



**From the SelectedWorks of Brendan M.
Conner**

April 2016

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

Contact
Author

Start Your Own
SelectedWorks

Notify Me
of New Work

Available at: http://works.bepress.com/brendan_conner/8

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

Brendan M. Conner†

TABLE OF CONTENTS

I. INTRODUCTION	2
II. AT THE DRAWING BOARD: THE NEW YORK SAFE HARBOUR FOR EXPLOITED CHILDREN ACT OF 2008	6
A. Legislative History	7
B. Title 8-A Social Services Framework.....	8
C. Person in Need of Supervision (“PINS”) Substitution Framework.....	9
D. Recent Amendments, Related Legislation, and Implementation	12
1. The Safe Harbor “Raise the Age” Amendments	12
2. The Vacating Trafficking Convictions Act.....	13
3. The Family Notification and Protection Act	15
III. “WATERSHED:” A STATE SURVEY OF SAFE HARBOR LAW AND POLICY	15
A. The Nature and Scope of “Immunity” from Criminal Liability and Juvenile Delinquency Proceedings ..	16
1. Covered Offenses.....	16
2. Eligibility Criteria.....	17
B. Secondary Immunity: Substitution Proceedings, Affirmative Defenses and Rebuttable Presumptions ...	19
C. Temporary Protective Custody, Arrest-Referral, and Pre-Booking Diversion.....	20
D. Status Offense Proceedings	23
IV. DETENTION BY ANY OTHER NAME: SECURE, NON-SECURE AND LIMITED SECURE PLACEMENT OF MINORS UNDER STATE SAFE HARBOR LAWS.....	25
A. Secure Detention	25
B. Non-Secure and Limited Secure Placement.....	27
C. Gender, Gender Identity and Sexual Orientation-Appropriate Placement	29
V. BAD EVIDENCE MAKES BAD LAW: WHY BEHAVIORAL, DEMOGRAPHIC, AND TESTIMONIAL EVIDENCE CONTRADICT THE POLICY JUSTIFICATIONS FOR SAFE HARBOR LAWS	30
A. Research Flaws in Population Estimates and Demographics	31
1. Age of Entry.....	32
2. Population Size.....	32
B. “I Don’t Have that Privilege:” Rational Choice within Limited Economic Choices	34
C. Criminals, Victims, or Survivors?: Prior Trauma as a Problematic Explanation for Entry into the Sex Trade	36
D. A Second Bite at the Apple: The High Degree of Prior Child Welfare Involvement Among Youth in the Sex Trades.....	38
E. Protect Us From Our Protectors: Institutionalized Violence by Police, Courts, Health Care Providers, and Social Services.....	39
VI. THE SURVIVOR MODEL: RECOMMENDATIONS FOR VOLUNTARY, LOW-THRESHOLD ALTERNATIVES TO SAFE HARBOR PROCEEDINGS	42
A. End the Arrest-Institutionalization Approach to Youth in the Sex Trades	44
B. Street-Based and Comprehensive Drop-In Services and Peer-Based Outreach	44

† Staff Attorney, Streetwise and Safe. J.D., 2013, City University of New York School of Law; M.A., Political Science, New School for Social Research. The views expressed are those of the Author and should not be attributed to Streetwise and Safe. The Author is indebted to the mentorship and editorial support of Professor Andrea McArdle, Meredith Dank of the Urban Institute, and my colleagues at Streetwise and Safe, especially Andrea J. Ritchie and Mitchyll Mora. This Article is dedicated to young people who do what they have to do to survive.

C. Safe and Supportive, Voluntary Short-Term Shelter, Long-Term, Affordable Housing, and Family-Based Placement Options	45
D. Safe and Supportive Housing and Placement Protocols Specific to Transgender and Gender Non-Conforming Youth	47
E. Non-Discrimination, Harassment, Confidentiality, and Complaint Procedures in Drop-ins, Shelters, Programs, and Out-of-Home Placements	48
F. Access to Integrated Primary, Sexual and Reproductive Health Care and Services, Gender-Affirming Health Care for Transgender and Gender Non-Conforming Youth and Harm-Reductionist Treatment for Youth Who Use Drugs	48
G. Living Wage Employment Opportunities and Job Training and Readiness Programs	50
H. Improving food security	51
VII. CONCLUSION	51

I. INTRODUCTION

It is 1904. Thirteen year-old Mary N., an African American girl, stands accused of prostitution.¹ Judge Tuthill, the first judge of the nation’s inaugural juvenile court, sentences Mary to the custody of the State Industrial School for Delinquent Girls at Geneva, Illinois to be “rehabilitated.”² There, Mary begins several, long years packed in beside hundreds of other working-class and poor girls of largely Catholic and African descent toiling over the domestic arts as a result of their adjudged immorality.³ Once the School’s matrons subject Mary and the other inmates to pelvic exams to verify their purity, Superintendent Ophelia Amigh applies whips, leather handcuffs, water torture, and solitary confinement to drive her wards along the path to proper femininity.⁴ If Amigh had the final word, the School would adopt sterilization as a remedy to what Amigh referred to as a root concern of “race and color.”⁵ When the press later exposes Amigh, she defends her practices as necessary to “checkmating the work of the white slavers” that snatch unsuspecting Midwestern girls and impress them into houses of prostitution.⁶

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

² T. H. MacQueary, *Schools for Dependent, Delinquent, and Truant Children in Illinois*, 9 AM. J. SOC. 1, 3 (1903).

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

⁴ Anne M. Knupfer, “*To Become Good, Self-Supporting Women: The State Industrial School for Delinquent Girls at Geneva, Illinois, 1900-1935*,” 9 J. HIST. SEXUALITY 420, 421–26 (2000).

⁵ *Id.*, at 425; *see also* MICHAEL A. REMBIS, DEFINING DEVIANCE, SEX, SCIENCE AND DELINQUENT GIRLS 1890–1960 16 (2011).

⁶ Ophelia Amigh, *More About the Traffic in Shame*, in FIGHTING THE TRAFFIC IN YOUNG GIRLS, OR WAR ON THE WHITE SLAVE TRADE 120 (Ernest A. Bell ed., 1910).

Please cite to 12 *Stanford J. C.R. & C.L.* ____ (forthcoming 2016).

Amigh maintains this narrative of categorical victimhood alongside one of corruption, writing that “girls of this class [...] should be considered defective and committed as such.”⁷ The Cook County Juvenile Court heeds Amigh’s advice. By 1910, 81 percent of girls who appear before the court are charged with sexual offenses,⁸ to say nothing of the many boys confined to the myriad reformatories of the day for sexual delinquency.⁹

Now that a century has passed, the practices of the Geneva School seem a relic—and to the extent that water torture is out of vogue this may be the case. In the intervening years, the Supreme Court has extended constitutional due process protections to youth facing delinquency proceedings, and so also youth charged with prostitution-related crimes.¹⁰ Yet, juvenile courts serve a dual function; these courts not only adjudicate delinquency cases regarding behavior that would be criminally punishable if committed by an adult,¹¹ but also dependency and status offense proceedings. These latter cases incorporate a variety of state custody actions to intercede where youth suffer physical or emotional harm, have been abandoned, or where youth commit status offenses—defined as conduct by a juvenile that would not be a crime if committed by an adult—such as running away, alcohol use, truancy, curfew violations, and “ungovernability.”¹²

While dependency and status offense proceedings are not novel to the Mary N.’s of the world, they have never been used systematically to address juvenile prostitution-related cases. That is, until “safe harbor” laws introduced the custodial model of the Geneva School to the present. The passage of the eponymous New York Safe Harbour (sic) for Exploited Children Act of 2008 (hereinafter “New York Safe Harbor Act” or “Safe Harbor Act”)¹³ triggered a landslide

⁷ *Discuss Border-Line Girl: Conference on Education of Backward Children Held at Buffalo*. N.Y. TIMES. June 8, 1909.

⁸ Bernardine Dohrn, *Schooling and the Vexing Social Control of Girls*, in *A CENTURY OF JUVENILE JUSTICE* 276 (Margaret K. Rosenheim ed., 2002).

⁹ Amigh’s contemporaries were equally concerned about the delinquent sexuality of male hustlers, gang-members, gamblers, and cadets, i.e. market facilitators or pimps for sex workers. *See, e.g.*, JUVENILE PROTECTIVE ASS’N, *NEWSBOY CONDITIONS IN CHICAGO 1903–1905* 17 (1905) (finding that one out of every three newsboys in Chicago were positive for venereal disease, likely caused by engaging in prostitution).

¹⁰ *See generally* *Kent v. United States*, 383 U.S. 541 (1966) (requiring juvenile courts hold a preliminary hearing to apprise minor offenders of charges against them and a forum in which the child’s claim will be heard); *In re Gault et al.*, 387 U.S. 1 (finding delinquency proceedings subject to due process protections of the Fourteenth Amendment, including the right to be notified of charges, to be informed of the privilege against self-incrimination, and the Sixth Amendment right to confront witnesses and right to counsel); *In re Winship*, 397 U.S. 358 (holding every element of an offense must be proven beyond a reasonable doubt in juvenile delinquency proceedings). For a position on the shortcomings of *In re Gault* and related procedural due process framework compared to potential substantive due process arguments, see also generally Robin W. Sterling, *Fundamental Unfairness: In re Gault and the Road Not Taken*, 72 MD. L. REV. 607 (2013).

¹¹ BLACK’S LAW DICTIONARY 945 (9th ed. 2009) (“juvenile delinquency. (1816) Antisocial behavior by a minor; esp., behavior that would be criminally punishable if the actor were an adult, but instead is usu. punished by special laws pertaining only to minors. Cf. INCORRIGIBILITY”).

¹² *See* 28 C.F.R. §31.304(h) (Westlaw 2014) (defining a status offender as “[a] juvenile offender who has been charged with or adjudicated for conduct which would not, under the law of the jurisdiction in which the offense was committed, be a crime if committed by an adult.”). *But see* *In re Jennifer G.*, 182 Misc. 2d 278, 288, 695 N.Y.S.2d 871, 878 (Fam. Ct. 1999)(noting “[t]he reality of the child, whether in Article 7 or Article 3, transcends the label. Delinquency is similarly a status offense, albeit having its genesis in a criminal offense ... The delinquent child is a person in need of supervision.”)(emphasis original).

¹³ Safe Harbour [*sic*] for Exploited Youth Act, 2008 Sess. Law News of N.Y. Ch. 569, adding Title 8-A, § 447 to N.Y. SOC. SERV. LAW, Art. VI, and amending N.Y. FAM. CT. ACT §§ 311.4, 712(a), & 732(a) (McKinney 2014).

of legislation responsive to youth in the sex trades.¹⁴ While there is no agreed-upon definition of a safe harbor law, these laws generally rely on custodial arrests to prosecute or divert youth arrested for or charged with prostitution-related offenses under the criminal law to court supervision under state child welfare, foster care, or dependency statutes.¹⁵ Using this definition as many as 25 states have adopted some form of safe harbor legislation and lawmakers in several additional states have introduced legislation.¹⁶ Congress has also called upon the Department of Justice to promulgate a model safe harbor law, and legislation has been introduced to require that states have a safe harbor law as a condition for receiving federal grants.¹⁷

At first glance the policy basis for safe harbor laws appears non-objectionable, namely that youth in the sex trades are not perpetrators but victims. They are not to be prosecuted under the penal law but to be treated under “the protection and services of the family court.”¹⁸ Yet the sound bite of safe harbor’s proponents has obscured the truth of its potential impact in increasing arrests, extending the length and restrictive conditions of involuntary commitment, and codifying the collateral consequences of an arrest, namely social services denial and endemic law enforcement harassment and brutality. The most straight-forward example of the law’s unintended consequences can be found in the New York Safe Harbor Act, under which the penalty for a violation or Class B misdemeanor with, at most, 90 days of jail time, is raised to

¹⁴ The term “youth in the sex trades” is intended to be inclusive of all adolescents under 18 selling sex regardless of how they identify themselves, whether as young sex workers or victims of sexual exploitation. The approach to terminology adopted by this paper is based on the belief that interventions must adapt to the specific needs of the many sub-populations of adolescents engaged in selling sex, many of whom do not attach an identity or status to their behavior. The term “youth in the sex trades” is therefore meant to cover adolescents trading sex for a range of reasons, including: economic survival and family support; sexual initiative; or physical force, threat of force, or other coercion. “Selling sex” does not necessarily imply that the adolescents themselves receive pay or goods in return for the sex act, rather than a third party. The term also denotes any exchange of sex acts for money, food, shelter, or other resources. While many legal documents refer to persons under the age of 18 engaged in selling sex to be “commercially sexually exploited children” (“CSEC”), young people do not label themselves according to legal instruments, and it is the Author’s position that we should not do so either. The young people I have worked with find the term “sexual exploitation” unrelatable and often stigmatizing, in that it denies the complexity of young people’s agency and development.

¹⁵ INST. OF MED. & NAT’L RESEARCH COUNCIL [hereinafter IOM & NRC CSEC REPORT], CONFRONTING COMMERCIAL SEXUAL EXPLOITATION AND SEX TRAFFICKING OF MINORS IN THE UNITED STATES 171–72 (Ellen W. Clayton et al. eds. 2013); *see also* POLARIS PROJECT, MODEL PROVISIONS OF COMPREHENSIVE STATE LEGISLATION TO COMBAT HUMAN TRAFFICKING 7 (2010), *available at* www.polarisproject.org/storage/documents/Final_Comprehensive_ModelLaw__8_2010.pdf; SHARED HOPE INT’L, 2013 PROTECTED INNOCENCE CHALLENGE: A LEGAL FRAMEWORK OF PROTECTION FOR THE NATION’S CHILDREN 21–22 (2014), *available at* <http://sharedhope.org/wp-content/uploads/2014/02/2013-Protected-Innocence-Challenge-Report.pdf>.

¹⁶ The Texas Supreme Court decision *In the Matter of B.W.* 313 S.W.3d 818 (2010), is an exception to the general rule that safe harbor policies are adopted by legislation.

¹⁷ Trafficking Victims Protection Reauthorization Act of 2013. Pub. L. No. 113-4, 127 Stat 54 (2013), *codified at* 22 U.S.C. § 7101 (directing the Attorney General to facilitate the promulgation of a model state statute to “treat an individual under 18 years of age who has been arrested for engaging in, or attempting to engage in, a sexual act with another person in exchange for monetary compensation as a victim of a severe form of trafficking in persons” and not be prosecuted for a prostitution offense but referred to appropriate services, which as of this writing has yet to be issued). *See also* Stop Exploitation Through Trafficking Act of 2015, H.R. 159, 114th Cong. § 2 (as passed by House, Jan. 27, 2015) (giving preferential consideration for federal grants to states that have enacted a law that “discourages the charging or prosecution” of a trafficked minor and “encourages their diversion to “appropriate service providers”).

¹⁸ Memorandum in Support of Legislation, N.Y. Bill Jacket, 2008 A.B. 5258-B, ch. 569 (McKinney 2014).

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

indefinite supervision, including in custodial placement until the age of majority.¹⁹ Nevertheless, this dramatic doctrinal shift has stimulated surprisingly little critical scholarship. The few papers that do exist tend to read like legislative memoranda in support of passage and either express near unequivocal support for safe harbor laws²⁰ or argue for a more aggressive standard.²¹

This Article attempts to remedy safe harbor's critical neglect. Part II presents an analysis of the New York Safe Harbor Act, with a focus on the substitution provision and its recent amendment as well as related legislation. Parts III surveys the variations on New York's law adopted in other states since the first law's passage. These derivative laws require some form of custodial arrest of youth in the sex trades or protective custody pending release, diversion, or the initiation of dependency proceedings, albeit in a variety of forms and at very different stages of the legal process. These laws' so-called immunity ranges from an investigative "hold and release" to full-fledged arrest, arraignment, and prosecution in criminal court, followed by the pleading of an affirmative defense or the substitution of dependency proceedings.

In many jurisdictions, the detention and placement of a minor depends on the posture of the case—that is, before or after a final judgment—and the availability of approved facilities. Part IV examines the under addressed issue of the safety, suitability, and security of young people detained in lock-ups or residential facilities *after* being taken into custody. In particular, safe harbor laws also suffer from a lack of clarity or uniformity with respect to placement

¹⁹ Compare N.Y. PENAL LAW § 230.00, with N.Y. FAM. CT. ACT §§ 711–718 (McKinney 2014).

²⁰ See, e.g., Tanya Mir, Note, *Trick or Treat: Why Minors Engaged in Prostitution Should be Treated as Victims, Not Criminals*, 51 FAM. CT. REV. 163, 169–70 (2013) (defending the New York model as reasonably preserving judicial discretion to order a delinquency proceeding "where individuals warrant rehabilitation in a strict setting" and justifying "[s]upervised detention ... in instances where the minor has a legitimate criminal record or when she poses a danger to herself or society."); Krystle M. Fernandez, Comment, *Victims or Criminals? The Intricacies of Dealing with Juvenile Victims of Sex Trafficking and why the Distinction Matters*, 45 ARIZ. ST. L. J. 859, 886 (2013) (advocating for New York's model in providing "the judge discretion to allow delinquency charges for a repeatedly uncooperative and resistant juvenile ..."); K. M. Baker, Comment, *Time for Change: Handling Child Prostitution Cases in Georgia*, 4 J. MARSHALL L. REV. 177, 199–200 (2011) (advocating for Georgia's adoption of the New York model, including allowance for a judge to proceed with a delinquency petition if the court determines the minor has previously been adjudicated for a prostitution offense, is unwilling to participate in services, or proceeding under a CHINS petition would be futile); Wendi J. Adelson, *Child Prostitute or Victim of Trafficking*, 6 ST. THOMAS L. REV. 96, 127 (2008) ("New York has taken a bold step forward [...] We need more state laws to finish the job."); Kate Brittle, Note, *Child Abuse by Another Name: Why the Child Welfare System is the Best Mechanism in Place to Address the Problem of Juvenile Prostitution*, 36 HOFSTRA L. REV. 1339, 1374 (2008) (describing New York's "groundbreaking headway" in passing the SHA and approving of the child welfare and court supervision model). *But cf.* Cynthia Godsoe, *Contempt, Status, and the Criminalization of Non-Conforming Girls*, 35 CARDOZO L. REV. 1091, 1112 (2014) (while referring to safe harbor laws as "a positive step" noting "numerous drawbacks," including the punitive nature of the status offense system, broad discretion for police and courts encouraging arbitrary enforcement, lack of adequate support services, and the "obscuration of the systemic social problems" causing youth involvement in the sex trades); Omeara Harrington, Note, *Free Lolita! The Contradictory Legal Status of Seattle's Prostituted Youth*, 9 SEATTLE J. SOC. JUST. 401, 416–17 (2010) (criticizing the New York law for not making the PINS conversion "automatic," namely by allowing judicial discretion where a youth has a prior prostitution conviction or is determined to fall outside the federal definition of a severe form of trafficking).

²¹ See, e.g., Darren Geist, *Finding Safe Harbor: Protection, Prosecution, and State Strategies to Address Prostituted Minors*, 4 LEG. & POL'Y BRIEF 67, 123 (2013) (defending the use of secure detention in certain cases, arguing that "holding minors in detention is better than simply returning them to the streets and to the pimps"); Shelby Schwartz, Note, *Harboring Concerns: The Problematic Conceptual Reorientation of Juvenile Prostitution Adjudication in New York*, 18 COLUM. J. GENDER & L. 235, 280 (2008) (criticizing PINS adjudication on grounds that juvenile delinquency petitions may be more appropriate for those young persons who ought to be "forced to remain" through secure confinement).

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

options, conditions of confinement, quality of care standards, and periodic review procedures for facilities in which youth charged with prostitution-related offenses are held.

In addition to the consequences of safe harbor reforms, recent data unavailable to the New York Legislature at the time of the law's passage call the purposes underpinning safe harbor laws into serious question. Safe harbor laws have been pushed through state legislatures based on the proposition that youth in the sex trade are categorical victims, or "Very Young Girls" coerced into trading sex by predatory third parties and in need of family court deprogramming.²² Part V draws from empirical studies challenging this assumption on the bases that the majority of youth in the sex trades have prior family court involvement, do not experience exploitation by a third party as a mode of entry but instead trade sex due to limited economic choices and occupational discrimination, and that a majority of youth in the sex trades are male, transgender, and gender non-conforming.²³ This section also presents evidence of widespread abuse perpetrated by the very officials designated to "protect" young people in the sex trades—law enforcement, courts, and social services personnel. These serious misgivings militate toward the conclusion that, regardless of whether a young person is coerced into trading sex by predation or limited economic choices, the arrest-based nature and custodial goals of safe harbor laws and policies make them ill-suited to the populations they are ostensibly designed to save.

There exists an ethical alternative to the "Very Young Girls" model. The groundbreaking advocacy work of youth-led organizations has highlighted serious abuses inherent in the arrest-based and custodial systems safe harbor laws embody. Part VI introduces an alternative model to the regime of safe harbor laws, proposing full immunity from criminal and juvenile delinquency prosecutions, prohibition on arrest, temporary protective custody, and law enforcement and guardian-initiated petitions for dependency proceedings, and, in dependency and status offense proceedings independently initiated by child protection agencies, equalization of procedural due process rights and abolition of forced treatment, institutional placement, and detention. In the place of arrest and institutionalization, this alternative model relies on voluntary, low-threshold services, including: street-based and comprehensive drop-in services and peer-led outreach; safe and supportive, voluntary short-term shelter, long-term affordable housing, and family-based placement options; safe and supportive housing and placement protocols for transgender and gender non-conforming youth; non-discrimination, harassment, confidentiality, and complaint procedures in youth-serving facilities; access to and improved primary, reproductive, and sexual health care and harm-reductionist treatment; living wage employment opportunities and leadership development; and food security. The Article attempts to center the experiences and needs that youth in the sex trades have themselves identified, to reach the conclusion that regardless of whether youth trade sex as a result of limited economic circumstances or forcible coercion, they should all equally be entitled to a truly safer harbor, not only under, but also *from* the law.

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

²² This view is epitomized by the documentary of the same name, "an exposé of the commercial sexual exploitation of girls in New York City as they are sold on the streets by pimps and treated as adult criminals by police." See *VERY YOUNG GIRLS* (Swinging T Productions 2007). Notably, Girls Education and Mentoring Services ("GEMS")—the subject of the documentary—was instrumental in the passage of the New York Safe Harbor Act.

²³ See *infra* Part V.

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

On September 26, 2008 then-New York Governor David Paterson accompanied his signature of the Safe Harbor Act into law with the statement that “[t]his law [...] will ensure that sexually exploited youth receive counseling and emergency services as well as long term housing solutions.”²⁴ Just before the law was scheduled to take effect in 2010, the New York legislature cut appropriations for counseling, emergency, and shelter services attached to the bill, an amount that has yet to be fully restored.²⁵ Nevertheless, the legislature failed to strip the law of its most lasting change: the conversion of juvenile delinquency to Persons In Need of Supervision (“PINS”) proceedings. Still, the substitution provision accomplished by amendments to the Family Court Act (“FCA”) is not the sum total of the Safe Harbor Act’s influence. The Act also created a social services framework with the adoption of Title 8-A of the Social Services Law.²⁶ This section will survey the Safe Harbor Act in its entirety before describing the substitution component and its rationale in more detail.

A. Legislative History

Proponents of safe harbor laws praise the New York law as a “watershed moment” in what they call the “fight against the commercial sexual exploitation of children.”²⁷ Nationally, the language is increasingly militaristic, with safe harbor laws regularly characterized as instrumental in combatting the “criminal slave trade.”²⁸ In this way, the policy justification for safe harbor laws is remarkably similar to Amigh’s statement a century earlier that a law-enforcement-based response is necessary to “checkmating the work of the white slavers.”²⁹

At first glance, the Assembly bill memorandum attached to the Safe Harbor Act presents more restrained language, explaining that the purpose of the Act is to “provide support and services to youth who are victims of sexual exploitation.”³⁰ Further, that New York’s:

response to this issue has been to prosecute sexually exploited youth as criminals. This response is ineffective as arresting, prosecuting and incarcerating victimized youth serves to re-traumatize them and to increase their feelings of low self-esteem. This only makes the process of recovery more difficult. [...] Therefore, sexually exploited youth should not be prosecuted under the penal law for acts of prostitution. Instead, services should be created to meet the needs of these youth outside of the justice system.³¹

The Assembly memo anchors the law’s legitimacy in “both federal and international

²⁴ Press Release, N.Y. State, Governor Paterson Signs Law To Protect Sexually Exploited Youth (Sept. 26, 2008).

²⁵ Stephanie Gendell, Citizen’s Committee for Children. Testimony to the New York State Senate Finance Committee on Ways and Means Regarding the New York State Human Services Budget Proposal State FY 2012-2013, at 4 (noting that “the State’s Safe Harbor Act, which passed in 2010 with an anticipated \$10 million, was cut to \$3 million in SFY 10–11 and was then cut to \$0 in SFY 11–12.”).

²⁶ N.Y. SOC. SERV. LAW § 447 (McKinney 2014).

²⁷ POLARIS PROJECT, OVERVIEW OF STATE LEGISLATIVE POLICY TO ADDRESS THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN—STATE “SAFE HARBOR” LAWS 1 (2008), available at http://www.polarisproject.org/storage/documents/policy_documents/model%20laws/model%20safe%20harbor%20aw%20overview%20final-1.pdf.

²⁸ Linda Smith & Samantha H. Vardaman, *A Legislative Framework for Combating Domestic Minor Sex Trafficking*, 23 REGENT U. L. REV. 265, 267 (2011).

²⁹ Amigh, *supra* note 6, at 120.

³⁰ Memorandum in Support of Legislation, N.Y. Bill Jacket, 2008 A.B. 5258-B, ch. 569 (McKinney 2014).

³¹ *Id.*

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

law,” which “recognize that sexually exploited youth are the victims of crime and should be treated as such.”³² Despite its language to the contrary, Safe Harbor’s provisions do not themselves “create” services, but merely shift a systemic response from juvenile detention to the child welfare system, specifically “the protection and services of the family court through processes in place for persons in need of supervision, including diversion, crisis intervention, counseling, and emergency and long term housing services.”³³

B. Title 8-A Social Services Framework

Safe Harbor established within the Social Services Law (“SSL”) the definition of a “sexually exploited child” as any person under eighteen who is the victim of the crimes of sex trafficking or compelling prostitution,³⁴ or who engages in any act defined as prostitution, loitering for the purposes of prostitution, or sexual performance by a child as defined by the New York Penal Law.³⁵ Notably, this definition applies only for the purposes of the creation of social services, and does not correspond to the age guidelines of Safe Harbor’s substitution provision discussed *infra* Part II.C, which only applied to ages 7 to 16 until almost a decade later, upon passage of the “raise the age” amendment discussed *infra* Part II.D.1. It is likely that this discrepancy is responsible for the misstatement of the original Act’s effects by a surprising number of legal commentators.³⁶

The Act goes on to define the terms “short-term safe house,” “advocate,” “safe house,” and “community-based program,” and prescribes training and approval of such facilities pursuant to regulations of the Office of Children and Family Services (“OCFS”).³⁷ Section 447-B then defines the scope of local social service district responsibility in providing services for eligible youth regardless of whether they are court-mandated,³⁸ need and capacity evaluations,³⁹ “separate and distinct service needs” according to gender,⁴⁰ and encouragement for the Office of Children and Family Services to contract with at least one long-term residential facility for youth statewide⁴¹ and for local social service commissioners to initiate contracts for training of law enforcement officers.⁴² These provisions necessarily require state appropriations, and as a result have been most affected by the funding cut. Even with renewed investment in 2014, the meager funds combines with the discretionary language to allow local service services districts wide latitude in meeting the requirements of the state framework.

³² *Id.*

³³ *Id.*

³⁴ N.Y. SOC. SERV. LAW § 447-a(1)(a) & (c)(McKinney 2014)(citing N.Y. PENAL LAW §§ 230.34 & 230.33).

³⁵ *Id.* § 447-a(1)(b) & (d)(citing N.Y. PENAL LAW §§ 230.00, 263.00 & 240.37).

³⁶ *See, e.g.*, Smith & Vardaman, *supra* note 28, at 292 (misstating that New York’s law “requires the court to adjudicate” youth under eighteen years of age); K. M. Baker, *supra* note 20, at 196 (misstating that New York’s law creates a presumption that all youth under eighteen years of age are severely trafficked persons); Tamar R. Birkhead, *The “Youngest Profession:” Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1068 n.48 (2011) (misstating that New York’s law “broadens the jurisdiction of family court to include qualified youth charged with acts of prostitution who are between the ages of sixteen and eighteen”).

³⁷ SOC. SERV. § 447(a).

³⁸ *Id.* § 447-b(1)-(2).

³⁹ *Id.* § 447-b(3).

⁴⁰ *Id.* § 447-b(4).

⁴¹ *Id.* § 447-b(5).

⁴² *Id.* § 447-b.

C. Person in Need of Supervision (“PINS”) Substitution Framework

The most impactful of Safe Harbor’s provisions, and the focus of this Article, is its amendment to the Family Court Act creating the family court substitution provision. Commentators have noted that the law’s central “intent is to immunize most children who have committed sexual offenses from criminal prosecution [...], substituting PINS adjudication and services.”⁴³ Importantly however, the Safe Harbor Act did not introduce a defense of infancy to the Penal Law to minors charged with a prostitution offense.⁴⁴ Instead, the Act required that a family court judge, regardless of the disposition of the presentment agency, must generally substitute a PINS petition for a juvenile delinquency petition in the case of a first-time prostitution offense when it is committed by a person between the ages of 7 and 16—later made available to persons ages sixteen and seventeen in adult criminal court as discussed *infra* Part II.D.1.⁴⁵

The exceptions to the remedy are numerous and far-reaching. A judge may decline substitution of a PINS petition and instead continue with delinquency proceedings if the respondent has previously faced delinquency proceedings for prostitution, expresses a “current unwillingness to cooperate with specialized services,” or, pending conclusion of the fact-finding hearing on the PINS petition, the youth is found to be “not in substantial compliance with a lawful order of the court.”⁴⁶ There is only one published case specifically applying these criteria, and it declined application of the remedy. In *In re Bobby P.* a Queens Family Court judge denied a PINS petition to a young woman despite her expressed willingness to accept and cooperate with specialized services for sexually exploited youth, in addition to her assistance in prosecuting a third party, said to be her pimp.⁴⁷ In spite of Bobby P.’s stated intent to comply with specialized services, the court justified the denial as within the discretion provided by the Safe Harbor Act.⁴⁸ The judge highlighted that Bobby P. had traded sex since 12, attempts to correct her behavior had failed, she had regularly run away from her foster home for long periods of time, she was unable or unwilling to properly care for her infant, and that she “ultimately” failed to cooperate with the prosecutor.⁴⁹

Some context is necessary to fully appreciate the significance and nature of a PINS proceeding under New York law. Traditionally, a PINS petition is filed not by first arrest but for the protective commitment of non-emancipated minors who have repeatedly committed status offenses, traditionally for uncontrollable truancy or repeated consumption of alcohol outside the control of a parent or guardian.⁵⁰ The purpose of PINS adjudication in New York has been said to provide for troubled but not delinquent youth to be “housed in a nonsecure facility for therapeutic purposes.”⁵¹

Prior to Safe Harbor’s adoption, the Family Court Act defined a PINS youth almost

⁴³ MERRIL SOBIE, PRACTICE COMMENTARIES, MCKINNEY'S CONS. LAWS OF N.Y., FAM. CT. ACT § 732 (McKinney 2014).

⁴⁴ *People v. Samatha R.*, 33 Misc. 3d 1235(A), at *4 (N.Y. Crim. Ct. 2011).

⁴⁵ N.Y. FAM. CT. ACT §§ 311.4, 712(a) & 732(a) (McKinney 2014).

⁴⁶ *Id.* § 311.4.

⁴⁷ *In re Bobby P.*, 907 N.Y.S.2d 540, 549, 28 Misc.3d 959, 972 (N.Y. Fam. Ct. 2010).

⁴⁸ *Bobby P.*, 28 Misc.3d 959 at 972.

⁴⁹ *Id.*

⁵⁰ For an in-depth analysis of the doctrinal differences between delinquency and PINS proceedings in New York State, see generally *People v. Juarbe*, 194 Misc. 2d 77, 749 N.Y.S.2d 665 (Sup 2002), *rev'd on unrelated grounds by In re Dylan C.*, 69 A.D.3d 127, 888 N.Y.S.2d 513 (2d Dept., 2009).

⁵¹ *Juarbe*, 194 Misc. 2d at 82.

exclusively as a young person who demonstrates a *course of conduct* making them “incorrigible, ungovernable or habitually disobedient and beyond the lawful control of a parent or other person legally responsible for such child's care, or other lawful authority.”⁵² For this reason, PINS petitions were required to allege specific acts sufficient to establish that the respondent engaged in a qualifying course of conduct.⁵³ Under the Safe Harbor Act, the disjunctive *or* was added to also allow a finding that a minor is a PINS based on one, isolated act constituting the crime of prostitution or the nebulous and arbitrarily enforced offense of “loitering for the purposes of prostitution.”⁵⁴

The Family Court Act vests standing to file a PINS petition in a variety of actors, specifically: (a) peace officer or police officers; (b) parents or guardians; (c) any person who has suffered injury as a result of the alleged activity of a person alleged to be in need of supervision or a witness to such activity; (d) the recognized agents of any authorized agency, association, society, or institution; or (e) the presentment agency that consented to substitute a PINS petition for a petition alleging the person is a juvenile delinquent.⁵⁵ Prior to passage of the Safe Harbor Act, the vast majority of PINS petitions were filed by a parent or guardian, and 45 percent of petitions were initiated without a referral, while 22 percent of parents had the PINS process recommended to them by law enforcement and 19 percent by school administrators.⁵⁶ This stands in sharp contrast to the traditional application of juvenile delinquency petitions by law enforcement. A formative evaluation of New York State’s approach to prosecuting minors aged fifteen and under for prostitution-related offenses on the verge of Safe Harbor law’s passage found that 80 percent of juveniles were brought on an arrest petition, while only 20 percent of juveniles were involved in a non-arrest petition such as one initiated by a parent or guardian in a PINS petition.⁵⁷ This proportion stands to be reversed subsequent to Safe Harbor’s passage, although a dataset has yet to be released.

In a novel change, the Safe Harbor Act also amended the Family Court Act to expand PINS jurisdiction to applicants who are not otherwise subject to court involvement, who are “less than eighteen years of age [...] who appears to be a sexually exploited child as defined in paragraph (a), (c) or (d) of [SSL § 447-a(1)], but only if the child consents to the filing of a petition under this article.”⁵⁸ This “voluntary” petition expressly excludes those youth who qualify under 447-a(1)(b) as a “sexually exploited child” if they engage in any act of prostitution as defined by section 230.00 of the New York Penal Law.⁵⁹ To date, there is no record of a young person submitting to voluntary PINS adjudication under the Safe Harbor Act, and as the Social

⁵² N.Y. FAM. CT. ACT § 712(a) (McKinney 2014). *See also id.* § 732(a)(i)(describing the procedure for originating a proceeding to adjudicate need for supervision of a minor who is “an *habitual* truant or is incorrigible, ungovernable, or habitually disobedient and beyond the lawful control of his parents, guardian or lawful custodian [...].”) (emphasis added).

⁵³ 47 N.Y. Jur. 2d *Domestic Relations* § 1606 (2014).

⁵⁴ FAM. CT. ACT §§ 712(a) & 732(a)(i).

⁵⁵ *Id.* § 732.

⁵⁶ VERA INST., A STUDY OF THE PINS SYSTEM IN NEW YORK CITY: RESULTS AND IMPLICATIONS 11, fig.6 (2002), available at www.vera.org/sites/default/files/resources/downloads/159_243.pdf.

⁵⁷ AMY MUSLIM, MELISSA LABRIOLA & MICHAEL REMPEL, THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN NEW YORK CITY, VOL. 2: FORMATIVE EVALUATION: THE NEW YORK CITY DEMONSTRATION 17–18 (2008).

⁵⁸ FAM. CT. ACT § 712(a).

⁵⁹ N.Y. SOC. SERV. LAW § 447-a(1)(b) (McKinney 2014).

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

Services Law framework provides that access to services cannot be conditioned on court involvement, it is unclear why such a provision is necessary.⁶⁰

Presumably the mere conversion of a petition to a PINS proceeding is not intended to render PINS *adjudication* a foregone conclusion. After all, the New York Court of Appeals decision held in 1974 that a respondent to a PINS proceeding is constitutionally entitled to a burden of proof equivalent to that of a juvenile delinquency and criminal prosecution, namely proof of guilt “beyond a reasonable doubt.”⁶¹ While an Article 7 PINS proceeding ostensibly requires the same or similar due process elements afforded to juvenile delinquents, “[i]n reality, PINS procedures, which were originally quasi-criminal but are now treated as purely civil in nature, comprise an uneasy hybrid of criminal and civil elements. The amalgam is artfully hidden beneath Section 711’s prescription of ‘a due process of law.’”⁶² For instance, in *Matter of Tabitha L.L.*, the New York Court of Appeals declined to incorporate the allocution requirement of the Family Court Act’s juvenile delinquency proceeding to an Article 7 PINS proceeding given the absence of specific legislative authorization.⁶³ There is also no due process requirement that a PINS petition set forth nonhearsay allegations of fact.⁶⁴ Family Court judges have justified these lesser protections “[b]ecause the goal in a PINS case is to provide rehabilitation and treatment to children at risk of more serious misbehavior.”⁶⁵

The available Family Court statistics on prostitution-related offenses point to the unsavory statistics resulting from this lesser protection. The formative evaluation of New York State’s approach found that among those youth aged fifteen and under prosecuted between 2004 and 2006 for prostitution-related offenses, an astonishing 90 percent resulted in an admission or finding that the acts were committed, while 10 percent were dismissed or withdrawn, and only one case resulted in an adjournment in contemplation of dismissal.⁶⁶ Among those cases reaching a final disposition, 62 percent resulted in detention or institutional placement.⁶⁷

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

In deciding that a PINS respondent has a right to be present at her dispositional hearing, Judge Fuchsberg wrote for a majority of the Court of Appeals when he noted “[t]he consequences of a PINS dispositional hearing are wide-ranging. They go all the way from the power to discharge a respondent with warning ... to compulsory placement for an initial period of 18 months ... plus further extensions without consent until age 18”⁶⁸ The Court also noted

⁶⁰ *People v. Samatha R.*, 33 Misc. 3d 1235(A), at *2 n.1 (N.Y. Crim. Ct. 2011)(questioning, prior to the “raise the age” amendment in 2014, whether sections 712 [a] and 732 [b] of the Family Court Act require the consent of the 16- or 17-year-old in order for a loitering allegation to form the basis of a PINS petition, but noting that section 732 [a] [i] of the Act does not and it applies to loitering by referencing Social Services Law 447-a [1] [d])(citing *SOBIE*, *supra* note 43, at § 732).

⁶¹ *In Matter of Iris R.*, 33 N.Y.2d 987, 988, 309 N.E.2d 140, 140 (1974).

⁶² *SOBIE*, *supra* note 43, at § 711.

⁶³ 87 N.Y.2d 1009, 1011 (1996).

⁶⁴ *Matter of Guy II*, 192 A.D.2d 770, 771 (3d Dep’t 1993).

⁶⁵ *In re Shana R.*, No. S-02531-03, 2003 WL 21212586, at *1 (N.Y. Fam. Ct. May 7, 2003).

⁶⁶ *MUSLIM ET AL.*, *supra* note 57, at 17–18.

⁶⁷ *Id.* at 17–18.

⁶⁸ *In re Cecilia R.*, 36 N.Y.2d 317, 319, 327 N.E.2d 812, 813 (1975).

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

“the crucial effect that the disposition of a ... PINS proceeding can have on the life of a youngster, whose liberty in a secure facility ... can be as circumscribed as in a penal institution”⁶⁹ In a decision on the permissible length of detention of an alleged juvenile delinquent, Judge Breitel—who would later become Chief Judge of the Court of Appeals—once wrote that “[i]t would take a distorted view to believe that adult felony criminal proceedings were designed to be more tender of the rights of detained adults than the Family Court proceedings are of juveniles.”⁷⁰ It hardly stands to reason that this proposition is less true when replacing a juvenile delinquency petition with a PINS proceeding. Sadly, Judge Breitel’s concerns remain unheeded in New York. The incongruent application of procedural protections to PINS minors is not only a phenomenon in New York State, however, and is covered in more detail in the state survey included *infra* Part III.D.

D. Recent Amendments, Related Legislation, and Implementation

As of December of 2011 a reported total of seven New York City youth had been adjudicated as PINS since the law’s inception.⁷¹ Given the fact that an estimated 3,946 minors in the sex trades in New York City are arrested on prostitution charges and proxy offenses, an average of 2.5 times, it is likely that this number will drastically increase upon implementation of the 2014 amendment discussed below.⁷²

1. The Safe Harbor “Raise the Age” Amendments

Shortly after the Safe Harbor Act’s passage, advocates began lobbying for an increase in the Act’s age eligibility to sixteen and seventeen year-olds.⁷³ Initially the Safe Harbor substitution proceeding did not apply to *any* young person between the ages of sixteen and seventeen arrested for a prostitution-related offense, despite the fact that between 1998 to 2006, 91 percent of youth arrested for prostitution were aged sixteen, seventeen, and eighteen, only nine percent were between ten years-old and fifteen, and the overwhelming majority of persons fifteen and under were ages fourteen (3%) and fifteen (5%), with youth aged ten through thirteen making up a mere 1.5 percent of total arrests.⁷⁴ Indeed, in New York, all young people aged sixteen and seventeen are charged as adults in Criminal Court, for both prostitution and non-prostitution offenses. The efforts of defense attorneys to secure dismissal of prosecutions of defendants aged seventeen and under through interests-of-justice arguments rooted in the Safe Harbor Act’s amendments to the Social Services Law had met with mixed results.⁷⁵

⁶⁹ *Id.*, 36 N.Y.2d at 320.

⁷⁰ *People ex rel. Guggenheim v. Mucci*, 32 N.Y.2d 307, 313, 344 N.Y.S.2d 944, 949, 298 N.E.2d 109, 112 (1973).

⁷¹ "Oversight—Implementation of the Safe Harbor Act." The New York City Administration for Children's Services Testimony to the New York City Council, at 3 (Dec. 5, 2011).

⁷² RIC CURTIS, KAREN TERRY, MEREDITH DANK, KIRK DOMBROWSKI & BILAL KHAN, *THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN NEW YORK CITY, VOL. 1: THE CSEC POPULATION IN NEW YORK CITY: SIZE, CHARACTERISTICS, AND NEEDS* 37, 89 (2008).

⁷³ ECPAT-USA, *NGO ALTERNATIVE REPORT TO THE U.N. COMMITTEE ON THE RIGHTS OF THE CHILD* 24 (2012); see also Marihug Cedeño, Note, *Pimps, Johns, and Juvenile Prostitutes: Is New York Doing Enough to Combat the Commercial Exploitation of Children?*, 22 CORNELL J. L. & PUB. POL’Y 153, 176 (2012).

⁷⁴ MUSLIM ET AL., *supra* note 57, at 14.

⁷⁵ Kate Mogulescu, *The Public Defender As Anti-Trafficking Advocate, an Unlikely Role: How Current New York City Arrest and Prosecution Policies Systematically Criminalize Victims of Sex Trafficking*, 15 CUNY L. REV. 471, 484 (2012).

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

In its first iteration, the bill proposed a procedure for the removal of Criminal Court prosecutions for certain prostitution-related offenses committed by sixteen and seventeen year-olds to Family Court. The Legal Aid Society criticized the removal approach, arguing it "will result in delay and expose these children to potentially extended periods of incarceration, make provision of immediate services more difficult, and disrupt continuity of legal representation which is crucial for this vulnerable population."⁷⁶ The version signed into law took the Legal Aid Society's advice, allowing a Criminal Court judge to convert and retain the case as a PINS proceeding and grant any relief available under Article 7 of the Family Court Act upon the defendant's consent after consultation with counsel.⁷⁷

In addition to the change in age eligibility, the amendment enacts an automatic expungement provision, which requires expungement of "[a]ny adverse finding and all records of the investigation and proceedings ... upon the person's eighteenth birthday or the conclusion of the proceedings on the charge before the court, whichever occurs later."⁷⁸ Should a defendant decline PINS referral and plead or be found guilty they are nonetheless entitled to youthful offender status.⁷⁹ This provision intelligently extends the relief of expungement to defendants who plead or are convicted of a first-offense Loitering for the Purposes of Engaging in Prostitution, correcting a "legal anomaly" created by the Criminal Procedure Law's restriction of youthful offender eligibility to a person ages 16 to 18 charged with a "crime" meaning a misdemeanor or felony, which, combined with the exemption on sealing requirements for such a conviction, resulted in the public availability of the conviction.⁸⁰

Still, the application of youthful offender adjudication to a violation was rightly criticized as precluding the young person from obtaining that treatment with regard to a future misdemeanor that is not covered by the specified prostitution offenses.⁸¹ In addition, after the raise the age law became effective it remained unclear whether a judge still has discretion to decline the conversion itself under the circumstances listed in the original law. As discussed *infra* Part II.C, a judge may deny substitution under the New York law if the youth has been previously convicted of a prostitution offense, adjudicated as a person in need of supervision ("PINS"), or is determined to be uncooperative with court-mandated services.⁸² While the law was subsequently amended, effective October 16, 2014, to prevent the preclusion effect described above in the application of the youthful offender remedy, it failed to rein in judicial discretion and instead codified it such that conversion was conditional upon compliance with court-ordered treatment and to allow a procedure for restoring the accusatory instrument upon a finding of non-compliance.⁸³

2. The Vacating Trafficking Convictions Act

In 2010, Governor Paterson signed into law the Vacating Trafficking Convictions Act, amending the New York Criminal Procedure Law section 440.10 to create a new basis for a post-

⁷⁶ The Legal Aid Soc'y, Memorandum in Support of A.7474 With a Suggested Amendment and In Opposition to A.2240B 2 (June 3, 2013).

⁷⁷ N.Y. CRIM. PROC. LAW §170.80(1) (McKinney 2014).

⁷⁸ CRIM. PROC. §170.80(2).

⁷⁹ *Id.* §170.80(2).

⁸⁰ *People v. Samatha R.*, 33 Misc. 3d 1235(A), at *6 (N.Y. Crim. Ct. 2011).

⁸¹ *See* WILLIAM C. DONNINO, PRACTICE COMMENTARY, N.Y. CRIM. PROC. LAW § 170.80 (McKinney 2014).

⁸² *In re Bobby P.*, 907 N.Y.S.2d 540, 549, 28 Misc.3d 959, 972 (N.Y. Fam. Ct. 2010).

⁸³ *See* 2014 Sess. Law News of N.Y. Ch. 402 (A. 8749-A).

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

judgment motion to vacate a conviction.⁸⁴ The purpose of this new remedy has been defined as “to remove a blot on the character of such victims so as to help those presumably not criminally responsible for the offense to gain useful employment and rebuild their lives.”⁸⁵ While this legislation does not on its face amend the provisions affected by the Safe Harbor Act, courts have repeatedly referenced the two legislative acts in conjunction when applying either.⁸⁶

This remedy allows for a defendant to file a motion after the entry of a judgment of conviction, where the arresting charge was made under either N.Y. Penal Law section 240.37 (loitering for the purposes of prostitution) or section 230.00 (prostitution), and the “defendant’s participation in the offense is a result of having been a victim of sex trafficking.”⁸⁷ In addition, the motion must be filed with “due diligence, after the defendant ceased to be a victim of such trafficking or has sought services for victims of such trafficking,” although the court will consider mitigating circumstances justifying delay.⁸⁸ Finally, although it is not required for granting a motion, where there is “official documentation of the defendant’s status as a victim of sex trafficking or trafficking in persons” from a government agency, the defendant is entitled to a presumption that their participation in the offense was a result of such activity.⁸⁹

Initially the statute’s use of the term “arresting charge” raised the concern that the remedy was underinclusive, such that § 440.10(1)(i) was exclusive to the two enumerated prostitution offenses. Despite multiple decisions granting vacatur for non-prostitution offenses, this issue remained unresolved by the courts for several years after the law’s enactment in 2010, because generally District Attorneys consented to vacatur of such charges.⁹⁰ In the one case to touch upon the issue in 2011, *People v. Gonzalez*, Judge Kotler vacated 86 prostitution-related convictions, but denied without argument any relief as to a conviction for resisting arrest, stating simply that it was not prostitution-related.⁹¹

However, on July 12, 2013, the Queens County Criminal Court issued a forceful decision in the case *People v. L.G.*, finding that “the legislature fully expected the statute to provide relief to trafficking victims who were not only arrested for prostitution or loitering for the purpose of prostitution, but were also convicted of other charges.”⁹² Judge Toko Serita explained that, to obtain relief, a movant must simply establish that she was a trafficking victim at the time of her arrest, and her conduct or “participation in the offense” leading to her arrest resulted from her being trafficked.⁹³ In other words, there is no “third element” that the defendant be initially charged with prostitution or loitering for the purposes. This decision is consistent with the view of the New York Court of Appeals, which has made clear that remedial statutes should be

⁸⁴ A.B. 7670, 233d Leg., 233rd Sess. (N.Y. 2010); S. 4429, 233d Leg., 233rd Sess. (N.Y. 2010).

⁸⁵ PETER PREISER, PRACTICE COMMENTARY, N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2014).

⁸⁶ See, e.g., *Samantha R.*, 33 Misc.3d 1235(A), at *5 (dismissing a charge of loitering for the purposes of prostitution against a sixteen year-old defendant, absent any evidence of force, fraud, or coercion, based on the court’s interest-of-justice authority under Criminal Procedure Law section 170.40, and relying in part on the fact that the defendant would be qualified under § 440.10 for vacatur of any conviction obtained).

⁸⁷ N.Y. CRIM. PROC. LAW § 440.10(1)(i) (McKinney 2014).

⁸⁸ *Id.* § 440.10(1)(i)-(i).

⁸⁹ *Id.* § 440.10(i)-(ii).

⁹⁰ Whitney J. Drasin, *New York’s Law Allowing Trafficked Persons to Bring Motions to Vacate Prostitution Convictions: Bridging the Gap or Just Covering it Up?*, 28 TOURO L. REV. 489, 513–14 (2012).

⁹¹ *People v. Gonzalez*, 927 N.Y.S.2d 567, 569, 32 Misc.3d 831, 835 (N.Y. Crim. Ct. 2011).

⁹² *People v. L.G.*, 2013 WL4402830 at *8 (N.Y. Crim. Ct. 2013).

⁹³ *L.G.*, 2013 WL4402830, at *5.

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

liberally construed to “spread its beneficial effects as widely as possible.”⁹⁴ For this reason among others, the enumeration of “arresting charges” in section 440.10 should not be read as exclusive.

The judicial discretion built into the statute has unfortunately impacted the many youth who do not experience force, fraud, or coercion, however, given that some courts disagree what criteria to rely on with respect to whether a minor defendant *is* a victim of trafficking.⁹⁵ The legislation’s “due diligence” and official documentation rules have also come under attack by advocates, as well as the inordinate time required to document this fact for purposes of a motion, and an informal reliance on collaboration with law enforcement in holding an exploiter accountable.⁹⁶

3. The Family Notification and Protection Act

Separately, the New York legislature has considered passage of a bill to require a police officer upon the arresting of a youth or upon the issuing of an appearance ticket to notify the parent or person legally responsible for such youth.⁹⁷ The proponents of the bill, titled the Family Notification and Protection Act, argue that it constitutes a “first step on the long road toward raising the age of criminal responsibility” in New York. The legislation would amend the Criminal Procedure Law to require that if the arrested person “appears” to be a “sexually exploited child” within the meaning of the Social Services Law, the officer may take the youth “to an available short-term safe house, but only if the youth consents to be taken.”⁹⁸ The bill would also amend the Social Services Law to include persons aged eighteen years old in the definition of a “sexually exploited child.”⁹⁹ The first introduction of the bill died in the Senate and Assembly Codes Committees. However, Senator Velmanette Montgomery reintroduced the bill in the Senate on January 12, 2015.¹⁰⁰

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

⁹⁴ *Asman v. Ambach*, 478 N.E. 2d 182, 184 (N.Y. 1985)(quoting *Post v. 120 E. End Ave. Corp.*, 464 N.E.2d 125, 127).

⁹⁵ *Compare People v. Lewis*, No. 035660, N.Y.L.J. 1202502663175, at * 1 (N.Y. Crim. Ct. 2011)(holding that a seventeen year-old defendant did not qualify for relief under the Trafficking Victims Protection Act, the Safe Harbor Act, or the recent amendments to Criminal Procedure Law section 440.10), with *People v. Doe*, 34 Misc. 3d 237, 241, 935 N.Y.S.2d 481, 484 (N.Y. Sup. Ct. 2011)(granting vacatur to twenty-two year-old woman, upon the consent of the Bronx District Attorney, of three prior convictions for loitering for the purposes of prostitution obtained at the age of 17 while being physically abused and exploited by a pimp); Hon. Toko Serita, *In Our Own Backyards: The Need for a Coordinated Judicial Response to Human Trafficking*, 36 N.Y.U. REV. LAW & SOC. CHANGE 635, 650 (2012)(“By explicitly incorporating the federal definition of a trafficking victim, this new post-conviction statute also provides relief to any prostituted minor who can establish that she was a minor at the time of her arrest.”).

⁹⁶ See e.g., CITY UNIV. OF N.Y. SCH. OF LAW, INT’L WOMEN’S HUMAN RIGHTS CLINIC, CLEARING THE SLATE: SEEKING EFFECTIVE REMEDIES FOR CRIMINALIZED TRAFFICKING VICTIMS 31, 35 (2014), available at www.law.cuny.edu/academics/clinics/iwhr/publications/Clearing-the-Slate.pdf; Drasin, *supra* note 90, at 511–12.

⁹⁷ The Family Notification and Protection Act, S.B. 3568, A.B. 7115, 236th Leg. (N.Y. 2013).

⁹⁸ *Id.* §§ 2, 3, which would create N.Y. CRIM. PROC. LAW § 120.90[7][b][iii] & 140.20[1].

⁹⁹ *Id.* § 5, which would amend N.Y. SOC. SERV. LAW 447-a.

¹⁰⁰ The Family Notification and Protection Act, S.B. 1325, 238th Leg. (N.Y. 2015).

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

The New York Safe Harbor Act’s derivations reflect important technical differences, including the nature of immunity, those offenses covered, and the eligibility criteria for substitution. In regards to procedural posture and timing, safe harbor laws vary from an investigative “hold and release” to full-fledged arrest, arraignment, and prosecution in criminal court, followed by the pleading of an affirmative defense or the substitution of dependency proceedings. Substitution may also be postponed or conditioned on court mandates, or as a result of prosecutorial diversion. These various state laws and policies also envision emerging extrajudicial approaches based on arrest without a hearing, such as the use of temporary protective custody and referral to a child protection agency and pre-booking diversion. Nonetheless, like the original Safe Harbor Act subsequent legislation, with the exception of Tennessee, universally envisions some form of custodial arrest of youth in the sex trades or protective custody pending release, diversion, or the initiation of dependency proceedings. This section provides a survey of state safe harbor laws and policies, focusing on modifications to the substitution framework modeled by New York law.

Arrest Charges, Ages 7 to 16, 2004-2006

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

Source: Muslim et al, *supra* note 57, at 19.

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

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

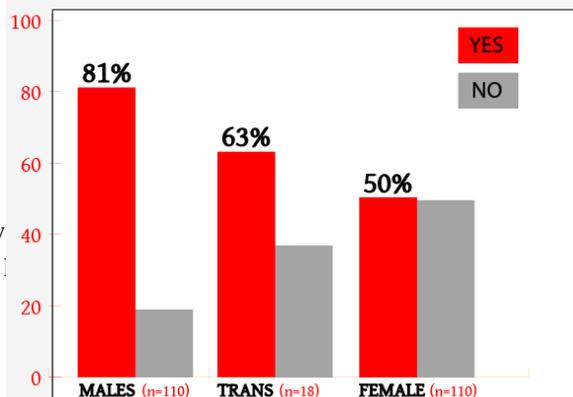
1. Covered Offenses

In many states, safe harbor laws cover only offenses with “prostitution” in the title, leaving open the possibility that youth in the sex trade will continue to be criminally prosecuted for “proxy” or “masking” charges. A proxy charge is an alternative charge often brought against youth engaging in the sex trade, such as false personation, loitering, public indecency, or disorderly conduct.¹⁰¹ In New York City, arrests for crimes with “prostitution” in the title account for only 17.6

Arrest Charges, Ages 10 to 18, 2008

Charges	Females	Males	Trans	Total
Drug Possession	12.6%	26.1%	0.00%	17.7%
Prostitution	10.9%	10.8%	21.1%	11.6%
Theft	10.1%	13.5%	5.3%	11.2%
Assault	6.7%	9.9%	5.3%	8.0%

Arrest History of Minors in the Sex Trade in New York City



¹⁰¹ MUSLIM ET AL., *supra* note 57, at 8 (finding proxy of prostitution in New York, including charges such as false

Please cite to 12 *Stanford J. C.R. & C.L.* ____ (forthcoming 2016).

percent of all arrests of youth engaged in selling sex.¹⁰² Prevalence of arrest across all offenses is highest among LGBTQ youth in the sex trade: 81% of young men and 63% of transgender youth who trade sex report prior arrests, primarily for offenses without “prostitution” in the title,¹⁰³ and similar figures are found among young LGB non-transgender women.¹⁰⁴ The widespread use of masking charges may also signal that police are “charging up” – charging youth engaged in trading sex for money with drug or weapons-related offenses that can be easier to prove than prostitution-related offenses.

There is some indication that lawmakers are open to the inclusion of non-prostitution-related proxy offenses within the scope of safe harbor laws. The Uniform Law Commission’s Prevention of and Remedies for Human Trafficking Act strongly endorses immunity from prosecution for prostitution-related offenses in both criminal and juvenile delinquency proceedings and recommends the extension of immunity to other “non-violent offenses.”¹⁰⁵

No state safe harbor law currently protects minors from criminal prosecution for felony prostitution and trafficking-related offenses. For instance, while Tennessee’s safe harbor law enacts a robust immunity provision for simply prostitution offenses, it does not extend to Aggravated Prostitution, a Class C Felony that applies to a person knowingly living with HIV who “engages in sexual activity as a business or is an inmate in a house of prostitution or loiters in a public place for the purpose of being hired to engage in sexual activity,”¹⁰⁶ or Promoting Prostitution, a Class E Felony,¹⁰⁷ each of which are offenses a minor could easily be charged with, particularly given the ways in which youth in the sex trades often share clients and resources to survive and stay safe.¹⁰⁸

2. Eligibility Criteria

Other states do not specifically enumerate covered offenses, instead simply setting out eligibility criteria for application of the law. In these cases, grounds for immunity from prosecution are often vague and invite arbitrary enforcement. For example, in Mississippi a minor is granted immunity only if another person “causes or attempts to cause [the] minor to engage in commercial sexual activity” rendering it unclear whether a minor who had not experienced physical force or coercion qualifies for relief.¹⁰⁹

In the majority of states, eligibility strictly turns on age. For instance, Minnesota’s legislation establishes mandatory first-time diversion for any 16 or 17 year old who has been charged with an offense “relating to being hired, offering to be hired, or agreeing to be hired . . . to engage in sexual penetration or sexual conduct,” but only optional diversion for young people with a prior history of prostitution-related charges and upon non-completion these minors can be

¹⁰² CURTIS ET AL., *supra* note 72, at 92.

¹⁰³ *Id.*

¹⁰⁴ MEREDITH DANK ET AL., URBAN INST., SURVIVING THE STREETS OF NEW YORK: EXPERIENCES OF LGBTQ, YMSM, AND YWSW YOUTH ENGAGED IN SURVIVAL SEX 32 (2015).

¹⁰⁵ NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, UNIFORM ACT ON PREVENTION OF AND REMEDIES FOR HUMAN TRAFFICKING 19–20 (2013), *available at* http://www.uniformlaws.org/shared/docs/Prevention%20of%20and%20Remedies%20for%20Human%20Trafficking/2013AM_UPRHT_As%20approved_Edited%20title%20page%20for%20web%20post.pdf.

¹⁰⁶ TENN. CODE ANN. § 39–13–516 (West 2014).

¹⁰⁷ *Id.* § 39–13–515.

¹⁰⁸ URBAN INST., SURVIVING THE STREETS OF NEW YORK, *supra* note 104, at 36–38.

¹⁰⁹ *See, e.g.*, MISS. CODE ANN. § 97-29-49(4) (West 2014).

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

referred by the prosecutor for reinstatement of the delinquency petition.¹¹⁰ The law also extends immunity to minors under 16 in juvenile delinquency proceedings, instead specifying that minors may be the subjects of a petition alleging the child is in need of protection or services.¹¹¹ In states such as Michigan¹¹² and Connecticut,¹¹³ youth under 16 are granted immunity from prosecution for the offense of prostitution in criminal and juvenile delinquency proceedings, and in states such as Illinois, Mississippi, Nebraska, Tennessee, Vermont, and Wyoming immunity from criminal prosecution is extended to persons under 18,¹¹⁴ although it must be noted with caution that in these states a court may yet assume jurisdiction for proxy offenses such as disorderly conduct, simple loitering, and trespassing.¹¹⁵ In a variation on this theme, the Texas Supreme Court held in 2010 that a delinquency prosecution of a child under 14 could not satisfy the “knowing” element of the prostitution statute because they “lack the capacity to appreciate the significance or the consequences of agreeing to sex, and thus cannot give meaningful consent.”¹¹⁶ However, delinquency proceedings may still be leveled at youth aged 15 through 17 years old, although Texas recently amended its penal code to allow for an affirmative defense to prosecution of victims of trafficking in persons as Texas Law defines the offense.¹¹⁷

The degree and scope of discretion in the application of safe harbor laws, as well as the role of judges or prosecutors, varies. Even where some discretion exists, this is often narrowed by categorical limitations on eligibility, especially where it is not the minor’s first offense. Those state laws offering conditional diversion programs and discretionary immunity have been criticized as creating “a confusing middle ground where a juvenile may be transformed into a victim or a criminal based on the whims of a prosecutor.”¹¹⁸ In one case, Washington mandates diversion for a first offense but allows prosecutors discretion as to whether to offer diversion for a second offense.¹¹⁹ Vermont on the other hand creates conditional diversion programs subject to

¹¹⁰ MINN. STAT. ANN. § 260C.007, subd. 6(16)–(17) (West 2014).

¹¹¹ *Id.*; see also generally Melissa Golke, Note, *The Age of Consent: How Minnesota’s Safe Harbor for Sexually Exploited Youth Act of 2011 Falls Short of Fully Addressing Domestic Child Sex Trafficking*, 33 HAMLINE J. PUB. L. & POL’Y 201 (2011).

¹¹² MICH. COMP. LAWS ANN. § 750.448 (West 2014).

¹¹³ An Act Providing a Safe Harbor for Exploited Children, 2010 Conn. Acts 10-115 (Reg. Session), *amending* CONN. GEN. STAT. ANN. §§ 53a-82, 53a-84, 53a-86, 53a-87 (West 2014).

¹¹⁴ See, e.g., 720 ILL. COMP. STAT. ANN. 5/11-14(d) (West 2014).

¹¹⁵ Birkhead, *supra* note 36, at 1112.

¹¹⁶ In the Matter of B.W., 313 S.W.3d 818, 820–21 (2010).

¹¹⁷ TEX. STAT. ANN. § 43.02(d)(West 2014)(“It is a defense to prosecution under this section that the actor engaged in the conduct that constitutes the offense because the actor was the victim of conduct that constitutes” the crime of trafficking in persons as defined by Texas law, which includes inducement of a minor to engage in prostitution whether or not there is evidence of force, fraud, or coercion); See also generally Cheryl N. Butler, *Sex Slavery in the Lone Star State: Does the Texas Human Trafficking Legislation of 2011 Protect Minors?*, 45 AKRON L. REV. 843 (2012).

¹¹⁸ Nikki J. Hasselbarth, Note, *Emerging Victimhood: Moving Towards the Protection of Domestic Juveniles Involved in Prostitution*, 21 DUKE J. GENDER L. & POL’Y 401, 411 (2014); see also Megan Anitto, *Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Exploitation of Children*, 30 YALE L. & POL’Y REV. 1, 62–63 (2011)(criticizing conditional diversion provisions and “carve-outs” that automatically bar some minors from safe harbor remedies, arguing that these provisions fail to resolve discordance in prosecution and the minimum age for capacity to consent to sex, as well as reflecting the hesitance of lawmakers who are “seeking to appease opposing constituencies”).

¹¹⁹ An Act Relating to Sex Crimes Involving Minors, 2010 Wash. Legis. Serv. c. 289, *amending* WASH. REV. CODE ANN. §§ 13.32A.030, 7.68.070, 13.40.070, 13.40.213, 9A.88.140, 9.68A.100, 9.68A.101, 9.68A.105, 9.68A.110 & 43.63A.740, *reenacting and amending* WASH. REV. CODE ANN. § 9.94A.515, *adding new sections to* WASH. REV. CODE ANN. §§ 13.32A, 13.40 & 74.15 (West 2014).

Please cite to 12 *Stanford J. C.R. & C.L.* ____ (forthcoming 2016).

the approval of both the prosecutor and judge.¹²⁰ Massachusetts law establishes a presumption in any delinquency or criminal court prosecution that a minor is entitled to a CHINS determination, but a judge retains the discretion to reinstate these proceedings if the child does not “substantially comply” with court-ordered treatment or if their “safety so requires.”¹²¹ Minnesota grants immunity from criminal proceedings to youth under the age of 16, creates a mandatory diversion program for any 16 or 17-year old first-time offenders, and optional diversion for minors with a prostitution-related arrest history.¹²²

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

As noted above, many states embrace a kind of secondary immunity, in which delinquency or adult criminal proceedings may be initiated, but a judge may hold the proceeding in abeyance or substitute it with a dependency or status offense proceeding. In Ohio, once a delinquency petition is filed against a minor alleged to have engaged in prostitution, the court may hold the complaint in abeyance pending the child’s completion of a mandated program.¹²³ Florida similarly does not create immunity from criminal prosecution and instead expands the jurisdiction of dependency proceedings to include those involving a person the court deems to be a “sexually exploited child,” and expressly excludes those minors who “willfully engage” in prostitution from a dependency finding.¹²⁴ The model advanced by New York, which allows for the substitution of a petition for protective custody in place of a juvenile delinquency or criminal court proceeding, also sets categorical limitations on a judge’s discretion.¹²⁵ As discussed *infra* Part II.C, a judge may deny substitution under the New York law if the youth has been previously convicted of a prostitution offense, adjudicated as a person in need of supervision (“PINS”), or is determined to be uncooperative with court-mandated services.¹²⁶

Several states permit criminal court proceedings against minors charged with prostitution, but allow an affirmative defense or rebuttable presumption of immunity. This approach postpones a decision on immunity to a time when the young person has already been arrested, held over, arraigned, required to attend multiple hearings, and may be ordered to comply with court mandated treatment. In Connecticut and Oklahoma youth aged 16 or 17 charged with the

¹²⁰ An Act Relating to Human Trafficking, 2010 Vt. Legis. Serv. 55 (West), *adding* VT. STAT. ANN., tit. 13, ch. 60; *and amending, inter alia*, VT. STAT. ANN., tit. 13, §§ 9, 3255, 4501, 5301, 5401, 7043 (West 2014).

¹²¹ An Act Relative to the Commercial Exploitation of People, 2011 Mass. Legis. Serv. c. 178 (West), *amending, inter alia*, MASS. GEN. LAWS ANN. ch. 6, § 178C; ch. 119, §§ 21, 51A, 51B, 51D, 55B, 58; ch. 265, § 24C; *and adding* MASS. GEN. LAWS ANN. ch.119, §§ 39K, 39L; ch. 265, §§ 26D, 49-57; & ch. 272 §§ 8, 53A (West 2014); *see also generally* 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. LAW & SOC. JUST. 147 (2013).

¹²² Sexually Exploited Youth, 2011 Minn. Sess. Law Serv. ch. 1, arts. 4–5, *amending, inter alia*, MINN. STAT. ANN. §§ 260B.007(6), (16); 260C(6), (11); 609.3241; & 626.558(2a) (West 2014).

¹²³ OHIO REV. CODE. ANN. § 2152.021(F)(1) (West 2014).

¹²⁴ Florida Safe Harbor Act, 2012 Fla. Sess. Law. Serv. 105, *amending* FLA. STAT. ANN. §§ 39.001, 39.01, 39.401 & 796.07, *and adding* FLA. STAT. ANN. §§ 39.524, 409.1678 (West 2014); *see also* Janelle Zabresky, Note, *Creating a Safe Harbor for Florida’s Children: An Overview of Florida’s Legislative Evolution in Domestic Minor Sex Trafficking*, 40 FLA. ST. U. L. REV. 415, 433 (2013).

¹²⁵ *See* N.Y. SOC. SERV. LAW § 447 & N.Y. FAM. CT. ACT §§ 311.4, 712 & 732 (West 2014). While the law initially permitted only persons between the ages of 7 and 16 to be eligible for the substitution provision, as of January 10, 2014, the provision was extended to 16- and 17 year-olds charged in adult criminal court as discussed *supra* Part II.D.1.

¹²⁶ *In re Bobby P.*, 907 N.Y.S.2d 540, 549, 28 Misc.3d 959, 972 (N.Y. Fam. Ct. 2010).

Please cite to 12 *Stanford J. C.R. & C.L.* ____ (forthcoming 2016).

offense of prostitution are entitled to a rebuttable presumption that they are a “victim of conduct by another person” that constitutes certain trafficking offenses.¹²⁷ New Jersey currently allows an affirmative defense against prostitution-related charges that the defendant meets the definition of a “victim of human trafficking” under New Jersey law, or was compelled by another to engage in sexual activity, without explicitly referencing the defendant’s age.¹²⁸ Georgia, Iowa, Missouri, Oregon, South Carolina, and Rhode Island merely note that the affirmative defense of force, duress, or coercion is available in prostitution cases as it is for any other criminal charge, although Oregon’s statute explicitly does not require proof of force if the minor charged with prostitution is under fifteen.¹²⁹ More recently, the appropriateness of imposing the burden of proving an affirmative defense on individuals charged with prostitution-related offenses has been called into question.¹³⁰ It is important to note that meeting this burden is more difficult for LGBTQ youth, who are generally not perceived to be victims of violence or trafficking.

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

In an increasing number of states—including Illinois, Kentucky, Nebraska, and North Carolina—immunity from criminal charges is paired with the requirement that police report and commit a young person to temporary protective custody and refer the case for initiation of abuse or neglect investigations to the local child protection authority. Still other protective-custody models do not create any immunity from criminal or delinquency proceedings, and instead permit extended detention. In Clark County, Las Vegas, while juveniles arrested on non-prostitution-related misdemeanor charges are normally released, detention facilities automatically detain juveniles arrested for prostitution on a “vice hold” for at least eight days.¹³¹

The Illinois Safe Children Act of 2010 provides for detention of up to 48 hours for investigative purposes, and requires initiation of a child abuse investigation by the Department of Children and Family Services within 24 hours.¹³² Kentucky takes a similar approach, but no categorical time limit is placed on investigative detention and reporting to the child welfare

¹²⁷ An Act Providing a Safe Harbor for Exploited Children, 2010 Conn. Acts 10-115 (Reg. Session), *amending* CONN. GEN. STAT. ANN. §§ 53a-82, 53a-84, 53a-86, 53a-87 (West 2014).

¹²⁸ N.J. STAT. ANN. § 2C:34-1(e) (West 2014); OKLA. STAT. tit. 21, § 1029 (West 2014)(creating a presumption in a prosecution of a sixteen or seventeen-year-old for prostitution that “the actor was coerced into committing such offense by another person in violation of the human trafficking provisions.”).

¹²⁹ GA. CODE ANN. § 16-3-6 (West 2014); IOWA CODE ANN. § 710A.3 (West 2014); MO. ANN. STAT. § 566.223 (West 2014); OR. REV. STAT. § 163.269 (West 2014); S.C. CODE ANN. 16-3-2020(J) (West 2014); R.I. GEN. LAWS ANN. § 11-34.1-2 (West 2014).

¹³⁰ IOM & NRC CSEC Report, *supra* note 15, at 170–172.

¹³¹ THE BARTON CHILD LAW AND POL’Y CLINIC, EMORY UNIV. SCH. OF LAW, COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN GEORGIA: SERVICE DELIVERY AND LEGISLATIVE RECOMMENDATIONS FOR STATE AND LOCAL POLICY MAKERS 36 (2008)[hereinafter BARTON CLINIC REPORT]. While the Nevada Legislature introduced a bill to give the juvenile court “exclusive original jurisdiction” of these cases, the legislation died in committee. A.B. 241, 2013 Leg., 77th Sess. (Nev. 2013).

¹³² Illinois Safe Children Act, 2010 Ill. Legis. Serv. 96-1464 (West), *amending, inter alia*, 325 ILL. COMP. STAT. ANN. 5/3; 705 ILL. COMP. STAT. ANN. 405/2-3, 2-18; 720 ILL. COMP. STAT. ANN. 5/11-14, 11-14.1, 11-14.2, 11-15, 11-15.1, 11-17, 11-17.1 11-18, 11-18.1, 11-19, 11-19.1, 11-19.2, 14-3; *and adding* 720 ILL. COMP. STAT. ANN. 5/11-19.3 (West 2014); *see also* Angela L. Bergman, Note, *For Their Own Good? Exploring Legislative Responses to the Commercial Sexual Exploitation of Children and the Illinois Safe Children Act*, 65 VAND. L. REV. 1361, 1399 (2012)(noting that the definition of an “abused child” excludes abuse by persons who are not a “parent, or immediate family member, or any person responsible for the child’s welfare, or any individual residing in the same home as the child, or a paramour of the child’s parent”)(quoting 325 ILL. COMP. STAT. ANN. 5/3 (West 2014)).

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

agency.¹³³ However, within twelve hours of taking the child into protective custody, the law enforcement officer must request the court to issue an emergency custody order.¹³⁴ Similarly, Nebraska also permits reasonable detention for investigative purposes, and the officer may subject a minor to temporary custody and neglect proceedings under the Nebraska Juvenile Code where she has reasonable grounds to believe the minor is immune from prosecution for prostitution under the law.¹³⁵ The officer is also required to immediately report the allegation to the Nebraska Department of Health and Human Services, which is to commence an investigation within twenty-four hours.¹³⁶

In one state a slightly less intrusive “arrest-referral” approach is taken. Tennessee provides the simplest formulation of safe harbor in that it provides that, where a law enforcement officer determines after a reasonable detention for investigative purposes that a person detained on suspicion of prostitution is a minor, the officer must provide the detainee with the telephone number for the National Human Trafficking Resource Center hotline and release the minor to the custody of a parent or legal guardian.¹³⁷ The courts however would still have jurisdiction upon initiation of a dependency proceeding.

Nonetheless, similar proposals have failed in other states. California’s Coalition to Abolish Slavery and Trafficking proposed legislation that would establish a rule that “[n]o arrest or punishment shall be imposed” for a prostitution offense but instead that a minor may be subject to the jurisdiction of a dependency proceeding.¹³⁸ The proposed law would have directed an officer, “[u]pon encounter of any youth by an officer for violation of this section, [... to] report suspected abuse of neglect to the Department of Child an Families.” Moreover, a dependency proceeding would only be initiated where the minor is found to be a victim of a human trafficking offense, there is no appropriate parent, guardian, or specialized program to refer the child to for services as a victim of human trafficking, and the criminal charges appear to be related or incident to the child’s victimization by trafficking.¹³⁹ The legislature, however, opted for a less radical change than the no-arrest proposal and amended the bill to propose that until a January 1, 2017 sunset, a minor may come within the jurisdiction of the juvenile court and become a dependent child.¹⁴⁰ The bill died in committee in late 2014.

The increasingly popular state-level approach of arrest-referral has its roots in local programs establishing pre-booking diversion programs for minor offenses. Seattle, Washington has piloted a pre-booking diversion program to address prostitution offenses in certain neighborhoods, titled the Law Enforcement Assisted Diversion (“LEAD”) Program. LEAD allows law enforcement officers through “social contact referrals” to redirect low-level offenders engaged in drug or prostitution activity to community-based services, instead of jail and

¹³³ KY. REV. STAT. ANN. § 529.120 (treatment of minor suspected of prostitution offense)(West 2014).

¹³⁴ *Id.* § 620.040(5)(c).

¹³⁵ NEB. REV. STAT. ANN. § 28-801(5) (LexisNexis 2014).

¹³⁶ *Id.*

¹³⁷ TENN. CODE ANN. § 39-13-513(d) (West 2014).

¹³⁸ *See* COAL. TO ABOLISH SLAVERY AND TRAFFICKING [CAST], PROPOSED CHANGES TO S.B. 738, at 3 (2014) available at www.castla.org/templates/files/proposed-decriminalization-language.pdf (which would have amended CAL. PENAL CODE § 647(b) to this effect); *see also generally* CAST, PROPOSAL FOR SAFE HARBOR OF CHILD TRAFFICKING VICTIMS IN CALIFORNIA (2015); Janet C. Sully, *Precedent or Problem?: Alameda County’s Diversion Policy for Youth Charged with Prostitution and the Case for a Policy of Immunity*, 55 WM. & MARY L. REV. 687 (2013).

¹³⁹ CAST, PROPOSED CHANGES TO S.B. 738, *supra* note 138, at 5–11 (which would have created CAL. WELF. & INST. CODE §§ 241.1(a) & 300(k) to this effect).

¹⁴⁰ *See* Sexually Exploited and Trafficked Minors, S.B. 738, 2013–2014 Leg. Sess. (Cal. 2013).

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

prosecution.¹⁴¹ The detainee is given thirty minutes to decide whether they want to be arrested or be referred to a program.¹⁴² If the person chooses the LEAD referral, the police contact the project lead at the Evergreen Treatment Services/REACH project.¹⁴³ A staff member will physically arrive to bring the individual to the REACH office treatment center about a block from Seattle's West Precinct.¹⁴⁴ If the person does not complete the assessments or show up for their appointment, staff is required to report the non-completion to the West Precinct immediately, which must then make a determination as to whether to subject the person to re-arrest.¹⁴⁵

Pre-booking diversion programs, however, have been criticized as coercive in that they act as an equivalent to custodial placement without the benefit of counsel or due process of law, under circumstances in which a detainee is impaired and there is no opportunity for a court to evaluate whether the arresting officer even had probable cause to stop, search, or arrest the person for a prostitution-related offense. One such program, known as Project ROSE, a program in Phoenix, Arizona, enlists local police to conduct five two-day stings, in which over 100 officers participate. These arrestees are handcuffed and transported to Bethany Bible Church, where prosecutors, detectives, and Project ROSE staff screen eligible arrestees. Those who refuse or do not qualify for the diversion program are prosecuted, and may face months or years in jail. Social work practitioners have roundly criticized programs like Project ROSE, pointing to ethical challenges and potential harms to clients presented by conditioning services on arrest.¹⁴⁶ Prostitution diversion programs have also been impugned for the lack of empirical evidence that such programs “help” people who engage in trading sex or address the circumstances driving involvement in the sex trades,¹⁴⁷ and participants report that court mandates interfere with treatment in that the threat of reporting for non-compliance introduces an inappropriate influence in the therapeutic process and breaches confidentiality protocols.

The modification of the safe harbor approach to an “arrest-referral” and problem-solving court model should be met with caution by legislators, as the practice would likely ratchet up criminalization of youth in the sex trades. In cities where drug courts have been implemented, a phenomenon known as “net-widening” has occurred, in which police arrest more people and prosecutors file more charges to include more low-level offenders that would have otherwise been released.¹⁴⁸ These courts have also been critiqued for removing the adversarial nature of judicial proceedings, and lending the judge a range of discretion unprecedented in the

¹⁴¹ KATHERINE BECKETT, SEATTLE'S LAW ENFORCEMENT ASSISTED DIVERSION (LEAD) PROGRAM: LESSONS LEARNED FROM THE FIRST TWO YEARS 10 (2014), available at <http://www.seattle.gov/council/Harrell/attachments/process%20evaluation%20final%2003-31-14.pdf>.

¹⁴² David Nelson, *55 drug offenders and prostitutes chose treatment over jail through Belltown's LEAD program*, SEATTLE POST-INTELLIGENCER (Aug. 29, 2012), <http://blog.seattlepi.com/insidebelltown/2012/08/29/55-drug-offenders-and-prostitutes-chose-treatment-over-jail-through-belltowns-lead-program/>.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Stéphanie Wahab & Meg Panichelli, *Ethical and Human Rights Issues in Coercive Interventions With Sex Workers*, 28 AFFILIA 344, 345 (2013).

¹⁴⁷ See generally Mae C. Quinn, *Revisiting Anna Moskowitz Kross's Critique of New York City's Women's Court: The Continued Problem of Solving the "Problem" of Prostitution with Specialized Courts*, 33 FORDHAM URB. L.J. 665 (2006).

¹⁴⁸ NAT'L ASSOC. OF CRIMINAL DEF. LAWYERS, AMERICA'S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM 42 (2009).

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

courtroom.¹⁴⁹ Problem-solving courts have also been charged with reinforcing systemic racial biases in excluding certain offenders based on prior convictions, or due to systemic differences in plea-bargaining, charging, or sentencing practices.¹⁵⁰

D. Status Offense Proceedings

Whether states embrace safe harbor on a substitution, secondary immunity, or arrest-referral model, the proceeding positioned to replace a delinquency or criminal court prosecution is often predicated on the use of a dependency or status offense proceeding. While each state has its own form of status offense proceedings, a person who commits a juvenile status offense is variously defined as “a MINS, PINS, CHINS (minor, person, or child in need of services or supervision) or an incorrigible or ungovernable youth.”¹⁵¹ Yet this common thread, frequently lauded by safe harbor advocates as a rehabilitative ideal, has serious and acknowledged deficiencies in the areas of procedural due process and vagueness. This move can be positioned within a broader trend to increase court involvement for minors, in that between 1985 to 2004, the number of formally petitioned status offense cases more than doubled.¹⁵² Safe harbor laws therefore threaten to extend these dubious proceedings to a whole new class of youth on the basis of their presumed sexual incorrigibility.

The fundamental difference between delinquency and status offense proceedings that safe harbor advocates embrace is the idea that status offense proceedings are not “criminal” in nature. Yet safe harbor laws universally require some form of law enforcement arrest or protective custody, and involve nearly identical processes. In the prosecution of adult offenses, indeterminate commitment is regarded as unconstitutional, and even in juvenile criminal courts, indeterminate commitment is generally seen as a “drastic and final step.”¹⁵³ In contrast, Family Courts adjudicating status offense and dependency proceedings view indeterminacy as par for the course, justified by the principle that family law determinations focus on “offenders and not offenses, on rehabilitation and not punishment.”¹⁵⁴ Whereas in adult criminal and delinquency prosecutions the discrete act of trading sex as a minor carries defined consequences cabined to that act, in family court dependency proceedings the very status of being an adolescent that trades sex may not formally be treated as a crime, yet many more aspects of a young person’s conduct and circumstances become subject to regulation by the judge. The prescription of programmatic “rehabilitation” stands at odds with the reality that homeless youth are “acutely

¹⁴⁹ DRUG POLICY ALLIANCE, DRUG COURTS ARE NOT THE ANSWER: TOWARD A HEALTH-CENTERED APPROACH TO DRUG USE 5–6 (2011).

¹⁵⁰ WEST HUDDLESTON & DOUGLAS B. MARLOWE, NAT’L DRUG COURT INST., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM SOLVING COURT PROGRAMS IN THE UNITED STATES 29 (2011).

¹⁵¹ DONALD T. KRAMER, 2 LEG. RTS. CHILD. REV. 2D § 20:1 (2d ed. 2014).

¹⁵² CHARLES PUZZANCHERA, NAT’L CTR. FOR JUVENILE JUSTICE, TRENDS IN THE JUSTICE SYSTEM’S RESPONSE TO STATUS OFFENDING: OJJDP BRIEFING PAPER 1 (2007), available at http://www.americanbar.org/content/dam/aba/migrated/child/PublicDocuments/adolescent_15.authcheckdam.pdf.

¹⁵³ Larry Cunningham, *Substantive Limitations on the Power of Family Courts to Commit Delinquent Juveniles to State Custody: Analysis and Critique*, 55 SYRACUSE L. REV. 87, 88 (2004).

¹⁵⁴ OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION [OJJDP], U.S. DEP’T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 86 (1999), available at <https://www.ncjrs.gov/html/ojjdp/nationalreport99/chapter4.pdf>.

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

aware of the potential risks they face in the course of the street economy”¹⁵⁵ and, in particular, demonstrate a high awareness of risks associated with involvement in the sex trades.¹⁵⁶

Commentators have criticized the fact that status offense proceedings, ostensibly non-criminal in nature, effectively “mirror those of the delinquency system, including the initiation of the procedure by arrest or application, preliminary hearing, bail determination, probation involvement, trial on the merits, adjudication, and post-adjudication monitoring by probation or commitment to state agencies.”¹⁵⁷ There is also wide divergence in state laws’ treatment of status offenses, including pre-adjudication diversion, classification as dependency or delinquency cases, and widely variable dispositional outcomes.¹⁵⁸ Status offenders are routinely afforded lesser procedural due process than delinquent youth, including a lesser burden of proof, right to counsel, allocution standards, and privilege against self-incrimination.¹⁵⁹ The very use of status offenses is arguably in violation of the Convention on the Rights of the Child’s non-discrimination clause, and harmful to children.¹⁶⁰ The Coalition for Juvenile Justice recently issued national standards for the care of youth charged with status offenses and called for reforms, including repeal of the valid court order exception to federal law’s prohibition on the use of secure detention for status offenders, elimination of the ability of a family member, school or other stakeholder to petition status behaviors to the juvenile court, and adoption of the least restrictive placement options for status offending youth.¹⁶¹

Despite the many challenges made to status offense statutes on grounds of vagueness, state courts have been reluctant to strike down status offense statutes.¹⁶² These proceedings have also come under assault by advocates for their discriminatory application. Young female offenders are more likely to receive confinement for status offenses, and more often enter the system for committing status offenses, such as truancy or running away, rather than charges of delinquency.¹⁶³ Family court courts are also reported to engage in inappropriate and harmful dispositions regulating the behaviors of LGBTQ youth, including ordering inappropriate services

¹⁵⁵ Marya V. Gwadz et al., *The Initiation of Homeless Youth into the Street Economy*, 32 J. ADOLESCENCE 357, 371 (2009).

¹⁵⁶ Jo Rees, *Trans Youth Involved in Sex Work in New York City: A Qualitative Study*, at 103 (May 2010) (unpublished Ph.D. dissertation, New York University) (on file with author); see also generally Michael C. Clatts, W. Rees Davis, J. L. Sotheran & Aylin Atillasoy, *Correlates and Distribution of HIV Risk Behaviors Among Homeless Youths in New York City: Implications for Prevention and Policy*, 77 CHILD WELFARE 195 (1998).

¹⁵⁷ David A. Michel, *The CHINS Don’t Stand A Chance: The Dubious Achievements of Child in Need of Services (“CHINS”) Jurisdiction in Massachusetts & A New Approach to Juvenile Status Offenses*, 20 B.U. PUB. INT. L.J. 321, 334 (2011).

¹⁵⁸ Aaron J. Curtis, *Tracing the School-to-Prison Pipeline from Zero-Tolerance Policies to Juvenile Justice Dispositions*, 102 GEO. L.J. 1251, 1266–67 (2014).

¹⁵⁹ Erin M. Smith, *In A Child’s Best Interest: Juvenile Status Offenders Deserve Procedural Due Process*, 10 LAW & INEQ. 253, 259–70 (1992).

¹⁶⁰ Chantima Chokloikaew, Note, *Article 6 of the CRC and New York State Law*, 12 N.Y. CITY L. REV. 473, 492 (2009).

¹⁶¹ COAL. FOR JUVENILE JUSTICE, NATIONAL STANDARDS FOR THE CARE OF YOUTH CHARGED WITH STATUS OFFENSES 98–104 (2014), available at <http://juvjustice.org/our-work/safety-opportunity-and-success-project/national-standards-care-youth-charged-status>; see also generally Lisa Pilnik, *New National Status Offense Standards Reshape Practice: Highlights for Advocates*, 33 CHILD. L. PRAC. 42 (2014).

¹⁶² KRAMER, *supra* note 151, at § 20:5.

¹⁶³ Laura A. Barnickol, *The Disparate Treatment of Males and Females Within the Juvenile Justice System*, 2 WASH. U. J.L. & POL’Y 429, 430 (2000). See also generally Godsoe, *supra* note 20; Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502 (2012); Julie J. Kim, *Left Behind: The Paternalistic Treatment of Status Offenders Within the Juvenile Justice System*, 87 WASH. U. L. REV. 843 (2010).

Please cite to 12 *Stanford J. C.R. & C.L.* ____ (forthcoming 2016).

based on biased views about sexual orientation and gender identity.¹⁶⁴ These services have included mandates that LGBTQ youth undergo “reparative therapy,” or counseling to address—and sometimes to change—their “sexual identity confusion” or “gender confusion.”¹⁶⁵ Judges have even hospitalized LGBTQ youth in an attempt to stop their same-sex attractions.¹⁶⁶

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

An under addressed issue in the debate around safe harbor laws is the safety and security of young people detained after being taken into police custody. The first state model law addressing a safe harbor for youth provided only that minors in custody not be detained in “inappropriate facilities,” but did not define the term.¹⁶⁷ This lack of specificity—and the broad valid court order exception embraced by federal law—has contributed to the high rate of restrictive institutionalization faced by youth in the sex trades.

A. Secure Detention

The risk of placing young people in secure detention is widely acknowledged. Detention can expose youth to violence and other harms, including violence by staff and fellow detainees.¹⁶⁸ In fact, youth are at higher risk of abuse by *staff* than they are at risk from other youth in detention.¹⁶⁹ Consequences of detention for youth in the sex trades include delay of education, exposure to violence in the general population, restricted or no services, police record, inability to access certain jobs or scholarships, and labeling stigma.¹⁷⁰

Any instance in which a minor labeled as a status offender by safe harbor laws is placed in secure detention arguably breaches the mandate of the Juvenile Justice and Delinquency Prevention Act (“JJDP”), which includes the deinstitutionalization of status offenders and young people adjudicated as dependents or abused or neglected children as a criterion for receipt of federal funds.¹⁷¹ The forty-nine states that participate in and receive grant funds through the program—Wyoming being the only non-participating state—must comply with this core requirement of the Act, as well as the core requirements of sight and sound separation between juveniles in secure detention and incarcerated adults, removal of juveniles from adult jails and

¹⁶⁴ KATAYOON MAJD, JODY MARKSAMER & CAROLYN REYES, THE EQUITY PROJECT, HIDDEN INJUSTICE: LGBTQ YOUTH IN JUVENILE COURTS 63 (2009), available at www.nclrights.org/wp-content/uploads/2014/06/hidden_injustice.pdf.

¹⁶⁵ *Id.* at 64.

¹⁶⁶ *Id.* at 65.

¹⁶⁷ GLOBAL RIGHTS, STATE MODEL LAW ON PROTECTION FOR VICTIMS OF HUMAN TRAFFICKING 11–12 (2005), available at http://humantrafficking.unc.edu/files/2011/09/StateModelLaw_9.05.pdf.

¹⁶⁸ IOM & NRC CSEC Report, *supra* note 15, at 21.

¹⁶⁹ BARTON CLINIC REPORT, *supra* note 131, at 40.

¹⁷⁰ LINDA A. SMITH, SAMANTHA H. VARDAMAN & MELISSA A. SNOW, SHARED HOPE INT’L, THE NATIONAL REPORT OF DOMESTIC MINOR SEX TRAFFICKING: AMERICA’S PROSTITUTED CHILDREN 61 (2009).

¹⁷¹ 42 U.S.C.A. § 5633(a)(11) (West 2014) (“Juveniles who are charged with or who have committed an offense that would not be criminal if committed by an adult [status offenders]... shall not be placed in secure detention facilities or secure correctional facilities; and juveniles—(i) who are not charged with any offense; and (ii) who are—(I) aliens; or (II) alleged to be dependent, neglected, or abused; shall not be placed in secure detention facilities or secure correctional facilities”).

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

lockups, and the reduction of disproportionate minority confinement.¹⁷² Participant states must monitor all facilities and report their compliance status annually to the Office of Juvenile Justice and Delinquency Prevention, and the amount of the grant funds allocated to the participant state may be reduced by 20 percent increments if full compliance is not maintained within *de minimis* exceptions.¹⁷³

However, safe harbor laws may yet result in the increase of secure detention as a result of a much-criticized exception to the JJDP Act. The Act was amended in 1984 to allow for judges to issue secure detention orders where a young person adjudicated for a status offense violates a valid court order.¹⁷⁴ The National Council of Juvenile and Family Court Judges lobbied the exception, but has since called for its elimination upon the JJDP Act's reauthorization.¹⁷⁵ While the exception is enshrined in federal law, some states have outlawed use of "bootstrapping" a status offender into a delinquent by statute or restricted its use. Unfortunately, the majority of states have adopted no such ban, and "[m]ost courts have found that imposing a more severe sentence on a status offender for violating her court orders is a valid use of the courts' contempt power. State courts, however, have placed different restrictions on this power."¹⁷⁶ In addition, several states have developed methods to allow placement of status offenders in secure facilities despite the ban, such that minors may be committed "following a second or later status offense, while others allow transfer to secure facilities following an administrative hearing in which there is proof of the child's unmanageability in the non-secure setting or a court finding that the child is not amenable to treatment."¹⁷⁷

Nonetheless, some states explicitly incorporate the threat of temporary and long-term secure detention for young people charged with prostitution-related offenses despite the "safe harbor" moniker. Minnesota's Department of Public Safety has recommended that the state juvenile protective hold statute be amended to allow temporary custody and secure detention of minors on prostitution-related charges for up to 24 hours, with the potential for a 48 hours extension upon motion by the prosecutor, and subject to judicial review, upon a showing that

¹⁷² Since its initial passage in 1974, the Juvenile Justice and Delinquency Prevention Act (Pub.L. 93-415, Title I, § 101, Sept. 7, 1974, 88 Stat. 1109) has been amended four times: 1980 (Pub.L. 96-509, § 3, Dec. 8, 1980, 94 Stat. 2750); 1984 (Pub.L. 98-473, Title II, § 611, Oct. 12, 1984, 98 Stat. 2107); 1992 (Pub.L. 102-586, § 1(a), Nov. 4, 1992, 106 Stat. 4982); and 2002 (Pub.L. 107-273, Div. C, Title II, § 12202, Nov. 2, 2002, 116 Stat. 1869).

¹⁷³ *Id.* See also OJJDP, DEP'T OF JUSTICE, STATE COMPLIANCE WITH JJDP ACT CORE REQUIREMENTS, ojjdp.gov/compliance/compliancedata.html (last visited January 30, 2015) (explaining that "[i]f a state fails to demonstrate compliance with any of the core requirements in a given year, OJJDP will reduce its formula grant for the subsequent fiscal year by 20 percent for each requirement with which the state is noncompliant."). See also generally OJJDP, GUIDANCE MANUAL FOR MONITORING FACILITIES UNDER THE JJDP ACT OF 2002 (2010), available at http://cyfd.org/docs/OJJDP_Guidance_Manual_2010.pdf. Note, however, that the manual is currently being reviewed for updates.

¹⁷⁴ See Formula Grants for Juvenile Justice, 47 Fed. Reg. 35,686 (Aug. 16, 1982) (codified at 28 C.F.R. pt. 31). There are competing views of the exception's efficacy. Compare Patricia J. Arthur & Regina Waugh, *Status Offenses and the Juvenile Justice and Delinquency Prevention Act: The Exception That Swallowed the Rule*, 7 SEATTLE J. SOC. JUST. 555, 556 (2009), with In re Jennifer G., 182 Misc. 2d 278, 288, 695 N.Y.S.2d 871, 879-80 (Fam. Ct. 1999) (arguing that the New York legislature ought to have incorporated the JJDP Act valid court order exception into New York law in order to allow for remand of a minor to secure detention, which is needed to "interrupt the cycle of the absconding PINS child").

¹⁷⁵ NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOLUTION SUPPORTING REAUTHORIZATION OF JJDP ACT AND ELIMINATION OF THE VCO (2010).

¹⁷⁶ Smith, *supra* note 159, at 275-76.

¹⁷⁷ KRAMER, *supra* note 151, at § 20:13.

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

release poses an immediate danger to the youth.¹⁷⁸ North Carolina permits reasonable detention for investigative purposes where the detainee is a minor, and permits a minor be taken into temporary protective custody as an “undisciplined juvenile” under the Juvenile Code, including by use of secure detention.¹⁷⁹ The statute does not limit the term of such temporary protective custody, and since North Carolina has been subject to funding reductions for non-compliance with the JJDP deinstitutionalization requirement from FY 2009 through FY 2014 it seems unlikely that North Carolina is envisioning application of the safe harbor provision in a manner that is strictly compliant with federal law.¹⁸⁰

B. Non-Secure and Limited Secure Placement

With respect to non-secure placement standards for youth charged with prostitution-related offenses, safe harbor laws suffer from a further lack of clarity or uniformity. Complicating matters further, in many jurisdictions the placement of a minor often depends on the posture of the case—that is, before or after a final judgment—and the availability of approved facilities. Among those states that specifically remove the possibility of secure detention for minors arrested on prostitution-related offenses, exist the variable definitions of “staff secure,” “semi-secure,” “non-secure,” “limited secure,” “community-based,” and “residential treatment.” Still other safe harbor laws expand the category of facilities that qualify for appropriate placement. Illinois’ safe harbor law limits the placement of a minor taken into temporary protective custody to a hospital, medical facility, or designated foster home, group home, or other program by the Department of Children and Family Services, subject to review by the Juvenile Court, and in no case may it include a jail or place for the detention of criminal or juvenile offenders.¹⁸¹

The JJDP Act itself defines the terms “secure detention” and “secure correctional” facilities to “any public or private residential facility which ... includes construction fixtures designed to physically restrict the movements and activities of juveniles” held in the facility.¹⁸² The federal regulations interpreting this provision have come to define “secure” to include “residential facilities which include construction features designed to physically restrict the movements and activities of persons in custody such as locked rooms and buildings, fences, or other physical structures”¹⁸³

Shortly after the JJDP Act’s initial passage in 1974, advocates criticized the use of so-called “semi-secure” facilities to confine status offenders and young people adjudicated as dependents or abused or neglected children. To prevent the “use of locked rooms or staff control from transforming [“semi-secure” facilities ...] into secure facilities,” advocates insisted on “on a narrow legislative definition which prohibits the complete control by staff of entrances and exits to any facility in which status offenders are placed.”¹⁸⁴ Despite these early warnings, the Department of Justice has since created wide latitude for supposedly non-secure facilities to

¹⁷⁸ MINN. DEP’T OF PUB. SAFETY OFFICE OF JUSTICE PROGRAMS, NO WRONG DOOR: A COMPREHENSIVE APPROACH TO SAFE HARBOR FOR MINNESOTA’S SEXUALLY EXPLOITED YOUTH 18 (2013).

¹⁷⁹ See N.C. GEN. STAT. ANN. §§ 14-204(c) & 7B-1900 (West 2014).

¹⁸⁰ OJJDP, STATE COMPLIANCE WITH JJDP ACT CORE REQUIREMENTS, *supra* note 173.

¹⁸¹ 325 ILL. COMP. STAT. ANN. 5/3 (West 2014).

¹⁸² 42 U.S.C.A. § 5603(12)–(13) (West 2014).

¹⁸³ 28 C.F.R. § 31.304(b) (West 2014).

¹⁸⁴ Jan C. Costelloa & Nancy L. Worthington, *Incarcerating Status Offenders: Attempts to Circumvent the Juvenile Justice and Delinquency Prevention Act*, 16 HARV. C.R.-C.L. L. REV. 41, 80 (1981).

avoid application of the federal ban on institutionalization of certain youth. Namely, federal regulations specify that secure detention “does not include facilities where physical restriction of movement or activity is provided solely through facility staff.”¹⁸⁵

Indeed, the Department has sanctioned this form of institutionalization by staff secure facilities from the definition of “secure” detention, such that a staff secure facility is deemed “a residential facility (1) which does not include construction features designed to physically restrict the movements and activities of juveniles who are in custody therein, but any such physical restriction of movement or activity is provided solely through staff; (2) which may establish reasonable rules restricting entrance to and egress from the facility; and (3) in which the movements and activities of individual juvenile residents may, for treatment purposes, be restricted or subject to control through the use of intensive staff supervision.”¹⁸⁶ This exception to the deinstitutionalization requirement also applies to a juvenile placed in a runaway shelter “but prevented from leaving due to staff restricting access to exits,” because “[a] facility may be non-secure if physical restriction of movement or activity is provided solely through facility staff.”¹⁸⁷ This nonsensical logic manufactures a distinction between being physically restrained by leather handcuffs and chokeholds by staff and being locked into a room by an automated locking mechanism.

The exclusive use of staff secure facilities for youth in the sex trades represents an increasingly popular method for states to sidestep the JJDP’s ban on institutionalization of juveniles subject to safe harbor laws. In Kansas, a person under 18 suspected of engaging in the sex trade is to be immediately placed in protective custody in a staff secure facility.¹⁸⁸ The officer is then directed to contact the Department for Children and Families to begin an investigation to initiate court proceedings. A hearing is to be held within 72 hours following a child having been taken into protective custody.¹⁸⁹ Under the Florida Safe Harbor Act, where the minor qualifies for dependency proceedings, a minor may be placed in a short term “staff secure” facility pending adjudication as a dependent child. A “staff secure” facility is defined as one with staff awake 24 hours a day and some staff or contract personnel are specifically trained to work with sexually exploited youth.¹⁹⁰

In the context of youth in the sex trades, “non-secure” and “limited secure” facilities are designed with even more restrictive policies, ostensibly to ensure distance from potential exploiters—whether or not the youth detained has an exploiter.¹⁹¹ The geographical isolation of “safe houses” to protect youth from “pimps” is clearly counterproductive, cruel, and excessive for youth who have not experienced coercion and for whom local peer networks represent sources of care and validation.¹⁹² These facilities are also designed on a “Very Young Girls” model, and as a result they are not equipped to provide transition-related and gender-affirming care to transgender youth.¹⁹³ Belying their label as non-detentional in nature, these facilities are

¹⁸⁵ 28 C.F.R. § 31.304(b) (West 2014).

¹⁸⁶ OJJDP, GUIDANCE MANUAL FOR MONITORING FACILITIES UNDER THE JJDP OF 2002, *supra* note 173, at 52–53. The term “residential facility pertains to “facilities with the structural and operational capacity to securely detain individuals overnight, and may include sleeping, shower and toilet, and day room areas.” Final Revision of the Existing Formula Grants Regulation, 61 Fed. Reg. 65,132 (Dec. 10, 1996).

¹⁸⁷ *Id.* at 52.

¹⁸⁸ KAN. STAT. ANN. § 38-2231(b) (West 2014).

¹⁸⁹ *Id.* § 38-2243.

¹⁹⁰ See FLA. STAT. ANN. §§ 39.524, 409.1678(1)(b), 409.1678(1)(e) (West 2014).

¹⁹¹ MUSLIM ET AL., *supra* note 57, at 61; SHARED HOPE INT’L, *supra* note 170, at 67–68.

¹⁹² Rees, *supra* note 156, at 190–91; CURTIS ET AL., *supra* note 72, at 51.

¹⁹³ Rees, *supra* note 156, at 190–91.

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

specifically designed to prevent voluntary departure by youth, and monitor young people through the installation of surveillance cameras and other methods. In the New York City Administration for Children’s Services limited secure facilities, for instance, facilities are required to maintain staffing of a facility control center 24/7, adopt systems for reporting AWOLs and warrants, and establish key control procedures, motion activated perimeter lighting, closed-circuit television monitoring inside the facility and on the perimeter, including but not limited to facility entry and exit points, and exterior building doors must remain locked at all times.¹⁹⁴ Non-secure placement facilities must also identify and report the confiscation of contraband such as hypodermic needles and “sexually explicit materials,” up to and including for the purposes of prosecution.¹⁹⁵

The potential consequences for attempts to leave these facilities are severe and escalating in nature: physical restraint, contempt proceedings, restoration of criminal charges or delinquency proceedings, secure detention, and even the addition of misdemeanor and felony charges for attempted escape. During fiscal year 2014, ACS recorded 575 incident reports of the use of physical restraints in non-secure placement and 175 such incidents in non-secure group homes.¹⁹⁶ Prosecutors in New York have, in the past, brought charges for felony escape against young people who attempted to leave non-secure facilities, although New York courts have refused to apply this statute to non-secure facilities, which by its language applies only to “detention facilities.”¹⁹⁷

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

While some states and municipalities specifically reference “gender-specific,” “separate” or “gender responsive” services in their safe harbor laws, no commonly accepted standards define gender-supportive or culturally competent care. Alameda County, California was authorized to implement a pilot “diversion program” for only non-transgender female minors arrested on prostitution charges, as an alternative to detainment at juvenile hall, but no provision was made for other youth.¹⁹⁸ The Florida Safe Harbor law requires that any short or long-term facility where a minor is committed “has set aside gender-specific, separate, and distinct living quarters for sexually exploited children.” Massachusetts’s law recognizes that “youth have separate and distinct service needs according to gender and appropriate services shall be made available while ensuring that an appropriate continuum of services exists.”¹⁹⁹ New York law requires local social services districts recognize the “separate and distinct service needs according to gender” and to the extent funds are available, make available appropriate programming.²⁰⁰ Minnesota’s Department of Public Safety has recommended—but has yet to implement—the policy that services must be responsive to the needs of individual youth,

¹⁹⁴ N.Y.C. ADMIN. FOR CHILDREN’S SERVS. [ACS], JUVENILE JUSTICE LIMITED SECURE PLACEMENTS QUALITY ASSURANCE STANDARDS 18 (2013), *available at* www.nyc.gov/html/acs/downloads/pdf/c2h/P2/Appendix_B_-_Draft_LSP_QAS.pdf.

¹⁹⁵ N.Y.C. ACS, NON-SECURE PLACEMENT (“NSP”) CONTRABAND POLICY, No. 2012/03 2–3 (2012).

¹⁹⁶ N.Y.C. ACS, ANNUAL INCIDENT DATA REPORT FISCAL YEAR 2014, *available at* www.nyc.gov/html/acs/downloads/pdf/statistics/FY14_Annual_Incident_Report_Non_Secure_Placement.pdf.

¹⁹⁷ *See, e.g.*, In re Dylan C., 20 Misc. 3d 942, 864 N.Y.S.2d 730 (Fam. Ct. 2008) *aff’d*, 69 A.D.3d 127, 888 N.Y.S.2d 513 (2009) *aff’d*, 16 N.Y.3d 614, 949 N.E.2d 949 (2011)(holding that non-secure facility from which juvenile left without permission was not a “detention facility” within meaning of felony escape statute).

¹⁹⁸ Thomas Carroll, *Gender and Juvenile Justice: New Courts, Programs Address Needs of Girls*, YOUTH LAW NEWS, July–Sept. 2009, at 3.

¹⁹⁹ MASS. GEN. LAWS ANN. ch. 119, § 39K(c) (West 2014).

²⁰⁰ N.Y. SOC. SERV. LAW § 447-b (West 2014).

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

including services that are gender responsive, culturally competent, age-appropriate, and supportive for LGBTQ youth.²⁰¹

LGBTQ youth also report high rates of physical, sexual, and emotional abuse in both custodial placement and detention.²⁰² It should come as no surprise that as many as 78 percent of LGBTQ youth who have been removed or ran away from a placement did so as a result of hostility toward their sexual orientation or gender identity.²⁰³ Many LGBTQ youth simply have no choice but to run away from placements in which they have experienced ongoing discrimination, harassment, or violence, including sexual assault.²⁰⁴ This abuse is by no means limited to fellow inmates. Facility staff reportedly punishes LGBTQ youth for benign behaviors that they mistakenly assume are sexually predatory.²⁰⁵ Staff also punish, ridicule, and prevent transgender youth from expressing their gender identity, and facilities fail to ensure the medical needs of transgender youth including gender-affirming care.²⁰⁶ Indeed, LGBTQ youth report incidents in which facility staff tried to change their sexual orientation, where professionals used coercive tactics that relied on religion to attempt to “convert” youth, and where detention staff attempted to change the gender identity of transgender youth, even recording these efforts in the youth’s treatment plans.²⁰⁷ This unfair treatment is built into administrative decisions, as well, including decisions about housing and classification, such as the isolation or segregation of LGBTQ youth, or the automatic housing of transgender youth according to their birth sex.²⁰⁸

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

With the provisions and stated purposes of the New York Safe Harbor Act in mind, the fact of the Act’s inefficacy is unavoidable. Out of an estimated 3,946 minors ages 10 to 18 in the sex trades in New York City arrested an average of 2.5 times,²⁰⁹ a reported total of seven New York City youth have been adjudicated as PINS since the law’s inception.²¹⁰ While the raise the age amendments passed into law in 2014 may change this fact, the law’s fundamental failings in this area should be seen as symptoms of a deeper maladjustment the facts. Indeed, the failure of the model in New York has occurred in spite of the increase of funds to law enforcement

²⁰¹ MINN. DEP’T OF PUBLIC SAFETY, *supra* note 171, at 8.

²⁰² HIDDEN INJUSTICE, *supra* note 164, at 102.

²⁰³ See generally JOINT TASK FORCE OF N.Y.C. CHILD WELFARE ADMIN. & THE COUNCIL OF FAMILY AND CHILD CARING AGENCIES, IMPROVING SERVICES FOR GAY AND LESBIAN YOUTH IN NYC’S CHILD WELFARE SYSTEM: A TASK FORCE REPORT (1994).

²⁰⁴ SHANNAN WILBER, CAITLIN RYAN & JODY MARKSAMER, CHILD WELFARE LEAGUE OF AM. [CWLA], CWLA BEST PRACTICE GUIDELINES: SERVING LGBT YOUTH IN OUT-OF-HOME CARE 6 (2006), available at http://www.cyfddivision.com/documents/2798_Best_Practices_LGBT0_5-06.pdf.

²⁰⁵ HIDDEN INJUSTICE, *supra* note 164, at 104.

²⁰⁶ *Id.* at 105, 111.

²⁰⁷ *Id.* at 65.

²⁰⁸ *Id.* at 106–108; LAMBDA LEGAL, NAT’L ALLIANCE TO END HOMELESSNESS, NAT’L NETWORK FOR YOUTH, & NAT’L CTR. FOR LESBIAN RIGHTS, NATIONAL RECOMMENDED BEST PRACTICES FOR SERVING LGBT HOMELESS YOUTH 6 (2009), available at www.f2f.ca.gov/res/pdf/NationalRecommended.pdf.

²⁰⁹ CURTIS ET AL., *supra* note 72, at 37, 89.

²¹⁰ "Oversight—Implementation of the Safe Harbor Act." The New York City Administration for Children's Services Testimony to the New York City Council. Dec. 5, 2011. p. 3.

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

agencies for training and services earmarked for “trafficked minors.”²¹¹ Relatedly, the conviction rate for youth between the ages of 16 to 18 prosecuted in adult criminal court for prostitution-related crimes actually increased several percentage points.²¹² The number of convictions resulting in adjudication in contemplation of dismissal *decreased* 10 percent in 2009 compared to 2005.²¹³ Given the stated purpose of the safe harbor approach—to replace prosecution with services—the foreseeable outcome should be the opposite of these statistics. Safe harbor’s failure has an alternative explanation: that youth in the sex trade are predominantly not “Very Young Girls” forced to trade sex by predatory third parties. Indeed, even in 2006 before Safe Harbor was passed, 93 percent of youth arrested for prostitution were aged 16 through 18 and were tried as adults rather than in family court where Safe Harbor applies.²¹⁴

But the research that has arisen since the safe harbor law’s passage is even more damning to the “Very Young Girls” narrative. This section introduces an assessment of safe harbor and its impact through the lens of social science research on motivations for entry, demographic data, and the community-based research and experiences of institutional violence documented by youth in the sex trades. The counterfactual presented by this research suggests that the culprit of minors’ involvement in the sex trade is not some shadowy stranger, but the society at large that fails to provide workable alternatives to trading sex for survival. The evidence also calls into question so-called “End Demand” provisions that often attend safe harbor laws, which include higher penalties for clients and the general prioritization of police training as first responders whose role is to arrest not only perpetrators, but youth themselves in order facilitate their transfer to rehabilitative custody. This latter trend is challenged by additional, and even more haunting reports, that document the perpetration of racial and sexual profiling, harassment, brutality, hate speech, confiscation of condoms, unlawful genital searches and unsafe placement of transgender youth by law enforcement.²¹⁵ It turns out that the police and Superintendent Amighs of the world are less saintly on the streets than in the tracts of “child savers.” These findings should still the hands of legislators and encourage a radical reevaluation of strategies for intervention, considering the recommendations put forward *infra* Part VI.

A. Research Flaws in Population Estimates and Demographics

The literature on minors’ involvement in the sex trades largely focuses on demographic data. Such studies are often commissioned by government agencies and research institutions as diagnostic tools to inform state actors so as to better allocate the ever-increasing number of resources earmarked for law enforcement and social service provision specific to this population. An alternative and drastically underappreciated form of research is provided by participatory action and community-driven research conducted by youth in the sex trades themselves. This research illuminates the, at best, wary response to law enforcement and social service interventions among minors involved, and militates in favor of a stronger understanding of the harms state actors perpetrate against street-involved young people.

²¹¹ See generally U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS—FY 2012 (2013).

²¹² Prostitution Data Analysis, New York City, 2005–2009, New York City Criminal Court (on file with author). This unpublished dataset includes figures on persons arrested for prostitution (PL 230.00) and loitering for prostitution (PL 240.37) in New York City, 2005 to 2009.

²¹³ *Id.*

²¹⁴ MUSLIM ET AL., *supra* note 57, at 14.

²¹⁵ CURTIS ET AL., *supra* note 72, at 120-21; Rees, *supra* note 156, at 79-81.

1. Age of Entry

The most common focus of demographic research is population, including estimated population size and age of entry. The most cited nationwide statistic was produced by Estes and Weiner registering the average age of first entry into prostitution at 13: with boys and transgender girls entering the sex trades between 11 and 13, and entry of non-transgender girls between 12 and 14.²¹⁶ Notably, these averages have been criticized for failing to define “entry” and the study may only measure age of first involvement rather than a course of conduct amounting to continued involvement, and the figure is vulnerable to criticism for cumulative bias, which deflates the average age of entry such that younger subjects are more likely to be counted by researchers than those with an older age of initiation, since they are engaged in the sex trade longer.²¹⁷ The few empirical studies that have advanced independent estimates, however, commonly exceed the figure produced by Estes and Weiner. For instance, one study conducted prior to Estes and Weiner found an average age of 14.1 years for girls, out of respondents aged 13 to 18.²¹⁸ Local estimates have also produced widely different results, but are largely consistent with the proposition that the Estes and Weiner figure is incorrect. The age of entry in New York City is documented to be, on average, 15.29 years, with females at 15.15 years, males at 15.28 years, and transgender minors at 16.16 years.²¹⁹ A New York statewide prevalence study found that the most frequent age group for initiation was ages 14 to 15 years-old—but this study is arguably skewed from a higher age of entry as a result of a flawed sampling methodology that relies on law enforcement reporting as discussed below.²²⁰

2. Population Size

The most widely cited population study estimates that between 100,000 and 300,000 young people are involved in, or at *risk* of involvement in, trading sex, although it is commonly and incorrectly cited as positing that 300,000 minors *are* trading sex any given year.²²¹ The definition of “at risk” includes large categories of youth such as runaway youth (121,911) and throwaway youth (51,602), which may be counted multiple times because the categories are not mutually exclusive.²²² According to the renowned researcher of child victimization David Finkelhor, “[a]s far as I’m concerned, [the Estes & Weiner study] has no scientific credibility to

²¹⁶ RICHARD J. ESTES & NEIL A. WEINER, *THE COMMERCIAL EXPLOITATION OF CHILDREN IN THE U.S.* 92 (2001).

²¹⁷ EMI KOYAMA, *WAR ON TERROR & WAR ON TRAFFICKING* 5 (2011).

²¹⁸ S. M. Nadon, C. Koverola & E. Shludermann, *Antecedents to Prostitution: Childhood Victimization*. 13 J. INTER. VIOLENCE 206, 206 (1998).

²¹⁹ CURTIS ET AL., *supra* note 72, at 54. Note that statistics on “transgender” minors often fail to disaggregate on the basis of transgender boys and transgender girls, and transgender minors may be mistakenly recorded as cisgender boys based on bias by researchers and fear of disclosure by respondents due to stigma and discrimination.

²²⁰ FRANCES GRAGG, IAN PETTA, HAIDEE BERNSTEIN, KARLA EISEN & LIZ QUINN, *NEW YORK PREVALENCE STUDY OF SEXUALLY EXPLOITED CHILDREN* 40 (2007).

²²¹ ESTES & WEINER, *supra* note 216, at 143 (“The numbers presented in these exhibits do not, therefore, reflect the actual number of cases of the CSEC in the United States but, rather, what we estimate to be the number of children “at risk” of CSEC.”)(emphasis in original).

²²² KOYAMA, *supra* note 217, at 9.

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

it” and noted that the 300,000 “figure was in a report that was never really subjected to any kind of peer review.”²²³

A New York statewide prevalence study estimated the population size of youth in the sex trades as 2,253 in New York City and 399 in the seven Upstate counties sampled.²²⁴ The report found that youth in the sex trades are predominantly female (85%), Black/African American (67%), and 16 to 17 years old (59%), with just four percent aged 13 or less.²²⁵ The study found that the presence of force, fraud, or coercion was reported in 58 percent of cases in New York City and 32 percent in Upstate counties.²²⁶ However, the study has several disadvantages that call its findings into question. The study measures only identifications of youth by “sentinel agencies,” namely police and sheriff’s departments and child welfare placements.²²⁷ The survey only collected data by mail questionnaires and qualitative telephone interviews, and included only one focus group protocol that collected narrative testimony from 15 young people.²²⁸ The study has been criticized as presenting a skewed perspective given its sampling methodology, and as a result underestimating the number of youth in the sex trades who are boys, transgender girls, and undocumented youth.²²⁹ In fact, transgender young people are three times more likely to engage in survival sex than the rest of the sample according to one study.²³⁰ Indeed, trans youth make up a disproportionate share of the homeless youth population, face special legal, employment, housing barriers, lack of documentation and fees, and higher rates of harassment, law enforcement violence, and shelter denial.²³¹

Other national research utilizes criminal justice statistics to determine some measure of certainty as to the population size of youth in the sex trades. The most recent national statistics on juvenile arrests indicate that in 2008, an estimated 1,500 minors were arrested for “prostitution or commercialized vice.”²³² The limitations of capturing population size based on national criminal statistics are apparent, as these statistics are collected from an unrepresentative sample of jurisdictions, and contain few large urban areas.²³³ Still, recent research has capitalized on the development of incident-based reporting over the Uniform Crime Reports, bringing together demographic estimates to provide a fuller assessment of the law enforcement response.

In perhaps the most extensive study to date of national criminal justice statistics on the subject, Finkelhor and Ormrod assessed 14,230 cases of prostitution from the National Incident Based Reporting System (“NIBRS”) reported between 1997 and 2000.²³⁴ Of those cases, 1.4 percent, or 199, involved juvenile offenders.²³⁵ While the incident reporting system suggests

²²³ Martin Cizmar, Ellis Conklin & Kristen Hinman, *Real Men Get Their Facts Straight*, VILLAGE VOICE, June 29, 2011, www.villagevoice.com/content/printVersion/2651144/

²²⁴ GRAGG ET AL., *supra* note 220, at 23-34.

²²⁵ *Id.*

²²⁶ *Id.* at 39.

²²⁷ *Id.* at app. B.

²²⁸ *Id.* at 18, 41.

²²⁹ THE N.Y.C. ASSOC. OF HOMELESS AND STREET-INVOLVED YOUTH ORGS., STATE OF THE CITY’S HOMELESS YOUTH REPORT—2011 77 (2011).

²³⁰ *See generally* Stephen Gaetz, *Safe Streets for Whom? Homeless Youth, Social Exclusion, and Criminal Victimization*, 46 CAN. J. CRIMINOLOGY & CRIM. JUSTICE 423 (2004).

²³¹ NICHOLAS RAY, NAT’L GAY & LESBIAN TASK FORCE & COAL. FOR THE HOMELESS, LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS 58–64 (2006).

²³² CHARLES PUZZANCHERA, OJJDP, U.S. DEP’T OF JUSTICE, JUVENILE ARRESTS—2008 3 (2009).

²³³ DAVID FINKELHOR & RICHARD ORMROD, OJJDP, U.S. DEP’T OF JUSTICE, PROSTITUTION OF JUVENILES: PATTERNS FROM NIBRS 2 (2004).

²³⁴ *See id.* at 3.

²³⁵ *Id.* at 4.

some confusion as to what grounds reported minors are found to be offenders as opposed to victims, the study produced important findings specific to gender. For instance, male minors involved in the sex trades face disproportionate arrest and detention at the hands of law enforcement, facing arrest in 63 percent of reported incidents compared to 52 percent of female minors.²³⁶ Police report more contacts with male juvenile prostitutes (61% of encounters) than female juvenile prostitutes (39%).²³⁷ Additionally, most or 74 percent of female minors arrested for prostitution were referred to other authorities, presumably social services, while 57 percent of male minors arrested for prostitution were handled within the department.²³⁸ Police are also more likely to categorize juveniles in prostitution as offenders than crime victims, but those categorized as victims are more likely to be female and young.²³⁹ While presumed race, class, and gender bias in enforcement cautions against accepting population estimates derived from criminal justice statistics at face value, the statistics showing that male minors face disproportionate arrest and detention appear to militate against a presumed gender bias. These data also problematize the application of a presumptive victimhood that is commonly ascribed to girls alone.

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

It's better to try and make money on the street than to have to steal off people. At least I'm doing this for myself.²⁴⁰

In New York City—often reviled as the “epicenter” of child trafficking²⁴¹— only 16 percent of girls, 6 percent of boys, and virtually no transgender youth who trade sex have *ever* come in contact with a third party beneficiary to their involvement, such as a friend who shares clients, let alone a pimp or trafficker.²⁴² An estimated 58 percent of the 3,946 minors (ages 18 and under) thought to be involved in the sex trades in New York City are not “Very Young Girls” at all, but male, transgender, and gender non-conforming youth.²⁴³ The pathway to entry into the sex trade for youth in New York City is also a far cry from Amigh’s street snatching “slave traders.” The majority identify lack of steady employment and access to education, and unstable housing as primary motivations to “do what [they] gotta do” to survive.²⁴⁴ Instead, the majority of youth characterize their involvement as a rational choice within a limited economy of choices:

I was on the streets and I didn't have anywhere to go. I couldn't go to shelters, I was too young, I couldn't go home because my father didn't accept me for who I was so I walked around every day, just eating and sleeping and trying to make money.²⁴⁵

The data on nature of involvement is even more striking in light of the approach of safe harbor laws. Instead of obtaining clients through a third party, most youth engage in the market

²³⁶ *Id.* at 7.

²³⁷ *Id.* at 5.

²³⁸ *Id.* at 7.

²³⁹ *Id.*

²⁴⁰ Rees, *supra* note 156, at 92.

²⁴¹ MIA SPANGENBERG, ECPAT-USA, PROSTITUTED YOUTH IN NEW YORK CITY: AN OVERVIEW 1 (2001).

²⁴² CURTIS ET AL., *supra* note 72, at 63.

²⁴³ *Compare id.* at 37, with GRAGG ET AL., *supra* note 220, at 23.

²⁴⁴ CURTIS ET AL., *supra* note 72, at 110, 102.

²⁴⁵ Rees, *supra* note 156, at 89.

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

by either allowing customers to approach them (49 percent) or approaching the customer (23 percent).²⁴⁶ These youth account for 72 percent of the population. Another 21 percent report that friends often facilitate customer contact and share their own customers, but do not do so for a fee, merely sharing resources for mutual support.²⁴⁷ Only 9.6 percent of youth reported recruiting clients through what was called a “market facilitator,” which itself might include the mutually supportive activity of sharing clients described above, only for a fee or some form of consideration.²⁴⁸ This figures does not disaggregate the 9.6 percent to identify whether the young people even reported physical coercion to trade sex.

This reported absence of physical force is given additional weight by data of the New York’s Missing and Exploited Children Clearinghouse.²⁴⁹ New York City reported zero stranger abductions, one acquaintance abduction, and 121 familial abduction cases in 2009, and statewide 19,026 (94 percent) of children reported missing turned out to be runaways.²⁵⁰ In the New York City boroughs, the proportion is even greater, with 6,412 (98 percent) of minors reported missing as runaways out of 6,544.²⁵¹

This datum also supports the alternative proposition that youth involved in the sex trade are motivated by limited economic circumstances. Instead of young people abducted at gunpoint, a more accurate portrait of youth in the sex trades focuses on runaway and homeless youth, 30 to 50 percent of whom are estimated to have participated in the sex trade.²⁵² In 2007, over 3,800 youth and young adults were estimated to be homeless in New York City.²⁵³ Further, 1,600 of those young people spent the night outside, in an abandoned building, at a transportation site or in a car, bus, train, or another vehicle, and 150 youth spent the night with a sex work client.²⁵⁴ In a nationally representative sample of runaway and homeless youth, researchers found that a higher proportion of street youths than youth in shelter had engaged in survival sex, and that survival sex was more prevalent among shelter youths with previous experiences than among those without such experiences.²⁵⁵ The study also identified a positive correlation between participation in survival sex and length of time away from home.²⁵⁶

The research also contradicts other common assumptions. For instance, the notion that all low-wage sex-trading encounters are street-based is called into question by the 18 percent of youth who reported using the Internet to engage in the market, with the explanation that the Internet offered them screening opportunities and protection from “law enforcement and other predators,” anonymity, and convenience.²⁵⁷ Contrary to claims of youth being brainwashed by trauma bonds, 86.8 percent of youth reported they would exit if provided the opportunity, with

²⁴⁶ CURTIS ET AL., *supra* note 72, at 55.

²⁴⁷ *Id.* at 56.

²⁴⁸ *Id.* at 58.

²⁴⁹ N. Y. STATE DIV. CRIM. JUSTICE SERVS., MISSING PERSONS CLEARINGHOUSE 2009 ANNUAL REPORT 8 (2010)(noting that the division produces an annual statistical report of the missing children register in the state).

²⁵⁰ *Id.* at 8–9.

²⁵¹ *Id.*

²⁵² See Stephen E. Lankenau et al., *Street Careers: Homelessness, Drug Use, and Sex Work Among Young Men who Have Sex with Men (YMSM)*, 16 INT’L J. OF DRUG POLICY 10, 12 (2005).

²⁵³ LANCE FREEMAN & DARRICK HAMILTON, EMPIRE STATE COAL. OF YOUTH AND FAMILY SERVS., A COUNT OF HOMELESS YOUTH IN NEW YORK CITY—2007 5 (2008).

²⁵⁴ *Id.* at 5.

²⁵⁵ Jody M. Greene, Susan T. Ennett & Christopher L. Ringwalt, *Prevalence and Correlates of Survival Sex Among Runaway and Homeless Youth*, 89 AM. J. OF PUB. HEALTH 1406, 1408 (1999).

²⁵⁶ *Id.* at 1408.

²⁵⁷ CURTIS ET AL., *supra* note 72, at 57–58.

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

transgender youth reporting 94.7 percent.²⁵⁸ In both cases, the evidence suggests less a situation of dire physical coercion, and more a weighing of limited economic choices. Qualitative research commonly finds this narrative among youth themselves, who most feared moral judgment and stigma as a result of their involvement:

Right [...] somebody over here be saying ‘you shouldn't be out there like that’ but at the end of the night, where you go? You go home, right, to your bed. You take your shoes off at the door, so that you don't get your floor messed up. Well I don't have that privilege. I don't have a floor. I don't have a bed. I don't have a hallway. I don't have a rug. So, we talkin'?'²⁵⁹

While any number of youth being physically forced into trading sex should be a call to action, an accurate and evidenced dataset is critically important in formulating the policy response. Indeed, 16 percent of girls and 6 percent of boys who trade sex have some third party involvement, and out of this group some fraction report physical coercion.²⁶⁰ These youth are in clear need of serious and effective services, including secure housing for protection from pimps and even abusive parents. However, the findings presented in this Article suggest that, even for those young people coerced into participation, services *must* be optional so as not to subject youth to the very denial of agency that they experienced at the hands of exploiters. Finally, this voluntary approach must apply regardless of whether youth involvement is due to circumstance or coercion, not only because mandated services are potentially harmful, but also because using police officers as a gateway to such services exposes all youth to harms that may surpass those they are escaping.

As many as 95 percent of youth in the sex trades reported that they exchanged sex with others simply in order to obtain money.²⁶¹ This fact speaks to the underlying economy of choices for minors involved—even those who bear the terrible burden of physical coercion—and the importance of encouragement for self-support through voluntary social services and not mandated programs. Contrary to common understanding, young people do not need “reeducation” in order to leave the sex trade.²⁶² Instead, New York City's young people have identified their own needs in facilitating exit. Sixty percent of youth involved reported that stable employment was necessary for them to exit, with education at 51 percent and stable housing preferred by 41 percent.²⁶³ The proper policy response is neither the traditional approach of arresting and detaining minors in secure juvenile detention facilities as “delinquents,” nor to arrest, detain, adjudicate, and incarcerate youth for their “rehabilitation,” but to provide young people a *meaningful preventive alternative*. Meeting these needs, rather than arrests and prosecutions, should be the priority of legislators considering adoption of safe harbor laws.

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

²⁵⁸ *Id.* at 110.

²⁵⁹ Rees, *supra* note 156, at 148–49.

²⁶⁰ CURTIS ET AL., *supra* note 72, at 47, 58–59.

²⁶¹ *Id.* at 63.

²⁶² *Id.* at 110.

²⁶³ *Id.* at 103.

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

A common form of research into minors' involvement in the sex trades reflects an interest in motivations for minors' first involvement or entry. This approach seeks to identify "risk factors" for entry in order to inform preventive interventions. In one representative instance of the risk factors approach, a study of a court-mandated group home for adolescent girls trading sex in the urban Southeast identified the following risk factors common to the residents: negative family dynamics, poor parenting skills, lower intellectual functioning, poor school success, inadequate social skills, multiple mental health disorders, and abuse and neglect.²⁶⁴ Another study found that survivors of child sexual abuse are substantially more likely to be arrested for prostitution as adults than non-victims.²⁶⁵ Studies often explain away the fact that minor "victims ... often do not self-identify as victims" arguing that this is caused by "fear of the physical and psychological abuse inflicted by the trafficker, and/or due to the trauma bonds developed through the victimization process."²⁶⁶ An alternative reading is confirmed by the demographic findings on the widespread absence of physical coercion as discussed above, in which these young people are simply telling the truth.

Studies based on a risk factors approach often use unrepresentative samples (e.g. incarcerated youth) as they have been affected by discretionary law enforcement practices on race, class, and gender lines. Still other researchers have appropriately disputed assertions of any singular motivation for entry, particular prior trauma. For instance, Brannigan & Van Brunschot take issue with the popular claim that past family sexual trauma is the determinative factor in minors' involvement, and explain that the evidence of prior rape, incest, and other kinds of sexual trauma in the backgrounds of youth in the sex trades is inconsistent and contradictory, and instead that traumas that unattach children and youth from their families make youth vulnerable to engaging in the sex trades.²⁶⁷ This position might also be extended to the view that family trauma is an *effect* of economic and social detachment rather than a cause. The causative formula drawing a positive relationship between prior sexual abuse and trading sex can also be challenged for other problematic assumptions. A Seattle study found that adolescents who experienced higher rates of early sexual abuse were likely to run from home at young ages, and a positive relationship existed between running away numerous times with engagement in survival sex.²⁶⁸ This observation suggests that prior sexual abuse is not a direct *cause* of trading sex, but instead abuse forces young people to flee, and as a runaway with limited to no resources, trading sex may be their best choice for survival.

Indeed, others have advanced the alternative theory that the experience with or observation of sexual contact, drug use, and other activities, may be understood not as delinquency but, alternatively, as "street capital," which better enables minors to survive limited economic circumstances by trading sex and drugs for survival.²⁶⁹ This theory posits that young people build these competencies through association with more experienced youth.²⁷⁰ This

²⁶⁴ Sarah E. Twill, Denise M. Green & Amy Traylor, *A Descriptive Study on Sexually Exploited Children in Residential Treatment*, 39 CHILD AND YOUTH CARE FORUM 187, 187 (2010).

²⁶⁵ Cathy S. Widom & Joseph B. Kuhns, *Childhood Victimization and Subsequent Risk for Promiscuity, Prostitution, and Teenage Pregnancy: A Prospective Study*, 86 AM. J. PUB. HEALTH 1607, 1610–11 (1996).

²⁶⁶ SHARED HOPE INT'L, *supra* note 170, at 41.

²⁶⁷ Augustine Brannigan & Erin G. Van Brunschot, *Youthful Prostitution and Child Sexual Trauma*, 20 INTN'L J. LAW & PSYCH. 337, 351 (1997).

²⁶⁸ Kimberly A. Tyler et al., *The Impact of Childhood Sexual Abuse on Later Sexual Victimization Among Runaway Youth*, 11 J. ADOLESCENCE 151, 165–67 (2001).

²⁶⁹ Lankenau et al., *supra* note 252, at 10–18.

²⁷⁰ *Id.* at 11.

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

framing contextualizes minor's involvement in the sex trade within broader and more nuanced participation in street economies. Similarly, studies have isolated five main factors that influenced the entry of homeless youth between the ages of 15 to 23 into the street economy: social control/bonds, barriers to the formal economy (e.g., homelessness, educational deficits, mental health problems, incarceration, stigma), tangible and social/emotional benefits of the street economy, severe economic need, and the active recruitment of homeless youth into the street economy by others.²⁷¹

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

Perhaps the greatest irony effected by safe harbor laws is the focus on increasing compulsory child welfare involvement by means of arrest and court-mandated institutionalization, when research shows the dearth of voluntary services available and the high degree of youth in the sex trade who have already been adjudicated as an abused, dependent, neglected, or minor in need of supervision. Indeed, advocates have decried the “epidemic shortage” of voluntary services for youth in the sex trades, sometimes resulting in youth being “turned away from programs due to lack of available resources, only to be arrested and mandated to services.”²⁷²

The high degree of prior child welfare involvement reported by youth in the sex trades is increasingly acknowledged, but often only for purposes of “identifying” youth within the child welfare system, presumably to initiate an alternative and more restrictive placement.²⁷³ One investigation found that the majority of juveniles arrested on prostitution charges in Los Angeles County come from the county's foster care system and group home placements.²⁷⁴ In a study of Midwestern youth ages 19 to 21, out of those youth reporting direct experience with trading sex, “most had been removed at least once from their parents’ care and placed in a series of foster homes, group homes, treatment facilities, and outreach shelters.”²⁷⁵ This fact is not limited to non-transgender female youth, with homeless male youth’s placement in foster care demonstrably predictive of participation in trading sex.²⁷⁶

In a surprising way, the jurisdiction responsible for drafting the first safe harbor law has long documented the fact of the high degree of child welfare involvement among youth in the sex trades. New York’s statewide study found that a majority of youth in the sex trades had prior child welfare involvement, typically in the form of child abuse and neglect allegations or investigations (69%) and foster care placements (75%).²⁷⁷ Moreover, over half of New York City cases had a prior residential placement due to a juvenile delinquency arrest, and 45 percent had a prior PINS placement.²⁷⁸ Similarly, in a New York City survey of over 1,000 homeless youth,

²⁷¹ Marya V. Gwadz et al., *The Initiation of Homeless Youth into the Street Economy*, 32 J. ADOLESCENCE 357, 357 (2009).

²⁷² STATE OF THE CITY 2011, *supra* note 229, at 78.

²⁷³ Dawn Post, *Why Human Traffickers Prey on Foster-Care Kids*, CITYLIMITS.ORG, Jan. 23, 2015, <http://citylimits.org/2015/01/23/why-traffickers-prey-on-foster-care-kids/>.

²⁷⁴ Abby Sewell, *Most L.A. County Youths Held for Prostitution Come from Foster Care*, L.A. TIMES, Nov. 27, 2012, <http://articles.latimes.com/2012/nov/27/local/la-me-1128-sex-trafficking-20121128>.

²⁷⁵ Kimberly A. Tyler & Katherine A. Johnson, *Trading Sex: Voluntary or Coerced? The Experiences of Homeless Youth*, 43 J. SEX RES. 209, 210 (2006).

²⁷⁶ Lankenau et al., *supra* note 252, at 12.

²⁷⁷ GRAGG ET AL., *supra* note 220, at 31.

²⁷⁸ *Id.*

Please cite to 12 *Stanford J. C.R. & C.L.* ____ (forthcoming 2016).

researchers found that 29 percent of homeless youth had experience in foster care, 15 percent had been in juvenile detention, and 27 percent had been to jail or prison.²⁷⁹

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

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

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

[E]very time [the police] see me or one of my friends walking in the street, they have the urge to pull us over and get out of the car and question us [...] even if we're not doing nothing [...] harassing us and stuff, calling us 'he-shes' and stuff [...] eventually you gonna get caught there and go to jail.²⁸⁰

This lived experience shines light on yet another false premise of safe harbor laws, namely that youth who trade sex face prosecution primarily as a result of the crime of prostitution. In fact, crimes with “prostitution” in the title account for an astonishingly low 17.6 percent of arrest charges brought against youth in the sex trade.²⁸¹ Thus safe harbor’s limited “immunity” from prosecution for “prostitution” does not extend to the vast majority of youth processed by police on proxy charges, such as “false personation” (48 percent of sex-trading youth ages 7 to 16 arrested between 2004 and 2006), loitering (12 percent), and criminal nuisance (5 percent).²⁸² Indeed, the collective action of youth themselves presents safe harbor’s most damning criticism: 48 percent of those sex-trading youth who are arrested purposely misrepresent their age to police, likely to avoid family court and be referred to criminal court. In addition, youth may be criminalized for using one of the few tools they have left for their self-protection. An astounding 76 percent of young people involved in sex work or trafficking report always practicing safe sex.²⁸³ Yet, the use of condoms as evidence in prostitution prosecutions threatens to reverse this trend.²⁸⁴ The atmosphere of policing also contributes to increased dangers for youth in the sex trades. A qualitative series of interviews of providers serving youth

²⁷⁹ FREEMAN & HAMILTON, *supra* note 253, at tbls. 9–10.

²⁸⁰ Rees, *supra* note 156, at 76–77.

²⁸¹ CURTIS ET AL., *supra* note 72, at 92.

²⁸² MUSLIM ET AL., *supra* note 57, at 19.

²⁸³ CURTIS ET AL., *supra* note 72, at 96.

²⁸⁴ URBAN INST., SURVIVING THE STREETS OF NEW YORK, *supra* note 104, at 77.

in the sex trades revealed that increased police presence resulted in false arrest and brutality, drove youth to move to more dangerous and secluded industrial areas of town and shortened the time youth have to assess clients and to set terms of negotiation, increasing the risk of engaging with a customer who may not be interested in safer sex and may be violent.²⁸⁵

The overrepresentation—and abuse—of transgender girls and young men who have sex with men in the child welfare system is matched by their higher likelihood of involvement in the sex trade.²⁸⁶ These youth also face highly disproportionate policing, with 75 percent of young men and 59 percent of transgender youth who trade sex reporting prior arrests.²⁸⁷ The model of the “Very Young Girl” also certainly excludes the 11 percent of female youth involved in the sex trade who report trading sex with women,²⁸⁸ and the young transgender men who report involvement in transactional sex. These latter youth may be subjected to equally unconscionable sexual harassment, and denied their preferred names and clothing and subjected to transphobic abuse by law enforcement officers and service providers.

The high level of police misconduct reported by youth in the sex trades pursuant to supposedly protective enforcement actions is a far cry from the “rescue” model that safe harbor laws envision. Young people who are homeless in New York City regularly report being “verbally harassed, often with racist and sexist language, pushed to the ground, pummeled, maced, and Tased, often because of perceived disrespect, for offenses like turnstile jumping.”²⁸⁹ In one study of transgender youth who trade sex in New York City, all participants reported having had contact with the police, including being profiled as sex workers and subjected to verbal and sexual harassment, along with incidents of physical and sexual violence, including sex acts in exchange for release from custody.²⁹⁰ This abuse occurs on the background of familial rejection, homelessness, unstable housing, and street involvement, exclusion from housing and shelter services, school violence, access to health care and gender-affirming medical treatment, and discrimination in employment.²⁹¹

The criminalization of youth in the sex trades does not by any means end with police interaction. Court services, involuntary placement, and incarceration carry their own set of risks, including involuntary separation from family or friends. Research indicates that, nationwide, LGBTQ youth in particular face denials of due process, unduly punitive responses comparative to responses to behavior of non-LGBTQ youth, harmful services and programs, and unsafe conditions of confinement.²⁹² In addition, LGBTQ youth are overrepresented in detention and the juvenile justice system more generally (at 13 percent), especially LGBTQ youth of color.²⁹³ Yet, even this number is likely an underestimate, because some youth do not disclose their orientation or gender identity for fear of drawing “unwanted attention to themselves, including placement options, or suffering abuse in their placements.”²⁹⁴

²⁸⁵ ECPAT-USA, *supra* note 241, at 7–9.

²⁸⁶ Lankenau et al., *supra* note 252, at 11.

²⁸⁷ CURTIS ET AL., *supra* note 72, at 92.

²⁸⁸ *Id.* at 82.

²⁸⁹ THE N.Y.C. ASSOC. OF HOMELESS AND STREET-INVOLVED YOUTH ORGS., STATE OF THE CITY'S HOMELESS YOUTH REPORT—2009 110 (2009).

²⁹⁰ Rees, *supra* note 156, at 79.

²⁹¹ *Id.* at 17–18.

²⁹² HIDDEN INJUSTICE, *supra* note 164, at 1.

²⁹³ *Id.* at 28.

²⁹⁴ *Id.* at 44.

Please cite to 12 *Stanford J. C.R. & C.L.* ____ (forthcoming 2016).

An alternative form of research is provided by community-driven research conducted by minors themselves. The Young Women’s Empowerment Project (“YWEP”) which operated in Chicago during the group’s existence, conducted an invaluable study in which girls, including transgender girls, involved in the sex trades or street economy gathered research from over 140 of their peers, including homeless girls, girls who have been incarcerated or detained, girls who inject drugs, mothers, and pregnant girls.²⁹⁵ Of the 140 interviewed, 30 identified as pimped, 5 as trafficked, and 119 as engaging in survival sex, with some overlap.²⁹⁶ The study relentlessly documents violence, both individual and institutional, in addition to the resistance and harm reduction practices of girls in the sex trades.²⁹⁷ Respondents reported sexual abuse in the form of gang rapes, stalking, and exploitation by pimps and johns, including threats to harm their children, in addition to the belief that the police would blame them for the violence if they were to report it.²⁹⁸ Respondents also importantly reported institutional violence such as “emotional and verbal abuse as well as exclusion from, or mistreatment by, services” by state actors including the Illinois Department of Children and Family Services, police and the legal system, hospitals, shelters, the foster system—which may involve a minor, her child, or both—and drug treatment programs.²⁹⁹ A high incidence of police violence, coercion, and refusal to help was also documented, such that “stories about police abuse outnumbered the stories of abuse by other systems by far.”³⁰⁰

In response to YWEP’s astonishing findings, this youth-led group initiated a second project referred to as the “Bad Encounter Line” to document youth’s experiences of institutional violence.³⁰¹ The study defined institutional violence including physical harm or sexual abuse, refusal to help, and harassment such as persistent verbal abuse.³⁰² The system collected 142 reports naming 146 bad encounters distributed across: law enforcement (30%), health care providers (28%), schools (24%), the Department of Children and Family Services (6%), pimps (4%), transportation (4%), shelters (1%), and other organizations (3%).³⁰³ The reports documented that bad encounters increase when two or more institutions work together, and particularly when the Department of Children and Family Services relied on police officers and vice versa.³⁰⁴ Moreover, youth in the sex trade and street economy reported institutional violence from healthcare providers almost as often as from police.³⁰⁵ In particular, transgender, gender non-conforming, gender queer, and intersex youth made up 25 percent of all bad encounter reports about hospitals, 25 percent of all reports about law enforcement, 40 percent of

²⁹⁵ YOUNG WOMEN’S EMPOWERMENT PROJECT, *GIRLS DO WHAT THEY HAVE TO DO TO SURVIVE: A STUDY OF RESILIENCE AND RESISTANCE* 26 (2009), available at <https://ywepchicago.files.wordpress.com/2011/06/girls-do-what-they-have-to-do-to-survive-a-study-of-resilience-and-resistance.pdf>.

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 29–32.

²⁹⁸ *Id.* at 29–30.

²⁹⁹ *Id.* at 30.

³⁰⁰ *Id.*

³⁰¹ YOUNG WOMEN’S EMPOWERMENT PROJECT, *DENIED HELP!: HOW YOUTH IN THE SEX TRADE & STREET ECONOMY ARE TURNED AWAY FROM SYSTEMS MEANT TO HELP US & WHAT WE ARE DOING TO FIGHT BACK* 14 (2012), available at <https://ywepchicago.files.wordpress.com/2012/09/bad-encounter-line-report-2012.pdf>.

³⁰² *Id.* at 21.

³⁰³ *Id.* at 16.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

reports about schools, and 37.5 percent of reports about the Department of Children and Family Services.³⁰⁶

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

VI. THE SURVIVOR MODEL:³⁰⁷ RECOMMENDATIONS FOR VOLUNTARY, LOW-THRESHOLD ALTERNATIVES TO SAFE HARBOR PROCEEDINGS

The bill memorandum attached to the first safe harbor law justified its passage on the principle that “youth should not be prosecuted under the penal law for acts of prostitution. Instead, services should be created to meet the needs of these youth outside of the justice system.”³⁰⁸ According to this definition of “safe harbor,” current laws have not accomplished the objective of removing youth “outside the justice system.” Indeed, safe harbor laws have actually *increased* court involvement through intensified compliance monitoring and program requirements, indeterminate sentencing, and institutionalization. In place of arrest and institutionalization, this Article recommends that safe harbor laws and policies must shift to voluntary, low-threshold services on a harm reduction model embraced by emerging research for the benefit of all youth engaged in the sex trade, who are primarily homeless or unstably housed.³⁰⁹ This Article proposes an alternative safe harbor model that can be realized by emerging legislation, in which the federal government incentivizes and states adopt laws that accomplish:

- Full immunity from criminal and juvenile delinquency prosecutions, prohibition on arrest, temporary protective custody, and law enforcement and guardian-initiated petitions for dependency or abuse or neglect proceedings, and, in dependency and status offense proceedings independently initiated by child protection agencies, equalization of procedural due process rights and abolition of forced treatment, institutional placement, and detention;
- Street-based and comprehensive drop-in services and peer-led outreach

³⁰⁶ *Id.* at 20.

³⁰⁷ This section was first drafted in a study conducted by the Urban Institute and Streetwise and Safe concerning LGBTQ youth in the sex trades, and this Article's version reflects recommendations for the broader population of youth who trade sex, regardless of gender identity or sexual orientation. *See generally* URBAN INST., SURVIVING THE STREETS OF NEW YORK, *supra* note 104. The Author was a co-author on the study. The recommendations made in this Article are the Author's alone, and do not reflect the views of Streetwise and Safe or the Urban Institute.

³⁰⁸ Memorandum in Support of Legislation, N.Y. Bill Jacket, 2008 A.B. 5258-B, ch. 569 (McKinney 2014).

³⁰⁹ STATE OF THE CITY 2009, *supra* note 289, at 79. For an alternate proposal in which law enforcement-based approaches are framed as mutually supportive to an expanded public health approach, see generally Jonathan Todres *Assessing Public Health Strategies for Advancing Child Protection: Human Trafficking as a Case Study*, 21 J.L. & POL'Y 93 (2012).

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

- Safe and supportive, voluntary short-term shelter, long-term, affordable housing, and family-based placement options
- Safe and supportive housing and placement protocols specific to transgender and gender non-conforming youth
- Non-discrimination, harassment, confidentiality and complaint procedures in shelters, programs, and out-of-home placements
- Access to and improvement of gender-affirming health care for transgender and gender non-conforming youth and harm-reductionist treatment for youth who use drugs
- Living wage employment opportunities and job training and readiness programs
- Improving food security

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

The originating narrative of safe harbor laws—that of “Very Young Girls”—is undermined by data on gender, nature of involvement, age of first involvement, and prior child welfare involvement, and calls for a radical reevaluation of the efficacy of safe harbor laws. Among those states that claim “immunity” from adult criminal and juvenile delinquency prosecutions, very few have adopted robust immunity provisions and instead the majority have conditional or secondary immunity schemes that rely on arrest and court-mandated institutionalization.³¹⁰ Even among those states that exclusively rely on status offense proceedings, as noted *infra* Part III.D, there is a wide divergence in state laws’ treatment of status offenses, and status offenders are routinely afforded lesser procedural due process protections than delinquent youth, including a lesser burden of proof, right to counsel, allocution standards, and denial of the privilege against self-incrimination.

The shift away from arrest and institutionalization to low-threshold and voluntary, harm-reduction services for youth in the sex trade has been repeatedly affirmed by international actors such as the Committee on the Rights of the Child, the World Health Organization, and the U.N. Commission on HIV and the Law, but the implementation gap cannot be resolved without country-level commitments.³¹¹ For this reason, states should commit to full immunity from criminal and juvenile delinquency prosecutions for any prostitution-related conduct, including proxy offenses. States must also enact a prohibition on arrest, temporary protective custody, and law enforcement and guardian-initiated petitions for dependency or abuse or neglect proceedings, and, in dependency and status offense proceedings independently initiated by child protection agencies, establish equalization of procedural due process rights and abolition of forced treatment, institutional placement, and detention.

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

A comprehensive approach combines mobile street-based services at locations where youth in the sex trade work with drop-in services.³¹² Utilizing mobile street-based services at locations where youth trade sex, providing services at times convenient to young people who sell sex, and rendering them free of charge or low-cost allows youth to adequately receive the services they need.³¹³ It is well recognized that prioritizing and integrating community-based and peer-led outreach and drop-in services is an effective intervention tool for these young people.³¹⁴ The Street Outreach Program at the Ruth Ellis Center in Detroit serves African American LGBT youth, and its street outreach team is staffed entirely by LGBT-identified African American staff.³¹⁵ The program conducts street-based services six times a week distributing safer sex materials and its drop-in center offers survival aid including showers and

³¹⁰ Tessa L. Dysart, *Child, Victim, or Prostitute? Justice Through Immunity for Prostituted Children*, 21 *DUKE J. GENDER L. & POL’Y* 255, 279 (2014).

³¹¹ See generally WORLD HEALTH ORG. [WHO], JOINT U.N. PROGRAMME ON HIV/AIDS [UNAIDS] & INTER-AGENCY WORKING GRP. ON KEY POPULATIONS [IAWG], HIV AND YOUNG PEOPLE WHO SELL SEX: A TECHNICAL BRIEF (2014), available at http://www.who.int/hiv/pub/guidelines/briefs__sw_2014.pdf.

³¹² *Id.* at 27.

³¹³ *Id.*

³¹⁴ *Id.* at 27–28.

³¹⁵ NGLTF, AN EPIDEMIC OF HOMELESSNESS, *supra* note 231, at 94.

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

hygiene products, laundry facilities, clothing from Ruth's Closet, food, safe space, referrals for shelter, crisis counseling, positive peer support, and harm reduction techniques.³¹⁶

In the context of drop-in services, it is also a best practice to provide comprehensive or “full service” support in a safe and accessible location that integrates a variety of programs, including health services.³¹⁷ Creating drop-in services and providing comprehensive or ‘full service’ support supplies youth with the opportunity to receive the majority of the services they need without having to visit a large number of service providers to have individual needs met.³¹⁸ This approach is not only a best practice but an effective one, in that project’s engaged in low-threshold and voluntary services report the highest prevalence of youth who trade sex. These programs also offer a needed respite from order-maintenance policing tactics designed to push out young people from gentrifying communities, and centralize outreach efforts in an urban geography that has seen street-involved youth dispersed by policing tactics.³¹⁹

When creating programming, it is important to offer a wide range of voluntary services, which facilitates youth in the sex trades to access support.³²⁰ For instance, in one comprehensive New York City population estimate of youth in the sex trade, respondents reported visiting a variety of service agencies, but the majority visiting Streetwork Project at Safe Horizon (38.2%), a full three times greater than the second most-accessed service provider, Covenant House.³²¹ The Streetwork Project provides two drop-in centers, a shelter, and street-based outreach and services for homeless children, teens, and young adults up to age 24 including youth who trade sex. This program offers a wide range of services including legal, medical, and psychiatric services, individual and group counseling, case management, advocacy, help in obtaining identification, emergency and crisis housing, GED preparation and support, help in obtaining Medicaid and other benefits, hot meals, showers, clothing, wellness activities including acupuncture, yoga, nutritional counseling, HIV prevention counseling, parenting groups, drop-in groups, and the opportunity to socialize in a safe, non-judgmental setting.

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

Housing needs have been consistently identified by youth in the sex trade as necessary for their care and support.³²² Every night, there are an estimated 3,800 homeless youth and young adults in New York City, and 150 of these youth spend the night with someone who pays them for sex.³²³ Moreover, 1,600 of those young people spent the night outside, in an abandoned building, at a transportation site or in a car, bus, train or some other vehicle.³²⁴ Indeed, 32 percent of minors involved in the sex trade self-identify as “living in the street,” with 44 percent of boys describing themselves as living in such a way, as well as 24 percent of girls and 11 percent of

³¹⁶ *Id.* at 99.

³¹⁷ WHO, UNAIDS & IAWG, *supra* note 311, at 27.

³¹⁸ *Id.*

³¹⁹ *See* KRISTINA E. GIBSON, STREET KIDS: HOMELESS YOUTH, OUTREACH, AND POLICING NEW YORK’S STREETS 189-90 (2011).

³²⁰ WHO, UNAIDS & IAWG, *supra* note 311, at 27.

³²¹ CURTIS ET AL., *supra* note 72, at 100.

³²² STATE OF THE CITY 2009, *supra* note 289, at 79; URBAN INST., SURVIVING THE STREETS OF NEW YORK, *supra* note 104, at 67.

³²³ FREEMAN & HAMILTON, *supra* note 253, at 5.

³²⁴ *Id.*

Please cite to 12 *Stanford J. C.R. & C.L.* ____ (forthcoming 2016).

transgender minors.³²⁵ Nearly half of the youth interviewed in one study of LGBTQ youth in the sex trades reported living in a shelter (48%), and another 10 percent lived on the street.³²⁶ Moreover, 31 percent of youth who trade sex report they frequented 30-day and 90-day shelters, but that “because there were so few available youth shelters, and a limited number of beds, many of the teens [are] forced back to the streets.”³²⁷

Youth in the sex trades frequently express frustration over the limited number of beds available in youth homeless shelters and the stringent policies that shelters enforce with the youth.³²⁸ Many credit the instability of emergency housing, and many of the rules that come with it, as what drove them back to the street.³²⁹ Intermittent access to shelter increases the likelihood that a young person will engage in survival sex. Improving housing options responsive to youth could enhance quality of life for youth and prevent young people from having to trade sex for shelter, and other basic needs.³³⁰

The National Alliance to End Homelessness has recognized the critical need of housing for homeless youth engaged in the sex trade and the importance of providing a continuum of care, including transitional housing, permanent supportive housing, guest homes, and rental assistance coupled with case management support, incorporating harm reduction and positive youth development principles, and services that are culturally competent and trauma informed.³³¹ The Child Welfare League of America has similarly recommended making individualized placement decisions while increasing and diversifying placement options available to LGBTQ youth to create a continuum of care.³³² Despite the need for balance, permanent and independent housing options are severely lacking. In a national survey of service providers working with LGBTQ homeless youth, 50% of respondents reported that their agencies offered transitional living services and street outreach services, as well as having a drop-in-center, but far fewer offered independent living (19%), permanent housing (10%), and host home services (8%).³³³

It is critical that any shelter and housing options for youth in the sex trades are voluntary, taking into account levels of violence that youth experience within current housing programs. It is crucial that programs do not follow the trend of current specialized services for sexually exploited youth that prevent voluntary departure, ensure distance from potential exploiters, and monitor young people through the installation of surveillance cameras and other methods.³³⁴ As noted *supra* Part IV, programs which are geographically isolated to protect youth from exploiters have been found to be counterproductive for the many youth who have not experienced coercion, and for whom peer networks represent critical sources of care and validation.

In addition to congregate care, it is equally important to create voluntary, in-home placement options for youth in the sex trades. The Child Welfare League of America recommends that agencies should intentionally reach out to LGBT families and communities

³²⁵ CURTIS ET AL., *supra* note 72, at 45.

³²⁶ *Id.* at 67.

³²⁷ *Id.* at 99.

³²⁸ URBAN INST., SURVIVING THE STREETS OF NEW YORK, *supra* note 104, at 67.

³²⁹ *Id.* at 67.

³³⁰ *Id.* at 67.

³³¹ TRUDEE ABLE-PETERSON & MARY J. MUELEENERS, NAT’L ALLIANCE TO END HOMELESSNESS, HOMELESS YOUTH AND SEXUAL EXPLOITATION: RESEARCH FINDINGS AND PRACTICE IMPLICATIONS 12 (2009).

³³² CWLA GUIDELINES, *supra* note 204, at 41.

³³³ LAURA E. DURSO & GARY J. GATES, THE WILLIAMS INST., TRUE COLORS FUND & THE PALETTE FUND, SERVING OUR YOUTH: FINDINGS FROM A NATIONAL SURVEY OF SERVICE PROVIDERS WORKING WITH LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH WHO ARE HOMELESS OR AT RISK OF BECOMING HOMELESS 10 (2012).

³³⁴ MUSLIM ET AL., *supra* note 57, at 61; SHARED HOPE INT’L, *supra* note 170, at 67–68.

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

when recruiting for foster parents, including as an alternative to secure detention for youth adjudicated as juvenile delinquents.³³⁵ The United Nations has specifically called for the placement of youth engaged in selling sex in family based settings where appropriate.³³⁶ Avenues for Homeless Youth, ages 16 to 21 in Minneapolis, provides emergency shelter and transitional living and runs an LGBT Host Home Program that recruits, trains, and supports volunteer hosts who then open their homes to LGBT youth experiencing homelessness.³³⁷ Volunteers commit to hosting for a year while youth participants receive support from their hosts and case managers.³³⁸

The dearth of voluntary long-term housing options contributes to the overrepresentation of youth in the sex trade in out-of-home custody, often in congregate care placements such as group homes and secure detention. For LGBTQ youth housing is even more crucial, as LGBTQ youth lack appropriate and acceptable shelter options³³⁹ and, even if admitted or placed, LGBTQ youth in out-of-home care are particularly vulnerable to “failed” placements, resulting in multiple rejections and frequent changes.³⁴⁰ Boys and young men engaged in the sex trade experience significant fluidity in relationships with caretakers, as well as consecutive housing in that they frequently moved to and from various housing situations, reside in new foster homes, or escape abusive caretakers.³⁴¹ The lack of housing options combines with the discriminatory application of prostitution-related laws to render a particularly dangerous environment for LGB and gender non-conforming youth. These young people are twice as likely to be held in secure detention for truancy, warrants, probation violations, running away, and prostitution, and are more likely to be detained for non-violent offenses with direct links to out-of-home placement and homelessness.³⁴² Lesbian, bisexual, and questioning girls are twice as likely as their heterosexual peers to be held in custody for prostitution—11% compared with 5%.³⁴³ Only 1% of heterosexual boys are detained for prostitution compared with 10% of their gay, bisexual, or questioning peers.³⁴⁴

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

In congregate care such as group homes, shelters, and residential placements, it is especially necessary to create safe space for transgender and gender-nonconforming youth. Intake staff usually conduct an assessment or initial screening to determine where and with whom the youth will be housed in the facility.³⁴⁵ Staff must appropriately address LGBT identity during the intake process and ensure LGBT youth are not treated differently from heterosexual

³³⁵ CWLA GUIDELINES, *supra* note 188, at 43.

³³⁶ U.N. DEVELOPMENT PROGRAMME [UNDP], GLOBAL COMMISSION ON HIV AND THE LAW, HIV AND THE LAW: RISKS, RIGHTS AND HEALTH 43 (2012).

³³⁷ AVENUES FOR HOMELESS YOUTH (“AHY”), PROGRAM BROCHURE: GLBT HOST HOME PROGRAM OF AVENUES FOR HOMELESS YOUTH 2 (2014), available at www.avenuesforyouth.org/images/glbthhp_022714_2.pdf.

³³⁸ *Id.*

³³⁹ IOM & NRC CSEC REPORT, *supra* note 15, at 261.

³⁴⁰ CWLA GUIDELINES, *supra* note 204, at 41.

³⁴¹ Lankenau et al., *supra* note 252, at 12.

³⁴² Angela Irvine, *We’ve Had Three of Them: Addressing the Invisibility of Lesbian, Gay, Bisexual, and Gender Non-Conforming Youths in the Juvenile Justice System*, 19 COLUM. J. GENDER & L. 675, 693 (2010).

³⁴³ *Id.* at 693.

³⁴⁴ *Id.*

³⁴⁵ CWLA GUIDELINES, *supra* note 204, at 47.

Please cite to 12 *Stanford J. C.R. & C.L.* ____ (forthcoming 2016).

youth in such determinations.³⁴⁶ In making the housing or classification decision, personnel must not isolate or segregate LGBT youth from other participants, and not automatically place youth based on their assigned sex at birth but rather in accordance with an individualized assessment that takes into account their safety, gender identity, and preference.³⁴⁷

Yet in recent RHY grantee program evaluations, only one site established written policies on appropriate emergency shelter accommodations for transgender youth.³⁴⁸ In contrast, proactive steps include (1) arranging for some youth to sleep in a private area if they do not feel comfortable in a male or female dormitory, (2) offering private rooms to all youth, and (3) establishing a written agency policy specifying that youth are to be assigned to dormitories based on their gender identification or offered the option of a private room if safety is a concern.³⁴⁹

E. Non-Discrimination, Harassment, Confidentiality, and Complaint Procedures in Drop-ins, Shelters, Programs, and Out-of-Home Placements

The WHO has specified that health providers must maintain services that are non-coercive, respectful, and non-stigmatizing, and that the right to confidentiality is to be clearly communicated to young people who trade sex and respected.³⁵⁰ Nearly a decade ago, the Child Welfare League of America similarly recognized as a best practice the adoption and dissemination of a written non-discrimination, grievance, and harassment policy inclusive of sexual orientation and gender identity.³⁵¹ Yet in recent program evaluations of several Runaway and Homeless Youth (“RHY”) program grantees, these programs rarely if ever communicate policies to youth in a formal client rights statement or restrict access to services based on incidents of discrimination or harassment reported.³⁵² Similarly, only one study site reported requiring staff to sign confidentiality agreements or offering a procedure for client complaints about information protection.³⁵³ It is imperative that facilities train personnel in competency with youth in the sex trades, establish sound recruitment and hiring practices, collect and evaluate data, and monitor personnel in charge of institutionalized children and those who come in contact with them, including police.³⁵⁴

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

³⁴⁶ LAMBDA LEGAL ET AL., *supra* note 208, at 4, 12; CWLA GUIDELINES, *supra* note 204, at 7.

³⁴⁷ LAMBDA LEGAL ET AL., *supra* note 208, at 4, 12; CWLA GUIDELINES, *supra* note 204, at 7.

³⁴⁸ ANDREW BURWICK, VANESSA ODDO, LAURA DURSO, DANIEL FRIEND & GARY GATES, IDENTIFYING AND SERVING LGBTQ YOUTH: CASE STUDIES OF RUNAWAY AND HOMELESS YOUTH PROGRAM GRANTEES FINAL REPORT 22 (2014), *available at* www.mathematica-mpr.com/~media/publications/PDFs/family_support/LGBTQ_youth_homeless.pdf.

³⁴⁹ *Id.* at 23.

³⁵⁰ WHO, UNAIDS & IAWG, *supra* note 311, at 28.

³⁵¹ CWLA GUIDELINES, *supra* note 204, at 10–13, 44; LAMBDA LEGAL ET AL., *supra* note 208, at 8.

³⁵² BURWICK ET AL., *supra* note 348, at 22.

³⁵³ *Id.* at 22.

³⁵⁴ LAMBDA LEGAL ET AL., *supra* note 208, at 8–11; BRENDAN M. CONNER, AYESHA MAGO & SARAH MIDDLETON-LEE, HIV YOUNG LEADERS FUND, SEXUAL AND REPRODUCTIVE HEALTH NEEDS AND ACCESS TO HEALTH SERVICES FOR ADOLESCENTS UNDER 18 ENGAGED IN SELLING SEX IN THE ASIA PACIFIC 13–14 (2014).

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

The WHO has emphasized the importance of primary and sexual and reproductive health care and services for youth in the sex trade and criticized age-related barriers and parental consent requirements that impede access to treatment and care.³⁵⁵ Sexual and reproductive health services are particularly important for young people engaged in trading sex, including access to screening, diagnosis, and treatment of sexually transmitted infections, a range of contraceptive options, services related to conception and pregnancy care, cervical cancer screening, and safe abortion.³⁵⁶

It is especially critical that transgender and gender non-conforming youth receive gender-affirming health care, whether in or out of state custody. The lack of adequate medical and mental health care for these youth is a recognized barrier to a variety of positive outcomes.³⁵⁷ The lack of free or affordable treatment and care pressures transgender youth to seek street hormones without medical supervision, which contributes to unsafe injection and potential drug interactions.³⁵⁸ For transgender youth engaged in the sex trade in particular, such care is often reported as necessary to conform to enforced gender binaries in order to stay safe in the face of violence and discrimination in public spaces and gender-segregated shelters and programs.³⁵⁹ For this reason, lack of transition-related care drives involvement in the sex trades and other underground economies to meet medical needs. When in care, the Child Welfare League of America recommends medical and mental health practitioners who are knowledgeable about the health needs of youth and who understand gender identity disorder and the professional standards of care for transgender people, permit transgender youth to continue to receive all transition-related treatment they started prior to involvement with the child welfare or juvenile justice systems, and provide any necessary authorization for transition-related treatments.³⁶⁰

The treatment and support provided must also extend to youth in the sex trades who use drugs. The WHO has stressed the importance of harm reductionist services for youth who trade sex, including sterile injecting equipment through needle and syringe programs, opioid substitution therapy for those who are dependent on opioids and access to naloxone for emergency management of suspected opioid overdose.³⁶¹

While daunting, the possibility of comprehensive and integrated medical services is achievable. Health & Education Alternatives for Teens Program (“HEAT”) at SUNY Downstate is a program focused on heterosexual, lesbian, gay, bisexuals, and transgender adolescents and young adults ages 13 to 24 living with or at-risk for HIV.³⁶² The HEAT program operates a low-threshold ‘one-stop shop’ full service clinic that is set in a youth-friendly, discrete, and easily accessible location, and offers services regardless of youth’s ability to pay, while maintaining client confidentiality and ages 13 and up do not need parental permission for exams and testing,

³⁵⁵ WHO, UNAIDS & IAWG, *supra* note 311, at 27, 29.

³⁵⁶ *Id.* at 27.

³⁵⁷ BURWICK ET AL., *supra* note 348, at 19–20; LAMBDA LEGAL ET AL., *supra* note 208, at 4–7.

³⁵⁸ STATE OF THE CITY 2009, *supra* note 204, at 91; HIDDEN INJUSTICE, *supra* note 164, at 51.

³⁵⁹ Rees, *supra* note 156, at 135.

³⁶⁰ CWLA GUIDELINES, *supra* note 204, at 59.

³⁶¹ WHO, UNAIDS & IAWG, *supra* note 311, at 26.

³⁶² N.Y.C. ACS, RESOURCES FOR LGBTQ YOUNG PEOPLE WHO ARE SURVIVORS OF COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN 6 (2013), *available at* http://www.nyc.gov/html/acs/downloads/providers_newsletter/october30_2013/Services_for_LGBTQ_youth_involved_in_the_Commercial_Sex_Industry.pdf.

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

and may be enrolled in treatment even if undocumented.³⁶³ HEAT's clinic offers a full range of medical, mental health, supportive, and prevention services, including HIV treatment and hormone therapy at no charge.³⁶⁴ The program also offers patients paid and volunteer positions within the HEAT Program.³⁶⁵

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

Between 80 to 95 percent of youth in the sex trade report that they trade sex in order to obtain money.³⁶⁶ In some cases youth engaged in the sex trade had prior employment experience, and left due to employer harassment and abuse, wage theft, low wages, or failure to pay salaries on time.³⁶⁷ The comparatively high remuneration offered by selling sex, combined with low barriers to entry, therefore acts as an incentive to engage in trading sex in some contexts.³⁶⁸ Contrary to common understanding, many young people do not need “reeducation” or “rehabilitation” in order to leave the sex trade, and instead 60.2 percent report that stable employment is necessary for them to exit, with education at 51 percent and stable housing at 41 percent.³⁶⁹

It is important to recognize that job training and readiness programs are unable to resolve discriminatory employment practices with respect to prior convictions and gender identity and sexual orientation discrimination. The barriers of a juvenile arrest history on career outcomes are well documented, and safe harbor laws are for the most part ill-suited to prevent the use of these histories by potential employers.³⁷⁰ LGBTQ youth in particular face discrimination in hiring and promotion, as well as the push-out effect of workplace harassment.³⁷¹ Transgender youth in the sex trade directly link limited economic choices resulting from harassment and discrimination with trading sex as a survival strategy. In one study, transgender youth in the sex trade reported active efforts to find other work, but few had managed to get even an initial interview.³⁷² Many reported direct discrimination on the basis of gender identity and expression along the lines of: “we don't want someone like you here.”³⁷³

For this reason, programs must not be limited to job readiness and training, but include safe, secure, and living wage employment opportunities. Creating job training programs with a practicum component would allow youth to receive both supervised and hands-on application of their newly acquired skills. This would afford youth the opportunity to make contact with

³⁶³ AIDS INST., N.Y. STATE DEP'T OF HEALTH, HIV CLINICAL GUIDELINES AND BEST PRACTICES FROM NEW YORK STATE: TRANSITIONING HIV-INFECTED ADOLESCENTS INTO ADULT CARE 8 (2011), *available at* cdn.hivguidelines.org/wp-content/uploads/transitional-care-best-practices-06-27-2011.pdf.

³⁶⁴ N.Y.C. ACS, *supra* note 362, at 6.

³⁶⁵ AIDS INST., N.Y. STATE DEP'T OF HEALTH, *supra* note 363, at 8.

³⁶⁶ CURTIS ET AL., *supra* note 72, at 63.

³⁶⁷ HIV YOUNG LEADERS FUND, *supra* note 354, at 30.

³⁶⁸ *Id.*

³⁶⁹ CURTIS ET AL., *supra* note 72, at 103, 110.

³⁷⁰ *See generally* Margit Wiesner, Hyoun K. Kim & Deborah M. Capaldi, *History of Juvenile Arrests and Vocational Career Outcomes for At-Risk Young Men*, 47 J. RES. CRIME & DELINQ. 91 (2010); John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUSTICE 121 (1999); Jeffrey Grogger, *The Effect of Arrests on the Employment and Earnings of Young Men*, 110 Q. J. ECON. 51 (1995).

³⁷¹ BURWICK ET AL., *supra* note 348, at 19–20.

³⁷² Rees, *supra* note 156, at 87–88.

³⁷³ *Id.*

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

potential employers and secure full employment. Paid practicum opportunities would also allow youth to have independence while also experiencing employment stability. The New York City Department of Youth and Community Development maintains a Summer Youth Employment Program, which provides New York City youth between the ages of 14 and 24 with summer employment and educational experiences. While the agency recently announced that forty slots would be set aside to specifically serve foster care youth in a specialized sexually exploited foster care placement, such programs must be exponentially expanded to meet the demand in both timing and scope, disconnected from any requirement of an adjudicated placement and made voluntary and low-threshold, and employment providers must be screened for affirming policies and practices.

H. Improving food security

Limited access to food forces many youth into engaging in survival sex. In one New York study, many youth report difficulty acquiring Food Stamps based on age limits for those under eighteen, and hardship retaining public benefits given either no or inconsistent place of residence, onerous “workfare” requirements, and discrimination and service denial from city agencies and contractors.³⁷⁴ Over half of youth, 54 percent, used their earnings to prioritize food and 31 percent of respondents reported receiving food in exchange for a sexual service.³⁷⁵ Throughout interviews youth referenced the limited avenues they had to obtain food, leading many of them to trade sex.³⁷⁶ Improving access to food through programs such as: food pantries, mobile food trucks, and daily meals provided by organizations specifically for youth, would reduce the pressures young people face to resort to survival sex to meet basic needs.

VII. CONCLUSION

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

Perhaps most disturbing is the federal government’s willingness to join the fray on the side of the “arrest-institutionalization” model. There is a sad irony in the fact that the federal government is currently advancing safe harbor laws given its abysmal record on the use of enforcement actions by the FBI to “rescue” youth in the sex trades.³⁷⁷ In 2013, Congress directed

³⁷⁴ URBAN INST., SURVIVING THE STREETS OF NEW YORK, *supra* note 104, at 71.

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ In October 2009, the fourth national Operation Cross Country spanned 37 cities and “recovered” 59 child victims with an average age of 15, in addition to arresting 69 alleged pimps. U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS—FY 2009 43 (2010). The FBI press release from the operation produces a slight discrepancy, in that the release notes 52 minors and 60 alleged pimps were booked, but also states 700 others were arrested on state and local charges. *See* Press Release, Federal Bureau of Investigation, Dep’t of Justice, More than Fifty Children Rescued During Operation Cross Country IV (Oct. 26, 2009),

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

the Attorney General to facilitate the promulgation of a model state statute to “treat an individual under 18 years of age who has been arrested for engaging in, or attempting to engage in, a sexual act with another person in exchange for monetary compensation as a victim of a severe form of trafficking in persons” and not be prosecuted for a prostitution offense but referred to appropriate services, which as of this writing has yet to be issued.³⁷⁸ Since that time, the House of Representatives has introduced and passed a bill to give preferential consideration for federal grants to states that have enacted safe harbor laws, described as a law that “discourages the charging or prosecution” of a trafficked minor and “encourages their diversion” to “appropriate service providers.”³⁷⁹ Signaling the widespread accession to this view, in her confirmation hearing, presumptive Attorney General Loretta Lynch testified that safe harbor laws represent “an essential next step in helping the victims of this horrible scourge.”³⁸⁰ This wave of moral support is drowning the warning of advocates that the bill threatens to “criminalize victims” and recommendations that “a true Safe Harbor Law will not arrest victims and instead ensure their access to service providers.”³⁸¹

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

<http://www.fbi.gov/news/pressrel/press-releases/more-than-50-children-rescued-during-operation-cross-country-iv>. The confusion may result from discretionary enforcement of anti-trafficking laws against sex workers, especially those who refuse to comply with prosecutors. The size of these actions continues to increase, bringing in a larger number of arrests and “rescues” each year. In November 2010, Operation Cross Country V “recovered” 69 children and 99 alleged pimps, but also 885 others arrested on state and local charges. See FBI Press Release: “Sixty-Nine Children Rescued During Operation Cross Country V (Nov. 8, 2010), http://www.fbi.gov/news/pressrel/press-releases/occv_110810. The remaining arrests—accounting for 81 percent of arrests—are presumably adult sex workers arrested under state and local charges, 885 in Cross Country V. U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS—FY 2012 43 (2013). In FY 2012, Innocence Lost Initiative operations resulted in an astounding 1,769 arrests and “547 child victims being identified and/or located,” and the 1,769 arrest disaggregation data has not been published. *Id.* at 41–42.

³⁷⁸ Trafficking Victims Protection Reauthorization Act of 2013. Pub. L. No. 113-4, 127 Stat 54 (2013), *codified at* 22 U.S.C.A. § 7101 (West 2014).

³⁷⁹ Stop Exploitation Through Trafficking Act of 2015, H.R. 159, 114th Cong. § 2 (as passed by House, Jan. 27, 2015).

³⁸⁰ *Attorney General Confirmation Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (Jan. 28, 2015)(statement of Loretta Lynch, U.S. Attorney, Eastern District of New York).

³⁸¹ FREEDOM NETWORK USA, RECOMMENDATIONS FOR AMENDMENT OF STOP EXPLOITATION THROUGH TRAFFICKING ACT OF 2014 1 (2014); see also CAST, AN ANALYSIS OF STATE SAFE HARBOR LAWS AND RECOMMENDATIONS FOR STATES CONSIDERING FUTURE SAFE HARBOR LEGISLATION 9–10 (2013).

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

minors as criminals, thereby re-traumatizing them, [...] contributing to the misidentification of victims,” “squandering opportunities to investigate and prosecute traffickers,” and discouraging witnesses from cooperating with law enforcement.³⁸²

In addition, while safe harbor proponents laud the policies as one area of conformity between the United States and its international treaty obligations, safe harbor laws do nothing to end arrests of youth engaged in the sex trades, and many in fact presume that arrests will continue to take place, arguably in violation of international law. The Convention on the Rights of the Child and other international legal instruments—including the Second Optional Protocol to which the United States is a State Party—prohibit the use of custodial arrest and involuntary detention against minors engaged in the sex trade.³⁸³ The body charged with monitoring compliance with the treaty—the Committee on the Rights of the Child—has increasingly criticized governments for retaining laws criminalizing minors for prostitution. For instance, the United States was encouraged in the first review of its compliance with its treaty obligations to “[e]nsure that all persons below the age of 18 who are victims of any of the offenses under the Optional Protocol are as such neither criminalized nor penalized at [the] federal or state level.”³⁸⁴ When the Committee revisited the United States with its most recent review it criticized the law enforcement-based approach of the nation and singled out the paucity of voluntary shelter beds for youth in the sex trades—identifying only a few hundred shelter beds—pointing out the contradiction that “[e]ven in states with safe-harbour laws which provide for service referral to victims, these are often non-existent resulting in most cases in arrest and detention in order ‘to protect’ children from further violations and suffering.”³⁸⁵

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

³⁸² Susan Crile, Note, *A Minor Conflict: Why the Objectives of Federal Sex Trafficking Legislation Preempt the Enforcement of State Prostitution Laws Against Minors*, 61 AM. U. L. REV. 1783, 1824 (2012); see also Carly E. Souther, *Victims Not Vixens: Prostituted Children and the Case for Preemption*, 21 GEO. J. ON POVERTY L. & POL’Y 381, 397-98 (2014).

³⁸³ See Brendan M. Conner, “First, Do No harm:” *Legal Guidelines for Health Programmes Affecting Adolescents Aged 10–17 Who Sell Sex or Inject Drugs*, 18 J. INT’L AIDS SOC’Y (forthcoming 2015); HIV YOUNG LEADERS FUND, *supra* note 354, at 11–14; Craig McClure, Caitlin Chandler & Susan Bissell, *Responses to HIV in Sexually Exploited Children or Adolescents Who Sell Sex*, 385 THE LANCET, 2015 at 97-98; UNDP, *supra* note 336, at 43.

³⁸⁴ U.N. Comm. on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 12, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography - Concluding Observations: United States of America*, ¶ 38(a), U.N. Doc. CRC/C/OPSC/USA/CO/1 (June 25, 2008).

³⁸⁵ U.N. Comm. on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 12, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography - Concluding Observations: United States of America*, ¶ 44, U.N. Doc. CRC/C/OPSC/USA/CO/2 (July 2, 2013).

Please cite to 12 Stanford J. C.R. & C.L. ____ (forthcoming 2016).

process, counterproductive, and wrong.