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Rights for Child Victims of Prostitution: A Significant Step in the Right Direction under the Florida Safe Harbor Act

By Banesa Arencibia*

I. INTRODUCTION

Carissa Phelps was only twelve years old when she got involved in prostitution after running away from a dysfunctional home. She describes meeting a man named Icey:

He . . . told me their sad story about how they needed money to get a car out of impound and that his current girlfriend could not make the money because she was pregnant and that I could really help them a lot, he said, if I could go out onto the street. So he tried to make me feel like I was contributing something . . . it was supposed to just be one night, and it turned into [ten] horrible days.¹

Despite her struggles, Carissa managed to escape that terrible situation and today she has a juris doctor degree.² She is a shining example of what troubled youth can accomplish in spite of facing major adversities early in life.³ Nevertheless, a runaway and misguided child, like Carissa, who engages in prostitution, would in today's legal system be arrested, prosecuted, and treated like a criminal in most states. A study released in 2004 showed that law enforcement authorities arrested seventy-four percent of minors who were found to be involved in prostitution between 1997 and 2000.⁴ In 2008, the number of children arrested reached approximately 1500 under the age of eighteen.⁵ This treatment robs prostituted children of the opportunity to become successful adults by tainting their lives with a criminal record, which can exacerbate existing psychological trauma.⁶ Prostituted children are victims, not criminals who deserve punishment.

Florida broke away from this practice of punishment through the passage of a statute protecting child victims of prostitution. The Florida Safe Harbor Act advances the rights of prostituted children.⁷ It is a stronger effort than similar laws passed in other states because it

* J.D., 2014, Florida International University College of Law. I would like to thank the following: Professor Megan Fairlie, for helping me find the right path; Professor Christyno L. Hayes, for her advice and guidance; my parents, for their love and support; my husband, for keeping me sane through this process; and all members of the FIU Law Review, for your help along the way. This piece is dedicated to those who have devoted their lives to defending the rights of those who need it most, children. In it, I intend not to criticize their efforts but to highlight their triumphs and suggest ways to improve upon them. From a humble but ardent thinker, who too hopes that it will create in you the fervor needed to advocate for the plight of children.

¹ Interview by Guy Raz with Carissa Phelps, CEO, Runaway Girl, FPC, in Cal. (July 21, 2012), available at <http://www.npr.org/2012/07/21/156969979/from-juvie-to-j-d-the-story-of-a-runaway-girl>.

² *Id.*

³ *Id.*

⁴ David Finkelhor & Richard Ormrod, *Prostitution of Juveniles: Patterns From NIBRS*, NAT'L CRIMINAL JUSTICE REFERENCE SERV. 5 (June 2004), <https://www.ncjrs.gov/pdffiles1/ojdp/203946.pdf>.

⁵ Tamar R. Birkhead, *The "Youngest Profession": Consent, Autonomy, and Prostituted Children*, 88 WASH. U.L. REV. 1055, 1062 (2011), available at http://www.americanbar.org/content/dam/aba/publications/criminaljustice/jj_birkhead.authcheckdam.pdf.

⁶ See Sarah Esther Lageson, Mike Vuolo & Christopher Uggen, *Legal Ambiguity in Managerial Assessments of Criminal Records*, 4 LAW & SOC. INQUIRY 39, 73 (2014) (discussing the psychological effects that result from having a criminal record).

⁷ FLA. STAT. ANN. § 39.001 (West 2015).

creates a separation between the dependency⁸ and delinquency⁹ systems—regardless of the child's age¹⁰—and provides specific guidelines for carrying out its objectives.¹¹

The Florida statute is problematic, however, in that it allocates initial decision-making powers to law enforcement.¹² Further, the Florida statute raises constitutional concerns by allowing the involuntary confinement of children while finding them not guilty of any crime that would justify such confinement.¹³ These issues could be resolved by amending the statute to provide clearer guidelines for police officers and by changing the current child-abuse model to one that better resembles a hybrid version, which includes the criminalization of the minors' acts. Despite its shortcomings, the statute is likely to be successful in combating the mistreatment of prostituted children because it provides a detailed methodology for dealing with sexually-exploited children and training for personnel involved in the process. Improvements to the statute are likely to come in the near future, as demonstrated by the recent amendments to the statute,¹⁴ because child prostitution has become a popular topic in the policy-making arena.¹⁵

Historically, courts and legislatures have prosecuted child victims of prostitution as delinquents instead of treating them as victims of horrifying crimes.¹⁶ Recognizing this treatment as an issue, child rights advocates began efforts to change this construct starting with New York in 2008.¹⁷ Their efforts culminated in what are now known as “safe harbor” laws.¹⁸ When used in the context of children's rights, “safe harbor” refers to laws that treat prostituted children as victims as opposed to criminals, by providing them with treatment instead of punishment.¹⁹

There are three state approaches to child prostitution: (1) the child-abuse model; (2) the prosecution model; and (3) the hybrid model.²⁰ The child-abuse model, exemplified in Boston, recognizes that child prostitution is often equivalent to child exploitation and that these children are victims who need treatment and care as opposed to punishment.²¹ The prosecution model, illustrated in Las Vegas, also recognizes that these children are victims, but it posits that the best

⁸ Dependency system refers to the family court/civil proceedings that concern the well-being and custody of a child.

⁹ Delinquency system refers to criminal proceedings.

¹⁰ See FLA. STAT. ANN. § 39.01(69)(g).

¹¹ See *id.* § 39.001(5)(b)(2). Consent is used in this Article to refer to the notion that a person freely agrees to engage in a particular action and it is not forced or in any way coerced into it.

¹² FLA. STAT. ANN. § 39.401.

¹³ *Id.*; Ryan Benk, *Human Trafficking Experts Rally Against Proposed Changes To Safe Harbor Act*, WFSU (Mar. 14, 2014, 12:00 AM), <http://news.wfsu.org/post/human-trafficking-experts-rally-against-proposed-changes-safe-harbor-act> (describing child advocate Trudy Novicki's concerns regarding the constitutionality of the proposed amendments to the Florida Safe Harbor Statute later enacted June 17, 2014).

¹⁴ See H.B. 7141, 2014 Leg., Reg. Sess. (Fla. 2014).

¹⁵ Many states have continued to legislate on the subject by either amending their current safe harbor statutes or by enacting new statutes. See CONN. GEN. STAT. ANN. § 53a-82 (West 2015); see 720 ILL. COMP. STAT. ANN. 5/11-14(d) (West 2015); see MINN. STAT. ANN. § 260B.007(6)(c) (West 2015); see N.J. STAT. ANN. § 2C:13-8 (West 2015); see NEB. REV. STAT. ANN. § 28-801(5) (West 2015).

¹⁶ See, e.g., *In re B.D.S.D.*, 289 S.W.3d 889, 899 (Tex. App. 2009) (finding that a child has engaged in delinquent conduct by committing the offense of prostitution).

¹⁷ See Wendi J. Adelson, *Prostitute or Victim of Trafficking?*, 6 U. ST. THOMAS L.J. 96, 107 (2008) (discussing New York's Anti-Human Trafficking statute); Marihug P. 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, 170–71 (2012).

¹⁸ See Megan Anitto, *Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors*, 30 YALE L. & POL'Y REV. 1, 45 (2011); see Emily Foxhall, *A Shelter for Victims of Sex Trafficking Offers Counseling, Schooling and Safety*, N.Y. TIMES (July 14, 2012), http://www.nytimes.com/2012/07/15/us/freedom-place-near-houston-provides-shelter-for-young-sex-trafficking-victims.html?_r=0.

¹⁹ See Foxhall, *supra* note 18.

²⁰ See generally H.B. 0099, 2012 Leg., Reg. Sess. (Fla. 2012) (providing a background explanation for the different models in relation to child prostitution).

²¹ See Birkhead, *supra* note 5, at 1106–07 (describing the My Life, My Choice Project in Boston, a non-profit program that provides counseling, mentoring, and training aimed at adolescent girls to prevent them from falling prey to prostitution).

way to help them is through arrest and prosecution.²² Alternatively, the hybrid model, represented in San Francisco, combines the child-abuse and prosecution models. Under the hybrid approach, prostituted children are prosecuted, but they also receive counseling and community-based support.²³ These approaches are frameworks through which different states' laws can be analyzed, whether the state has "safe harbor" laws or not. States that do have "safe harbor" laws often do not neatly conform into one approach but more often fit the hybrid model. The ideologies of states are evident in how the criminal system treats prostituted children.²⁴

In 2008, New York was the first state to develop "safe harbor" statutes or case law,²⁵ and many other states such as Washington, Connecticut, Illinois, and Texas have followed in subsequent years.²⁶ Florida passed the Safe Harbor Act in 2012, becoming the most recent state to adopt such a law.²⁷ This Article examines the Florida Safe Harbor Act to answer the following: (1) in what context did this law arise; (2) how did international, national, federal, and other states' laws influence the Florida statute; and (3) what are the statute's drawbacks and how can they be addressed. This Article concludes that Florida's "safe harbor" law is superior to other states' efforts, because, if applied correctly, it will protect prostituted children from being treated as juvenile delinquents, regardless of consent.

II. BACKGROUND

A. One Potential Source of the Problem

In the United States, Christian values are prominent and affect the nation's moral culture.²⁸ Laws can be a reflection of society's values.²⁹ Interracial marriages, for example, were illegal in the United States from the 1660s until *Loving v. Virginia*³⁰ legalized interracial marriage in 1967.³¹ Before *Loving* reached the U.S. Supreme Court, the trial court, in upholding the illegality of interracial marriages, used religious views as a basis for its holding: "Almighty God created the races white, black, yellow, malay, and red, and he placed them on separate continents

²² See Melissa Dess, Note, *Walking The Freedom Trail: An Analysis of the Massachusetts Human Trafficking Statute and Its Potential To Combat Child Sex Trafficking*, 33 B.C. J.L. & SOC. JUST. 147, 174 (2013) (discussing that in Las Vegas, "prostitution is a misdemeanor offense that can result in detention lasting, on average, three weeks," a time period in which the children are provided limited social services).

²³ See Birkhead, *supra* note 5, at 1106 (discussing the First Offender Prostitution Program in San Francisco that keeps minors who engage in prostitution out of the court system and provides them with access to educational and rehabilitation programs).

²⁴ See MASS. GEN. LAWS ANN. ch. 119, § 21 (West 2015) (setting out children as victims by defining a "sexually exploited child" to include children who engage in prostitution with or without consent); see also DARLENE LYNCH & KIRSTEN WIDNER, BARTON CHILD LAW & POL'Y CLINIC, COMMERCIAL EXPLOITATION OF CHILDREN IN GEORGIA: SERVICE DELIVERY AND LEGISLATIVE RECOMMENDATIONS FOR STATE AND LOCAL POLICY MAKERS 1-5 (Elizabeth Reimels ed., 2008), available at http://bartoncenter.net/uploads/fall2011updates/status_other/CSEC-recs-for-policy-makers.pdf (discussing Georgia's laws as lacking because they provide for the prosecution of minors who engage in prostitution as the only way to "link . . . children to services," portraying the prosecution model).

²⁵ See *People v. Doe*, 935 N.Y.S.2d 481, 483 (N.Y. Sup. Ct. 2011) (stating that New York passed "safe harbor" laws in 2008 in response to the federal Trafficking Victims Protection Act of 2000, 22 U.S.C. §§ 7101-7113 (2012)).

²⁶ See CONN. GEN. STAT. ANN. § 53a-82 (West 2015); see 720 ILL. COMP. STAT. ANN. 5/11-14(d) (West 2015); See WASH. REV. CODE ANN. § 13.40.219 (West 2015); *In re B.W.*, 313 S.W.3d 818, 826 (Tex. 2010).

²⁷ See FLA. STAT. ANN. § 39.001 (West 2015).

²⁸ Patrick Devlin, *Morals and the Criminal Law*, in LAW AND MORALITY: READINGS IN LEGAL PHILOSOPHY 308, 372 (David Dyzenhaus et al. eds., 3d ed. 2007); Ronald R. Cherry, *The Judeo-Christian Values of America*, AM. THINKER (Sept. 15, 2007), http://www.americanthinker.com/articles/2007/09/the_judeochristian_values_of_a.html.

²⁹ See Brief for Agudath Israel of America as Amicus Curiae Supporting Respondent at 568, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

³⁰ *Loving v. Virginia*, 388 U.S. 1 (1967) (ruling that it was unconstitutional to prohibit interracial marriages).

³¹ B.A. Robinson, *Marriage Prohibition on the Basis of Race: Part 1*, RELIGIOUS TOLERANCE, (May 27, 2014), http://www.religioustolerance.org/hom_mar14.htm.

... he did not intend for the races to mix.”³² This quote made apparent how the prejudices and religious views of those in the legal profession can distort reason and affect the law.

Today, interracial marriages are both legal and common, but same-sex marriage is prohibited in many states.³³ The persistence of this policy, at least in some states, signals that law is still influenced by religion. Prostitution, like same-sex marriage, was outlawed because it is viewed as an immoral act.³⁴ While prostitution and same-sex marriage are inherently different legal issues, they seem to both be affected by society's views of religion and morality.

People who believe in God often form their moral views out of their religious beliefs,³⁵ and Christianity played a role in the foundation of the United States as it exists today.³⁶ In Christianity, a person's virginity is an object of pureness to be reserved for marriage,³⁷ and thus intercourse is immoral if it does not take place within the context of marriage.³⁸ Under this view, an individual who, in exchange for money or before marriage, engages in intercourse is committing a transgression against God, making their act immoral in the eyes of society.³⁹ This same rationale could be applied to children who engage in prostitution by categorizing their acts as immoral.⁴⁰ Although morality may not be responsible for generating the problem that “safe harbor” laws attempt to fix—the treatment of prostituted children as criminals as opposed to victims—it could be a factor.

In arguing that religion may play a subconscious role in our morals and therefore in our laws, it is important to clarify that this is not a criticism of religion. In fact, religious groups are often involved in helping abused children,⁴¹ including those who have perhaps not been down a righteous path. As individuals, our religious views are part of us, and just like biases they affect the way we view the world even when we have the best intentions. As Henri Bergson put it: “the eye sees only what the mind is prepared to comprehend.”⁴²

B. International Protections

Sex trafficking—different from prostitution in that it involves a lack of consent⁴³—is a mobile crime that spreads across borders and often involves children.⁴⁴ In 2000, the United

³² *Id.*; *Loving*, 388 U.S. at 3.

³³ See Nancy K. Kubasek et al., *Civil Union Statutes: A Shortcut to Legal Equality for Same-Sex Partners in a Landscape Littered with Defense of Marriage Acts*, 15 U. FLA. J.L. & PUB. POL'Y 229, 237–38 (2004).

³⁴ See *Roe v. Butterworth*, 958 F. Supp. 1569, 1577 (S.D. Fla. 1997), *aff'd*, 129 F.3d 1221 (11th Cir. 1997).

³⁵ WILLIAM J. WAINWRIGHT, *RELIGION AND MORALITY* (2005) (supporting command theory, a theory that argues that God's commands determine right from wrong and moral from immoral).

³⁶ Mark David Hall, *Did America Have a Christian Founding?*, HERITAGE FOUND. (June 7, 2011), <http://www.heritage.org/research/lecture/2011/06/did-america-have-a-christian-founding>.

³⁷ See 1 *Corinthians* 7:7–9 (“I wish that all were as I myself am. But each has his own gift from God, one of one kind and one of another. To the unmarried and the widows I say that it is good for them to remain single as I am. But if they cannot exercise self-control, they should marry. For it is better to marry than to burn with passion.”).

³⁸ See *id.* at 7:2 (“But because of the temptation to sexual immorality, each man should have his own wife and each woman her own husband.”); see also *Sieber v. Town of Oliver Springs*, No. E1999-01228-COA-R3-CV, 2000 WL 555233, at *3 (Tenn. Ct. App. May 8, 2000) (stating that engaging in sex for money was immoral conduct).

³⁹ See 1 *Corinthians* 7:2; see *Sieber*, 2000 WL 555233, at *3.

⁴⁰ See Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 107–08 (2010) (discussing juvenile transfer laws and a perceived “moral panic” that swept the United States during the 1990s).

⁴¹ Some of the religious entities involved in efforts to protect children from sexual abuse include the Archdiocese of Chicago Office for Child Abuse Investigations and Review, Jewish Child and Family Services, Misericordia, and the Brevard Interfaith Coalition, to name a few. See *Brevard Interfaith Coalition*, CATHOLIC CHARITIES OF CENTRAL FLORIDA (Jan. 22, 2015, 9:10 P.M.), <http://www.cflcc.org/interfaith/home>; *Coalition Against Sexual Abuse of Children with Disabilities (CASACD)*, CHICAGO CHILDREN'S ADVOCACY CENTER (Jan. 22, 2015, 9:00 P.M.) <http://www.chicagocac.org/what-we-do/casacd/>.

⁴² MICHAEL MCCAUSLAND, *PIONEERING IN THE 21ST CENTURY: SURVIVAL SKILLS FOR THE TRANSFORMATION GENERATION*, 83 (2012), available at <https://s3.amazonaws.com/hstatic/Pioneering+in+the+21st+Century.pdf>.

⁴³ Sex trafficking takes place when a child is kidnapped or coerced into exchanging sexual favors for money, whereas prostitution takes place when a child decides to engage in prostitution and does so willingly. See Elizabeth M. Bruch, *Models Wanted: The Search*

Nations (the “U.N.”), in response to this international concern, created a Protocol to Prevent, Suppress, and Punish Trafficking in Persons (the “Trafficking Protocol”).⁴⁵ The Trafficking Protocol’s stated purposes are: (1) to stop and fight human trafficking, especially in women and children; (2) to protect and aid victims; and (3) to promote collaboration among countries.⁴⁶ The Trafficking Protocol defines “trafficking in persons” as the “[r]ecruitment, transportation, transfer, harboring, or receipt of persons” against their will and by use of threats, force, or other means of coercion.⁴⁷ The Trafficking Protocol protects victims of sexual exploitation—including child and adult prostitutes—by requiring that State Parties: (1) enact legislation criminalizing prohibited actions; (2) protect the victim’s identity; (3) provide treatment and avenues for the victim’s relief; (4) create programs to educate the public about trafficking; and (5) train law enforcement and other relevant authorities.⁴⁸

Joining over one hundred other countries, the United States signed the Trafficking Protocol in December 2000.⁴⁹ The protocol provides protection, prevention, and unification at the international level to necessarily deal with this mobile crime.⁵⁰ The Trafficking Protocol has been successful in that there are now more resources allocated to dealing specifically with human trafficking.⁵¹ There have also been significant advancements including the creation of a new visa status for victims in order to facilitate their integration into society.⁵² Still, the Trafficking Protocol has drawbacks. For example, it does not cover trafficking over the Internet, creating a gap of protection.⁵³ Further, while the Trafficking Protocol is helpful, it does little to control domestic sex trafficking.⁵⁴ Even if a nation agrees to the minimum standards set forth in the protocol, prostitution will not be affected without implementation and enforcement at the local level.⁵⁵

C. Federal and National Protections

1. Federal Law

Approximately 200,000 children are victims of prostitution in the United States annually.⁵⁶ Recent reports suggest that many more children may be at risk.⁵⁷ Congress has responded by

for an Effective Response to Human Trafficking, 40 STAN. J INT’L L. 1, 19 (2004) (discussing that the debate around the difference between trafficking and prostitution focuses on consent).

⁴⁴ H.B. 1355, 2012 Leg., Reg. Sess. (Fla. 2012); Theodore R. Sangalis, Comment, *Elusive Empowerment: Compensating the Sex Trafficked Person Under The Trafficking Victims Protection Act*, 80 FORDHAM L. REV. 403, 408–09 (2011).

⁴⁵ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Trafficking Protocol], available at <https://treaties.un.org/doc/Publication/UNTS/Volume%202237/v2237.pdf>.

⁴⁶ *Id.* at 344.

⁴⁷ *Id.*

⁴⁸ *Id.* at 344–47.

⁴⁹ Velez v. Sanchez, 693 F.3d 308, 323 (2d Cir. 2012); Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564, 1662 (2006).

⁵⁰ Trafficking Protocol, *supra* note 45, at 345–48.

⁵¹ See Jennifer L. Enck, Note, *The United Nations Convention Against Transnational Organized Crime: Is It All That It Is Cracked Up to Be? Problems Posed by the Russian Mafia in the Trafficking of Humans*, 30 SYRACUSE J. INT’L L. COM. 369, 377 (2003).

⁵² See *id.* at 379–80.

⁵³ Kendall Vitale, Comment, *Barricading the Information Superhighway to Stop the Flow of Traffic: Why International Regulation of the Internet is Necessary to Prevent Sex Trafficking*, 27 AM. U. INT’L L. REV. 91, 95–96.

⁵⁴ See Enck, *supra* note 51, at 385. Domestic sex trafficking refers to the trafficking of human beings for sex that takes place within a country’s borders and not at an international level. See HUMAN SMUGGLING & TRAFFICKING CTR., DOMESTIC HUMAN TRAFFICKING - AN INTERNAL ISSUE, U.S. DEP’T OF STATE 2 (2008), available at <http://www.state.gov/documents/organization/113612.pdf> [hereinafter *Domestic Human Trafficking*] (discussing the misconception that human trafficking is an international and not a domestic problem).

⁵⁵ See *Domestic Human Trafficking*, *supra* note 54, at 4 (discussing how law enforcement authorities need to be more aware of human sex trafficking in order to better identify victims of these crimes).

⁵⁶ *Human Trafficking Cheat Sheet*, POLARIS PROJECT (2012), http://www.rescue.org/sites/default/files/resource-file/Human%20Trafficking%20Cheat%20Sheet_0.pdf; Courtney Bryan, Dir. Criminal Justice Operations, Ctr. Court Innovation, *What*

passing the Trafficking Victims Protection Act of 2000 (the "TVPA").⁵⁸ The TVPA criminalized human trafficking and granted relief in the form of benefits and services to those identified as victims of severe human trafficking, including children.⁵⁹ Severe human trafficking is defined as "sex trafficking . . . induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained [eighteen] years of age; or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services."⁶⁰

As the Criminal Court of the City of New York explained in *People v. Samantha R.*, the TVPA creates federal protections for individuals under eighteen who have been induced to prostitute themselves.⁶¹ Adult victims of human trafficking, unlike child victims, have the additional requirement of becoming certified as victims of severe human trafficking.⁶² The Secretary of Health and Human Services certifies only those victims who assist in the investigation and prosecution of traffickers.⁶³ The benefits of certification include, but are not limited to, temporary asylum (where applicable), housing, food, and other basic needs, such as medical care, health care and counseling, case management, legal assistance, transportation, English language classes, and job skills training (for adult victims).⁶⁴ Although the TVPA is helpful, it does not fix the problem of unjust treatment of child victims of prostitution at the state level. Because the TVPA has not been successfully implemented locally, critics have described it as a lack of "Prosecution, Prevention, Protection, and Partnership."⁶⁵

2. National Efforts

In addition to international and federal law, there are national efforts geared at eradicating human trafficking. The American Bar Association (the "ABA") has a "Task Force on Human Trafficking" (the "Task Force") that seeks to mobilize the legal profession to combat human trafficking through raising awareness, advocacy, and education.⁶⁶ The Task Force engages in a number of national activities, including: corporate training, assisting in pro bono activities, engaging in publication of materials to raise public awareness, training for legal professionals and

Judges Need to Know About Human Sex Trafficking: Screening and Assessment and Matching to Empirically Based Treatment, Presented at the National Council of Juvenile and Family Court Judges Annual Conference (July 14, 2014).

⁵⁷ See William Adams et al., *Effects of Federal Legislation on the Commercial Exploitation of Children*, NAT'L CRIMINAL JUSTICE REFERENCE SERV. 1 (July 2010), <https://www.ncjrs.gov/pdffiles1/ojdp/228631.pdf> (estimating that the number of children in the United States at risk of sexual exploitation could be as high as 300,000).

⁵⁸ Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7101(a) (2012); U.N. Office on Drugs & Crime, *An Introduction to Human Trafficking: Vulnerability, Impact and Action*, U.N. Doc. V.07-88925, at 1, 99 (Jan. 2008), available at http://www.ungift.org/docs/ungift/pdf/knowledge/background_paper.pdf ("The United States regards trafficking in persons as an important issue both because of its human impact and also because of its consequences for national security, primarily with respect to terrorism, crime, health and welfare, and border control.").

⁵⁹ 22 U.S.C. § 7101(b)(14)–(15), (17)–(19).

⁶⁰ *Id.* § 7102(9).

⁶¹ *People v. Samantha R.*, 941 N.Y.S.2d 540, at *2 (Crim. Ct. 2011).

⁶² 22 U.S.C. § 7105(b)(1)(C); Nguyen Van Hanh, *Testimony on the Trafficking Victims Protection Act of 2000*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Mar. 7, 2002), <http://www.acf.hhs.gov/programs/olab/resource/testimony-on-the-trafficking-victims-protection-act-of-2000>.

⁶³ 22 U.S.C. § 7105(b)(1)(E).

⁶⁴ *Information for Victims of Human Trafficking*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (Apr. 2010), available at http://www.dhs.gov/xlibrary/assets/ht_ice_victim_assistance_program.pdf.

⁶⁵ Jennifer A.L. Sheldon-Sherman, *The Missing "P": Prosecution, Prevention, Protection, and Partnership in the Trafficking Victims Protection Act*, 117 PENN ST. L. REV. 443, 460 (2012) ("Because local law enforcement officers are more familiar with their jurisdiction and are more likely to have personal connections within the community, they are more likely than federal law enforcement to be approached by witnesses of trafficking or to come in first-hand contact with trafficking victims."); see also Dina Francesca Haynes, *Good Intentions Are Not Enough: Four Recommendations for Implementing the Trafficking Victims Protection Act*, 6 U. ST. THOMAS L.J. 77, 77 (2008) (arguing that the TVPA has not been successfully implemented and that "human trafficking appears to be increasing as traffickers discover how lucrative and easy it is to enslave another human being").

⁶⁶ *What We Do*, AM. BAR ASS'N TASK FORCE ON HUMAN TRAFFICKING, http://www.americanbar.org/groups/human_rights/projects/task_force_human_trafficking/whatwedo.html (last visited Jan. 15, 2015) (discussing how the ABA Task Force will create awareness and train the legal community to focus on human trafficking issues).

government agencies, and lobbying and partnering to draft legislation.⁶⁷ The ABA petitioned the National Conference of Commissioners⁶⁸ to draft legislation focusing on human trafficking for sexual purposes in which a child or adult became involved through force, fraud, or coercion—but not intended to cover consensual prostitution.⁶⁹

The ABA, in its proposal to the Committee, posited that uniform state laws on trafficking would promote inter-jurisdictional collaboration, which would in turn help the nation combat human trafficking more effectively.⁷⁰ The National Conference of Commissioners, in support of the ABA's argument, drafted the Prevention of and Remedies for Human Trafficking Act (the "Uniform Act"), which was enacted in its final form in July 2013.⁷¹ The Uniform Act has interesting provisions geared specifically at human trafficking and touching upon prostitution.⁷² The Uniform Act combines some of the ideas expressed in previous drafts with some nuances, such as introducing the concept of aggravating circumstances.⁷³

The Uniform Act makes human trafficking a felony regardless of whether a minor consented to being trafficked.⁷⁴ As set out in the draft, the Uniform Act operates under four grades of felony, A through D.⁷⁵ However, the final text⁷⁶ bases the severity on whether there is a child⁷⁷ involved, and on whether there are aggravating circumstances,⁷⁸ as opposed to using mens rea⁷⁹ as a guide like the draft. A grade-A felony would constitute the most serious felony (other than the death penalty), while a grade-D felony would be the least serious.⁸⁰ Under the Uniform Act, when the trafficked victim is a child, the degree of felony is raised, for example, from a C to a B.⁸¹ Trafficking under the proposed Uniform Act includes: transporting, transferring, harboring, receiving, providing, obtaining, isolating, maintaining, or enticing an individual for the purpose of forced labor or servitude, including sexual servitude.⁸² In addition to penalties for traffickers, the Uniform Act provides immunity from prosecution to minors who committed illegal activities—such as prostitution—as a result of being a victim of human trafficking.⁸³ If the victim is a child, they must be presumed to be a "child in need of protection" and treated in accordance with the applicable state's juvenile program.⁸⁴

⁶⁷ See *id.*

⁶⁸ The National Conference of Commissioners is a non-profit association of commissioners appointed by each state, with the purpose of discussing uniformity of laws among the states. *About the ULC*, UNIF. LAW COMM'N, <http://www.uniformlawcommission.com/Narrative.aspx?title=About%20the%20ULC> (last visited Jan. 15, 2015) ("[P]rovid[ing] states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.").

⁶⁹ *Id.*; *Uniform Law Commission Project Proposal: Uniform Human Trafficking Law*, AM. BAR ASS'N CTR. FOR HUMAN RIGHTS 1 (July 2010), <http://www.law.washington.edu/AsianLaw/HumanTrafficking/ULC-ProjectProposal.pdf> [hereinafter *Uniform Human Trafficking Law*].

⁷⁰ *Uniform Human Trafficking Law*, *supra* note 69, at 2.

⁷¹ UNIFORM ACT ON PREVENTION OF AND REMEDIES FOR HUMAN TRAFFICKING (2013), available at http://www.uniformlaws.org/shared/docs/Prevention%20of%20and%20Remedies%20for%20Human%20Trafficking/2013AM_UPRH_T_As%20approved.pdf.

⁷² *Id.* § 2(15) (defining victim as "an individual who is subjected to human trafficking"); see also *id.* § 15 (stating that minors are immune from prosecution if they commit a crime, like prostitution, as a result of being a victim of human trafficking).

⁷³ *Id.* § 9.

⁷⁴ See *id.* § 3.

⁷⁵ See *id.*

⁷⁶ See *id.* §§ 3(c), 9.

⁷⁷ Under the statute, "child" is any person under the age of eighteen. *Id.* § 2(9).

⁷⁸ Aggravating circumstances are circumstances that, when present, make a crime more serious and can increase the applicable sentence.

⁷⁹ Mens rea refers to the mental state required to find someone guilty of a particular crime.

⁸⁰ See UNIFORM ACT ON PREVENTION OF AND REMEDIES FOR HUMAN TRAFFICKING § 3.

⁸¹ See *id.* § 3(c).

⁸² *Id.* § 3.

⁸³ *Id.* § 15.

⁸⁴ *Id.* § 15(c).

Finally, the Uniform Act inflicts serious civil consequences on traffickers, giving victims the right to recover monetary damages from their abusers in the form of restitution, for both expenses incurred and for their labor.⁸⁵ Further, the Uniform Act would force the forfeiture of property, real and personal, by any person convicted under the Uniform Act, if the property was used or intended to be used to commit the crime or if it was acquired with the proceeds of the crime.⁸⁶ Lastly, the victim may bring a civil action against the offender to recover actual, compensatory, and punitive damages and may also request injunctive or other appropriate relief.⁸⁷

Since its enactment, the Uniform Act has been introduced in fourteen states but enacted only in four, not including Florida.⁸⁸ The Uniform Act seems promising because it provides strong deterrents against child sexual exploitation. The Uniform Act also provides victims with civil remedies and a defense against criminal liability.⁸⁹ The Uniform Act's provisions show special consideration for children by, for example, providing immunity for crimes committed while victims.⁹⁰ Despite these positive features, the Uniform Act only covers victims of trafficking and does not protect children who "consent"—children who are not trafficked but rather engage in prostitution freely are not considered victims under the statute.⁹¹ It is a very promising effort, however, in the field of children's rights. Uniformity of laws between the states could help stop human trafficking at the national level, while varying local state laws would have the effect of shifting the problem across borders.

D. State Protections

Despite the international and federal efforts to stop the prosecution of prostituted children in states that lack "safe harbor" laws, children under eighteen continue to be treated as criminals because prostitution is considered a crime.⁹² At least eleven states have passed "safe harbor" laws to create a "victim status" for child victims of prostitution.⁹³ This Article will examine the laws of New York, Washington, Connecticut, Illinois, Texas, and Florida—a representative sample of the national situation.⁹⁴

Washington, Connecticut, and Illinois take a hybrid approach, using prosecution and the criminal system as a mechanism for helping prostituted children, while also including a component of outside treatment often provided by child services. Common features of "safe harbor" laws include: (1) an affirmative defense against prosecution; (2) arrest and custody of the child by the delinquency system; (3) discretion to government officials in deciding victim status; (4) use of the delinquency system as a mechanism to manage cases of child prostitution; (5) remedies and relief only for children who are forced or coerced into prostitution; and (6) a

⁸⁵ *Id.* § 10(a).

⁸⁶ *Id.* § 11(a).

⁸⁷ *Id.* § 18(a).

⁸⁸

Legislation,	UNIF.	LAW	COMM'N,
http://www.uniformlaws.org/Legislation.aspx?title=Prevention%20of%20and%20Remedies%20for%20Human%20Trafficking (last visited Jan. 15, 2015).			

⁸⁹ See UNIFORM ACT ON PREVENTION OF AND REMEDIES FOR HUMAN TRAFFICKING §§ 16, 18.

⁹⁰ See *id.* § 15.

⁹¹ See *id.* § 2(15) (defining victim as an individual who is subjected to human trafficking).

⁹² See S.B. 202, Leg. 2012, Reg. Sess. (Fla. 2012).

⁹³ See UNIFORM ACT ON PREVENTION OF AND REMEDIES FOR HUMAN TRAFFICKING § 19; see also Susan Crile, *A Minor Conflict: Why the Objectives of Federal Sex Trafficking Legislation Preempt the Enforcement of State Prostitution Laws Against Minors*, 61 AM. U.L. REV. 1783, 1792 (2012) (stating that "ten states have enacted some form of legislation limiting the criminal liability of minors who are arrested for prostitution: Connecticut, Illinois, Massachusetts, Michigan, Minnesota, New York, Ohio, Tennessee, Vermont, and Washington").

⁹⁴ Although eighteen states have "safe harbor" laws, each different, the states' laws that this Article discusses are a representative sample of the characteristics shared by "safe harbor" laws nationwide. POLARIS PROJECT, 2013 ANALYSIS OF STATE HUMAN TRAFFICKING LAWS: SAFE HARBOR – PROTECTING SEXUALLY EXPLOITED MINORS 2 (2013), available at <http://www.polarisproject.org/storage/2013-Analysis-Category-6-Safe-Harbor.pdf>.

presumption that the child was abused.⁹⁵ Florida's statute is unique in that it does not follow these common features, with the exception of the fourth feature—because it gives police officers discretion to decide whether a child is a victim.⁹⁶

The type of model for treating child prostitution that a state utilizes can be used to analyze in a spectrum their legislation's strengths individually and as they compare to other states. States that follow the prosecution model often provide little protection and can be said to be weak, whereas those that follow the child-abuse model offer the highest level of protection and thus can be said to be stronger. Protection in this case refers to the amount of services and resources available to child victims.

New York enacted the first "safe harbor" law with the passage of the Safe Harbor for Exploited Children Act in 2008.⁹⁷ New York's approach to child prostitution is similar to the prosecution model because it provides services for child victims, but these services often can only be obtained once the child enters the delinquency system. New York's safe harbor laws provide a defense for children under eighteen who have been arrested for prostitution.⁹⁸ The statute effectively operates to divert these children to family courts under a petition for person "in need of supervision."⁹⁹ Nevertheless, children above the age of sixteen can still be charged in criminal court for the crime of prostitution.¹⁰⁰ Further, even if a child is labeled a "person in need of supervision," if they fail to comply with the court's orders and with the service plans being provided, the court has sole discretion to substitute their protected status for that of a juvenile delinquent.¹⁰¹ The statute also directs local social services agencies to provide services for these children but fails to specify a source of funding.¹⁰²

New York's model has multiple issues that make it inferior to other states' approaches. These include the lack of protection for all persons under eighteen, the ample discretion given to the court in determining the status of a child, and the use of the criminal system in some instances as a mechanism for "helping" child victims of sexual exploitation. Precluding the prosecution of children sixteen and under is commendable but allowing criminal courts to have jurisdiction over those above sixteen is not ideal. Further, judges can decide to take a victim and criminalize them for their failure to follow orders, something these children more than likely have trouble doing.¹⁰³ Finally, by utilizing the criminal law mechanism in its structure, New York's law fails to recognize the harm that stigmatizing a child victim as a criminal can cause.

Washington followed New York by passing the Sex Crimes Involving Minors Act.¹⁰⁴ Washington's laws resemble the hybrid model because they provide a solution to the problem of child prostitution through the criminal/delinquency system, but include the community-help

⁹⁵ CONN. GEN. STAT. ANN. § 53a-82(b)–(c) (West 2015); FLA. STAT. ANN. § 39.401 (West 2015); N.Y. SOC. SERV. LAW § 447-b(2) (McKinney 2014); WASH. REV. CODE ANN. § 13.40.219 (West 2015); see Ian Urbina, *Legislators Work to Improve Laws on Runaways*, N.Y. TIMES (Jan. 4, 2010), <http://www.nytimes.com/2010/01/04/us/04runaways.html>; see also Birkhead, *supra* note 5, at 1067 (arguing that the "safe harbor" laws passed among the different states have similarities).

⁹⁶ FLA. STAT. ANN. § 39.401.

⁹⁷ N.Y. SOC. SERV. LAW § 447-b.

⁹⁸ *Id.* § 447-a(1) (providing that any person under eighteen who is sexually exploited or engages in prostitution will be considered a "sexually exploited child").

⁹⁹ N.Y. FAM. CT. ACT § 311.4(3) (McKinney 2014).

¹⁰⁰ N.Y. CRIM. PROC. LAW § 170.80 (McKinney 2014).

¹⁰¹ See N.Y. FAM. CT. ACT § 311.4(3).

¹⁰² N.Y. SOC. SERV. LAW § 447-b(4).

¹⁰³ See Annitto, *supra* note 18, at 60–61 ("[M]ost children with these histories are deemed by courts as unlikely to accept services and are thus forced to endure prosecution as a result, then the ultimate intent of reforms in this arena will be ignored . . . [i]f signs of rebelliousness preclude assistance, the reforms will fail many of the children that they are intended to help.").

¹⁰⁴ 2010 Wash. Sess. Laws 2301.

elements found in hybrid models.¹⁰⁵ The Washington laws (1) establish a presumption that the suspected individual meets the criteria for certification as a victim so long as he or she is under the age of eighteen and (2) shield a first-time offender from prosecution by encouraging prosecutors to not pursue charges.¹⁰⁶ Furthermore, in addition to directing local agencies to provide services to child victims, the statute actually provides for funding to do so.¹⁰⁷

In application, the Washington statute provides for the arrest and custody of prostituted children with the caveat that prosecutors are given discretion not to pursue charges.¹⁰⁸ If the prosecutor decides against bringing charges, children may be able to receive remedies similar to those afforded under the TVPA, such as medical care and counseling, because they are taken out of the juvenile system and channeled through dependency.¹⁰⁹ This element is evidenced by the statute's reference to the TVPA and the way in which the statute mimics the language of the TVPA, using terms like "certification as a victim."¹¹⁰ Washington's adopted hybrid approach is an improvement upon the New York statute, but it can be problematic because it punishes repeat offenders who may need the most help.

Connecticut also passed "safe harbor" legislation titled, An Act Providing a Safe Harbor for Exploited Children, that creates an affirmative defense for children charged with prostitution.¹¹¹ Connecticut's law resembles the hybrid model because it provides help through the criminal system, but also includes a component of outside help provided by the state Department of Children and Families (the "CDCF").¹¹² This legislation provides for: (1) a complete bar on the prosecution of children under sixteen,¹¹³ (2) an affirmative defense to prostitution and a presumption of coercion for those who are sixteen or seventeen years old,¹¹⁴ and (3) an obligation for the arresting officer to report any suspected abuse to the CDCF.¹¹⁵ In application, the child¹¹⁶ is arrested and is presumed to have been coerced—consent is not an issue—but provided only with an affirmative defense to the criminal charges, so that the child may still be prosecuted where the defense is ineffective.¹¹⁷ Further, while children showing signs of abuse will be reported to the CDCF—opening an opportunity for treatment—the delinquency system retains custody of them.¹¹⁸ Connecticut's law combines elements of the New York and Washington statutes by adopting an affirmative defense, using the delinquency system as a tool for assistance (features of the New York statute) but including an element of treatment through child services (seen in the Washington statute).¹¹⁹ Connecticut's approach is problematic because it allows for the introduction of prostituted children into the criminal system, and whatever help they may receive from the CDCF is not sufficient to overcome the extended trauma that

¹⁰⁵ *Id.* at 2301–02, 2308–09.

¹⁰⁶ WASH. REV. CODE ANN. §§ 13.40.2139(1), 13.40.219 (West 2015).

¹⁰⁷ *Id.* § 13.32A.270.

¹⁰⁸ *Id.* §§ 13.40.2139(1), 13.40.219.

¹⁰⁹ 2010 Wash. Sess. Laws 2302 (“[W]hen a youth who has been diverted under RCW 13.40.070 for an alleged offense of prostitution or prostitution loitering is referred to the department, the department shall connect that child with the services and treatment specified in RCW 74.14B.060 and 74.14B.070.”).

¹¹⁰ WASH. REV. CODE ANN. § 13.40.219.

¹¹¹ S.B. 153, 2010 Gen. Assemb., Feb. Sess. (Conn. 2010).

¹¹² *See* CONN. GEN. STAT. ANN. § 53a-82.

¹¹³ *Id.* § 53a-82(1)(a).

¹¹⁴ *Id.* § 53a-82.

¹¹⁵ *Id.* § 46b-133(2).

¹¹⁶ If the child is sixteen or older.

¹¹⁷ CONN. GEN. STAT. ANN. § 53a-82.

¹¹⁸ *Id.* § 53a-82(1)(a)–(c).

¹¹⁹ *Id.*; *see* N.Y. SOC. SERV. LAW § 447-b (McKinney 2014); *see* WASH. REV. CODE ANN. §§ 13.40.2139(1), 13.40.219 (West 2015).

incarceration can cause. On the other hand, the Connecticut approach is successful because it eliminates children under sixteen from the grasp of the delinquency system completely.

Illinois enacted “safe harbor” laws with the passage of the Safe Children Act.¹²⁰ This statute resembles the hybrid approach in that it involves the use of the delinquency system as a tool for helping prostituted children while also having a dependency component.¹²¹ The legislature enacted the statute to: (1) preclude the prosecution of child victims of prostitution; (2) establish a presumption of abuse/neglect for minors; and (3) establish temporary custody over a child until placement can be found.¹²² In application, a child who is arrested may be detained for a “reasonable” period of time.¹²³ But, despite being immune from prosecution, the child must remain in protective custody¹²⁴ until they can be placed somewhere, through Illinois’s Department of Children and Family Services, where his or her interests can be best served.¹²⁵ Further, the statute encourages services for child victims and provides funding.¹²⁶

This approach is an improvement upon the approaches of New York, Washington, and Connecticut because it precludes all criminal charges for all minors under the age of eighteen as opposed to providing immunity only to children of some ages or providing only a defense to the charges or giving someone discretion to decide. Illinois’s approach is problematic, however, in that it subjects children to involuntary confinement despite the lack of criminal charges.

In 2010, a Texas Supreme Court decision held that child prostitutes were victims and not delinquents.¹²⁷ On its face, this holding represents the child-abuse model, but because there is no statute on point in Texas, the state’s laws reflect a prosecution model. In *In re B.W.*, the Supreme Court of Texas interpreted the state’s laws as prohibiting the prosecution of prostituted children.¹²⁸ The Texas Supreme Court expressed a similar view to that of “safe harbor” law advocates: “[c]hildren are the victims, not the perpetrators, of child prostitution. Children do not freely choose a life of prostitution, and experts have described in detail the extent to which they are manipulated and controlled by their exploiters.”¹²⁹

Texas’s laws resemble the prosecution model because: (1) they allow for children to be prosecuted regardless of the recognition that they are victims and (2) help trafficked children through the delinquency system (criminal courts).¹³⁰ In application, Texas’s laws may allow for prostituted children to be arrested because their penal code provides no defense or bar against a charge of prostitution.¹³¹ Although there is case law that recognizes non-trafficked children can also be victims, lacking a clear statute on point means that prosecution is unlikely to be avoided on every occasion.

¹²⁰ 2010 Ill. Laws 6931.

¹²¹ 720 ILL. COMP. STAT. ANN. 5/11-14(d) (West 2015).

¹²² *See id.*

¹²³ *See id.*

¹²⁴ *See id.*

¹²⁵ 705 ILL. COMP. STAT. ANN. 405/2-5; *see* 325 ILL. COMP. STAT. ANN. 5/3 (defining the duty of the state Department of Children and Family Services to take care of children who are at risk).

¹²⁶ *See* 720 ILL. COMP. STAT. ANN. 5/11-14(d).

¹²⁷ *In re B.W.*, 313 S.W.3d 818, 826 (Tex. 2010).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *In re B.D.S.D.*, 289 S.W.3d 889, 895 (Tex. App. 2009) (finding that Tex. Penal Code Ann. § 43.05 does not protect a juvenile from adjudication for engaging in delinquent conduct by committing the offense of prostitution despite the language in Tex. Fam. Code Ann. § 51.03(a)(1)).

¹³¹ *Id.*

III. ANALYSIS

A. Florida

Prior to the passage of the Safe Harbor Act, Florida law most closely resembled a prosecution model, because prostituted children were prosecuted as juvenile delinquents.¹³² In 2007, Florida passed a statute that made it a felony to “recruit, entice, harbor, transport, provide, or obtain a person knowing that force, fraud, or coercion will be used to cause that person to engage in prostitution.”¹³³ The statute increased the charge to first degree if the prostituted individual is fourteen years old or younger.¹³⁴ Florida laws favor severe punishment for those who engage in the exploitation of children.¹³⁵ The statute was helpful in that it provided a deterrent for the trafficking of children. But the statute did not provide protection for sexually-exploited children because it did not recognize these children as victims.

The Florida Safe Harbor Act, as written, resembles the child-abuse model because, unlike other states, it eliminates the role of the delinquency system through police discretion.¹³⁶ Children picked up by the police will be taken to child services if the police find probable cause to believe they were sexually exploited.¹³⁷ The Florida statute establishes all of the following protections for prostituted children: (1) it amends the definition of sexual exploitation to now include child prostitutes;¹³⁸ (2) it gives the police the role of deciding whether there is probable cause to believe the child has been sexually exploited;¹³⁹ (3) it gives law enforcement the discretion to either arrest a child prostitute or take them to a safe house if one is available;¹⁴⁰ (4) it increases monetary penalties for those who procure others to engage in prostitution and uses the proceeds from these penalties to create funds for safe houses and other treatment programs for child victims;¹⁴¹ and (5) it offers relief to children not covered under the TVPA.¹⁴²

On June 17, 2014, the Florida Safe Harbor Act was revised and many of the sections that govern its application were altered to provide further structure for its implementation.¹⁴³ One of the weaknesses of the Florida Safe Harbor Act as first implemented was the lack of guidance for child services in determining the needs of a prostituted child.¹⁴⁴ The legislature passed what they have called a “screening assessment” to solve this issue.¹⁴⁵ The assessment takes into account, at a minimum, these factors: (1) risk of a child running away, (2) child’s attachment to the abuser,

¹³² FLA. STAT. ANN. § 796.045 (West 2015).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ FLA. STAT. ANN. § 39.001(5)(b)(2) (West 2015); *but see* Telephone Interview with Trudy Novicki, Exec. Dir., Kristi House (Oct. 19, 2012) (commenting that the Florida Statute resembles the hybrid model as written and will resemble the prosecution approach in application). Ms. Novicki is an attorney, advocate, and participated in the drafting of Florida Safe Harbor Act; *see also* Jorge Veitia, *Support the FL Safe Harbor Act*, SOL (Dec. 6, 2011) <http://www.solmedia.net/2011/12/support-the-fl-safe-harbor-act/> (describing the features of the Florida Safe Harbor Act and citing Ms. Novicki as an authority in saying that the Act separates delinquency and dependency).

¹³⁷ FLA. STAT. ANN. § 39.401(2)(b).

¹³⁸ *Id.* § 39.01(69)(g).

¹³⁹ *Id.* § 39.401(2)(b).

¹⁴⁰ *Id.*

¹⁴¹ S.B. 202, 2012 Leg., Reg. Sess. (Fla. 2012) (stating that the Florida Safe Harbor Act “[i]ncreases the civil penalty for crimes related to prostitution from \$500 to \$5000 and provides for the increase to be paid to the department to be used to fund safe houses and short-term safe houses”).

¹⁴² FLA. STAT. ANN. § 39.01(67)(g) (describing that children who engage in sexual performance willingly are also considered sexually exploited).

¹⁴³ *See* H.B. 7141, 2014 Leg., Reg. Sess. (Fla. 2014).

¹⁴⁴ *See* FLA. STAT. ANN. § 39.401(2)(b) (stating only that child legal services would be responsible for providing services to exploited children, but not how).

¹⁴⁵ *Id.* § 409.1754(1) (West 2015).

(3) risk of the child recruiting other children, (4) child's interactions with law enforcement, (5) length of time that the child was exploited for, (7) substance abuse, if any, and (8) level and type of trauma that the child is suffering.¹⁴⁶ This assessment is intended to ensure that each child receives the individualized treatment needed in terms of the type of placement and social services they will receive.¹⁴⁷

Other additions include: (1) a requirement that all government staff, including child protective investigators, case managers, community-based care agencies' staff, and law enforcement, receive special training geared at sexually-exploited children;¹⁴⁸ (2) the elimination of short-term safe houses and addition of foster homes, and "other setting [if it] is more appropriate" as a possibility for placement;¹⁴⁹ (3) prerequisite that safe houses be certified¹⁵⁰ in order to qualify for housing sexually-exploited children;¹⁵¹ and (4) the creation of a statewide council on human trafficking for the purpose of encouraging coordination between the states and local authorities.¹⁵² The legislature's additions resolved some of the flaws of the statute as it was originally enacted: (1) the lack of guidance for authorities in applying the statute; (2) the lack of training that made the prior statute's implementation difficult; and (3) the short-term housing placements that did not provide the long-term treatment these children need.

In application, the Florida statute is likely to resemble a hybrid model because once a police officer finds probable cause to believe that a child qualifies as sexually exploited, they must take the child to child services. In this way, if the system works as is intended, children would not at any point be introduced into the delinquency system. The statute recognizes children as victims by defining dependency to include prostituted children.¹⁵³

The legislature's intent in passing the Florida Safe Harbor Act was to ensure that child victims of sexual exploitation receive relief through the dependency system, as opposed to the delinquency system.¹⁵⁴ The purposes of the statute are to: (1) ensure the well-being of children; (2) provide for their treatment as dependents; (3) sever bonds between exploited children and their abusers; (4) reunite children with their relatives or provide them with guardians; and (5) enable these children to be reliable and willing witnesses.¹⁵⁵ Under the statute, a "child" is an individual who is seventeen years old or younger¹⁵⁶ and "prostitution" is defined as the "giving or receiving of the body for sexual activity for hire but excludes sexual activity between spouses."¹⁵⁷

1. Influences

Considering that Florida is the third-most popular destination for human traffickers in the country,¹⁵⁸ it seems logical that the legislature would be concerned about child sexual exploitation. Traffickers are drawn to Florida because of the tourism that its weather, location,

¹⁴⁶ *Id.* § 409.1754(1)(a)(1)-(7).

¹⁴⁷ *Id.* § 409.1754(1)(a).

¹⁴⁸ *Id.* § 409.1754(2)(a)(1).

¹⁴⁹ *See id.* §§ 409.1678(1)(a), 39.524(1), 39.401(2)(b).

¹⁵⁰ In order to be certified, a safe house must use a model of treatment that includes strength-based and trauma-informed approaches, serve exclusively one sex, group sexually-exploited children in a manner that separates them from children with other needs, have twenty-four hour awake staff, and provide appropriate security. *See id.* § 409.1678(2)(c).

¹⁵¹ *See id.* §§ 409.1754(2)(b), 409.1678(2)(b).

¹⁵² *See id.* § 16.617(4) (West 2015).

¹⁵³ *Id.* § 39.01(15).

¹⁵⁴ Telephone Interview with Trudy Novicki, *supra* note 136.

¹⁵⁵ *See* FLA. STAT. ANN. § 39.001.

¹⁵⁶ *Id.* § 39.01(12).

¹⁵⁷ *Id.* § 796.07(1)(a) (West 2015).

¹⁵⁸ *See* Press Release, Fla. Senate, Senate Passes Legislation to Improve Protections for Human Trafficking Victims (May 2, 2014), <http://www.flsenate.gov/Media/PressReleases/Show/1792> (listing the three most popular destinations for traffickers in the country as: (1) California, (2) New York, and (3) Florida).

and beaches bring.¹⁵⁹ Aware of Florida's attractiveness to human traffickers, the legislature recognized the necessity for more protections for the children involved in child prostitution.¹⁶⁰ But the Florida Safe Harbor Act did not come to pass as a result of legislative initiative, lobbying and community efforts by safe house employees and child advocates provided the necessary momentum.¹⁶¹

Florida lawmakers first proposed the statute in 2010, but it did not pass until 2012.¹⁶² This delay was due to both opposition and budget issues because offering safe houses required the legislature to budget some funds for this purpose and it was reluctant to do so.¹⁶³ The first version of the statute was drafted to decriminalize prostitution for children under the age of sixteen.¹⁶⁴ But the proposed legislation had to be repeatedly amended due to law enforcement opposition likely based on the perception that the decriminalization of prostitution for individuals under the age of sixteen would place a conflicting directive on law enforcement: prostitution is only a crime "sometimes."¹⁶⁵ The compromise reached instead provided police officers with the discretion to decide if a child is a victim and take the child directly to child services.¹⁶⁶

Safe houses, like the Kristi House in Miami, Florida, played an important lobbying role in the passage of this statute through its officers and advocates.¹⁶⁷ Safe houses provide services like shelter, clinical aid, and victim advocacy to child victims of sexual abuse, all under one roof.¹⁶⁸ This structure ensures more effective prosecution of the child's abusers and minimizes trauma to the child.¹⁶⁹ Trauma is minimized in this way because the child is not subjected to multiple rounds of questioning by authorities and the process of getting them to testify against the abuser is treated more delicately than it would be otherwise.¹⁷⁰

In addition to the community efforts and the high human trafficking that takes place in Florida, case law favors the view that prostituted children are victims and not criminals.¹⁷¹ Florida courts have a strong policy of protecting minors who engage in harmful sexual conduct,

¹⁵⁹ See Frederick Reese, *Spring Break: A Human Trafficker's Paradise?*, MINTPRESS NEWS (Mar. 10, 2014), <http://www.mintpressnews.com/spring-break-a-human-traffickers-paradise/186050/> (quoting Thomas Lares, Director of the Human Trafficking Task Force in Orlando, as he discussed how being a hot spot for events and tourism Florida is the "perfect storm" for human traffickers).

¹⁶⁰ See FLA. STAT. ANN. § 39.001(4)(a).

¹⁶¹ Among the leaders in the effort of passing "safe harbor" laws in Florida was Trudy Novicki. See Telephone Interview with Trudy Novicki, *supra* note 136. Ms. Novicki was the co-author of the original bill and was involved in the lobbying of this statute. *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ See Interview by Linda Sullivan with Julia Luyster, Attorney, Shendell & Pollock, PL (Aug. 8, 2012), available at <http://www.blubrry.com/yourbestvoice/1505406/the-florida-safe-harbor-act-and-its-shortcomings/?autoplay=1;%20accessed%20September%202018>.

¹⁶⁶ *Id.*

¹⁶⁷ See KRISTI HOUSE, <http://www.kristihouse.org/?s=safe+harbor> (last visited Jan. 15, 2015) (listing all of the lobbying efforts and events that the Kristi House has been involved with in relation to the Florida Safe Harbor Act); see also Lee Stephens, *Nelson Diaz Elected Board President of Kristi House*, BISCAYNE BAY, <http://www.communitynewspapers.com/biscayne-bay/nelson-diaz-elected-board-president-of-kristi-house/> (last visited Jan. 15, 2015) (recounting Nelson Diaz's, President of Kristi House's, statements as to the role that Kristi House played in the passage of the Florida Safe Harbor Act as follows: "Diaz is credited with leading Kristi House's effort in the successful passage of the Florida Safe Harbor Act As Kristi House's pro bono advocate lobbying for the passage of the legislation, he described this legislative victory as the conclusion of a long and, at times, arduous road, but the beginning of many, many success stories for all child victims of sexual abuse").

¹⁶⁸ See generally KRISTI HOUSE, <http://www.kristihouse.org/> (last visited Jan. 15, 2015) (explaining that the Kristi House provides all of the services a sexually-exploited child may need under one roof).

¹⁶⁹ See *Child Sexual Abuse. It Happens. It Hurts*, KRISTI HOUSE 2, available at <http://www.kristihouse.org/pdfs/outreach.pdf> (stating that Kristi House, working closely with other agencies, "provides recorded forensic interviews that are used by the State Attorney to prosecute perpetrators of child abuse. These taped interviews limit the number of times a child must tell the story of his/her abuse, reducing the need to relive the trauma").

¹⁷⁰ See *id.*

¹⁷¹ See *State v. Cunningham*, 712 So. 2d 1221, 1223 (Fla. Dist. Ct. App. 1998).

regardless of consent.¹⁷² In *State v. Cunningham*, a Florida appellate court held that a child who had consensually engaged in sexual conduct with an adult should be protected from criminal prosecution.¹⁷³ Also, in *Schmitt v. State*, the Florida Supreme Court found constitutional a statute mandated that anyone who owns a nude photograph of a child has committed a crime and that the court considered this type of photograph “sexual conduct by a child.”¹⁷⁴ Finally, in *State v. Enstice*, another appellate court reasoned that when a child was at risk of sexual abuse, a poorly drafted search warrant was valid.¹⁷⁵ These cases indicate that Florida case law protects minors involved in sexual behavior, even by sometimes interpreting the rules more liberally.¹⁷⁶

2. Strengths of the Florida Safe Harbor Act

The Florida Safe Harbor Act is stronger than other states’ “safe harbor” laws because it follows a child-abuse model by providing: (1) separation between the dependency and delinquency systems—prostituted children’s custody and treatment is handled by child services (dependency system) as opposed to the juvenile delinquency department,¹⁷⁷ without compartmentalizing children into different processes depending on their age, or conduct as do other states.¹⁷⁸ Further, Florida provides in its law specific methodologies and systems to carry out the goals of the Florida Safe Harbor Act,¹⁷⁹ whereas other states have passed laws without providing the means to implement them.¹⁸⁰

The provision in the Florida statute giving law enforcement discretion effectively creates a separation because children who are categorized as victims are not arrested (and therefore do not enter the delinquency system) but are instead taken to the state Department of Children and Families (dependency) and placed in safe houses, where they are not subject to criminal procedure.¹⁸¹ Keeping the children out of the delinquency system is crucial because if the statute is applied as intended, it eliminates the possibility of further traumatizing the child.¹⁸² Because the Florida Safe Harbor Act relies solely on the dependency system to carry out its mandate, it does not use the criminal system as a tool or alternative route in the case of any child under

¹⁷² *Id.* at 1223 (“[A]ny type of sexual conduct involving a child constitutes an intrusion upon the rights of that child, whether or not the child consents . . . society has a compelling interest in intervening to stop such misconduct.”) (quoting *Schmitt v. State*, 590 So. 2d 404 (Fla. 1991)).

¹⁷³ *Id.*

¹⁷⁴ See *Schmitt v. State*, 590 So. 2d 404, 413 (Fla. 1991).

¹⁷⁵ See *State v. Enstice*, 573 So. 2d 340, 343 (Fla. Dist. Ct. App. 1990).

¹⁷⁶ See *Cunningham*, 712 So. 2d at 1223; see *Schmitt*, 590 So. 2d at 413; see *Enstice*, 573 So. 2d at 343.

¹⁷⁷ See Telephone Interview with Trudy Novicki, *supra* note 136 (stating that one of the most important features of the safe harbor statute was the separation between dependency and delinquency it provides); see FLA. STAT. ANN. § 39.401(2)(b) (West 2015); see also Barbara Bennett Woodhouse, *David C. Baum Memorial Lecture: The Courage of Innocence: Children as Heroes in the Struggle for Justice*, 2009 U. ILL. L. REV. 1567, 1581 (2009) (discussing the differences between the dependency and delinquency systems).

¹⁷⁸ Cf. FLA. STAT. ANN. § 39.01(12) (operating under the definition of children in Chapter 39, protects all sexually-exploited children under eighteen); N.Y. FAM. CT. ACT § 311.4 (McKinney 2014) (allowing children who do not cooperate with authorities to be charged in criminal court); CONN. GEN. STAT. ANN. § 53a-829(c) (West 2015) (differentiating between children under sixteen, who are immune to prosecution, and children sixteen and older, who are only presumed coerced but not immune).

¹⁷⁹ See FLA. STAT. ANN. § 409.1754(1)(a)(1)–(7), (2)(a)(2) (West 2015); see generally *id.* § 409.1678 (discussing safe foster homes and safe houses); see generally *id.* § 39.524 (discussing child placement in safe housing); see generally *id.* § 39.401 (authorizing the taking of dependent children into custody); see generally *id.* § 796.07 (criminalizing prostitution); see generally *id.* § 985.115 (discussing the release of minors who are in custody); see generally *id.* § 394.495 (discussing children’s mental health system care, programs, and services); see generally *id.* § 16.617 (discussing specific departments and steps to take when implementing the law); see generally *id.* § 409.997 (discussing child welfare results-oriented accountability programs).

¹⁸⁰ See, e.g., N.Y. SOC. SERV. LAW § 447-b(4) (McKinney 2014) (stating that abused children need services but failing to allocate funding towards this end).

¹⁸¹ See Telephone Interview with Trudy Novicki, *supra* note 136.

¹⁸² 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, 1351 (2008).

eighteen.¹⁸³ This feature makes it a stronger model in the spectrum of protection than that of other states that currently have “safe harbor” laws.

Florida has continued to legislate after the passage of the Florida Safe Harbor Act to ensure a smoother implementation of the law,¹⁸⁴ whereas other states have stagnated after the passage of safe harbor laws.¹⁸⁵ Florida revalued one of the most serious weaknesses of the original legislation—safe house placement—as discussed by professionals in the field¹⁸⁶ and provided solutions through legislation.¹⁸⁷

Children who are sexually exploited have very specific needs.¹⁸⁸ Initially, the Safe Harbor Act provided for long-term and short-term housing.¹⁸⁹ Short-term housing was problematic because in addition to placing the child back on the street, it would not provide child victims with the extended services they require.¹⁹⁰ Now the statute provides only long-term safe housing and foster homes or other appropriate placements.¹⁹¹ This approach is more likely to be successful because it can be tailored individually to what each child needs while providing the long-term aspect they all need.¹⁹²

Once placement was resolved, the old statute¹⁹³ was not very helpful in combating the child's instincts to run away and back to their abuser.¹⁹⁴ The amendments that have been made provide for the certification of safe houses to ensure security and staff availability twenty-four hours a day.¹⁹⁵ These amendments and additions to the statute have made Florida's approach more likely to succeed in the long run. While Florida's statute is not perfect, it is promising and it is likely to continue to evolve.

3. Weaknesses of the Florida Statute

Despite being a stronger effort than other states' “safe harbor” laws, the Florida Safe Harbor Act has some drawbacks. These include the less-than-ideal authority given to police officers in having first contact with child victims and the possibility of constitutional rights violations.

¹⁸³ FLA. STAT. ANN. § 39.001.

¹⁸⁴ See H.B. 7141, 2014 Leg., Reg. Sess. (Fla. 2014).

¹⁸⁵ States like Texas, despite passing some favorable laws or cases, have failed to pass any subsequent laws to improve their existing treatment of children. See *In re B.W.*, 313 S.W.3d 818, 826 (Tex. 2010) (representing the only law in Texas, passed four years ago, which attempts to create safe harbor for child victims).

¹⁸⁶ See Interview by Linda Sullivan with Julia Luyster, *supra* note 165 (discussing that safe housing, as provided for in the original Florida Safe Harbor Act, was problematic due to the child's possible attachment to their perpetrators).

¹⁸⁷ See generally FLA. STAT. ANN. § 409.1678 (West 2015) (discussing safe foster homes and safe houses); see generally *id.* § 39.524 (discussing child placement in safe housing); see generally *id.* § 796.07 (criminalizing prostitution).

¹⁸⁸ See Sarah E. Twill et al., *A Descriptive Study on Sexually Exploited Children in Residential Treatment*, 39 CHILD & YOUTH CARE FORUM 187–99 (2010) (finding that low IQ scores and multiple mental health disorders are common conditions in prostituted children); see RAYMOND ARTHUR, FAMILY LIFE AND YOUTH OFFENDING: HOME IS WHERE THE HURT IS 7–20 (2007); see Eric Thomas Berkman, *Responses to the International Child Sex Tourism Trade*, 19 B.C. INT'L & COMP. L. REV. 397, 402 (1996) (explaining that child victims of prostitution often suffer from depression); see Interview by Linda Sullivan with Julia Luyster, *supra* note 165; see Graham Bowley, *A Rare Case of Justice: Life Has Improved for the Women of Afghanistan Since 2001. But There's Still a Long Way to Go*, N.Y. TIMES 14 (Nov. 5, 2012), available at http://go.galegroup.com/ps/i.do?id=GALE%7CA307525084&v=2.1&u=nysl_me_cms&it=r&inPS=true&prodId=GPS&userGroupNa me=nysl_me_cms&p=GPS&digest=bdc4205071c061895fc9ab5d07e2a7d&rssr=rss (discussing that because the children are more often arrested for prostitution than their abusers, the abuser is likely to be there when the child returns).

¹⁸⁹ See H.B. 7141, 2014 Leg., Reg. Sess. (Fla. 2014) (showing the amendments made to the different statutes that make up the Florida Safe Harbor Act).

¹⁹⁰ Twill et al., *supra* note 188.

¹⁹¹ See FLA. STAT. ANN. §§ 409.1678(1)(a)–(b), 39.524(1), 39.401(2)(b).

¹⁹² See Twill et al., *supra* note 188.

¹⁹³ See FLA. STAT. ANN. § 39.524.

¹⁹⁴ See Interview by Linda Sullivan with Julia Luyster, *supra* note 165.

¹⁹⁵ See FLA. STAT. ANN. § 409.1678(2)(c).

One of the least-concerning weaknesses about the statute is the discretionary role that the Florida Safe Harbor Act gives police officers. The statute is problematic in stating the following: “[f]or such a child for whom there is also probable cause to believe he or she has been sexually exploited, the law enforcement officer shall deliver the child to the department”¹⁹⁶ This text gives law enforcement officers the role of deciding whether they have probable cause to believe that the child has been sexually exploited.¹⁹⁷ If the answer is yes, then the officer must deliver the child to child services.¹⁹⁸ If the answer is no, there exists a probability that the child can be taken into custody for criminal charges.¹⁹⁹

It seems like a weakness to put so much power in the hands of police officers, wherein they would be effectively deciding the fate of a child, as opposed to a judge or child legal service—someone who is better prepared to make such a decision. However, it is intuitive to give this kind of role to law enforcement, since law enforcement have historically been asked to make determinations as to whether to arrest someone.²⁰⁰ Further, it is a weakness that the Florida penal code was not amended to immunize children from criminal prosecution.²⁰¹ However, by including children who engage in prostitution within the definition of sexually-exploited children,²⁰² the police have a clear decision to take such children to child services, despite the illegality of the act committed.

Another current issue with the Florida Safe Harbor Act is that it sets up a process by which the child’s rights are potentially violated.²⁰³ There is a concern in the field that the initial police interview is done immediately, without the presence of an attorney, and without the child having an understanding of his or her rights.²⁰⁴ The process can be compared to a finding of innocence (victim) or guilt (delinquent), and this could potentially be a violation of the child’s constitutional right to a presumption of innocence.²⁰⁵ According to a leading expert in the field, however, this situation is only an issue where there are additional charges involved.²⁰⁶ This is the case because under the statute a prostituted child is a dependent,²⁰⁷ and thus in order for a child to be found delinquent, he must have committed an additional crime. Because of this distinction, the child’s rights are unlikely to be violated by the initial interview with the police.

Another way in which advocates believe children’s rights could be violated under Florida’s statute is through involuntary confinement, which is prohibited under the U.S. Constitution.²⁰⁸ Under the Fourteenth Amendment, every citizen has the right to be free from confinement unless that freedom is taken away through due process of the law.²⁰⁹ A citizen under the Fourteenth Amendment is “[any] person[] born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”²¹⁰ Due process means can be broken down into substantive—whether a fundamental right

¹⁹⁶ FLA. STAT. ANN. § 39.401(2)(b)

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ See Telephone Interview with Trudy Novicki, *supra* note 136 (discussing that police are asked to make probable cause findings on a daily basis).

²⁰¹ FLA. STAT. ANN. § 796.07 (West 2015) (setting out that prostitution is a crime but not limiting its application by age).

²⁰² *Id.* § 39.401(2)(b).

²⁰³ See Benk, *supra* note 13 (discussing advocates’ concern that detaining victims is unconstitutional).

²⁰⁴ Interview by Linda Sullivan with Julia Luyster, *supra* note 165.

²⁰⁵ *Id.*

²⁰⁶ See Telephone Interview with Trudy Novicki, *supra* note 136.

²⁰⁷ FLA. STAT. ANN. § 39.01(69)(g).

²⁰⁸ See Benk, *supra* note 13.

²⁰⁹ U.S. CONST. amend. XIV, § 1.

²¹⁰ *Id.*

has been abridged²¹¹—and into procedural—whether defendant has been given such things as notice and the right to be heard.²¹²

Children who are born in the United States or who are naturalized²¹³ are considered citizens under the Fourteenth Amendment.²¹⁴ Further, the Fourteenth Amendment establishes the fundamental right for individuals to be free of confinement.²¹⁵ Under this analysis, the government can be said to be violating children's constitutional rights to freedom because there are no charges being brought against them that would give the government the right to detain them.²¹⁶ There is no easy answer to resolving this dilemma except to perhaps say that the state has an inherent interest in protecting the well-being of children in the state and that this gives them the power to detain children as it gives them the power to terminate parental rights when appropriate.²¹⁷ While this is not a very strong argument, it is a possibility and it is likely to be successful in cases where the child requires psychiatric commitment.²¹⁸

IV. SOLUTIONS

A. Improving the Florida Statute

Among all the weaknesses that the Florida Safe Harbor Act may have, the most concerning are that: (1) technically speaking, prostituted children are still criminals under Florida's penal code,²¹⁹ and (2) constitutional violations may result from the Safe Harbor Act as it is currently structured. State legislative action could resolve the present flaws in the Florida statute by doing the following: (1) eliminating the possibility of arrest entirely by decriminalizing prostitution for minors;²²⁰ (2) amending its penal code²²¹ (unlikely because this approach was previously rejected);²²² and (3) addressing the constitutional concerns by eliminating long-term safe housing for those children who do not mentally need it, and instead placing children in foster homes or other appropriate placements. In the end, only further lobbying and campaigning efforts from children's rights advocates can help overcome the rigidity that characterizes the legislature and resolve the statute's remaining weaknesses. In order to solve the statute's flaws, advocates will need to pursue legislative changes and encourage victims to bring their cases to court.

B. Comparative Approach

Although the Florida statute and "safe harbor" laws generally have a number of shortcomings, a more global and comparative perspective is not often considered, but could be helpful to lawmakers nationwide. Human trafficking and prostitution are global problems and

²¹¹ *VI. Prisoners' Rights*, 40 GEO. L.J. ANN. REV. CRIM. PROC. 1007, 1038 (2011) (discussing procedural and substantive due process).

²¹² Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 8 (2006) (discussing the concept of procedural due process more in depth).

²¹³ Although the requirement of U.S. citizenship for protection raises some concerns for children who are trafficked to the United States from other countries, I will not discuss this topic in this Article because my concern is with domestic prostitution.

²¹⁴ See FLA. STAT. ANN. §§ 409.1678(1)(a), 39.524(1), 39.401(2)(b) (West 2015).

²¹⁵ U.S. CONST. amend. XIV.

²¹⁶ See Benk, *supra* note 13.

²¹⁷ See FLA. STAT. ANN. § 39.001 (setting out the state's duty to ensure the well-being of children and families).

²¹⁸ See FLA. STAT. ANN. § 39.407(5) (allowing the government to confine children against their will to psychiatric institutions).

²¹⁹ See FLA. STAT. ANN. § 796.07.

²²⁰ See *Giving the Customer What He Wants*, ECONOMIST (Feb. 12, 1998), available at <http://www.economist.com/node/113208> (expressing the idea that legalization of prostitution "would free law enforcers to concentrate on what is not tolerated, such as the sexual exploitation of children").

²²¹ FLA. STAT. ANN. § 796.07.

²²² See Telephone Interview with Trudy Novicki, *supra* note 136 (discussing how the idea of decriminalizing prostitution for minors was unpalatable for legislators and thus a compromise had to be made).

often these chains of crime spread through different states and countries.²²³ Looking at how other countries handle prostitution, and child prostitution specifically, may provide lawmakers with some insight as to where the United States' laws have gone wrong and what can be done to improve them.

Diverse approaches are illustrated in how different countries cope with child prostitution. In Canada, prostitution itself is legal, but some of the acts related to it are not.²²⁴ In *Bedford v. Canada*, the Ontario Superior Court of Justice found the criminalization of related acts, such as the operation of common bawdy-houses, to be unconstitutional because they intensified the risks that women engaged in this profession already face.²²⁵ But child prostitution remains illegal.²²⁶ Additionally, the laws regarding child prostitution focus on the punishment of those who procure and abet, but not on the punishment of the children themselves. Canadian law punishes the following activities in relation to child prostitution: (1) “§ 170: Parent or guardian procuring sexual activity”; (2) “§ 171: Home owner permitting sexual activity of person under [eighteen] years old for a purpose prohibited in the Criminal Code”; and (3) “§ 172.2: [M]aking an agreement or arrangement through any means of telecommunication to commit an offence under section 151 (sexual interference), 152 (invitations to sexual touching), 153(1) (sexual exploitation), 170 (parents procuring sexual activity), 171 (householder permitting sexual activity), 212 (2) (procuring sexual activity for the purposes of exploitation), 212 (2) (living on the avails of prostitution of a person under the age of [eighteen]).”²²⁷

Under Canadian law, children are not the targets of the criminal system, only their abusers are, thus making it a desirable model.²²⁸ Nevertheless, Canada has serious issues with child prostitution, and the way in which the government has attempted to provide help to these children has proven ineffective.²²⁹ Canada's Child, Family and Community Service Act allows for the admission of a child into protective custody if there are reasonable grounds to believe that the child is at risk of becoming a prostitute.²³⁰ In operation, this law allows police officers to apply to the court for authorization to detain the children and return them to their families or take them to a safe house.²³¹ Confinement of child victims of prostitution may be increased if there is reason to believe the child is still at risk and could benefit from further treatment.²³² In addition, restraining

²²³ Dag Stenvoll, *From Russia with Love?: Newspaper Coverage of Cross-Border Prostitution in Northern Norway, 1990–2001*, 9 EUR. J. WOMEN'S STUD. 143, 143–44 (2002), available at <http://rokan.uni.no/progemi/files/2010/06/Stenvoll-2002-From-Russia-With-Love1.pdf>.

²²⁴ See *Canada (Att'y Gen.) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, para. 4–5, available at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/13389/1/document.do>; see LAURA BARNETT, LIBRARY OF PARLIAMENT, PROSTITUTION IN CANADA: INTERNATIONAL OBLIGATIONS, FEDERAL LAW, AND PROVINCIAL AND MUNICIPAL JURISDICTION 15 (2014), available at <http://www.parl.gc.ca/content/lop/researchpublications/prb0330-e.pdf>.

²²⁵ *Bedford*, 3 S.C.R. 1101, para. 164–69.

²²⁶ See *Research–Child Prostitution, VICTIMS OF VIOLENCE*, http://www.victimsofviolence.on.ca/rev2/index.php?option=com_content&task=view&id=330&Itemid=20 (last updated Apr. 10, 2012); see Linda McKay-Panos, *Using the Coercive Power of the State to Deal with Child Prostitution and Drug Abuse*, ABLAWG: UNIV. OF CALGARY FACULTY OF LAW BLOG ON DEVS. IN ALTA. LAW (Feb. 12, 2009), http://ablawg.ca/wp-content/uploads/2009/10/blog_lmp_protection_feb2009.pdf.

²²⁷ *Research–Child Prostitution*, *supra* note 226 (citing Canada Criminal Code, R.S.C. 1985, c. C-46).

²²⁸ See Child, Family and Community Service Act, R.S.B.C. 1996, c. 46(13)(1.1), available at http://www.bclaws.ca/civix/document/id/complete/statreg/96046_01.

²²⁹ See Ludovica Iaccino, *Top Five Countries with Highest Rates of Child Prostitution*, INT'L BUS. TIMES (Feb. 6, 2014, 5:40 PM), <http://www.ibtimes.co.uk/top-five-countries-highest-rates-child-prostitution-1435448> (ranking Canada as one of the top five countries with the highest rates of child prostitution, and describing child prostitution as “deeply rooted” in Canadian communities).

²³⁰ See generally Child, Family and Community Service Act, R.S.B.C. 1996, c. 46(13)(1.1), available at http://www.bclaws.ca/civix/document/id/complete/statreg/96046_01 (setting out the procedures for dealing with abused children).

²³¹ *Id.*

²³² *Id.*

orders can be issued against those, such as “pimps,” who engaged in the procurement of the child.²³³

Despite the legislation's focus on abusers and attempts to help child victims, Canada's laws could use improvement. One problem, highlighted by child advocates, is the inadequacy of non-voluntary programs that have been implemented in some provinces as a result of the law.²³⁴ In effect, reviews found these types of programs to be ineffective because of the lack of long-term treatment, leading to constant admission into and expulsion from the programs.²³⁵ The Canadian approach is similar to the United States' approach in that at the national level, the government wants to protect child victims and prosecute their abusers, but at the local level, there is a lack of enforcement, because provinces/states take different approaches to the issue.²³⁶

Similar to Canada, prostitution in Brazil is legal.²³⁷ Prostituted children in Brazil do not have many protections under the law and are often treated as adults.²³⁸ Since 2009, Brazil's age of consent has been fourteen years old.²³⁹ While the highest criminal court in Brazil expressed views that having intercourse with young children was “immoral,” a man who had sexual relations with three twelve-year-olds was found to have engaged in “legal” activity in 2002.²⁴⁰ The court reasoned that the girls were mature beyond their years due to their “wide sexual experience” and thus their ages were not determinative of their ability to consent.²⁴¹ Some cities have attempted to alleviate child prostitution in the streets by conducting raids led by a child protection unit in order to catch sex tourists, pimps, and other child abusers.²⁴² Some of the children rescued during these raids have found refuge in charity homes.²⁴³

Despite these efforts to better the situation of child prostitutes, Brazil continues to be considered an international hot spot for sex trafficking, and the poverty that drives these young children to prostitute themselves continues to be a sad reality.²⁴⁴ As long as poverty continues and the government lacks a unified front protecting child prostitutes across the board, as opposed to the differences that exist now between courts, statutes, and police efforts, Brazil is unlikely to improve the rights of child victims and to lower the levels of child prostitution.

On the other hand, in Russia, while prostitution is illegal, it is an ongoing practice.²⁴⁵ The age of consent in Russia is sixteen and these parameters allow for the legal prostitution of minors who are sixteen and seventeen.²⁴⁶ On the other hand, engaging in sexual acts with children who are fourteen or younger is criminalized.²⁴⁷ In 2007, in Yekaterinburg, Russia, three men were

²³³ *Id.*

²³⁴ See McKay-Panos, *supra* note 226.

²³⁵ *Id.*

²³⁶ See BARNETT, *supra* note 224, at 29.

²³⁷ Jen Ross, *Brazil Tries to Stem Tide of Sex Slavery*, WOMEN'S ENEWS (June 19, 2005), <http://womensnews.org/story/prostitution-and-trafficking/050619/brazil-tries-stem-tide-sex-slavery#UPYA0idkzym>.

²³⁸ São Paulo, *Prostitution in Brazil: The Wrong Signal*, ECONOMIST (Apr. 7, 2012), <http://www.economist.com/node/21552201/print>.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Brazil's Child Prostitutes* (BBC television broadcast May 28, 2010), available at <http://www.bbc.co.uk/news/10188471>.

²⁴³ *Id.*

²⁴⁴ Jackie M. Briski, *Brazilian Court Makes Child Prostitutes Criminals*, BEING LATINO (Apr. 19, 2012), <http://www.beinglatino.us/politics-2/mundo/brazilian-court-makes-child-prostitutes-criminals/>.

²⁴⁵ Ellen Barry, *The Russia Left Behind: A Journey Through a Heartland on the Slow Road to Ruin*, N.Y. TIMES, <http://www.nytimes.com/newsgraphics/2013/10/13/russia/> (last visited Jan. 15, 2015); Peter Roudik, *Children's Rights: Russian Federation*, LIBRARY OF CONG., <http://www.loc.gov/law/help/child-rights/russia.php> (last updated Sept. 16, 2014).

²⁴⁶ *Minimum Legal Age of Consent-Female*, CHARTSBIN, <http://chartsbin.com/view/hxj> (last visited Jan. 15, 2015); Stenvoll, *supra* note 223, at 148.

²⁴⁷ *Child Prostitution Ringleaders Sentenced*, UNITED PRESS INT'L (Oct. 3, 2007, 8:07 PM), http://www.upi.com/Top_News/2007/10/03/Child-prostitution-ringleaders-sentenced/UPI-60461191456463/.

convicted for running a child prostitution ring involving children between the ages of nine to fourteen.²⁴⁸ The men were charged for violating the criminal code for trading with people, “sexual violence, sexual violence against underage children, [and] the production and the sale of printed materials or films with the pornographic pictures of adolescents, and the involvement of adolescents in criminal actions.”²⁴⁹ They were respectively given seventeen, sixteen, and twenty years in prison.²⁵⁰

Although cases like this give the appearance of protection for child victims, it is unclear how much enforcement these types of laws actually receive.²⁵¹ Further, child prostitution has been, and continues to be a growing problem in Russia.²⁵² In reality, child prostitutes do not seem to have any rights, protections, or medical help or treatment and they are unlikely to be viewed as victims because minors are treated like “adults.”²⁵³ While the law seemingly attempts to target the abusers, it does not operate to protect victims of trafficking, and the victims may instead be punished as criminals.²⁵⁴ Russian laws are not geared at protecting children who are sexually exploited.²⁵⁵ Currently in Russia, children are not being offered any services or real protection and this is not likely to change soon.²⁵⁶

A look at three different continents is not only enlightening but also revealing. Child prostitution is a worldwide problem and even countries that have specific laws addressing it seem to have large populations of abused children.²⁵⁷ The United States seems to be more procedurally advanced than other countries around the world, because at the federal level there are laws addressing human trafficking, and many states now have “safe harbor” laws that address prostitution as well.²⁵⁸ Nevertheless, the United States’ legal system could incorporate some aspects of other countries’ laws. In Canada, for example, by legalizing adult prostitution and passing laws specifically tailored to protect children, the government has allowed police officers more time to focus on the real abusers: the “pimps.”²⁵⁹ On the other hand, forcing child victims of prostitution into custody for short-term treatment has proved ineffective because these children need long-term assistance.²⁶⁰

Applying a global perspective to the Florida Safe Harbor Act, it seems that the structure and enforcement system set up by this statute is promising.²⁶¹ But it is also noticeable that

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ Guerman Grachev, *Child Prostitution Becomes Global Problem, with Russia No Exception*, PRAVDA.RU (Nov. 10, 2006), http://english.pravda.ru/society/stories/11-10-2006/84991-child_prostitution-0/.

²⁵² See Cesar Chelala, “Inhuman Traffic”: *Stopping Sexual Abuse of Children in Russia*, COUNTERPUNCH (Feb. 18, 2013), available at <http://www.counterpunch.org/2013/02/18/stopping-sexual-abuse-of-children-in-russia/>.

²⁵³ See generally Roudik, *supra* note 245 (discussing that the age of full criminal liability for any offense is twelve years old).

²⁵⁴ See U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 325–26 (2014), available at <http://www.state.gov/documents/organization/226848.pdf>.

²⁵⁵ *Id.* at 324–26.

²⁵⁶ See Clara A. Dietel, Note: “Not Our Problem”: *Russia’s Resistance to Joining the Convention on Action Against Trafficking in Human Beings*, 32 SUFFOLK TRANSNAT’L L. REV. 161, 162–66, 167 (2008) (discussing human trafficking in Russia and Russia’s refusal to sign the Trafficking Convention).

²⁵⁷ Jackie M. Briski, *supra* note 244; see *Legal Prostitution: Pros and Cons: 100 Countries and Their Prostitution Policies*, PROCON.ORG, http://prostitution.procon.org/view_resource.php?resourceID=000772 (last updated Dec. 23, 2013, 9:49 AM).

²⁵⁸ Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7101(a) (2012); CONN. GEN. STAT. ANN. § 53a-82(b)–(c) (West 2015); FLA. STAT. ANN. § 39.001 (West 2015); N.Y. SOC. SERV. LAW § 447-b(2) (McKinney 2014); WASH. REV. CODE ANN. § 13.40.219 (West 2015); *In re B.W.*, 313 S.W.3d 818, 826 (Tex. 2010).

²⁵⁹ *Hearing on Bill C-36 Before the S. Comm. on Legal and Constitutional Affairs* (Sept. 9, 2014) (statement of Peter MacKay, P.C., M.P., Minister of Justice & Att’ Gen. of Canada), available at <http://www.parl.gc.ca/content/sen/committee/412%5CLCJC/51557-e.HTM>.

²⁶⁰ *Id.*

²⁶¹ See generally Telephone Interview with Trudy Novicki, *supra* note 136 (discussing how the Florida Safe Harbor Act was a promising start to “safe harbor” legislation in Florida).

Florida's approach partially targets the victim by providing discretion to police officers instead of making it mandatory²⁶² (like under Canadian law) to take the child into custody for treatment.²⁶³ The Canadian approach of completely eliminating the criminalization of child prostitutes while maintaining that child prostitution is illegal, is superior to Florida's approach because it focuses all resources on the real problem: the abusers.²⁶⁴ But the Canadian approach of detaining child victims involuntarily and then letting them go has proven to be ineffective.²⁶⁵ The finding can be applied to amend the Florida Safe Harbor Act so that it provides more adequate treatment. In the recent amendments to the Florida Safe Harbor Act, the legislature made Florida's system different from Canada's by eliminating short-term housing, a decision that is likely to prove fruitful.²⁶⁶

When generating solutions to the flaws of the United States' "safe harbor" laws, it is often difficult to imagine how they will play out in application. For this reason, having a global perspective can be helpful because other countries have already engaged in similar processes and their experiences are instructive. If a solution to a similar problem has been ineffective in another country, it is likely to be ineffective in the United States. Having this prior knowledge saves resources and time and will allow lawmakers to focus on what will advance the rights of child victims of prostitution.

V. OTHER CONSIDERATIONS

The omission of gender and sexuality in the discussion of child sexual exploitation is likely to result in inadequacies in "safe harbor" laws enacted in the United States. Gender is an essential subject of discussion when dealing with the issue of child prostitution, not because the victims themselves suffer any differently depending on their gender, but because there are many misconceptions regarding child prostitutes.²⁶⁷ The general societal misconception of a child prostitute is that the term refers to a young girl, but in reality many boys are also engaged in prostitution, and they often begin to prostitute themselves at an earlier age than girls.²⁶⁸ While the "safe harbor" law that passed in Florida uses "child" in its language as opposed to boy or girl in an attempt to encompass all victims of child prostitution, it does not recognize or prevent misconceptions that may result in unequal application of the law.²⁶⁹

A lack of discussion about gender when drafting and advocating for "safe harbor" legislation may lead not only to unequal treatment of boys and girls but also to the failure of the purpose of "safe harbor" laws: protecting abused children. For example, the Florida Safe Harbor Act asks law enforcement to determine whether there is probable cause to believe a child was sexually exploited.²⁷⁰ Police officers lacking further guidance or instruction are more likely to view a young girl as a victim than they are to view a young boy as a dependent, because boys are

²⁶² Florida could do this by appealing its penal code.

²⁶³ FLA. STAT. ANN. § 39.401(2)(b); see Child, Family and Community Service Act, R.S.B.C. 1996, c. 46(13)(1.1), available at http://www.bclaws.ca/civix/document/id/complete/statreg/96046_01 (setting out the procedures for dealing with abused children); see also BARNETT, *supra* note 224, at 19 (discussing how several provinces allow police officers who have reasonable grounds to believe a child is being prostituted to request permission from the court to take these children into protective custody).

²⁶⁴ *Research—Child Prostitution*, *supra* note 226.

²⁶⁵ See BARNETT, *supra* note 224, at 22.

²⁶⁶ See FLA. STAT. ANN. §§ 409.1678(1)(a), 39.524(1), 39.401(2)(b).

²⁶⁷ Birckhead, *supra* note 5, at 1092; Annitto, *supra* note 18, at 18–21.

²⁶⁸ Birckhead, *supra* note 5, at 1092.

²⁶⁹ See FLA. STAT. ANN. § 39.01(12).

²⁷⁰ FLA. STAT. ANN. § 39.401(2)(b).

usually expected “to engage in sex whenever the opportunity presents itself.”²⁷¹ Therefore, despite the drafting of the laws to accommodate the protection of both male and female child prostitutes, current laws may not provide equal protection. Thus, advocates should not assume that the law will be applied as they envision, but look for ways to ensure that it is applied fairly and equally.

Part of advancing children’s rights is reshaping society’s views and educating the public as to the children that are engaged in these activities.²⁷² It is important to correct the misconception that prostitutes are only female and that child abusers are only male. Advocates should raise awareness about these misconceptions, not only to ensure more equal treatment of child victims, but to also help advance child rights. The more educated that society becomes about the realities of child prostitution, the more likely it will support the passage of legislation and become engaged in programs that help child victims.

Finally, one unexplored topic in relation to gender and child prostitution is sexual orientation.²⁷³ Many child prostitutes are not heterosexual but are lesbian, gay, bi-sexual, or transgendered; often they have been thrown out of their homes as a result of their sexual preferences.²⁷⁴ Much like the misconception that prostitutes are female, another misconception in society is that child prostitutes are usually heterosexual, and the child’s sexual preferences are rarely if ever taken into consideration.²⁷⁵ Breaking these notions of who a child prostitute is, and adjusting the definition of “prostitute” to encompass the spectrum of victims that are involved and all of their characteristics, will help lawmakers draft more adequate legislation and will help law enforcement and authorities better implement them.

Each child victim has a unique story and enters the world of prostitution for different reasons. Knowing why these children end up in a particular situation is necessary in order to provide them with adequate aid and treatment. While providing language in “safe harbor” laws that encompasses all children equally is a good place to start, laws must evolve to be specified and tailored in order to be more effective. Florida has started to progress in that direction by adding to the original statute provisions to ensure that sexually-exploited children are separate from other abused children and from other sexes, and that they receive treatment and placement tailored to their needs.²⁷⁶

VI. CONCLUSION

The treatment of prostituted children as delinquents is allowed too often in the United States. As a result of this tradition, child victims of prostitution are arrested in many parts of the country.²⁷⁷ Children’s rights advocates are fighting to change this treatment, however, and to protect child victims from further punishment.²⁷⁸ These efforts to pass “safe harbor” laws that

²⁷¹ See Anitto, *supra* note 18, at 19; see Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 715 (2000); see generally Ralph Lillywhite, *Boys Are Not Sexually Exploited? A Challenge to Practitioners*, 15 CHILD. ABUSE REV. 351 (2006) (describing the expectations that society places on young boys in comparison to girls).

²⁷² See generally Trafficking Protocol, *supra* note 45 (supporting the proposition that education of the public is a necessary step).

²⁷³ See Birckhead, *supra* note 5, at 1092–93.

²⁷⁴ See *id.* at 1093.

²⁷⁵ See Renee Loth, *Exploited Boys Remain Invisible*, BOSTON GLOBE (Mar. 9, 2013), <http://www.bostonglobe.com/2013/03/09/loth/Nd7GP0LOIKU19KCFg8zw0J/story.html>.

²⁷⁶ See FLA. STAT. ANN. §§ 409.1678(2)(c)(1)–(6), 39.524(1), 39.401(2)(b) (West 2015).

²⁷⁷ See Arya, *supra* note 40, at 107–08 (discussing minors being prosecuted as adults).

²⁷⁸ See generally KRISTI HOUSE, *supra* note 167 (listing all of events in which Kristi House has participated to advocate for exploited children).

protect sexually-exploited children have been successful in a number of states, including Florida.²⁷⁹ The Florida Safe Harbor Act represents a “win” for the advocates of “safe harbor” laws because it provides more protection for sexually-exploited children than any other state statute has up to this point. Its main strengths are that it provides a separation between the dependency and delinquency systems—without excluding any child based on age,²⁸⁰—and that it provides clear and specific guidelines for implementing its mandates.²⁸¹ These strengths are somewhat undermined by the lack of amendment to the penal code²⁸² and the constitutional concerns of involuntary confinement,²⁸³ but there is hope that these flaws can be fixed through further legislation. In the process, lawmakers could benefit from taking a more comparative approach and exploring issues of gender. Overall, the Florida “safe harbor” laws are a major step in the right direction and have the potential of leading to more positive advancements in this field of law.

²⁷⁹ FLA. STAT. ANN. § 39.001; Telephone Interview with Trudy Novicki, *supra* note 136.

²⁸⁰ *See* FLA. STAT. ANN. §§ 39.01(69)(g), 39.401(2)(b).

²⁸¹ *See* FLA. STAT. ANN. § 409.1754(1)(a).

²⁸² FLA. STAT. ANN. § 796.07.

²⁸³ *See* Benk, *supra* note 13.