

2016

# In Loco Aequitatis: The Dangers of 'Safe Harbor' Laws for Youth in the Sex Trades

Brendan M. Conner

*William & Mary Law School*, [bmconner@wm.edu](mailto:bmconner@wm.edu)

---

## Repository Citation

Conner, Brendan M., "In Loco Aequitatis: The Dangers of 'Safe Harbor' Laws for Youth in the Sex Trades" (2016). *Faculty Publications*. 1934.  
<https://scholarship.law.wm.edu/facpubs/1934>

IN LOCO AEQUITATIS:  
THE DANGERS OF “SAFE HARBOR” LAWS  
FOR YOUTH IN THE SEX TRADES

Brendan M. Conner†

*This Article provides the first critical analysis of safe harbor laws, which rely on custodial arrests to prosecute or divert youth arrested for or charged with prostitution related offenses under criminal or juvenile codes to court supervision under state child welfare, foster care, or dependency statutes. This subject is a matter of intense debate nationwide, and on May 29, 2015 the President signed legislation that would give preferential consideration for federal grants to states that have enacted a law that “discourages the charging or prosecution” of a trafficked minor and encourages court-ordered treatment and institutionalization. Nearly universally lauded, the sound bite of safe harbor’s proponents has obscured the truth of its potential impact: increasing arrests through a net-widening effect, extending the length of court supervision and institutionalization, and perpetuating endemic law enforcement harassment and brutality against these young people. This Article offers new perspectives on the debate and examines challenges presented to legislators considering adoption of safe harbor laws.*

INTRODUCTION ..... 45

I. BAD EVIDENCE MAKES BAD LAW: WHY BEHAVIORAL,  
DEMOGRAPHIC, AND TESTIMONIAL EVIDENCE CONTRADICT  
THE POLICY JUSTIFICATIONS FOR SAFE HARBOR LAWS ..... 52

A. Research Flaws in Population Estimates and Demographics  
of Youth Trading Sex ..... 54

1. Age of Entry ..... 55

† Staff Attorney, Streetwise and Safe. J.D., 2013, City University of New York School of Law; M.A., Political Science, New School for Social Research. The views expressed are those of the Author and should not be attributed to Streetwise and Safe or the Urban Institute. The Author is indebted to the mentorship and editorial support of Professor Andrea McArdle, Meredith Dank of the Urban Institute, and my colleagues at Streetwise and Safe, especially Andrea J. Ritchie and Mitchyll Mora. This writing could not have been accomplished without the editorial support of *Stanford Journal of Civil Rights and Civil Liberties* staff, particularly Cameron Brown, Rachel Frank, Sean R. Janda, Deepa Kannappan, and Margo Watson. The Article is dedicated to young people who do what they have to do to survive.

- 2. Population Size ..... 55
- B. “I Don’t Have that Privilege”: Rational Choice within  
Limited Economic Choices ..... 58
- C. Criminals, Victims, or Survivors?: Prior Trauma as a  
Problematic Explanation for Entry into the Sex Trade ..... 61
- D. A Second Bite at the Apple: The High Degree of Prior Child  
Welfare Involvement Among Youth in the Sex Trades ..... 63
- E. Protect Us From Our Protectors: Institutionalized Violence  
by Police, Courts, Health Care Providers, and Social  
Services ..... 64
- II. AT THE DRAWING BOARD: THE NEW YORK SAFE HARBOUR FOR  
EXPLOITED CHILDREN ACT OF 2008 ..... 70
- A. Legislative History ..... 71
- B. Title 8-A Social Services Framework ..... 72
- C. Person in Need of Supervision (“PINS”) Substitution  
Framework ..... 73
- D. Recent Amendments, Related Legislation, and  
Implementation ..... 77
- 1. The Safe Harbor “Raise the Age” Amendments ..... 78
- 2. The Vacating Trafficking Convictions Act ..... 80
- 3. The Family Notification and Protection Act ..... 82
- III. “WATERSHED”: A STATE SURVEY OF SAFE HARBOR LAW AND  
POLICY ..... 82
- A. The Nature and Scope of “Immunity” from Criminal  
Liability and Juvenile Delinquency Proceedings ..... 83
- 1. Covered Offenses ..... 83
- 2. Eligibility Criteria ..... 85
- B. Secondary Immunity: Substitution Proceedings, Affirmative  
Defenses, and Rebuttable Presumptions ..... 87
- C. Temporary Protective Custody, Arrest-Referral, and Pre-  
Booking Diversion ..... 89
- D. Status Offense Proceedings ..... 92
- IV. DETENTION BY ANY OTHER NAME: SECURE, NON-SECURE, AND  
LIMITED SECURE PLACEMENT OF MINORS UNDER STATE SAFE  
HARBOR LAWS ..... 95
- A. Secure Detention ..... 95
- B. Non-Secure, Limited Secure, and Staff Secure Detention ..... 97
- C. Gender, Gender Identity and Sexual Orientation-Appropriate  
Placement ..... 100
- V. THE HARM REDUCTION MODEL: RECOMMENDATIONS FOR  
VOLUNTARY, LOW-THRESHOLD ALTERNATIVES TO SAFE  
HARBOR PROCEEDINGS ..... 102
- A. End the Arrest-Institutionalization Approach to Youth in the  
Sex Trades ..... 103
- 1. Establish Clear Guidelines in Federal-State Grant  
Incentives to Protect Youth Engaged in Survival Sex  
from Arrest, Undue Court Involvement, Discrimination,  
or Involuntary Confinement. .... 103
- 2. Increase Transparency, Oversight, and Accountability in

Federal Agency Actions Involving Youth Engaged In Survival Sex .....	106
3. Establish and Expand Safe Harbor Protections in State Law to Serve Youth Outside of the Court System .....	107
B. Street-Based and Comprehensive Drop-In Services and Peer-Based Outreach.....	107
C. Safe and Supportive, Voluntary Short-Term Shelter, Long-Term, Affordable Housing, and Family-Based Placement Options .....	109
D. Safe and Supportive Housing and Placement Protocols Specific to Transgender and Gender Non-Conforming Youth.....	111
E. Non-Discrimination, Harassment, Confidentiality, and Complaint Procedures in Drop-ins, Shelters, Programs, and Out-of-Home Placements.....	112
F. Access to Integrated Primary, Sexual, and Reproductive Health Care and Services, Gender-Affirming Health Care for Transgender and Gender Non-Conforming Youth, and Harm-Reductionist Treatment for Youth Who Use Drugs .....	113
G. Living Wage Employment Opportunities and Job Training and Readiness Programs .....	114
H. Improving Food Security .....	116
CONCLUSION .....	116

## INTRODUCTION

It is 1904. Thirteen year-old Mary N., an African American girl, stands accused of prostitution.<sup>1</sup> Judge Tuthill, the first judge of the nation’s inaugural juvenile court, sentences Mary to the custody of the State Industrial School for

---

1. “Mary N.” is the Author’s composite character constructed from department reports, psycho-medical charts, case studies, test results, contemporaneously written graduate theses and dissertations, and inmate correspondence collected by scholars such as Anne Meis Knupfer. *See generally* ANNE MEIS KNUPFER, *REFORM AND RESISTANCE: GENDER, DELINQUENCY, AND AMERICA’S FIRST JUVENILE COURT* (2001). Unfortunately, historians interested in the Cook County Juvenile Court have been forced to rely largely on these secondary sources, as well as annual institutional and court reports drawing from case records, to piece together its social history. *See id.* at 181-82 (noting the complete absence of any Cook County Juvenile Court individual case records between 1899 to 1935, and the existence but inaccessibility of individual case files, given that only one historian, David Tanenhaus, has succeeded in obtaining permission to view these files from the presiding judge of the Cook County Circuit Court). The secondary sources available, as well as comparable records available in other jurisdictions such as Toronto and Los Angeles County, however, easily corroborate the circumstances of a child like Mary N. *See generally* MARY E. ODEM, *DELINQUENT DAUGHTERS: PROTECTING AND POLICING ADOLESCENT FEMALE SEXUALITY IN THE UNITED STATES, 1885-1920* (1995); CAROLYN STRANGE, *TORONTO’S GIRL PROBLEM: THE PERILS AND PLEASURE OF THE CITY, 1880-1930* (1995); Cheryl Nelson Butler, *Blackness as Delinquency*, 90 WASH. U. L. REV. 1335 (2013).

Delinquent Girls at Geneva, Illinois to be rehabilitated.<sup>2</sup> Mary joins the ranks of hundreds of other working-class girls placed in institutions for juvenile delinquents in 1904, spending several long years toiling over the domestic arts as a result of their adjudged immorality.<sup>3</sup> After the School's matrons subject Mary and the other inmates to pelvic exams to verify their purity, Superintendent Ophelia Amigh applies whips, leather handcuffs, water torture, and solitary confinement to drive her wards to proper femininity.<sup>4</sup> When exposed by the press, Amigh maintains a narrative of corrupted femininity, writing that her practices are necessary to "checkmat[e] the work of white slavers"<sup>5</sup> that snatch Midwestern girls and impress them into prostitution, but that "girls of this class . . . should be considered defective and committed as such."<sup>6</sup> The Cook County Juvenile Court heeds Amigh's advice and charges eighty-one percent of girls appearing before the court with sexual offenses by 1910.<sup>7</sup>

The practices of the Geneva School seem antiquated and, to the extent that water torture is out of vogue, this may be the case. In the intervening years, the Supreme Court has extended constitutional due process protections to youth facing delinquency proceedings.<sup>8</sup> However, juvenile courts not only adjudicate cases regarding behavior that would be criminally punishable if committed by an adult,<sup>9</sup> but they also handle dependency and status offense—conduct by a

---

2. KNUFFER, *supra* note 1, at 165; *see also* T. H. MacQueary, *Schools for Dependent, Delinquent, and Truant Children in Illinois*, 9 AM. J. SOC. 1, 3 (1903).

3. *See* KNUFFER, *supra* note 1, at 188 tbl.4. If Mary were prosecuted just one year earlier, before the passage of the Illinois Juvenile Court Act of 1899, she would likely have faced no more than one week in county jail. *See* Law of April 21, 1899, 1899 Ill. Laws 131.

4. Anne Meis Knupfer, "To Become Good, Self-Supporting Women": *The State Industrial School for Delinquent Girls at Geneva, Illinois, 1900-1935*, 9 J. HIST. SEXUALITY 420, 420-26 (2000).

5. Ophelia Amigh, *More about the Traffic in Shame*, in FIGHTING THE TRAFFIC IN YOUNG GIRLS OR WAR ON THE WHITE SLAVE TRADE 117, 124 (Ernest A. Bell ed., 1910).

6. *Discuss Border-Line Girl: Conference on Education of Backward Children Held at Buffalo*, N.Y. TIMES, June 8, 1909, at 3 (reporting on a speech that Amigh made at the conference).

7. Bernardine Dohrn, *Schooling and the Vexing Social Control of Girls*, in A CENTURY OF JUVENILE JUSTICE 276, 273 (Margaret K. Rosenheim ed., 2002).

8. *See In re Winship*, 397 U.S. 358, 368 (1970) (holding every element of an offense must be proven beyond a reasonable doubt in juvenile delinquency proceedings); *In re Gault*, 387 U.S. 1, 4, 11 (1967) (finding delinquency proceedings subject to due process protections of the Fourteenth Amendment, including the right to be notified of charges, the right to be informed of the privilege against self-incrimination, and the Sixth Amendment rights to confront witnesses and access to counsel); *Kent v. United States*, 383 U.S. 541, 553-54 (1966) (requiring juvenile courts hold a preliminary hearing to apprise minor offenders of charges against them and the forum in which the child's claim will be heard). For a position on the shortcomings of the procedural due process framework established by *In re Gault*, *see also* generally Robin Walker Sterling, *Fundamental Unfairness: In re Gault and the Road Not Taken*, 72 MD. L. REV. 607 (2013).

9. *Juvenile Delinquency*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining juvenile delinquency as "[s]erious antisocial behavior by a minor . . . ; esp., behavior that would be

juvenile that would not be a crime if committed by an adult—proceedings.<sup>10</sup> Dependency and status offense proceedings incorporate a variety of state custody actions to intervene where youth suffer physical or emotional harm, have been abandoned, or commit status offenses, such as running away, alcohol use, truancy, and curfew violations.<sup>11</sup>

While dependency and status offense proceedings are not novel to girls like Mary N., they have not been used systematically to address juvenile-prostitution-related cases.<sup>12</sup> That is, until "safe harbor" laws re-introduced the custodial model of the Geneva School, begun by the passage of the New York Safe Harbour for Exploited Children Act of 2008 ("New York Safe Harbor Act").<sup>13</sup> A safe harbor statute, as defined by this Article, utilizes custodial arrests or temporary protective custody for the purpose of adjudicating youth under state child welfare, foster care, or dependency statutes.<sup>14</sup>

In the first iteration of the safe harbor framework in New York, a judge considering a criminal or delinquency prosecution for a prostitution offense of

criminally punishable if the actor were an adult, but instead is usu. punished by special laws applying only to minors").

10. See 43 C.J.S. *Infants* § 11 (2015) (noting that juvenile courts do not have a "grant of general criminal jurisdiction").

11. See 28 C.F.R. § 31.304(h) (2015) (defining a status offender as "[a] juvenile offender who has been charged with or adjudicated for conduct which would not, under the law of the jurisdiction in which the offense was committed, be a crime if committed by an adult"). But see *In re Jennifer G.*, 695 N.Y.S.2d 871, 878 (N.Y. Fam. Ct. 1999) ("The reality of the child, whether in article 7 or article 3, transcends the label. Delinquency is similarly a status offense, albeit having its genesis in a criminal offense. . . . The delinquent child is a person in need of supervision.").

12. See, e.g., NAT'L HUMAN TRAFFICKING RES. CTR., *SAFE HARBOR LAWS: A SYSTEMIC APPROACH TO ADDRESSING CHILD SEX TRAFFICKING* (2013), <http://traffickingresourcecenter.org/resources/safe-harbor-laws-systemic-approach-addressing-child-sex-trafficking> (characterizing safe harbor laws as a systemic recognition that youth in the sex trade should be diverted from criminal prosecution).

13. Safe Harbour for Exploited Children Act, 2008 N.Y. Laws 569.

14. INST. OF MED. & NAT'L RESEARCH COUNCIL, *CONFRONTING COMMERCIAL SEXUAL EXPLOITATION AND SEX TRAFFICKING OF MINORS IN THE UNITED STATES* 171-72 (Ellen Wright Clayton et al. eds., 2013) [hereinafter IOM & NRC CSEC REPORT]; see also SHARED HOPE INT'L, 2013 PROTECTED INNOCENCE CHALLENGE: A LEGAL FRAMEWORK OF PROTECTION FOR THE NATION'S CHILDREN 21-22 (2014), <http://sharedhope.org/wp-content/uploads/2014/02/2013-Protected-Innocence-Challenge-Report.pdf>. It is important to note, however, that the Author's definition of safe harbor legislation excludes certain legislation that is self-styled as such. For instance, Arkansas's law is excluded because it does not alter the proceedings brought against a minor in the sex trades but instead attaches fines to certain purchasing and sex-trafficking offenses, provides for a service assessment study and the establishment of a referral protocol for service provision, and provides for law enforcement training. See Safe Harbor for Victims, 2013 Ark. Acts 1257. Similarly, the laws of Iowa, Missouri, Oregon, Rhode Island, and South Carolina are excluded, as they merely restate the availability of the affirmative defense of duress for victims of human trafficking charged with prostitution offenses. See IOWA CODE § 710A.3 (2015); MO. REV. STAT. § 566.223 (2015); OR. REV. STAT. § 163.269 (2015); R.I. GEN. LAWS § 11-34.1-2 (2015); S.C. CODE ANN. § 16-3-2020(J) (2015).

a youth under the age of sixteen may instead convert the proceeding to a Person In Need of Supervision (“PINS”) proceeding—a state custody proceeding reserved for status offenders.<sup>15</sup> However, a judge may deny substitution under the New York law if the youth has been previously convicted of a prostitution offense, adjudicated as PINS, or is determined to be uncooperative with court-mandated services.<sup>16</sup> In 2014, the New York State Legislature expanded the law to allow for PINS proceedings to substitute for the prosecution of prostitution offenses committed by youth ages sixteen and seventeen in Criminal Court.<sup>17</sup>

In just eight years since the New York law’s passage, twenty-nine states and the District of Columbia have adopted similar safe harbor legislation since the New York law’s passage.<sup>18</sup> Congress has also called upon the Department of Justice to promulgate a model safe harbor law,<sup>19</sup> and on May 29, 2015 the President signed legislation to provide preferential consideration for federal grants to states with safe harbor legislation.<sup>20</sup> The policy basis—that youth in

15. See N.Y. FAM. CT. ACT §§ 311.4, 712(a), 732(a) (McKinney 2015).

16. See, e.g., *In re Bobby P.*, 907 N.Y.S.2d 540, 549 (N.Y. Fam. Ct. 2010) (denying a motion for the substitution of a PINS petition due in part to the minor’s past prostitution offenses and lack of cooperation with services).

17. N.Y. CRIM. PROC. LAW § 170.80(1) (McKinney 2015).

18. These states include Connecticut, Delaware, the District of Columbia, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, Vermont, Washington, and Wyoming. See An Act Providing a Safe Harbor for Exploited Children, 2010 Conn. Acts 10-115; Act of June 30, 2014, 79 Del. Laws. 276 (2014); Sex Trafficking of Children Prevention Amendment Act of 2014, 62 D.C. Reg. 479 (Jan. 16, 2015); Act of June 17, 2014, 2014 Fla. Laws 161; Safe Harbor/Rachel’s Law Act, 2015 Ga. Laws 95; Abused and Neglected Child Reporting Act, 2010 Ill. Laws 6931; Act of Apr. 15, 2015, 2015 Ind. Acts 235; Act of Apr. 22, 2013, 2013 Kan. Sess. Laws 120; Act of Mar. 19, 2013, 2013 Ky. Acts 25; Act of June 1, 2012, 2012 La. Acts 446; An Act Relative to the Commercial Exploitation of People, 2011 Mass. Acts 178; Act of Oct. 15, 2014, 2014 Mich. Pub. Acts 336; Act of July 20, 2011, 2011 Spec. Sess. Minn. Laws 1; Act of Apr. 25, 2013, 2013 Miss. Laws 543; Act of Apr. 24, 2015; 2015 Mont. Laws 285; Act of June 5, 2013, 2013 Neb. Laws 255; Act of May 25, 2015, 2015 Nev. 569; Act of July 25, 2014, 2014 N.H. Laws 257; Act of Jan. 17, 2012, 2011 N.J. Laws 195 (2012); Act of July 29, 2013, 2013 N.C. Sess. Laws 368; Act of Apr. 23, 2015, 2015 N.D. Laws 117; Act of June 8, 2015; 2015 S.C. Acts 74; Act of June 29, 2012, 2012 Ohio Laws 142; Act of Apr. 18, 2013, 2013 Okla. Sess. Law Serv. 59; Act of Apr. 24, 2015, 2015 Tenn. Pub. Acts 264; Act of June 19, 2009, 2009 Tex. Gen. Laws 1002; An Act Relating to Human Trafficking, Act of Mar. 11, 2015; 2015 Utah Laws 363; 2011 Vt. Adv. Legis. Serv. 55 (LexisNexis); Act of Apr. 1, 2010, 2010 Wash. Legis. Serv. 289 (West); Act of Feb. 27, 2013, 2013 Wyo. Sess. Laws 91.

19. Trafficking Victims Protection Reauthorization Act of 2013. Pub. L. No. 113-4, § 1243, 127 Stat. 54, 154 (codified at 22 U.S.C. § 7101) (directing the Attorney General to facilitate the promulgation of a model state statute to “treat an individual under 18 years of age who has been arrested for engaging in, or attempting to engage in, a sexual act with another person in exchange for monetary compensation as a victim of a severe form of trafficking in persons” and not be prosecuted for a prostitution offense but referred to appropriate services, which as of this writing has yet to be issued).

20. Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 601, 129 Stat. 227, 258-59 (codified at 42 U.S.C. §§ 3796dd to 3796dd-8) (giving preferential

sex trades<sup>21</sup> are not perpetrators but victims—for safe harbor legislation appears non-objectionable, but the policy rationale has obscured the truth of the legislation's actual impact in increasing arrests, extending the length and restrictive conditions of involuntary commitment, and codifying the collateral consequences of an arrest, namely social services denial and endemic law enforcement misconduct.<sup>22</sup> The law's unintended consequences are readily apparent in the red ink of the New York Safe Harbor Act itself, by which the penalty for a violation or Class B misdemeanor—which, in the rare case where a maximum sentence is imposed, is ninety days of jail time—is raised to indefinite state custody, including in custodial placement in a geographically isolated and restrictive "staff secure" facility until the age of majority if deemed necessary, as discussed in more detail *infra* Part IV.<sup>23</sup>

Nevertheless, this dramatic doctrinal shift has stimulated surprisingly little critical scholarship. The few papers that do exist tend to read like legislative memoranda in support of passage and either express near unequivocal support for safe harbor laws<sup>24</sup> or argue for a more aggressive standard.<sup>25</sup> Given the

---

consideration for some federal grants to states that have enacted a law that "discourages or prohibits the charging or prosecution" of a trafficked minor and "encourages the diversion" of those minors "to appropriate service providers").

21. The term "youth in the sex trades" is intended to be inclusive of all adolescents under eighteen selling sex regardless of how they identify themselves, whether as young sex workers or as victims of sexual exploitation. The approach to terminology adopted by this paper is based on the belief that interventions must adapt to the specific needs of the many sub-populations of adolescents engaged in selling sex, many of whom do not attach an identity or status to their behavior. The term "youth in the sex trades" is therefore meant to cover adolescents trading sex for a range of reasons, including: economic survival and family support; sexual initiative; and physical force, threat of force, or other coercion. "Selling sex" does not necessarily imply that the adolescents themselves, rather than a third party, receive pay or goods in return for the sex act. The term also denotes any exchange of sex acts for money, food, shelter, or other resources. While many legal documents refer to persons under the age of eighteen engaged in selling sex to be "commercially sexually exploited children" ("CSEC"), young people do not label themselves according to legal instruments, and it is my position that we should not do so either.

22. See *infra* Part II; see also Kimberly Mehlman-Orozco, *Safe Harbor Policies for Juvenile Victims of Sex Trafficking: A Myopic View of Improvements in Practice*, 3 SOC. INCLUSION 52, 58 (2015) (finding that safe harbor laws do not reduce the number of juveniles arrested for prostitution crimes and specifically that New York experienced a nearly tenfold increase in such arrests the year after the law became effective).

23. Compare N.Y. PENAL LAW § 230.00 (McKinney 2015) ("Prostitution is a class B misdemeanor."), with N.Y. FAM. CT. ACT §§ 711-718 (McKinney 2015) (enumerating a variety of options available to the Family Court when determining the disposition of a PINS).

24. See, e.g., Wendi J. Adelson, *Child Prostitute or Victim of Trafficking?*, 6 U. ST. THOMAS L.J. 96, 127 (2008) ("New York has taken a bold step forward . . . . We need more state laws to finish the job."); K. Michael Baker, Comment, *Time for Change: Handling Child Prostitution Cases in Georgia*, 4 J. MARSHALL L.J. 177, 199–200 (2011) (advocating for Georgia's adoption of the New York model, including allowance for a judge to proceed with a delinquency petition if the court determines the minor "has previously been adjudicated for a prostitution offense," is "unwilling to participate in services," or



extraordinary changes enacted by safe harbor laws, one would expect them to be backed by extraordinary evidence. Unfortunately, safe harbor laws have been pushed through state legislatures based on the proposition that youth in the sex trade are categorical victims, or “Very Young Girls” coerced into trading sex by predatory third parties and in need of family court deprogramming. Recent data unavailable to the New York State Legislature at the time of the law’s passage, however, call the purposes underpinning safe harbor laws into serious question.<sup>26</sup>

---

proceeding under a CHINS petition “would be futile”); Kate Brittle, Note, *Child Abuse by Another Name: Why the Child Welfare System is the Best Mechanism in Place to Address the Problem of Juvenile Prostitution*, 36 HOFSTRA L. REV. 1339, 1374 (2008) (describing New York’s “groundbreaking headway” in passing the SHA and approving of the child welfare and court supervision model); Krystle M. Fernandez, Comment, *Victims or Criminals? The Intricacies of Dealing with Juvenile Victims of Sex Trafficking and Why the Distinction Matters*, 45 ARIZ. ST. L.J. 859, 886 (2013) (advocating for providing “the judge discretion to allow delinquency charges for a repeatedly uncooperative and resistant juvenile”); Tanya Mir, Note, *Trick or Treat: Why Minors Engaged in Prostitution Should be Treated as Victims, Not Criminals*, 51 FAM. CT. REV. 163, 168-69 (2013) (defending the New York model as reasonably preserving judicial discretion to order a delinquency proceeding “where individuals warrant rehabilitation in a strict setting” and justifying “[s]upervised detention . . . in instances where the minor has a legitimate criminal record or when she poses as a [sic] danger to herself or society.”). But cf. Cheryl Nelson Butler, *Bridge Over Troubled Water: Safe Harbor Laws for Sexually Exploited Minors*, 93 N.C. L. REV. 1281, 1287 (2015) (criticizing the “prosecution-based” model of New York and instead advocating for conformance with the Uniform Act on Prevention of and Remedies for Human Trafficking); Cynthia Godsoe, *Contempt, Status, and the Criminalization of Non-Conforming Girls*, 35 CARDOZO L. REV. 1091, 1112 (2014) (referring to safe harbor laws as “a positive step” but noting “numerous drawbacks,” including the punitive nature of the status offense system, arbitrary enforcement caused by broad discretion for police and courts, lack of adequate support services, and the “obscuration of the systemic social problems” causing youth involvement in the sex trades); Omeara Harrington, Note, *Free Lolita! The Contradictory Legal Status of Seattle’s Prostituted Youth*, 9 SEATTLE J. SOC. JUST. 401, 416-17 (2010) (criticizing the New York law for not making the PINS conversion automatic, namely by allowing judicial discretion where a youth has a prior prostitution conviction or is determined to fall outside the federal definition of a severe form of trafficking).

25. See, e.g., Darren Geist, *Finding Safe Harbor: Protection, Prosecution, and State Strategies to Address Prostituted Minors*, 4 LEGIS. & POL’Y BRIEF 67, 123 (2013) (defending the use of secure detention in certain cases, arguing that “holding minors in detention is better than simply returning them to the streets and to the pimps”); Shelby Schwartz, Note, *Harboring Concerns: The Problematic Conceptual Reorientation of Juvenile Prostitution Adjudication in New York*, 18 COLUM. J. GENDER & L. 235, 280 (2008) (criticizing PINS adjudication because juvenile delinquency petitions may be more appropriate for those young persons who ought to be “forced to remain” through secure confinement).

26. This view is epitomized by the documentary of the same name, which purports to expose the exploitation of girls in New York City as they are prostituted by pimps and treated as adult criminals by the police. See VERY YOUNG GIRLS (Swinging T Productions 2007). Notably, Girls Education and Mentoring Services (“GEMS”)—the subject of the documentary—was instrumental in the passage of the New York Safe Harbor Act. Press Release, GEMS, New York Laws at Work: The New York Safe Harbor for Exploited Children Act Protecting NYC Youth (Aug. 16, 2010), [www.gems-girls.org/news/new-york-laws-at-work](http://www.gems-girls.org/news/new-york-laws-at-work) (noting that for several years GEMS lobbied the New York State legislature and New York City Council to support passage of the New York Safe Harbor Act, through

This Article attempts to remedy the critical neglect of safe harbor laws in legal scholarship by providing a close reading of this new brand legislation. Part I opens with empirical data demonstrating that the arrest-based nature and custodial goals of safe harbor laws and policies make them ill-suited to the populations they are ostensibly designed to save. The safe harbor model relies on custodial arrests as a means to introduce youth to court supervision or other state custody, on the theory that only state intervention can interrupt the violence-forged trauma bonds forced on young people by third parties. Yet the best available demographic evidence from the United States, as well as other high or middle-income countries, shows that adolescents are typically introduced to trading sex by supportive peers of other runaway, homeless, unstably housed, or systems-involved youth rather than by third party coercion. Some youth of all gender identities experienced third-party exploitation, but where such exploitation does occur it often changed over time, and some youth find temporary respite, escape, or return to trading sex without third-party involvement. Advocates for safe harbor laws ignore such demographic realities, and instead champion discredited figures that misstate scientific findings or extrapolate national estimates from biased and unrepresentative samples. Similarly, a substantial number of these young people already have prior child protection, juvenile delinquency, or other state contact and ran away or experienced family rejection or abuse. On this background safe harbor laws empower state officers whom youth report perpetrate frequent abuse.

Part II then presents a statutory analysis of the New York Safe Harbor Act, focusing on the law's reliance on arrest and the conversion of a criminal prosecution to a status offense proceeding, its recent amendment, and other relevant New York legislation. Part III surveys the variety of safe harbor laws adopted in other states. Part IV examines the under addressed issue of the safety, suitability, and security of young people detained in lock-ups or residential facilities *after* being taken into custody. In particular, safe harbor laws suffer from a lack of clarity or uniformity with respect to placement options, conditions of confinement, quality of care standards, and periodic review procedures for facilities in which youth charged with prostitution-related offenses are held.

Part V closes by outlining an alternative model to the regime of safe harbor laws, proposing full immunity from criminal and juvenile delinquency prosecutions, a prohibition on arrest, temporary protective custody, and law enforcement and guardian-initiated petitions for dependency proceedings, and, in dependency and status offense proceedings independently initiated by child protection agencies, equalization of procedural due process rights and abolition of forced treatment, institutional placement, and detention. In the place of arrest and institutionalization, this alternative model relies on voluntary, low-threshold services to meet the basic, material needs that young people

---

conducting legislative visits, testifying at hearings, and presenting at legislative briefings).

themselves have identified. This Article attempts to center the experiences and needs that youth in the sex trades have themselves identified and concludes that regardless of whether youth trade sex as a result of limited economic circumstances or forcible coercion, they should all equally be entitled to a truly safer harbor, not only under, but also *from* the law.

I. BAD EVIDENCE MAKES BAD LAW:  
WHY BEHAVIORAL, DEMOGRAPHIC, AND TESTIMONIAL EVIDENCE  
CONTRADICT THE POLICY JUSTIFICATIONS FOR SAFE HARBOR LAWS

With the provisions and stated purposes of the New York Safe Harbor Act in mind, the fact of the Act's inefficacy is unavoidable. The estimated 3,946 minors ages eighteen and younger in the sex trades in New York City have been arrested an average of 2.5 times each,<sup>27</sup> but a reported total of seven New York City youth were adjudicated PINS under Safe Harbor in the first year after the law became effective in 2010.<sup>28</sup> By contrast, a study of arrest statistics in the FBI's Uniform Crime Reports for juveniles arrested for prostitution offenses in four safe harbor states suggests that these laws do not reduce the number of juveniles arrested for prostitution crimes, and in New York, arrests actually increased almost tenfold, from 14 in 2010 to 136 in 2011.<sup>29</sup> The fact that the Uniform Crime Reports are collected from a highly unrepresentative sample, and exclude New York City statistics,<sup>30</sup> suggests the increase was even higher.

Between 1997 and 2006, out of 3,348 prosecutions of youth ages sixteen through eighteen for prostitution offenses as adults in New York City Criminal Court, 79% resulted in a conviction or a guilty plea.<sup>31</sup> Of those who were convicted, 22% were sentenced to additional jail time for an average of 14.9 days, while the remaining 78% who were convicted almost all received a sentence of time served or a conditional discharge.<sup>32</sup>

The "raise the age" amendments passed into law in 2014 and discussed

27. RIC CURTIS ET AL., *THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN NEW YORK CITY*, VOL. 1: THE CSEC POPULATION IN NEW YORK CITY: SIZE, CHARACTERISTICS, AND NEEDS 33, 89 (2008).

28. *Oversight—Implementation of the Safe Harbor Act: Testimony Before the N.Y. City Council Comm. on Youth Servs.*, Sess. 2010-2013 3 (N.Y. 2011) (statement of Sara Hemmeter, Executive Director, Family Assessment Program, Division of Youth and Family Justice).

29. Mehlman-Orozco, *supra* note 22, at 58.

30. DAVID FINKELHOR & RICHARD ORMROD, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *PROSTITUTION OF JUVENILES: PATTERNS FROM NIBRS 2* (2004).

31. AMY MUSLIM ET AL., *THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN NEW YORK CITY*, VOL. 2: FORMATIVE EVALUATION: THE NEW YORK CITY DEMONSTRATION 16 tbl.3.3 (2008).

32. *Id.* at 16-17.

*infra* Part II.D.1 threaten to worsen this trend, and the law's fundamental failings in this area should be seen as symptoms of a deeper maladjustment. New York's track record should serve as a warning to other states considering passage of Safe Harbor legislation. Indeed, the failure of the model in New York has coincided with a substantial increase in funds to law enforcement agencies for training and services earmarked for trafficked minors.<sup>33</sup> The fact that the FBI's Uniform Crime Reports reveal 25 juvenile prostitution arrests in New York in 2009, 14 in 2010, and a startling tenfold increase to 136 in 2011 dispels the possibility that the increased conviction rate is due to a selection effect resulting from prosecutorial discretion in charging only youth perceived to be the most severe juvenile prostitution offenders.<sup>34</sup>

Relatedly, despite passage of the federal Trafficking Victims Protection Act of 2000 and the New York Safe Harbor law in 2008, the rate of cases ending in the lesser penalty of adjudication in contemplation ("ACD") for youth ages sixteen to eighteen prosecuted in New York City Criminal Court for prostitution-related crimes decreased from 20% of citywide dispositions for these youth in 2005 to 10% in 2009.<sup>35</sup>

Given the stated purpose of the Safe Harbor approach—to replace prosecution with services—the foreseeable outcome should be the opposite of these statistics. A counterargument might be that once the Safe Harbor law became effective in 2010 the circumstances improved for youth covered by the legislation—which was specific to youth ages fifteen and under—but not those young people excluded, specifically those ages sixteen and seventeen. But the number of youth ages fifteen and younger arrested on prostitution-related charges is extraordinarily small. One study found that between 1998 and 2006, arrests of these youth made up only 9% of all prostitution arrests of minors, while youth ages sixteen to eighteen made up 91%; the average age of youth arrested was 17.2.<sup>36</sup>

By the same token, one might argue that upon the Safe Harbor law's 2014 expansion to all youth ages seventeen and under, better outcomes will be secured in Family Court proceedings. But this same study found a shockingly high rate of conviction and commitment: specifically, among the subgroup of youth fifteen and younger arrested and brought before Family Court for prostitution-related offenses from 2004 to 2006, 90% of cases resulted in an admission or finding that the acts were committed, while only 10% were

---

33. See generally U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS—FISCAL YEAR 2012 (2013).

34. Mehlman-Orozco, *supra* note 22, at 58.

35. Ctr. for Court Innovation & Midtown Cmty. Court, Prostitution Data Analysis, New York City, 2005-2009 4 (unpublished) (on file with author). This unpublished dataset includes figures on persons arrested for prostitution and loitering for prostitution in New York City between 2005 and 2009.

36. MUSLIM ET AL., *supra* note 31, at 14 tbl.3.1.

dismissed or withdrawn and only one case resulted in an ACD.<sup>37</sup> Moreover, among those cases reaching a final disposition, 62% resulted in institutional placement.<sup>38</sup> In contrast, one study found that only 12% of all PINS cases result in a final disposition of placement, likely in foster homes.<sup>39</sup>

This section introduces an assessment of Safe Harbor and its impact through the lens of social science research on motivations for entry, demographic data, and the community-based research and experiences of institutional violence documented by youth in the sex trades. The counterfactual presented by this research suggests that the culprit of minors' involvement in the sex trade is not some shadowy stranger but the society at large that fails to provide workable alternatives to trading sex for survival. The evidence also calls into question so-called "End Demand" provisions that often attend safe harbor laws, which include higher penalties for clients and the general prioritization of police training as first responders whose role is to arrest not only perpetrators but also youth themselves in order to facilitate their transfer to rehabilitative custody. This latter trend is challenged by additional and even more haunting reports that document the perpetration of profiling based on race, sex, gender identity, and sexual orientation; verbal, physical, and sexual harassment and abuse; destruction and confiscation of condoms as evidence; and unsafe facility placement of transgender youth.<sup>40</sup> It turns out that the modern-day Superintendent Amighs are less saintly on the streets than in the tracts of "child savers." These findings should still the hands of legislators and encourage a radical reevaluation of strategies for intervention, including a consideration of the recommendations put forward *infra* Part V.

#### A. Research Flaws in Population Estimates and Demographics of Youth Trading Sex

Demographic studies are often commissioned by government agencies and research institutions as diagnostic tools to inform state actors so as to better allocate the ever-increasing number of resources earmarked for law enforcement and social service provision specific to this population. An alternative form of research is provided by participatory action and community-driven research conducted by youth in the sex trades themselves. This research illuminates the, at best, wary response to law enforcement and social service

---

37. *Id.* at 17, 18 tbl.3.4.

38. *Id.* at 18 tbl.3.4.

39. VERA INST. OF JUSTICE, A STUDY OF THE PINS SYSTEM IN NEW YORK CITY: RESULTS AND IMPLICATIONS 25 fig.16 (2002).

40. MEREDITH DANK ET AL., URBAN INST., LOCKED IN: INTERACTIONS WITH THE CRIMINAL JUSTICE AND CHILD WELFARE SYSTEMS FOR LGBTQ YOUTH, YMSM, YWSW WHO ENGAGE IN SURVIVAL SEX 21-27, 30-33 (2015); CURTIS ET AL., *supra* note 27, at 120-21; see also Jo Rees, Trans Youth Involved in Sex Work in New York City: A Qualitative Study, 79-80 (May 2010) (unpublished Ph.D. dissertation, New York University) (on file with author).

interventions among minors involved, and it militates in favor of a stronger understanding of the harms state actors perpetrate against street-involved young people.

### 1. Age of Entry

The most common focus of demographic research of youth in sex trades is population, including estimated population size and age of entry. One of the most widely cited nationwide statistics,<sup>41</sup> produced by Estes and Weiner, reported the average age of first entry into prostitution at thirteen, with boys and transgender girls entering the sex trades between eleven and thirteen and non-transgender girls entering between twelve and fourteen.<sup>42</sup> Notably, this statistic fails to define "entry" and the study may only measure age of first involvement rather than a course of conduct amounting to continued involvement. Moreover, the figure is vulnerable to criticism for cumulative bias; younger subjects are more likely to be counted by researchers than those with an older age of initiation, since they are engaged in the sex trade longer, which deflates the average age of entry.<sup>43</sup> The few empirical studies that have advanced independent estimates, however, commonly arrive at an older age than Estes and Weiner. For instance, one study conducted prior to Estes and Weiner found an average age of 14.1 years for girls, out of respondents aged thirteen to eighteen.<sup>44</sup> Yet another study, in estimating the age of entry in New York City, found it to be on average 15.29 years, with young women at 15.15 years, young men at 15.28 years, and transgender minors at 16.16 years.<sup>45</sup> A New York statewide prevalence study—arguably skewed from a higher age of entry as a result of a flawed sampling methodology that relies on law enforcement reporting—found that the most frequent age group for initiation in New York City was fourteen to fifteen years old.<sup>46</sup>

### 2. Population Size

A widely cited population study estimates that between 100,000 and 300,000 young people are involved in, or are at risk of involvement in, trading

---

41. EMI KOYAMA, *WAR ON TERROR & WAR ON TRAFFICKING* 4 (2011).

42. RICHARD J. ESTES & NEIL ALAN WEINER, *THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA AND MEXICO* 92 (2001).

43. Koyami, *supra* note 41, at 4-5.

44. Susan M. Nadon et al., *Antecedents to Prostitution: Childhood Victimization*, 13 J. INTERPERSONAL VIOLENCE 206, 213 (1998).

45. CURTIS ET AL., *supra* note 27, at 54. Note that statistics on "transgender" minors may fail to disaggregate on the basis of transgender boys and transgender girls, and transgender minors may be mistakenly recorded as cisgender boys based on bias by researchers and fear of disclosure by respondents due to stigma and discrimination.

46. FRANCES GRAGG ET AL., *NEW YORK PREVALENCE STUDY OF COMMERCIAL SEXUALLY EXPLOITED CHILDREN* 40 (2007).

sex, although it is commonly and incorrectly cited as positing that 300,000 minors *are* trading sex in any given year.<sup>47</sup> The definition of “at risk” includes large categories of youth such as runaway youth (121,911) and throwaway youth (51,602),<sup>48</sup> which may be counted multiple times because the categories are not mutually exclusive.<sup>49</sup> According to the renowned researcher of child victimization David Finkelhor, “As far as I’m concerned, [the Estes & Weiner study] has no scientific credibility to it. . . . [It] was never really subjected to any kind of peer review.”<sup>50</sup>

Other national research utilizes criminal justice statistics to determine the population size of youth in the sex trades. One recent study indicates that in 2008, an estimated 1,500 minors were arrested for “prostitution and commercialized vice.”<sup>51</sup> However, the limitations of capturing population size based on national criminal statistics are readily apparent, as these statistics are collected from a highly unrepresentative sample of jurisdictions and contain few large urban areas.<sup>52</sup>

In perhaps the most extensive study to date of national criminal justice statistics on the subject, Finkelhor and Ormrod assessed 14,230 cases of prostitution from the National Incident Based Reporting System (“NIBRS”) reported between 1997 and 2000.<sup>53</sup> Of those cases, 1.4 percent involved juvenile offenders.<sup>54</sup> While the incident reporting system suggests some confusion as to why some reported minors are found to be offenders while others are found to be victims, the study produced important findings specific to gender. For instance, male minors involved in the sex trades face disproportionate arrest and detention at the hands of law enforcement, facing arrest in 63% of reported incidents compared to 52% of female minors.<sup>55</sup> Police report more contacts with male juvenile prostitutes (61% of encounters) than female juvenile prostitutes (39%).<sup>56</sup> Additionally, 74% of female minors arrested for prostitution were referred to other authorities, presumably social

47. See ESTES & WEINER, *supra* note 42, at 143 (“The numbers presented in these exhibits do not, therefore, reflect the actual number of cases of the CSEC in the United States but, rather, what we estimate to be the number of children ‘at risk’ of commercial sexual exploitation.”).

48. *Id.* at 146.

49. KOYAMA, *supra* note 41, at 9.

50. Martin Cizmar et al., *Real Men Get Their Facts Straight*, VILLAGE VOICE (N.Y.) (June 29, 2011), <http://www.villagevoice.com/news/real-men-get-their-facts-straight-6431644>; see also MICHELLE STRANSKY & DAVID FINKELHOR, CRIMES AGAINST CHILDREN RESEARCH CTR., HOW MANY JUVENILES ARE INVOLVED IN PROSTITUTION IN THE U.S.? 1 (2008).

51. Charles Puzzanchera, *Juvenile Arrests 2008*, OJJDP JUV. JUST. BULL., Dec. 2009, at 3.

52. FINKELHOR & ORMROD, *supra* note 30, at 2.

53. See *id.* at 3.

54. *Id.* at 4.

55. *Id.* at 7.

56. *Id.* at 5.

services, while 57% of male minors arrested for prostitution were handled within the department.<sup>57</sup> Police are also more likely to categorize juveniles in prostitution as offenders than crime victims, but those categorized as victims are more likely to be female and young.<sup>58</sup> The statistics showing that male minors face disproportionate arrest and detention appear to caution against a presumed gender bias against young women in prostitution-related prosecutions. These data also problematize the application of a presumptive victimhood that is commonly ascribed to girls alone.

Local population estimates also disagree. For instance, one New York statewide prevalence study estimated the population size of youth in the sex trades as 2,253 in New York City and 399 in the seven Upstate counties sampled,<sup>59</sup> while another citywide study estimated 3,946 minors thought to be involved in the sex trades in New York City alone.<sup>60</sup> Similarly, the statewide report found that youth in the sex trades are predominantly girls,<sup>61</sup> while the citywide study found the majority of youth in the sex trade in New York City are male, transgender, and gender non-conforming youth.<sup>62</sup> The statewide study also found that force or coercion was reported in 58% of cases in New York City and 32% in the Upstate counties sampled,<sup>63</sup> but the citywide study found only 9.6% of youth reported recruiting clients through what was called a "market facilitator," which itself might include the mutually supportive activity of sharing clients, only for a fee or some form of consideration.<sup>64</sup>

In reconciling these conflicting data, it is important to weigh the methodological approaches of the studies. The statewide study has several disadvantages that call its findings into question. The study measures only identifications of youth by "sentinel agencies," for example, police and sheriff's departments and child welfare placements.<sup>65</sup> The statewide survey also only collected data by mail questionnaires, qualitative telephone interviews, and three focus groups that each collected narrative testimony from fifteen young people.<sup>66</sup> The study has been criticized as employing a flawed sampling methodology that underestimates the number of youth in the sex trades who are boys, transgender girls, and undocumented youth.<sup>67</sup> Indeed, trans youth, in

---

57. *Id.* at 7.

58. *Id.*

59. GRAGG ET AL., *supra* note 46, at 23-34.

60. CURTIS ET AL., *supra* note 27, at 113.

61. GRAGG ET AL., *supra* note 46, at 86-87 (noting that 85% of sampled NYC youth and 77% of sampled Upstate youth were female).

62. CURTIS ET AL., *supra* note 27, at 34 (estimating that 58% of CSEC youth in NYC are male or transgender).

63. GRAGG ET AL., *supra* note 46, at 39.

64. CURTIS ET AL., *supra* note 27, at 63.

65. GRAGG ET AL., *supra* note 46, at 89.

66. *Id.* at 13, 43.

67. See, e.g., THE N.Y.C. ASS'N OF HOMELESS AND STREET-INVOLVED YOUTH ORGS., STATE OF THE CITY'S HOMELESS YOUTH REPORT—2011 77 (2011) [hereinafter STATE OF THE



particular, make up a disproportionate share of the homeless youth population, face special legal, employment, and housing barriers, lack of documentation and fees, and higher rates of harassment, law enforcement violence, and shelter denial.<sup>68</sup>

In contrast, the citywide study conducted by researchers from John Jay College employed respondent-driven sampling (“RDS”), a methodology used to “recruit statistically representative samples of hard-to-reach groups by taking advantage of intragroup social connections.”<sup>69</sup> In RDS, a small number of initial subjects (or “seeds”) are interviewed and paid (in this case, twenty dollars) and given three numbered coupons to pass on to their peers (here, other youth engaged in the sex trades).<sup>70</sup> When eligible research subjects later redeem these coupons, the initial referrer is paid (here, ten dollars).<sup>71</sup> The process continues in recruitment “wave[s] . . . until the desired sample size is reached.”<sup>72</sup> Notably, at one point, concerned that “pimped girls” were not represented, the John Jay team even affirmatively prevented more males from entering the study, offered incentives for the recruitment of pimped girls, and self-recruited ten pimped girls in state custody.<sup>73</sup>

#### B. “I Don’t Have that Privilege”: Rational Choice within Limited Economic Choices

*It’s better to try and make money on the street than to have to steal off people. At least I’m doing this for myself.*<sup>74</sup>

In New York City, only 14% of girls, 6% of boys, and virtually no transgender youth who trade sex have *ever* come in contact with a third party beneficiary to their involvement, such as a friend who shares clients, let alone a pimp or trafficker.<sup>75</sup> An estimated 58% of the 3,946 youth thought to be involved in the sex trades in New York City are not “Very Young Girls” at all, but male, transgender, and gender non-conforming youth.<sup>76</sup> The pathway to entry into the sex trade for youth in New York City is also a far cry from Amigh’s street snatching “slave traders.” The majority identify lack of access to steady employment, education, and stable housing as primary motivations to

---

City 2011].

68. NICHOLAS RAY, NAT’L GAY & LESBIAN TASK FORCE POLICY INST., LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS 4 (2006) [hereinafter NGLTF & NCH].

69. CURTIS ET AL., *supra* note 27, at 5.

70. *Id.* at 6.

71. *Id.*

72. *Id.*

73. *Id.* at 29-31.

74. Rees, *supra* note 40, at 92 (alteration in original).

75. CURTIS ET AL., *supra* note 27, at 63.

76. *Id.* at 33-34.

"do what [they] gotta do" to survive."<sup>77</sup> Many youth characterize their involvement as a rational choice within a limited economy of choices: "I didn't have anywhere to go. I couldn't go to shelters, I was too young, I couldn't go home because my father didn't accept me for who I was so I walked around every day, just eating and sleeping and trying to make money . . . ."<sup>78</sup>

The data on nature of involvement are even more striking in light of the approach of safe harbor laws. Instead of obtaining clients through a third party, most youth who have recently entered the sex trade find clients by either allowing customers to approach them (49%) or approaching the customer (23%).<sup>79</sup> Another 21% report that friends often facilitate customer contact and share their own customers, but do not do so for a fee, merely sharing resources for mutual support.<sup>80</sup> Only 9.6% of youth reported recruiting clients through what was called a "market facilitator," which itself might include the mutually supportive activity of sharing clients described above, only for a fee or some form of consideration.<sup>81</sup> This figure does not disaggregate the 9.6% to identify whether the young people even reported physical coercion to trade sex.

This reported absence of physical force is given additional weight by data of the New York's Missing and Exploited Children Clearinghouse.<sup>82</sup> New York City reported zero stranger abductions and acquaintance abductions, and 111 familial abduction cases in 2013, and 95% of children reported missing statewide were reported as runaways.<sup>83</sup> In the New York City boroughs, the proportion is even greater, with more than 98% of missing children cases reported as runaways.<sup>84</sup>

These data also support the alternative proposition that youth involved in the sex trade are motivated by limited economic circumstances. Instead of young people abducted at gunpoint, a more accurate portrait of youth in the sex trades focuses on runaway and homeless youth. In 2007, over 3,800 youth and young adults were estimated to be homeless in New York City.<sup>85</sup> Further, on any given night, it is estimated that 1,600 of those young people are spending the night outside, in an abandoned building, at a transportation site, or in a

---

77. *Id.* at 102, 110.

78. Rees, *supra* note 40, at 89 (alteration in original).

79. CURTIS ET AL., *supra* note 27, at 55. Youth were allowed to select multiple methods for engaging clients, and as a result, the numbers reported do not add up to 100%. *Id.* at 63.

80. *Id.* at 56.

81. *Id.* at 63.

82. See generally N.Y. STATE DIV. CRIMINAL JUSTICE SERVS., MISSING PERSS. CLEARINGHOUSE 2013 ANNUAL REPORT (2014).

83. *Id.* at 26, 29. Note, however, that "[t]he number of stranger abductions reported to the Register may be an undercount. Typically, cases are not categorized as stranger abductions unless someone actually witnessed the child being abducted." *Id.* at 11.

84. *Id.* at 29.

85. LANCE FREEMAN & DARRICK HAMILTON, EMPIRE STATE COAL. OF YOUTH & FAM. SERVS., A COUNT OF HOMELESS YOUTH IN NEW YORK CITY 5 (2008).

vehicle, and 150 of them are spending the night with a sex work client.<sup>86</sup> In a nationally representative sample of runaway and homeless youth, researchers found that a higher proportion of street youths than youths in shelter had engaged in survival sex and that survival sex was more prevalent among shelter youths with previous street experiences than among those without such experiences.<sup>87</sup> The study also identified a positive correlation between participation in survival sex and length of time away from home.<sup>88</sup>

Recent research also contradicts other common assumptions. For instance, the notion that all low-wage sex-trading encounters are street-based is called into question by the 18% of youth who reported using the Internet to engage in the market, with the explanation that the Internet offered them screening opportunities and protection from “law enforcement and other predators,” anonymity, and convenience.<sup>89</sup> Contrary to claims of youth being brainwashed by trauma bonds, 86.8% of youth, and 94.7% of transgender youth, reported that they would like to exit the sex trade.<sup>90</sup> In both cases, the evidence suggests less a situation of dire physical coercion and more a weighing of limited economic choices. Qualitative research commonly finds this narrative among youth themselves, many of whom most feared moral judgment and stigma as a result of their involvement:

Right . . . somebody over here be saying “you shouldn’t be out there like that” but at the end of the night, where you go? You go home, right, to your bed. You take your shoes off at the door, so that you don’t get your floor messed up. Well I don’t have that privilege. I don’t have a floor. I don’t have a bed. I don’t have a hallway. I don’t have a rug. So, we talkin’?<sup>91</sup>

While any number of youth being physically forced into trading sex should be a call to action, an accurate and evidenced dataset is critically important in formulating a policy response. Indeed, the New York City prevalence study found that 14% of girls and 6% of boys who trade sex have some third party involvement, and, out of this group, an unspecified fraction report physical coercion.<sup>92</sup> As many as 95% of youth in the sex trades reported that they exchanged sex with others in order to obtain money.<sup>93</sup> This fact speaks to the underlying economy of choices for minors involved—even those who bear the terrible burden of physical coercion—and the importance of encouragement for self-support through voluntary social services and not mandatory programs. Contrary to common understanding, young people do not need “reeducation” in

---

86. *Id.*

87. Jody M. Greene et al., *Prevalence and Correlates of Survival Sex Among Runaway and Homeless Youth*, 89 AM. J. PUB. HEALTH 1406, 1408 (1999).

88. *Id.* at 1408.

89. CURTIS ET AL., *supra* note 26, at 57-58, 63.

90. *Id.* at 110.

91. Rees, *supra* note 40, at 148-49 (alteration in original).

92. CURTIS ET AL., *supra* note 27, at 63.

93. *Id.*

order to leave the sex trade.<sup>94</sup> Instead, New York City's young people have identified their own needs in facilitating an exit. Of the youth involved, 60% reported that stable employment was necessary for them to exit, 51% said education was necessary, and 41% said stable housing was necessary.<sup>95</sup> The proper policy response is not to arrest and detain minors in secure juvenile detention facilities as "delinquents," nor to arrest, detain, adjudicate, and incarcerate youth for their "rehabilitation," but to provide young people a *meaningful preventive alternative*. Meeting these needs, rather than arrests and prosecutions, should be the priority of legislators considering adoption of safe harbor laws.

### C. Criminals, Victims, or Survivors?: Prior Trauma as a Problematic Explanation for Entry into the Sex Trade

A common form of research into minors' involvement in the sex trades reflects a preoccupation with the motivation for minors' involvement. This approach seeks to identify "risk factors" for entry in order to inform preventive interventions. One study found that survivors of child sexual abuse are substantially more likely to be arrested for prostitution as adults than non-victims.<sup>96</sup> In another representative instance, a study of a court-mandated group home for adolescent girls trading sex in the urban Southeast identified the following risk factors common to the residents: negative family dynamics, poor parenting skills, lower intellectual functioning, poor school success, inadequate social skills, multiple mental health disorders, and abuse and neglect.<sup>97</sup> This study too arguably relies on an unrepresentative sample (i.e., court-involved youth) as skewed by discretionary law enforcement, prosecutorial, and judicial practices on race, class, and gender lines. Studies often explain away the fact that minor "victims . . . often do not self-identify as victims" by arguing that this is caused by "fear of the physical and psychological abuse inflicted by the trafficker, and/or due to the trauma bonds developed through the victimization process."<sup>98</sup> An alternative reading—that these young people are simply telling the truth—is suggested by the demographic findings on the widespread absence of physical coercion as discussed above.

---

94. See *id.* at 110 (reporting that youth have identified the specific support they would need to be able to leave the sex trade).

95. *Id.* Note that youth could identify multiple changes needed for them to leave the sex trade, so the percentages do not add up to 100%. *Id.*

96. Cathy Spatz Widom & Joseph B. Kuhns, *Childhood Victimization and Subsequent Risk for Promiscuity, Prostitution, and Teenage Pregnancy: A Prospective Study*, 86 AM. J. PUB. HEALTH 1607, 1611 (1996).

97. See Sarah E. Twill et al., *A Descriptive Study on Sexually Exploited Children in Residential Treatment*, 39 CHILD & YOUTH CARE F. 187, 188-90 (2010) (surveying the existing literature on the issue).

98. LINDA A. SMITH ET AL., SHARED HOPE INT'L, THE NATIONAL REPORT ON DOMESTIC MINOR SEX TRAFFICKING: AMERICA'S PROSTITUTED CHILDREN 41 (2009).

Still other researchers have appropriately disputed assertions of any singular motivation, particularly prior trauma, for entry. For instance, Brannigan and Van Brunschot take issue with the popular claim that past family sexual trauma is the determinative factor in minors' involvement, and they explain that the evidence of prior rape, incest, and other kinds of sexual trauma in the backgrounds of youth in the sex trades is inconsistent and contradictory. Instead, they argue that negative home lives, which make youth vulnerable to engaging in the sex trades, also are independently correlated with sexual abuse.<sup>99</sup> In this light, family trauma is an *effect* of economic and social detachment rather than a cause. The causative formula drawing a positive relationship between prior sexual abuse and trading sex can also be challenged for other problematic assumptions. One Seattle study found that adolescents who experienced higher rates of early sexual abuse were likely to run away from home at young ages, and a positive relationship existed between running away numerous times and engagement in survival sex.<sup>100</sup> This observation suggests that prior sexual abuse is not a direct *cause* of trading sex, but instead abuse forces young people to flee, and as a runaway with limited to no resources, trading sex may be their best choice for survival.

Indeed, others have advanced the alternative theory that experience with or observation of sexual contact, drug use, and other activities, may be understood not as delinquency but, alternatively, as "street capital," which better enables minors to survive limited economic circumstances by trading sex and drugs for survival.<sup>101</sup> This theory posits that young people build these competencies through association with more experienced youth.<sup>102</sup> This framing contextualizes a minor's involvement in the sex trade within broader and more nuanced participation in street economies. One study isolated five main factors that influenced the entry of homeless youth between the ages of fifteen and twenty-three into the street economy: (1) social control, (2) barriers to entering the formal economy (such as homelessness, lack of education, and mental health problems), (3) benefits of entering the street economy (both tangible benefits and social or emotional benefits), (4) severe economic need, and (5) active recruitment by others.<sup>103</sup>

---

99. Augustine Brannigan & Erin Gibbs Van Brunschot, *Youthful Prostitution and Child Sexual Trauma*, 20 INT'L J.L. & PSYCHIATRY 337, 351 (1997).

100. Kimberly A. Tyler et al., *The Impact of Childhood Sexual Abuse on Later Sexual Victimization Among Runaway Youth*, 11 J. RES. ON ADOLESCENCE 151, 165-67 (2001).

101. See Stephen E. Lankenau et al., *Street Careers: Homelessness, Drug Use, and Sex Work Among Young Men who Have Sex with Men (YMSM)*, 16 INT'L J. DRUG POLICY 10, 10-18 (2005).

102. *Id.* at 11.

103. Marya Viorst Gwadz et al., *The Initiation of Homeless Youth into the Street Economy*, 32 J. ADOLESCENCE 357, 366 (2009).

#### D. A Second Bite at the Apple: The High Degree of Prior Child Welfare Involvement Among Youth in the Sex Trades

Perhaps the greatest irony effected by safe harbor laws is the focus on increasing compulsory child welfare involvement by means of arrest and court-mandated institutionalization, when research shows the dearth of voluntary services available and the high degree of youth in the sex trade who have already been adjudicated as an abused, dependent, neglected, or minor in need of supervision. Indeed, advocates have decried the "epidemic shortage of voluntary services" for youth in the sex trades, sometimes resulting in youth being "turned away from programs due to lack of available resources, only to be arrested and mandated to services."<sup>104</sup>

The high degree of prior child welfare involvement reported by youth in the sex trades is readily apparent. One investigation found that 59% of juveniles arrested on prostitution-related charges in Los Angeles County in 2010 were in the foster care system.<sup>105</sup> Los Angeles County also reported in 2012 that 78% of the young women diverted from an arrest to the Succeed Through Achievement and Resilience (STAR) Court Program had prior involvement with the Department of Children and Family Services.<sup>106</sup> In a study of Midwestern youth ages nineteen to twenty-one, most of the youth reporting direct experience with trading sex "had been removed at least once from their parents' care and placed in a series of foster homes, group homes, treatment facilities, and outreach shelters."<sup>107</sup> This fact is not limited to non-transgender female youth, with placement in foster care also demonstrably predictive of participation in trading sex for homeless male youth.<sup>108</sup>

In a surprising way, the jurisdiction responsible for drafting the first safe harbor law has long documented the fact of the high degree of child welfare involvement among youth in the sex trades. One study found that a majority of youth in the sex trades in New York City had prior child welfare involvement, typically in the form of child abuse and neglect allegations or investigations (69%) and foster care placements (75%).<sup>109</sup> Moreover, over half of New York

---

104. STATE OF THE CITY 2011, *supra* note 67, at 78.

105. Abby Sewell, *Most L.A. County Youths Held for Prostitution Come from Foster Care*, L.A. TIMES (Nov. 27, 2012), <http://articles.latimes.com/2012/nov/27/local/la-me-1128-sex-trafficking-20121128>.

106. CAL. CHILD WELFARE COUNCIL, ENDING THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN: A CALL FOR MULTI-SYSTEM COLLABORATION IN CALIFORNIA 11 (2013), [www.chhs.ca.gov/CWCDOC/Ending%20CSEC%20-%20A%20Call%20for%20Multi-System%20Collaboration%20in%20CA%20-%20February%202013.pdf](http://www.chhs.ca.gov/CWCDOC/Ending%20CSEC%20-%20A%20Call%20for%20Multi-System%20Collaboration%20in%20CA%20-%20February%202013.pdf).

107. Kimberly A. Tyler & Katherine A. Johnson, *Trading Sex: Voluntary or Coerced? The Experiences of Homeless Youth*, 43 J. SEX RES. 208, 210 (2006).

108. See Lankenau et al., *supra* note 101, at 12 (noting that all ten of the study's participants— young men involved in the sex trades— had "experienced significant fluidity in their relationships with caretakers").

109. GRAGG ET AL., *supra* note 46, at 31 tbl.3.6.

City youth who were trading sex had a prior juvenile justice placement, and 45% had a prior PINS placement.<sup>110</sup> Similarly, in a New York City survey of over 1,000 homeless youth, researchers found that approximately 29% of homeless youth had experience in foster care, 15% had been in juvenile detention, and 27% had been to jail or prison.<sup>111</sup>

#### E. Protect Us From Our Protectors: Institutionalized Violence by Police, Courts, Health Care Providers, and Social Services

While these findings undermine preconceptions about gender representation, the nature and age of first involvement, and the prevalence of prior child welfare involvement, as described by the narrative informing safe harbor laws, the skeptic might formulate an objection that, regardless of whether youth are *very* young girls, or have the opportunity to make other remunerative choices, their involvement in the sex trade signifies immaturity or poor judgment sufficient to warrant state custody. However, when the reality of research demonstrating the degree to which youth in the sex trade are involved in trading sex due to structural conditions such as racial, sexual, and transphobic occupational discrimination and limited economic choices is combined with the affirmative harms of the arrest-institutionalization system embodied by safe harbor laws, an indictment of the model is unavoidable. This section makes precisely that case.

While safe harbor laws envision police, social service agencies, and the court system as rescuers, this understanding is emphatically rejected by youth involved in the sex trade. As put by one transgender youth, the police outlook is defined not by chivalry but by targeted harassment shot through with racial and sexual animosity:

[E]very time [the police] see me or one of my friends walking in the street, they have the urge to pull us over and get out of the car and question us . . . even if we're not doing nothing . . . harassing us and stuff, calling us 'he-shes' and stuff . . . eventually you gonna get caught there and go to jail.<sup>112</sup>

This lived experience shines light on yet another false premise of safe harbor laws, namely that youth who trade sex face prosecution primarily as a result of the crime of prostitution. In fact, only 11.6% of youth in the sex trade have been arrested for prostitution and only 6.0% of such youth have been arrested for loitering for prostitution.<sup>113</sup> Thus, safe harbor laws' limited "immunity" from prosecution for "prostitution" does not extend to the vast majority of youth processed by police on proxy charges.<sup>114</sup> Indeed, the

110. *Id.*

111. FREEMAN & HAMILTON, *supra* note 85, at tbl.9.

112. Rees, *supra* note 40, at 76-77 (third and fourth alterations in original).

113. CURTIS ET AL., *supra* note 27, at 92.

114. MUSLIM ET AL., *supra* note 31, at 18 tbl.3.4 (finding that, among youth in the sex trade under the age of fifteen who were arrested between 2004 and 2006, only 36% were

collective action of youth themselves presents safe harbor's most damning criticism: in a study of New York City Family Court statistics, 48% of those sex-trading youth ages fifteen and younger arrested on prostitution-related charges were charged with false personation, suggested that they purposely misrepresented their age to police to avoid Family Court and be referred to criminal court.<sup>115</sup>

In addition, youth may be criminalized for using one of the few tools they have left for their self-protection. An astounding 76% of young people involved in sex work or trafficking report always practicing safe sex.<sup>116</sup> Yet, the use of condoms as evidence of prostitution and trafficking-related offenses threatens to reverse this trend.<sup>117</sup> The confiscation of condoms as evidence is not the only public health impact of the hyper-policing of youth in the sex trades. A qualitative series of interviews of providers serving youth in the sex trades in New York City revealed that increased police presence resulted in false arrest and brutality, drove youth to more dangerous and secluded areas, and shortened the time youth "have to assess their clients and to set terms of negotiation, increasing the risk of engaging with a customer who may not be interested in safe sex and may be violent."<sup>118</sup>

In addition, transgender girls and young men who have sex with men face highly disproportionate policing, with 75% of young men and 59% of transgender youth who trade sex reporting prior arrests.<sup>119</sup> The model of the "Very Young Girl" also excludes the 11% of female youth involved in the sex trade who report trading sex with women<sup>120</sup> and the young transgender men who report involvement in transactional sex.

The high level of police misconduct reported by youth in the sex trades pursuant to supposedly protective enforcement actions is a far cry from the "rescue" model that safe harbor laws envision. Young people who are homeless in New York City regularly report being "verbally harassed (often with racist and sexist language), pushed to the ground, pummeled, maced, and tazed, often because of perceived disrespect, for offenses like turnstile jumping."<sup>121</sup> In one study of transgender youth who trade sex in New York City, all participants reported having had contact with the police, and the youth interviewed reported being profiled as sex workers and subjected to verbal, physical, and sexual

---

charged with prostitution, while 48% were charged with false personation, 12% with loitering, and 5% with criminal nuisance).

115. *Id.*

116. CURTIS ET AL., *supra* note 27, at 96.

117. DANK ET AL., *supra* note 40, at 30-33.

118. MIA SPANGENBERG, ECPAT-USA, PROSTITUTED YOUTH IN NEW YORK CITY: AN OVERVIEW 7-9 (2001).

119. CURTIS ET AL., *supra* note 27, at 92.

120. *Id.* at 82.

121. THE N.Y.C. ASS'N OF HOMELESS AND STREET-INVOLVED YOUTH ORGS., STATE OF THE CITY'S HOMELESS YOUTH REPORT—2009 110 (2009) [hereinafter STATE OF THE CITY 2009].



harassment and assault.<sup>122</sup> This abuse occurs on the background of familial rejection, homelessness, unstable housing, and street involvement, exclusion from housing and shelter services, school violence, access to health care and gender-affirming medical treatment, and discrimination in employment.<sup>123</sup>

The recent Urban Institute study *Locked In*, which partnered with the community organization Streetwise and Safe,<sup>124</sup> used in-depth, peer-to-peer interviews of LGBTQ youth, young men who have sex with men (“YMSM”), and young women who have sex with women (“YWSW”) engaged in survival sex in New York City to study their interactions with juvenile and criminal justice systems, in addition to the child welfare system.<sup>125</sup> The study, conducted between 2012 and 2014, used respondent-driven sampling to recruit eligible youth to collect data about their experiences of arrest and court-involvement.<sup>126</sup> These interviews were supplemented with in-depth interviews of sixty-eight criminal justice, child welfare, and youth-serving professionals across twenty-eight organizations.<sup>127</sup>

Youth interviews resulted in the following key findings relating to encounters with law enforcement. Two-thirds of study respondents reported being stopped, questioned, and frisked at some point in their life, and 19% stated that they had weekly, and sometimes daily, run-ins with the police.<sup>128</sup> Youth reported that many police encounters were initiated due to profiling on the basis of actual or perceived race, sexuality, and gender non-conformity.<sup>129</sup> Fifteen percent of youth reported having condoms found during a stop, question, or frisk used as a justification for sustained questioning or even arrest for prostitution-related offenses.<sup>130</sup> Over 70% of the young people had been arrested at least once, and many of the youth reported frequent arrest for a variety of “quality of life” and misdemeanor crimes other than prostitution offenses, creating further instability and perpetuating the need to engage in survival sex.<sup>131</sup> “Youth described being locked in a constant and vicious cycle of involvement in the criminal justice system with far-reaching collateral consequences ranging from instability in the home and school to inability to pay fines and surcharges, active warrants, incarceration, and consequences for future employment.”<sup>132</sup> Only 9% of the youth had been arrested on a

---

122. Rees, *supra* note 40, at 79.

123. *Id.* at 17-18.

124. For the purposes of full disclosure, the Author is a Staff Attorney at Streetwise and Safe and co-authored the reports *Surviving the Streets of New York*, cited *infra* note 278, and *Locked In*, cited *supra* note 40.

125. DANK ET AL., *supra* note 40, at 13.

126. *Id.*

127. *Id.* at 14.

128. *Id.* at 16.

129. *Id.* at 20-22.

130. *Id.* at 29-30.

131. *Id.* at 33-34.

132. *Id.* at 90.

prostitution-related charge, which leads to a false perception by the police and the courts that LGBTQQ youth are not engaging in survival sex.<sup>133</sup>

One-third of the youth who had been previously arrested reported feeling unsafe during booking and processing; many had in fact experienced violence and abuse by police.<sup>134</sup> Youth reported verbal abuse (including harassment based on gender identity and sexual orientation), physical violence (including beatings and chokings), and sexual assault (including rape and being propositioned for sex in exchange for release).<sup>135</sup> Youth also reported high levels of psychological distress, including, in some cases, post-traumatic stress disorder, stemming from the police violence.<sup>136</sup> Perhaps partly as a result of this fear of violence, the majority of youth surveyed reported trying to avoid the police.<sup>137</sup>

The study conducted interviews with various law enforcement stakeholders, including police and probation officers, judges, and prosecutors. Overall, the stakeholders reported that law enforcement and court personnel are making a "good-faith effort[] to address the needs of LGBTQ youth or change LGBTQ policy."<sup>138</sup> Stakeholder-identified barriers included facility and personnel challenges such as lack of gender-appropriate staffing and safe spaces, lack of information about where to refer youth for services, and budget constraints.<sup>139</sup> However, law enforcement stakeholders also reported that mistrust of police by LGBTQQ communities—specifically the "misinformation" spread by LGBTQQ service providers and community advocates—prevented officers from meeting the needs of these youth.<sup>140</sup>

Law enforcement interviewed for this study exhibited a high level of bias toward LGBTQQ youth, YMSM, and YWSW engaged in survival sex. Some acknowledged that survival sex was a behavior related to making up for a lack of financial and other resources, but many officers indicated a common belief that "LGBTQ youth who engaged in survival sex [were] generally criminogenic, meaning causing or likely to cause criminal behavior."<sup>141</sup> The peer networks youth repeatedly identified as sources of mutual support—gay families, the ball scene—were sometimes characterized as criminal enterprises.<sup>142</sup> Stakeholder interviews with police also revealed a startling perspective on comparative victimization. Law enforcement officers reported that arrests of youth engaged in survival sex were more valuable to crime

---

133. *Id.* at 90-91.

134. *Id.* at 42.

135. *Id.* at 2, 91.

136. *Id.*

137. *Id.* at 53.

138. *Id.* at 63.

139. *Id.* at 66-68.

140. *Id.* at 68.

141. *Id.* at 73.

142. *Id.*

control efforts than arrests of others engaged in survival sex, including clients, because of their greater likelihood of criminality.<sup>143</sup>

The criminalization of youth in the sex trades does not by any means end with police interaction. Court services, involuntary placement, and incarceration carry their own set of risks, including involuntary separation from family or friends. Research indicates that, nationwide, LGBTQ youth in particular face “denials of due process, unduly punitive responses, harmful services and programs, and unsafe conditions of confinement.”<sup>144</sup> In addition, LGBTQ youth—and especially youth of color—are overrepresented in detention facilities and the juvenile justice system more generally.<sup>145</sup> Yet, even this number is likely an underestimate, because some youth do not disclose their orientation or gender identity “for fear of drawing unwanted attention to themselves, limiting their placement options, or suffering abuse in their placements.”<sup>146</sup>

The *Locked In* study also documented LGBTQ youth, YMSM, and YSW experiences with court and child welfare systems. While youth perceptions of the court system, including Criminal Court and Family Court, were somewhat less negative than with law enforcement, youth reported that judges, prosecutors and court officers refused to use names and pronouns that reflect their gender identity and made disrespectful remarks about gender identity, gender expression, or sexual orientation.<sup>147</sup> Some youth specifically mentioned experiencing violence in Family Court.<sup>148</sup> Youth noted that survival behaviors like engaging in survival sex resulted in in-court arrests or detention.<sup>149</sup> Judges also reportedly referred youth back to abusive home environments, including in cases where they identified family rejection and abuse based on sexual orientation and gender identity.<sup>150</sup>

Many youth who discussed child welfare involvement reported negative experiences, which they often mentioned as justifications for running away from placements.<sup>151</sup> Some youth described their foster home or group home placements as unsafe, overcrowded, and highly restrictive.<sup>152</sup> Youth also reported that foster parents or group home staff were “often restrictive,

143. *Id.* at 74.

144. KATAYOON MAJD ET AL., *HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN JUVENILE COURTS* 1 (2009), [www.nclrights.org/wp-content/uploads/2014/06/hidden\\_injustice.pdf](http://www.nclrights.org/wp-content/uploads/2014/06/hidden_injustice.pdf).

145. *Id.* at 28, 43.

146. *Id.* at 44.

147. DANK ET AL., *supra* note 40, at 50-51.

148. *Id.* at 4, 50.

149. *Id.* at 85-88.

150. *Id.* at 87-88.

151. *Id.* at 79.

152. *Id.* at 82-83, 109.

perceived as cruel, or downright abusive.”<sup>153</sup> Youth reported inappropriate placement decisions by the Administration for Children’s Services and a lack of accountability and oversight of both congregate care placements and placements with foster or group homes.<sup>154</sup> Youth also described the child welfare system as ineffective at meeting their needs, including late payments to foster parents and failure to support youth “aging out” of the foster care system.<sup>155</sup> Some youth also reported great frustration that when under the age of sixteen, the only option for leaving abusive home environments was either ACS custody or living on the streets. They reported lying to youth shelters to gain access but being returned to the custody of an abusive family upon discovery.<sup>156</sup>

These observations are supplemented by similar community-driven research conducted by youth themselves in Chicago. The Young Women’s Empowerment Project (“YWEP”), which operated in Chicago, conducted an invaluable study in which girls, including transgender girls, involved in the sex trades or street economy gathered research from over 140 of their peers, including homeless girls, girls who have been incarcerated or detained, girls who inject drugs, mothers, and pregnant girls.<sup>157</sup> Of the 140 interviewed, 30 identified as pimped, 5 as trafficked, and 119 as engaging in survival sex, with some overlap.<sup>158</sup> The study documents relentless violence, both individual and institutional, in addition to the resistance and harm reduction practices of girls in the sex trades.<sup>159</sup> Respondents reported sexual abuse in the form of gang rapes, stalking, and exploitation by pimps and johns, threats to harm their children, and the belief that the police would blame them for the violence if they were to report it.<sup>160</sup> Respondents also reported institutional violence such as “emotional and verbal abuse as well as exclusion from, or mistreatment by, services” by state actors including the Illinois Department of Children and Family Services (“DCFS”), police and the legal system, hospitals, shelters, the foster system—which may involve a minor, her child, or both—and drug treatment programs.<sup>161</sup> A high incidence of police violence, coercion, and refusal to help was also documented, such that “[s]tories about police abuse

---

153. *Id.* at 82-83, 107.

154. *Id.* at 84.

155. *Id.* at 85.

156. *Id.* at 87.

157. YOUNG WOMEN’S EMPOWERMENT PROJECT, GIRLS DO WHAT THEY HAVE TO DO TO SURVIVE: ILLUMINATING METHODS USED BY GIRLS IN THE SEX TRADE AND STREET ECONOMY TO FIGHT BACK AND HEAL 17-21 (2009), <https://ywepchicago.files.wordpress.com/2011/06/girls-do-what-they-have-to-do-to-survive-a-study-of-resilience-and-resistance.pdf>.

158. *Id.* at 26.

159. *Id.* at 29-32.

160. *Id.* at 29.

161. *Id.* at 30.

outnumbered the stories of abuse by other systems by far.”<sup>162</sup>

In response to YWEP’s astonishing findings, this youth-led group initiated a second project referred to as the “Bad Encounter Line” to document youths’ experiences of institutional violence.<sup>163</sup> The study defined institutional violence as including physical harm or sexual abuse, refusal to help, and harassment.<sup>164</sup> The system collected 127 reports distributed across: police (30%), hospitals (28%), schools (24%), DCFS (6%), pimps (4%), transportation (4%), shelters (1%), and other organizations (3%).<sup>165</sup> The reports documented that bad encounters increase when two or more institutions work together, and particularly when DCFS relied on police officers and vice versa.<sup>166</sup> Moreover, youth in the sex trade and street economy reported institutional violence from healthcare providers almost as often as from police.<sup>167</sup> In addition, transgender, gender non-conforming, gender queer, and intersex youth made up 25% of all bad encounter reports about hospitals, 25% of all reports about police, 40% of reports about schools, and 37.5% of reports about DCFS.<sup>168</sup>

The YWEP studies challenge the claim that minors involved merely need more of the same services in order to achieve exit. YWEP’s research as to minors’ involvement importantly shifts the burden to police and social service providers to reverse the harms perpetrated against minors involved. It is here, where youth themselves leave off, that a meaningful policy alternative to safe harbor laws begins. The true-life testimony of these brave youth presents an unequivocal indictment of a social service and criminal legal system set out to reform their perceived sexual delinquency on the model of the Geneva School. This testimony leaves no room for any conclusion but that the myriad dangers of safe harbor provisions based on the arrest-institutionalization model outweigh the benefits, if any.

## II. AT THE DRAWING BOARD: THE NEW YORK SAFE HARBOUR FOR EXPLOITED CHILDREN ACT OF 2008

On September 26, 2008 then-New York Governor David Paterson accompanied his signature of the Safe Harbor Act into law with the statement that “[t]his law . . . will ensure that sexually exploited youth receive counseling

---

162. *Id.*

163. C Angel Torres & Naima Paz, YOUNG WOMEN’S EMPOWERMENT PROJECT, DENIED HELP!: HOW YOUTH IN THE SEX TRADE & STREET ECONOMY ARE TURNED AWAY FROM SYSTEMS MEANT TO HELP US & WHAT WE ARE DOING TO FIGHT BACK 14 (2012), <https://ywepchicago.files.wordpress.com/2012/09/bad-encounter-line-report-2012.pdf>.

164. *Id.* at 21.

165. *Id.* at 16.

166. *Id.*

167. *Id.*

168. *Id.* at 20.

and emergency services as well as long term housing solutions.”<sup>169</sup> Just before the law was scheduled to take effect in 2010, the New York legislature cut the full \$10 million in appropriations for counseling, emergency, and shelter services attached to the bill, an amount that was restored to \$1.65 million in the Enacted 2014-2015 New York State Budget.<sup>170</sup>

Nevertheless, the legislature failed to strip the law of its most lasting change: the conversion of juvenile delinquency to Persons In Need of Supervision (“PINS”) proceedings through amendments to the Family Court Act (“FCA”).<sup>171</sup> Still, the substitution provision is not the sum total of the Safe Harbor Act’s influence. The Act also created a social services framework with the adoption of Title 8-A of the Social Services Law.<sup>172</sup> This section will survey the Safe Harbor Act in its entirety before describing the substitution component and its rationale in more detail.

### A. Legislative History

Proponents of safe harbor laws praise the New York law as a “watershed moment” in what they call the “fight against the commercial sexual exploitation of children.”<sup>173</sup> Nationally, the language is increasingly militaristic, with safe harbor laws regularly characterized as instrumental in combatting the “criminal slave trade.”<sup>174</sup> In this way, the policy justification for safe harbor laws is remarkably similar to Amigh’s statement a century earlier that a law-enforcement-based response is necessary to “checkmating the work of the white slavers.”<sup>175</sup>

At first glance, the Assembly bill memorandum attached to the Safe Harbor

169. Press Release, David Paterson, Governor of N.Y., Governor Paterson Signs Law To Protect Sexually Exploited Youth (Sept. 26, 2008), <http://votesmart.org/public-statement/385447/governor-paterson-signs-law-to-protect-sexually-exploited-youth/?search=sexually%20exploited#.Vh7anta4nVo>.

170. *Regarding the New York State Human Services Budget Proposals: Testimony Before the S. Fin. Comm. & the H. Comm. on Ways & Means*, 2012 Leg., 199th Sess. 4 (N.Y. 2012) (statement of Stephanie Gendell, Associate Executive Director, Policy & Public Affairs, Citizen’s Committee for Children) (“[T]he State’s Safe Harbor Act, which passed in 2010 with an anticipated \$10 million, was cut to \$3 million in SFY 10-11 and was then cut to \$0 in SFY 11-12.”); see also N.Y.C. ADMIN. ON CHILDREN’S SERVS., REPORT ON THE FISCAL YEAR 2015 EXECUTIVE BUDGET 4 (2014), [council.nyc.gov/downloads/pdf/budget/2015/15/eb/acs.pdf](http://council.nyc.gov/downloads/pdf/budget/2015/15/eb/acs.pdf) (noting the SFY 14-15 funding level of \$1.65 million).

171. N.Y. FAM. CT. ACT §§ 311.4, 712(a), 732(a) (McKinney 2015).

172. N.Y. SOC. SERV. LAW § 447 (McKinney 2015).

173. POLARIS PROJECT, OVERVIEW OF STATE LEGISLATIVE POLICY TO ADDRESS THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN—STATE “SAFE HARBOR” LAWS (2008).

174. See Linda Smith & Samantha Healy Vardaman, *A Legislative Framework for Combating Domestic Minor Sex Trafficking*, 23 REGENT U. L. REV. 265, 267 (2011). (characterizing the sex trade as a “criminal slave trade”).

175. Amigh, *supra* note 5, at 124.

Act presents more restrained language, explaining that the purpose of the Act is to “provide support and services to youth who are victims of sexual exploitation.”<sup>176</sup> Further, the memorandum explains that New York’s:

response to this issue has been to prosecute sexually exploited youth as criminals. This response is ineffective as arresting, prosecuting and incarcerating victimized youth serves to re-traumatize them and to increase their feelings of low self-esteem. This only makes the process of recovery more difficult. . . . Therefore, sexually exploited youth should not be prosecuted under the penal law for acts of prostitution. Instead, services should be created to meet the needs of these youth outside of the justice system.<sup>177</sup>

The Assembly memo anchors the law’s legitimacy in “both federal and international law,” which “recognize that sexually exploited youth are the victims of crime and should be treated as such.”<sup>178</sup> Despite its language to the contrary, Safe Harbor’s provisions do not themselves “create” services; instead, they merely shift a systemic response from juvenile detention to the child welfare system, specifically using “the protection and services of the family court through processes in place for persons in need of supervision, including diversion, crisis intervention, counseling, and emergency and long term housing services.”<sup>179</sup>

#### B. Title 8-A Social Services Framework

Safe Harbor established within the Social Services Law (“SSL”) the definition of a “sexually exploited child” as any person under eighteen who is the victim of the crimes of sex trafficking or compelling prostitution or who engages in any act defined as prostitution, loitering for the purposes of prostitution, or sexual performance by a child as defined by the New York Penal Law.<sup>180</sup> Notably, this definition applies only for the purposes of the creation of social services, and it does not correspond to the age guidelines of Safe Harbor’s substitution provision discussed *infra* Part II.C, which only applied to youth ages seven to sixteen until the passage of the “raise the age” amendment described *infra* Part II.D.1.<sup>181</sup> It is likely that this discrepancy is responsible for the misstatement of the original Act’s effects by a surprising number of legal commentators.<sup>182</sup>

---

176. N.Y. STATE ASSEMBLY, MEMORANDUM IN SUPPORT OF LEGISLATION, Assembly 197-5258B, 2007-08 Sess., at 13 (2008).

177. *Id.* at 14.

178. *Id.*

179. *Id.*

180. N.Y. SOC. SERV. LAW § 447 (McKinney 2015).

181. *Id.*

182. See, e.g., Baker, *supra* note 24, at 196 (misstating that New York’s law creates a presumption that all minors who are charged with prostitution are severely trafficked

The Act goes on to define the terms "short-term safe house," "advocate," "safe house," and "community-based program," and prescribes training and approval of such facilities pursuant to regulations of the Office of Children and Family Services ("OCFS").<sup>183</sup> Section 447-B then defines the scope of local social service district responsibility in providing services for eligible youth regardless of whether they are court-mandated,<sup>184</sup> need and capacity evaluations,<sup>185</sup> "separate and distinct service needs according to gender,"<sup>186</sup> and encouragement for the Office of Children and Family Services to contract with at least one long-term residential facility for youth statewide<sup>187</sup> and for local social service commissioners to initiate contracts for training of law enforcement officers.<sup>188</sup> These provisions necessarily require state appropriations and, as a result, have been most affected by the minimal funding allocated.<sup>189</sup> Even with renewed investment in the 2014-15 fiscal year, the meager \$1.65 million in funds dovetails to ill effect with the discretionary language of the Social Service Law, which allows local service services districts wide latitude in meeting the requirements of the state framework.<sup>190</sup>

### C. Person in Need of Supervision ("PINS") Substitution Framework

The most impactful of Safe Harbor's provisions, and the focus of this Article, is its amendment to the Family Court Act creating the family court substitution provision. Commentators have noted that the law's central "intent is to immunize most children who have committed sexual offenses from criminal prosecution . . . [by] substituting PINS adjudication and services."<sup>191</sup> The purpose of PINS adjudication in New York has been said to provide for troubled but not delinquent youth to be housed in a "therapeutic rather than punitive" facility.<sup>192</sup>

---

persons); Tamar R. Birkhead, *The "Youngest Profession": Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1068 n.48 (2011) (misstating that New York's law "broadens the jurisdiction of family court to include qualified youth charged with acts of prostitution who are between the ages of sixteen and eighteen"); Smith & Vardaman, *supra* note 174, at 292 (misstating that New York's law "requires the court to adjudicate" youth under eighteen years of age as PINS).

183. N.Y. SOC. SERV. § 447-a (McKinney 2015).

184. *Id.* § 447-b(1) to -b(2).

185. *Id.* § 447-b(3).

186. *Id.* § 447-b(4).

187. *Id.* § 447-b(5).

188. *Id.* § 447-b(6).

189. See Gendell, *supra* note 170, at 4 (noting state budget cuts to the program).

190. See N.Y. SOC. SERV. § 447-b (McKinney 2015); N.Y.C. ADMIN. ON CHILDREN'S SERVS., *supra* note 170, at 4 (noting the SFY 14-15 funding level of \$1.65 million).

191. MERRIL SOBIE & GARY SOLOMON, NEW YORK FAMILY COURT PRACTICE § 11:1 (2d ed.), Westlaw (database updated December 2014).

192. *People v. Juarbe*, 749 N.Y.S.2d 665, 669 (N.Y. Cty. Ct. 2002), *abrogated on unrelated grounds by In re Dylan C.*, 846 N.Y.S.2d 730 (N.Y. Fam. Ct. 2008).



Importantly, the Safe Harbor Act did not introduce a defense of infancy to the Penal Law to minors charged with a prostitution offense.<sup>193</sup> Instead, the Act required that a family court judge, regardless of the disposition of the presentment agency, must generally substitute a PINS petition for a juvenile delinquency petition in the case of a first-time prostitution offense when it is committed by a person between the ages of seven and sixteen—later made available to persons ages sixteen and seventeen in adult criminal court as discussed *infra* Part II.D.1.<sup>194</sup>

The exceptions to the remedy are numerous and far-reaching. A judge may decline substitution of a PINS petition and instead continue with delinquency proceedings if the respondent has previously faced delinquency proceedings for prostitution, expresses a “current unwillingness to cooperate with specialized services,” or, pending conclusion of the fact-finding hearing on the PINS petition, the youth is found to be “not in substantial compliance with a lawful order of the court.”<sup>195</sup> There is only one published case specifically applying these criteria, and it declined application of the remedy. In *In re Bobby P.*, a Queens Family Court judge denied a PINS petition to a young woman despite her expressed willingness to accept and cooperate with specialized services for sexually exploited youth, in addition to her assistance in prosecuting a third party, said to be her pimp.<sup>196</sup> In spite of Bobby P.’s stated intent to comply with specialized services, the court justified the denial as within the discretion provided by the Safe Harbor Act.<sup>197</sup> The judge highlighted that Bobby P. had traded sex since age twelve, attempts to correct her behavior had failed, she had regularly run away from her foster home for long periods of time, she was unable or unwilling to properly care for her infant, and that she “ultimately” failed to cooperate with the prosecutor.<sup>198</sup>

Traditionally, a PINS petition is filed for the protective commitment of non-emancipated minors who have repeatedly committed status offenses.<sup>199</sup> Prior to Safe Harbor’s adoption, the Family Court Act defined a PINS youth almost exclusively as a young person who demonstrates a course of conduct making them “incorrigible, ungovernable or habitually disobedient and beyond the lawful control of a parent or other person legally responsible for such child’s care, or other lawful authority.”<sup>200</sup> For this reason, PINS petitions were

---

193. *People v. Samatha R.*, No. 2011KN092555, 2011 WL 6303402, at \*4 (N.Y. Crim. Ct. Dec. 16, 2011).

194. N.Y. FAM. CT. ACT §§ 311.4, 712(a) & 732(a) (McKinney 2015).

195. *Id.* § 311.4.

196. *In re Bobby P.*, 907 N.Y.S.2d 540, 549 (N.Y. Fam. Ct. 2010).

197. *Id.*

198. *Id.* at 547-49.

199. For an in-depth analysis of the doctrinal differences between delinquency and PINS proceedings in New York State, see generally *People v. Juarbe*, 749 N.Y.S.2d 665 (N.Y. Cty. Ct. 2002), *abrogated on unrelated grounds by In re Dylan C.*, 846 N.Y.S.2d 730 (N.Y. Fam. Ct. 2008).

200. N.Y. FAM. CT. ACT § 712(a) (McKinney 2015). See also *id.* § 732(a)(i)

required to allege specific acts sufficient to establish that the respondent engaged in a qualifying course of conduct.<sup>201</sup> Under the Safe Harbor Act, the disjunctive *or* was added to also allow a finding that a minor is a PINS based on one, isolated act constituting the crime of prostitution or the nebulous and arbitrarily enforced offense of loitering for the purposes of prostitution.<sup>202</sup>

The Safe Harbor Act similarly threatens to shift from family-based to arrest-based petition initiations. The Family Court Act vests standing to file a PINS petition in a variety of actors, specifically: (a) peace officers or police officers; (b) parents or guardians; (c) any "person who has suffered injury as a result of the alleged activity of a person alleged to be in need of supervision, or a witness to such activity"; (d) the "recognized agents of any duly authorized agency, association, society, or institution"; or (e) the presentment agency that consented to substitute a PINS petition for a petition alleging the person is a juvenile delinquent.<sup>203</sup> Prior to passage of the Safe Harbor Act, the vast majority of PINS petitions were filed by a parent or guardian, and 45% of petitions were initiated without a referral, while 22% of petitioning parents had the PINS process recommended to them by law enforcement and 19% had it recommended by school administrators.<sup>204</sup> This stands in sharp contrast to the traditional application of juvenile delinquency petitions by law enforcement. A formative evaluation of New York State's approach to prosecuting minors aged fifteen and under for prostitution-related offenses on the verge of Safe Harbor law's passage found that only 20% of juveniles being prosecuted during the relevant timeframe were also involved in a non-arrest petition such as one initiated by a parent or guardian in a PINS petition.<sup>205</sup>

In a novel change, the Safe Harbor Act also amended the Family Court Act to expand PINS jurisdiction to an applicant who is not otherwise subject to court involvement, who is "less than eighteen years of age . . . who appears to be a sexually exploited child as defined in paragraph (a), (c) or (d) of [New York Social Services Law § 447-a], but only if the child consents to the filing of a petition under this article."<sup>206</sup> This "voluntary" petition expressly excludes those youth who qualify under 447-a(1)(b) as a "sexually exploited child" if they engage in any act of prostitution as defined by section 230.00 of the New York Penal Law.<sup>207</sup> To date, there is no record of a young person submitting to

---

(McKinney 2015) (describing the procedure for originating a proceeding to adjudicate need for supervision of a minor who is "an *habitual* truant or is incorrigible, ungovernable, or habitually disobedient and beyond the lawful control of his or her parents, guardian or lawful custodian" (emphasis added)).

201. 47 N.Y. JUR. 2D *Domestic Relations* § 1606 (2015).

202. N.Y. FAM. CT. ACT §§ 712(a) & 732(a)(i) (McKinney 2015).

203. *Id.* § 733.

204. VERA INST. OF JUSTICE, A STUDY OF THE PINS SYSTEM IN NEW YORK CITY: RESULTS AND IMPLICATIONS 11 fig.6 (2002).

205. MUSLIM ET AL., *supra* note 31, at 17-18.

206. N.Y. FAM. CT. ACT § 712(a) (McKinney 2015).

207. N.Y. SOC. SERV. LAW § 447-a(1)(b) (McKinney 2015).

voluntary PINS adjudication under the Safe Harbor Act, and as the Social Services Law framework provides that access to services cannot be conditioned on court involvement, it is unclear why such a provision is necessary.<sup>208</sup>

Presumably the mere conversion of a petition to a PINS proceeding is not intended to render PINS *adjudication* a foregone conclusion. After all, the New York Court of Appeals held in 1974 that a respondent to a PINS proceeding is constitutionally entitled to a burden of proof equivalent to that of a juvenile delinquency and criminal prosecution, namely proof of guilt “beyond a reasonable doubt.”<sup>209</sup> While an Article 7 PINS proceeding ostensibly requires the same or similar due process elements afforded to juvenile delinquents, “[i]n reality, PINS procedures, which were originally quasi-criminal but are now treated as purely civil in nature, comprise an uneasy hybrid of criminal and civil elements. The amalgam is artfully hidden beneath Section 711’s prescription of ‘a due process of law.’”<sup>210</sup> For instance, in *In re Tabitha L.L.*, the New York Court of Appeals declined to incorporate the allocution requirement of the Family Court Act’s juvenile delinquency proceeding to an Article 7 PINS proceeding given the absence of specific legislative authorization.<sup>211</sup> There is also no due process requirement that a PINS petition set forth non-hearsay allegations of fact.<sup>212</sup> Family Court judges have justified these lesser protections “[b]ecause the goal in a PINS case is to provide rehabilitation and treatment to children at risk of more serious misbehavior.”<sup>213</sup>

The available Family Court statistics on prostitution-related offenses indicate that this lesser protection leads to unsavory results. One evaluation of New York State’s approach found that 90% of cases between 2004 and 2006 where youth aged fifteen and under were prosecuted as juvenile delinquents for prostitution-related offenses resulted in an admission or finding that the acts were committed.<sup>214</sup> Only 10% of such cases were dismissed or withdrawn, and only one case resulted in an adjournment in contemplation of dismissal.<sup>215</sup> Among those cases reaching a final disposition, 62% resulted in detention or institutional placement.<sup>216</sup>

---

208. *People v. Samatha R.*, No. 2011KN092555, 2011 WL 6303402, at \*4 (N.Y. Crim. Ct. Dec. 16, 2011) (questioning, prior to the “raise the age” amendment in 2014, whether sections 712(a) and 732(b) “of the Family Court Act . . . require the consent of the 16- or 17-year-old in order for a loitering allegation to form the basis of a PINS petition,” but noting that section 731(a)(i) “does not and it applies to loitering by referencing Social Services Law 447-a [1] [d]”); see also N.Y. FAM. CT. ACT § 711 practice commentary (McKinney 2015).

209. *In re Iris R.*, 309 N.E.2d 140, 140 (N.Y. 1974).

210. N.Y. FAM. CT. ACT § 711 practice commentary (McKinney 2015).

211. *In re Tabitha L.L.*, 666 N.E.2d 171, 171 (N.Y. 1996).

212. *In re Guy II*, 595 N.Y.S.2d 986, 987 (N.Y. App. Div. 1993).

213. *In re Shana R.*, No. S-02531-03, 2003 WL 21212586, at \*1 (N.Y. Fam. Ct. May 7, 2003).

214. MUSLIM ET AL., *supra* note 31, at 17-18.

215. *Id.*

216. *Id.*

Contrary to the stated intent of the legislature, the Safe Harbor Act's "services" do not meet youth "outside the justice system," unless the justice system is defined narrowly to exclude New York's mammoth child welfare court system. Instead, by any definition, indefinite and onerous supervision and compliance monitoring, often in long-term residential facilities, remains the primary tool of retaining youth in the legal system.<sup>217</sup> This dramatically extends the scope of state intervention in the lives of young people who trade sex, no matter their circumstances or motivation for engaging in the trade.

In deciding that a PINS respondent has a right to be present at her dispositional hearing, Judge Fuchsberg wrote for a majority of the Court of Appeals when he noted, "The consequences of a PINS dispositional hearing are wide-ranging. They go all the way from the power to discharge a respondent with warning to compulsory placement for an initial period of 18 months . . . plus further extensions without consent until age 18."<sup>218</sup> The Court also noted "the crucial effect that the disposition of a PINS proceeding can have on the life of a youngster, whose liberty in a secure facility can be as circumscribed as in a penal institution . . ."<sup>219</sup> In a decision on the permissible length of detention of an alleged juvenile delinquent, Judge Breitel—who would later become Chief Judge of the Court of Appeals—once wrote that "[i]t would take a distorted view to believe that adult felony criminal proceedings were designed to be more tender of the rights of detained adults than the Family Court proceedings are of juveniles."<sup>220</sup> It hardly stands to reason that this proposition is less true when replacing a juvenile delinquency petition with a PINS proceeding. Sadly, Judge Breitel's concerns remain unheeded in New York. The incongruent application of procedural protections to PINS minors is not only a phenomenon in New York State, however, and is covered in more detail in the state survey included *infra* Part III.D.

#### D. Recent Amendments, Related Legislation, and Implementation

As of December of 2011, a reported total of seven New York City youth had been adjudicated as PINS since the law's inception.<sup>221</sup> Given the fact that the estimated 3,946 minors currently in the sex trades in New York City have been arrested on prostitution charges and proxy offenses an average of 2.5 times each,<sup>222</sup> it is likely that this number will drastically increase upon implementation of the 2014 amendment discussed below. Indeed, a study of arrest statistics in the FBI's Uniform Crime Reports for juveniles arrested for prostitution offenses in four safe harbor states—New York, Connecticut, Texas,

---

217. See *supra* Part I.E.

218. *In re Cecilia R.*, 327 N.E.2d 812, 813 (N.Y. 1975) (citations omitted).

219. *Id.*

220. *People ex rel. Guggenheim v. Mucci*, 298 N.E.2d 109, 112 (N.Y. 1973).

221. Hemmeter, *supra* note 28, at 3.

222. CURTIS ET AL., *supra* note 27, at 33, 89.

and Washington—suggests that safe harbor laws do not reduce the number of juveniles arrested for prostitution crimes. In New York, arrests actually increased tenfold in the year after the law became effective.<sup>223</sup>

### 1. The Safe Harbor “Raise the Age” Amendments

Shortly after the Safe Harbor Act’s passage, advocates began lobbying for a change in the Act’s eligibility so its provisions would encompass all minors.<sup>224</sup> Initially the Safe Harbor substitution proceeding did not apply to *any* young person between the ages of sixteen and seventeen arrested for a prostitution-related offense, despite the fact that between 1998 and 2006, 91% of youth arrested for prostitution were ages sixteen, seventeen, and eighteen.<sup>225</sup> Indeed, in New York, all young people aged sixteen and above are charged as adults in Criminal Court.<sup>226</sup> The efforts of defense attorneys to secure dismissal of prosecutions of defendants aged seventeen and under through interests-of-justice arguments rooted in the Safe Harbor Act’s amendments to the Social Services Law had mixed results.<sup>227</sup>

In its first iteration, the bill proposed a procedure for the removal of Criminal Court prosecutions for certain prostitution-related offenses committed by sixteen- and seventeen-year-olds to Family Court. The Legal Aid Society criticized the removal approach, arguing it “will result in delay and expose these children to potentially extended periods of incarceration, make provision of immediate services more difficult, and disrupt continuity of legal representation which is crucial for this vulnerable population.”<sup>228</sup> The version signed into law took the Legal Aid Society’s advice, allowing a Criminal Court judge to convert and retain the case as a PINS proceeding and grant any relief

---

223. MEHLMAN-Orozco, *supra* note 29, at 58.

224. See, e.g., ECPAT-USA, AN NGO RESPONSE TO THE PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE UN COMMITTEE ON THE RIGHTS OF THE CHILD CONCERNING THE OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY 28 (2012); Marihug Cedeño, Note, *Pimps, Johns, and Juvenile Prostitutes: Is New York Doing Enough to Combat the Commercial Sexual Exploitation of Children?*, 22 CORNELL J.L. & PUB. POL’Y 153, 176 (2012).

225. MUSLIM ET AL., *supra* note 31, at 14.

226. See N.Y. PENAL LAW § 30.00 (McKinney 2015) (defining the defense of infancy to apply only to those less than sixteen years of age); N.Y. FAM. CT. ACT § 301.2(1) (McKinney 2015) (defining “juvenile delinquent” as limited to a person over seven and less than sixteen years of age).

227. 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, 484 & n.42 (2012) (noting that challenges to prosecutions of youth in the sex trades in New York State rooted in “federal and state anti-trafficking statutes and definitions have drawn mixed results” and comparing cases).

228. THE LEGAL AID SOC’Y, THE LEGAL AID SOCIETY MEMORANDUM IN SUPPORT OF A.7474 WITH A SUGGESTED AMENDMENT AND IN OPPOSITION TO A.2240B 2 (2013).

available under Article 7 of the Family Court Act upon the defendant's consent after consultation with counsel.<sup>229</sup>

In addition to the change in age eligibility, the amendment enacts an automatic expungement provision, which requires expungement of "all records of the investigation and proceedings relating to such proceedings."<sup>230</sup> Should a defendant decline PINS referral and plead or be found guilty they nonetheless are entitled to youthful offender status.<sup>231</sup> This provision intelligently extends the relief of expungement to defendants who plead or are convicted of a first-offense for Loitering for the Purposes of Engaging in Prostitution, shielding these young people from two legal anomalies in the Criminal Procedure Law.<sup>232</sup> First, New York law restricts youthful offender eligibility for any person ages sixteen to eighteen to *only* those charged with a "crime," meaning a misdemeanor or felony, of which a first offense for Loitering for the Purposes of Engaging in Prostitution, as a violation, is excluded.<sup>233</sup> Second, New York law ordinarily exempts the sealing requirement for Loitering for the Purposes of Engaging in Prostitution, resulting in the public availability of the conviction.<sup>234</sup>

Still, because youthful offender status is only available for a first offense, the application of youthful offender adjudication to a violation such as Loitering for the Purposes of Engaging in Prostitution threatens to preclude the young person from obtaining that treatment with regard to a future misdemeanor that is not covered by the specified prostitution offenses.<sup>235</sup> In addition, since the raise-the-age law became effective, it remains undecided whether a judge still has discretion to decline the conversion itself under the circumstances listed in the original law. As discussed *supra* Part II.C, a judge may deny substitution under the New York law if the youth has been previously convicted of a prostitution offense, adjudicated as a person in need of supervision, or is determined to be uncooperative with court-mandated services.<sup>236</sup> While the law was subsequently amended, effective October 16, 2014, to prevent the preclusion effect described above, it failed to rein in judicial discretion; instead, the law codified discretion by making conversion conditional upon compliance with court-ordered treatment and by allowing a procedure for restoring the accusatory instrument upon a finding of non-compliance.<sup>237</sup>

---

229. N.Y. CRIM. PROC. LAW § 170.80(1) (McKinney 2015).

230. *Id.* § 170.80(4).

231. N.Y. CRIM. PROC. LAW § 170.80 & practice commentary (McKinney 2015).

232. *Id.*

233. *People v. Samatha R.*, No. 2011KN092555, 2011 WL 6303402, at \*6 (N.Y. Crim. Ct. Dec. 16, 2011).

234. *Id.*

235. N.Y. CRIM. PROC. LAW § 170.80 practice commentary (McKinney 2015).

236. *In re Bobby P.*, 907 N.Y.S.2d 540, 549 (N.Y. Fam. Ct. 2010).

237. *See* 2014 N.Y. Laws 402.

## 2. The Vacating Trafficking Convictions Act

In 2010, Governor Paterson signed into law the Vacating Trafficking Convictions Act, amending the New York Criminal Procedure Law section 440.10 to create a new basis for a post-judgment motion to vacate a conviction.<sup>238</sup> The purpose of this new remedy has been defined as “to remove a blot on the character of such victims so as to help those presumably not criminally responsible for the offense to gain useful employment and rebuild their lives.”<sup>239</sup> While this legislation does not on its face amend the provisions affected by the Safe Harbor Act, courts have repeatedly referenced the two legislative acts in conjunction when applying either.<sup>240</sup>

This remedy allows for a defendant to file a motion after the entry of a judgment of conviction, where the arresting charge was made under either New York Penal Law section 240.37 (loitering for the purposes of prostitution) or section 230.00 (prostitution), and the “defendant’s participation in the offense was a result of having been a victim of sex trafficking.”<sup>241</sup> In addition, the motion must be filed with “due diligence, after the defendant has ceased to be a victim of such trafficking or has sought services for victims of such trafficking,” although the court will consider mitigating circumstances justifying delay.<sup>242</sup> Finally, although it is not required for granting a motion, where there is “official documentation of the defendant’s status as a victim of sex trafficking or trafficking in persons” from a government agency, the defendant is entitled to a presumption that his or her participation in the offense was a result of such activity.<sup>243</sup>

Initially the statute’s use of the term “arresting charge” raised the concern that the remedy was underinclusive, such that section 440.10(1)(i) was exclusive to the two enumerated prostitution offenses. Despite multiple decisions granting vacatur for non-prostitution offenses, this issue remained unresolved by the courts for several years after the law’s enactment in 2010, because generally District Attorneys consented to vacatur of such charges.<sup>244</sup> In the one case to touch upon the issue in 2011, Judge Kotler vacated eighty-six

238. 2010 N.Y. Laws Ch. 332.

239. N.Y. CRIM. PROC. LAW § 440.10 practice commentary (McKinney 2015).

240. *See, e.g.,* People v. Samatha R., No. 2011KN092555, 2011 WL 6303402, at \*6 (N.Y. Crim. Ct. Dec. 16, 2011) (dismissing a charge of loitering for the purposes of prostitution against a sixteen-year-old defendant, absent any evidence of force, fraud, or coercion, based on the court’s interest-of-justice authority under Criminal Procedure Law section 170.40, and relying in part on the fact that the defendant would be qualified under section 440.10 for vacatur of any conviction obtained).

241. N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney 2015).

242. *Id.* § 440.10(1)(i)(i).

243. *Id.* § 440.10(i)(ii).

244. Whitney J. Drasin, *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, 513-14 (2012).

prostitution-related convictions, but she denied any relief as to a conviction for resisting arrest, stating simply that it was not prostitution-related.<sup>245</sup>

However, on July 12, 2013, the Queens County Criminal Court issued a forceful decision in *People v. L.G.*, finding that "the legislature fully expected the statute to provide relief to trafficking victims who were not only arrested for prostitution or loitering for the purpose of prostitution, but were also convicted of other charges."<sup>246</sup> Judge Toko Serita explained that, to obtain relief, a movant must simply "establish that (1) she was a trafficking victim at the time of her arrest, and (2) her conduct or 'participation in the offense' leading to her arrest resulted from her being trafficked."<sup>247</sup> In other words, there is no "third element" that the defendant be initially charged with prostitution or loitering for the purposes. This decision is consistent with the approach taken to interpreting similar laws by the New York Court of Appeals, which has made clear that a remedial statute "should be liberally construed to spread its beneficial effects as widely as possible."<sup>248</sup> For this reason among others, the enumeration of "arresting charges" in section 440.10 should not be read as exclusive.

The judicial discretion built into the statute has unfortunately impacted the many youth who do not experience force, fraud, or coercion, however, given that some courts disagree about what criteria to rely on with respect to whether a minor defendant *is* a victim of trafficking.<sup>249</sup> Advocates have also attacked the legislation's official documentation rules, pointing to the inordinate time required to meet documentation standards and an informal requirement to collaborate with law enforcement in holding an exploiter accountable.<sup>250</sup>

---

245. *People v. Gonzalez*, 927 N.Y.S.2d 567, 569-70 (N.Y. Crim. Ct. 2011).

246. 972 N.Y.S.2d 418, 427 (N.Y. Crim. Ct. 2013).

247. *Id.* at 423.

248. *Asman v. Ambach*, 478 N.E.2d 182, 184 (N.Y. 1985) (quoting *Post v. 120 E. End Ave. Corp.*, 464 N.E.2d 125, 127 (1984)).

249. Compare *People v. Lewis*, No. 035660, N.Y.L.J. 1202502663175, at \*1, \*4-5 (N.Y. Crim. Ct. July 12, 2011) (holding that a seventeen-year-old defendant did not qualify for relief under the Trafficking Victims Protection Act, the Safe Harbor Act, or the recent amendments to Criminal Procedure Law section 440.10), with *People v. Doe*, 935 N.Y.S.2d 481, 484 (N.Y. Sup. Ct. 2011) (granting vacatur to twenty-two-year-old woman, upon the consent of the Bronx District Attorney, of three prior convictions for loitering for the purposes of prostitution obtained at the age of seventeen while being physically abused and exploited by a pimp), and 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, 650 (2012) ("By explicitly incorporating the federal definition of a trafficking victim, this new post-conviction statute also provides relief to any prostituted minor who can establish that she was a minor at the time of her arrest.").

250. See, e.g., INT'L WOMEN'S HUMAN RIGHTS CLINIC, CITY UNIV. OF N.Y. SCH. OF LAW, CLEARING THE SLATE: SEEKING EFFECTIVE REMEDIES FOR CRIMINALIZED TRAFFICKING VICTIMS 31, 35 (2014), [www.law.cuny.edu/academics/clinics/iwhr/publications/Clearing-the-Slate.pdf](http://www.law.cuny.edu/academics/clinics/iwhr/publications/Clearing-the-Slate.pdf).



### 3. The Family Notification and Protection Act

Separately, the New York legislature has considered passage of a bill to require a police officer upon arresting a youth or issuing an appearance ticket to notify the parent or person legally responsible for such youth.<sup>251</sup> The legislation would amend the Criminal Procedure Law to require that if the arrested person “appears” to be a “sexually exploited child” within the meaning of the Social Services Law, the officer may take the youth “to an available short-term safe house, but only if the youth consents to be taken.”<sup>252</sup> The bill would also amend the Social Services Law to include persons aged eighteen years old in the definition of a “sexually exploited child.”<sup>253</sup> The latest reintroduction of the bill stagnated in the Senate and Assembly Codes Committees.<sup>254</sup>

### III. “WATERSHED”: A STATE SURVEY OF SAFE HARBOR LAW AND POLICY

Safe harbor laws in other states have important technical differences, including the nature of immunity, those offenses covered, and the eligibility criteria for substitution. In regards to procedural posture and timing, safe harbor laws vary from an investigative “hold and release” to full-fledged arrest, arraignment, and prosecution in criminal court, followed by the pleading of an affirmative defense or the substitution of dependency proceedings. Substitution may also be postponed or conditioned on court mandates or as a result of prosecutorial diversion. These various state laws and policies also envision emerging extrajudicial approaches based on pre-trial commitment followed by a delayed or non-existent hearing, such as the use of temporary protective custody, referral to a child protection agency, and pre-booking diversion. Nonetheless, like the original Safe Harbor Act, subsequent legislation, with the exception of Tennessee, universally envisions some form of custodial arrest of youth in the sex trades or protective custody pending release, diversion, or the initiation of dependency proceedings. This section provides a survey of state safe harbor laws and policies, focusing on modifications to the substitution framework modeled by New York law.

---

251. The Family Notification and Protection Act, S.B. 3568, A.B. 7115, 200th Leg. (N.Y. 2013).

252. *Id.* §§ 2, 3.

253. *Id.* § 5.

254. The Family Notification and Protection Act, A.B. 6484, S.B. 1325, 201st Leg. (N.Y. 2015).

A. The Nature and Scope of “Immunity” from Criminal Liability and Juvenile Delinquency Proceedings

**Arrest Charges, Ages 7 to 16, 2004-2006**

*Source:* MUSLIM ET AL., *supra* note 31, at 19.

Charges	Number	Percentage
Prostitution	52	36%
Loitering	17	12%
False Personation	70	48%
Criminal Nuisance	7	5%

**Arrest Charges, Ages 10 to 18, 2008**

*Source:* CURTIS ET AL., *supra* note 27, at 92.

Charges	Female	Male	Trans	Total
Drug Possession	12.6%	26.1%	0.00%	17.7%
Prostitution	10.9%	10.8%	21.1%	11.6%
Theft	10.1%	13.5%	5.3%	11.2%
Assault	6.7%	9.9%	5.3%	8.0%
Trespassing	4.2%	10.8%	0.00%	6.8%
Loitering for Prostitution	6.7%	2.7%	21.1%	6.0%

Many states have adopted an “immunity” model barring prosecution of a minor charged with a prostitution offense in criminal court and juvenile delinquency proceedings and instead establishing dependency proceedings as the ultimate method for adjudicating allegations of a minor’s participation in prostitution-related offenses. It is important to note that, generally speaking, such legislation does not preclude detention for purposes of initiating dependency proceedings in Family Court. This is because, as discussed below, state laws establishing immunity vary greatly with respect to covered offenses, eligibility, the scope of judicial and prosecutorial discretion, and procedural process and timing.

1. Covered Offenses

In the majority of safe harbor states, the reform specifically applies only to prostitution offenses, leaving open the possibility that youth in the sex trades

will continue to be criminally prosecuted for “proxy” or “masking” charges. These states include Connecticut,<sup>255</sup> Georgia,<sup>256</sup> Illinois,<sup>257</sup> Kentucky,<sup>258</sup> Louisiana,<sup>259</sup> Massachusetts,<sup>260</sup> Michigan,<sup>261</sup> Nebraska,<sup>262</sup> Nevada,<sup>263</sup> New Jersey,<sup>264</sup> New York,<sup>265</sup> North Carolina,<sup>266</sup> Ohio,<sup>267</sup> Oklahoma,<sup>268</sup> and Tennessee,<sup>269</sup> and Texas.<sup>270</sup> A proxy charge is an alternative charge often brought against youth engaging in the sex trades, such as false personation, loitering, public indecency, or disorderly conduct.<sup>271</sup>

In New York City, according to one survey, only 11.6% of youth engaged in selling sex have been arrested for prostitution and only 6.0% have been arrested for loitering for prostitution (though 60% of such youth have been

255. CONN. GEN. STAT. §§ 53a-82 & 53a-84(b) (2015) (establishing a rebuttable presumption that a sixteen- or seventeen-year-old charged with simple prostitution is a victim of human trafficking and specifically barring the safe harbor affirmative defense where the charge is patronizing, promoting, or permitting prostitution).

256. GA. CODE ANN. § 16-3-6 (2015) (applying safe harbor defense only to the offenses of prostitution, sodomy, solicitation of sodomy, and masturbation for hire).

257. 720 ILL. COMP. STAT. §§ 5/11-14(d), 5/11-14.1(c) & 5/11-14.3(a)(2)(C) (2015) (applying only to the offenses of simple prostitution, solicitation of a sexual act, and, in limited circumstances where the youth charged does not compel another to engage in prostitution or arrange or offer to arrange a situation in which a person may practice prostitution, promoting prostitution).

258. KY. REV. STAT. ANN. § 529.120 (West 2015) (applying only to the offenses of simple prostitution and loitering for the purposes of prostitution).

259. LA. STAT. ANN. §§ 14:82(G), 14:83.3(D), 14:83.4(C), 14:89(C), & 14:89.2(B)(3)(b) (2015) (applying only to the offenses of prostitution, prostitution by massage, sexual massage, crime against nature, and crime against nature by solicitation).

260. MASS. GEN. LAWS. ch.119, § 39L (2015) (applying only to common night walking or common streetwalking).

261. MICH. COMP. LAWS § 750.451 (2015) (applying only to the offenses of prostitution, permitting prostitution, solicitation, and aiding and abetting).

262. NEB. REV. STAT. §§ 28-801(5) & 28-801.01(3) (2015) (applying only to simple prostitution and solicitation).

263. 2015 Nev. Stat. Ch. 146 (applying only to simple prostitution or solicitation).

264. N.J. STAT. ANN. § 2C:34-1(e) (West 2015) (applying only to simple prostitution and promoting prostitution).

265. N.Y. FAM. CT. ACT § 311.4(3) (McKinney 2015) (applying only to a proceeding “based upon an arrest for an act of prostitution”).

266. N.C. GEN. STAT. § 14-204(c) (2015) (applying only to the offense of simple prostitution).

267. OHIO REV. CODE ANN. § 2152.021(F)(1)(a) (West 2015) (applying only to prostitution, solicitation, and loitering for the purposes of prostitution).

268. OKLA. STAT. tit. 21, § 1029 (2015) (applying only to the offenses of simple prostitution, solicitation, and entering or remaining in a place of prostitution).

269. TENN. CODE ANN. § 39-13-513(d) (2015) (applying only to the offense of simple prostitution).

270. TEX. PENAL CODE ANN. § 43.02(d) (West 2015) (applying only to the offenses of simple prostitution and solicitation).

271. MUSLIM ET AL., *supra* note 31, at 8 (finding juveniles suspected of prostitution in New York are often charged with proxy offenses, such as false personation, loitering, and criminal nuisance).

arrested).<sup>272</sup> Prevalence of arrest across all offenses is highest among LGBTQ youth in the sex trade: 75% of young men and 59% of transgender youth who trade sex report prior arrests, primarily for offenses without "prostitution" in the title.<sup>273</sup>

There is some indication that lawmakers are open to the inclusion of non-prostitution-related proxy offenses within the scope of safe harbor laws. The Uniform Law Commission's Prevention of and Remedies for Human Trafficking Act strongly endorses immunity from prosecution for prostitution-related offenses in both criminal and juvenile delinquency proceedings and recommends the extension of immunity to other "non-violent offenses."<sup>274</sup>

No state safe harbor law protects minors from criminal prosecution for felony prostitution or trafficking-related offenses.<sup>275</sup> For instance, while Tennessee's safe harbor law enacts a robust immunity provision for simple prostitution, it does not extend to Aggravated Prostitution, a Class C Felony that applies to a person knowingly living with HIV who "engages in sexual activity as a business or is an inmate in a house of prostitution or loiters in a public place for the purpose of being hired to engage in sexual activity,"<sup>276</sup> or Promoting Prostitution, a Class E Felony,<sup>277</sup> each of which are offenses a minor could easily be charged with, particularly given the ways in which youth in the sex trades often share clients and resources to survive and stay safe.<sup>278</sup>

## 2. Eligibility Criteria

Other states do not specifically enumerate covered offenses, instead describing the conduct itself or limiting eligibility by age or prior record. In these cases, grounds for immunity from prosecution are sometimes vague. For example, the Minnesota safe harbor law predicates immunity for juvenile delinquency proceedings and eligibility for CHINS proceeding on whether the conduct in question "would, if committed by an adult, violate any federal, state, or local law relating to being hired, offering to be hired, or agreeing to be hired by another individual to engage in sexual penetration or sexual conduct."<sup>279</sup>

---

272. CURTIS ET AL., *supra* note 27, at 92.

273. *Id.*

274. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIFORM ACT ON PREVENTION OF AND REMEDIES FOR HUMAN TRAFFICKING 9-10 (2013).

275. *See supra* notes 255-70 and accompanying text.

276. TENN. CODE ANN. § 39-13-516 (2015).

277. *Id.* § 39-13-515.

278. *See* MEREDITH DANK ET AL., URBAN INST., SURVIVING THE STREETS OF NEW YORK: EXPERIENCES OF LGBTQ YOUTH, YMSM, AND YWSW ENGAGED IN SURVIVAL SEX 36-38 (2015).

279. MINN. STAT. § 260B.007 (2015) (excluding from the definitions of "delinquent child" and "juvenile petty offender" any child "engaged in conduct which would, if committed by an adult, violate any federal, state, or local law relating to being hired, offering to be hired, or agreeing to be hired by another individual to engage in sexual penetration or

Still other states reflect an inverse definition for eligibility, such that the minor only qualifies if defined as a victim of a covered offense. For instance, in Kansas, a law enforcement officer is to take a child under eighteen-years-old into temporary protective custody when they reasonably believe the child is “a victim of human trafficking, aggravated human trafficking or commercial sexual exploitation of a child.”<sup>280</sup>

In the majority of states, eligibility strictly turns on age. For example, in Connecticut,<sup>281</sup> youth under sixteen are granted immunity from prosecution for the offense of simple prostitution in criminal and juvenile delinquency proceedings, and in states such as Illinois,<sup>282</sup> Mississippi,<sup>283</sup> Nebraska,<sup>284</sup> Tennessee,<sup>285</sup> and Vermont,<sup>286</sup> immunity from criminal prosecution is extended to persons under eighteen, although it must be noted with caution that in these states a court may yet assume jurisdiction for proxy offenses such as disorderly conduct, simple loitering, and trespass.<sup>287</sup> In a variation on this theme, the Texas Supreme Court held in 2010 that a delinquency prosecution of a child under fourteen could not satisfy the “knowing” element of the prostitution statute because they “lack the capacity to appreciate the significance or the consequences of agreeing to sex, and thus cannot give meaningful consent.”<sup>288</sup> However, delinquency proceedings may still be leveled at youth aged fifteen through seventeen-years-old, although Texas recently amended its penal code to allow for an affirmative defense to prosecution of victims of trafficking in persons as Texas law defines the offense.<sup>289</sup>

The degree and scope of discretion in the application of safe harbor laws, as well as the role of judges or prosecutors, vary. Even where some discretion exists, this is often narrowed by categorical limitations on eligibility, especially where it is not the minor’s first offense. Those state laws offering conditional diversion programs and discretionary immunity have been criticized as creating “a confusing middle ground where a juvenile may be transformed into a victim

---

sexual conduct”); *id.* § 260C.007 (broadening grounds for a CHINS proceeding to include a minor who has “engaged in conduct which would, if committed by an adult, violate any federal, state, or local law relating to being hired, offering to be hired, or agreeing to be hired by another individual to engage in sexual penetration or sexual contact.”).

280. KAN. STAT. ANN. § 38-2231(b) (2015).

281. CONN. GEN. STAT. §§ 53a-82 & 53a-84(b) (2015).

282. 720 ILL. COMP. STAT. § 5/11-14 (2015).

283. MISS. CODE ANN. § 97-29-49(4) (2015).

284. NEB. REV. STAT. §§ 28-801(5) & 28-801.01(3) (2015).

285. TENN. CODE ANN. § 39-13-513 (2015).

286. VT. STAT. ANN. tit. 13, § 2652(e) (2015).

287. Birkhead, *supra* note 182, at 1112.

288. *In re B.W.*, 313 S.W.3d 818, 820-21 (Tex. 2010).

289. TEX. PENAL CODE ANN. § 43.02(d) (West 2015) (“It is a defense to prosecution for an offense under Subsection (a) that the actor engaged in the conduct that constitutes the offense because the actor was the victim of conduct that constitutes” the crime of trafficking in persons as defined by Texas law, which includes inducement of a minor to engage in prostitution whether or not there is evidence of force, fraud, or coercion).

or a criminal based on the whims of a prosecutor.”<sup>290</sup> Washington mandates diversion for a first offense but allows prosecutors discretion as to whether to offer diversion for a second offense, where the county in which the offense was committed maintains a residential treatment center where the minor can be placed.<sup>291</sup> Vermont on the other hand creates conditional diversion programs subject to the discretion of the state.<sup>292</sup> Massachusetts law establishes a presumption in any delinquency or criminal court prosecution that a minor is entitled to a CHINS determination, but a judge retains the discretion to reinstate these proceedings if the child does not “substantially comply” with court-ordered treatment or if their “safety so requires.”<sup>293</sup> Minnesota initially granted immunity from delinquency proceedings for youth trading sex under the age of sixteen, a mandatory diversion program for any sixteen- or seventeen-year old first-time offenders, and optional diversion for minors with a prostitution-related arrest history, until a 2013 amendment raised the age of immunity from delinquency proceedings to any person under the age of eighteen years old.<sup>294</sup>

#### B. Secondary Immunity: Substitution Proceedings, Affirmative Defenses, and Rebuttable Presumptions

As noted above, many states embrace a form of secondary immunity for children accused of prostitution, in which delinquency or adult criminal proceedings may be initiated, but a judge may hold the proceeding in abeyance or substitute it with a dependency or status offense proceeding. In Ohio, once a delinquency petition is filed against a minor alleged to have engaged in prostitution, the court may hold the complaint in abeyance pending the child’s completion of a mandated program.<sup>295</sup> Florida similarly does not provide immunity from criminal prosecution, instead expanding dependency proceedings to include those involving a person the court deems to be a

---

290. Nikki J. Hasselbarth, Note, *Emerging Victimhood: Moving Towards the Protection of Domestic Juveniles Involved in Prostitution*, 21 DUKE J. GENDER L. & POL’Y 401, 411 (2014); see also Megan Annitto, *Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Exploitation of Children*, 30 YALE L. & POL’Y REV. 1, 62-63 (2011) (criticizing conditional diversion provisions and “carve-outs” that automatically bar some minors from safe harbor remedies, arguing that these provisions fail to resolve discordance in prosecution and the minimum age for capacity to consent to sex, as well as reflecting the hesitance of lawmakers who are “seeking to appease opposing constituencies”).

291. WASH. REV. CODE §§ 13.40.070, 13.40.213 (2015). Note that discretion to offer diversion for consecutive offenses is only available if the county in which the offense was committed maintains a residential treatment center where the minor can be placed. If not, diversion is not possible. *Id.* § 13.40.213.

292. VT. STAT. ANN. tit. 13, § 2652(e) (2015).

293. MASS. GEN. LAWS ch.119, § 39L (2015).

294. 2013 Minn. Laws Ch. 108.

295. OHIO REV. CODE ANN. § 2152.021(F)(1) (West 2015).

sexually exploited child.<sup>296</sup> The model advanced by New York, which allows for the substitution of a petition for protective custody in place of a juvenile delinquency or criminal court proceeding, also sets categorical limitations on a judge's discretion.<sup>297</sup> A judge may deny substitution under the New York law if the youth has been previously convicted of a prostitution offense or adjudicated as a person in need of supervision, or is determined to be uncooperative with court-mandated services.<sup>298</sup>

Several states permit criminal court proceedings against minors charged with prostitution but allow an affirmative defense or rebuttable presumption of immunity. This approach postpones a decision on immunity to a time when the young person has already been arrested, held over, arraigned, required to attend multiple hearings, and may be ordered to comply with court-mandated treatment. For example, in Connecticut<sup>299</sup> and Oklahoma<sup>300</sup> a youth aged sixteen or seventeen charged with the offense of prostitution is entitled to a rebuttable presumption that he or she is a victim of conduct by another person that constitutes certain trafficking offenses. New Jersey currently allows an affirmative defense against prostitution-related charges where the defendant meets the definition of a "victim of human trafficking" under New Jersey law or was "compelled by another to engage in sexual activity," without explicitly referencing the defendant's age.<sup>301</sup>

In contrast, Iowa, Missouri, Oregon, Rhode Island, and South Carolina fall short of being safe harbor states in that they merely note that the affirmative defenses of force, duress, or coercion are available in prostitution cases as in any other criminal case.<sup>302</sup> The appropriateness of imposing the burden of proving an affirmative defense on individuals charged with prostitution-related offenses has been called into question.<sup>303</sup> In particular, meeting this burden is more difficult for LGBTQ youth, who may not be perceived as victims of

---

296. See FLA. STAT. § 39.524 (2015) (providing placement options in safe houses and foster homes for dependent children who are victims of sexual exploitation); see also Janelle Zabresky, *Creating a Safe Harbor for Florida's Children: An Overview of Florida's Legislative Evolution in Domestic Minor Sex Trafficking*, 40 FLA. ST. U. L. REV. 415, 433 (2013) (explaining that Florida exempts minors who "willfully engage" in prostitution from receiving Domestic Minor Sex Trafficking services).

297. See *supra* Part II.C. While the law initially permitted only persons between the ages of 7 and 16 to be eligible for the substitution provision, as of January 10, 2014, the provision was extended to 16- and 17 year-olds charged in adult criminal court as discussed *supra* Part II.D.1.

298. *In re Bobby P.*, 907 N.Y.S.2d 540, 549 (N.Y. Fam. Ct. 2010).

299. CONN. GEN. STAT. § 53a-82 (2015).

300. OKLA. STAT. tit. 21, § 1029 (2015).

301. N.J. STAT. ANN. § 2C:34 (West 2015).

302. IOWA CODE § 710A.3 (2015); MO. REV. STAT. § 566.223(2) (2015); OR. REV. STAT. § 163.269 (2015); 11 R.I. GEN. LAWS § 11-34.1-2 (2015); S.C. CODE ANN. § 16-3-2020(J) (2015).

303. IOM & NRC CSEC REPORT, *supra* note 14, at 172.

violence or trafficking.<sup>304</sup>

### C. Temporary Protective Custody, Arrest-Referral, and Pre-Booking Diversion

In a number of states—such as Illinois,<sup>305</sup> Kentucky,<sup>306</sup> Nebraska,<sup>307</sup> and North Carolina<sup>308</sup>—immunity from criminal charges also requires that police report and possibly commit a young person to temporary protective custody and refer the case for initiation of abuse or neglect investigations to the local child protection authority. Other protective-custody models do not create any immunity from criminal or delinquency proceedings, instead permitting extended detention: for example, in Clark County, Las Vegas, while juveniles arrested on non-prostitution-related misdemeanor charges are normally released, detention facilities automatically detain juveniles arrested for prostitution on a “vice hold” for at least eight days.<sup>309</sup>

The Illinois Safe Children Act of 2010 provides for detention of up to forty-eight hours for investigative purposes and requires initiation of a child abuse investigation by DCFS within twenty-four hours.<sup>310</sup> Kentucky takes a similar approach, but no categorical time limit is placed on investigative detention and reporting to the child welfare agency.<sup>311</sup> However, within twelve hours of taking the child into protective custody, the law enforcement officer must ask the court to issue an emergency custody order.<sup>312</sup> Similarly, Nebraska also permits reasonable detention for investigative purposes, and the officer may subject a minor to temporary custody and neglect proceedings under the Nebraska Juvenile Code where she has reasonable grounds to believe the minor is immune from prosecution for prostitution under the law.<sup>313</sup> The officer is also required to immediately report the allegation to the Nebraska Department of Health and Human Services, which is to commence an investigation within

---

304. See DANK ET AL., *supra* note 40, at 75.

305. 720 ILL. COMP. STAT. § 5/11-14 (2015).

306. KY. REV. STAT. ANN. § 529.120 (West 2015).

307. NEB. REV. STAT. § 28-801(5) (2015).

308. N.C. GEN. STAT. § 14-204(c) (2015).

309. THE BARTON CHILD LAW AND POLICY CLINIC, EMORY UNIV. SCH. OF LAW, COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN GEORGIA: SERVICE DELIVERY AND LEGISLATIVE RECOMMENDATIONS FOR STATE AND LOCAL POLICY MAKERS 36-37 (2008) [hereinafter BARTON CLINIC REPORT].

310. 720 ILL. COMP. STAT. 5/11-14 (2015); see also Angela L. Bergman, Note, *For Their Own Good? Exploring Legislative Responses to the Commercial Sexual Exploitation of Children and the Illinois Safe Children Act*, 65 VAND. L. REV. 1361, 1399 (2012) (noting that the definition of an “abused child” does not include children who are commercially exploited by third-parties who are not (1) parents or guardians of the child, (2) living in the same house as the child, or (3) in a relationship with the child’s parent).

311. KY. REV. STAT. ANN. § 529.120 (West 2015).

312. *Id.* § 620.040(5)(c).

313. NEB. REV. STAT. § 28-801(5) (2015).



twenty-four hours.<sup>314</sup>

One state takes a slightly less intrusive “arrest-referral” approach. Tennessee provides a simple version of safe harbor laws by requiring that where a law enforcement officer determines that a person detained on suspicion of prostitution is a minor, the officer must provide the detainee with the telephone number for the Tennessee Human Trafficking Resource Center hotline and release the minor to the custody of a parent or legal guardian.<sup>315</sup> On April 24, 2015, the Governor signed into law an amendment adding the language “or transport the minor to a shelter care facility designated by the juvenile court judge to facilitate the release of the minor to the custody of a parent or legal guardian” after the word “guardian.”<sup>316</sup> The courts however still have jurisdiction upon initiation of a dependency proceeding.<sup>317</sup>

The increasingly popular state-level approach of arrest-referral has its roots in local programs establishing pre-booking diversion programs for minor offenses. Seattle has piloted a pre-booking diversion program to address prostitution offenses in certain neighborhoods, titled the Law Enforcement Assisted Diversion (“LEAD”) Program. LEAD allows law enforcement officers to use “social contact referrals” to redirect low-level offenders engaged in drug or prostitution activity to community-based services instead of jail or prosecution.<sup>318</sup> The detainee is given thirty minutes to decide whether they want to be arrested or be referred to a program.<sup>319</sup> If the person chooses the LEAD referral, the police contact the project lead at a nearby “drug addiction treatment center.”<sup>320</sup> A staff member will physically arrive to bring the individual to the office treatment center.<sup>321</sup> If the person does not complete initial assessments or return for follow-up appointments, then the treatment program is required to report the person to the police, who may then arrest the individual.<sup>322</sup>

Pre-booking diversion programs, however, may be coercive in that they act as an equivalent to custodial placement without the benefit of counsel or due

314. *Id.*

315. TENN. CODE ANN. § 39-13-513(d) (2015).

316. 2015 Tenn. Pub. Acts Ch. 264.

317. *See* TENN CODE ANN. § 36-1-113 (2015) (setting out grounds for termination of parental rights); *id.* § 37-1-102(12) (2015) (defining dependent and neglected child).

318. KATHERINE BECKETT, SEATTLE’S LAW ENFORCEMENT ASSISTED DIVERSION PROGRAM: LESSONS LEARNED FROM THE FIRST TWO YEARS 10 (2014), <http://www.seattle.gov/council/Harrell/attachments/process%20evaluation%20final%2031-14.pdf>.

319. David Nelson, *55 Drug Offenders and Prostitutes Chose Treatment over Jail Through Belltown’s LEAD Program*, SEATTLE POST-INTELLIGENCER: INSIDE BELLTOWN (Aug. 29, 2012, 2:24 PM), <http://blog.seattlepi.com/insidebelltown/2012/08/29/55-drug-offenders-and-prostitutes-chose-treatment-over-jail-through-belltowns-lead-program>.

320. *Id.*

321. *Id.*

322. *Id.*

process of law, under circumstances in which a detainee is impaired and there is no opportunity for a court to evaluate whether the arresting officer even had probable cause to stop, search, or arrest the person for a prostitution-related offense. One such program in Phoenix, known as Project ROSE, enlists local police to conduct five two-day stings in which over one hundred officers participate.<sup>323</sup> These arrestees are handcuffed and transported to Bethany Bible Church, where prosecutors, detectives, and Project ROSE staff screen eligible arrestees.<sup>324</sup> Those who refuse or do not qualify for the diversion program are prosecuted and may face months or years in jail.<sup>325</sup> Social work practitioners have roundly criticized programs like Project ROSE, pointing to ethical challenges and potential harms to clients presented by conditioning services on arrest.<sup>326</sup> Prostitution diversion programs have also been impugned for the lack of empirical evidence that such programs "facilitate social justice" for people who engage in trading sex or address the circumstances driving involvement in the sex trades.<sup>327</sup>

The modification of the safe harbor approach to an "arrest-referral" and problem-solving court model should be met with caution by legislators, as the practice may ratchet up criminalization of youth in the sex trades. In cities where drug courts have been implemented, a phenomenon known as "net-widening" has occurred, in which police arrest more people and prosecutors file more charges to include low-level offenders who would have otherwise been released.<sup>328</sup> These courts have also been critiqued for removing the adversarial nature of judicial proceedings and lending the judge a range of discretion unprecedented in the courtroom.<sup>329</sup> Problem-solving courts have also been charged with reinforcing systemic racial biases by excluding certain offenders based on prior convictions that may themselves be the result of systemic

---

323. Molly Crabapple, *Project ROSE Is Arresting Sex Workers in Arizona to Save Their Souls*, VICE NEWS (Feb. 26, 2014), [www.vice.com/en\\_ca/read/in-arizona-project-rose-is-arresting-sex-workers-to-save-them](http://www.vice.com/en_ca/read/in-arizona-project-rose-is-arresting-sex-workers-to-save-them).

324. *Id.*

325. Stéphanie Wahab & Meg Panichelli, *Ethical and Human Rights Issues in Coercive Interventions with Sex Workers*, 28 AFFILIA: J. WOMEN & SOC. WORK 344, 346 (2013).

326. *Id.*

327. *Id.*; see also Mae C. Quinn, *Revisiting Anna Moskowitz's Kross's Critique of New York City's Women's Court: The Continued Problem of Solving the "Problem" of Prostitution with Specialized Criminal Courts*, 33 FORDHAM URB. L.J. 101, 103-04 (2006) (critiquing the specialized "problem-solving" criminal court approach to prostitution, in that they "have allowed for special interest control of the justice system, fostered undesirable police and judicial practices, and failed to meaningfully address social problems," including the continued criminalization of prostitution).

328. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, AMERICA'S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM 42 (2009).

329. DRUG POLICY ALLIANCE, DRUG COURTS ARE NOT THE ANSWER: TOWARD A HEALTH-CENTERED APPROACH TO DRUG USE 5-6 (2011).

differences in plea-bargaining, charging, and sentencing.<sup>330</sup>

Despite the increasing popularity of the arrest-referral model described above, the model recently saw defeat in California. California's Coalition to Abolish Slavery & Trafficking proposed legislation that would establish a rule that "[n]o arrest or punishment shall be imposed" on a minor for a prostitution offense; the legislation would have instead subjected eligible minors to the jurisdiction of a dependency proceeding.<sup>331</sup> The proposed law would have directed an officer, "[u]pon encounter of any youth by an officer for violation of this section," to report suspected abuse to child welfare officials.<sup>332</sup> Moreover, a dependency proceeding would only be initiated where the minor is found to be a victim of a human trafficking offense, there is no appropriate parent, guardian, or specialized program to refer the child to for services as a victim of human trafficking, and the criminal charges appear to be related or incident to the child's victimization by trafficking.<sup>333</sup> The legislature, however, opted for a less radical change than the no-arrest proposal and amended the bill to propose that until a January 1, 2017 sunset, a minor may come within the jurisdiction of the juvenile court and become a dependent child.<sup>334</sup> The bill passed the California Legislature on September 29, 2014, but Governor Brown vetoed the measure, stating that the recent state budget set out a blueprint and funds for planning, prevention, and intervention activities but that "[t]his bill . . . premature. More investigation and discussion needs to take place . . . I am directing the Department of Social Services to assemble relevant parties to explore all avenues that can be pursued to alleviate this suffering."<sup>335</sup>

#### D. Status Offense Proceedings

Whether states embrace safe harbor on a substitution, secondary immunity, or even an arrest-referral model as discussed above, the proceeding positioned to substitute for a delinquency or criminal court prosecution is often a dependency or status offense proceeding. While each state has its own form of

---

330. WEST HUDDLESTON & DOUGLAS B. MARLOWE, NAT'L DRUG COURT INST., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES 30 (2011).

331. See COAL. TO ABOLISH SLAVERY & TRAFFICKING, SUMMARY OF PROPOSED CHANGES 3 (2014), <http://www.castla.org/templates/files/proposed-decriminalization-language.pdf>; see also Janet C. Sully, *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, 690-91 (2013) (critiquing the Alameda County, California pilot program, which allowed girls arrested on charges of prostitution to enter a diversion program, and arguing instead for full immunity from arrest, prosecution, and mandatory services for sex-trading minors).

332. COAL. TO ABOLISH SLAVERY & TRAFFICKING, *supra* note 331, at 3.

333. *Id.* at 7-8.

334. S.B. 738, 2013-2014 Reg. Sess. (Cal. 2013).

335. GOVERNOR EDMUND G. BROWN, JR., A.B. 2035 VETO MESSAGE (2014), [https://www.gov.ca.gov/docs/AB\\_2035\\_Veto\\_Message.pdf](https://www.gov.ca.gov/docs/AB_2035_Veto_Message.pdf).

status offense proceedings, a person who commits a juvenile status offense is variously defined as "a MINS, PINS, CHINS (minor, person, or child in need of services or supervision) or an incorrigible or ungovernable youth."<sup>336</sup> Yet this common thread, frequently lauded by safe harbor advocates as a rehabilitative ideal, has serious and acknowledged deficiencies in the areas of procedural due process and vagueness. This move stands at counter-purposes to the efforts of reformists to reverse the trend of court involvement for minors, between 1985 and 2004, the number of formally petitioned status offense cases more than doubled.<sup>337</sup> Safe harbor laws therefore threaten to extend these dubious proceedings to a whole new class of youth on the basis of their presumed incorrigibility.

Safe harbor advocates argue that status offense proceedings are not criminal in nature, and this is a fundamental difference between delinquency and status offense proceedings.<sup>338</sup> However, because safe harbor laws require some form of arrest or protective custody, practically, delinquency proceedings and status offense proceedings involve nearly identical processes.

In the prosecution of adult offenses, indeterminate commitment is regarded as unconstitutional, and even in juvenile criminal courts, indeterminate commitment is generally seen as a "drastic and final step."<sup>339</sup> In contrast, family courts adjudicating status offense and dependency proceedings view indeterminacy as par for the course, justified by the principle that family law determinations focus on "offenders and not offenses, on rehabilitation and not punishment . . . ."<sup>340</sup> The prescription of programmatic "rehabilitation" stands at odds with the reality that homeless youth are "acutely aware of the potential risks they face in the course of street economy participation"<sup>341</sup> and, in particular, they demonstrate a high awareness of risks associated with involvement in the sex trades.<sup>342</sup>

Commentators have criticized the fact that status offense proceedings, ostensibly non-criminal in nature, effectively "mirror those of the delinquency

---

336. DONALD T. KRAMER, LEG. RTS. CHILD. REV. § 20:1 (2d ed.), Westlaw (database updated November 2014) (footnote omitted).

337. CHARLES PUZZANCHERA, NAT'L CTR. FOR JUVENILE JUSTICE, TRENDS IN THE JUSTICE SYSTEM'S RESPONSE TO STATUS OFFENDING: OJJDP BRIEFING PAPER 2 (2007), [http://www.americanbar.org/content/dam/aba/migrated/child/PublicDocuments/adolescent\\_15.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/child/PublicDocuments/adolescent_15.authcheckdam.pdf).

338. See, e.g., N.Y. STATE ASSEMBLY, MEMORANDUM IN SUPPORT OF LEGISLATION, Assembly 197-5258B, 2007-08 Sess., at 14 (2008).

339. Larry Cunningham, *Substantive Limitations on the Power of Family Courts to Commit Delinquent Juveniles to State Custody: Analysis and Critique*, 55 SYRACUSE L. REV. 87, 88 (2004).

340. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 86 (1999), <https://www.ncjrs.gov/html/ojjdp/nationalreport99/chapter4.pdf>.

341. Gwadz et al., *supra* note 103, at 371.

342. Rees, *supra* note 40, at 103.

system, including the initiation of the procedure by arrest or application, preliminary hearing, bail determination, probation involvement, trial on the merits, adjudication, and post-adjudication monitoring by probation or commitment to state agencies.”<sup>343</sup> By contrast, the procedural protections afforded to youth in delinquency proceedings are often greater than in these cases; also, “state laws are widely divergent in their treatment of status offenses,” including in their approach to pre-adjudication diversion, their classification of cases as dependency or delinquency cases, and widely variable dispositional outcomes.<sup>344</sup> Status offenders are routinely afforded lesser procedural due process than delinquent youth, including a lesser burden of proof, right to counsel, allocution standards, and privilege against self-incrimination.<sup>345</sup> The very use of status offenses is arguably in violation of the Convention on the Rights of the Child’s non-discrimination clause and may be harmful to children.<sup>346</sup> The Coalition for Juvenile Justice recently issued national standards for the care of youth charged with status offenses and called for reforms, including repeal of the valid court order exception to federal law’s prohibition on the use of secure detention for status offenders; elimination of the ability of a family member, school, or other stakeholder to petition status behaviors to the juvenile court; and adoption of the least restrictive placement options for status offending youth.<sup>347</sup>

Status offense proceedings have come under assault by advocates for their discriminatory application. Young female offenders are more likely to receive confinement for status offenses, and they more often enter the system for committing status offenses, such as truancy or running away, rather than charges of delinquency.<sup>348</sup> Family court courts are also reported to engage in inappropriate and harmful dispositions regulating the behaviors of LGBTQQ youth, including ordering inappropriate services based on biased views about

343. David Aaron Michel, Note, *The CHINS Don’t Stand A Chance: The Dubious Achievements of Child in Need of Services (“CHINS”) Jurisdiction in Massachusetts & A New Approach to Juvenile Status Offenses*, 20 B.U. PUB. INT’L L.J. 321, 334 (2011).

344. Aaron J. Curtis, Note, *Tracing the School-to-Prison Pipeline from Zero-Tolerance Policies to Juvenile Justice Dispositions*, 102 GEO. L.J. 1251, 1266-67 (2014).

345. Erin M. Smith, *In A Child’s Best Interest: Juvenile Status Offenders Deserve Procedural Due Process*, 10 L. & INEQUALITY: J. THEORY & PRACTICE 253, 259-60 (1992).

346. Chantima Chokloikaew, Note, *Article 6 of the CRC and New York State Law*, 12 N.Y.C.L. REV. 487, 492 (2009).

347. COAL. FOR JUVENILE JUSTICE, NATIONAL STANDARDS FOR THE CARE OF YOUTH CHARGED WITH STATUS OFFENSES 74-78 (2014), <http://juvjustice.org/sites/default/files/resource-files/National%20Standards%202015%20WEB.pdf>.

348. Laura A. Barnickol, *The Disparate Treatment of Males and Females Within the Juvenile Justice System*, 2 WASH. U. J.L. & POL’Y 429, 430 (2000); see also Godsoe, *supra* note 24, at 1103-04; Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502, 1529 (2012); Julie J. Kim, Note, *Left Behind: The Paternalistic Treatment of Status Offenders Within the Juvenile Justice System*, 87 WASH. U. L. REV. 843, 861 (2010).

sexual orientation and gender identity.<sup>349</sup> These services have included mandates that LGBTQQ youth undergo "reparative therapy," or counseling to address or change their "sexual identity confusion" or "gender confusion."<sup>350</sup> Judges have even "hospitalized LGBT[QQ] youth in an attempt to stop their same-sex attractions."<sup>351</sup>

#### IV. DETENTION BY ANY OTHER NAME: SECURE, NON-SECURE, AND LIMITED SECURE PLACEMENT OF MINORS UNDER STATE SAFE HARBOR LAWS

An under-addressed issue in the debate around safe harbor laws is the safety and security of young people detained after being taken into police custody. The first state model law addressing a safe harbor for youth provided only that minors in custody not be detained in "inappropriate" facilities, but it did not define the term.<sup>352</sup> This lack of specificity—and the broad Valid Court Order ("VCO") exception embraced by federal law discussed *infra* Part IV.A—threatens to contribute to a higher rate of secure detention for youth detained on status offenses, already at 8,800 youth in 2011 alone.<sup>353</sup>

##### A. Secure Detention

The risk of placing young people in secure detention is widely acknowledged. Detention can expose youth to violence and other harms, including violence by staff and fellow detainees.<sup>354</sup> Consequences of detention for youth in the sex trades include "delay of education," "exposure to violence in the general population," "restricted or no services," "police record," "inability to access certain jobs or scholarships," and "stigma."<sup>355</sup>

Any instance in which a minor labeled as a status offender by safe harbor laws is placed in secure detention arguably breaches the mandate of the Juvenile Justice and Delinquency Prevention Act ("JJDP"), which includes the deinstitutionalization of status offenders and young people adjudicated as dependents or abused or neglected children as a criterion for receipt of federal funds.<sup>356</sup> The forty-nine states that participate in and receive grant funds through the program—Wyoming being the only non-participating state<sup>357</sup>—

349. MAJD ET AL., *supra* note 144, at 63.

350. *Id.* at 64.

351. *Id.* at 65.

352. GLOBAL RIGHTS, STATE MODEL LAW ON PROTECTION FOR VICTIMS OF HUMAN TRAFFICKING 11-12 (2005), [http://humantrafficking.unc.edu/files/2011/09/StateModelLaw\\_9.05.pdf](http://humantrafficking.unc.edu/files/2011/09/StateModelLaw_9.05.pdf).

353. COAL. FOR JUVENILE JUSTICE, STATUS OFFENSES: A NATIONAL SURVEY 5 (2014).

354. BARTON CLINIC REPORT, *supra* note 309, at 40.

355. SHARED HOPE INT'L, *supra* note 98, at 61.

356. 42 U.S.C. § 5633(a)(11) (2015).

357. *State Compliance with JJDP Act Core Requirements*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEPT OF JUSTICE,

must comply with this core requirement of the Act, as well as the core requirements of sight and sound separation between juveniles in secure detention and incarcerated adults, removal of juveniles from adult jails and lockups, and the reduction of disproportionate minority confinement.<sup>358</sup> Participant states must monitor all facilities and report their compliance status annually to the Office of Juvenile Justice and Delinquency Prevention, and the amount of the grant funds allocated to the participant state will be reduced in 20% increments if full compliance is not maintained within *de minimis* exceptions.<sup>359</sup>

However, safe harbor laws may yet result in the increase of secure detention as a result of a much-criticized exception to the JJDP Act. The Act was amended in 1984 to allow for judges to issue secure detention orders where a young person adjudicated for a status offense violates a Valid Court Order.<sup>360</sup> The National Council of Juvenile and Family Court Judges has called for elimination of the VCO upon the JJDP Act's reauthorization.<sup>361</sup> Unfortunately as of 2014, twenty-seven states and territories report that they continue to use this exception to incarcerate children.<sup>362</sup> While some states have ended this practice through case law, "[m]ost courts have found that imposing a more severe sentence on a status offender for violating her court orders is a valid use of the courts' contempt power."<sup>363</sup> In addition, several states have developed methods to allow placement of status offenders in secure facilities despite the ban, such that minors may be committed "following a second or later status offense, while others allow transfer to secure facilities following an administrative hearing in which there is proof of the child's unmanageability in the non-secure setting or a court finding that the child is not amenable to treatment."<sup>364</sup>

Nonetheless, some states explicitly incorporate the threat of temporary and long-term secure detention for young people charged with prostitution-related offenses despite the "safe harbor" moniker. Minnesota's Department of Public Safety has recommended that the state juvenile protective hold statute be

---

[www.ojjdp.gov/compliance/compliancedata.html](http://www.ojjdp.gov/compliance/compliancedata.html) (last visited Dec. 19, 2015).

358. 42 U.S.C. § 5633(a) (2015).

359. *Id.*

360. See 28 C.F.R. § 31.303(f)(3) (2015). There are competing views on the exception's efficacy. Compare Patricia J. Arthur & Regina Waugh, *Status Offenses and the Juvenile Justice and Delinquency Prevention Act: The Exception that Swallowed the Rule*, 7 SEATTLE J. FOR SOC. JUST. 555, 556 (2009) ("[T]he VCO exception to the JJDP Act has increased the harmful use of detention for juveniles throughout the United States . . ."), with *In re Jennifer G.*, 695 N.Y.S.2d 871, 879-80 (N.Y. Fam. Ct. 1999) (arguing that the New York legislature ought to have incorporated the JJDP Act valid court order exception into New York law in order to allow for remand of a minor to secure detention, which is needed to "interrupt the cycle of the absconding PINS child").

361. NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOLUTION SUPPORTING REAUTHORIZATION OF JJDP ACT AND ELIMINATION OF THE VCO (2010).

362. COAL. FOR JUVENILE JUSTICE, *supra* note 353, at 54.

363. Smith, *supra* note 345, at 275-76.

364. KRAMER, *supra* note 336, at § 20:13 (footnotes omitted).

amended to allow temporary custody and secure detention of minors on prostitution-related charges for up to twenty-four hours, with the potential for a forty-eight-hour extension upon a showing that release poses an immediate danger to the youth.<sup>365</sup> North Carolina permits reasonable detention for investigative purposes where the detainee is a minor and permits a minor be taken into temporary protective custody as an “undisciplined juvenile” under the Juvenile Code, including by use of secure detention.<sup>366</sup> The statute does not limit the term of such temporary protective custody, and since North Carolina has been subject to funding reductions for non-compliance with the JJDP deinstitutionalization requirement from FY 2009 through FY 2014,<sup>367</sup> it seems unlikely that North Carolina is envisioning application of the safe harbor provision in a manner that is strictly compliant with federal law.

#### B. Non-Secure, Limited Secure, and Staff Secure Detention

With respect to non-secure placement standards for youth charged with prostitution-related offenses, safe harbor laws suffer from a lack of clarity or uniformity. Complicating matters further, in some jurisdictions, the placement of a minor often depends on the posture of the case—that is, before or after a final judgment—and the availability of approved facilities.<sup>368</sup> Still other safe harbor laws expand the category of facilities that qualify for appropriate placement. Illinois limits the placement of a minor taken into temporary protective custody to a hospital, medical facility, or designated foster home, group home, or other program by DCFS, subject to review by the Juvenile Court, and in no case may it include a jail or place for the detention of criminal or juvenile offenders.<sup>369</sup> The Florida Safe Harbor law aims for placement in certified residential facilities on a staff secure model or foster care placements, but allows county commissioners discretion based on what facilities or foster homes are available.<sup>370</sup>

The JJDP Act itself defines the terms “secure detention” and “secure correctional” facilities to “any public or private residential facility which . . . includes construction fixtures designed to physically restrict the movements

---

365. MINN. DEP’T OF PUB. SAFETY, NO WRONG DOOR: A COMPREHENSIVE APPROACH TO SAFE HARBOR FOR MINNESOTA’S SEXUALLY EXPLOITED YOUTH 18 (2013).

366. See N.C. GEN. STAT. §§ 14-204(c) & 7B-1900 (2015).

367. *State Compliance with JJDP Act Core Requirements*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, [www.ojjdp.gov/compliance/compliancedata.html](http://www.ojjdp.gov/compliance/compliancedata.html) (last visited Dec. 19, 2015).

368. See, e.g., FLA. STAT. § 39.524(1) (2015) (“[T]he child may be placed in a safe house or safe foster home, if one is available. However, the child may be placed in another setting, if the other setting is more appropriate to the child’s needs or if a safe house or safe foster home is unavailable, as long as the child’s behaviors are managed so as not to endanger other children served in that setting.”).

369. 325 ILL. COMP. STAT. 5/3 (2015).

370. FLA. STAT. § 39.524(1) (2015).



and activities of juveniles” held in the facility.<sup>371</sup> The federal regulations interpreting this provision have come to define “secure” to encompass “residential facilities which include construction features designed to physically restrict the movements and activities of persons in custody such as locked rooms and buildings, fences, or other physical structures.”<sup>372</sup>

Shortly after the JJDPA’s initial passage in 1974, advocates criticized the use of so-called “semi-secure” facilities to confine status offenders and young people adjudicated as dependents or abused or neglected children. To prevent the “use of locked rooms or staff control from transforming [semi-secure facilities] into secure facilities,” advocates insisted “on a narrow legislative definition which prohibits the complete control by staff of entrances and exits to any facility in which status offenders are placed.”<sup>373</sup> Despite these early warnings, the Department of Justice has since created wide latitude for supposedly non-secure facilities to avoid application of the federal ban on institutionalization of certain youth. Namely, federal regulations specify that secure detention “does not include facilities where physical restriction of movement or activity is provided solely through facility staff.”<sup>374</sup>

Indeed, the Department has sanctioned this form of institutionalization by staff secure facilities from the definition of “secure” detention, such that a staff secure facility is a residential facility without construction features designed to restrict movement but “which may establish reasonable rules restricting entrance to and egress from the facility . . . [and] in which the movements and activities of individual juvenile residents may, for treatment purposes, be restricted or subject to control through the use of intensive staff supervision.”<sup>375</sup> This exception to the deinstitutionalization requirement also applies to a juvenile placed in a runaway shelter “but prevented from leaving due to staff restricting access to exits,” because “[a] facility may be nonsecure (i.e., staff secure) if physical restriction of movement or activity is provided solely through facility staff.”<sup>376</sup> This nonsensical logic manufactures a distinction between being physically restrained by leather handcuffs and chokeholds by staff and being locked into a room by an automated locking mechanism.

The exclusive use of staff secure facilities for youth in the sex trades represents an increasingly popular method for states to sidestep the JJDPA’s ban on institutionalization of juveniles subject to safe harbor laws. In Kansas, a

371. 42 U.S.C. § 5603 (2015).

372. 28 C.F.R. § 31.304(b) (2015).

373. Jan C. Costello & Nancy L. Worthington, *Incarcerating Status Offenders: Attempts to Circumvent the Juvenile Justice and Delinquency Prevention Act*, 16 HARV. C.R.-C.L.L. REV. 41, 80 (1981).

374. 28 C.F.R. § 31.304(b) (2015).

375. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, GUIDANCE MANUAL FOR MONITORING FACILITIES UNDER THE JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT OF 2002 52-53 (2010).

376. *Id.* at 12.

person under eighteen suspected of engaging in the sex trade is to be immediately placed in protective custody.<sup>377</sup> The officer is then directed to contact the Department for Children and Families to begin an investigation to initiate court proceedings,<sup>378</sup> and a hearing is to be held within seventy-hours following a child having been taken into protective custody.<sup>379</sup> Under the Florida Safe Harbor Act, where the minor qualifies for dependency proceedings, a minor may be placed in a short-term staff-secure facility pending adjudication as a dependent child.<sup>380</sup>

In the context of youth in the sex trades, “non-secure” and “limited secure” facilities are designed with even more restrictive policies, ostensibly to ensure distance from potential exploiters<sup>381</sup>—whether or not the youth detained has an exploiter. The geographical isolation of “safe houses” to protect youth from “pimps” is clearly counterproductive, cruel, and excessive for youth who have not experienced coercion and for whom local peer networks represent sources of care and validation.<sup>382</sup> These facilities are also designed on a “Very Young Girls” model, and as a result they are not equipped to provide transition-related and gender-affirming care to transgender youth.<sup>383</sup>

Belying their label as non-detentional in nature, these facilities are specifically designed to prevent voluntary departure by youth and monitor young people through the installation of surveillance cameras and other methods. The Florida Safe Harbor Act requires that residential placements certified as a “safe house” to house “sexually exploited children” to have awake staff members on duty twenty-four hours a day and to “[p]rovide appropriate security through facility design, hardware, technology, staffing, and siting, including, but not limited to, external video monitoring or door exit alarms, a high staff-to-client ratio, or being situated in a remote location that is isolated from major transportation centers and common trafficking areas.”<sup>384</sup> In New York City, limited secure facilities are required to maintain staffing of a facility control center at all times, adopt systems for reporting AWOLs, lock exterior doors at all times, and establish key control procedures, motion activated perimeter lighting, and closed-circuit television monitoring inside the facility and on the perimeter.<sup>385</sup> Non-secure placement facilities must also identify and

---

377. KAN. STAT. ANN. § 38-2231(b) (2015).

378. *Id.* § 38-2232.

379. *Id.* § 38-2243.

380. FLA. STAT. § 39.401(2)(b) (2015).

381. MUSLIM ET AL., *supra* note 31, at 61; SHARED HOPE INT’L, *supra* note 98, at 67-68.

382. See CURTIS ET AL., *supra* note 27, at 51; Rees, *supra* note 40, at 190-91.

383. Rees, *supra* note 40, at 190-91.

384. FLA. STAT. § 409.1678(2)(c) (2015).

385. N.Y.C. ADMIN. FOR CHILDREN’S SERVS., JUVENILE JUSTICE LIMITED SECURE PLACEMENTS QUALITY ASSURANCE STANDARDS 20, 22, 118 (2013), [www.nyc.gov/html/acs/downloads/pdf/c2h/P2/Appendix\\_B\\_-\\_Draft\\_LSP\\_QAS.pdf](http://www.nyc.gov/html/acs/downloads/pdf/c2h/P2/Appendix_B_-_Draft_LSP_QAS.pdf).

report the confiscation of contraband such as needles and “sexually explicit materials.”<sup>386</sup>

The potential consequences for attempts to leave these facilities are also severe and escalating in nature: physical restraint by staff; contempt proceedings, restoration of criminal charges or delinquency proceedings, and secure detention pursuant to the Valid Court Order exception; and even the addition of misdemeanor and felony charges for attempted escape in some jurisdictions. During fiscal year 2014, ACS recorded 575 incident reports of the use of physical restraints in non-secure placement.<sup>387</sup> Prosecutors in New York have, in the past, brought charges for felony escape against young people who attempted to leave non-secure facilities, but New York courts have refused to apply this statute to non-secure facilities, which by its language applies only to “detention facilities.”<sup>388</sup> Nonetheless, in New York a juvenile may still be prosecuted for escape in the third degree, a Class A Misdemeanor that carries up to one year in detention.<sup>389</sup>

### C. Gender, Gender Identity and Sexual Orientation-Appropriate Placement

While some states and municipalities specifically reference “gender-specific,” “separate,” or “gender responsive” services in their safe harbor laws, no standards define gender-supportive or culturally competent care. Alameda County, California was authorized to implement a pilot “diversion program” for only non-transgender female minors arrested on prostitution charges, as an alternative to detainment at juvenile hall, but no provision was made for other youth.<sup>390</sup> The Florida Safe Harbor law requires for certification of any short or long-term facility where a minor is committed that it houses “exclusively one sex,” but it does not define “sex” or guarantee facilities for transgender youth.<sup>391</sup> Massachusetts’s law recognizes that “sexually exploited youth have separate and distinct service needs according to gender and appropriate services

---

386. N.Y.C. ADMIN. FOR CHILDREN’S SERVS., NON-SECURE PLACEMENT (NSP) CONTRABAND POLICY, No. 2012/03 2-3 (2012).

387. N.Y.C. ADMIN. FOR CHILDREN’S SERVS., ANNUAL INCIDENT DATA REPORT FISCAL YEAR 2014 1 (2014), [www.nyc.gov/html/acs/downloads/pdf/statistics/FY14\\_Annual\\_Incident\\_Report\\_Non\\_Secure\\_Placement.pdf](http://www.nyc.gov/html/acs/downloads/pdf/statistics/FY14_Annual_Incident_Report_Non_Secure_Placement.pdf).

388. *But see In re Dylan C.*, 864 N.Y.S.2d 730, 733 (N.Y. Fam. Ct. 2008) (holding that non-secure facility from which juvenile left without permission was not a “detention facility” within meaning of felony escape statute).

389. N.Y. PENAL LAW § 250.05 (McKinney 2015); *see In re Bernard T.*, 672 N.Y.S.2d 882, 882 (N.Y. App. Div. 1998) (convicting a juvenile who escaped from an agency case worker in whose custody the juvenile has been placed under a court order in a delinquency case).

390. Thomas Carroll, *Gender and Juvenile Justice: New Courts, Programs Address Needs of Girls*, NAT’L CTR. FOR YOUTH LAW, <http://youthlaw.org/publication/gender-and-juvenile-justice-new-courts-programs-address-needs-of-girls> (last visited Dec. 19, 2015).

391. FLA. STAT. § 409.1678 (2015).

shall be made available while ensuring that an appropriate continuum of services exists.”<sup>392</sup> While the Massachusetts’s Department of Children and Families is mandated to issue regulations to carry out this section and presumably define gender-appropriate services,<sup>393</sup> as of this writing it has failed to do so. New York law similarly requires local social services districts to recognize that “sexually exploited youth have separate and distinct service needs according to gender” and to the extent funds are available, make available appropriate programming.<sup>394</sup> Yet as of the date of this writing, New York has never issued a contract to a residential treatment facility that includes trans youth or cisgender boys. Minnesota’s Department of Public Safety has recommended that services be responsive to the needs of individual youth, including that services be “gender-responsive, culturally competent, age-appropriate, and supportive for [LGBTQQ] youth,”<sup>395</sup> yet it has never defined these terms or recommended specific programs or policies to guarantee fulfillment of this recommendation.

The lack of any definition to requirements for gender or sexuality-appropriate services threatens LGBTQQ youth in particular. LGBTQQ youth also report high rates of physical, sexual, and emotional abuse in both custodial placement and detention.<sup>396</sup> It should come as no surprise that as many as 78% of LGBTQQ youth who have been removed or run away from a placement did so as a result of hostility toward their sexual orientation or gender identity.<sup>397</sup> Many LGBTQQ youth simply have no choice but to run away from placements “in which they have experienced ongoing discrimination, harassment, or violence, including sexual assault.”<sup>398</sup> This abuse is by no means limited to fellow inmates. Facility staff reportedly punish LGBTQQ youth for benign behaviors that they mistakenly assume are sexually predatory.<sup>399</sup> Staff also punish, ridicule, and prevent transgender youth from expressing their gender identity, and facilities fail to meet the medical needs of transgender youth including providing gender-affirming care.<sup>400</sup> Indeed, LGBTQQ youth report incidents in which facility staff tried to change their sexual orientation, where professionals used coercive tactics that relied on religion to attempt to

---

392. MASS. GEN. LAWS ch. 119, § 39K (2015).

393. *Id.*

394. N.Y. SOC. SERV. LAW § 447-b (Westlaw 2015).

395. MINN. DEP’T OF PUBLIC SAFETY, *supra* note 365, at 8.

396. MAJD ET AL., *supra* note 144, at 102.

397. N.Y.C. CHILD WELFARE ADMIN. & COUNCIL OF FAMILY AND CHILD CARING AGENCIES, IMPROVING SERVICES TO GAY AND LESBIAN YOUTH IN NEW YORK CITY’S CHILD WELFARE SYSTEM 4 (1994).

398. SHANNAN WILBER ET AL., CHILD WELFARE LEAGUE OF AM., CWLA BEST PRACTICE GUIDELINES FOR SERVING LGBT YOUTH IN OUT-OF-HOME CARE 6 (2006), <http://familyproject.sfsu.edu/sites/sites7.sfsu.edu.familyproject/files/bestpracticeslgbtyouth.pdf>.

399. MAJD ET AL., *supra* note 144, at 104.

400. *Id.* at 105, 111-12.

“convert” youth, and where detention staff attempted to change the gender identity of transgender youth, even recording these efforts in the youth’s treatment plans.<sup>401</sup> This unfair treatment is built into administrative decisions, as well, including decisions about housing and classification, such as the isolation or segregation of LGBTQ youth, or the automatic housing of transgender youth based on their birth sex.<sup>402</sup>

#### V. THE HARM REDUCTION MODEL: RECOMMENDATIONS FOR VOLUNTARY, LOW-THRESHOLD ALTERNATIVES TO SAFE HARBOR PROCEEDINGS<sup>403</sup>

The bill memorandum attached to the first safe harbor law justified its passage on the principle that “youth should not be prosecuted under the penal law for acts of prostitution. Instead, services should be created to meet the needs of these youth outside of the justice system.”<sup>404</sup> According to this definition of “safe harbor,” current laws have not accomplished the objective of removing youth “outside of the justice system.”<sup>405</sup> Indeed, safe harbor laws have actually *increased* court involvement through intensified compliance monitoring and program requirements, indeterminate sentencing, and institutionalization.<sup>406</sup> In place of arrest and institutionalization, this Article recommends that safe harbor laws and policies must shift to voluntary, low-threshold services on a harm reduction model embraced by emerging research for the benefit of all youth engaged in the sex trade, who are often homeless or unstably housed.<sup>407</sup> This Article proposes an alternative safe harbor model that can be realized by emerging legislation, in which the federal government incentivizes and states adopt laws that meet the basic, material needs identified by youth in the sex trades themselves.

---

401. *Id.* at 65.

402. *Id.* at 106-08.

403. This section was first drafted in a study conducted by the Urban Institute and Streetwise and Safe concerning LGBTQ youth in the sex trades, and this Article’s version reflects recommendations for the broader population of youth who trade sex, regardless of gender identity or sexual orientation. *See generally* DANK ET AL., *supra* note 40; DANK ET AL., *supra* note 278. The Author was a co-author on each report of this series. The recommendations made in this Article, however, are the Author’s alone and do not reflect the views of Streetwise and Safe or the Urban Institute.

404. N.Y. STATE ASSEMBLY, MEMORANDUM IN SUPPORT OF LEGISLATION, Assembly 197-5258B, 2007-08 Sess., at 14 (2008).

405. *Id.*

406. *See supra* Part I.E.

407. STATE OF THE CITY 2011, *supra* note 67, at 79. For an alternate proposal in which law-enforcement-based approaches are framed as mutually supportive to an expanded public health approach, see Jonathan Todres *Assessing Public Health Strategies for Advancing Child Protection: Human Trafficking as a Case Study*, 21 J.L. & POL’Y 93, 94-95 (2012).

### A. End the Arrest-Institutionalization Approach to Youth in the Sex Trades

This Article demonstrated that data on gender, the nature of involvement, age of first involvement, and prior child welfare involvement undermine the original narrative of safe harbor laws—that youth in the sex trades are “Very Young Girls.” In response, the conclusion calls for a radical reevaluation of the efficacy of safe harbor laws. Indeed, even among states that attempt to provide children “immunity” from adult criminal and juvenile delinquency prosecutions, few have robust immunity provisions, instead relying on conditional or secondary immunity schemes premised on arrest and court-mandated institutionalization.<sup>408</sup> Even among those states exclusively relying on status offense proceedings, there is a wide divergence in state laws’ treatment of status offenses, and status offenders are routinely afforded lesser procedural due process protections than delinquent youth, including a lesser burden of proof, right to counsel, allocution standards, and denial of the privilege against self-incrimination.<sup>409</sup>

The shift away from arrest and institutionalization to low-threshold and voluntary, harm-reduction services for youth in the sex trade has been repeatedly affirmed by international actors such as the Committee on the Rights of the Child, the World Health Organization, and the U.N. Commission on HIV and the Law.<sup>410</sup> But a shift from arrest and institutionalization to harm-reduction services for youth trading sex cannot happen without commitments from states. For this reason, states should commit to providing youth seeking help full immunity from criminal and juvenile delinquency prosecutions for any prostitution-related conduct, including proxy offenses. States should also prohibit arrest, temporary protective custody, and law enforcement and guardian-initiated petitions for dependency, abuse, or neglect proceedings. Finally, in dependency and status offense proceedings initiated independently by child protection agencies, states must take steps to ensure procedural due process rights, including abolition of forced treatment, institutional placement, and detention.

1. Establish Clear Guidelines in Federal-State Grant Incentives to Protect Youth Engaged in Survival Sex from Arrest, Undue Court Involvement, Discrimination, or Involuntary Confinement.

On May 21, 2015, President Obama signed legislation giving preferential consideration for federal Community Oriented Police Services grants to states

---

408. Tessa L. Dysart, *Child, Victim, or Prostitute? Justice Through Immunity for Prostituted Children*, 21 DUKE J. GENDER L. & POL’Y 255, 279 (2014).

409. See *supra* Part III.D.

410. See generally Brendan Conner, “First, Do No Harm:” *Legal Guidelines for Health Programmes Affecting Adolescents Aged 10-17 Who Sell Sex or Inject Drugs*, 18 J. INT’L AIDS SOC’Y 78 (2015).

that have enacted a safe harbor law.<sup>411</sup> The bill in its current version ignores warnings by anti-trafficking advocates, such as the Freedom Network, that the practical effects of the legislation will be to allow states to mandate arrest and court-involvement as a prerequisite to receiving services.<sup>412</sup>

The Stop Exploitation Through Trafficking Act also departs from model legislation by narrowing which offenses qualify for the diversion remedy, leaving out proxy offenses commonly used to arrest and detain youth engaged in survival sex.<sup>413</sup> This is a good start. However, the Uniform Law Commission's Prevention of and Remedies for Human Trafficking Act strongly endorses immunity from prosecution for prostitution-related offenses in both criminal and juvenile delinquency proceedings and recommends the extension of immunity to other "non-violent offenses."<sup>414</sup> For these reasons, at a minimum, the federal legislation should be amended to make clear that the federal-state cooperative grant incentive bans arrest, prosecution, and court proceedings for minors for selling sex, including prostitution- and trafficking-related proxy offenses. Furthermore, because police cannot meet the basic survival needs youth involved in the sex trade require, even if police are providing these resources, police should not be the first responders for children who trade sex.

In contrast to the fast passage of the Justice for Victims of Trafficking Act, other legislation to meet the basic, material needs of youth engaged in survival sex—like food, clothing, and connections to transitional housing—has not yet been voted on by Congress. On January 27, 2015, the Runaway and Homeless Youth and Trafficking Prevention Act<sup>415</sup> was referred to the Senate Judiciary Committee, which has entertained nearly a year of opposition by Republican Senators to a sexual orientation and gender identity non-discrimination clause in the legislation.<sup>416</sup> The legislation would also extend the maximum stay in Basic Center Program shelters from twenty-one to thirty days and fund street-based services for runaway and homeless youth, which keep youth from

---

411. Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 601, 129 Stat. 227, 258-59 (codified at 42 U.S.C. §§ 3796dd to 3796dd-8) (giving preferential consideration for some federal grants to states that have enacted a law that "discourages or prohibits the charging or prosecution" of a trafficked minor and "encourages the diversion" of those minors "to appropriate service providers").

412. See FREEDOM NET., STOP EXPLOITATION THROUGH TRAFFICKING ACT LETTER 1 (2014), <http://freedomnetworkusa.org/wp-content/uploads/2012/05/Stop-Exploitation-through-Trafficking-Act-Letter.pdf>.

413. Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 601, 129 Stat. 227, 258-59 (codified at 42 U.S.C. §§ 3796dd to 3796dd-8).

414. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, *supra* note 274, at 9-10.

415. S. 262, 114th Cong. (2015).

416. Press Release, Sen. Patrick Leahy, Ranking Member, Senate Judiciary Comm., On Senate Republicans' Vote Against Legislation to Protect Runaway and Homeless Youth (Apr. 22, 2015), <http://www.leahy.senate.gov/press/ranking-member-senate-judiciary-committee-on-senate-republicans-vote-against-legislation-to-protect-runaway-and-homeless-youth->

engaging in the sex trade by providing for their basic needs.<sup>417</sup>

Congress has also repeatedly postponed reauthorization of the Juvenile Justice and Delinquency Prevention Act.<sup>418</sup> The bill was introduced on April 30, 2015 and was reported on July 23, 2015 by the Senate Judiciary Committee.<sup>419</sup> This important bill would require state grant recipients to not detain status offenders unless pursuant to a valid court order, keep juveniles out of adult facilities, maintain “sight or sound” separation from adults when juveniles are confined in adult facilities, and make genuine efforts to reduce disproportionate minority contact in the juvenile justice system.<sup>420</sup> The reauthorization bill would also phase the VCO loophole.<sup>421</sup>

Unfortunately, the Juvenile Justice and Delinquency Prevention Act does not fully address the issue of confining youth engaged in survival sex. Further legislation and agency action is needed to discourage involuntary commitment of youth engaged in survival sex to institutions and guarantee quality of care and safe and supportive placement. One such necessary change is that the definition of a “status offender” and “non-offender” in the Code of Federal Regulations must be altered to include youth subjected to an arrest on prostitution-related charges.<sup>422</sup>

Furthermore, the facilities that states are using are not equipped to care for transgender youth,<sup>423</sup> and the facilities are not required to provide safe, supportive housing, nor are there any protocols specific to transgender and gender non-conforming youth in these custodial settings. To address this deficiency, the Department of Justice should issue regulations requiring safe houses to accommodate gender identity and sexual orientation and, when placing young adults in safe houses, rely on the preference of the youth detained, not solitary confinement or isolation.

As discussed above, these facilities are specifically designed to prevent voluntary departure by youth and monitor young people through the installation of surveillance cameras and other methods. In place of this approach, the Department of Justice ought to expand regulations beyond construction features designed to physically restrict movement and extend these principles to curb surveillance and mobility restrictions in “staff secure” placement by implementing reasonable rules restricting entrance to, but not restricting egress from, the facility.

---

417. S. 262, 114th Cong. § 4 (2015).

418. S.1169, 114th Cong. (2015).

419. *Id.*

420. *Id.* § 205.

421. *Id.*

422. See 28 C.F.R. § 31.304 (2015) (defining “status offender” and “non-offender”).

423. See Rees, *supra* note 40, at 190.



## 2. Increase Transparency, Oversight, and Accountability in Federal Agency Actions Involving Youth Engaged In Survival Sex

In addition to influencing state detention policies, federal regulations also play a central role in state policies affecting youth engaged in survival sex through programs administered through the Bureau of Justice Assistance and Federal Bureau of Investigation such as the Anti-Trafficking Task Force Initiative, Operation Cross Country, and Innocence. In 2012, for example, the Innocence Lost Initiative alone identified 547 child victims out of 1,769 arrests.<sup>424</sup> Currently, no arrest data collected pursuant to federally-assisted enforcement actions is released, let alone disaggregated by key demographic information such as arrest charge, age, or gender identity or sexual orientation.

As discussed above, there is a high incidence of troubling police encounters experienced by youth engaged in survival sex. It is especially critical that the Department of Justice exercise more oversight of federally-assisted enforcement actions and increase transparency in operations and outcomes. One change that would help with oversight would be developing clear protocols for classification and processing of persons charged as “offenders” and “victims of trafficking.” The DOJ should prohibit the arrest of those identified as victims and instead require states to provide a safe, supportive, and unrestrictive shelter option. Such option should not be conditioned on cooperation with law enforcement or prosecutors. The Department should also establish an independent oversight program for federally-assisted enforcement actions that are not administered by the same agency that oversees the actions. Also critical is enhancing prosecution of law enforcement officers engaging in misconduct such as false arrest, false imprisonment, and sexual assault. To combat these troubling interactions, the DOJ should create whistleblower policies and complaint procedures for victims of police misconduct.

In the past few years, several other federal agencies have developed portfolios to address trafficking in persons. These agencies are increasingly encouraged to convene advisory committees to inform their operations, but often with little to no resourcing for survivors to participate in oversight. For example, the Department of Health and Human Services is in the process of establishing a National Advisory Committee on the Sex Trafficking of Children and Youth in the United States to inform the Secretary and Attorney General.<sup>425</sup> However only one member of the twenty-one-person committee must be a former victim of sex trafficking.<sup>426</sup> It is essential to the success of such initiatives that membership include a majority of former victims and youth engaged in survival sex.

---

424. U.S. DEP’T OF JUSTICE, *supra* note 33, at 41–42.

425. 42 U.S.C. § 1314b (2015).

426. *Id.*

### 3. Establish and Expand Safe Harbor Protections in State Law to Serve Youth Outside of the Court System

While the federal government can create grant incentives for affirmative changes in state law, the ultimate responsibility for enacting these changes lies with state government. No state currently provides youth engaged in survival sex full immunity from prosecution for all prostitution-related charges, including proxy offenses. No state has yet provided youth charged with promoting or sex trafficking offenses an affirmative defense that they were engaged in the sex trades themselves at the time the offense occurred.

The majority of states that have adopted safe harbor protections require a custodial arrest, booking, and pre-arraignment detention before the detained person can bring a petition to divert the charge or raise an affirmative defense. This Article recommends changes in status offender and dependency systems to prohibit arrest, temporary protective custody, and law-enforcement- and guardian-initiated petitions for dependency, status offense, or abuse or neglect proceedings. Further, this Article demonstrates that in dependency, status offense, and abuse or neglect proceedings independently initiated by child protection agencies, states must adopt equalization of procedural due process rights and limit or end forced treatment or institutional placement in staff-secure facilities. When youth are adjudicated to state custody in whatever form, they must be guaranteed quality of care and periodic review of their placement. State child protective service agencies must establish an independent ombudsperson or similar oversight program for both secure and non-secure facilities that is not administered by the same agency that oversees the institutions.

Similarly, states have the positive obligation to replace court-mandated programs requiring arrest for access to services by radically increasing appropriations for voluntary and low-threshold service programs providing what youth in the sex trades have identified as their basic needs. These include food security, supportive housing, lockers, showers, gender-affirming health care, living-wage employment options, assistance with TANF and Social Security benefits, and legal services to address collateral consequences of conviction.

### B. Street-Based and Comprehensive Drop-In Services and Peer-Based Outreach

A comprehensive approach combines mobile street-based services at locations where youth in the sex trade work with drop-in services.<sup>427</sup> Utilizing mobile street-based services at locations where youth trade sex,<sup>428</sup> providing

---

427. DANK ET AL., *supra* note 278, at 71.

428. *Id.*

services at times convenient to young people who sell sex, and rendering them free of charge or at a low cost allows youth to adequately receive the services they need.<sup>429</sup> For example, the Street Outreach Program at the Ruth Ellis Center in Detroit serves African American LGBT youth, and its street outreach team is staffed entirely by LGBT-identified African American staff.<sup>430</sup> The program conducts street-based services six times a week distributing safer-sex materials and its drop-in center offers “survival aid, including showers and hygiene products, laundry facilities, clothing from Ruth’s Closet, food, safe space, referrals for shelter, crisis counseling, positive peer support, safe sex aids, and other harm reduction techniques.”<sup>431</sup>

In the context of drop-in services, groups should also provide comprehensive or full service support in a safe and accessible location that integrates a variety of programs, including health services.<sup>432</sup> Creating drop-in services and providing comprehensive or “full service” support supplies youth with the opportunity to receive the majority of the services they need without having to visit a large number of service providers to have individual needs met. This approach is not only a best practice but an effective one, in that projects engaged in low-threshold and voluntary services report the highest prevalence of youth who trade sex. These programs also offer a needed respite from order-maintenance policing tactics designed to push out young people from gentrifying communities and centralize outreach efforts in an urban geography that has seen street-involved youth dispersed by policing tactics.<sup>433</sup>

When creating programming, it is important to offer a wide range of voluntary services, which facilitates access to support for youth in the sex trades. For instance, in one comprehensive New York City population estimate of youth in the sex trade, respondents reported visiting a variety of service agencies, but the plurality (38.2%) reported visiting Streetwork Project at Safe Horizon; only 11.2% reported visiting the second most-accessed service provider, Covenant House.<sup>434</sup> The Streetwork Project provides two drop-in centers, a shelter, and street-based outreach and services for homeless children, teens, and young adults up to age twenty-four.<sup>435</sup> This program offers a wide range of services including necessities (“meals, showers, clothing, wellness activities . . . and nutritional counseling”); legal, medical, and psychiatric

---

429. INTER-AGENCY WORKING GRP. ON KEY POPULATIONS, WORLD HEALTH ORG., HIV AND YOUNG PEOPLE WHO SELL SEX: A TECHNICAL BRIEF 27 (2014), [http://www.who.int/hiv/pub/guidelines/briefs\\_sw\\_2014.pdf](http://www.who.int/hiv/pub/guidelines/briefs_sw_2014.pdf). The Author served as an expert reviewer for the Inter-Agency Working Group.

430. NGLTF & NCH, *supra* note 68, at 93-94.

431. *Id.* at 99.

432. INTER-AGENCY WORKING GRP. ON KEY POPULATIONS, *supra* note 429, at 27.

433. See KRISTINA E. GIBSON, STREET KIDS: HOMELESS YOUTH, OUTREACH, AND POLICING NEW YORK’S STREETS 145-48 (2011).

434. CURTIS ET AL., *supra* note 27, at 100.

435. See *Streetwork Project: Helping Homeless Youth*, SAFE HORIZON, [www.safehorizon.org/page/streetwork-project-68.html](http://www.safehorizon.org/page/streetwork-project-68.html) (last visited Dec. 19, 2015).

services; emergency/crisis housing; sexual health services (“HIV prevention and counseling, parenting groups, drop-in groups); and the “[o]pportunity to socialize in a safe, non-judgmental setting.”<sup>436</sup>

C. Safe and Supportive, Voluntary Short-Term Shelter, Long-Term, Affordable Housing, and Family-Based Placement Options

Housing needs have been consistently identified by youth in the sex trade as necessary for their care and support.<sup>437</sup> Every night, there are an estimated 3,800 homeless youth and young adults in New York City, and 150 of these youth spend the night with someone who pays them for sex.<sup>438</sup> Moreover, 1,600 of those young people spend any given night outside, in an abandoned building, at a transportation site or in a vehicle.<sup>439</sup> Indeed, 32% of minors—including 44% of boys, 24% of girls, and 11% of transgender youth—involved in the sex trade self-identify as living in the street”, while an additional 24% report living in a shelter.<sup>440</sup> Moreover, 31% of youth who trade sex report “that they frequent[] certain agencies’ emergency 30-day and 90-day shelters,” but “because there [are] so few available youth shelters, and a limited number of beds, many of the teens [are] forced back to the streets.”<sup>441</sup>

Youth in the sex trades frequently “express[] frustration over the limited number of beds available in youth homeless shelters and the stringent policies that shelters enforce.”<sup>442</sup> Many “credit[] the instability and rules associated with emergency housing with driving them back to the street.”<sup>443</sup> Moreover, “intermittent access to shelter increases the likelihood that a young person will engage in survival sex[, and i]mprov[ing] housing options responsive to the needs of . . . youth could enhance their quality of life and prevent young people from having to trade sex for shelter and other basic needs.”<sup>444</sup>

The National Alliance to End Homelessness has recognized the critical need for housing for homeless youth engaged in the sex trade and the importance of providing a continuum of care, including “transitional housing, permanent supportive housing, host homes, and rental assistance coupled with case management support,” employing “harm reduction and positive youth development principles,” and delivering services that are “culturally competent and trauma informed.”<sup>445</sup> The Child Welfare League of America has similarly

---

436. *Id.*

437. DANK ET AL., *supra* note 278, at 67.

438. FREEMAN & HAMILTON, *supra* note 85, at 5.

439. *Id.*

440. CURTIS ET AL., *supra* note 27, at 45.

441. *Id.* at 99.

442. DANK ET AL., *supra* note 278, at 72.

443. *Id.*

444. *Id.*

445. NAT’L ALLIANCE TO END HOMELESSNESS, HOMELESS YOUTH AND SEXUAL

recommended “making individualized placement decisions” while “increasing and diversifying placement options available to LGBT youth” to create a continuum of care.<sup>446</sup> Despite the need for balance, permanent and independent housing options are severely lacking. In a national survey of service providers working with LGBTQQ homeless youth, “more than 50% of respondents reported that their agencies offered transitional living services and street outreach services, as well as having a drop-in-center[, but f]ar fewer offered independent living [19%], permanent housing [10%], and host home services [8%].”<sup>447</sup>

It is critical that any shelter and housing options for youth in the sex trades are voluntary, taking into account levels of violence that youth experience within current housing programs. It is important that programs do not follow the trend of current specialized services for sexually exploited youth that prevent voluntary departure, ensure distance from potential exploiters, and monitor young people through the installation of surveillance cameras and other methods.<sup>448</sup> Programs which are geographically isolated to protect youth from exploiters have been found to be counterproductive for the many youth who have not experienced coercion, and for whom peer networks represent critical sources of care and validation.<sup>449</sup>

In addition to congregate care, it is equally important to create voluntary, in-home placement options for youth in the sex trades. The Child Welfare League of America recommends that agencies should intentionally reach out to LGBT families and communities when recruiting for foster parents, including as an alternative to secure detention for youth adjudicated as juvenile delinquents.<sup>450</sup> The United Nations has specifically called for the placement of youth engaged in selling sex in family-based settings where appropriate.<sup>451</sup> One service provider engaged in this type of service provision is Avenues for Homeless Youth, which provides emergency shelter and transitional living and runs an LGBT Host Home Program for youth ages sixteen to twenty-one in Minneapolis.<sup>452</sup> The program recruits, trains, and supports volunteer hosts who then open their homes to LGBT youth experiencing homelessness.<sup>453</sup> Volunteers commit to hosting while youth participants receive support from

---

EXPLOITATION: RESEARCH FINDINGS AND PRACTICE IMPLICATIONS 12 (2009).

446. WILBER ET AL., *supra* note 398, at 41.

447. LAURA E. DURSO & GARY J. GATES, *SERVING OUR YOUTH: FINDINGS FROM A NATIONAL SURVEY OF SERVICE PROVIDERS WORKING WITH LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH WHO ARE HOMELESS OR AT RISK OF BECOMING HOMELESS* 10 (2012).

448. *See supra* Part IV.

449. *See id.*

450. WILBER ET AL., *supra* note 398, at 43.

451. U.N. DEV. PROGRAMME, *GLOB. COMM’N ON HIV AND THE LAW, RISKS, RIGHTS AND HEALTH* 43 (2012).

452. *GLBT Host Home Program*, AVENUES FOR HOMELESS YOUTH, <http://avenuesforyouth.org/glbt-host-home-program/> (last visited Dec. 20, 2015).

453. *Id.*

their hosts and case managers.<sup>454</sup>

The dearth of voluntary long-term housing options contributes to the overrepresentation of youth in the sex trade in out-of-home custody, often in congregate care placements such as group homes and secure detention. For LGBTQ youth housing is even more crucial, as LGBTQ youth lack appropriate and acceptable shelter options and, even if admitted or placed, LGBTQ youth in out-of-home care "are particularly vulnerable to 'failed' placements, multiple rejections, and frequent transitions."<sup>455</sup> Boys and young men engaged in the sex trade experience "significant fluidity in their relationships with caretakers," as well as consecutive housing in that they "frequently move[] to and from various housing situations to visit parents, to reside in new foster homes, or to escape abusive parents."<sup>456</sup> The lack of housing options combines with the discriminatory application of prostitution-related laws to render a particularly dangerous environment for LGB and gender non-conforming youth. These young people are "twice as likely to be held in secure detention for truancy, warrants, probation violations, running away and prostitution," and they are "more likely to be detained for non-violent offenses with direct links to out-of-home placement and homelessness."<sup>457</sup> Among children held in custody, lesbian, gay, bisexual, and questioning boys and girls are significantly more likely to have been arrested for prostitution than their heterosexual peers.<sup>458</sup>

#### D. Safe and Supportive Housing and Placement Protocols Specific to Transgender and Gender Non-Conforming Youth

In congregate care such as group homes, shelters, and residential placements, it is especially necessary to create safe space for transgender and gender-nonconforming youth. Intake staff usually "conduct an assessment or initial screening to determine where and with whom the youth will be housed in the facility."<sup>459</sup> Staff must appropriately address LGBTQ identity during the intake process and ensure LGBTQ youth are not treated differently from heterosexual youth in such determinations.<sup>460</sup> In making the housing or classification decision, personnel must not "isolate or segregate LGBTQ youth from other participants," and not automatically place youth "based on

---

454. *Id.*

455. WILBER ET AL., *supra* note 398, at 41.

456. Lankenau et al., *supra* note 101, at 12.

457. Angela Irvine, "We've Had Three of Them": Addressing the Invisibility of Lesbian, Gay, Bisexual, and Gender Non-Conforming Youths in the Juvenile Justice System, 19 COLUM. J. GENDER & L. 675, 693 (2010).

458. *Id.* at 694.

459. WILBER ET AL., *supra* note 398, at 47.

460. LAMBDA LEGAL, NATIONAL RECOMMENDED BEST PRACTICES FOR SERVING LGBT HOMELESS YOUTH 4, 12, <http://www.lamdalegal.org/publications/national-recommended-best-practices-for-lgbt-homeless-youth>; see also WILBER ET AL., *supra* note 398, at 7.

their assigned sex at birth but rather in accordance with an individualized assessment that takes into account their safety[, preference,] and gender identity.”<sup>461</sup>

Yet in recent program evaluations, it was very rare for a site to establish “written policies on appropriate emergency shelter accommodations for transgender youth.”<sup>462</sup> Many agencies have, however, taken steps toward establishing space spaces, including “(1) arranging for some youth to sleep in a private area if they do not feel comfortable in a male or female dormitory,” “(2) offering private rooms to all youth,” and “(3) establishing a written agency policy specifying that youth are to be assigned to dormitories based on their gender identification or offered the option of a private room if safety is a concern.”<sup>463</sup>

#### E. Non-Discrimination, Harassment, Confidentiality, and Complaint

##### Procedures in Drop-ins, Shelters, Programs, and Out-of-Home Placements

The WHO has specified that health providers must maintain services that are “non-coercive, respectful, and non-stigmatizing” and that the right to confidentiality is to be clearly communicated to young people who trade sex and respected.<sup>464</sup> Nearly a decade ago, the Child Welfare League of America similarly recognized as a best practice the adoption and dissemination of a written non-discrimination, grievance, and harassment policy inclusive of sexual orientation and gender identity.<sup>465</sup> Yet in recent program evaluations of several Runaway and Homeless Youth program grantees, these programs rarely if ever “communicat[e] policies to youth in a formal client rights statement” or restrict access to services based on incidents of discrimination or harassment reported.<sup>466</sup> Similarly, only one study site reported “requiring staff to sign confidentiality agreements” or “offering a procedure for client complaints about information protection.”<sup>467</sup> It is imperative that facilities train personnel in competency with youth in the sex trades, devise and follow appropriate hiring practices, collect data on the demographics of their clients and use that data to refine services, and monitor personnel in charge of institutionalized

---

461. LAMBDA LEGAL, *supra* note 460, at 12; *see also* WILBER ET AL., *supra* note 398, at 7.

462. ANDREW BURWICK ET AL., IDENTIFYING AND SERVING LGBTQ YOUTH: CASE STUDIES OF RUNAWAY AND HOMELESS YOUTH PROGRAM GRANTEES FINAL REPORT 22 (2014), [www.mathematica-mpr.com/~media/publications/PDFs/family\\_support/LGBTQ\\_youth\\_homeless.pdf](http://www.mathematica-mpr.com/~media/publications/PDFs/family_support/LGBTQ_youth_homeless.pdf).

463. *Id.* at 23.

464. INTER-AGENCY WORKING GRP. ON KEY POPULATIONS, *supra* note 429, at 28.

465. WILBER ET AL., *supra* note 398, at 10-13; *see also* LAMBDA LEGAL, *supra* note 460, at 8.

466. BURWICK ET AL., *supra* note 462, at 22.

467. *Id.*

children and those who come in contact with them, including police.<sup>468</sup>

F. Access to Integrated Primary, Sexual, and Reproductive Health Care and Services, Gender-Affirming Health Care for Transgender and Gender Non-Conforming Youth, and Harm-Reductionist Treatment for Youth Who Use Drugs

The WHO has emphasized the importance of primary, sexual, and reproductive health care and services for youth in the sex trade and criticized age-related barriers and parental consent requirements that impede access to treatment and care.<sup>469</sup> Sexual and reproductive health services are particularly important for young people engaged in trading sex, including "access to screening, diagnosis and treatment of sexually transmitted infections, a range of contraceptive options, services related to conception and pregnancy care, cervical cancer screening, and safe abortion."<sup>470</sup>

It is especially critical that transgender and gender non-conforming youth receive gender-affirming health care, whether in or out of state custody. The lack of adequate medical and mental health care for these youth is a recognized barrier to a variety of positive outcomes.<sup>471</sup> The lack of free or affordable treatment and care pressures transgender youth to seek street hormones without medical supervision, which contributes to unsafe injection and potential drug interactions.<sup>472</sup> For transgender youth engaged in the sex trade in particular, such care is often reported as necessary to conform to enforced gender binaries in order to stay safe in the face of violence and discrimination in public spaces and gender-segregated shelters and programs.<sup>473</sup> For this reason, lack of transition-related care drives involvement in the sex trades and other underground economies to meet medical needs. The Child Welfare League of America recommends the use of medical and mental health practitioners "who are knowledgeable about the health needs of transgender youth and who understand gender identity disorder and the professional standards of care for transgender people;" in addition, transgender youth should be permitted to continue to receive "all transition-related treatment they started prior to involvement with the child welfare or juvenile justice agencies" and should be provided "any necessary authorization for transition-related treatments."<sup>474</sup>

The treatment and support provided must also extend to youth in the sex trades who use drugs. The WHO has stressed the importance of harm

---

468. LAMBDA LEGAL, *supra* note 460, at 8-11.

469. INTER-AGENCY WORKING GRP. ON KEY POPULATIONS, *supra* note 429, at 27-28.

470. *Id.* at 27.

471. BURWICK ET AL., *supra* note 462, at 19; LAMBDA LEGAL, *supra* note 460, at 5-6.

472. STATE OF THE CITY 2009, *supra* note 121, at 91; MAJD ET AL., *supra* note 144, at 51.

473. Rees, *supra* note 40, at 135.

474. WILBER ET AL., *supra* note 398, at 58.



reductionist services for youth who trade sex, including “sterile injecting equipment through needle and syringe programs, opioid substitution therapy for those who are dependent on opioids and access to naloxone for emergency management of suspected opioid overdose.”<sup>475</sup>

The possibility of comprehensive and integrated medical services is achievable. Health & Education Alternatives for Teens Program (“HEAT”) at SUNY Downstate is a program focused on heterosexual, lesbian, gay, bisexuals, and transgender adolescents and young adults ages thirteen to twenty-four living with or at-risk for contracting HIV.<sup>476</sup> The HEAT program “operates a ‘one-stop’ full-service clinic” that is set in a “youth-friendly, discrete, and easily accessible” location.<sup>477</sup> The program offers services regardless of ability to pay, maintains confidentiality,<sup>478</sup> and enrolls teens even if they are undocumented or do not have parental permission for exams or testing. HEAT’s clinic offers a full range of medical, mental health, supportive, and prevention services, including HIV treatment and hormone therapy at no charge.<sup>479</sup> The program also offers patients paid and volunteer positions within the HEAT Program.<sup>480</sup>

#### G. Living Wage Employment Opportunities and Job Training and Readiness Programs

Between eighty and ninety-five percent of youth in the sex trade report that they trade sex in order to obtain money.<sup>481</sup> The comparatively high remuneration offered by selling sex, combined with low barriers to entry, therefore acts as an incentive to engage in trading sex in some contexts.<sup>482</sup> Contrary to common understanding, many young people do not need “reeducation” or “rehabilitation” in order to leave the sex trade; instead 60% report that stable employment is necessary for them to exit, while 51% point to education and 41% to stable housing.<sup>483</sup>

475. INTER-AGENCY WORKING GRP. ON KEY POPULATIONS, *supra* note 429, at 26.

476. AIDS INST., N.Y. STATE DEP’T OF HEALTH, TRANSITIONING HIV-INFECTED ADOLESCENTS INTO ADULT CARE 8 (2011), [cdn.hivguidelines.org/wp-content/uploads/transitional-care-best-practices-06-27-2011.pdf](http://cdn.hivguidelines.org/wp-content/uploads/transitional-care-best-practices-06-27-2011.pdf).

477. *Who We Are*, HEALTH AND EDUCATION ALTERNATIVES FOR TEENS (HEAT) PROGRAM, <http://www.heatprogram.org/history.html> (last visited Dec. 20, 2015).

478. *Id.*

479. N.Y.C. ADMIN. FOR CHILDREN’S SERVS., RESOURCES FOR LGBTQ YOUNG PEOPLE WHO ARE SURVIVORS OF COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN (CSEC) 6 (2013).

480. AIDS INST., *supra* note 476, at 8.

481. CURTIS ET AL., *supra* note 27, at 63.

482. See BRENDAN M. CONNER ET AL., HIV YOUNG LEADERS FUND, SEXUAL AND REPRODUCTIVE HEALTH NEEDS AND ACCESS TO HEALTH SERVICES FOR ADOLESCENTS UNDER 18 ENGAGED IN SELLING SEX IN ASIA PACIFIC 30 (2014) (discussing adolescents engaged in the sex trade in the Asia-Pacific region).

483. CURTIS ET AL., *supra* note 27, at 110. Respondents could select multiple options, and as a result, the total exceeds 100%.

It is important to recognize that job training and readiness programs are unable to resolve discriminatory employment practices with respect to prior convictions and gender identity and sexual orientation discrimination. The barriers of a juvenile arrest history on career outcomes are well documented,<sup>484</sup> and safe harbor laws are for the most part ill-suited to prevent the use of these histories by potential employers. LGBTQ youth in particular face discrimination in hiring and promotion, as well as the push-out effect of workplace harassment.<sup>485</sup> Transgender youth in the sex trade directly link limited economic choices resulting from harassment and discrimination with trading sex as a survival strategy. In one study, transgender youth in the sex trade reported active efforts to find other work, but few had even received an initial interview.<sup>486</sup> Many reported direct discrimination on the basis of gender identity and expression along the lines of "we don't want someone like you here."<sup>487</sup>

For this reason, programs must not be limited to job readiness and training, but they must also include safe, secure, and living-wage employment opportunities. Creating job-training programs with a practicum component would allow youth to receive both supervised and hands-on application of their new skills. This would afford youth the opportunity to make contact with potential employers and secure full employment. Paid practicum opportunities would also allow youth to have independence while experiencing employment stability. The New York City Department of Youth and Community Development maintains a Summer Youth Employment Program, which provides New York City youth between the ages of fourteen and twenty-four with summer employment and educational experiences.<sup>488</sup> While the agency sets aside some slots specifically to serve foster care youth,<sup>489</sup> such programs must be exponentially expanded to meet the demand in both timing and scope, disconnected from any requirement of an adjudicated placement, and made voluntary and low-threshold. In addition, employment providers must be screened for affirming policies and practices.

---

484. See generally John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUST. 121 (1999); Jeffrey Grogger, *The Effect of Arrests on the Employment and Earnings of Young Men*, 110 Q.J. ECON. 51 (1995); Margit Wiesner et al., *History of Juvenile Arrests and Vocational Career Outcomes for At-Risk Young Men*, 47 J. RES. CRIME & DELINQ. 91 (2010).

485. BURWICK ET AL., *supra* note 462, at 20.

486. Rees, *supra* note 40, at 87-88.

487. *Id.* at 87.

488. *Summer Youth Employment Program (SYEP)*, N.Y.C. DEP'T OF YOUTH AND CMTY DEV., <http://www.nyc.gov/html/dycd/html/jobs/syep.shtml> (last visited Dec. 20, 2015).

489. Amy Ellen Schwartz et al., *Making Summer Matter: The Impact of Youth Employment on Academic Performance* 10 n.1 (N.Y. Univ. Steinhardt School of Culture, Educ., and Human Dev., Working Paper #03-14, 2014), [http://steinhardt.nyu.edu/scmsAdmin/media/users/spa2/Schwartz\\_et\\_al\\_Making\\_Summer\\_Matter.pdf](http://steinhardt.nyu.edu/scmsAdmin/media/users/spa2/Schwartz_et_al_Making_Summer_Matter.pdf)

## H. Improving Food Security

Limited access to food forces many youth into engaging in survival sex. In one New York study, many youth report difficulty acquiring food stamp benefits and hardship retaining them because of an inconsistent place of residence, “workfare” requirements, and discrimination and service denial.<sup>490</sup> Over half of youth, 54%, “reported that food was their top priority when it came to spending their earnings” and 31% of respondents “reported receiving food in exchange for a sexual service.”<sup>491</sup> Throughout interviews, “youth said that the limited avenues they had to obtain food led many of them to trade sex.”<sup>492</sup> Improving access to food through programs such as food pantries, mobile food trucks, and daily meals provided by organizations specifically for youth would reduce the pressures young people face to resort to survival sex to meet basic needs.

## CONCLUSION

The middle-class “child-savers” who backed Superintendent Amigh were not always so careful to couch interventions in the language of rescue but gestured to a more depraved delinquency that justified extended commitment. Julia Lathrop, a principal proponent of the Juvenile Court Act of 1899 and future Director of the U.S. Children’s Bureau, said, “These ruined children are brought before the justices over and over again. The children regard it as a mere joke.”<sup>493</sup> Apparently, it was the object of the child-savers to stop children from laughing by confining them to institutions for their own good.

Perhaps most disturbing is the federal government’s willingness to join the fray on the side of the “arrest-institutionalization” model. There is a sad irony in the fact that the federal government is currently advancing safe harbor laws given its abysmal record on the use of enforcement actions by the FBI to “rescue” youth in the sex trades.<sup>494</sup> In 2013, Congress directed the Attorney

---

490. DANK ET AL., *supra* note 278, at 76.

491. *Id.*

492. *Id.*

493. *An Illinois History of Juvenile Court*, WBEZ (June 16, 2010), <http://www.wbez.org/episode-segments/illinois-history-juvenile-court>.

494. In November 2010, the FBI’s Operation Cross Country V “recovered” sixty-nine children and arrested ninety-nine alleged pimps, but officers also arrested nearly 786 others on state and local charges. *See* Press Release, Fed. Bureau of Investigation, Sixty-Nine Children Rescued During Operation Cross Country V (Nov. 8, 2010), [http://www.fbi.gov/news/pressrel/press-releases/occv\\_110810](http://www.fbi.gov/news/pressrel/press-releases/occv_110810). Some number of the residual arrestees may be adult sex workers. The size of these actions continues to increase, bringing in a larger number of arrests and “rescues” each year. In Fiscal Year 2012, FBI Innocence Lost Initiative operations resulted in an astounding 1,769 arrests and “547 child victims being identified and/or located.” U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS—FISCAL YEAR 2012 41-42 (2013).

General to facilitate the promulgation of a model state statute to "treat an individual under 18 years of age who has been arrested for engaging in, or attempting to engage in, a sexual act with another person in exchange for monetary compensation as a victim of a severe form of trafficking in persons" and to refer such children to appropriate services rather than prosecuting them for prostitution.<sup>495</sup> As of this writing, the model statute has yet to be issued. Since that time, the President signed a bill to give preferential consideration for federal grants to states that have enacted safe harbor laws, described as a law that "discourages or prohibits the charging or prosecution" of a trafficked minor and "encourages the diversion" of minors to "appropriate service providers."<sup>496</sup> Signaling the widespread accession to this view, in her confirmation hearing, Attorney General Loretta Lynch testified that safe harbor laws represent "an essential next step in helping the victims of this horrible scourge."<sup>497</sup> This wave of moral support is drowning the warning of advocates that the bill threatens to "criminalize victims" and recommendations that "a true Safe Harbor Law will not arrest victims and instead ensure their access to service providers."<sup>498</sup>

It has been the goal of this Article to challenge the prevailing trust in law-enforcement-based interventions in this area and to introduce important questions for state and federal legislators to consider. However, the interrogatories posed by this paper raise more questions than they do answers, justifying further research into the issues posed by these laws, which may be of interest to litigators, scholars, and judges. In particular, safe harbor laws are not only based on factually questionable assumptions as articulated by this Article; the laws also present significant questions as to their constitutionality—the trend toward "automatic" finding of state custody based solely on a prostitution arrest may amount to violations of due process for lack of individualized determinations. Cases in which the disposition is grossly disproportionate to the crime committed also raise concerns related to substantive due process and the Eighth Amendment's prohibition on cruel and unusual punishment. Recent literature has also posited that federal law, by implied preemption, precludes states' enforcement of criminal prostitution laws against minors, in that enforcing state prostitution laws against minors frustrates the TVPA's protective and prosecutorial purposes through "treating prostituted minors as criminals, thereby re-traumatizing them, . . . contributing to the

---

495. Trafficking Victims Protection Reauthorization Act of 2013. Pub. L. No. 113-4, § 1243, 127 Stat 54, 154 (codified at 22 U.S.C. § 7101).

496. Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 601, 129 Stat. 227, 258-59 (codified at 42 U.S.C. §§ 3796dd to 3796dd-8).

497. *Attorney General Confirmation Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015) (statement of Loretta Lynch, United States Attorney, Eastern District of New York).

498. FREEDOM NET., STOP EXPLOITATION THROUGH TRAFFICKING ACT LETTER 1 (2014), <http://freedomnetworkusa.org/wp-content/uploads/2012/05/Stop-Exploitation-through-Trafficking-Act-Letter.pdf>.

misidentification of victims,” “squandering opportunities to investigate and prosecute traffickers,” and discouraging witnesses from cooperating with law enforcement.<sup>499</sup>

In addition, while safe harbor proponents laud the policies as one area where the United States conforms its international treaty obligations, safe harbor laws do nothing to end arrests of youth engaged in the sex trades, and many in fact presume that arrests will continue to take place, arguably in violation of international law. The Convention on the Rights of the Child and other international legal instruments—including the Second Optional Protocol to which the United States is a State Party—prohibit the use of custodial arrest and involuntary detention against minors engaged in the sex trade.<sup>500</sup> The body charged with monitoring compliance with the treaty—the Committee on the Rights of the Child—has increasingly criticized governments for retaining laws criminalizing minors for prostitution. For instance, the United States was encouraged in the first review of its compliance with its treaty obligations to “[e]nsure that all persons below the age of 18 who are victims of any of the offenses under the Optional Protocol are as such neither criminalized nor penalized at [the] federal or state level.”<sup>501</sup> When the Committee revisited the United States with its most recent review, it criticized the law-enforcement-based approach of the nation, singled out the paucity of voluntary shelter beds for youth in the sex trades (identifying only a few hundred beds), and pointing out the contradiction that “[e]ven in states with safe-harbour laws which provide for service referral to victims, these are often non-existent resulting in most cases in arrest and detention in order ‘to protect’ children from further violations and suffering.”<sup>502</sup>

Those youth who either enter into or experience force, fraud, or coercion in the sex trades are in clear need of serious and effective services, including secure housing for protection from pimps and even abusive parents. However, the findings presented in this Article suggest that, even for those young people

---

499. Susan Crile, Comment, *A Minor Conflict: Why the Objectives of Federal Sex Trafficking Legislation Preempt the Enforcement of State Prostitution Laws Against Minors*, 61 AM. U. L. REV. 1783, 1824 (2012); see also Carly Elizabeth Souther, *Victims Not Vixens: Prostituted Children and the Case for Preemption*, 21 GEO. J. ON POVERTY L. & POL’Y 381, 397-98 (2014).

500. See CONNER, *supra* note 482, at 11-14.

501. Comm. on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 12, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography: Concluding Observations: United States of America*, ¶ 38(a), U.N. Doc. CRC/C/OPSC/USA/CO/1 (June 25, 2008).

502. Comm. on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 12, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography: Concluding Observations: United States of America*, ¶ 44, U.N. Doc. CRC/C/OPSC/USA/CO/2 (July 2, 2013).

coerced into participation, services *must* be optional so as not to subject youth to the very denial of agency that they experienced at the hands of exploiters. Finally, this voluntary approach must apply regardless of whether youth involvement is due to circumstance or coercion, not only because mandated services are potentially harmful, but also because using police officers as a gateway to such services exposes all youth to harms that may surpass those they are escaping.

This paper invokes the Geneva School to sound a warning to state and federal legislators advocating for the adoption and expansion of safe harbor laws. Instead of the interventionist model promoted by categorical victimhood, youth must be asked what they need to survive. For some youth, a self-identified need is exit from the sex trade and secure housing for protection from controlling family members, intimate partners, or pimps. For many others, however, what is needed is a living wage alternative to the sex trade. The discourse must be adjusted according to the principle that, regardless of whether minors trade sex as a result of limited economic circumstances or physical coercion, forced "rehabilitation" through handcuffing young people to services and confining them in institutions by taking advantage of lesser due process protections in family court systems is inconsistent with principles of due process, counterproductive, and wrong.