

## **An Analysis of State Safe Harbor Laws and Recommendations for States Considering Future Safe Harbor Legislation**

California's Department of Social Services (DSS) is not unlike most other state and local agencies in declaring their mission to be "to serve, aid, and protect needy and vulnerable children."<sup>1</sup> It is well settled that a 13 year old boy left virtually abandoned by a drug addicted mother falls under the protection of DSS, or a 14 year old girl molested for years at the hands of her step-father. The children would be removed from the home and placed in a safe environment, assigned a social worker to monitor their progress, special educational resources, benefits, and most importantly, access to specialized counseling and mental health services.

In contrast, currently the vast majority of state prostitution statutes declare that a person engaging in a commercial sex act commits a crime, even if that person is under 18. So, paradoxically, should that same boy escape to the street and engage in survival sex, a desperate measure to gain a few dollars for food, he is suddenly considered a criminal. Similarly, should the girl be lured out of the house by a "boyfriend pimp" who offers her what any child yearns for - love, attention, and security - only to later require her to earn her keep or face brutality, she is also a criminal. Gone are the benefits, the counseling, the sympathy -- replaced by further stigmatization and trauma of being labeled a criminal.

The same is true for the labor trafficked child, who is even harder to identify, but might toil in someone's home, peddle on the streets or be forced to sell drugs, only to be arrested for a crime their trafficker forced them to commit.

Without active measures to protect this most vulnerable of victims - the trafficked child - they are often caught in a revolving door of criminal activities. And these are very young children. Nationally, recent studies have shown that most girls and boys are on average recruited into prostitution between the ages of 12- 14.<sup>2</sup> Consequently, many end up in the criminal justice system at a very young age. For example in 2010, 360 children were arrested for prostitution in California. Thirteen percent of these children were between 12-14 years of age.<sup>3</sup>

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<sup>1</sup> CA Dept. of Social Services, Section About CDSS, *About CDSS*, available at <http://www.dss.cahwnet.gov/cdssweb/PG190.htm> (last visited Dec. 27, 2012).

<sup>2</sup> Comparison Chart of Primary Sex Trafficking Networks in the U.S. (2011), Polaris Project, available at: <http://www.polarisproject.org/resources/resources-by-topic/sex-trafficking>; Washington State Office of the Attorney General, Section about Human Trafficking, *Sexual Trafficking*, available at: <http://www.atg.wa.gov/HumanTrafficking/SexTrafficking.aspx#.UOYaJonjkUU> (last visited January 3, 2013).

<sup>3</sup> Juvenile Justice in California, 59, (2010), CA Dept. of Justice, available at: <http://oag.ca.gov/sites/all/files/pdfs/cjsc/publications/misc/jj10/preface.pdf>

This paper argues that child trafficking victims, both sex and labor trafficked, identified as victims, need to be treated as victims and not face criminal charges or be mandated into services where they face incarceration if they fail to complete programs and parole requirements. It also argues that current state activities to pass “Safe Harbor” statutes for trafficked children are inadequate and a more comprehensive, realistic framework needs to be created to truly assist and prevent child trafficking in the future. In exploring this position, first this paper reviews the current legal framework relevant to child trafficking and then explores Safe Harbor legislation already passed by states to address this concern. Finally, it provides recommendations to any states seeking to pass future Safe Harbor provisions.

## **Legal Framework**

Federal law already recognizes all sex trafficked children as victims. Under the federal Trafficking Victims Protection Act (TVPA), any person under 18 who is induced to perform a commercial sex act is a victim of a severe form of trafficking; a showing of force, fraud, or coercion is immaterial.<sup>4</sup> Additionally many states have passed similar state criminal laws that indicate that children induced to perform commercial sex are victims of human trafficking.<sup>5</sup> For example, California recently passed a ballot initiative which changed the former state standard of both adults and minors having to show force, fraud, coercion or duress to establish a criminal claim for human trafficking. The initiative now allows minor victims in California to establish a claim for human trafficking by merely showing that a person causes, induces, or persuades, or attempts to cause, induce, or persuade, a person who is a minor to engage in a commercial sex act.”<sup>6</sup>

However at the same time that both federal and state law have recognized the grave human rights abuse that human trafficking entails, the majority of states still criminalize child prostitution.<sup>7</sup> This is the case despite the fact that in all the states children cannot legally consent to sex until the age of 16 years or older.<sup>8</sup> In a recent Texas Supreme Court Case, the Court grappling with this very issue concluded that “Because a thirteen-year-old-child cannot consent to sex as a matter of law, we conclude that B.W. cannot be prosecuted as a prostitute...”<sup>9</sup>

Despite the Texas Supreme Court holding, many states’ conflicting statutes mean children continue to be arrested and prosecuted for prostitution. For example, the FBI’s Uniform

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<sup>4</sup> 22 U.S.C.A. §7102(8)(B) (2008).

<sup>5</sup> Linda A. Smith, Samantha Healy Vardaman & Melissa A. Snow, The Nat’l Report on Domestic Minor Sex Trafficking: America’s Prostituted Children, 2 (May 2009), Shared Hope International, available at: [http://sharedhope.org/wp-content/uploads/2012/09/SHI\\_National\\_Report\\_on\\_DMST\\_2009.pdf](http://sharedhope.org/wp-content/uploads/2012/09/SHI_National_Report_on_DMST_2009.pdf)

<sup>6</sup> CA PENAL CODE § 236.1(C)

<sup>7</sup> Smith, et. al., at 59 *supra* note 4

<sup>8</sup> Age of Consent by Age, available at: <http://www.age-of-consent.info/> (Last Viewed Jan. 3, 2013); See *State v. Hazelton*, 915, A.2d 224, 233-34 (Vt. 2006); *Payne v. Commonwealth*, 623 S.W.2d 867, 875 (Ky. 1981); *May v. State*, 9191, S.W.2d 422, 424 (Tex. Crim. App. 1997), holding that a child under the age of fourteen cannot legally consent to sex.

<sup>9</sup> *In the Matter of B.W.*, 313 S.W.3d 818, 822 (Tex. 2010).

Crime Report data analyzed by Snyder and Sickmund (2006), shows that 1,400 juveniles were arrested nationally in 2003 for prostitution and commercialized vice.<sup>10</sup> Eight years later, in 2011, the FBI estimated anywhere between 1,100-1,200 minors were arrested for prostitution.<sup>11</sup> These records show that the majority of sex trafficked children, identified by law enforcement continue to face prostitution charges and are placed in the juvenile justice system, even after states have passed anti-trafficking laws that clearly declare them to be victims. These charges often entail time in juvenile detention and mandated services, which, if the child fails to fulfill could mean additional time in juvenile detention. Instead of placing these vulnerable children in the juvenile justice system, the existing Child Protective Services framework must be strengthened to extend specialized services to trafficked children. Given Child Protective Services' areas of expertise and mission they must start taking a leadership role on each and every case identified as a trafficked child, so that children are not punished for the crimes their traffickers forced them to commit.

### **Why Child Protective Services Needs to be More Fully Engaged**

Aside from the fundamental right of a child to be a child, there are also practical reasons for Child Protective Services to be the primary service providers for children identified as trafficked children or engaging in commercial sex:

- Placing children in jail merely validates the pimp's and or/traffickers threats. Pimps/Traffickers regularly warn girls and boys not to talk to the police because they will be treated like criminals and locked up. If the goal is to break the cycle, then we need to create a system which children can trust, not one in which they expect to be arrested when they ask for help.
- Negative social stigma attached to prostitution specifically perpetuates the cycle
- Once a child has been in jail they are more likely to be repeat offenders.
- Not labeling the children trafficking victims but criminal perpetrators often bars them from accessing services under state victims compensation funds

Additionally, recent research has shown that a large majority of children identified as sex trafficked are already in Child Protective Services, they just have not been identified in this system or received any specialized services. For example a recent study in New York State found that more than 85% of identified commercially sexually exploited children in New York State had prior child welfare involvement.<sup>12</sup> In Los Angeles, the LA Times also recently reported that

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<sup>10</sup> *How many Juveniles are Involved in Prostitution in the U.S.?* (2008), Crimes Against Children Research Center from the University of New Hampshire, available at [http://www.unh.edu/ccrc/prostitution/Juvenile\\_Prostitution\\_factsheet.pdf](http://www.unh.edu/ccrc/prostitution/Juvenile_Prostitution_factsheet.pdf)

<sup>11</sup> Brenda Zurita, *Sex Trafficking of Children: What are the Numbers?*, Concerned Women for America (Nov. 2011), available at: [http://www.cwfa.org/familyvoice/2011-11/CWA\\_FamilyVoiceInsight\\_Nov2011.pdf](http://www.cwfa.org/familyvoice/2011-11/CWA_FamilyVoiceInsight_Nov2011.pdf)

<sup>12</sup> Frances Gragg, Ian Petta, Haidee Bernstein, Karla Eisen, Liz Quinn, *NY Prevalence Study of Commercially Sexually Exploited Children* (Apr. 18 2007), Weststat, available at: <http://www.ocfs.state.ny.us/main/reports/csec-2007.pdf>

the majority of juveniles arrested on prostitution charges came from the county's foster care system.<sup>13</sup>

Furthermore the cost of juvenile detention versus child protective services alone reveals a monetary benefit to the state in assisting a child through child protective services rather than juvenile detention. For example in California currently it costs \$179,400 for the state to incarcerate a juvenile for one year. This is more than twice the cost of housing a child at a group home that provides counseling, education, and other social services, tailored for victims of child sex trafficking.<sup>14</sup>

Finally, a recent study from Minnesota found that investing in prevention of adolescent sex trading results in a return on the investment to a state government of approximately \$34.00 for every \$1.00 spent.<sup>15</sup> Therefore a moral, cultural, social and economic perspectives points to the benefits of serving trafficked children not through a juvenile justice system lens but through Child Protective Services.

### **State Safe Harbor Legislation**

In growing recognition of this problem nine states have passed Safe Harbor Legislation designed to better protect trafficked children. Safe Harbor as a legal concept has generally meant "a provision granting protection from liability or penalty if certain conditions are met."<sup>16</sup> In the anti-trafficking context this has generally meant decriminalization of child prostitution, as well as designation under the state system that the child is in need of specialized services and protection as a crime victim.<sup>17</sup> States have taken various approaches to addressing this problem and the next section reviews key provisions of already passed State Safe Harbor Legislation which include New York, Washington, Vermont, Massachusetts, Connecticut, Illinois, Tennessee, Minnesota, and Florida.

### **New York Safe Harbor for Exploited Children Act – 2008**

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<sup>13</sup> Abby Sewell, *Most L.A. County youths held for prostitution come from foster care* (Nov. 27, 2012), *The Los Angeles Times*, available at: <http://articles.latimes.com/2012/nov/27/local/la-me-1128-sex-trafficking-20121128>

<sup>14</sup> R. Mendel (2011). *No Place for Kids: The Case for Reducing Juvenile Incarceration* (2011), The Annie E. Casey Foundation, available at: <http://www.aecf.org/OurWork/JuvenileJustice/JuvenileJusticeReport.aspx> (The average daily cost nationwide to incarcerate one juvenile offender in 2008 was \$241. That translates to an average cost of \$66,000 to \$88,000 to incarcerate a youth for 9-12 months in a correctional facility)

<sup>15</sup> *Early Intervention to Avoid Sex Trading and Trafficking of Minnesota's Female Youth: A Benefit Cost Analysis* (2012), Minnesota Indian Woman's Resource Center, available at: [http://www.miwrc.org/system/uploaded\\_files/0000/0147/Benefit-Cost-Study\\_Full\\_Report\\_9-4-2012.pdf](http://www.miwrc.org/system/uploaded_files/0000/0147/Benefit-Cost-Study_Full_Report_9-4-2012.pdf)

<sup>16</sup> Legal Encyclopedia, Cornell University Law School, available at: [http://www.law.cornell.edu/wex/safe\\_harbor](http://www.law.cornell.edu/wex/safe_harbor)

<sup>17</sup> *2012 State Ratings Category Descriptions* (2012), The Polaris Project, available at: <https://na4.salesforce.com/sfc/p/300000006E4SZ2vOAvBtmKICytWEBvS.6oLeE4k=>

New York's Safe Harbor law is often heralded as a major win in decriminalization movement. While the Safe Harbor for Exploited Children Act should rightly be praised for being the first state legislation to address the issue, it should be noted that it is not in fact a decriminalization statute at all.<sup>18</sup> The Act is actually a diversion program. Under New York's Safe Harbor law children can still be arrested and charged with prostitution, but then diverted to specialized services at the order of the judge, if they meet a narrow set of circumstances.<sup>19</sup> Indeed, the Act does define a minor engaged in prostitution as a sexually exploited minor, but bars many children from receiving services as victims.<sup>20</sup>

Because of the narrowly defined set of circumstance that a court must find for a child to be eligible, the fact is that the majority of children will not be eligible for New York's Safe Harbor provision. The first major hurdle that eliminates eligibility for many of children is that the arrest must be for a first offense. Therefore any prior arrests for prostitution will bar the child from the diversion program.<sup>21</sup> This creates major problems as many children do not self-report as victims and the majority of law enforcement officers, no matter how well-intentioned, are not properly trained in identifying trafficked children. The result of this provision means that a child trafficked by a pimp, and then re-trafficked after an arrest, which is so often the case, is no longer eligible for Safe Harbor. As training and awareness of the issue grows, it is unjust to exclude children who have not previously benefitted from Safe Harbor or acknowledge that a cycle of violence is not easily broken and that it is the child's fault if he or she returns to prostitution.

If a child passes the first hurdle, diversion from criminal charges is still not mandatory; the Court must still certify them as a Person in Need of Supervision (PINS). The PINS certification is problematic in itself as a PINS Petition must be heard by the courts and leaves broad discretion in hands of the judge. The Safe Harbor Provisions outlines that A PINS petition will be denied if:

- The child does not meet the federal definition of a victim of a severe form of trafficking;
- The child was previously granted PINS certification; or
- The child is unwilling to cooperate in specialized services.<sup>22</sup>

A child's willing or unwillingness to cooperate in specialized services is the largest shortcoming of the act as: (1) the arrest has already likely started an adversarial process for the child, (2) children who have been trafficked often do not identify as victim in need of assistance, and (3) fear of their traffickers/pimps often mean they cannot request assistance for

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<sup>18</sup> Darren Geist, *Finding Safe Harbor: Protection, Prosecution, and State Strategies to Address Prostituted Minors*, 4 Legislation and Policy Brief 67, 92-104 (2012), available at: <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1038&context=lpb>

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Geist at 97 *supra* note 17

fear that they or other loved ones might be hurt.<sup>23</sup> Finally, even if a child is PINS certified, although the Act does recognize the need for specialized services for victims of commercial sexual exploitation; there is no specified funding source or plan of action to coordinate services for these minors. Thus without effective implementation, this provision has had little practical effects.<sup>24</sup>

### **Washington's Sex Crimes Involving Minors Act - 2010**

Much like New York, Washington defines a child engaged in prostitution as a "sexually exploited child" but does not define all such children as *per se* victims.<sup>25</sup> Instead the Act considers minors engaged in prostitution as victims for the limited purpose of victim's compensation benefits, but still allows them to be arrested and convicted of prostitution.<sup>26</sup> As such, Washington also falls short of true safe harbor provisions, since like New York they only allow for diversion from criminal charges in a limited set of circumstances.

Washington does differ from New York in that much of the discretion lies in the hands of prosecutors instead of the judge. The prosecution must first find a child to be a "child in need of services" (CHINS). Unlike, New York, for a first time prostitution offense, diversion is mandatory, but only if the county has specialized services in place. Additionally, unlike New York, a prior offense is not an absolute bar, but left to the discretion of the judges.<sup>27</sup>

### **Connecticut's Safe Harbor for Protected Children - 2010**

Connecticut is the first state to decriminalize child prostitution under its Safe Harbor Provisions. It states that a child engaging in commercial sex cannot be convicted of prostitution.<sup>28</sup> However, this provision only applies to those under 16. For children 16 and 17, it creates a rebuttable presumption that there was coercion involved; therefore a Court may still decide that a child can be convicted of prostitution since the state's age of consent for a sex act is 16.<sup>29</sup>

### **Vermont's Act Relating to Human Trafficking - 2011**

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<sup>23</sup> Polaris Project, Section on Human Trafficking, Section on Sex Trafficking in the U.S., *Street Prostitution*, available at: <http://www.polarisproject.org/human-trafficking/sex-trafficking-in-the-us/street-prostitution>

<sup>24</sup> Geist *supra* note 17

<sup>25</sup> *Id.*; The Protected Innocence Challenge, 1, 200-201 (2011), Shared Hope International, available at: [http://sharedhope.org/wp-content/uploads/2012/10/PIC\\_ChallengeReport\\_2011.pdf](http://sharedhope.org/wp-content/uploads/2012/10/PIC_ChallengeReport_2011.pdf)

<sup>26</sup> The Protected Innocence Challenge *supra* note 24

<sup>27</sup> Geist at 97 *supra* note 17

<sup>28</sup> *Id.*

<sup>29</sup> Age of Consent by Age, available at: <http://www.age-of-consent.info/> (Last Viewed Jan. 3, 2013)

Vermont, like New York and Washington, has instituted a diversion program, rather than a decriminalization statute under its Safe Harbor Provisions.<sup>30</sup> To be eligible for diversion, once again, the child must be first certified as a Child in Need of Services.<sup>31</sup> To make such a case, the statute establishes human trafficking as an affirmative defense to the prostitution charge.<sup>32</sup> But even if a child successfully raises the defense and is diverted from criminal prosecution, the statute does not provide for any specialized services or coordinate plan of action to assist these children.<sup>33</sup>

### **Massachusetts' Act Relative to the Commercial Exploitation of People- 2011**

Like New York, Washington and Vermont, Massachusetts did not enact a decriminalization statute; it provides for merely a possible diversion from criminal charges in limited circumstances. Massachusetts similarly defines a child engaged in commercial sexual activities as a "sexually exploited child" but also does not declare them a victim per se.<sup>34</sup>

In Massachusetts a child can still be arrested and detained for prostitution, but a rebuttable presumption arises that the child should be afforded a hearing on a "care and protection" petition. The presumption only applies to the hearing of the petition, with the burden of proof on the child in proving they were under "duress or coerced into committing the offenses."<sup>35</sup> Like New York, one of the factors that would preclude many children from diversion is prior offenses. The availability of existing specialized services is also taken into consideration.<sup>36</sup>

### **Illinois' Safe Children's Act – 2011**

Illinois enacted the most robust Safe Harbor legislation to date. The Safe Children's Act provides for decriminalization across the board for all children under 18.<sup>37</sup> Minors identified as engaged in commercial sex are immediately placed under Department of Children and Family Services (DCFS) jurisdiction. This is an absolute and not left to the discretion of a prosecutor or judge.<sup>38</sup> Thus one of the critical distinguishing factors in the Illinois Act is that children engaging in commercial sex are never arrested but rather "subject to temporary protective custody," usually for no more than 48 hours.<sup>39</sup> This hold by DCFS allows for detention for investigative purposes only and the child is immune from prosecution for prostitution charges. Furthermore, this protective hold is not considered an arrest and will not create a criminal record for the child.

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<sup>30</sup> Geist at 99 *supra* note 17; S.B. 272, 2009-2010 Gen. Assemb. Sess. (Vt. 2010), *available at*: <http://www.leg.state.vt.us/docs/2012/Acts/ACT055.PDF>

<sup>31</sup> Geist at 99 *supra* note 17

<sup>32</sup> Geist at 101 *supra* note 17; S.B. 272, 2009-2010 Gen. Assemb. Sess. (Vt. 2010).

<sup>33</sup> S.B. 272, §3 2009-2010 Gen. Assemb. Sess. (Vt. 2010).

<sup>34</sup> Geist at 101 *supra* note 17

<sup>35</sup> *Id.*; H.B 3808, § 23, 57 (Mass. 2011)

<sup>36</sup> Geist at 101 *supra* note 17

<sup>37</sup> *Id.* at 102.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> The Illinois Act also mandates that in every case of child commercial sexual exploitation there must be an investigation by the police for child abuse and/or trafficking.<sup>41</sup>

### **Tennessee's Safe Harbor Law- 2011**

Tennessee, similar to Illinois, provides for decriminalization of children engaging in prostitution under the age of 18.<sup>42</sup> However, unlike Illinois it does little to further protect the children or take proactive measures to break the cycle of violence. Children may be taken into temporary protective custody by Children Services but an investigation into abuse and/or trafficking is not mandated. Worse still, children may then be released back to parents or a guardian, often without independent verification if that adult has custodial rights or played any role in the commercial sexual exploitation of the child. No follow-up or specialized services are provided.<sup>43</sup>

### **Minnesota's Safe Harbor for Exploited Children- 2011**

Minnesota's Safe Harbor provisions allow children engaging in commercial sex to be arrested, but do not allow children under 16 to be prosecuted for prostitution charges.<sup>44</sup> For children who are 16 or 17 years old, diversion from criminal charges is only offered for first time offenses.<sup>45</sup> This type of hybrid provision does little to acknowledge that children forced to commit a crime are victims not criminals. The Act does mandate the creation of specialized services for commercially exploited children, but funding for such programs is limited merely to donated funds; no government funds are specifically allocated.<sup>46</sup> If no special programs are available, assistance is offered through existing DCFS programs.

### **Florida Safe Harbor Act -- 2012**

Florida authorizes law enforcement, upon suspecting that a child is engaged in commercial sexual activity, to bring that child to a DCFS safe house rather than placing that child under arrest, but does not decriminalize prostitution offenses for children or bar arrest and prosecution for these offenses.<sup>47</sup> Indeed it specifically exempts children who are arrested and/or are being prosecuted for prostitution violations from this protection.<sup>48</sup>

### **Necessary Provisions in Safe Harbor Legislation to Best Protect Child Trafficking Victims**

Although many states have passed Safe Harbor provisions with the best of intentions, what we are learning as these laws are being implemented is that they are not adequately

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> TENN. CODE ANN. § 39-13-513 (2011)

<sup>43</sup> *Id.*

<sup>44</sup> Geist at 104 *supra* note 17

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 107

<sup>47</sup> FLA. STAT. ANN. §39.401(2)(b) (2013)

<sup>48</sup> FLA. STAT. ANN. §39.01(g) (2013)

protecting our children. Therefore it is important that all states at a minimum when considering Safe Harbor provisions in the future provide the following: (1) Decriminalization of prostitution related offenses for any child under 18, which includes explicit language that the child can be neither arrested for these crimes or convicted of these crimes; (2) Ensure that the child welfare system has jurisdiction over child trafficking victims even if their abuser is not a parent or guardian; and (3) Mandate the creation of a plan of action for appropriate law enforcement and child welfare response.

### **Decriminalization of Prostitution Related Offenses for Children**

In most states if a child is between the age of 16 and 18 years of age and an older adult engages in sex with that child, than it is statutory rape.<sup>49</sup> However in almost all states if money exchanges hands for that same sexual encounter with the child then the child under the state's prostitution laws is criminalized. Instead of being seen as a victim that child can be arrested and convicted of a crime even though it is generally understood that a child cannot consent to sexual acts because they are a child.<sup>50</sup> This principle was also acknowledged federally in the Trafficking Victims Protection Act of 2000 (TVPA) which provides that any minor under the age of 18 induced to perform a commercial sex act is considered a victim of "severe forms of trafficking" and entitled to benefits and protections under the law. Given the vulnerability of children to adult influence, and the current profitability of selling children with little criminal consequence, no matter what the age of consent is in the state, states should follow the federal model and ensure under their criminal code that any child under 18 cannot be criminally guilty of prostitution or prostitution related offenses. Hopefully if state laws are clear that any child under 18 involved in commercial sex is a victim, traffickers will get the message that all children will be protected and they will think twice about recruiting child victims. It will also be harder for them to threaten their victims into silence anymore.

In addition to ensuring that children under the age of 18 cannot be convicted of prostitution related offenses, it is also important that safe harbor legislation has clear language that children cannot be arrested for these offenses. Child trafficking victims often face threats from their traffickers that the police will not believe them and that they will be arrested and put in jail if they come forward and ask for help. Additionally, in many parts of the country law enforcement, with the best intentions, believes it is often in the best interest of the child to arrest that child. However, when this occurs the police have then confirmed that the traffickers' threats to the child were correct, likely increasing the traffickers control or influence over that child. The culture of law enforcement in this area must be changed to fully address the issue of child trafficking. In no other case has law enforcement voiced the opinion that identified victims in a criminal case should be arrested. Given this current culture, state laws need to be explicitly clear

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<sup>49</sup> Age of Consent *supra* note 7

<sup>50</sup> *Id.*

that children engaging in prostitution or prostitution related offenses cannot be arrested and a clear plan for services and police response to identified child victims must be mandated.

Finally, any decriminalization provisions enacted must allow for no exceptions to decriminalization of child trafficking victims. As discussed above, some states have enacted provisions that child trafficking victims are only eligible for safe harbor provisions if it is their first offense. However, painfully as we know, many children do not identify as crime victims, feel a connection to their trafficker, feel like they have no other options but to stay in the life, or have no other means of supporting themselves and return to their traffickers. If a child was raped twice we would not say that she should have learned her lesson the first time and that the second time the rape occurred it was her fault, and she deserves to be criminally punished for the rape. Instead we would likely believe that this individual is even more vulnerable and deserving of services. So must be the case for each child trafficking victim. Any exception to safe harbor provisions cling to the past culture of treating child trafficking victims as criminals and legislation in this area must send a clear message that this culture must change.

### **Ensure that the child welfare system has jurisdiction over child trafficking victims**

The child welfare system throughout the United States has been slow to respond to the issue of child trafficking. This is likely the case because child welfare services have typically deferred to juvenile justice and probation services in these cases because children were being arrested and convicted of crimes their traffickers forced them to commit. Additionally, although the traditional role of the child welfare system is to protect abused, abandoned or neglect children, in most states this role is limited to abuse and neglect by a parent or guardian, not an outside third-party.<sup>51</sup> However, given the specific nature of trafficking and the subsequent abuse and exploitation the child experiences, these children will be in need of many of the same services that other abused children receive through the child welfare system. This is especially the case as limited to no specialized outside services for trafficked children are now available.<sup>52</sup>

The most straightforward way that a state can ensure that its child welfare system has jurisdiction over all child trafficking victims is to clearly indicate in its statutory listing for eligibility that any child is eligible for its services if the child meets the state criminal definition of a victim of human trafficking, even if it is a third-party abuser. The law could also be written to provide some flexibility in child welfare jurisdiction if no other specialized placement or treatment for the child is available. This would allow for states to develop more specialized programs and services overtime and phase out child welfare's role if other programs become available and are seen as more appropriate to serve this victim population.

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<sup>51</sup> The Protected Innocence Challenge, 1, 87 (2011), Shared Hope International, *available at*: [http://sharedhope.org/wp-content/uploads/2012/10/PIC\\_ChallengeReport\\_2011.pdf](http://sharedhope.org/wp-content/uploads/2012/10/PIC_ChallengeReport_2011.pdf)

<sup>52</sup> Smith, et. al., at 67 *supra* note 4

Utilizing the state's criminal definition of human trafficking will cover all trafficking victims-both sex and labor. Although this provides broader protection than all of the current State Safe Harbor Provision, which are limited to commercially sexually exploited minors, this phrasing should be preferred by states enacting new legislation if they wish to better protect all child crime victims in their states. Child Labor trafficking victims are often even harder to identify and toil unidentified and unseen for traffickers for years because of lack of awareness and protections for these children.<sup>53</sup> Ensuring that state child welfare agencies also have jurisdiction over labor trafficked children is an important first step to preventing and eradicating this problem as well.

### **Mandate the creation of a plan of action for appropriate law enforcement and child welfare response**

Children must receive critical services and support as soon as they are identified as child trafficking victims. All of the state safe harbor legislation above provides none to very limited access to services to survivors once identified. For example, Illinois the most progressive provision provides specialized services limited to specially trained personal at existing facilities and has no provision for specialized residential and/or treatment facilities or coordinated action utilizing existing services.<sup>54</sup> Additionally, Tennessee and Connecticut do not offer services under their safe harbor laws.<sup>55</sup>

In this difficult budget environment, when in each state any measure which will cost money is likely to die in committee, states must think creatively about resources for new specialized programs for trafficking victims, including provisions like Minnesota's form of voluntary contribution, or those in Washington and Illinois where money from fines or seizure of assets from traffickers is given to provide services for trafficking victims.<sup>56</sup>

Additionally, States enacting these provisions should acknowledge that by utilizing their existing child welfare systems which already provide shelter, medical, mental health, and counseling for abused children, that they have many of the tools in place to better assist trafficked children. Combating child trafficking in our states might not be so much a lack of resources issue, but an issue of training, cultural change, and coordination that will in the end best protect and assist these children. To that end at a minimum all states enacting Safe Harbor provisions must include provisions that engage (1) child protective services; (2) juvenile justice and probation; and (3) other relevant government agencies and community partners in

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<sup>53</sup> Child Trafficking for Labor in the United States (Sept. 2012), Freedom Network USA, available at: <http://freedomnetworkusa.org/wp-content/uploads/2012/05/FN-Factsheet-Child-Trafficking-for-Labor-in-the-US.pdf> and [http://freedomnetworkusa.org/wp-content/uploads/2012/05/FN\\_Child\\_Trafficking\\_Updated.pdf](http://freedomnetworkusa.org/wp-content/uploads/2012/05/FN_Child_Trafficking_Updated.pdf)

<sup>54</sup> Geist at 108-110 *supra* note 17

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

formulating a strategic plan to address the issue of child trafficking in their state. Without a coordinate effort well intentioned parties will continue to act in silos.

### **Going Beyond Decriminalization of Child Sex Trafficking Victims**

Arresting and criminalizing a child for a crime he or she is forced to commit is a gross injustice, but what no state safe harbor legislation has yet to address is safe harbor for child labor trafficking victims who might be forced to steal, sell or cultivate drugs, or smuggle individuals into the United States. To truly protect all trafficked children states must figure out a way to decriminalize all children from crimes their traffickers force them to commit.

A good first step to addressing this issue may be passing a robust affirmative defense based on trafficking. Due to lack of extensive outreach and training on identification of human trafficking survivors, many law enforcement officials and local and state prosecutors are still unfamiliar with the parameters and nuances of human trafficking crimes and the insidious ways that victims can be enslaved. This means that prosecutors often proceed with prosecutions against trafficking victims for crimes that their traffickers forced them to commit. The only current defense to these crimes is duress and necessity<sup>57</sup>; both defenses require a high standard of proof.<sup>58</sup> In recognition that trafficking survivors should not be convicted of crimes they committed as a result of being trafficked, several states, including Connecticut and New Jersey, have created limited affirmative defenses for human trafficking victims, protecting such victims against prosecution for prostitution. For example, Connecticut law reads: “In any prosecution for an offense under this section [prostitution], it shall be an affirmative defense that the actor was coerced into committing such offense by another person in violation of §§ 53a-192a.”<sup>59</sup> States should go a step further and introduce an even broader defense for children, such as an affirmative defense for specifically enumerated crimes if such crimes were allegedly committed while the defendant was a victim of human trafficking.

Additionally all trafficking victims should be given the opportunity to vacate criminal convictions. Trafficked children who have committed any nonviolent crimes, not just prostitution offenses, should be allowed to petition to vacate their convictions and seal the appropriate records. Juveniles might have charges related to truancy, forced drug use or sale/and or cultivation, trespassing, loitering, theft crimes, and warrants for charges for failure to appear for trafficking violations which can result in misdemeanor convictions. All of these non-violent crimes may be committed directly as a result of being trafficked, and the children who have committed them should be protected accordingly.

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<sup>57</sup> Geist at 101 *supra* note 17

<sup>58</sup> Manual of Model Jury Instructions, §§6.5-6.6, *available at*: <http://www3.ce9.uscourts.gov/web/sdocuments.nsf/crim?OpenView&Start=1&Count=250&Expand=9#9>

<sup>59</sup> S.B. 153, Feb. Sess. 2010 (C.T. 2010), *available at*: <http://cga.ct.gov/2010/ACT/PA/2010PA-00115-R00SB-00153-PA.htm>

## National Advocacy for State Welfare Reform

In addition to passing legislation which truly provides a safe harbor for our trafficked youth, the United States must begin engaging in a national dialogue to combat child trafficking. This can only be done by encouraging all 50 states to take action to reform their current child welfare and juvenile probation systems and properly implement real solutions to address the specialized needs of these youth. In August of 2011, Representative Karen Bass and Tom Marino introduced H.R. 2730 Strengthening the Child Welfare Response to Trafficking Act. This act was designed to “ensure that child welfare agencies have the tools to understand the unique needs of the child victims of human trafficking and the resources to appropriately serve them.”<sup>60</sup> We should not need federal legislation to ensure that State protective services increase involvement in the issues of child trafficking, but a mechanism for a coordinated national dialogue such as H.R. 2730 presents would better ensure that states more effectively learn from each other’s experience in this area and share best practices and protocols.

## Conclusion

For too long trafficked children have toiled in modern-day slavery in the United States, in brothels, on the streets, in our fields, in our factories, and homes. Shamefully, now even when our children are being identified as victims of this horrific crimes, they are not being served as victims of crimes. To this end we need systemic legislation, and also cultural and societal change to acknowledge that we have failed these children, and that we will not continue to fail them in the future.

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<sup>60</sup> Representative Karen Bass, Section on Media Center > Press Releases, *Statement on National Trafficking Month* (Jan. 27, 2012), available at: <http://karenbass.house.gov/press-release/us-rep-karen-bass-statement-national-trafficking-month>

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