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## Protecting the Imperfect Victim: Expanding “Safe Harbors” to Adult Victims of Sex Trafficking

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## PROTECTING THE IMPERFECT VICTIM: EXPANDING “SAFE HARBORS” TO ADULT VICTIMS OF SEX TRAFFICKING

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### INTRODUCTION: SEX TRAFFICKING IN THE UNITED STATES

Over the past twenty years, there has been increased recognition of the problem of human trafficking.<sup>1</sup> Human trafficking is an umbrella term for “the act of recruiting, harboring, transporting, providing, or obtaining a person for compelled labor or commercial sex acts through the use of force, fraud, or coercion,” and is considered “to be the third most profitable criminal enterprise” in the world, earning an estimated 31.6 billion in profits for the perpetrators of

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1. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102(b)(1), 114 Stat. 1464, 1466 (“As the 21st century begins, the degrading institution of slavery continues throughout the world. Trafficking in persons is a modern form of slavery, and it is the largest manifestation of slavery today.”). Addressing the issue of modern slavery, President Obama, declaring February as the National Slavery and Human Trafficking Prevention Month said: “One hundred and fifty years ago, our Nation codified the fundamental truth that slavery is an affront to human dignity. Still, the bitter fact remains that millions of men, women, and children around the globe, including here at home, are subject to modern-day slavery: the cruel, inhumane practice of human trafficking. . . . [L]et us recognize the victims of trafficking, and let us resolve to build a future in which its perpetrators are brought to justice and no people are denied their inherent human rights of freedom and dignity.” Proclamation No. 9386, 81 Fed. Reg. 317, 715 (Jan. 6, 2016).

these crimes.<sup>2</sup> Of the estimated twenty-one million trafficking victims, approximately 4.5 million are victims of some form of sex trafficking.<sup>3</sup> Global and domestic efforts have been taken to address the issue of modern slavery.

In 2000, the United Nations adopted the “Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,” supplementing the “Convention against Transnational Organized Crime” (Palermo Protocol).<sup>4</sup> The same year, the United States federal government enacted the Trafficking Victims Protection Act (TVPA) “[t]o combat trafficking in persons, especially into the sex trade, slavery, and involuntary servitude.”<sup>5</sup> TVPA was reauthorized as the Trafficking Victims Protection Act (TVPRA) in 2004, 2006, 2008, 2013, and most recently in 2015.<sup>6</sup> The Act acknowledged that victims of trafficking are predominately women and children and was designed “to ensure just and effective punishment of traffickers, and to protect their victims.”<sup>7</sup> The TVPRA does not prohibit all forms of human trafficking, but criminalizes “[s]everal forms of trafficking,” including sex trafficking “through [means] of force, fraud, or coercion,” or where the victim is under the age of eighteen.<sup>8</sup>

Particularly vulnerable populations in the United States [to human trafficking] include: children in the child welfare and juvenile justice systems; runaway and homeless youth; children working in agriculture; American Indians and Alaska Natives; migrant laborers; foreign national domestic workers in diplomatic households; . . . [persons] with limited English proficiency;

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2. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 29 (2014); KEVIN BALES & RON SOODALTER, THE SLAVE NEXT DOOR: HUMAN TRAFFICKING AND SLAVERY IN AMERICA TODAY 3 (2009); Patrick Belser, *Forced Labour and Human Trafficking: Estimating the Profits* 17 (Int'l Labour Office, Working Paper No. 42, 2005), [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_081971.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_081971.pdf).

3. SUZANNAH PHILLIPS ET AL., INT'L WOMEN'S HUMAN RIGHTS CLINIC, CLEARING THE SLATE: SEEKING EFFECTIVE REMEDIES FOR CRIMINALIZED TRAFFICKING VICTIMS 5 (2014), <http://www.law.cuny.edu/academics/clinics/iwhr/publications/Clearing-the-Slate.pdf>.

4. See U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 11 (2015) (“166 countries have become a party to the Protocol,” which introduced the concept of “the ‘3P’ paradigm of prosecuting traffickers, protecting victims, and preventing the crime through the passage and implementation of national anti-trafficking laws.”).

5. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1464.

6. Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat. 227, 227; Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54, 54; William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044, 5044; Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558, 3558 (2006); Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875, 2875.

7. 22 U.S.C. § 7101(a) (2000).

8. 22 U.S.C. § 7102(9) (2000).

persons with disabilities; . . . and lesbian, gay, bisexual and transgender individuals.<sup>9</sup>

The federal government's investigation and prosecution of sex trafficking is generally considered successful.<sup>10</sup> However, in addition to federal laws, "state laws form the basis of the majority of criminal actions, making [the] adoption of state anti-trafficking laws key" to adequately addressing the issue of sex trafficking.<sup>11</sup> "[A]ll fifty states adopted some form of human trafficking legislation," some of which are considered "comprehensive tools for prosecuting traffickers and supporting victims, while others have been criticized as lacking provisions essential to effective human trafficking legislation."<sup>12</sup> Despite the federal government's legal mandate to treat involuntary sex workers as victims rather than criminal defendants, one area that states frequently fall short is in the adoption of victim-centered policies, which ensure that victims are not punished for crimes committed as a direct result of being subjected to trafficking.<sup>13</sup> Trafficking victims frequently come into contact with the criminal justice system when they are arrested for prostitution and other related crimes.<sup>14</sup> Such encounters "are frequently traumatic[,] . . . can fuel mistrust of law enforcement, . . . [and] result[] in collateral harms for the victims themselves."<sup>15</sup> Further, "[p]rostitution and related convictions [can] continue to haunt trafficking survivors long after they have escaped the trafficking situation, posing a serious hurdle

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9. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 352 (2015).

10. *Id.* at 353. In 2011, the Departments of Justice, Homeland Security, and Labor launched the Anti-Trafficking Coordination Team (ACTeam) Initiative, "which . . . streamlined trafficking investigations and prosecutions." *Id.* Although only Phase 1 of the ACTeam Initiative has been completed, "[a]n internal assessment of ACTeam Districts found a significant increase in anti-trafficking convictions . . . of adults by force, fraud, and coercion. . . . The DOJ initiated a total of 208 federal human trafficking prosecutions in FY 2014, charging 335 defendants." *Id.* Convictions were secured against 184 traffickers, 157 of which predominantly involved sex trafficking. *Id.*

11. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 354 (2015).

12. Erin N. Kauffman, Note, *The Uniform Act on Prevention of and Remedies for Human Trafficking: State Law and the National Response to Labor Trafficking*, 41 J. LEGIS. 291, 292 (2014).

13. See Trafficking Victims Protection Act, 22 U.S.C. § 7105(c)(1)(A) (2015).

14. See PHILLIPS ET AL., *supra* note 3, at 2 ("Trafficking victims may be swept up in police raids of brothels or may be arrested as part of current policing efforts to crackdown on misdemeanor offenses, including prostitution."); see also JANICE G. RAYMOND, NOT A CHOICE, NOT A JOB: EXPOSING THE MYTHS ABOUT PROSTITUTION AND THE GLOBAL SEX TRADE 26 (2013) ("For the most part, prostitution as actually practiced in the world usually does satisfy the elements of trafficking. It is rare that one finds a case in which the path to prostitution and/or a person's experiences within prostitution do not involve . . . an abuse of power and/or an abuse of vulnerability.").

15. PHILLIPS ET AL., *supra* note 3, at 2.

to their ability to secure employment [and] safe housing”—factors that are crucial to rebuilding their lives.<sup>16</sup> As discussed below, law and policy reflect more of a willingness to acknowledge that child prostitutes are victims of trafficking, while adults engaged in prostitution, who may be similarly situated, are treated with greater ambivalence.<sup>17</sup>

Part I of this Note provides a general background on the problem of human trafficking in the United States, and the connection between trafficking and prostitution laws. Part II will discuss the rise of “safe harbor laws,” and the general trend toward recognizing that all minors engaged in the commercial sex trade are victims of human trafficking. Part III will highlight circumstances that suggest that adults engaged in prostitution are often trafficking victims, and will discuss the limitations on current governmental efforts to address this. Finally, Part IV will explore how safe harbor laws for minors can serve as a framework to offer protection to adult victims of trafficking.

#### I. “SAFE HARBOR” LAWS FOR SEXUALLY EXPLOITED CHILDREN

Children are generally afforded increased protection under the law, as they are understood to be in a biological and developmental phase in which they lack maturity and thus, “need[] special safeguards and care.”<sup>18</sup> Notably, many U.S. anti-trafficking efforts arose from the goal of addressing the sexual abuse and exploitation of children, in recognition that “minors rarely consent to prostitution” but are pulled into it through abuse, coercion, and victimization.<sup>19</sup> Many minors in prostitution are victims of child abuse or neglect, including runaways from backgrounds of sexual and/or physical abuse, addiction, incest, and poverty.<sup>20</sup> As a result of such conditions, these vulnerable minors often become “prey for sexually exploitive adults.”<sup>21</sup>

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16. *Id.*

17. See Priscilla A. Ocen, *(E)racing Childhood: Examining the Racialized Construction of Childhood and Innocence in the Treatment of Sexually Exploited Minors*, 62 UCLA L. REV. 1586, 1588–89 (2015).

18. *Id.* at 1596.

19. Cheryl Nelson Butler, *Bridge Over Troubled Water: Safe Harbor Laws for Sexually Exploited Minors*, 93 N.C. L. REV. 1281, 1290 (2015); see U.S. DEPT OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS 6–7 (2010), <http://www.justice.gov/psc/docs/natstrategyreport.pdf> (citing protecting childhood as the normative justification for federal anti-trafficking efforts).

20. Butler, *supra* note 19, at 1290–91.

21. *Id.* at 1291–93 (“Kids who are emotionally broken may seek love in all of the wrong persons, including the arms of pimps posing as boyfriends with false promises of love and support.”). Even middle class children, with presumably more familial and social

Once recruited, traffickers use “pimp subculture”—physical violence and known methods of psychological manipulation—“to groom victims for exploitation.”<sup>22</sup> Traffickers maintain control through the use of “[b]eatings, whippings, . . . sexual assaults, and other torture techniques,” and psychological tactics such as threatening to harm family members.<sup>23</sup> These abuses are often successful at creating a sense of shame and self-blame in the victim, leading to “hopelessness and resignation.”<sup>24</sup>

Not surprisingly, trafficking laws contain special protections and distinctions, which apply specifically to minors.<sup>25</sup> Under the TVPA, those found guilty of trafficking adults “by means of force, . . . fraud, or coercion” can face a minimum of fifteen years in prison.<sup>26</sup> Those convicted of child trafficking face a minimum of ten years imprisonment if the child was over the age of fourteen or a minimum of fifteen years imprisonment if the child was under the age of fourteen.<sup>27</sup> When prosecuting child sex traffickers, the government does not need to prove that the trafficking occurred as a result of force, fraud, or coercion.<sup>28</sup> Under TVPA guidelines, minors who engage in commercial sex should be designated as a victim of a severe form of trafficking and should be extended the protections authorized by the Act.<sup>29</sup>

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support may be vulnerable to being physically or emotionally coerced into prostitution, even while living in the security of their homes. *Id.* at 1292–93.

22. *Id.* at 1293.

23. *Id.*

24. *Id.* (Butler defines the essence of the pimp subculture applied to groom minors for prostitution as “‘Pimps Up, Ho’s Downs’—complete subjugation, humiliation, and manipulation.”).

25. *See* Ocen, *supra* note 17, at 1588.

26. 18 U.S.C. § 1591(b)(1) (2012).

27. *Id.* § 1591(b)(1)–(2). With respect to children under the age of fourteen, individuals can face up to life imprisonment for recruiting a child for purposes of sexual exploitation, even if the actual exploitation never occurs. *Id.*

28. U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 7 (2015) (“[N]o cultural or socioeconomic rationalizations alter the fact that children who are prostituted are trafficking victims.”); *see also* 18 U.S.C. § 1591(b)(1)–(2) (2015).

29. For example, the TVPRA of 2013 calls upon states to provide prostituted minors with immunity from prosecution and provides block grant for programs, shelters, and law enforcement efforts. *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, §§ 1241–43, 127 Stat. 54, 149–54 (codified as amended at 22 U.S.C. § 7101).

In addition to the TVPRA, other federal legislation has also been proposed to complement legal protections for sexually exploited minors. On November 13, 2013, Congress passed House Committee Resolution 66, to “support[] survivors of domestic child sex trafficking” by recognizing their need for services “to heal from the complex trauma of sexual violence and exploitation.” H.R. Con. Res. 66, 113th Cong. (2013). Congress also proposed the Strengthening the Child Welfare Response to Human Trafficking Act of 2013, which proposes to amend part of Title IV of the Social Security Act to increase the role of the child welfare system in combating child sex trafficking. Strengthening the Child Welfare Response to Human Trafficking Act of 2013, H.R. 1732, 113th Cong. (2013).

There is a trend toward treating prostituted minors as human trafficking victims, generally through “shifting the legal paradigm from prosecution to protection.”<sup>30</sup> Under such a model, laws discourage the charging or prosecution of minors for prostitution or sex trafficking related offenses, and encourage the diversion of such individuals to child protective services and other supportive programs.<sup>31</sup> This shifting paradigm is well reflected in “safe harbor” laws—laws that “recognize[] sexually exploited individuals under 18 as victims of a crime in need of protection and services by granting immunity from prosecution or diverting minors from juvenile delinquency proceedings, and instead directing them to child welfare services.”<sup>32</sup> As of 2014, “[a]t least [twenty-eight] states have enacted legislation addressing safe harbor issues.”<sup>33</sup> “At least six states . . . make . . . minors immune from prosecution for prostitution; some extend that immunity to related offenses such as pandering, trafficking and procuring prostitutes.”<sup>34</sup> “Some states enable minors charged with prostitution and related offenses to be diverted to pretrial programs at the discretion of” law enforcement.<sup>35</sup>

In furtherance of the movement to develop clear and effective standards for state safe harbor legislation, Congress adopted the Uniform Act on Prevention of and Remedies for Human Trafficking of 2013 (Uniform Act), which offers three key standards for shifting the paradigm toward protecting sexually exploited minors.<sup>36</sup> First,

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30. Butler, *supra* note 19, at 1305–06.

31. *See id.*

32. POLARIS PROJECT, 2013 ANALYSIS OF STATE HUMAN TRAFFICKING LAWS 4 (2013), <http://polarisproject.org/sites/default/files/2013-State-Ratings-Analysis.pdf>.

33. *Human Trafficking Overview*, NAT’L CONFERENCE OF STATE LEGISLATURES (May 9, 2014), <http://www.ncsl.org/research/civil-and-criminal-justice/human-trafficking-overview.aspx> [<https://perma.cc/2WE3G8K4>].

34. *Id.* (explaining that the six states granting full immunity are Illinois, Mississippi, Nebraska, North Carolina, Tennessee and Vermont).

35. *Id.*

36. UNIF. ACT ON PREVENTION OF & REMEDIES FOR HUMAN TRAFFICKING § 15(a) (NAT’L CONF. OF COMM’RS ON UNIF. STATE LAW, Recommended Draft 2013). The Uniform Act is a comprehensive model statute that incorporates best practices in state anti-trafficking legislation. According to the Uniform Commissioners, the Uniform Act reflects agreement among state legislatures on key provisions that anti-trafficking laws adopt. James Dold, Senior Pol’y Council, Polaris Project, ATEST National Call for Uniform Law Commissioners (June 25, 2013) (transcript available at [http://www.endslaveryandtrafficking.org/wp-content/uploads/2016/03/written\\_transcript\\_June\\_25\\_2013.pdf](http://www.endslaveryandtrafficking.org/wp-content/uploads/2016/03/written_transcript_June_25_2013.pdf)) (describing that variances in state laws led to the efforts to develop the Uniform Law Act). The Uniform Act is also consistent with model standards supported by advocacy organizations and the federal government. For example, similar to the Uniform Act, the Polaris Project recommends that safe harbor laws address four key goals: (1) legally defining all sexually exploited minors as victims; (2) removing sexually exploited minors from the jurisdiction of the criminal and juvenile justice systems; (3) provision of victim services; and (4) training law enforcement and raising public awareness. POLARIS PROJECT,

under the Uniform Act, a safe harbor provision is one that provides all prostituted minors under the age of eighteen complete immunity for criminal prosecution or juvenile delinquency adjudication.<sup>37</sup> Second, the Uniform Act recognizes minors as “CHINS”—children in need of services—allowing minors to receive services without being adjudicated as delinquent.<sup>38</sup> These “[s]ervices should [generally] include medical and psychological treatment, emergency and long-term housing, education [and job] assistance, . . . and legal services.”<sup>39</sup> Third, safe harbor laws must offer training and education to law enforcement, legal professionals and other community stakeholders.<sup>40</sup>

There is less consensus regarding the appropriate response to adult victims of sex trafficking who come in contact with law enforcement due to prostitution-related activity because of competing narratives about the role of consent in prostitution.<sup>41</sup> On one end of the spectrum is the anti-prostitution view that prostitution “subordinates and exploits and disadvantages women.”<sup>42</sup> Under such a view, even when women may have “consented” to prostitution in a contractual sense, “they probably did not consent volitionally.”<sup>43</sup>

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OVERVIEW OF STATE LEGISLATIVE POLICY TO ADDRESS THE COMMERCIAL EXPLOITATION OF CHILDREN—STATE “SAFE HARBOR” LAWS 1–3 (2008), [http://www.polarisproject.org/storage/documents/policy\\_documents/model%20laws/model%20safe%20harbor%20law%20overview%final-1.pdf](http://www.polarisproject.org/storage/documents/policy_documents/model%20laws/model%20safe%20harbor%20law%20overview%final-1.pdf).

37. UNIF. ACT ON PREVENTION OF & REMEDIES FOR HUMAN TRAFFICKING § 15(a)–(b).

38. See UNIF. ACT ON PREVENTION OF & REMEDIES FOR HUMAN TRAFFICKING § 15(c); ROSHAL ERSKINE & JESSICA SMITH, JUST GEORGIA, CHILDREN IN NEED OF SERVICES (CHINS): A BETTER FRAMEWORK FOR STATUS OFFENDERS 5–6 (2010) (“The definition of a ‘child in need of services’ is very similar to Georgia’s current definition of an ‘unruly child.’ While the courts currently treat these children in a manner similar to delinquent offenders, the new law would require a more holistic service-oriented approach.”).

39. POLARIS PROJECT, HUMAN TRAFFICKING ISSUE BRIEF: SAFE HARBOR (2015), <http://www.polarisproject.org/sites/default/files/2015%20Safe%20Harbor%20Issue%20Brief.pdf> [hereinafter POLARIS PROJECT, HUMAN TRAFFICKING ISSUE BRIEF: SAFE HARBOR].

40. See UNIF. ACT ON PREVENTION OF & REMEDIES FOR HUMAN TRAFFICKING § 19(c)(5).

41. See, e.g., Elizabeth Kaigh, Comment, *Whores and Other Sex Slaves: Why the Equation of Prostitution with Sex Trafficking in the Wilberforce Reauthorization Act of 2008 Promotes Gender Discrimination*, 12 THE SCHOLAR: ST. MARY’S L. REV. ON MINORITY ISSUES 139, 142 (2009).

42. Catharine MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 13, 20 (1993) (“Women in prostitution are denied every imaginable civil right in every imaginable and unimaginable way.”).

43. Amanda Peters, *Modern Prostitution, Legal Reform & the Return of Volitional Consent*, 3 VA. J. CRIM. L. 11, 43 (2015) (citing Jody Raphael & Deborah L. Shapiro, *Sisters Speak Out: The Lives and Needs of Prostituted Women in Chicago*, CENTER FOR IMPACT RESEARCH 1, 13 (Aug. 2002)) (explaining that under a contractual model, “courts have . . . interpreted the consent element of prostitution as . . . the agreement entered into by the parties” to exchange sexual acts for a fee, “rather than [considering] the defendant’s consent to engage in the underlying acts of prostitution or willingness to participate in the profession itself.”).



Instead, most prostituted women engage in a “choiceless choice.”<sup>44</sup> The system of prostitution, which represses women’s freedom, does not allow women to make meaningful choices.<sup>45</sup> “Choice has come to replace what is actually a *strategy for survival* for most prostituted women.”<sup>46</sup> On the other hand, a growing body of scholarship promotes the position that women have the power to consent to sexual activity, meaning that prostitution can be a valid form of employment.<sup>47</sup> These “[s]ex-work advocates generally consider the prohibition on the commercial sale of sex to infringe upon an individual’s right to choice or agency.”<sup>48</sup>

For adults, under most legal frameworks, the “presence of coercion . . . is [generally] a necessary condition to establish the existence of trafficking . . . whether as an offence [sic], . . . or to identify victims of trafficking.”<sup>49</sup> How consent is defined and conceptualized has important implications for victims of sex trafficking.<sup>50</sup> Generally, an activity will be considered consensual by default if there is an apparent lack of coercion or other element of force.<sup>51</sup> However, even when consent can clearly be deemed valid, the activity is not necessarily rendered harmless or justified—exploitative conditions may still exist.<sup>52</sup> Toko Serita, presiding judge of the Human Trafficking Intervention Court (HTIC) in New York City, notes that a “significant portion of street-level prostitution of adult women is pimp-controlled,” and that “violence, subjugation, and control are integral aspects of pimp-controlled prostitution.”<sup>53</sup> Thus, although under some constructions of consent, adult women engaging in street-level prostitution are technically consenting, a pimp’s

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44. RAYMOND, *supra* note 14, at 19.

45. *See id.*

46. *Id.*

47. Kaigh, *supra* note 41, at 142 n.15.

48. John Elrod, Note, *Filling the Gap: Refining Sex Trafficking Legislation to Address the Problem of Pimping*, 68 VAND. L. REV. 961, 972 (2015); *see also, e.g.*, RAYMOND, *supra* note 14, at 20 (“In 1990 at a UN Economic and Social Council (ECOSOC) meeting, the Dutch government argued for a woman’s right to choose prostitution, including her right to choose her pimp: ‘The right to self-determination, enjoyed by every independent adult man or woman who has not been subjected to any unlawful influence, implies the right of that individual to engage in prostitution and to allow another individual to profit from the resulting earnings.’”).

49. JESSICA ELLIOT, THE ROLE OF CONSENT IN HUMAN TRAFFICKING 129 (2015).

50. *Id.*

51. *Id.*

52. *Id.*

53. Hon. Toko Serita, *In Our Own Backyards: The Need for A Coordinated Judicial Response to Human Trafficking*, 36 N.Y.U. REV. L. & SOC. CHANGE 635, 642 (2011) (noting that “it is rare that a defendant in the HTIC works ‘the streets’ on her own” due to the dangers that exist for those without the protection of a pimp).

control calls into question the extent that the prostitute actually has a choice.<sup>54</sup> The “culture of pimping is far removed from the glorified portrayal of pimps popularized in the mass media,” but includes standardized practices and strict adherence to rules, which are created by the pimp.<sup>55</sup> These rules are designed to control and break down the individual will of the prostitute, and those who fail to follow the rules are often severely punished.<sup>56</sup> For example, a woman may be beaten for not meeting daily quotas, for looking another pimp directly in the eye, or disagreeing with her pimp.<sup>57</sup> In some instances, a pimp will even brand or tattoo his victims with the pimp’s name or another identifying marker in order to reinforce a sense of power over his victims.<sup>58</sup>

The dynamics of prostitution can be complicated; pimps often resemble domestic batterers, and women under the control of a pimp may resemble victims of domestic violence in that they “often express feelings of love and admiration for the pimp, have their freedom and finances controlled, and may feel they somehow deserve the violence they are dealt.”<sup>59</sup> This emotional control helps explain why it is often difficult for prostitutes to leave their pimps.<sup>60</sup> Further, “[p]imp-controlled women are primarily poor and are particularly vulnerable to exploitation because they are without stable families, jobs, and educational prospects.”<sup>61</sup> Although there is generally increased sympathy for foreign trafficking victims, in many ways, the experiences of trafficking victims in America tend to be similar.<sup>62</sup>

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54. Commentators note that street-level prostitution is also comprised of “independent entrepreneurial prostitution.” Celia Williamson & Terry Cluse-Tolar, *Pimp-Controlled Prostitution: Still an Integral Part of Street Life*, 8 VIOLENCE AGAINST WOMEN 1074, 1074–75 (2002).

55. Serita, *supra* note 53, at 642.

56. RACHEL LLOYD, GIRLS LIKE US: FIGHTING FOR A WORLD WHERE GIRLS ARE NOT FOR SALE, AN ACTIVIST FINDS HER CALLING AND HEALS HERSELF 96 (2011).

57. *See id.*

58. Sara Snider, *Old Mark of Slavery is Being Used on Sex Trafficking Victims*, CNN U.S. (Sept. 1, 2015, 10:00 AM), <http://www.cnn.com/2015/08/31/us/sex-trafficking-branding> [<https://perma.cc/ME5CM7LC>]; LLOYD, *supra* note 56, at 97.

59. Williamson & Cluse-Tolar, *supra* note 54, at 1089; *see also* RAYMOND, *supra* note 14, at 19. Despite the similarities between battered women and prostitutes, the former are generally granted increased sympathy and recognition as victims. For example, “[w]hen a woman continues in an abusive relationship with a partner who batters her, or even when she defends her partner’s actions, concerned people [do not] assume she remains voluntarily. They recognize the complexity of her compliance.” *Id.*

60. *See* LLOYD, *supra* note 56, at 96.

61. Serita, *supra* note 53, at 643; JILL LAURIE GOODMAN, LAWYER’S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE FOR VICTIMS 8 (Jill Goodman & Dorchen A. Leidholdt eds., 2011).

62. Serita, *supra* note 53, at 638–39, 643 (noting that internationally trafficked children and women are seen as the “real” trafficking victims: “when we hear about trafficking in India or Cambodia, our hearts melt.”).

For example, a pimp or trafficker may confiscate documents, take the victim from her home, and subject her to fill an assigned quota every night under the threat of rape, abuse, or other violence.<sup>63</sup> Additionally, “the majority of adults in prostitution were initially prostituted as children.”<sup>64</sup> “Reintegration into society is incredibly difficult for these women, who are often without any of the basic tools or resources necessary for participation in society that most ‘average’ citizens take for granted.”<sup>65</sup>

## II. LIMITATIONS TO GOVERNMENTAL EFFORTS TO MINIMIZE CRIMINALIZATION OF ADULT VICTIMS OF SEX TRAFFICKING

### A. Screening and Diversion upon Arrest

“[One] method for decriminalizing victims of sex trafficking is to rely on law enforcement officials and/or prosecutors to identify victims and exercise their discretion to decline prosecution.”<sup>66</sup> This approach is insufficient “to address the scope of the problem” because of the “high . . . risk that law enforcement will fail to identify cases” in which the prostitute is a victim “under conditions that amount to trafficking.”<sup>67</sup> “Despite a [relatively] robust anti-trafficking discourse [in society generally], these notions have not permeated the spheres of urban policing and local criminal courts.”<sup>68</sup> “Swept up in a criminal justice system that depends on the swift and thoughtless processing of criminal cases in record times, sex trafficking victims are not identified or thought of as victims.”<sup>69</sup> Further, “[c]riminal courts designated to process [such a] high volume” of low-level offenses are insufficiently “equipped to explore the circumstances of each case individually.”<sup>70</sup>

Additionally, “by the time law enforcement can screen . . . cases to identify potential victims of sex trafficking, the [individual] is [generally] already subject to arrest and detention.”<sup>71</sup> Victims identify

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63. See BALES & SOODALTER, *supra* note 2, at 21.

64. Serita, *supra* note 53, at 655.

65. *Id.* at 656.

66. Michelle Madden Dempsey, *Decriminalizing Victims of Sex Trafficking*, 52 AM. CRIM. L. REV. 207, 224 (2015).

67. *Id.* at 224–25 (“This problem is particularly acute where people arrested for selling sex view themselves as being in a committed . . . relationship with their pimps.”).

68. *Id.* at 225 (second bracket in original).

69. Kate Mogulescu, *The Public Defender as Anti-Trafficking Advocate, An Unlikely Role: How Current New York City Arrest and Prosecution Policies Systematically Criminalize Victims of Sex Trafficking*, 15 CUNY L. REV. 471, 474 (2012).

70. *Id.*

71. Dempsey, *supra* note 66, at 225.

these negative interactions with the criminal justice system as a form of re-victimization, which “make it less likely that trafficking victims will confide in law enforcement officers that they have been trafficked,” and perpetuate the systematic criminalization of victims of trafficking.<sup>72</sup>

### *B. Affirmative Defenses*

Affirmative defenses are traditionally proffered to mitigate punishment, not to acquit the accused, and are generally not crime specific.<sup>73</sup> For example, affirmative defenses such as entrapment, necessity, and self-defense can be raised to justify various criminal offenses.<sup>74</sup> In the context of prostitution cases, “affirmative defenses like entrapment have been raised by sellers and buyers . . . [but] have rarely been successful.”<sup>75</sup> Recently, state legislatures have created new prostitution-specific affirmative defenses.<sup>76</sup>

Currently, “[t]wenty-two states [have] enacted prostitution[-specific] affirmative defenses;” statutes vary regarding when and who can use the affirmative defense.<sup>77</sup> “[P]rostitution affirmative defenses are raised at trial, after the defendant has been arrested and charged with prostitution.”<sup>78</sup> “Most of the affirmative defenses allow those charged with prostitution to justify the offense if they were

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72. See Serita, *supra* note 53, at 657.

73. See Peters, *supra* note 43, at 29–30.

74. *Id.*

75. *Id.* at 30–31 (highlighting that the states have rarely created new affirmative defenses over the last two hundred years).

76. See *id.* at 31.

77. *Id.*; see, e.g., ALA. CODE § 13A-6-159 (2013) (describing the affirmative defense provided to human trafficking victims engaged in prostitution); LA. REV. STAT. ANN. §§ 14:46.3(E), 14:82(G), 14:83.3(D), 14:83.4(C), 14:89.2(D)(1) (2013) (highlighting the affirmative defenses for minors built into several existing statutes addressing criminal commercial sexual acts); MASS. GEN. LAWS ANN. ch. 265, § 57 (West 2013) (explaining that affirmative defense applies only to juveniles who establish coercion or duress); MINN. STAT. ANN. § 609.325(4) (West 2013) (explaining that affirmative defense available once it is established that victim committed acts under compulsion or apprehension); N.J. STAT. ANN. § 2C:34-1(e) (West 2013) (describing that adults can use the defense if they meet specific requirements, but those under eighteen have different requirements); N.C. GEN. STAT. § 14-204(c) (2013); OKLA. STAT. ANN. tit. 21, § 748(D) (West 2013) (noting the defendant need only prove that he or she meets the state’s definition of human trafficking victim to qualify); WASH. REV. CODE ANN. § 9A.88.040 (West 2013) (creating an affirmative defense through a presumption that the defendant is a victim of trafficking if “the actor is named as a current victim in an information or the investigative records upon which a conviction is obtained for trafficking, promoting prostitution in the first degree, or trafficking in persons.”).

78. Peters, *supra* note 43, at 32. In some states, affirmative defenses are available only to minors, often in lieu of safe harbor laws. Other states have affirmative defenses that apply to both adults and minors.

coerced or forced into the act,” mirroring the language found in the TVPA’s definition of “severe forms of trafficking in persons.”<sup>79</sup>

Affirmative defenses raise “potential challenges for trafficking victims.”<sup>80</sup> “[P]roving ‘duress’ requires a showing of threat of imminent or immediate harm.”<sup>81</sup> It may be “challenging to prove . . . immediate harm in the trafficking context, [because] some victims form emotional ties with their exploiters that make it difficult for them to leave trafficking situations.”<sup>82</sup> Also, “because the defense of coercion has most often been used as a defense for use of force against another, courts have analyzed defendants’ ‘reasonable apprehension’ of harm, which is either irrelevant or difficult to prove in most trafficking cases.”<sup>83</sup> The requirement that victims prove that force was used in recruiting or keeping them in prostitution limits the legal recourse available to women, and decreases the prosecution of offenders.<sup>84</sup>

### C. Vacating Sentences

Another approach that has recently gained traction as a way to support victims of sex trafficking is state vacatur statutes.<sup>85</sup> “A vacating convictions statute allows a survivor of human trafficking to file a motion with a court to have convictions removed.”<sup>86</sup> In granting the motion, “the court acknowledges that an error has been made and the conviction is reversed.”<sup>87</sup>

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79. Peters, *supra* note 43, at 34 (“Because issues of force, coercion, threats, compulsion, and apprehension factor into many of the reformed laws, the prostitution affirmative defense most closely resembles the affirmative defense of duress.”); 22 U.S.C. § 7102(9)(A) (2000).

80. Dara Goodman et al., *Representing Victims of Human Trafficking in Massachusetts: A Guide for Attorneys* 77 (2013), <http://www.representingmatraffickingvictims.org> [<https://perma.cc/4XQ458W8>].

81. *Id.*

82. *Id.*

83. *Id.*

84. RAYMOND, *supra* note 14, at 21–22 (stating that the idea of “forced prostitution” as distinct from voluntary prostitution is a “powerful legal tool for perpetrators of sexual exploitation”).

85. Alyssa M. Barnard, Note, “*The Second Chance They Deserve*”: *Vacating Convictions of Sex Trafficking Victims*, 114 COLUM. L. REV. 1463, 1463–64 (2014) (discussing New York’s vacatur provision, and noting that “similar laws in other states have been praised for their ability to give victims of sex trafficking a fresh start, free from the stigma of a criminal record.”); see *Vacatur*, BLACK’S LAW DICTIONARY (9th ed. 2009) (defining vacatur as “[t]he act of annulling or setting aside” or “[a] rule or order by which a proceeding is vacated.”).

86. *Human Trafficking Issue Brief: Vacating Convictions*, POLARIS PROJECT 1 (2014), <https://polarisproject.org/sites/default/files/2015%20Vacating%20Convictions%20Issue%20Brief.pdf> [hereinafter POLARIS PROJECT].

87. *Id.*

Generally, successful vacatur depends on the presentation of “evidence that the conviction was the result of being trafficked.”<sup>88</sup> While the type of showing that constitutes acceptable proof varies by state, official documentation from a government entity is generally not required.<sup>89</sup> Currently, twenty-three states have enacted vacatur statutes, and leading legal organizations endorse, and encourage the expansion of relief available to trafficking victims through vacatur statutes.<sup>90</sup> However, vacatur statutes should not be considered a completely effective remedy for trafficking victims. Another consideration is that the damage is already done—criminal convictions that occur in an individual’s record may become a barrier to employment, housing, and other benefits.<sup>91</sup> Employers, as well as landlords, property managers, housing authority, or real estate agents may be able to lawfully request background checks, which would include criminal convictions.<sup>92</sup> “A criminal conviction—or even just criminal conduct—may have severe consequences on a [victim’s] immigration status by either making [him or her] ineligible for immigration relief or by providing grounds for . . . deportation.”<sup>93</sup>

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88. *Id.*

89. *See, e.g.*, N.Y. CRIM. PROC. LAW § 440.10(1)(i)(ii) (McKinney 2013) (noting that although a defendant can provide “official documentation of the defendant’s status as a victim of [sex] trafficking . . . at the time of the offense from a federal, state or local government agency [to] create a presumption that the defendant’s participation in the offense was a result of . . . trafficking,” such documentation is “not . . . required for granting a motion” under the statute).

90. POLARIS PROJECT, *supra* note 86, at 2. States vary regarding what specific convictions can be vacated or expunged and in procedural requirements; further some vacatur laws apply only to juveniles. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-921(B)(1) (2009) (explaining that the court may, in its discretion, set aside, dismiss, or expunge the records of juvenile victims of sex trafficking who are convicted and placed on probation, provided they successfully complete the terms of probation); COLO. REV. STAT. ANN. § 19-1-306(d) (West 2013) (qualifying juveniles may have prostitution records expunged); FLA. STAT. ANN. § 943.0582(1) (West 2013) (noting minors and adults may request that minority age arrest records be expunged); HAW. REV. STAT. ANN. § 712-1209.6(1) (LexisNexis 2013) (describing that a person convicted of prostitution may have a conviction vacated upon establishing that he or she was a victim of a severe form of human trafficking); MD. CODE ANN., crim. proc. § 8-302(a) (West 2011) (explaining a motion to vacate is granted upon proving “the person was acting under duress caused by an act of another” at the time of commission of the offense); MISS. CODE ANN. § 97-3-54.6(5) (West 2013) (in motion to vacate, “[o]fficial documentation from a federal, state or local government agency as to the defendant’s status as a victim at the time of the offense creates a presumption that the defendant’s participation in the offense was a result of being a victim, but official documentation not required” in motion to vacate); NEV. REV. STAT. ANN. § 176.515(5)(c) (West 2013) (explaining that if convicted, once a defendant ceases being a victim of human trafficking, as defined by the TVPA, the person may move to vacate a prostitution conviction); R.I. GEN. LAWS ANN. § 11-34.1-5(a) (West 2013) (explaining that any person found guilty of prostitution, at the court’s discretion, can seek to have the record expunged after one year).

91. *See* Goodman et al., *supra* note 80, at 80.

92. *Id.*

93. *Id.* at 80–81.

First, most cases where the arresting charges are for prostitution and related offenses are usually pled out at arraignment or first appearance in court; there is no way to appeal such a conviction because it is the result of a plea.<sup>94</sup> Further, vacatur laws appear generally underutilized. New York became the first state to pass legislation allowing victims of sex trafficking to vacate prostitution-related conviction and as of March 2014, “only thirty-eight . . . trafficking victims . . . received vacatur relief under the provision.”<sup>95</sup> “The situation is even more disheartening in other states,” and there is a “significant mismatch between those [likely] eligible for relief and those seeking relief.”<sup>96</sup> A small percentage of people eligible for vacatur take advantage of such statutes because victims of sex trafficking may not know that such relief is available to them.<sup>97</sup> “Others may not be able to find a lawyer to help them file [the appropriate] motion.”<sup>98</sup> Trafficking victims may also be deterred by the time and costs involved in filing a motion for vacatur.<sup>99</sup>

### III. CONSIDERATIONS FOR EXPANDING “SAFE HARBOR” LAWS TO ADULT VICTIMS OF TRAFFICKING

While the notion that sex trafficking victims should not be prosecuted as criminals is not controversial, there is less consensus regarding who should be considered a victim. The growing number of safe harbor laws for minors reflect an acknowledgment that youth engaged in the commercial sex industry are victims.<sup>100</sup> Adults, on the other hand, may be considered victims if they can show that their conduct was a result of force, fraud, or coercion.<sup>101</sup> Given the

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94. Whitney J. Drasin, Comment, *New York’s Law Allowing Trafficked Persons to Bring Motions to Vacate Prostitution Convictions: Bridging the Gap or Just Covering it Up?*, 28 TOURO L. REV. 489, 506 (2012) (noting that victims are often instructed by their pimps to enter a guilty plea so they can return to their exploiter quickly, and that victims comply out of fear).

95. Barnard, *supra* note 85, at 1463–64, 1483–84.

96. *Id.* at 1484 (“In Illinois, which enacted its sex trafficking vacatur provisions in 2011, only two [individuals] have successfully vacated their trafficking-related convictions; . . . in Maryland, only one person has vacated an eligible conviction since the passage of its vacatur statute, also in 2011.”).

97. See, e.g., N.Y.C. BAR ASS’N, REPORT ON LEGISLATION BY THE COMMITTEE OF SEX AND THE LAW 31 n.4 (2010), [http://www.nycbar.org/pdf/report/uploads/20071848-Comment on Legislation re Victims of Sex Trafficking.pdf](http://www.nycbar.org/pdf/report/uploads/20071848-Comment%20on%20Legislation%20re%20Victims%20of%20Sex%20Trafficking.pdf) (describing lack of access to information about the remedies available through vacatur provisions as a particular problem victims of sex trafficking face).

98. Barnard, *supra* note 85, at 1485.

99. See *id.*

100. See POLARIS PROJECT, HUMAN TRAFFICKING ISSUE BRIEF: SAFE HARBOR, *supra* note 39.

101. Jennifer A. L. Sheldon-Sherman, *The Missing “P”: Prosecution, Prevention, Protection, and Partnership in the Trafficking Victims Protection Act*, 117 PENN ST. L. REV. 443, 462 (2012).

characteristics of many adults engaged in street-level prostitution, there is significant room to expand protection for these vulnerable individuals.<sup>102</sup> First, as a prerequisite to the effective expansion of safe harbor laws, the definition of “victim” of sex trafficking should be expanded. Second, safe harbor provisions should not be limited to minors, but should cover this broader class of victims. Finally, adequately protecting adult victims from criminal prosecution—and from the sense of stigma stemming from engaging in prostitution—requires a cultural shift toward sensitivity regarding the complex factors that lead individuals into the commercial sex industry, instead of judgment.

### A. *Victim Redefined*

Instrumental in the protection of trafficking victims is a definition that protects *all* victims of trafficking.<sup>103</sup> Where the burden of proof is on adult women, and men, to prove force or coercion, many victims will be left unprotected.<sup>104</sup> For example, “the line distinguishing force, fraud, and coercion . . . is . . . vague,” and open “to the interpretation of the law enforcement officials who may have their own preconceived notions about the rightness or wrongness of certain acts.”<sup>105</sup>

A more inclusive definition of trafficking acknowledges that trafficking can occur with or without the victims’ consent.<sup>106</sup> Legislatures could work toward accomplishing this goal by expanding the narrow force or fraud requirement currently in trafficking statutes with a broader requirement—where exploitative conditions exist, an individual engaging in prostitution should be considered a victim.<sup>107</sup> For example, an adequate addition to the Trafficking Victims Protection Act definition of trafficking, would include commercial sex acts not only induced by force, fraud, or coercion, but also “deception,

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102. Criminalization of victims of human trafficking can be considered a human rights violation. ORG. FOR SEC. AND CO-OPERATION IN EUROPE [OSCE], POLICY AND LEGISLATIVE RECOMMENDATIONS TOWARDS THE EFFECTIVE IMPLEMENTATION OF THE NON-PUNISHMENT PROVISION WITH REGARD TO VICTIMS OF TRAFFICKING 9 (2013), [http://www.osce.org/secretariat/101002?download\\_true](http://www.osce.org/secretariat/101002?download_true) [<https://perma.cc/GWK24NGE>] (“The principle of non-punishment of victims is affirmed in a number of international standards, including legally and politically-binding instruments.”).

103. See RAYMOND, *supra* note 14, at 22.

104. See *id.* (describing that most victims of trafficking do not fit the classic picture of those who are forced).

105. Sheldon-Sherman, *supra* note 101, at 462.

106. RAYMOND, *supra* note 14, at 23. This type of framework takes the burden of proof off the exploited and places it on the exploiters.

107. See MODEL LAW AGAINST TRAFFICKING IN PERSONS art. 8(b), art. 8 cmt., at 24 (United Nations Office on Drugs and Crime 2010), [http://www.unodc.org/documents/human-trafficking/UNODC\\_Model\\_Law\\_on\\_Trafficking\\_in\\_Persons.pdf](http://www.unodc.org/documents/human-trafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf).



[the] abuse of power or of a position of vulnerability, or . . . the giving or receiving of payments or benefits to achieve the consent of a person having control over another person.”<sup>108</sup> This framework is consistent with the understanding that even if trafficking women consent, they are still exploited—“[a] human rights definition of trafficking should focus on *exploitation*, which is the core of the crime.”<sup>109</sup> Under this framework, a model law would shield victims of trafficking from prostitution and prostitution-related offenses—instead of having to show any element of force, the law would assume exploitation, or require a showing of exploitation.<sup>110</sup>

One way to define exploitation is an “abuse of a position of vulnerability, [ . . . ] [o]r taking advantage of the vulnerable position a person is placed in as a result of:”

- [1.] Having entered the country illegally or without proper documentation; or
- [2.] Pregnancy or any physical or mental disease or disability of the person, including addiction [and substance abuse]; . . .
- [3.] Reduced capacity to form judgments [due to] . . . illness[,] . . . infirmity, physical or mental disability; . . .
- [4.] Promises or giving sums of money or other advantages to those having authority over a person; . . .
- [5.] Being in a precarious situation from the standpoint of social survival; or
- [6.] Other relevant factors[,including but not limited to the economic and social situation of the victim].<sup>111</sup>

These factors should be assessed from both an objective lens, as well as the subjective view of the victim, and upon showing of exploitation, any defense or allegation that the victim “consented” is

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108. *Id.* See H.R. Res. 3887, 110th Cong. § 2429 (2007); Heather Monasky, Note, *On Comprehensive Prostitution Reform: Criminalizing the Trafficker and the Trick, But Not the Victim—Sweden’s Sexköpslagen in America*, 37 WM. MITCHELL L. REV. 1989, 2026 (2014) (noting that while some states use this standard, the federal law ultimately rejected this version of the bill due to intense debate over whether all persons in prostitution should be considered trafficked). During the process of enacting the TVPRA of 2008, legislators considered “replacing the requirement of ‘force, fraud, or coercion’ with [a lower standard of] ‘persuades, induces, or entices.’” *Id.*

109. RAYMOND, *supra* note 14, at 22.

110. See MODEL LAW AGAINST TRAFFICKING IN PERSONS, *supra* note 107, art. 5(e), at 11.

111. *Id.* art. 5, at 9 (original brackets omitted). An alternative model contemplated by the UN model law focuses on the offender, e.g., the pimp or the buyer of services, and his or her intention to take advantage of the situation of the victim. While this showing may be considered easier to prove, as it does not require an inquiry into the state of mind of the victim, it offers no direct protection to victims when they are arrested for prostitution related crimes. Quite frequently, trafficking offenders are not known or prosecuted at the same time.

irrelevant.<sup>112</sup> The problem of exploitation, which is central to the issue of prostitution, would be more adequately addressed. At the same time, the idea that some sex workers engage voluntarily in prostitution is inherent in this definition.<sup>113</sup> Individuals opposed to the more radical shift to partial decriminalization could support this less drastic step, because sex workers who could not make an adequate showing of exploitation could still be prosecuted. At the same time, granting exploited women immunity from criminal prosecution would allow “police forces [to] devote more resources towards apprehending pimps” and other “true criminals in the industry.”<sup>114</sup> Of course, the proposed expansion of the definition of “trafficking victim” is not without criticism.<sup>115</sup> If adopted at the federal level, the language is broad enough to allow for the prosecution of not only pimps, but also lower level players like johns.<sup>116</sup> This would make the Department of Justice responsible for enforcing a broad law covering prostitution-related offenses—a responsibility that they do not want.<sup>117</sup> At the same time, states are more likely to adopt a more broad definition of “trafficking victim” if it is endorsed by the federal government and federal law.<sup>118</sup>

### *B. Expanding Safe Harbors*

Recognizing a more inclusive class of victims of sex trafficking then requires protection of these individuals from prostitution related offenses. Whereas Congress has recognized the importance of shielding minors engaging in prostitution from criminal sanctions, the law should recognize the need for similar “safe harbors” for adult

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112. *See id.* at 26 (recommending that the law should directly state that “[t]he consent of a victim of trafficking in persons [is] . . . irrelevant” upon showing of exploitation).

113. *See id.*

114. Janet C. Sully, Note, *Precedent or Problem? Alameda County’s Diversion Policy for Youth Charged with Prostitution and the Case for a Policy of Immunity*, 55 WM. & MARY L. REV. 687, 709 (2013).

115. *See id.* art. 5 cmt., at 21.

116. *See* Monasky, *supra* note 108, at 2029–30.

117. This concern was raised by opponents of H.R. 3887, which proposed a sex trafficking offense which made it a crime for an individual to “persuade[], induce[], or entice[] any individual to engage in prostitution.” H.R. 3887, 110th Cong. § 2430 (2007). One the DOJ’s primary arguments against H.R. 3887 was that it would divert federal resources devoted to sex trafficking to the enforcement of common prostitution laws. Elrod, *supra* note 48, at 983–84.

118. States may resist adopting a broader definition of trafficking victim due to concerns about enforcement capability. However, unlike the federal government, prostitution and related offenses are traditionally within the realm of state legislation. Thus, states can—and should—demonstrate an actual commitment to ending trafficking by allocating the resources to adequately protect victims.

victims of trafficking.<sup>119</sup> The Uniform Act's areas of focus create a workable framework.<sup>120</sup>

### 1. *Protection of All Victims*

Under safe harbor provisions for minors, prostituted minors under the age of eighteen have complete immunity for criminal prosecution or juvenile delinquency adjudication.<sup>121</sup> Prostitution laws and policies that recognize all prostituted individuals as victims provide the most inclusive protection for victims.<sup>122</sup> Sweden has taken this innovative approach by adopting a law that partially criminalizes prostitution by penalizing consumers of sex (i.e., johns) and traffickers, while decriminalizing individuals in prostitution.<sup>123</sup> This approach is known as the “Nordic model,” or “Swedish model,” and has two main goals: to “curb the demand for commercial sex that fuels sex trafficking,” and to “promote equality between men and women.”<sup>124</sup> Critics of the partial decriminalization approach reject the underlying presumption that all women are inherently subordinated through prostitution—while such laws do not penalize sex workers directly, they affect sex workers’ agency and autonomy by criminalizing their clients.<sup>125</sup> While advocates of the Nordic model argue that it has been a success, critics identify areas where it has been a failure.<sup>126</sup> The passage of the law in Sweden led to an increase in violence against prostituted women.<sup>127</sup> “Fewer men were willing to purchase sex, but the disappearing johns had been the nicer customers”

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119. Serita, *supra* note 53, at 645.

120. Discussed *supra* Part I.

121. Discussed *supra* Part I.

122. Serita, *supra* note 53, at 659.

123. See Monasky, *supra* note 108, at 2011. France also recently adopted a similar law. See Elliot Hannon, *France Outlaws Paying for Sex; Targets Clients, Not Sex Workers, to Discourage Prostitution*, SLATE (Apr. 6, 2016, 9:34 PM), [http://www.slate.com/blogs/the\\_slatest/2016/04/06/france\\_outlaws\\_paying\\_for\\_sex\\_targeting\\_clients\\_not\\_prostitution.html](http://www.slate.com/blogs/the_slatest/2016/04/06/france_outlaws_paying_for_sex_targeting_clients_not_prostitution.html) [<https://perma.cc/BY2E3ZRA>].

124. WHAT IS THE NORDIC MODEL?, EQUALITY NOW, [http://www.equalitynow.org/sites/default/files/Nordic Model Fact Sheet\\_0.pdf](http://www.equalitynow.org/sites/default/files/Nordic%20Model%20Fact%20Sheet_0.pdf) [hereinafter EQUALITY NOW]. The Nordic model was first adopted in Sweden in 1999 as part of a Violence Against Women bill, and followed by Norway and Iceland. In addition to this law, the Swedish government made a “significant investment in exit programs” for women attempting to leave prostitution, including systems “to provide comprehensive social services for victims of exploitation.” *Id.*

125. See Monasky, *supra* note 108, at 2011.

126. Monasky, *supra* note 108, at 2028; see also EQUALITY NOW, *supra* note 124, at 2 (“Since the introduction of the law, . . . prostitution has decreased . . . and Sweden has become an undesirable destination for pimps and traffickers. . . . [F]rom 1996 . . . until 2008, the number of male sex buyers decreased from 13.6 [percent] to 7.9 [percent].”).

127. Monasky, *supra* note 108, at 2030.

leaving women at the mercy of the “more troubled ones,” including those who insisted on violent or unprotected sex.<sup>128</sup> “Critics also assert that prostitution has not decreased overall,” but instead moved to underground venues.<sup>129</sup>

Given that states criminalize the act of prostitution, legislatures would probably reject a full shift to partial decriminalization,<sup>130</sup> even though implementation may be plausible.<sup>131</sup> Partial decriminalization represents an ideological shift that law enforcement and legal systems have not yet embraced.<sup>132</sup> However, shielding individuals from arrest and prosecution where prostitution is the result of exploitive conditions represents movement in the right direction.

## 2. *Service Without Adjudication*

The Uniform Act recognizes minors as “CHINS”—children in need of services—allowing minors to receive services without being adjudicated as delinquent.<sup>133</sup> Similarly, adult victims should have the benefit of obtaining access to relevant services, as an alternative to arrest and prosecution. Currently, the criminal justice system often facilitates the first point of intervention, and a coordinated judicial response would help women connect with appropriate resources.<sup>134</sup>

Victims often face an initial hurdle regarding access to services in that they do not trust law enforcement.<sup>135</sup> Laws that protect all victims of trafficking, addressed above, are a starting point in rebuilding the trust between law enforcement and victims.<sup>136</sup> For example, where there is a sensitivity to the exploitive conditions inherent in prostitution, and movement toward decriminalization, women might be more willing to rely on law enforcement for assistance.

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128. *Id.* at 2030–31.

129. *Id.* at 2032.

130. *See id.* at 2009.

131. *See id.* at 2036 (highlighting social services and law enforcement practices that suggest the existing system could support a policy of partial decriminalization of prostitution).

132. *See id.* at 2009.

133. ERSKINE & SMITH, *supra* note 38, at 5–6 (“The definition of a ‘child in need of services’ is very similar to Georgia’s current definition of an ‘unruly child.’ While the courts currently treat these children in a manner similar to delinquent offenders, the new law would require a more holistic service-oriented approach.”); *see* UNIF. ACT ON PREVENTION OF & REMEDIES FOR HUMAN TRAFFICKING § 15(c).

134. *See* Serita, *supra* note 53, at 656.

135. *Id.* at 657.

136. *See* Monasky, *supra* note 108, at 2041 (explaining advocates highlight that changes in the law are only one way to attempt to better protect victims). Broader, non-legal interventions are also needed. For example, many victims would respond better to social service providers trained in trauma recovery, as opposed to police officers or legal providers. “A change in the law is not going to wipe away a broken system’s decades of harm, especially in the more vulnerable communities.” *Id.*

“Some cities in the United States currently experiment with alternative court programs for individuals in prostitution. These include diversion programs . . . where probation officers and social service providers supervise and support women.”<sup>137</sup> The Human Trafficking Intervention Court (HTIC) provides a model of a coordinated judicial response.<sup>138</sup> The HTIC was formed in 2004 in Queen’s County, New York, to address the issue of underage sex trafficking “by providing alternatives to criminal punishment for minors accused of prostitution offenses.”<sup>139</sup> The HTIC initially partnered with the Girls Educational Mentoring Services (GEMS), which provides aid to sexually trafficked girls and young women under the age of twenty-one.<sup>140</sup> Later, the court expanded and partnered with other community organizations to provide aid to “adult women charged with prostitution offenses.”<sup>141</sup> “The HTIC flourished over time, even without additional staff, funding, or institutional intervention,” suggesting that jurisdictions could institute similar programs without incurring substantial costs or burdens.<sup>142</sup> The HTIC “[r]epresent[s] a dynamic collaboration between the court, the District Attorney’s office, the defense bar, and . . . trafficking victim service providers” in the community.<sup>143</sup> Parties work together toward a favorable disposition for the defendant, with a focus on connecting victims to aid appropriate for their individual situations, including job training, education, housing, medical assistance, immigration services, and mental health and substance abuse treatment.<sup>144</sup> This model of consistent and coordinated support assists trafficking victims in the recovery process.<sup>145</sup> Recognition by the law that individuals engaging in prostitution are often victims of exploitation and trafficking naturally supports a

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137. *Id.* at 2039–40 (highlighting that courts can establish successful partnerships with community organizations). For example, the Minneapolis organization, “PRIDE (from Prostitution to Independence, Dignity and Equality), provides social services to prostituted women and girls”; some clients are court ordered to participate in the program. *Id.* at 2039; see also THE FAMILY PARTNERSHIP: COUNSELING, EDUCATION, ADVOCACY, <http://www.thefamilypartnership.org/pride> [<https://perma.cc/HL6JM8KU>].

138. See Serita, *supra* note 53, at 652.

139. *Id.* at 652 (noting the HTIC was started by Justice Fernando Camacho).

140. *Id.*

141. *Id.*

142. *Id.*

143. See *id.* at 652–53. Service providers also regularly appear in court to advocate for and counsel the victim. “In their role as in-court advocates, these service providers not only provide counseling and supportive services to clients, but also offer valuable information about their clients to the court and prosecutor through written updates describing clients’ compliance with programs.” *Id.* at 653.

144. Serita, *supra* note 53, at 653 (noting that defendants in the HTIC system can opt to have their case sent to an all purpose criminal court if they are not interested in services).

145. See *id.*

philosophy that resources should be directed toward helping women escape prostitution instead of criminalizing them.<sup>146</sup>

### *3. Training and Education for Law Enforcement and Legal Professionals*

Finally, model safe harbor laws for minors include provisions ensuring training and education for law enforcement, legal professionals, and other community stakeholders.<sup>147</sup> Similarly, education for the law enforcement and legal community is an imperative piece of improving the treatment of sex trafficking victims.<sup>148</sup> Law enforcement officers often have initial contact with victims, and face the task of deciphering whether an individual should be considered a victim.<sup>149</sup> Attorneys also are often in a prime position to “decipher complex narratives to determine if a client meets the definition of human trafficking under relevant law.”<sup>150</sup> It is important that these players make an effort to understand a client’s unique history and inquire into a range of topics, to understand if a potential criminal defendant may be a victim under the relevant trafficking law. Education is a necessary component for individuals in the criminal justice system to be able to effectively work with victims. The expanded definition of trafficking helps to simplify this task—similar to safe harbor laws for minors, most women engaging in street-level prostitution would be considered victims. Nevertheless, education and training is vital to help officers and legal professionals approach prostituted individuals with increased sensitivity.

Regarding judicial treatment of adult victims of trafficking, it is also important to recognize that “[r]ecidivism and multiple arrests are often unavoidable, especially for women who are still under the control of a trafficker.”<sup>151</sup> Thus, a zero tolerance, punitive system is often

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146. See Monasky, *supra* note 108, at 2043 (“Governments must recognize the complexity of escaping prostitution and implement a multi-faceted, victim-centered, respectful approach to interventions and assistance.”).

147. See UNIF. ACT ON PREVENTION OF & REMEDIES FOR HUMAN TRAFFICKING § 19(c)(5) (NAT’L CONF. OF COMM’RS ON UNIF. STATE LAW, Recommended Draft 2013).

148. See *id.*

149. See Goodman et al., *supra* note 80, at 80.

150. *Id.* at 7–8. The following “red flags” can serve as indicators that a client may have been a victim of trafficking: the individual is disconnected from family, school, work, or community; has prior arrests, charges, convictions or outstanding warrants correlated with trafficking such as sex for a fee, drug possession, theft, or robbery; is unusually distrustful or fearful of law enforcement; shows signs of anxiety, paranoia, or nervousness; or appears malnourished or shows signs of abuse. This list is not exhaustive, nor does “their presence . . . necessarily mean that a client is a victim of human trafficking.” *Id.*

151. Serita, *supra* note 53, at 656.

counterproductive, even for individuals with more than one prostitution arrest.<sup>152</sup> The work of the New York City's Human Trafficking Intervention Court (HTIC) offers support that a more flexible model is preferred.<sup>153</sup> For example, some HTIC defendants are so entrenched in prostitution as a way of life that it may take time and repeated intervention before they are able to exit the industry.<sup>154</sup> However, when defendants are "given resources and opportunities to thrive, many have shown their resilience as survivors [by] . . . regain[ing] control over important aspects of their lives, including leaving their pimps, returning to . . . their families, and regaining custody of their children."<sup>155</sup> Actors in the criminal justice system should be aware of this and interact with individuals engaged in prostitution in a way that encourages resilience. In turn, women may develop trust in the system and become more willing to accept aid.

### *C. From Stigmatization to Support*

While expanding the definition of who is a victim of sex trafficking, and adopting a "safe harbor" framework to protect these individuals is a worthy goal, critics could accurately argue that implementation will pose significant challenges. At some level, there appears to be resistance to viewing prostitutes as victims—instead they are harmed by stereotypes and general negative attitudes suggesting that these individuals should take responsibility for their actions. Criminalization of prostitution is well-accepted, and individuals engaging in prostitution are not thought of as trafficking victims, in the colloquial sense. Only twenty-eight states have adopted safe harbor laws for minors, reflecting resistance to the policies that could be viewed as giving offenders a free pass. However, as trafficking continues to be a problem in the United States, after many years and attempts to address the problem, it is worth pushing toward new policies that offer greater protection to women.

Beyond the need for changed attitudes of law enforcement and the legal system, perhaps the greatest change can be achieved when society as a whole can shift toward a greater understanding that true victims do not always look like individuals we feel comfortable labeling as victims. In fact, some victims may appear to make poor decisions, maybe even repeatedly; some victims may appear to consent to their abusers or to choose a detrimental lifestyle. Thus,

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152. *Id.*

153. *See id.*

154. *Id.*

155. *Id.*

beyond training specifically for law enforcement, the public could also benefit from education and increased discourse regarding the complexities of prostitution, including the harsh reality of exploitation as a driving force in why individuals get involved and remain in commercial sex work. When the law explicitly recognizes the realities of sex trafficking and its severe exploitation of prostitutes, social attitudes can be changed, and victims can get the support they need.

### CONCLUSION

“[G]iven the undeniable intersection between trafficking and the commercial sex trade, the traditional response by the criminal justice system has not only been inadequate, but may have devastating consequences for trafficked individuals who are being re-victimized by the very institutions that should be protecting them.”<sup>156</sup> Protecting victims begins with acknowledging that they are in fact victims. Trafficking and prostitution related laws have moved in the direction of acknowledging that minors engaging in prostitution are victims of trafficking, regardless of the question of consent. On the other hand, adults engaging in prostitution are not offered similar protections, even when they are similarly situated. Circumstances surrounding a woman’s entry into prostitution, as well as physically and mentally abusive tactics used by pimps call into question the extent that a woman is truly engaging in prostitution by voluntary choice. For a woman to be considered a victim of trafficking, a showing of force, fraud, or coercion is generally required. However, this definition fails to take into account exploitation, which should be sufficient to classify a woman engaged in commercial sex as a victim, thus shielding her from criminal prosecution and its related detriments. “Safe Harbor” laws for minors can serve as a model for providing greater protection to victims of sex trafficking by shifting the focus from prosecution of prostitutes to providing support and services that help them escape the commercial sex trade. Despite increased recognition of the problem of sex trafficking, and various attempts to find adequate solutions, it remains an issue in the United States. The only way to decrease exploitation and sex trafficking is to take an affirmative step to protect those who are most vulnerable: the victims.

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156. *Id.* at 659.

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