explain how, despite the controversy over adult prostitution, domestic and international anti-trafficking efforts have been uniform in addressing prostituted minors and have treated them as victims, regardless of whether “force, fraud, or coercion” was used to induce commercial sex acts.

Efforts to combat sex trafficking predate the passage of the Trafficking Victims Protection Act of 2000 by almost 100 years. Although prostitution in the United States has historically been prohibited and punished at the state level,²⁰ the federal government, using its power under the Commerce Clause, first outlawed the interstate transportation of “any woman or girl for the purpose of prostitution, or for the purpose of inducing, enticing, or compelling a woman to become a prostitute,” with the passage of the Mann Act in 1910.²¹ The Act also made it a crime to “knowingly persuade, induce, entice, or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing or coercing” women and girls to move in interstate or foreign commerce for the purposes of prostitution.²² The United States was not alone in its efforts to

19. Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271, 271 (2011).

20. JAMES ROBERT MANN, WHITE SLAVE TRAFFIC, H.R. REP. NO. 61-47, at 1-2, 9-10 (1909) (noting that “[t]he legislation is not needed or intended as an aid to the States in the exercise of their police powers in the suppression or regulation of immorality in general.”); *see also* Keller v. United States, 213 U.S. 138, 143 (1909) (“While the keeping of a house of ill-fame is offensive to the moral sense, yet that fact must not close the eye to the question whether the power to punish therefor is delegated to Congress or is reserved to the state. Jurisdiction over such an offense comes within the accepted definition of the police power. Speaking generally, that power is reserved to the states, for there is in the Constitution no grant thereof to Congress.”).

21. H.R. REP. NO. 61-47 at 2; White-Slave Traffic (Mann) Act. The Mann Act also applied to the transportation of women for prostitution into the United States, building on previous legislation, starting in 1875, when Congress passed a law prohibiting “the importation into the United States of women for the purposes of prostitution.” H.R. REP. NO. 61-47, at 2-6 (1909) (quoting Act of March 3, 1875 § 3, ch. 141, 18 Stat 477).

22. White-Slave Traffic (Mann) Act § 3.

suppress the trafficking of women and girls for prostitution.²³ Several years before passing the Mann Act, the United States had joined with other nations in agreeing to the International Agreement for the Repression of the Trade in White Women to address issues related to the international trafficking of women and girls for “debauchery.”²⁴ The agreement treated the women and girls subjected to trafficking as victims and sought to ensure that they received assistance, including transportation back to their home country if desired.²⁵ Likewise, the Mann Act did not criminalize the actions of women who merely acquiesced to being transported in interstate commerce for prostitution,²⁶ although a woman who was actively involved in planning her transport could be charged with conspiracy.²⁷

The push for comprehensive anti-trafficking laws in the late 1990s, both in the United States and internationally, stemmed from many factors including “the rise of the women’s human rights movement, the increased international labor migration in response to globalization, the feminization of poverty (and hence of migration), and the growing recognition of the role of organized crime in the clandestine movement of peoples.”²⁸ This movement culminated in the October 2000 passage of the Trafficking Victims Protection Act (TVPA), which was part of the Victims of Trafficking and Violence Protection Act of 2000.²⁹ Approximately two weeks later, the fifty-fifth session of the United Nations General Assembly adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children—a supplement to the United Nations Convention against Transnational Organized Crime (also known as the Palermo Protocol).³⁰

Negotiations over the TVPA and the Protocol were influenced by the larger debate over prostitution reform.³¹ As Professor Janie Chuang has explained, the two sides of the prostitution reform debate can be broadly described as the “neo-abolitionists,” who believe that “prostitution is exploitative and degrading to women, [and] a form of violence against women that should be abolished,”³² and

23. H.R. Rep. No. 61-47, at 13-14 (setting out an international agreement for the repression of the trade in white women that was signed “at Paris, May 18, 1904, by the Governments of Germany, Belgium, Denmark, Spain, France, Great Britain, Italy, the Netherlands, Portugal, Russia, Sweden, Norway, and the Swiss Federal Council,” and later ratified by the U.S. Senate).

24. *Id.*

25. *See id.* (agreement assuring that women would be provided the most “efficacious protection against the criminal traffic known under the name of trade of white women (‘traite des blanches’)”).

26. *Gebardi v. United States*, 287 U.S. 112, 121-23 (1932).

27. Michael Conant, *Federalism, the Mann Act, and the Imperative to Decriminalize Prostitution*, 5 CORNELL J. L. & PUB. POL’Y 99, 110 n.75 (1996) (citing *Gebardi*, 287 U.S. 112).

28. Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1660 (2010).

29. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of 18, 22, 27, and 42 U.S.C.). [KRR - R12 - SUBST.]

30. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 15, 2000, 2237 U.N.T.S. 319, available at http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=XVIII-12-a&chapter=18&lang=en.

31. Chuang, *supra* note 28, at 1663.

32. *Id.* at 1664 (citations omitted). According to Chuang, the neo-abolitionist group is made up of “feminists, neoconservatives, and evangelical Christians.” *Id.* (citations omitted). The feminists

the “non-abolitionists,” some of whom embrace, to varying degrees, the notion that “sex work” can be “liberatory, an expression of women’s right to sexual self-determination and equality.”³³ At the negotiations over the Palermo Protocol, the neo-abolitionists tried to conflate sex trafficking and prostitution, going so far as to push for a definition of trafficking that included “non-coerced, adult migrant prostitution,” while the non-abolitionists sought workplace protections for “sex workers.”³⁴ The final definition of trafficking in the Protocol reflected a compromise that gave both sides a chance to claim victory and ultimately left the various countries party to the Protocol to define important terms such as “exploitation of prostitution of others” and “other forms of sexual exploitation.”³⁵

Similarly, the debates over the TVPA and the definition of trafficking centered on the debates over prostitution, and the final TVPA text reflected a compromise.³⁶ The TVPA defined “sex trafficking” as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act,”³⁷ a definition that encompassed voluntary prostitution. But, the Act defined “severe forms of trafficking in persons” to require that the sex trafficking be “induced by force, fraud, or coercion, or . . . the person induced to perform” the act be less than eighteen years old.³⁸ The key parts of the Act only applied to “severe forms of trafficking in persons,”³⁹ and the new anti-sex trafficking domestic criminal provision, 18 U.S.C. § 1591, criminalized the sex trafficking of minors, regardless of the existence of “force, fraud, or coercion,” or sex trafficking of any age person by “force, fraud or coercion.”⁴⁰

The domestic debate over the status of prostitution did not stop with the TVPA’s enactment. Although the TVPA and its 2003 reauthorization, the Trafficking Victims Protection Reauthorization Act of 2003 (TVPRA 2003), were focused largely on trafficking overseas,⁴¹ the neo-abolitionists were successful in adding anti-prostitution provisions in the reauthorization. The TVPRA 2003 added a new subsection to the authorization of appropriations provisions of the TVPA that restricted funds under the TVPA from being used to “promote, support, or advocate the legalization or practice of prostitution.”⁴² It also

see “no distinction between ‘forced’ and ‘voluntary’ prostitution,” as they believe that “choice and consent are not possible because prostitution is an institution of male dominance and results from the absence of meaningful choices.” *Id.* (citations omitted). According to some of the feminists, “[w]omen who (believe they) choose prostitution suffer from a ‘false consciousness,’ the inability to recognize their own oppression; whether or not these ‘prostituted women’ seemingly consent, prostitution involves a violation of a human being.” *Id.* at 1664-65 (citations omitted).

33. *Id.* at 1670 (citations omitted).

34. *Id.* at 1673-74 (citations omitted).

35. *Id.* at 1676.

36. *Id.* at 1677-79.

37. Trafficking Victims Protection Act (TVPA) of 2000 § 103(9), 22 U.S.C. § 7102(9) (2012).

38. *Id.* § 103(8)(A), 22 U.S.C. § 7102(8)(A).

39. See generally TVPA; Chuang, *supra* note 28, at 1679.

40. TVPA § 112, 18 U.S.C. § 1591.

41. See Tessa L. Dysart, *The Protected Innocence Initiative: Building Protective State Law Regimes for America’s Sex-Trafficked Children*, 44 COLUM. HUM. RTS. L. REV. 619, 623-24 (2013) (discussing the initial international focus of the TVPA and its 2003 reauthorization).

42. Trafficking Victims Protection Reauthorization Act of 2003 § 7, 22 U.S.C. § 7110 (2012)

prohibited the funding of grants to organizations that had “not stated in either a grant application, a grant agreement, or both, that it does not promote, support, or advocate the legalization or practice of prostitution.”⁴³

The 2005 reauthorization of the TVPA (TVPRA 2005) shifted the focus of anti-trafficking efforts from trafficking overseas or trafficking involving foreign victims to trafficking in the United States with U.S. citizens as the victims.⁴⁴ Despite this shift, and the federalism concerns that accompany any attempt to federalize prostitution prosecutions, the neo-abolitionists were successful in continuing to blur the lines between prostitution and sex trafficking. Section 201 of the TVPRA 2005 required the Attorney General to use available state and local data to carry out “biennial comprehensive research and statistical review and analysis of sex trafficking and unlawful commercial sex acts in the United States.”⁴⁵ Given the broad definition of “sex trafficking” in the TVPA,⁴⁶ this study would include statistics on prostitution arrests and prosecutions, even if that prostitution was not induced by force, fraud, or coercion and did not involve a prostituted minor. Similarly, the TVPRA 2005 required the Attorney General to disseminate at a conference on human trafficking “best methods and practices for training State and local law enforcement personnel on the enforcement of laws prohibiting sex trafficking and commercial sex acts, including, . . . best methods for investigating and prosecuting exploiters and persons who solicit or purchase an unlawful commercial sex act.”⁴⁷ The TVPRA 2005 also included a grant program to states, local governments, non-governmental organizations, and others to “establish, develop, expand, and strengthen assistance programs” for U.S. citizens and legal permanent residents subjected to sex trafficking and severe forms of trafficking in persons in the United States.⁴⁸ Congress also authorized a grant program to strengthen state and local efforts to prosecute and investigate severe forms of trafficking in persons and related offenses, with the definition of related offenses including “violations of tax laws, transacting in illegally derived proceeds, money laundering, racketeering, and other violations of criminal laws committed in connection with an act of sex trafficking or a severe form of trafficking in persons.”⁴⁹

Given the increasing focus on prostitution in the reauthorizations of the TVPA, it was not surprising that the issue played an important role in the 2008 reauthorization. On November 4, 2007, the House of Representatives passed H.R. 3887, the William Wilberforce Trafficking Victims Protection Reauthorization Act

[hereinafter TVPRA 2003].

43. *Id.* This second provision, however, is likely unconstitutional following the Supreme Court’s opinion in *Agency for Int’l Dev. v. Alliance for Open Society Int’l*, 133 S. Ct. 2321 (2013), which held unconstitutional a similar provision in the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003.

44. See Dysart, *supra* note 41, at 624–27.

45. Trafficking Victims Protection Reauthorization Act of 2005 § 201(a)(1)(A), 42 U.S.C. § 14044 (2012) [hereinafter TVPRA 2005].

46. TVPA § 103(9), 22 U.S.C. § 7102(10) (2012).

47. TVPRA 2005 §201(a)(2).

48. TVPRA 2005 § 202.

49. TVPRA 2005 § 204.

of 2007.⁵⁰ This bill capitalized on the broad definition of “sex trafficking” in the TVPA and greatly blurred the lines between the federal government’s efforts to combat “severe forms of trafficking in persons” and the federal government’s ability to prosecute non-coerced, adult prostitution.⁵¹ Among its provisions, the bill created the federal crime of “sex trafficking,” which made it a crime “in or affecting interstate or foreign commerce” to “persuade[], induce[], or entice[] any individual to engage in prostitution for which any person can be charged with an offense.”⁵² The bill also required the Department of Justice to draft a new model state anti-trafficking law that reflected this new crime of “sex trafficking.”⁵³ The bill also changed the name of the Department of Justice’s Child Exploitation and Obscenity Section (CEOS), which prosecutes cases of child sex trafficking and prostitution of children,⁵⁴ to the Sexual Exploitation and Obscenity Section, and directed the chief of that section to “work with other parts of the Department of Justice and State and local law enforcement to ensure effective prosecutions” of crimes involving “sex trafficking.”⁵⁵ Additionally, the bill required the FBI’s Innocence Lost Task Forces, which are also focused on investigating child sex trafficking in the United States,⁵⁶ to expand their mission to include “sex trafficking” of adults.⁵⁷

The Department of Justice strongly opposed H.R. 3887’s broad new criminal provisions and the Department’s expanded role in prosecuting non-coerced adult prostitution.⁵⁸ In talking points, the Department noted that the bill would “undermine[] the Department’s model state law against trafficking” by, among other things “requir[ing] DOJ to write, publish, and help states enact laws similar to those in the bill itself, which DOJ believes are detrimental to effective law

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

51. Department of Justice Position on William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007, Pub. L. No. 122 Stat. 5044 (2007), H.R. 3887 110th Cong. (1st Sess. 2007), available at <http://www.justice.gov/olp/pdf/doj-position-on-hr3887.pdf>; Brian W. Walsh and Andrew M. Grossman, *Human Trafficking Reauthorization Would Undermine Existing Anti-Trafficking Efforts and Constitutional Federalism*, THE HERITAGE FOUNDATION (Feb. 14, 2008), http://www.heritage.org/research/reports/2008/02/human-trafficking-reauthorization-would-undermine-existing-anti-trafficking-efforts-and-constitutional-federalism#_ftnref10.

52. H.R. 3887, §221(f).

53. *Id.* §. 224.

54. U.S. DEP’T OF JUSTICE, CHILD EXPLOITATION AND OBSCENITY SECTION, *Mission*, <http://www.justice.gov/criminal/ceos/mission/mission.html>.

55. H.R. 3887, § 234(1).

56. *Innocence Lost*, FEDERAL BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/investigate/vc_majorthefts/cac/innocencelost.

57. H.R. 3887, 110th Cong., § 234(1).

58. Department of Justice Position on William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007, Pub. L. No. 122 Stat. 5044 (2007), H.R. 3887, 110th Cong. (1st Sess. 2007), available at <http://www.justice.gov/olp/pdf/doj-position-on-hr3887.pdf>; Brian W. Walsh and Andrew M. Grossman, *Human Trafficking Reauthorization Would Undermine Existing Anti-Trafficking Efforts and Constitutional Federalism*, THE HERITAGE FOUNDATION (Feb. 14, 2008), at n.4, http://www.heritage.org/research/reports/2008/02/human-trafficking-reauthorization-would-undermine-existing-anti-trafficking-efforts-and-constitutional-federalism#_ftnref10.

(noting the Department of Justice’s letter to Rep. John Conyers, Jr., Chairman of the House Judiciary Committee).

enforcement.”⁵⁹ DOJ also criticized the bill’s prostitution focus as “divert[ing]” the federal government “from its core anti-trafficking mission against crimes involving force, fraud, or coercion and child victims,” noting that the “[s]tates are better situated to combat adult prostitution.”⁶⁰ Additionally, changing the mission of CEOS and the Innocence Lost Task Forces would, in the Department’s words, “effectively . . . turn the FBI and CEOS into a national vice squad, at the expense of their current efforts to identify, rescue, and protect victims of all forms of child exploitation.”⁶¹ Likewise, the Heritage Foundation opposed the bill, citing federalism concerns and concerns that the bill would “trivialize[] the seriousness of actual human trafficking by equating it with run-of-the-mill sex crimes—such as pimping, pandering, and prostitution—that are neither international nor interstate in nature.”⁶²

The Senate failed to act on H.R. 3887.⁶³ On December 9, 2008, H.R. 7311, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 was introduced in the House.⁶⁴ It passed the House and Senate the next day and was signed by the President on December 23, 2008.⁶⁵ While the final act did not contain all the problematic provisions noted above, it did contain at least one provision that blurred the line between prostitution and sex trafficking. One section of the act required DOJ to issue a model law based on the District of Columbia’s prostitution and pandering statutes that “further[s] a comprehensive approach to investigation and prosecution through modernization of State and local prostitution and pandering statutes.”⁶⁶ The act also required the DOJ to report to Congress on federal efforts to enforce federal racketeering laws “in cases involving human trafficking, sex trafficking, or prostitution offenses,” and to enforce D.C.’s prostitution statutes.⁶⁷

The TVPA’s most recent reauthorization does not appear to overly conflate non-coerced adult prostitution and sex trafficking. While it contains a large section on assisting “sex trafficking victims,” that section is limited to minor victims.⁶⁸ This approach is consistent with the compromise struck in the original

59. Department of Justice Position on William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007, Pub. L. No. 122 Stat. 5044 (2007), H.R. 3887, 110th Cong. (1st Sess. 2007), available at <http://www.justice.gov/olp/pdf/doj-position-on-hr3887.pdf>.

60. *Id.*

61. *Id.*

62. Brian W. Walsh & Andrew M. Grossman, *Human Trafficking Reauthorization Would Undermine Existing Anti-Trafficking Efforts and Constitutional Federalism*, THE HERITAGE FOUND. (Feb. 14, 2008), http://www.heritage.org/research/reports/2008/02/human-trafficking-reauthorization-would-undermine-existing-anti-trafficking-efforts-and-constitutional-federalism#_ftn4.

63. *Bill Summary & Status: H.R. 3887, 110th Cong.*, THE LIBRARY OF CONG. (2007), <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR03887:@@R>.

64. *Bill Summary & Status: H.R. 7311, 110th Cong.*, THE LIBRARY OF CONG. (2008), <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR07311:@@R>.

65. *Id.*

66. William Wilberforce Trafficking Victims Prot. Reauthorization Act of 2008, Pub. L. No. 110-457, § 225(b)(1), 122 Stat. 5044 (2008). Congress noted in the act, however, that “[n]othing in [it] . . . shall preempt, supplant, or limit the effect of any State or Federal criminal law.” *Id.* at § 225(a)(2).

67. *Id.* at § 237(c)(1)(C).

68. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 1241, 127 Stat. 54, 149-53 (2013) (containing the 2013 amendments to the 2005 TVPA).

TVPA to broadly define “sex trafficking” to include all prostitution, but to limit the criminal provisions and key operative provisions to actions involving “severe forms of trafficking in persons,” which includes “sex trafficking of minors” or sex trafficking induced by “force, fraud, or coercion.”⁶⁹ This distinction in federal law is consistent with the fact that domestic anti-trafficking laws are “rooted in the prohibition against slavery and involuntary servitude guaranteed by the Thirteenth Amendment to the United States Constitution.”⁷⁰ Because of the “vulnerability of minors, where minors are offered for commercial sex the statutes do not require proof of force, fraud, or coercion.”⁷¹

This distinction between treating prostituted minors as trafficking victims and requiring “force, fraud, or coercion” for treating adult prostitutes as trafficking victims is also present in state law. Although several states have yet to conform their anti-trafficking statutes to federal law by treating all prostituted minors as trafficking victims, regardless of the existence of force or coercion,⁷² most states that do distinguish between minors and adults do so only by removing the force or coercion requirement for minors.⁷³ Similarly, the model state trafficking laws proposed by the Polaris Project and Global Rights make a distinction between minors and adults with respect to requiring force or

69. See *supra* notes 36-40 and accompanying text.

70. *Human Trafficking Prosecution Unit*, THE U.S. DEP'T OF JUSTICE, <http://www.justice.gov/crt/about/crm/htpu.php> (last visited Apr. 6, 2014).

71. *Id.* However, there is an enhanced sentence under the federal sex trafficking statute for trafficking children under the age of fourteen or for when force, fraud, or coercion are used. 18 U.S.C. § 1591(b)(1) (2012).

72. ALA. CODE §§ 13A-6-152(a)(2), 13A-6-151(7) (2013); CONN. GEN. STAT. § 53a-192a (2013); HAW. REV. STAT. § 707-781 (West 2013); N.H. REV. STAT. ANN. § 633:7 (2013); N.Y. PENAL LAW § 230.34 (McKinney 2013); OHIO REV. CODE ANN. § 2905.32 (West 2013), 18 PA. CONS. STAT. ANN. § 3002 (West, 2013); S.C. CODE ANN. § 16-3-2010 (2013) (it appears that South Carolina may have tried to remove the force requirement for minors, but did not do so completely); S.D. CODIFIED LAWS § 22-49-1 (2013); UTAH CODE ANN. § 76-5-308 (West 2013); VA. CODE ANN. § 18.2-48 (2013).

73. ALASKA STAT. § 11.66.110 (2013); ARIZ. REV. STAT. ANN. § 13-1307(B) (2013); ARK. CODE ANN. § 5-18-103(a)(4) (2013); CAL. PENAL CODE § 236.1 (West 2013); COLO. REV. STAT. § 18-3-502 (2013) (while this statute does not require force, it does not clearly address sex trafficking); DEL. CODE ANN. tit. 11, § 787(b)(2) (2013); D.C. CODE § 22-1834 (2013); FLA. STAT. § 787.06(3)(g)-(h) (2013); GA. CODE ANN. § 16-5-46(c) (2013); IDAHO CODE ANN. § 18-8602 (2013); 720 ILL. COMP. STAT. 5/10-9 (2013) (force is not required for minors under the age of sixteen); IND. CODE § 35-42-3.5-1 (2013); IOWA CODE ANN. § 710A.1(4)(a)(2) (West 2013); KAN. STAT. ANN. § 21-5426(b)(4) (2013); KY. REV. STAT. ANN. §§ 529.010(5)(b), 529.100 (West 2013); LA. REV. STAT. ANN. § 14:46.3 (2013); ME. REV. STAT. tit. 17-A, § 852 (2013); MD. CODE ANN., CRIM. LAW § 11-303 (West 2013) (although this statute does not appear to require force for adults either); MASS. GEN. LAWS ANN. ch. 265, § 50 (West 2013) (although this statute does not appear to require force for adults either); MICH. COMP. LAWS ANN. § 750.462g (West 2013); MINN. STAT. ANN. § 609.322(1)(a) (West 2013) (although this statute does not appear to require force for adults either); MISS. CODE ANN. § 97-3-54.1(c) (2013); MO. REV. STAT. § 566.212 (2013); H.B. 478, 2013 Leg., 63rd Reg. Sess. (Mt. 2013); NEB. REV. STAT. § 28-831(2) (2013); NEV. REV. STAT. § 201.300(2)(a)(1) (2013); N.J. STAT. ANN. § 2C:13-8 (West 2013); N.M. STAT. ANN. § 30-52-1(A)(2) (West 2013); N.C. GEN. STAT. §§ 14-43.10, 14-43.11 (2013); N.D. CENT. CODE §§ 12.1-40-01, -02 (2013) (although this statute does not appear to require force for adults either); OKLA. STAT. tit. 21, § 748.2 (2013); OR. REV. STAT. § 163.266 (2013) (force is not required for minors under the age of fifteen); R.I. GEN. LAWS § 11-67-6 (2013); TENN. CODE ANN. § 39-13-309 (2013) (although this statute does not appear to require force for adults either); TEX. PENAL CODE ANN. § 20A.02 (West 2013); VT. STAT. ANN. tit. 13, § 2652 (2013); WASH. REV. CODE § 9A.40.100 (2013); W. VA. CODE § 61-2-17 (2013); WIS. STAT. § 948.051 (2013); WYO. STAT. ANN. §§ 6-2-702, 6-2-706 (2013).

coercion.⁷⁴ Likewise, under the Palermo Protocol, the “recruitment, transportation, transfer, harbouring or receipt of a child⁷⁵ for the purpose of exploitation”⁷⁶ falls under the definition of “trafficking in persons” even if the “threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person” is not present.⁷⁷

Despite early and persistent efforts to treat adult, non-coerced prostitution as sex trafficking, federal and state law, and international protocols, have consistently drawn a line between adult, non-coerced prostitution and sex trafficking. Federal and state law and international protocols, however, have recognized minors differently. Due to minors’ vulnerability, Congress and many states in their sex trafficking laws criminalize the prostitution of minors, regardless of the existence of force or coercion. Given this clear distinction, it is appropriate to limit any discussion about immunity from prosecution for prostitution to prostituted minors.

II. STATE IMMUNITY PROVISIONS FOR PROSTITUTED MINORS

A. The Need for an Immunity Provision

As Professor Wendi Adelson has explained, one of the TVPA’s key purposes was to “move away from a model of punishment for victims entirely.”⁷⁸ In recounting the TVPA’s legislative history, Professor Adelson noted that “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.”⁷⁹ For example, Representative Chris Smith, a leading voice in the House against human trafficking, stated that “[p]art 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.”⁸⁰

74. MODEL PROVISIONS OF COMPREHENSIVE STATE LEGISLATION TO COMBAT HUMAN TRAFFICKING (Polaris Project 2010), available at http://www.polarisproject.org/storage/documents/Final_Comprehensive_ModelLaw_8_2010.pdf; STATE MODEL LAW ON PROTECTION FOR VICTIMS OF HUMAN TRAFFICKING (Global Rights 2005), available at http://humantrafficking.unc.edu/files/2011/09/StateModelLaw_9.05.pdf.

75. U.N. Office on Drugs and Crime [UNODC], *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, art. 3(d), (2004)(available at <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCbook-e.pdf>) (defining “child” as “any person under eighteen years of age.”).

76. *Id.* at art. 3(c). “Exploitation,” according to the protocol, “shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.” *Id.* at art. 3(a).

77. *Id.* at arts. 3(a), (c). The Council of Europe Convention on Action Against Trafficking in Human Beings contains criminal provisions similar to the Palermo Protocol. Council of Europe Convention on Action Against Trafficking in Human Beings, May 16, 2005, 45 I.L.M. 12, 20-21, available at <http://www.conventions.coe.int/Treaty/EN/Treaties/Html/197.htm>.

78. Adelson, *supra* note 11, at 101.

79. *Id.*

80. *Id.* (quoting 146 CONG. REC. 7293 (2000) (statement of Rep. Smith)).

Although the TVPA does not contain a specific provision making minors immune from prosecution for prostitution, under the TVPA, “[v]ictims of severe forms of trafficking, while in the custody of the Federal Government and to the extent practicable shall not be detained in facilities inappropriate to their status as crime victims.”⁸¹ This language reflects the initial international focus of the TVPA, and is consistent with the fact that prostitution is typically prosecuted at the state and local level, and Congress, in enacting the TVPA, has been attentive to federalism and preemption concerns. Before the legislative discussions surrounding the TVPRA 2005, the TVPA’s focus was on international trafficking in persons, which included trafficking in foreign countries or the transportation into the United States of foreign nationals for forced labor or sexual servitude.⁸² Therefore, undocumented individuals found in the United States who were victims of trafficking were to be treated as victims, not as criminals. Furthermore, the TVPA provided a way for these individuals to gain legal immigration status.⁸³

During the lead up to the TVPRA 2005, legislators and anti-trafficking advocates began focusing on “domestic trafficking,” which one legislator defined as the trafficking of United States citizens or individuals already present in the United States.⁸⁴ Specifically, legislators and anti-trafficking advocates became concerned with the plight of prostituted minors, also known as domestic minor sex trafficking victims.⁸⁵ Under the TVPA’s broad criminal provisions, prostituted minors are trafficking victims.⁸⁶ However, as Representative Smith noted upon introducing the TVPRA 2005:

To date, U.S. victims of trafficking for sexual exploitation have been dismissed by the law enforcement community, particularly at the State and local levels, as prostitutes. Child victims are dealt with as juvenile delinquents. [The TVPRA 2005] would begin to shift the paradigm . . . to view these exploited souls for what they really are—victims of crime and sexually exploited children.⁸⁷

Since the TVPRA 2005, prostituted minors have increasingly been recognized as trafficking victims by lawmakers and anti-trafficking advocates. Both the 2008 and the 2013 reauthorizations of the TVPA contained specific provisions designed to protect and restore prostituted minors.⁸⁸ Additionally, several anti-trafficking advocacy groups have focused on treating prostituted minors as victims. For example, anti-trafficking advocate Shared Hope

81. Trafficking Victims Protection Act of 2000 (TVPA), 22 U.S.C. § 7105(c)(1)(A) (2012).

82. See Dysart, *supra* note 41, at 622-29, for a discussion of the initial international focus of the TVPA and the increasing focus on U.S. citizen victims in 2005.

83. 8 U.S.C. § 1101(a)(15)(T) (2012).

84. Dysart, *supra* note 41, at 624-25.

85. *Id.* at 619, 624-25.

86. See TVPA § 112(a)(2), 18 U.S.C. § 1591; see also *Child Exploitation & Obscenity Section*, U.S. DEP’T OF JUST., <http://www.justice.gov/criminal/ceos/subjectareas/prostitution.html> (last visited Feb. 14, 2014) (stating that “[c]hildren involved in this form of commercial sexual exploitation are victims” and “[a] number of different phrases are used to describe the prostitution of children, including sex trafficking, a severe form of human trafficking, or the commercial sexual exploitation of children.”).

87. 151 CONG. REC. E270 (daily ed. Feb. 17, 2005) (statement of Rep. Chris Smith).

88. Dysart, *supra* note 41, at 627-28; see also notes 104-07 and accompanying text.

International, in conjunction with the American Center for Law & Justice (ACLJ), established the Protected Innocence Initiative, which was designed to “set[] out the basic policy principles required to create a safer environment for children”⁸⁹ and engage in a detailed analysis of state law on minor sex trafficking and related issues to ensure that prostituted children are treated as victims, not criminals, under state law.⁹⁰ In fact, two of the specific components that Shared Hope and ACLJ examined in the Protected Innocence Initiative were, first, whether the state laws mirrored federal law in criminalizing sex trafficking of minors without the use of force, fraud, or coercion, and second, whether the state laws made minors immune from prosecution for prostitution.⁹¹

Although many lawmakers and anti-trafficking advocates believe that prostituted minors are victims of trafficking, and, as will be discussed below, many states criminalize the prostitution of minors as trafficking, minors are still being arrested for prostitution. In 2012, according to the FBI’s Uniform Crime Reports, 616 minors, including 46 children under the age of fifteen, were arrested for prostitution or commercialized vice.⁹² In 2011, 763 minors, including 70 under the age of fifteen, were arrested for prostitution or commercialized vice.⁹³ In 2000, the year the TVPA was passed, with fewer jurisdictions reporting numbers to the FBI, 924 minors were arrested for prostitution, including 120 under the age of fifteen.⁹⁴ These numbers show that, despite the TVPA’s victim-centered approach and the growing awareness that prostituted minors are victims rather than criminals,⁹⁵ prostituted minors are still being arrested.

The fact that minors are still being arrested for prostitution underlines the need for a provision that makes minors immune from prosecution for prostitution. Under federal law, and under most states’ laws, the commercial

89. Shared Hope Int’l, *Protected Innocence Legislative Framework: Methodology* (2011), http://sharedhope.org/wp-content/uploads/2012/09/SHI_ProtectedInnocence_Methodology_FINAL.pdf; SHARED HOPE INT’L, *supra* note 11, at 1.

90. *See generally* SHARED HOPE INT’L, *supra* note 11.

91. *Id.* at 4, 6. Shared Hope and ACLJ’s initial research found that, at that time, “of the states that had human trafficking laws, eighteen still required the state to show some form of force, fraud, or coercion for sex trafficking, even when the victim was a minor.” Dysart, *supra* note 41, at 648 (citations omitted). Furthermore, their research found only one state that made all minors immune from prosecution for prostitution, two other states that offered immunity to young minors, and twelve states that provided either minors, or all trafficking victims, some sort of a defense. *Id.* at 676-77.

92. FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2012, TABLE 38 (2013), *available at* <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/38tabledatadecoverviewpdf>. Of that number, approximately 136 of those arrested were male and 443 were female, meaning that it is likely that the majority of the arrests were for the prostituted minor and not those soliciting a prostitute. FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2012, TABLE 37 (2013), *available at* <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/37tabledatadecoverviewpdf>.

93. FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2011, TABLE 38 (2012), *available at* <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-38>.

94. FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2000, SECTION IV 226 (2001), *available at* <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2000/00sec4.pdf>.

95. *See* Dysart, *supra* note 41, at 684-94 (discussing the advancements in state law providing for greater treatment and protection of prostituted children as victims, not criminals).

sexual exploitation of a minor, including the prostitution of a minor, constitutes sex trafficking.⁹⁶ To hold minors criminally liable for the very action that makes them a victim—the prostitution—contradicts the principles that underlie the victim-centered approach that the federal government and states have put into their anti-trafficking efforts. The federal government’s approach to combating trafficking follows the formerly “3P,” now “4P,”⁹⁷ framework—prevention, protection, and prosecution—which has been “used by governments around the world to combat human trafficking” and is reflected in both the TVPA and the Palermo Protocol.⁹⁸ According to the United States Department of State, the “protection” prong “is key to the victim-centered approach the United States and the international community pursues in efforts to combat modern slavery.”⁹⁹ The protection prong has three subparts—“rescue, rehabilitation, and reintegration.”¹⁰⁰ As part of this process, the State Department notes that “governments need to enable identified trafficking victims to remain in the country, work, and obtain services without fear of detention or deportation for lack of legal status or crimes that the trafficker made them commit.”¹⁰¹

While the State Department’s focus, much like the TVPA’s early focus as discussed above, is on international trafficking, the same principles apply to domestic victims, especially child victims, as proven by Congress’s reauthorization of the TVPA, which created specific programs to restore child victims. In the TVPRA 2005, under the title heading “combatting domestic trafficking in persons,” Congress directed the creation of a pilot program to “establish residential treatment facilities in the United States for juveniles subjected to trafficking.”¹⁰² The purposes of the program included “provid[ing] benefits and services to juveniles subjected to trafficking, including shelter, psychological counseling, and assistance in developing independent living skills.”¹⁰³ In the TVPA’s most recent reauthorization, Congress amended a provision in the TVPRA 2005, which had established a grant program for states, local governments, Indian tribes, and non-profits “to establish, develop, expand, and strengthen assistance programs for United States citizens or aliens admitted for permanent residence who are the subject of sex trafficking or severe forms of trafficking in persons that occurs, in whole or in part, within the territorial jurisdiction of the United States.”¹⁰⁴ The new provision, under the section heading “assistance for domestic minor sex trafficking victims,” created a grant

96. Trafficking Victims Protection Act of 2000, 18 U.S.C. § 1591 (2012); *see also* note 73 and accompanying text.

97. In 2009, then-Secretary of State Hillary Rodham Clinton added a fourth “P” to the paradigm—partnership. *Partnerships*, U.S. DEP’T OF ST., <http://www.state.gov/j/tip/4p/partner/> (last visited Feb. 14, 2014).

98. OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, THE 3PS: PREVENTION, PROTECTION, PROSECUTION, 1 (2011) *available at* <http://www.state.gov/documents/organization/167334.pdf>.

99. *Id.*

100. *Id.*

101. *Id.*

102. Trafficking Victims Protection Reauthorization Act of 2005 § 203(a), 42 U.S.C. § 14044b(a) (2012).

103. *Id.* § 203(b)(1), 42 U.S.C. § 114044b(b)(1).

104. *Id.* § 202(a), 42 U.S.C. § 14044a (2012).

program for state and local governments to assist in state and local efforts to combat sex trafficking of minors.¹⁰⁵ At least 67 percent of the grant funds “shall be used . . . to provide residential care and services . . . to minor victims of sex trafficking through qualified non-governmental organizations.”¹⁰⁶ The authorized services include:

- (i) providing residential care to minor victims of sex trafficking, including temporary or long-term placement as appropriate; (ii) providing 24-hour emergency social services response for minor victims of sex trafficking; (iii) providing minor victims of sex trafficking with clothing and other daily necessities needed to keep such victims from returning to living on the street; (iv) case management services for minor victims of sex trafficking; (v) mental health counseling for minor victims of sex trafficking, including specialized counseling and substance abuse treatment; (vi) legal services for minor victims of sex trafficking; . . . (viii) outreach and education programs to provide information about deterrence and prevention of sex trafficking of minors; . . . and (x) screening and referral of minor victims of severe forms of trafficking in persons.¹⁰⁷

Some states also provide protective provisions for minor sex trafficking victims. For example, a recent Arkansas law directs the Department of Human Services to “develop a statewide referral protocol for helping to coordinate the delivery of services to sexually exploited children,” which is defined to include children under the age of eighteen who engage in prostitution.¹⁰⁸ Additionally, the law that was passed adding this section of the code contained several non-codified statements of legislative intent and findings that recognized the need to remove sexually exploited children from the criminal justice system and provide them with child welfare services.¹⁰⁹ Similarly, although not minor specific,

105. Violence Against Women Reauthorization Act of 2013 § 1241, 42 U.S.C. § 14044a (2012). To be eligible for a grant, the state or local government must have, among other things, “developed a workable, multi-disciplinary plan to combat sex trafficking of minors,” which includes (1) “building or establishing a residential care facility for minor sex trafficking victims,” (2) providing the victims rehabilitative care, (3) providing specialized training on sex trafficking and sex trafficking of minors for law enforcement and service providers, (4) “prevent[ing], deter[ing], and prosecute[ing] . . . offenses involving sex trafficking of minors,” (5) cooperating with organizations that provide services and outreach to runaway and homeless youth, and (6) having “law enforcement protocols or procedures to screen all individuals arrested for prostitution, whether adult or minor, for victimization by sex trafficking and by other crimes, such as sexual assault and domestic violence.” *Id.* § 14044a(a)(3)(C). Additionally, entities must “provide[] assurance that a minor victim of sex trafficking shall not be required to collaborate with law enforcement to have access to residential care or services provided with a grant under this section.” *Id.* § 14044a(a)(3)(D).

106. *Id.* § 14044a(b)(2)(A).

107. *Id.* § 14044a(b)(2)(B).

108. ARK. CODE ANN. § 9-27-323(k)(1) (West 2014).

109. S.B. 869, 89th Gen. Assemb., Gen. Sess., 2013 Ark. Acts 1257. The legislative findings in section 1 of the act note that (1) “[t]he criminal justice system is not the appropriate place for sexually exploited children because it serves to retraumatize them and to increase their feelings of low self-esteem”; (2) that federal and international law recognize that these children are crime victims and should be treated accordingly; (3) that these children should be directed into services outside of the criminal justice system that meet their needs; and (4) that these children “deserve the protection of child welfare services, including diversion, crisis intervention, counseling, and emergency housing services.” *Id.* Under the legislative intent in section 2, the act is designed to “to protect a child from further victimization after the child is discovered to be a sexually exploited child by ensuring that a

Connecticut law directs the Office of Victim Services to work with the state Judicial Department to “contract with nongovernmental organizations to develop a coordinated response system to assist victims of the offense of trafficking in persons.”¹¹⁰ Under Missouri law, as soon as a law enforcement agency comes into contact with “a person who reasonably appears . . . to be a victim of trafficking” as defined by state law, the agency is directed to notify the department of social services or the juvenile justice officers to determine if the victim is eligible for services.¹¹¹ Furthermore, the Department of Social Services is permitted to coordinate services with other state, federal, and local agencies, and the state may contract with nongovernmental organizations to provide services to victims, including temporary housing, health care, and counseling.¹¹² Oklahoma law sets out guidelines for how human trafficking victims should be treated, including a provision that directs law enforcement officers to report minor victims of trafficking or sexual abuse to the Department of Human Services.¹¹³ Pennsylvania law directs the Pennsylvania Commission on Crime and Delinquency to consult with governmental and non-governmental entities to develop a plan to provide trafficking victims with services, including counseling and medical care.¹¹⁴ These laws are just a few examples of state provisions that set up protective regimes for trafficking victims.

Other states expressly define trafficked children as victims for the purposes of victims’ rights or for the state’s child abuse statutes. For example, under the chapter in Iowa’s code for “victim rights,” the term “victim” is defined as “a minor under the age of eighteen who has been sexually abused or subjected to any other unlawful sexual conduct under chapter 709 [the chapter on sexual abuse], 710A [the chapter on human trafficking], or 726 [the chapter on protection of the family and dependent persons] or who has been the subject of a forcible felony.”¹¹⁵ These victims may receive medical and mental health services.¹¹⁶ Under Louisiana’s chapter on “rights of crime victims and witnesses,” the term “crime victim who is a minor” is defined to include minors under the age of eighteen against whom the felony offense of sex trafficking has been committed.¹¹⁷ Mississippi’s code defines “abused child” to include “a child whose parent, guardian or custodian or any person responsible for his care or support, whether legally obligated to do so or not, has caused or allowed to be caused, upon the child, sexual abuse, sexual exploitation, . . . or other maltreatment.”¹¹⁸ “Sexual abuse” is defined to include “prostitution.”¹¹⁹

child protective response is in place in the state.” *Id.* This is accomplished by presuming that prostituted children are sex trafficking victims and providing them with the necessary services, related to their distinct needs. *Id.*

110. CONN. GEN. STAT. § 54-234(a) (West 2014).

111. MO. ANN. STAT. § 566.223(4) (West 2014).

112. *Id.* § 566.223(5).

113. OKLA. STAT. ANN. tit. 21, § 748.2(E) (West 2014).

114. 43 PA. STAT. ANN. § 1499(a) (West 2014).

115. IOWA CODE ANN. § 915.35(1) (West 2014).

116. *Id.* § 915.35(2).

117. LA. REV. STAT. ANN. §§ 46:1842(1.1)(a), 14:2(B)(42) (2014).

118. MISS. CODE ANN. § 43-21-105(m) (West 2014).

119. *Id.* § 43-21-105(n). Other states also include commercial sexual exploitation in their

Additionally, several states, including New York, Florida, Kansas, Illinois, Nebraska, and Massachusetts have passed so-called “Safe Harbor” laws that provide a protective response to sex trafficked minors.¹²⁰

Holding minor sex trafficking victims criminally liable for prostitution is contrary to the policy interest advanced by the extensive federal and state legal regimes that protect such victims. In *Gebardi v. United States*, the Supreme Court considered whether a woman who willingly traveled with a man in interstate commerce for the purpose of engaging in sexual intercourse could be prosecuted for conspiracy to violate the Mann Act.¹²¹ With respect to prosecuting her for a substantive offense under the Mann Act, the Court found that “[t]he penalties of the statute are too clearly directed against the acts of the transporter as distinguished from the consent of the subject of the transportation.”¹²² Concerning the conspiracy charge, the Court said,

[W]e perceive in the failure of the Mann Act to condemn the woman’s participation in those transportations which are effected with her mere consent, evidence of an affirmative legislative policy to leave her acquiescence unpunished. We think it a necessary implication of that policy that when the Mann Act and the conspiracy statute came to be construed together, as they necessarily would be, the same participation which the former contemplates as an inseparable incident of all cases in which the woman is a voluntary agent at all, but does not punish, was not automatically to be made punishable under the latter. It would contravene that policy to hold that the very passage of the Mann Act effected a withdrawal by the conspiracy statute of that immunity which the Mann Act itself confers.¹²³

The Court based its decision in *Gebardi*, in part, on the principle set out in *Queen v. Tyrrell*, in which Lord Coleridge, in addressing whether a minor could be convicted for aiding and inciting a man to commit the crime of unlawful carnal knowledge of a minor between the ages of thirteen and sixteen with her.¹²⁴ In reversing the conviction, Lord Coleridge stated, “it is impossible to say that the Act, which is absolutely silent about aiding or abetting, or soliciting or inciting, can have intended that the girls for whose protection it was passed should be punishable under it for the offences committed upon themselves.”¹²⁵ While these two examples are not precisely analogous to prosecuting minors for prostitution, the same principles apply. Congress and many state legislatures have specifically made the prostitution of minors a crime and have developed protective regimes to assist prostituted minors. In some instances, prosecuting a

definition of abuse, child abuse, or sexual abuse. See, e.g. ALA. CODE §§ 12-15-301(2), (12) (2014); IDAHO CODE ANN. § 16-1602(1)(b) (West 2014).

120. Megan Annitto, *Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors*, 30 YALE L. & POL’Y REV. 1, 45 (2011); POLARIS PROJECT, 2013 ANALYSIS OF STATE HUMAN TRAFFICKING LAWS: SAFE HARBOR – PROTECTING SEXUALLY EXPLOITED MINORS 2-4 (2013), available at <http://www.polarisproject.org/storage/2013-Analysis-Category-6-Safe-Harbor.pdf>; see also *infra* notes 198-217 and accompanying text.

121. *Gebardi v. United States*, 287 U.S. 112, 115 (1932).

122. *Id.* at 119.

123. *Id.* at 123.

124. *Id.* at 123; *Queen v. Tyrrell*, 1 Q.B. 710 (1893).

125. *Tyrrell*, 1 Q.B. at 712.

victim for prostitution could prohibit that victim from accessing state crime victim assistance funds.¹²⁶ Holding these minors criminally liable for the underlying activity that makes them victims is contrary to the policy embodied in the federal and state anti-trafficking laws.

Other scholars have noted the problem of prostituted minors being treated as criminals rather than victims.¹²⁷ Scholars have pointed out that prosecuting minors for prostitution can be inconsistent with other state laws, such as statutory rape laws.¹²⁸ Professor Adelson has noted that “[i]t is logically inconsistent that minors of a certain age are incapable of consenting to sex, but that they simultaneously can be punished for prostitution.”¹²⁹ Professor Megan Annitto has called the “[p]rosecution of youth for prostitution . . . not legally coherent, and . . . inconsistent with best practices developed under federal law.”¹³⁰ She also has explained that it is the FBI’s position “that ‘children can never consent to prostitution. It is always exploitation.’”¹³¹ Professor Birkhead has argued that “at a minimum—criminal liability for prostitution should be consistent with each state’s statutory rape and age of consent laws.”¹³² Furthermore, prosecuting minors for prostitution shifts the focus away from the greater harm of commercial sexual exploitation of children. Darren Geist has argued that prosecuting prostituted children is unjust and counter-productive and that it “hinders law enforcement efforts to go after the real criminals—the pimps and the johns, and misses an important opportunity to rescue minors from

126. Adelson, *supra* note 11, at 121–22; SHARED HOPE METHODOLOGY, *supra* note 11, at 8. For example, under Idaho’s victim compensation statutes, claims for compensation must be filed within one year and the crime must be reported within 72 hours; however both of these requirements have a “good cause” exception. IDAHO CODE ANN. § 72-1016(1), (3). Additionally, claimants must cooperate with law enforcement and imprisoned persons are not eligible for compensation. IDAHO CODE ANN. § 72-1016(4), (6). Under Indiana’s law, “benefits may not be awarded” if, among other things “the victim sustained the injury as a result of participating or assisting in, or attempting to commit or committing a criminal act” or “if the victim profited or would have profited from the criminal act.” IND. CODE ANN. § 5-2-6.1-13(a)(1), (3). However, “[i]f the victim is a dependent child or dependent parent of the person who commits a violent crime, compensation may be awarded where justice requires.” IND. CODE ANN. § 5-2-6.1-13(b). Under Maine’s crime victim compensation statutes, failure to cooperate with law enforcement of violating a criminal law “that caused or contributed to the injury or death for which compensation is sought” serve as ineligibility factors. ME. REV. STAT. tit. 5, § 3360-C(2). Similarly, in Maryland “[a] person who commits the crime or delinquent act that is the basis of a claim, or an accomplice of the person, is not eligible to receive an award with respect to the claim.” MD CRIM. PROC. § 11-808(a)(2).

127. Several student notes have also touched on aspects of making minors immune from prosecution for prostitution. See Susan Crile, *A Minor Conflict: Why the Objectives of Federal Sex Trafficking Legislation Preempt the Enforcement of State Prostitution Laws Against Minors*, 61 Am. U. L. Rev. 1783 (2012); Krystle M. Fernandez, *Victims or Criminals? The Intricacies of Dealing with Juvenile Victims of Sex Trafficking and Why the Distinction Matters*, 45 Ariz. St. L. J. 859 (2013); Tanya Mir, *Trick or Treat: Why Minors Engaged in Prostitution Should Be Treated As Victims, Not Criminals*, 51 Fam. Ct. Rev. 163 (2013).

128. See, e.g., Adelson, *supra* note 11, at 108.

129. *Id.*

130. Annitto, *supra* note 120, at 6.

131. *Id.* at 43.

132. Tamar R. Birkhead, *The “Youngest Profession”: Consent, Autonomy, and Prostituted Children*, 88 Wash. U. L. Rev. 1055, 1066 (2011).

a system of commercial sexual exploitation."¹³³

133. Darren Geist, *Finding Safe Harbor: Protection, Prosecution, and State Strategies to Address Prostituted Minors*, 4 LEGIS. POL'Y BRIEF 67, 70 (2012). An important value in our criminal justice system and in our entire system of law is justice. 1 HENRICI DE BRACON, DE LIGIBUS ET CONSUETUDINIBUS ANGLIAE [THE LAWS AND CUSTOMS OF ENGLAND] 13, 15, 17 (Longman & Company 1878), available at http://books.google.com/books?id=olXSAAAAMAAJ&pg=PR18&lpq=PR18&dq=henrici+de+bracton&source=bl&ots=Xat68yST_B&sig=ZuSx5Y7F-KPVeOI7WEwCsQbTtA&hl=en&sa=X&ei=8b-fUorUAsm2qQGt64DICg&ved=0CF8Q6AEwBQ#v=onepage&q&f=false. Historically, however, anti-prostitution efforts have focused on prosecuting the prostitute, rather than her customers. The approach of holding women liable for unlawful sexual activity even dates back to biblical times. See, e.g., Genesis 39:24 (NIV) ("about three months later Judah was told, 'Your daughter-in-law Tamar is guilty of prostitution, and as a result she is now pregnant.' Judah said, 'Bring her out and have her burned to death!'); John 8 (recording the story of the woman caught in adultery who was brought before Jesus, but the man was not). In Michigan, a woman charged with keeping a place of prostitution and prostitution is challenging the charges on equal protection grounds, arguing that "the discrepancy in prosecuting both genders in prostitution-related cases . . . violates the . . . [Fourteenth] Amendment." Ariel Cheung, *Women Charged More Often than Men in Fox Cities Prostitution Cases*, GREENBAYPRESSGAZETTE.COM (Nov. 4, 2013, 6:57 AM), <http://www.greenbaypressgazette.com/article/20131103/GPG0101/311030315/?gcheck=1>. In her town in Michigan, 48 of the 129 women arrested for prostitution have been criminally charged, while only 11 of the 158 men have faced charges, and of that number, "all but one of them were charged as pimps, solicitors or male prostitutes—rather than customers." *Id.* In Nassau County, New York, the district attorney has started prosecuting "johns" after traditionally focusing enforcement efforts on prostitutes. Joe Dowd, *D.A. Announces Prostitution Sting Aimed at Johns*, PLAINVIEWPATCH.COM (June 3, 2013, 2:15 PM), http://plainview.patch.com/groups/police-and-fire/p/da-announces-prostitution-sting-aimed-at-johns_792582a4. The district attorney's office noted that in the past ten years, less than 40 "johns" had been arrested. *Id.* The FBI's Uniform Crime Reports arrest data tell a similar story. In 2003, nearly twice as many women were arrested than men for prostitution and commercialized vice. FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2012, TABLE 33 (2013), available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/33tabledatacoveroverviewpdf>. According to the tables, 16,382 men were arrested for commercialized vice and prostitution in 2003. *Id.* It is unclear how many of these men were arrested as customers as opposed to pimps. During the same time 32,131 women were arrested for commercialized vice and prostitution. *Id.* In 2012, more than twice as many women were arrested than men for prostitution and commercialized vice. *Id.* According to the tables, 24,954 women as opposed to 11,977 men were arrested for prostitution and commercialized vice. *Id.* However, not all cities arrest more women than men for prostitution offenses. See MICHAEL SHIVELY, ET. AL., A NATIONAL OVERVIEW OF PROSTITUTION AND SEX TRAFFICKING DEMAND REDUCTION EFFORTS, FINAL REPORT 41, 42 tbl.39, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/238796.pdf> (recounting several sample cities that have arrested more "johns" than women and girls for prostitution); see also Astrid Galvan, 'Johns' Seldom Prosecuted, Albuquerque Journal News (Aug. 14, 2011), available at <http://www.abqjournal.com/50091/news/johns-seldom-prosecuted.html> (noting that as of mid-July 2011, "104 johns cases and 66 cases of prostitution had gone through Metro Court" in Albuquerque, New Mexico). However, increasing awareness of how the demand for commercial sex fuels sex trafficking, and other factors, may be moving the trend towards targeting the "johns" rather than the prostitutes. See Larry Neumeister, *Public Shaming of Prostitution Clients A Growing Trend, Can Harm Families*, HUFFINGTON POST (Oct. 13, 2012), available at http://www.huffingtonpost.com/2012/10/14/shaming-prostitute-patrons-johns-public_n_1964925.html ("Interviews and surveys of officers at 200 police departments nationwide since 2008 found most consider targeting customers the best way to curb prostitution, because they fear publicity about the charges more than fines or even jail time. It continues a long-developing trend away from prosecuting the 'supply' side—the prostitutes themselves—and targeting the demand."); Kyle Nagel, *Cops Focusing More on "Johns" in Prostitution Busts*, Dayton Daily News (Aug. 21, 2012), available at <http://www.daytondailynews.com/news/news/cops-focusing-more-on-johns-in-prostitution-busts/nRGxG/> (noting that Dayton and Cincinnati, Ohio police are increasingly focusing on arresting customers of prostitutes after years of arresting the prostitutes); Jeb Phillips, *Police Jailing "Johns" to Fight Prostitution*, The Columbus

Therefore, some states have made it clear in their statutes that minors should not be prosecuted for prostitution, and the remaining states should follow by example and enact similar provisions.

B. The Status of State Immunity Provisions

One way to ensure immunity for prostituted minors would be to provide immunity at the federal level. In fact, it has been argued that federal law preempts states from enforcing prostitution laws against minors.¹³⁴ But prostitution prosecutions traditionally have been handled at the state and local level. The Supreme Court recognized in *Keller v. United States* that “[j]urisdiction over [the offense of keeping a house of ill-fame] comes within the accepted definition of the police power. Speaking generally, that power is reserved to the states, for there is in the Constitution no grant thereof to Congress.”¹³⁵ In fact, one of the complaints about the Mann Act in Congress was that it was “an attempt to exercise police power authority by the General Government over those things subject only to the police authority of the States.”¹³⁶

While the federal government, under the Thirteenth Amendment, certainly has a role to play in combatting sex trafficking, it is inconceivable to think that the federal government is best situated to eradicate trafficking in the United States. Rather, that role is best played by federal, state, and local governments working together. In fact, the federal government in the TVPA and its reauthorizations “envisioned a role for state and local governments to prosecute sex traffickers and restore victims.”¹³⁷ For example, as discussed above, the most recent reauthorization of the TVPA contained a section amending a grant program in the TVPRA 2005 to provide grants to state or local governments to “combat sex trafficking of minors.”¹³⁸ State and local government involvement is

Dispatch (July 25, 2013), available at <http://www.dispatch.com/content/stories/local/2013/07/25/police-jailing-johns-to-fight-prostitution.html> (“The vice squad of the Columbus Police Division announced yesterday that it is changing the way it fights prostitution. For decades, the primary strategy has been to arrest prostitutes themselves, Lt. Mark Lang said. But a month focused on arresting prostitution customers has helped convince police that an ‘end demand’ approach—which has gained favor among some in Illinois, New York and internationally—could work here, too.”); Keegan Kyle, *D.A. Adopts ‘Shaming’ Tactic to Fight Prostitution*, Orange County Register (April 29, 2013), available at <http://www.ocregister.com/articles/prostitution-506274-sex-customers.html> (noting that the Orange County, California, district attorney is increasingly focusing on customers of prostitutes and that this effort “marks a significant shift in local law-enforcement strategy to address prostitution,” and that in 2011, “about 75 percent of prostitution-related arrests in the county were of women”).

134. Crile, *supra* note 127, at 1783. *But see* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 225, 122 Stat. 5044 (2008). (“RELATIONSHIP AMONG FEDERAL AND STATE LAW—Nothing in this Act, the Trafficking Victims Protection Act of 2000, the Trafficking Victims Protection Reauthorization Act of 2003, the Trafficking Victims Protection Reauthorization Act of 2005, chapters 77 and 117 of title 18, United States Code, or any model law issued by the Department of Justice to carry out the purposes of any of the aforementioned statutes—. . . (2) shall preempt, supplant, or limit the effect of any State or Federal criminal law.”).

135. *Keller v. United States*, 213 U.S. 138, 143 (1909).

136. H.R. REP. NO. 61-47 at 1; White-Slave Traffic (Mann) Act, (minority views).

137. Dysart, *supra* note 41, at 629.

138. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 1241, 127 Stat. 54,

important because the federal government has limited resources and is unable to prosecute all trafficking cases.¹³⁹ This is one of the reasons that Shared Hope and ACLJ focused the Protected Innocence Initiative on state law. Furthermore, in the course of their daily activities, state and local law enforcement are more likely to come into contact with prostituted minors than are federal law enforcement officials.¹⁴⁰ Enacting immunity provisions for prostituted minors, therefore, would be most effective at the state level.

As of December 2013, thirty-nine states had enacted trafficking laws that were similar to federal law and did not require a showing of force or coercion for minor victims,¹⁴¹ although two of the states only removed the force requirement for younger minors.¹⁴² However, only twenty-nine or thirty states, depending on how one counts, offered some form of legislatively enacted immunity or affirmative defense provisions.¹⁴³ Illinois, Kentucky, North Carolina, and Tennessee have the most protective provisions, which provide immunity to prostituted minors, regardless of the minor's age.¹⁴⁴ Louisiana and Mississippi

149-53 (2013).

139. Dysart, *supra* note 41, at 629-30.

140. *Id.* at 630-31.

141. See *supra* notes 72-73 and accompanying text.

142. 720 ILL. COMP. STAT. 5/10-9 (2013) (force is not required for minors under the age of sixteen); OR. REV. STAT. § 163.266 (2013) (force is not required for minors under the age of fifteen). AO 12

143. ALA. CODE § 13A-6-159 (2013); ARK. CODE ANN. § 5-70-102(c), 5-7-103(c) (West 2013); CONN. GEN. STAT. ANN. § 53a-82 (West 2013); GA. CODE ANN. § 16-3-6 (West 2013); 720 ILL. COMP. STAT. ANN. 5/11-14 (West 2013); IOWA CODE ANN. § 710A.3 (West 2013); KAN. STAT. ANN. § 21-6419 (West 2013); KY. REV. STAT. ANN. § 529.120 (West 2013); LA. REV. STAT. ANN. § 14:82(g), 14.46.3(E) (West 2013); MASS. GEN. LAWS ANN. ch. 265, § 57 (West 2013); MICH. COMP. LAWS ANN. § 750.448 (West 2013); MINN. STAT. § 260B.007 (West 2013); MISS. CODE ANN. § 97-3-54.1(4), (5) (West 2013); MO. ANN. STAT. § 566.223 (West 2013); NEB. REV. STAT. § 28-501(5) (2013); N.H. REV. STAT. ANN. § 645:2 (2013); N.J. STAT. ANN. § 2C:13-8(c) (West 2013); N.Y. FAM. CT. LAW § 311.4 (McKinney 2013); N.C. Gen. Stat. Ann. § 14-204 (West 2013); HB 262, 129th Gen. Assembly (Ohio, 2012) *available at*, http://www.legislature.state.oh.us/bills.cfm?ID=129_HB_262 (Ohio has a diversion program that permits, under certain circumstances, the charges to be dropped); HB 1067, 2012-13 Gen. Assembly (Okla 2013); OR. REV. STAT. § 163.269 (West 2013); R.I. GEN LAWS ANN. § 11-34.1-2 (West 2013); S.C. CODE ANN. 16-3-2020(J) (West 2013); S.D. CODIFIED LAWS § 22-23-1(2013); Tenn. Code Ann. § 39-13-513(d) (West 2013); TEX. PENAL CODE ANN. § 43.02(d) (West 2013) (given the Texas Supreme Court's decision in *In re B.W.*, it is also presumed that minors under the age of fourteen are immune from prosecution for prostitution); VT. STAT. ANN. tit. 13, § 2652 (2013); WASH. R. CODE ANN. § 9A.88.040 (West 2013); WYO. STAT. ANN. § 6-4-101 (West 2013).

144. 720 ILL. COMP. STAT. ANN. 5/11-14 (West 2013) ("Notwithstanding the foregoing, if it is determined, after a reasonable detention for investigative purposes, that a person suspected of or charged with a violation of this Section [prostitution] is a person under the age of 18, that person shall be immune from prosecution for a prostitution offense under this Section . . ."); KY. REV. STAT. ANN. § 529.120 (West 2013) ("if it is determined after a reasonable period of custody for investigative purposes, that the person suspected of prostitution or loitering for prostitution is under the age of eighteen (18), then the minor shall not be prosecuted for an offense under" the prostitution or loitering for prostitution purposes statutes); N.C. GEN. STAT. ANN. § 14-204 (West 2013) ("Notwithstanding any other provision of this section, if it is determined, after a reasonable detention for investigative purposes, that a person suspected of or charged with a violation of this section is a minor, that person shall be immune from prosecution under this section and instead shall be taken into temporary protective custody as an undisciplined juvenile pursuant . . ."); TENN. CODE ANN. § 39-13-513(d) (West 2013) ("Notwithstanding any provision of this section to the contrary, if it is determined after a reasonable detention for investigative purposes, that a person suspected of or charged with a violation of this section is under eighteen (18) years of age, that person shall be

also have immunity provisions, but they are tied to the child being deemed a trafficking victim.¹⁴⁵ Wyoming also appears to tie its immunity provision to the trafficking statutes.¹⁴⁶ Minnesota has a protective immunity provision, but it is tied to the state's juvenile code.¹⁴⁷ Conversely, Nebraska provides for immunity in the criminal code, but not the juvenile code.¹⁴⁸ Vermont has a complicated immunity provision that provides full immunity to sex trafficking victims and criminal law immunity, but not juvenile code immunity, to prostituted children.¹⁴⁹ Connecticut and Michigan both provide immunity to prostituted minors under the age of sixteen.¹⁵⁰ In Connecticut, there is also a presumption in prostitution prosecutions involving minors age sixteen or seventeen "that the actor was a victim of conduct by another person that constitutes (1) a violation of section 53a-192a [Connecticut's trafficking law, which requires force], as amended by this act, or (2) a criminal violation of 18 USC Chapter 77 [the federal trafficking statutes], as amended from time to time."¹⁵¹ Also, under Connecticut's prostitution statute, a victim of the state trafficking statute or the federal trafficking statutes may assert an affirmative defense to a prostitution

immune from prosecution for prostitution as a juvenile or adult.").

145. LA. REV. STAT. ANN. § 14.46.3(E) (West 2013); ("No victim of trafficking as defined by the provisions of this Section shall be prosecuted for unlawful acts committed as a direct result of being trafficked."); MISS. CODE ANN. § 97-3-54.1(4), (5) (West 2013) ("A minor who has been identified as a victim of trafficking shall not be liable for criminal activity in violation of this section.")

146. WYO. STAT. ANN. § 6-4-101 (West 2013). ("Except as provided in W.S. 6-2-701 through 6-2-710 [the human trafficking statute], a person who knowingly or intentionally performs or permits, or offers or agrees to perform or permit an act of sexual intrusion . . . for money or other property commits prostitution which is a misdemeanor punishable by imprisonment for not more than six (6) months, a fine of not more than seven hundred fifty dollars (\$750.00), or both.")

147. MINN. STAT. § 260B.007 (West 2013) ("The term delinquent child does not include a child alleged to have engaged in conduct which would, if committed by an adult, violate any federal, state, or local law relating to being hired, offering to be hired, or agreeing to be hired by another individual to engage in sexual penetration or sexual conduct.").

148. NEB. REV. STAT. ANN. § 28-801(5) (West 2013) ("If the law enforcement officer determines, after a reasonable detention for investigative purposes, that a person suspected of or charged with a violation of subsection (1) of this section [prostitution] is a person under eighteen years of age, such person shall be immune from prosecution for a prostitution offense under this section and shall be subject to temporary custody under section 43-248 [temporary custody of juvenile without warrant] and further disposition under the Nebraska Juvenile Code. . . .")

149. VT. STAT. ANN. tit. 13, § 2652 (2013) ("A person who is a victim of sex trafficking in violation of subdivisions 2652(a)(1)-(4) of this title shall not be found in violation of or be the subject of a delinquency petition based on chapter 59 (lewdness and prostitution) or 63 (obscenity) of this title for any conduct committed as a victim of sex trafficking."); § 2652(c)(B) ("Notwithstanding any other provision of law, a person under the age of 18 shall be immune from prosecution in the Criminal Division of the Superior Court for a violation of section 2632 of this title (prohibited acts; prostitution), but may be treated as a juvenile under 33 V.S.A. chapter 52 [delinquency proceedings] or referred to the department for children and families for treatment under 33 V.S.A. chapter 53 [children in need of care or supervision].")

150. CONN. GEN. STAT. ANN. § 53a-82 (West 2013) ("A person sixteen years of age or older is guilty of prostitution when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee."); MICH. COMP. LAWS ANN. § 750.448 (West 2013) ("A person 16 years of age or older who accosts, solicits, or invites another person in a public place or in or from a building or vehicle, by word, gesture, or any other means, to commit prostitution or to do any other lewd or immoral act, is guilty of a crime . . .").

151. CONN. GEN. STAT. ANN. § 53a-82 (West 2013).

prosecution.¹⁵²

Arkansas, Kansas, Texas, and Washington offer trafficking victims an affirmative defense, regardless of the existence of force.¹⁵³ Alabama, New Hampshire, and South Dakota also offer affirmative defenses that do not require force; however, the defenses are connected to the states' trafficking statutes, which require proof of force or coercion used in the commission of the offense, even when the victim is a minor.¹⁵⁴ New Jersey has an affirmative defense provision as well, but it appears to be for prosecutions of human trafficking.¹⁵⁵ Georgia, Iowa, Massachusetts, Missouri, Oregon, South Carolina, and Rhode Island all have affirmative defenses that can be raised in cases of force, duress, or coercion.¹⁵⁶ This distinction is interesting since all of these states except Oregon

152. *Id.*

153. ARK. CODE ANN. § 5-70-102(c) (West 2013) ("It is an affirmative defense to prosecution that the person engaged in an act of prostitution as a result of being a victim of trafficking of persons . . ."); ARK. CODE ANN. § 5-70-103(c) ("It is an affirmative defense to prosecution under this section that the person engaged in an act of sexual solicitation as a result of being a victim of trafficking of person . . ."); KAN. STAT. ANN. § 21-6419 (West 2013) ("It shall be an affirmative defense to any prosecution under this section [selling sexual relations] that the defendant committed the violation of this section because such defendant was subjected to human trafficking or aggravated human trafficking, as defined by [Kansas law], or commercial sexual exploitation of a child, as defined by [Kansas law]."); TEX. PENAL CODE ANN. § 43.02(d) (West 2013) ("It is a defense to prosecution under this section [prostitution] that the actor engaged in the conduct that constitutes the offense because the actor was the victim of conduct that constitutes an offense under Section 20A.02 [trafficking in persons]."); WASH. R. CODE ANN. § 9A.88.040 (West 2013) ("In any prosecution for prostitution under RCW 9A.88.030, it is an affirmative defense that the actor committed the offense as a result of being a victim of trafficking, RCW 9A.40.100, promoting prostitution in the first degree, RCW 9A.88.070, or trafficking in persons under the trafficking victims protection act of 2000 . . ."). Some of the states that offer immunity also offer an affirmative defense. *See, e.g.* LA. REV. STAT. ANN. § 14:82(g) (West 2013) ("It shall be an affirmative defense to prosecution for a violation of this Section [prostitution] that, during the time of the alleged commission of the offense, the defendant was a victim of trafficking of children for sexual purposes as provided in R.S. 14:46.3(E)."). AO 12

154. *See supra* note 72; ALA. CODE § 13A-6-159 (2013) ("In a prosecution for prostitution, or a sexually explicit performance defined in this article, of a human trafficking victim for the victim's illegal acts engaged in or performed as a result of labor servitude or sexual servitude, it shall be an affirmative defense that the person was a victim of human trafficking."); N.H. REV. STAT. ANN. § 645:2 (2013) ("It shall be an affirmative defense to a charge under subparagraph I(a) [prostitution] that the defendant engaged in the conduct because he or she was the victim of trafficking in persons, as defined" by state law.); S.D. CODIFIED LAWS § 22-23-1 (2013) ("It is an affirmative defense to a charge of prostitution under § 22-23-1 if the defendant proves by a preponderance of the evidence that the defendant is a victim of human trafficking under chapter 22-49 . . ."). AO 12

155. N.J. STAT. ANN. § 2C:13-8(c) (West 2013) ("It is an affirmative defense to prosecution for a violation of this section [human trafficking] that, during the time of the alleged commission of the offense of human trafficking created by this section, the defendant was a victim of human trafficking."). AO 12

156. GA. CODE ANN. § 16-3-6 (West 2013) ("A person shall not be guilty of a sexual crime [includes prostitution] if the conduct upon which the alleged criminal liability is based was committed under coercion or deception while the accused was being trafficked for sexual servitude in violation of subsection (c) of Code Section 16-5-46."); IOWA CODE ANN. § 710A.3 (West 2013) ("It shall be an affirmative defense, in addition to any other affirmative defenses for which the victim might be eligible, to a prosecution for a criminal violation directly related to the defendant's status as a victim of a crime that is a violation of section 710A.2 [human trafficking], that the defendant committed the violation under compulsion by another's threat of serious injury, provided that the defendant reasonably believed that such injury was imminent."); MASS. GEN. LAWS ANN. ch. 265, § 57 (West

and South Carolina, do not require force or coercion in cases involving minor victims in their trafficking statutes.¹⁵⁷ Oregon's affirmative defense provision does not require force if the minor is younger than fifteen, and South Carolina's statute reads as though the state meant to eliminate the force requirement for minors but failed due to poor drafting.¹⁵⁸

The remaining states—New York, Ohio, and Oklahoma—do not clearly have immunity provisions, but their protective response laws provide minors with some protection. In New York, there is a presumption that a minor under the age of sixteen who is arrested for prostitution is a victim of a severe form of trafficking in persons under federal law and that the minor will be treated as a child in need of services.¹⁵⁹ However, if the minor is a repeat offender or fails to cooperate with services provided, the minor can still be prosecuted.¹⁶⁰ Under Ohio's protective response law, a prostituted child may qualify for diversion that may lead to dismissal of the charges if the child fulfills certain requirements.¹⁶¹ Finally, under Oklahoma law, there is a presumption in a prosecution of a sixteen or seventeen-year-old for prostitution that "the actor was coerced into

2013) ("In any prosecution or juvenile delinquency proceeding of a person who is a human trafficking victim, as defined by section 20M of chapter 233, it shall be an affirmative defense to charges of engaging in common night walking or common streetwalking . . . that, while a human trafficking victim, such person was under duress or coerced into committing the offenses for which such person is being prosecuted or against whom juvenile delinquency proceedings have commenced."); MO. ANN. STAT. § 566.223 (West 2013) ("It is an affirmative defense for the offense of prostitution . . . that the defendant engaged in the conduct charged to constitute an offense because he or she was coerced to do so by the use of, or threatened use of, unlawful physical force upon himself or herself or a third person, which force or threatened force a person of reasonable firmness in his or her situation would have been unable to resist."); OR. REV. STAT. § 163.269 (West 2013) ("A person who is the victim of a crime described in ORS 163.263, 163.264 [involuntary servitude offenses] or 163.266 [human trafficking] may assert the defense of duress, as described in ORS 161.270, if the person is prosecuted for conduct that constitutes services under ORS 163.261, that the person was caused to provide."); S.C. CODE ANN. 16-3-2020(J) (West 2013) ("In a prosecution of a person who is a victim of trafficking in persons, it is an affirmative defense that he was under duress or coerced into committing the offenses for which he is subject to prosecution, if the offenses were committed as a direct result of, or incidental or related to, trafficking."); R.I. GEN. LAWS ANN. § 11-34.1-2 (West 2013) ("In any prosecution for a violation under this section it shall be an affirmative defense if the accused was forced to commit a commercial sexual activity by: (1) Being threatened or, subjected to physical harm; (2) Being physically restrained or threatened to be physically restrained; (3) Being subject to threats of abuse of law or legal process; (4) Being subject to destruction, concealment, removal or confiscation, of any passport or other immigration document, or any other actual or purported governmental identification document; or (5) Being subject to intimidation in which the accused's physical well being was perceived as threatened.").

157. *Supra* note 72.

158. S.C. CODE ANN. 16-3-2020(J) (West 2013); OR. REV. STAT. § 163.269 (West 2013). South Carolina defines "sex trafficking" as "the recruitment, harboring, transportation, provision, or obtaining of a person for one of the following when it is induced by force, fraud, or coercion or the person forced to perform the act is under the age of eighteen years and anything of value is given, promised to, or received, directly or indirectly, by another person." § 16-3-2010. The fact that the legislature does not require the act to be "induced by force, fraud, or coercion," suggests that they were trying to mirror federal law. However, the minor provision still uses the word "forced," meaning that the force requirement was not totally removed for minors.

159. N.Y. FAM. CT. LAW § 311.4 (McKinney 2013).

160. *Id.*

161. H.B. 262, 129th Gen. Assemb., Reg. Sess. (Ohio 2012), *available at* http://www.legislature.state.oh.us/bills.cfm?ID=129_HB_262.

committing such offense by another person in violation of the human trafficking provisions.”¹⁶²

Immunity provisions are also important in model statutes. Polaris Project’s model law contains an immunity provision that covers all trafficking victims.¹⁶³ Global Rights’ model law also contains a similarly broad immunity provision.¹⁶⁴ The National Conference of Commissioners on Uniform State Laws approved at its 2013 Annual Conference a Uniform Act on Prevention of and Remedies for Human Trafficking,¹⁶⁵ which contains a robust immunity provision that states:

(a) An individual who was a minor at the time of the offense is not criminally liable or subject to a [juvenile delinquency proceeding] for [prostitution] and [insert other non-violent offenses] committed as a direct result of being a victim of human trafficking.

(b) An individual who was a minor at the time of the offense who has engaged in commercial sexual activity is not criminally liable or subject to a [juvenile delinquency proceeding] for [prostitution].

....

(d) The immunities granted by this section do not apply in a prosecution for [patronizing a prostitute].¹⁶⁶

This immunity provision protects prostituted minors from criminal or delinquency proceedings but is not so broad as to immunize minors who are not

162. OKLA. STAT. tit. 21, § 1029 (2013).

163. MODEL PROVISIONS OF COMPREHENSIVE STATE LEGISLATION TO COMBAT HUMAN TRAFFICKING 7 (Polaris Project 2010), available at http://www.polarisproject.org/storage/documents/Final_Comprehensive_ModelLaw__8_2010.pdf (“A victim of human trafficking is not criminally liable for any commercial sex act or illegal sexually explicit performance committed as a direct result of, or incident or related to, being subject to [state human trafficking offenses].” (alterations in original)).

164. STATE MODEL LAW ON PROTECTION FOR VICTIMS OF HUMAN TRAFFICKING § 9(a) (Global Rights 2005), available at http://humantrafficking.unc.edu/files/2011/09/StateModelLaw_9.05.pdf (“Victims of trafficking will not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of, or incident or related to, being trafficked, such as entering the United States without inspection or documentation, using false documents, unlawful presence in the country, working without documentation, engaging in prostitution or drug possession.”). Global Rights’ immunity provision also addresses detention of victims, stating, “Victims of trafficking will not be held in detention centers, jail or prison at any time prior to, during, or after all civil, criminal or other legal proceedings.” *Id.* at § 9(b).

165. UNIFORM ACT ON PREVENTION OF AND REMEDIES FOR HUMAN TRAFFICKING (National Conference of Commissioners on Uniform State Laws 2013), available at http://www.uniformlaws.org/shared/docs/Prevention%20of%20and%20Remedies%20for%20Human%20Trafficking/2013AM_UPRHT_As%20approved_Edited%20title%20page%20for%20web%20post.pdf.

166. *Id.* § 15 (alterations in original). The National Conference of Commissioners on Uniform State Laws provides the following legislative note on the immunity provision: “A state should determine the other non-violent offenses to be immunized by subsection (a). Examples of non-violent offenses might include such offenses as forgery, possession of stolen property, shoplifting, or uttering worthless checks. Those offenses selected by the enacting state should be added to the provision in place of the second bracketed language. In those states where a term is used other than ‘prostitution’ and ‘patronizing a prostitute,’ those terms should be substituted within bracket one.” *Id.*

sex trafficking victims, namely minors who patronize prostitutes.¹⁶⁷

Dr. Mohamed Mattar of the Johns Hopkins University's Protection Project also has recognized the importance of immunity provisions in national anti-trafficking laws.¹⁶⁸ According to Dr. Mattar,

Recognition of the trafficked person as a victim requires the application of the principle of noncriminalization. That is, the law must excuse the victim from criminal liability for the acts committed as a result of being trafficked. Victims of trafficking should be immune from such liability every time they commit an illegal act as long as those acts are related to their trafficking, whether this act is illegal entry, falsification of travel documents, or prostitution.¹⁶⁹

While the Palermo Protocol does not expressly contain an immunity provision, one of its listed purposes is "[t]o protect and assist the victims of such trafficking, with full respect for their human rights."¹⁷⁰ The Council of Europe Convention on Action against Trafficking in Human Beings, however, does contain an express immunity provision, which states that "[e]ach Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so."¹⁷¹

Therefore, despite the fact that immunity provisions for prostituted minors or victims have been recognized as important aspects of protective state anti-trafficking laws, few states have adopted robust immunity provisions. Given the protective structure set forth in the TVPA and in state anti-trafficking laws, states should adopt immunity provisions to protect minors from being prosecuted for prostitution.

III. ARGUMENTS AGAINST IMMUNITY PROVISIONS FOR MINORS

Despite the compelling arguments in favor of making prostituted minors immune from prosecution for prostitution, immunity provisions face opposition from some judges, prosecutors, legislators, and non-profit organizations. The arguments on both sides of the issue have been laid out in judicial opinions,¹⁷² opinion pieces in the media,¹⁷³ academic articles,¹⁷⁴ and state legislative debates.¹⁷⁵ In this section, I will describe the most common objections to minor

167. See *id.* The National Conference also provides a defense for adults arrested for prostitution who may be trafficking victims. *Id.* § 16 ("An individual charged with [prostitution] or [insert other non-violent offenses] committed as a direct result of being a victim of human trafficking may assert as an affirmative defense that the individual is a victim." (alterations in original)).

168. Mohamed Y. Mattar, *Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention*, 14 TUL. J. INT'L & COMP. L. 357, 380-81 (2006).

169. *Id.*

170. Palermo Protocol, *supra* note 75, at art. 2(b).

171. Convention on Action Against Trafficking in Human Beings, *supra* note 77, at art. 26.

172. See *In re B.W.*, 313 S.W.3d 818 (Tex. 2010).

173. See Mark Hoerrner, *Pro & Con: Should prostitution be decriminalized for minors?*, ATLANTA JOURNAL-CONSTITUTION (Mar. 22, 2010, 8:27 PM), <http://www.ajc.com/news/news/opinion/pro-con-should-prostitution-be-decriminalized-for-/nQdY8/>.

174. See Birckhead, *supra* note 132, at 1083-88; see also Annitto, *supra* note 120, at 26-30.

175. See Kevin O'Hanlon, *Human-trafficking bill would make minors immune from prostitution*

immunity provisions and rationales for not enacting such provisions. I will then explain why these objections should not prevent states from enacting immunity provisions.

A. Cooperation Rationale

According to Professor Birkhead, one of the most common arguments against minor immunity provisions, often given by law enforcement and prosecutors, is “the need to pressure youth to cooperate with the prosecution of their pimps by testifying against them.”¹⁷⁶ Under this rationale, if prostituted minors do not face the threat of prosecution and imprisonment, they will not appear at court hearings to testify against pimps, and the charges against the pimps will be dismissed.¹⁷⁷

This rationale fails for several reasons. First, if prosecutors and law enforcement truly believe that a prostituted minor is a victim, and if the state’s law treats prostituted minors as victims, holding the threat of prosecution over the victim’s head is contrary to the purposes behind the state and federal trafficking statutes. For example, under the TVPRA 2013, an entity seeking a grant for combating minor sex trafficking must “provide[] assurance that a minor victim of sex trafficking shall not be required to collaborate with law enforcement to have access to residential care or services provided with a grant under this section.”¹⁷⁸ Congress clearly stated that state and local grant recipients must not make minors’ eligibility for services contingent on collaboration with law enforcement; Congress likely would equally frown on holding the threat of criminal conviction over a prostituted minor’s head to secure cooperation.

Second, as Professor Annitto has pointed out, “it is easier for law enforcement personnel to build a relationship of trust with children when they are not at risk of prosecution.”¹⁷⁹ As she explains, “traffickers often condition young girls to fear punishment by law enforcement so that they do not seek help.”¹⁸⁰ Prostituted minors may be more willing to approach law enforcement for assistance if they do not fear prosecution.¹⁸¹ Third, and similarly, prostituted minors may be more likely to seek medical help, which could lead to their rescue and restoration, if they do not fear prosecution.¹⁸² Fourth, prostituted minors are

charges, Lincoln Journal Star (June 3, 2013, 1:30 PM), http://journalstar.com/legislature/human-trafficking-bill-would-make-minors-immune-from-prostitution-charges/article_e27154ba-4993-5372-b96a-5a226f4b634a.html.

176. Birkhead, *supra* note 132, at 1083 (footnotes omitted); *see also* Annitto, *supra* note 120, at 27–28 (“A third argument in support of prosecution is related to the testimony of prostituted youth. Because their testimony is often necessary to successfully prosecute those who exploit them, some argue that the mere threat of prosecution and the subsequent ability to detain children is the most effective way to obtain their important testimony.” (footnotes omitted)).

177. Birkhead, *supra* note 132, at 1083.

178. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 1241, 127 Stat. 54, 149–53 (2013) (containing the 2013 TVPA reauthorization).

179. Annitto, *supra* note 120, at 28.

180. *Id.* (footnotes omitted).

181. *Id.*

182. *Id.*

often vulnerable and have been known to exhibit elements of Stockholm Syndrome—often viewing their exploiter as a boyfriend or father figure.¹⁸³ These minors, regardless of the threat of prosecution, are less likely to initially turn their exploiters over to the police.¹⁸⁴

B. The Need to Get Prostituted Minors Services and Prevent Them From Returning to Trafficking

Another rationale for allowing minors to be prosecuted for prostitution is that the only way to keep minors from returning to prostitution and ensure that they receive needed services is to keep them in secure custody.¹⁸⁵ Support for this rationale often comes from prosecutors and juvenile court judges who argue that “because strategies of persuasion and common sense have failed with these youth, it is necessary to place them in secure custody for their own protection,”¹⁸⁶ both to keep them from running back to their pimps and to ensure that they receive the services they need.¹⁸⁷

While it is undisputed that prostituted minors need access to social services, their need does not justify holding them criminally liable. First, while keeping a prostituted child locked up in either detention or jail may allow for access to services, it may also leave the child with a label that will follow her throughout her life and serve as an obstacle to full rehabilitation.¹⁸⁸ Second, detaining a prostituted child to ensure access to services is counter both to the victim-

183. Adelson, *supra* note 11, at 125-26; *see also* SHARED HOPE INT’L, *supra* note 11, at 3 (“Due to the unique trauma bonding that occurs between victims and their traffickers, these children often run from juvenile facilities right back to the people who exploited them.”); Linda Smith & Samantha Vardaman, *A Legislative Framework for Combating Domestic Minor Sex Trafficking*, 23 REGENT U. L. REV. 265, 286 (2010) (noting that the force, fraud, or coercion requirement “is difficult to meet in cases of domestic minor sex trafficking in which it is very common for traffickers to enslave girls through psychological bonding and perceived love,” and, “[a]s a result, girl victims of sex trafficking rarely believe they are victims—rather, many are typically convinced that the trafficker is their boyfriend.” (citations omitted)).

184. Adelson, *supra* note 11, at 126.

185. Birckhead, *supra* note 132, at 1085; Anitto, *supra* note 120, at 27; *In re B.W.*, 313 S.W.3d 818, 834 (Tex. 2010) (Wainwright, J., dissenting) (“The Court’s opinion removes B.W. from adjudication under the Juvenile Justice Code for a criminal act she acknowledged committing. Instead of allowing B.W. to be treated as the Legislature intended, its opinion overturns the juvenile judge’s treatment order and sends her back into CPS custody or, more likely given her history of running away, back to a toxic street environment.”).

186. Birckhead, *supra* note 132, at 1085 (citations omitted).

187. *Id.*; Anitto, *supra* note 120, at 27.

188. Birckhead, *supra* note 132, at 1085-86 (“Yet, the justification of detention in the name of protection is less compelling when the penalty includes such negative consequences as a permanent criminal record or imprisonment with adult offenders, as it does for many youth charged with prostitution in adult court.” (citations omitted)); Adelson, *supra* note 11, at 120-21 (“Prostituted children . . . frequently spend time in jail-like conditions without the necessary services and treatment to prevent recidivism.”); SHARED HOPE INT’L, *supra* note 11, at 3 (“Law enforcement officers expressed frustration that they are often compelled to charge a domestic minor sex trafficking victim with a delinquency offense, such as prostitution, to detain the child and to keep the child safe from the trafficker. Detention, however, is detrimental to the victim in that the victim rarely receives any services in detention, much less services specific to the trauma endured through sex trafficking. . . . Also, in some states, a victim’s entry into the delinquency system can disqualify him or her from accessing crime victim funds for services.”).

centered approach in the TVPA and state trafficking laws and to typical law enforcement treatment of crime victims. The same arguments for detaining prostituted children could apply to victims of domestic violence or child sexual abuse. In those situations, however, law enforcement tries to ensure that victims are protected and receive services either through specialized shelters and other social services or through child protective services. A better approach to addressing prostituted minors' need for services would be to continue to develop specialized shelters equipped to handle their needs.¹⁸⁹

Finally, as the Texas Supreme Court pointed out in *In re B.W.*, the juvenile justice system is not the "only portal" for prostituted children to receive needed social services.¹⁹⁰ For example, in Texas, a law enforcement officer is permitted to "take possession of a child without a court order if a person of ordinary prudence and caution would believe there is an immediate danger to the physical health or safety of the child, or that the child has been the victim of sexual abuse" or, with a court order, "to protect the child's health and safety."¹⁹¹ In the care of Child Protective Services the minor "has access to a full range of counseling and treatment options, including 24-hour supervision and one-on-one monitoring," but the services are offered "within a purely rehabilitative setting, and without the permanent stigma associated with being adjudged a prostitute."¹⁹² Texas is not unique in offering other avenues for providing children with needed services.¹⁹³ As Professor Annitto has pointed out, "laws already exist or can be amended to permit a child welfare agency to provide medical and therapeutic services to survivors of commercial sexual exploitation."¹⁹⁴

This "child protective services" approach is similar to the approach taken by states with so-called "Safe Harbor" laws. Generally speaking, Safe Harbor laws seek to treat prostituted minors as victims rather than criminals or delinquents and exhibit the following features: (1) a provision making minors immune from prosecution, including delinquency proceedings, for prostitution; (2) diverting prostituted minors from delinquency proceedings into specialized services, such as child protective services; (3) defining prostituted minors as victims of sexual exploitation or abuse; and (4) ensuring that prostituted children receive state services that are either focused on trafficking victims or are generally available

189. SHARED HOPE INT'L, *supra* note 11, at 3 ("Establishing protective shelters and services for domestic minor sex trafficking victims would provide law enforcement officers or juvenile courts with an alternative placement for prostituted minors. Protective shelters also provide a more conducive environment for breaking the cycle of destructive trauma bonding between a victim and the trafficker and restoring a victim to the point where the victim can assist in an investigation and trial.").

190. *In re B.W.*, 313 S.W.3d at 825.

191. *Id.* (citations omitted).

192. *Id.* (citations omitted).

193. See *Exploiting Americans on American Soil, Hearing Before the Commission on Security and Cooperation in Europe*, 109th Cong. 9-11 (2005) (statement of Susan Orr) (describing the scenarios under which state child welfare agencies can help prostituted minors and also describing federal resources available to help prostituted minors). *But see id.* at 19 (explaining that some state child welfare agencies can only assist when the perpetrator is a family member or primary caregiver).

194. Annitto, *supra* note 120, at 29 (citations omitted).

for sexually abused children.¹⁹⁵ The term “protective response law” probably is more apt for a law that excludes the first feature, since it does not literally provide minors with a safe harbor from prosecution for prostitution. Protective response laws vary drastically between the states that have enacted them. Some simply provide prostituted minors with immunity from prosecution, although, as noted above, not all of the immunity provisions cover older minors.¹⁹⁶ Other states provide diversion programs for prostituted minors. For example, New York, the first state to enact a “Safe Harbor” law,¹⁹⁷ provides a diversion process that operates under the presumption that minors¹⁹⁸ before the family court on charges of prostitution meet the definition of a victim of a severe form of trafficking in persons.¹⁹⁹ In these cases, a petition alleging that the minor is in need of supervision will be substituted for the delinquency petition.²⁰⁰ However, if the person is a minor previously adjudicated delinquent for a prostitution offense, is an adult, or is unwilling to cooperate in the receipt of specialized services, the court has discretion to continue with the delinquency proceedings.²⁰¹ The court may also revert back to the delinquency petition if, before the final hearing on the petition for supervision, the person “is not in substantial compliance with a lawful order of the court.”²⁰²

Massachusetts also provides for a diversion option, stating that in juvenile delinquency or criminal proceedings “against a sexually exploited child”²⁰³ in which it is alleged that the child engaged in prostitution, “there shall be a presumption that a care and protection petition on behalf of such child, or a child in need of services petition . . . , shall be filed.”²⁰⁴ The attorney general or district attorney may object to a motion to treat a child as a child in need of services or protection, but absent the objection, the court “shall, if arraignment has not yet occurred, indefinitely stay arraignment and place the proceeding on file.”²⁰⁵ If, however, “the court finds that the child has failed to substantially comply with the requirements of services or that the child’s welfare or safety so requires, the

195. Geist, *supra* note 133, at 86; POLARIS PROJECT, *supra* note 120, at 1.

196. See e.g. CONN. GEN. STAT. ANN. § 53a-82 (West 2014) (making minors under the age of sixteen immune from prosecution for prostitution, giving all trafficking victims an affirmative defense to prosecution for prostitution, and stating that for prostitution prosecutions involving minors aged sixteen and seventeen, there is “a presumption that the actor was a victim of conduct by another person that constitutes” a violation of the state or federal anti-trafficking laws); MICH. COMP. LAWS ANN. § 750.448 (West 2014) (limiting the prostitution law to persons age sixteen or older); see also POLARIS PROJECT, *supra* note 120 at 2-3.

197. Anitto, *supra* note 120, at 45.

198. Although the Family Court Act appears to only apply to persons less than sixteen years of age, N.Y. FAM. CT. ACT § 301.2 (McKinney 2014), N.Y. FAM. CT. ACT § 712(a) (McKinney 2014) labels prostituted minors under the age of eighteen as a “person in need of supervision,” (PINS), if the minor consents to the filing of the petition.

199. N.Y. FAM. CT. ACT § 311.4(3) (McKinney 2014).

200. *Id.*

201. *Id.*

202. *Id.*

203. “Sexually exploited child” is defined to include minors under the age of eighteen who fall under the federal definition of a sex trafficking victim or who violate the state’s prostitution laws. MASS. GEN. LAWS ANN. ch. 119, § 21 (West 2014).

204. MASS. GEN. LAWS ANN. ch. 199, § 39L(a) (West 2014).

205. *Id.* § 39L(c).

court may remove the proceeding from file, arraign the child and restore the delinquency or criminal complaint.”²⁰⁶ If the child has been arraigned, absent an objection, the child shall be placed on probation, which shall include “requiring the child to substantially comply with all lawful orders of the court, including orders relating to any care and protection or child in need of services proceeding, and the child shall also comply with the guidance and services of the department or any designated non-governmental service provider.”²⁰⁷ Failure to comply with the conditions of probation allows the court, in its discretion, to restore the delinquency or criminal proceedings.²⁰⁸

Under Ohio’s law, after the filing of a delinquency petition for a child alleged to have committed prostitution, “the court may hold a hearing to determine whether to hold the complaint in abeyance pending the child’s successful completion of actions that constitute a method to divert the child from the juvenile court system if the child agrees to the hearing.”²⁰⁹ The prosecuting attorney has the right to participate in the hearing and object.²¹⁰ If the court does hold the complaint in abeyance, “the court may make any orders regarding placement, services, supervision, diversion actions, and conditions of abeyance, including, but not limited to, engagement in trauma-based behavioral health services or education activities, that the court considers appropriate and in the best interest of the child.”²¹¹ The court will dismiss the complaint if the program is successfully completed, or proceed on the complaint if it is not.²¹² These three laws are just a few examples of diversion-type protective response laws.²¹³

Illinois provides one of the most protective response laws that also includes a safe harbor provision. Under Illinois law, if a minor is suspected of or charged with prostitution, the minor will be immune from prosecution, and the law enforcement officer will make a report of human trafficking to the state Department of Children and Family Services State Central Register, “which shall commence an initial investigation into child abuse or child neglect within 24 hours.”²¹⁴ Nebraska’s law also completely immunizes prostituted minors from prosecution for prostitution and states that such children “shall be subject to temporary custody . . . and further disposition under the Nebraska Juvenile Code.”²¹⁵ Law enforcement officers who take prostituted minors into custody “shall immediately report an allegation of a violation [of Nebraska’s trafficking

206. *Id.*

207. *Id.*

208. *Id.*

209. OHIO REV. CODE ANN. § 2152.021(F)(1) (West 2014).

210. *Id.* § 2152.021(F)(2).

211. *Id.*

212. *Id.*

213. While not an exhaustive list, other states, including Washington and Minnesota, have specific diversion-type laws for prostituted minors. WASH. REV. CODE ANN. §§ 13.40.070, 13.40.213 (West 2013). Arkansas, while it does not appear to have a specific diversion program for prostituted minors, does include in its diversion statute a provision on sexually exploited children, which includes prostituted children. ARK. CODE ANN. § 9-27-323 (West 2013) (directing the Department of Human Services to develop “a statewide referral protocol for helping to coordinate the delivery of services to sexually exploited children.”).

214. 720 ILL. COMP. STAT. ANN. 5/11-14 (West 2013).

215. Neb. Rev. Stat. § 28-801 (2013).

law] to the Department of Health and Human Services which shall commence an investigation within twenty-four hours under the Child Protection Act.”²¹⁶ Under Tennessee law, minors are also immune from prosecution for prostitution, and, if a minor is arrested for a suspected prostitution offense, the minor shall be released to her parents and provided the phone number for the national trafficking hotline.²¹⁷

The approaches of Illinois and Nebraska are preferred over diversion programs, which still hold the threat of prosecution. Illinois’s and Nebraska’s approaches are also preferred over Tennessee’s, which does not direct a child immediately into services. However, to follow Illinois and Nebraska, some states would need to amend their child protective services laws to ensure that they apply to more than just abuse by a parent, guardian, or caretaker.²¹⁸

C. Immunity Will Increase Trafficking and Other Crimes

Another argument against immunity provisions for prostituted minors is that the provisions will either lead to the increased prostitution of children or the decriminalization of other offenses that minors commit.²¹⁹ Concerned Women for America, in its report entitled “Children in Prostitution,” conflates noncriminalization of prostitution involving child trafficking victims with legalization of prostitution.²²⁰ CWA argues that “where there is legal prostitution, illegal prostitution flourishes.”²²¹ This argument, however, ignores the significant difference between legalizing prostitution and making minors immune from prosecution for the prostitution.²²² Under the immunity scenario, prostitution is only decriminalized as to the prostituted minors. “Johns,” pimps, and other participants in the prostitution scheme—including minors who serve as “johns” or pimps—would still be prosecuted for prostitution or the relevant offense; perhaps even more so than they are now. The goal of the immunity provision is to ensure that the *victims*—the prostituted minors—are not prosecuted.²²³ And, as discussed above, these minors can still receive needed

216. *Id.*

217. TENN. CODE ANN. § 39-13-513(d) (West 2013).

218. *See supra* note 193.

219. Birkhead, *supra* note 132, at 1086; Brenda Zurita, *Children in Prostitution: How Many are there and What to Do?* CONCERNED WOMEN FOR AMERICA, http://www.cwfa.org/images/content/CWA_Decriminalization-of-Prostitution-for-Minors2012.pdf at 6 (last visited Apr. 6, 2014) (hereinafter CWA Report).

220. CWA Report, *supra* note 219.

221. *Id.* at 6.

222. The Texas Supreme Court made this point in *In re B.W.*, noting that the argument that holding minors immune will “encourage pimps to seek out young children” was “unavailing,” since “sexual exploitation of children under fourteen is already a crime” and “[i]t is unclear how the prosecution of a child for prostitution would serve as any further deterrent, especially in the case of children on the streets.” 313 S.W.3d 818, 825 (Tex. 2010).

223. Professor Birkhead, however, does give some credence to this argument. She writes, “On the other hand, the assertion (not yet addressed by empirical research) that decriminalizing the role of the child in prostitution will encourage its proliferation—because adults will have yet another motive to target minors for sexual exploitation and youth will have one fewer reason not to submit—may have some credence. Yet, given that most prostituted children are controlled by adult pimps (girls at higher rates than boys) and thus have not made a voluntary ‘choice’ to engage in

services outside of the criminal justice system.²²⁴

The second aspect of the argument that decriminalization can lead to increased crime by minors is that “if child prostitution is decriminalized, it may usher in the decriminalization of more pernicious or violent conduct that can also result from the exploitation of juveniles by adults, such as drug distribution or armed robbery.”²²⁵ This argument is based on the premise that “if youth are not culpable for ‘survival sex,’ how can they be culpable for other acts that are arguably necessary for their survival?”²²⁶ Relatedly, the argument is made that labeling prostituted minors as “‘victims’ . . . could lead to categorizing all juvenile offenders as victims, regardless of the nature of their criminal conduct, prior record, or background.”²²⁷ Professor Birkhead has addressed this argument by pointing out a difference in “the nature of the harm that is being perpetuated,” arguing that prostituted minors are engaging in illegal activity (prostitution) that makes them the “objects of acute harm,” while minors engaged in other illegal activity are “not undergoing the same harm to the self . . . but instead are causing harm to others as a result of physical damage to property or bodily harm to persons.”²²⁸ Therefore, while, on balance, public policy calls for treating prostituted children as victims, and legislators can act on that public policy by immunizing prostituted minors from prosecution for prostitution, the same policy arguments are not present with respect to violent crimes.²²⁹

One of the benefits of a positive-law immunity provision, as opposed to a judicially created provision, is that the legislature can better consider the legal and policy issues on both sides of the argument and craft a solution that best balances the countervailing concerns.

D. Some Children Freely Enter Prostitution, and These Children Should Be Punished

Another argument against making minors immune from prosecution for prostitution is that some minors may “choose to prostitute” and may act without a pimp, and given that “[t]eenagers can make some terrible decisions due to their youth and inexperience, . . . the law should not make it easier for them to

prostitution, and given that adolescents typically have limited intellectual and psychological capacity to weigh the likelihood of arrest and prosecution or consider the deterrent value of legal sanctions, this concern has limited validity. Moreover, although there may be some risk that decriminalization could lead to greater numbers of prostituted children (at least in the short term), the fact that no legitimate constituency would support—or even countenance—such a result makes it less germane. The assertion is analogous to the claim that failing to hold children criminally liable for their role in statutory rape makes them more likely to engage in it and more vulnerable to exploitation. Legislatures have determined that while these risks may indeed be possible, their likelihood does not justify holding children culpable for such acts.”). Birkhead, *supra* note 132, at 1087 (footnotes omitted).

224. See *supra* notes 190–202 and accompanying text.

225. Birkhead, *supra* note 132, at 1086.

226. *Id.*

227. *Id.* (internal punctuation omitted).

228. *Id.*

229. *Id.* at 1086–87.

experiment in this dangerous world of commercial sexual exploitation.”²³⁰ There are also stories of minors engaging in prostitution to earn money for luxury goods or to “feel loved” and “feel important.”²³¹ While these situations may exist, this argument ignores the policy decision made in the TVPA and in many state trafficking laws to hold prostituted minors, regardless of the existence of force, fraud, or coercion, as victims of sex trafficking. This decision was made, in part, based on the vulnerability of these children. As Professor Annitto has explained, those who make this argument “simply underestimate the reality of coercion in this industry.”²³² The federal government recognizes the coercion in this area. In 2005, Chris Swecker, then Assistant Director of the Criminal Investigation Division of the FBI, testified before Congress that, under federal law and international agreements, “children can never consent to prostitution;” stating that, rather, “[i]t is always exploitation.”²³³ He explained that children enter prostitution as early as age nine, with the average age being eleven to fourteen.²³⁴ These children have often “left home because of physical, sexual and psychological abuse,” and “have low self-esteem and are extremely vulnerable.”²³⁵

This argument also ignores the fundamental differences between the adult and juvenile minds. The Supreme Court has pointed out these differences in several cases. First, according to the Court, “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.”²³⁶ This is one of the reasons, as the Court said in *Roper v. Simmons*, that nearly every state limits the ability of persons under the age of eighteen from voting, marrying without parental permission, and serving on juries.²³⁷ Second, minors “are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.”²³⁸ Third, “the character of a juvenile is not as well formed as that of an adult.”²³⁹ As the Court said in *Graham v. Florida*, “[t]hese salient characteristics mean that ‘[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.’”²⁴⁰

Given the policy choices made by Congress in the TVPA and many states in

230. CWA Report, *supra* note 219, at 9.

231. *Id.* at 8; *see also* Annitto, *supra* note 120, at 28.

232. Annitto, *supra* note 120, at 28.

233. *Exploiting Americans on American Soil: Domestic Trafficking Exposed, Hearing before the Commission on Security and Cooperation in Europe*, 109th Cong. 6 (2005).

234. *Id.*

235. *Id.*

236. *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)) (alteration in original).

237. *Id.*

238. *Id.* (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (2005)).

239. *Id.*

240. *Graham v. Florida*, 560 U.S. 48, 68 (2010) (quoting *Roper*, 543 U.S. at 573) (alteration in original).

their anti-trafficking statutes, the vulnerability and exploitation that prostituted children face, and the Court's approach to the culpability of minors as compared to adults, the argument that some minors may "freely choose" to engage in prostitution is not a compelling argument against enacting an immunity provision.

CONCLUSION

The question of what to do with "Cynthia," the minor in *In re B.W.*, and other prostituted children is a difficult one. While the issue of conflating adult prostitution and criminal sex trafficking under the TVPA has been contentious, federal law and international protocols have treated prostituted minors as victims across the board. Additionally, most state laws mirror federal law and consider prostituted minors trafficking victims. However, not all of these states have enacted immunity provisions that prevent prostituted minors from being prosecuted for prostitution at the same time that they are considered trafficking victims. Many states have also failed to enact protective response laws that provide a child protective response, rather than a juvenile justice or criminal response, for prostituted children. Given the victim-centered policy choices that Congress made in enacting the TVPA, which many states mirrored in enacting anti-trafficking statutes, states should enact specific immunity provisions that make clear that prostituted minors should not be prosecuted for prostitution. To ensure that these children receive services and support that reflects their status as crime victims, states should also enact safe harbor laws that direct these children into a child protective services framework. The rationales and arguments raised by opponents of immunity provisions are not sufficient to overcome the strong policy preferences that Congress and many states have espoused. If Congress and the states are serious about protecting victims and prosecuting those who exploit them, then enacting an immunity provision is a step in the right direction.