

# HARBORING CONCERNS: THE PROBLEMATIC CONCEPTUAL REORIENTATION OF JUVENILE PROSTITUTION ADJUDICATION IN NEW YORK

SHELBY SCHWARTZ\*

In 2003, New York City police arrested Nicolette R., a twelve-year-old girl, for offering oral sex to an undercover officer for forty dollars.<sup>1</sup> Nicolette had already been arrested for prostitution in a different city, but that time her pimp paid her fine and she returned to the streets.<sup>2</sup> This time was different. Prosecutors sought to sentence Nicolette to secure detention, pointing to her lack of remorse and tendency to carry weapons; her defense attorneys argued that she was a child, victimized by sexual predators, and should be set free.<sup>3</sup> First a Family Court judge placed her in a secure juvenile detention center, but later an Appeals Court granted her the right to be placed in a residential treatment facility for emotionally disturbed children.<sup>4</sup> Unfortunately, the only facility that accepted Nicolette had no resources to treat victims of sexual abuse or prostitution.<sup>5</sup> The struggle over Nicolette's fate is not unique; it occurs over and over in New York family courts and throughout the country. Simultaneously too young to consent to sex and in violation of criminal laws banning prostitution, juvenile

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\* J.D. 2009, Columbia Law School; A.B., 2005, University of Chicago. I am truly thankful for the generous assistance of Jeffrey Fagan, without whose guidance this article would not have been written.

<sup>1</sup> See Leslie Kaufman, *Determining the Future of a Girl With a Past: Is the Answer to Child Prostitution Counseling, or Incarceration?*, N.Y. TIMES, Sept. 15, 2004, at B1.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* The *Nicolette R.* case garnered media attention and resulted in the Appellate Division reversing the Bronx Family Court's placement of Nicolette. See *In re Nicolette R.*, 779 N.Y.S.2d 487 (App. Div. 2004).

prostitutes have been trapped in a contradictory system of regulations and left without any resources for their rehabilitation.

Issues of juvenile prostitution tap into the longstanding cultural confusion over management of teenage sexuality. The traditional adjudication of juvenile prostitutes through juvenile delinquency proceedings typifies state responses. In 1920, Mabel Ruth Fernald, who researched female criminal behavior in the early twentieth century, noted that the most common class of convictions for delinquent women was offenses against chastity.<sup>6</sup> Fernald's study tracks women convicted for prostitution, "sexually irregular" women—those who had been sexually promiscuous but not for money or who had "lived with one or more consorts for any length of time"—and "occasional sexual offenders," including women who had "illicit" sexual intercourse.<sup>7</sup> This criminalization of sexual conduct based on its perceived immorality exemplifies one strain of the discourse underlying the debates surrounding the adjudication and treatment of juvenile prostitutes.

An opposing normative view of adolescent prostitutes as victims in need of protection competes with these moral narratives in cultural discourse. We can see this "child-saving" philosophy reflected in traditional state laws setting age of consent requirements.<sup>8</sup> For example, in New York, juveniles aged sixteen years and under cannot legally give consent to sexual acts. Thus, juvenile prostitutes are technically victims of rape during each sex act performed. This peculiar situation has been noted by the New York state courts.<sup>9</sup> The above point does not apply to juvenile prostitutes aged

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<sup>6</sup> See MABEL RUTH FERNALD, ET AL., A STUDY OF WOMEN DELINQUENTS IN NEW YORK STATE 119 (1920) (noting that 49.7% of women found delinquent for the first time were convicted of chastity offenses, compared to 36% convicted of property offenses).

<sup>7</sup> *Id.* at 385 (discussing how Fernald and her fellow researchers decided to classify these women for the purposes of their study).

<sup>8</sup> See Franklin E. Zimring, *The Common Thread: Diversion in Juvenile Justice*, 88 CAL L. REV. 2477, 2480 (2000) [hereinafter Zimring, *The Common Thread*] ("Various called 'child saving,' 'the omnibus theory of delinquency,' and, most memorably, 'the rehabilitative ideal,' the original justification we remember of the Juvenile Court was as an institution that would intervene forcefully in the lives of all children at risk to effect a rescue.").

<sup>9</sup> N.Y. PENAL LAW § 130.05(3)(a) (McKinney 2008) ("A person is deemed incapable of consent when he or she is less than seventeen years old."). See also *In re Nicolette R.*, 779 N.Y.S.2d 487 (App. Div. 2004) ("Although appellant was 12 years old [and] . . . incapable of consenting to any sexual act rendered unlawful by Penal Law article 130, this circumstance was irrelevant . . ."); *In re Emani G.*, No. D-7650/05, 2005 WL 1225030, at \*2 (N.Y. Fam. Ct. May 23, 2005) (upholding a finding of delinquency of a

between sixteen and seventeen, however, as they are still below the age of majority and thus technically “juvenile” prostitutes.

New York State has recently attempted to alleviate these tensions through the Safe Harbour for Exploited Children Act (SHA),<sup>10</sup> passed into law on September 25, 2008, and effective April 1, 2010.<sup>11</sup> This Act will convert all family court juvenile delinquency proceedings for prostitution-related offenses into Persons in Need of Supervision (“PINS”) proceedings.<sup>12</sup> This change will decriminalize prostitution for juveniles, mandate specialized court services, and prohibit detention.

This Article will argue that, in the midst of the cultural tension surrounding teenagers and sex, New York should promote a more tailored, philosophically- and developmentally-appropriate method of dealing with juvenile prostitutes than the Safe Harbour Act offers. Instead of abandoning traditional theories of juvenile adjudication for a new victim-based theory, New York should instead hold onto the kind of individualized and graduated dispositions for which the juvenile court was created. Part I will provide background material on domestic juvenile prostitution and the traditional approach to adjudication, especially focusing on juvenile prostitution in New York, and on the philosophical bases of juvenile courts and delinquency proceedings. Part II will develop the tensions and identify the problems of working with the victim-centered approach to juvenile prostitution. The federal government created the victim-centered approach for application to internationally trafficked minors, and the Safe Harbour Act applies it to domestic juvenile prostitutes. Part III will suggest that adaptation of addiction treatment models to the juvenile prostitution

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minor girl for prostitution despite noting that “[t]he essence of the crime of prostitution is an agreement by two willing participants to engage in sexual contact in exchange for a fee.”).

<sup>10</sup> For reasons that remain unclear, the Act’s sponsors chose to use the British spelling of “harbor.” To maintain consistency with the official Act, this Article will retain the alternate spelling, “harbour.” This Act has alternately been referred to as the Safe Harbor for Exploited Youth Act. See Press Release, Governor David A. Patterson, N.Y. State, Governor Patterson Signs Law to Protect Sexually Exploited Youth (Sept. 26, 2008), available at [http://www.state.ny.us/governor/press/press\\_0926082.html](http://www.state.ny.us/governor/press/press_0926082.html). The Safe Harbour for Exploited Youth Act, however, was an earlier bill that was not passed. A.B. 4352, 2007 Leg., 231st Sess. (N.Y. 2007); see *infra* Part II.B.1.

<sup>11</sup> A.B. 5258-C, 2007 Leg., 231st Sess. (N.Y. 2007); S. 3175-C, 2007 Leg., 231st Sess. (N.Y. 2007).

<sup>12</sup> In these proceedings, a family court can mandate social services provisions for a juvenile in a non-delinquency context. For further discussion of these proceedings, see *infra* notes 142-148 and accompanying text.

context, along with varying levels of judicial response, presents a better solution than the Safe Harbour Act. Finally, the Article identifies the need for a richer base of empirical knowledge regarding juvenile prostitution to inform legal responses and treatment models.

## I. DOMESTIC JUVENILE PROSTITUTION AND THE TRADITIONAL ADJUDICATORY REGIME

This Part will examine the current knowledge about domestic juvenile prostitution in America and assess how these facts fit with the philosophical bases of the juvenile courts that adjudicate and treat juvenile prostitutes when they are apprehended. Juvenile courts use the traditional approach to adjudication, discussed above.

### A. Current State of Domestic Juvenile Prostitution

Juvenile prostitution in the United States represents a poorly tracked but clearly growing problem.

#### *1. What Does Juvenile Prostitution in the United States Look Like?*

In 2004, the most recent year for which data are available, approximately 1,800 juveniles in the United States were arrested for prostitution and other forms of commercialized vice.<sup>13</sup> This represents a seven percent increase from 2003 and a forty-four percent increase since 2000.<sup>14</sup> These arrest statistics probably represent a gross underestimate of the number of adolescents involved in prostitution, because in many cases, police do not arrest juvenile prostitutes when they arrest their adult patrons.<sup>15</sup> Frank Zimring has posited that “[a] plausible reason for this

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<sup>13</sup> *Juvenile Arrests 2004*, JUV. JUST. BULL. (Off. of Juv. Just. & Delinq. Prevention, U.S. Dep’t of Just., D.C.), Dec. 2006, at 3 [hereinafter *Juvenile Arrests 2004*], available at <http://www.noys.org/Juvenile%20Arrests%202004.pdf>.

<sup>14</sup> *Id.* It is unclear whether the increase in juvenile prostitution arrests stems from an increase in juvenile prostitution or an increase in arrests and reporting.

<sup>15</sup> See Cheryl Hanna, *Somebody’s Daughter: The Domestic Trafficking of Girls for the Commercial Sex Industry and the Power of Love*, 9 WM. & MARY J. WOMEN & L. 1, 17 (2002). (“For example, in a recent report on the prostitution of women and girls in the Chicago Metropolitan area, researchers suggest that the discrepancy between the low numbers of arrests for juvenile prostitution and the experience of service providers who see numerous girls who have exchanged sex for money, is in part due to the way in which juveniles are processed by law enforcement.”); FRANK ZIMRING, AMERICAN TRAVESTY 40 (2004) [hereinafter ZIMRING, TRAVESTY] (“Unlike adult arrest patterns, where almost 40% of

pattern is that when older patrons pay underage sex partners or procure for them, the adult is considered the predator and the child (victim) is not arrested.”<sup>16</sup> Even though there were only 1,800 estimated arrests across the entire nation in 2004, the New York Office of Children and Family Services (OCFS) estimates that there are 2,500 youth engaged in commercialized sex in New York City alone.<sup>17</sup> A 2001 study reported that between 300,000 and 400,000 children are victims of some form of sexual exploitation each year.<sup>18</sup> The Justice Department estimates that there are between 100,000 and 300,000 adolescents involved in prostitution annually in America.<sup>19</sup>

Although both boys and girls engage in juvenile prostitution, the vast majority of arrests are of female prostitutes<sup>20</sup>. This Article focuses on the state’s response to juvenile prostitution and will specifically discuss female juvenile prostitution. Male juvenile prostitution appears generally to take a very different form than female juvenile prostitution, with male juvenile prostitutes more likely to be older and to work without pimps.<sup>21</sup>

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total sex arrests were for commercial vice, only 6% of the minors arrested were accused of commercial vice crimes.”).

<sup>16</sup> ZIMRING, TRAVESTY, *supra* note 15, at 40.

<sup>17</sup> See Kate Mullin, Staff Attorney, Legal Aid Soc’y Juv. Rts. Prac., Panel Presentation: Teen Prostitutes: Victims or Defendants?, held by the Bar Assoc. of the City of NY (Oct. 17, 2007) (audio tape on file with author) (describing juvenile prostitution in New York state).

<sup>18</sup> RICHARD J. ESTES & NEIL ALAN WEINER, THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA AND MEXICO: EXECUTIVE SUMMARY (OF THE U.S. NATIONAL STUDY) 13 (Sept. 19, 2001; revised Feb. 20, 2002), *available at* [http://www.sp2.upenn.edu/~restes/CSEC\\_files/Exec\\_Sum\\_020220.pdf](http://www.sp2.upenn.edu/~restes/CSEC_files/Exec_Sum_020220.pdf).

<sup>19</sup> R. BARRI FLOWERS, RUNAWAY KIDS AND TEENAGE PROSTITUTION 87 (2001).

<sup>20</sup> See *Juvenile Arrests 2004*, *supra* note 13, at 3 (showing that seventy-two percent of prostitution and commercial vice arrests of juveniles in 2004 were of females). See also Lori Iskowitz, Asst. Corp. Counsel, Queens County, Panel Presentation: Teen Prostitutes: Victims or Defendants?, held by the Bar Assoc. of the City of NY (Oct. 17, 2007) (audio tape on file with author) (noting that in eleven years of handling all Queens juvenile prostitution prosecutions, only one case involved a boy).

<sup>21</sup> *Prostitution of Juveniles: Patterns From NIBRS*, JUV. JUST. BULL. (Off. of Juv. Just. & Delinq. Prevention, U.S. Dep’t of Just., D.C.) June 2004, at 6, *available at* <http://www.ncjrs.gov/html/ojjdp/203946/page6.html> (“Strong gender segregation appears to occur in the prostitution of juveniles. According to NIBRS data, the prostitution of male juveniles appears different from that of female juveniles. Males tend to be somewhat older, more likely to operate outdoors, somewhat more likely to be arrested, and less likely to be treated by the police as ‘victims.’ According to the literature, female juveniles are more

Based on the observed difference, the treatment of female juvenile prostitution presented here may be inapposite to male juvenile prostitutes; their methods of operation have been documented to be different, and it seems likely that their motivations and reactions will be different as well.

Sociologists note that most young women who enter into prostitution do so because they are emotionally searching for some form of love or protection that they cannot find at home and which they believe their pimp will give them.<sup>22</sup> As Cheryl Hanna has explained, "we have fundamentally misunderstood what would motivate a girl to say yes the first time someone offers her money or food or drugs in exchange for sex . . . . Most girls are not motivated by lust or greed or gluttony or wrath or envy or pride or sloth; they are lured by love."<sup>23</sup> The vast majority of adolescents arrested for juvenile prostitution come from family backgrounds of physical, emotional, and sexual abuse in their homes.<sup>24</sup> One study, ordered by the New York State Legislature, estimated that approximately eighty-five percent of these children come from homes involved with the child welfare system and that, in New York City, seventy-five percent had been placed in foster homes.<sup>25</sup> Their entry into prostitution tends to be a matter of

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likely to operate in conjunction with pimps, and the NIBRS data on adult offenders in incidents involving juveniles are consistent with this observation.").

<sup>22</sup> See FLOWERS, *supra* note 19, at 52-53 (describing how pimps welcome young runaway girls offering "a roof over their heads, a 'caring adult,' clothes, makeup and promises of love and belonging"); KAREN M. STALLER, RUNAWAYS: HOW THE SIXTIES COUNTERCULTURE SHAPED TODAY'S PRACTICES AND POLICIES 46-48 (2006) (describing changing attitudes towards juvenile prostitutes in the late 60s and early 70s that recognized their behaviors as "necessary for survival" and motivated by "looking for love, affection, and romance").

<sup>23</sup> Hanna, *supra* note 15, at 3.

<sup>24</sup> See FLOWERS, *supra* note 19, at 43-44 (noting the high incidence of sexual and physical abuse of runaways, including that seventy percent of runaways in shelters had been sexually molested at home and ninety percent were victims of severe child abuse); Hanna, *supra* note 15, at 22 ("Many of those factors [for running away to prostitution] involve a poor home environment, the absence of one parent (almost always the father), and sexual abuse (often by a male the girl knows, and too often it is her mother's boyfriend)."); JANE LEVINE POWERS & BARBARA WEISS JAKLITSCH, UNDERSTANDING SURVIVORS OF ABUSE: STORIES OF HOMELESS AND RUNAWAY ADOLESCENTS 4 (1989) ("In order to survive, increasing numbers of street youth are pushed into prostitution, the drug trade, and other forms of criminal activity. Nearly all juvenile prostitutes were at one time runaways or throwaways."); Mullin, *supra* note 17.

<sup>25</sup> FRANCES GRAGG, ET AL., NEW YORK PREVALENCE STUDY OF COMMERCIALY SEXUALLY EXPLOITED CHILDREN, FINAL REPORT, at ii, available at <http://www.ocfs.state.ny.us/main/reports/CSEC-2007.pdf>; Op-Ed, *Children in Need of Safe*

necessity in order to meet basic material needs and free themselves from abusive situations.<sup>26</sup> These young women do not possess the developmental capacity to recognize that they most likely are moving from one abusive and exploitative situation into another. One pimp commented that “[t]he goal is to get the girls as dependent as possible . . . . If they mess up, there is a price to pay, and they know it is a heavy price.”<sup>27</sup> Adolescent women often enter into prostitution because an older man promises to take care of them in exchange for their willing compliance to his demands; this acquiescence, however rational it seems to them, nearly always devolves into dependence and a chronic cycle of prostitution, drug use, and physical abuse.<sup>28</sup>

Once involved with a pimp, young girls often feel as if there is nowhere for them to go and no acceptance outside of the world of prostitution.<sup>29</sup> The creation of a community, or even a substitute family, within the narrow social networks of prostitution furthers this feeling. Young girls often call their pimps “Daddy” and refer to other young prostitutes for the same pimp as “sisters.”<sup>30</sup> These concurrent senses of inclusion within the group of prostitutes and exclusion from the world of

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*Harbor*, N.Y. TIMES, Sept. 15, 2007, at A16 (“A study ordered by the Legislature estimated that about eighty-five percent of the state’s exploited children are from families that have been involved with the child welfare system, while in New York City, three-quarters of the children had been placed in foster homes.”).

<sup>26</sup> See FLOWERS, *supra* note 19, at 51-57 (“When teens run away or are forced to leave home, what awaits them is often just as bad, if not worse than what they ran from. They usually find themselves quickly unable to meet basic needs such as food and shelter. In order to meet these needs, many runaways will be forced into selling their bodies . . . .”); Hanna, *supra* note 15, at 13 (“‘Survival sex’ is the term . . . used within the community of service providers who know these girls best . . . . Often, sex is a commodity that they trade for the most basic of needs because it is all they perceive that they have to offer.”).

<sup>27</sup> Hanna, *supra* note 15, at 23-24.

<sup>28</sup> See generally, Jessica Lustig, *The 13-Year-Old Prostitute: Working Girl or Sex Slave?* N.Y. MAGAZINE, Apr. 9, 2007 (recounting the story of Lucilia, a thirteen-year-old prostitute working in Queens, New York).

<sup>29</sup> See Pamela Chen, Deputy of Pub. Integrity, Crim. Div., U.S. Att’y’s Off., E.D.N.Y., Panel Presentation: Teen Prostitutes: Victims or Defendants?, held by the Bar Assoc. of the City of NY (Oct. 17, 2007) (audio tape on file with author) (describing interactions with juvenile prostitutes in New York).

<sup>30</sup> See *id.*; see also TIA JEAN PLYMPTON, HOMELESS YOUTH CREATING THEIR OWN “STREET FAMILIES” 47-49 (1997) (describing how homeless youth perceive “street families” as including those with whom they have sexual relationships).

family and institutional structures facilitate the girls' descent into an underworld. Young girls become detached from social structures that could serve to normalize their lives and help them recover from this trauma and abuse.<sup>31</sup> Jane Levine Powers and Barbara Weiss Jaklitsch describe four stages that maltreated adolescents typically experience when becoming involved in prostitution: adaptation, acculturation, assimilation, and commitment.<sup>32</sup> Through this four-stage process, a young woman who already has a negative self-image based on past maltreatment begins to internalize the belief that she is unworthy of respect or care. At this stage, a pimp's entrance into her life, complete with promises of gifts and love, food and shelter, as well as physical abuse and illicit substances, prompts the young woman's acceptance of a new identity centered on prostitution.<sup>33</sup> This world of abuse, drugs and prostitution becomes the only home she knows.

The problem of juvenile prostitution has existed through America's history. Governments and courts have attempted to deal with such problematic behavior through a variety of laws and adjudicatory procedures, which Part I.A.2 will outline.

## ***2. The Traditional Approach to the Treatment of Women Arrested for Juvenile Prostitution in the United States***

The earliest federal law aimed at domestic prostitution that focused specifically on young women was the Mann Act.<sup>34</sup> Originally, the Act outlawed the interstate transportation of women and girls for the purpose of prostitution, debauchery, or other immoral purposes; a 1986 amendment altered the act to cover both prostitution and any criminalized sex acts.<sup>35</sup>

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<sup>31</sup> See Hanna, *supra* note 15, at 26-27 (describing how attachment to pimps hinders investigation of juvenile prostitution and treatment of adolescent victims). These institutional and social structures include a traditional family, the educational system (including the schools that they previously attended), social services agencies—such as the Office of Children and Family Services (OCFS)—responsible for ensuring their wellbeing, and law enforcement and judicial systems.

<sup>32</sup> POWERS & JAKLITSCH, *supra* note 24, at 26 (noting Boyer and James's work on the topic of prostitution involvement).

<sup>33</sup> *Id.*

<sup>34</sup> 18 U.S.C. §§ 2421-2427; see Nesheba Kittling, *God Bless the Child: The United States' Response to Domestic Juvenile Prostitution*, 6 NEV. L.J. 913, 918 (2006) (describing early efforts to combat juvenile prostitution).

<sup>35</sup> See Kittling, *supra* note 34, at 918.

Congress amended the Mann Act again in 2006 to incorporate it into the Trafficking Victims Protection Act reauthorization.<sup>36</sup> The Mann Act, however, deals specifically with traffickers in juvenile prostitutes (pimps, madams, etc.), not with the young women themselves.

Traditionally, most states deal with juvenile prostitutes by adjudicating them delinquent in the family or juvenile court systems. For instance, until the SHA goes into effect in New York State, juveniles arrested for prostitution are subject to juvenile delinquency proceedings based on their commission of a criminal act, which under New York state penal law would be the crime of prostitution.<sup>37</sup> Article 3 of the Family Court Act in New York establishes the procedures for determining whether a juvenile is delinquent.<sup>38</sup> In juvenile prostitution cases, the family court judge must decide at a fact-finding hearing if the girl has committed acts which, if committed by an adult, would constitute the crime of prostitution; if she has, the judge will adjudicate her delinquent.<sup>39</sup>

If a juvenile is found delinquent for prostitution, the judge will fashion an appropriate disposition for her.<sup>40</sup> The judge can charge her conditionally,<sup>41</sup> put her on probation, or place her in one of a variety of secure and non-secure placement facilities.<sup>42</sup> The proceedings attempt to balance “the needs and best interests of the respondent” with the “need for protection of the community.”<sup>43</sup> Since prostitution is not a designated felony

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<sup>36</sup> See *infra* Part II.

<sup>37</sup> N.Y. PENAL LAW § 230.00 (McKinney 2007).

<sup>38</sup> N.Y. FAM. CT. ACT § 301.1 (McKinney 2008).

<sup>39</sup> The fact-finding hearing is governed by N.Y. FAM. CT. ACT §§ 340.1-347.1 (McKinney 2007).

<sup>40</sup> The disposition is governed by N.Y. FAM. CT. ACT §§ 350.1-355.5 (McKinney 2007).

<sup>41</sup> A conditional disposition occurs when a judge technically delays entering a factual finding, based on the promise of continued good behavior by the juvenile. If the juvenile follows the court’s orders regarding behavioral compliance, the judge will dismiss the original delinquency petition.

<sup>42</sup> See N.Y. FAM. CT. ACT § 352.2(1) (McKinney 2007) (describing the various dispositional possibilities).

<sup>43</sup> N.Y. FAM. CT. ACT § 301.1 (McKinney 2007); see also N.Y. FAM. CT. ACT § 325.2(2) (McKinney 2007) (describing the order of the proceeding).

act,<sup>44</sup> the judge must attempt to fashion the “least restrictive” disposition consistent with the balance described above for a juvenile found delinquent for prostitution.<sup>45</sup> The courts have held that immediate placement in a fully secure facility is not in accordance with the least restrictive alternative principle, unless a less secure placement has proven ineffective.<sup>46</sup> Thus, once adjudicated delinquent for prostitution, a juvenile will probably receive a disposition of non-secure placement or probation with mandated court services; if such placements prove ineffective, she can be moved to a secure placement at the discretion of the Family Court judge.

In addition to state delinquency adjudications, there are a variety of federal laws aimed at responding to juvenile prostitution and its causes, including the Child Abuse Prevention and Treatment Act,<sup>47</sup> the Juvenile Justice and Delinquency Prevention Act,<sup>48</sup> the Protection of Children Against Sexual Exploitation Act,<sup>49</sup> the Missing Children Act,<sup>50</sup> the Trafficking Victims Protection Act,<sup>51</sup> and the PROTECT Act.<sup>52</sup> These laws

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<sup>44</sup> N.Y. FAM. CT. ACT § 353.5 requires judges to consider a restrictive placement when a juvenile commits a designated felony act, as defined in the New York Penal Law.

<sup>45</sup> N.Y. FAM. CT. ACT § 352.2(2)(a) (McKinney 2007).

<sup>46</sup> See *In re Nicolette R.*, 779 N.Y.S.2d 487 (App. Div. 2004) (“It is undisputed that appellant is in need of specialized services that are unavailable at a limited secure facility operated by the Office of Children and Family Services. While, as the court found, appellant poses a potential flight risk appropriate security measures are provided at the residential facility that has accepted her, and transfer to a more secure facility may be considered should such a risk become a reality.”).

<sup>47</sup> 42 U.S.C. §§ 5101-5106 (1974) (defining child abuse and neglect and offering federal funds to states that meet certain criteria, such as uniform comprehensive definitions of child abuse, investigation of child abuse reports, confidentiality of records, and appointment of guardians ad litem to children involved in abuse and neglect proceedings).

<sup>48</sup> 42 U.S.C. § 5633 (2006) (offering states incentives for diverting status offenders, including runaways, from juvenile delinquency proceedings and placements).

<sup>49</sup> 18 U.S.C. §§ 2423, 2251 (1977). This Act prohibited transportation of persons under the age of eighteen for sexual exploitation, with the specific intent to halt production and dissemination of child pornography. It also extended prosecutorial power against child pornographers and provided for harsh monetary penalties against pimps and pornographers.

<sup>50</sup> 28 U.S.C. §§ 5771-5780a (1982) (granting parents and local authorities access to the FBI’s National Crime Information Center in cases of missing or kidnapped children).

<sup>51</sup> 22 U.S.C. § 7101 (2000) (reauthorized in 2003 and 2005). See also 22 U.S.C. §§ 7103-7107, 7109b, 7110. For more information on this Act, see *infra* Part II.

attempt to provide greater protection against child abuse and offer greater penalties for offenders than previously existed under state or federal laws.<sup>53</sup> Other suggested responses that many states have accepted include the creation of anti-prostitution task forces, including those specifically targeted to juveniles, which combine the efforts of law enforcement, service providers, and community members.<sup>54</sup>

Juvenile prostitution is a widespread problem across the United States. Young women from abusive homes can get caught in a cycle of dependence that ends in prostitution. Courts have adjudicated these cases using the traditional approach of juvenile delinquency, which evolved from the complex philosophy of the juvenile court system.

## **B. Philosophical Bases of Juvenile Justice and Teenage Sexuality**

This Section will examine the underlying philosophical goals of the juvenile justice system in order to understand what modern courts envision as the ideal treatment for juveniles arrested for prostitution under the traditional approach.

### ***1. Historical and Philosophical Bases of the Juvenile Court System***

The first juvenile court in America began in Cook County, Illinois, on July 3, 1899.<sup>55</sup> The reformers who had campaigned for the creation of this court, the legislators who created it, and the judges who ran it viewed the juvenile court as a means to assist helpless children upon whom society

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<sup>52</sup> 18 U.S.C. § 2251-2260a (2003); 42 U.S.C. § 5119a (2006). This Act is also known as the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act. It defines sexual abuse as engaging in sexual conduct with a person who is incapable of consenting or whom one has placed in fear. It also defines illicit sexual conduct as including commercial sex with anyone under eighteen, subjecting such acts to expanded investigative tools and harsher prison sentences.

<sup>53</sup> See FLOWERS, *supra* note 19, at 73-80 ("Federal legislation . . . has paved the way for greater protection of juveniles from child abuse and child sexual exploitation, while creating greater penalties for offenders.").

<sup>54</sup> See Kittling, *supra* note 34, at 922-24 (advocating use of anti-prostitution task forces to combat juvenile prostitution).

<sup>55</sup> See DAVID S. TANENHAUS, JUVENILE JUSTICE IN THE MAKING 23 (2004) ("On July 3, 1899, Lucy Flower's vision of a 'parental court' for Chicago became a reality when the Honorable Richard Tuthill, a Civil War veteran and respected jurist . . . ushered in the modern era for juvenile justice by informally adjudicating the care of eleven-year-old Henry Campbell.").

had inflicted harm.<sup>56</sup> The first court's chief probation officer, Timothy Hurley, stated, "It was realized that the real criminal was not the individual himself, but the entire social body that permitted conditions to exist which could produce only criminals."<sup>57</sup> The juvenile courts' goal was to provide the "tender solicitude and care" that a parent would exercise over a child in order to help that child develop into a functional adult.<sup>58</sup>

The two main philosophies driving the early juvenile reformers who shaped the traditional approach were the interventionist and diversionary concepts.<sup>59</sup> Franklin E. Zimring describes the competing philosophies by noting, "The diversionary goal of the court was to save kids from the savagery of the criminal courts and prisons. The interventionist goal was to create programs that would rescue delinquents from crime and truancy. The diversionary justification for juvenile court was always the most important of the two rationales . . . ."<sup>60</sup> Though some scholars have criticized and some legislation has undermined the interventionist rationale, these are the main philosophies that continue to animate the modern juvenile court and its traditional approach to juvenile prostitution.<sup>61</sup>

In the 1960's and 70s, a new philosophy of rights-based reform began to influence juvenile jurisprudence. *Kent v. United States* established the due process requirement of procedural formality in decisions to waive a

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<sup>56</sup> See *id.* at 17 ("Thus, all children under sixteen years of age, if the legislation were enacted, would be treated as members of a single class in need of assistance . . . ."); CHARLES H. SHIREMAN & FREDERIC G. REAMER, *REHABILITATING JUVENILE JUSTICE* 6-8 (1986) ("The perceptions of the young offender as a child not culpable for his acts and as a victim of unintended but miasmic social conditions did not change dramatically during the first half-century of the juvenile court's life.").

<sup>57</sup> See SHIREMAN & REAMER, *supra* note 56, at 6.

<sup>58</sup> *Id.* at 7 (quoting Timothy Hurley, the chief probation officer of the first juvenile court in America, on the court's philosophical charge).

<sup>59</sup> Zimring, *The Common Thread*, *supra* note 8, at 2480 (discussing the original justifications for creating a separate children's court); SHIREMAN & REAMER, *supra* note 56, at 3-9 ("[T]here was an inordinately high level of agreement at the time that children ought to be 'saved' and not punished for their misdeeds."); TANENHAUS, *supra* note 55, at 6-8, 17-18 (describing early court reformers' desire to spare children from a court system that made "criminals 'out of many that are not naturally so'" and to "rehabilitate, instead of simply punish").

<sup>60</sup> Zimring, *The Common Thread*, *supra* note 8, at 2480.

<sup>61</sup> See *id.* at 2490-95 (positing that failure of juvenile detention to match rising rates of adult incarceration is based upon continued reliance on diversionary rationale of juvenile courts).

juvenile from juvenile to criminal court.<sup>62</sup> Following immediately upon *Kent's* heels, *In re Gault* secured broad due process rights for juveniles during the entire delinquency adjudication and dispositional proceedings, such as notice of charges and right to counsel.<sup>63</sup> Shortly thereafter, *In re Winship* established the standard of proof in juvenile court as "beyond a reasonable doubt."<sup>64</sup> These, along with other less notable cases, brought procedural regularity and rights-based jurisprudence to the juvenile courts, shifting and creating complexity in their philosophical underpinnings.

Three recent additions to the jurisprudence of the juvenile court have reshaped its response to offenders: notions of individual responsibility, dissemination of concepts such as proportionality and retribution, and the influence of developmental psychology on issues of culpability and punishment. By the early 1970's, strong emphasis on protection of the community from juveniles began to enter the literature and politics surrounding juvenile courts.<sup>65</sup> Starting in the 1990's, federal legislation provided financial incentives to states to reshape their juvenile court systems and focus on proportional retribution for community protection.<sup>66</sup> At the same time, a new emphasis on adolescents' diminished culpability makes relevant the juvenile's developmental capacity to make conscious

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<sup>62</sup> 383 U.S. 541, 554-55 (1966) ("[T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons . . . [T]he admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness.").

<sup>63</sup> 387 U.S. 1, 13 (1967) ("We consider only the problems presented to us by this case. These relate to the proceedings by which a determination is made as to whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution. As to these proceedings, there appears to be little current dissent from the proposition that the Due Process Clause has a role to play.").

<sup>64</sup> 397 U.S. 358, 362 (1970) ("[I]t has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required.").

<sup>65</sup> Zimring, *The Common Thread*, *supra* note 8, at 2491 ("The rhetoric in support of [the Juvenile Justice and Delinquency Prevention Act of 1974] uses new phrases such as 'accountability' and 'graduated sanctions' to describe the desired juvenile court outcomes."). Hints of this shift began even earlier, with community protection discussed as early as 1967. SHIREMAN & REAMER, *supra* note 56, at 10-17 ("Rehabilitating offenders through individualized handling is one way of providing protection, and appropriately the primary way in dealing with children. But the guiding consideration for a court of law that deals with threatening conduct is nonetheless the protection of the community." (quoting the President's Commission of 1967)).

<sup>66</sup> See Part II.B.2 *infra*.

choices and understand her actions in determining the nature of dispositions.<sup>67</sup> Previously, juvenile courts focused on intervention; now, though “saving” the child matters, courts also focus on whether a juvenile was able to make an independent choice to act.

The philosophical bases of juvenile adjudication are complex and multi-faceted. Divergent influences have altered the original rationales for the juvenile court; the original philosophies still pervade to the extent that new models have not directly replaced them. Furthermore, the desire to “save” children, especially girls, continues to pervade the consciousness of juvenile judges, prosecutors, and advocates, as well as communities at large.

In addition to general philosophical trends, federal legislation with coercive funding mandates has strongly influenced state juvenile courts since the last half of the twentieth century. This legislation helps define the traditional approach to juvenile delinquency.

## ***2. Federal Legislation Shaping the Juvenile Court***

In 1974, Congress passed the Juvenile Justice and Delinquency Prevention Act,<sup>68</sup> which influenced the evolution of the modern juvenile justice system by setting up financial incentives for states to conform their juvenile proceedings to core goals, including focusing attention on juveniles who commit serious crimes, preventing youth from entering the juvenile justice system, and reducing instances of juvenile delinquency through public programs for youth.<sup>69</sup> The Act found that juveniles accounted for nearly half of all arrests for serious crimes and that the current systems did not adequately deal with the need for “individualized justice or effective

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<sup>67</sup> A pertinent example of this burgeoning awareness of the importance of psychosocial development on a juvenile’s ability to be held individually culpable is *Roper v. Simmons*, where the Supreme Court held unconstitutional the application of the death penalty to minors based on insufficient culpability. 543 U.S. 551, 568-69 (2005) (“Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders . . . . [A]s the scientific and sociological studies . . . confirm ‘[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young.’”).

<sup>68</sup> Juvenile Justice and Delinquency Prevention Act, Pub. L. No. 93-415, § 101, 88 Stat. 1109 (1974).

<sup>69</sup> See 42 U.S.C. § 5601(a)(10)-(12) (2002 Amendment) (summing up Congressional findings regarding juvenile delinquency).

help.”<sup>70</sup> Through this Act, the federal government provided financial incentives in the form of grants for the states to create plans designed “to prevent juvenile delinquency,” to divert juveniles from the “juvenile justice system,” and to provide “community-based alternatives to ‘secure’ juvenile detention and correctional facilities.”<sup>71</sup> In creating these incentives, Congress defined the inherent goals of the juvenile justice system as prevention, diversion, and community-based treatment.

The goals of prevention, diversion, and community-based treatment underpinned the philosophy of rehabilitative intervention that has pervaded the modern juvenile justice system. There is widespread agreement that “[t]he historical mission of the juvenile system has primarily been to rehabilitate offenders, not to punish them.”<sup>72</sup> In 1974, Congress codified in state incentive programs the philosophy that had been underlying the state juvenile courts since the courts’ conception in the mid-nineteenth century and in longstanding common law criminal traditions.<sup>73</sup> The underlying philosophy of care was thus buttressed by the practical layering of concrete goals, and indicates a philosophy geared toward shielding children from corrupting influences and curing the flaws which prior social contact has put upon them.

Since 1974, a series of amendments were made to the Juvenile Justice and Delinquency Prevention Act. The most notable philosophical shift occurred with the enactment of a two-track approach through 42 U.S.C. § 5601, on November 2, 2002. In response to a national consensus that the juvenile crime rate remained too high, Congress developed a “2-track common sense approach” that aimed both to prevent incidences of juvenile offenses through community programs and to create programs that simultaneously held juveniles accountable for their actions and helped them develop the skills necessary to become “responsible and productive

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<sup>70</sup> Juvenile Justice and Delinquency Prevention Act, Pub. L. No. 93-415, § 101, 88 Stat. 1109 (1974).

<sup>71</sup> 42 U.S.C. § 5633 (1977).

<sup>72</sup> Russel K. Van Vleet, *Will the Juvenile Court System Survive?: The Attack on Juvenile Justice*, 564 ANNALS AM. ACAD. POL. & SOC. SCI. 203, 207 (1999).

<sup>73</sup> See SHIREMAN & REAMER, *supra* note 56, at 3-8 (“However, many of the beliefs and practices that have characterized American juvenile justice preceded the creation of the first juvenile court in the United States by over ten centuries . . . . It seems clear that these characterizations of the youthful offender as one who should incur society’s aid instead of its wrath were not exceptional ones . . .”).

members of their communities.”<sup>74</sup> This amendment mandated development of graduated sanctions for each delinquent act, restitution and community service by juveniles, and development of methods to increase victim satisfaction.<sup>75</sup>

This Article argues that these changes indicate a shift in the underlying philosophy of the 1974 Act. The new philosophy incorporates elements of moralism and discipline into juvenile courts, in addition to the rehabilitative function that previously existed. In emphasizing personal responsibility and the importance of retribution, the 2002 amendment shifts the philosophical goals of juvenile courts. Children are no longer considered purely victims of social influence; they are also philosophically dealt with as offenders. The dual track approach, along with the retention of the 1974 enactments, indicates that rehabilitation and care of children coexist with the philosophical orientation of personal responsibility and culpability. In making decisions that accord with its statutory mandate, the modern juvenile court must take care in all of its actions to balance these dueling bases.

Thus far, this Article has considered the juvenile court’s approach to juvenile crime generally. Adolescent and criminal sexuality, however, present a subset of the behaviors that the court regulates.

### ***3. Sex as a Special Case in Juvenile Justice***

Juvenile sexual behavior alters some of the court’s goals. Sex, and with it prostitution, has occupied a special space in the juvenile courts since their inception. In the late nineteenth and early twentieth centuries, the girls brought before the juvenile court “were almost exclusively charged with either ‘immorality’ or ‘incurability,’ code words for sexual activity.”<sup>76</sup> Judges incarcerated these girls at substantially higher rates than delinquent adolescent males based on the fear that sexually active girls would continue in their promiscuity to their later moral detriment.<sup>77</sup> This incarceration aimed to separate the girls from their compatriots, who the court feared

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<sup>74</sup> 42 U.S.C. §5601(a)(10)(A).

<sup>75</sup> 42 U.S.C. §5601(a)(10)(B).

<sup>76</sup> TANENHAUS, *supra* note 55, at 51.

<sup>77</sup> *Id.* (noting higher rates of incarceration of female juvenile delinquents brought before early juvenile courts). There is no evidence that courts at this time engaged in delinquency proceedings related to any types of non-violent male sexual behavior.

would continue to exert poor moral influence over the girls,<sup>78</sup> a concern significantly less present in the more common cases of property crimes by boys.<sup>79</sup> Fernald's studies of female delinquents in the early twentieth century confirm that courts continued to consider sexuality, and its associated criminal implications, as morally and philosophically distinct from most delinquent behaviors.<sup>80</sup>

Such distinctions regarding sexual activity, especially for girls, continue in modern juvenile courts. For instance, courts tend to judge illicit sexual conduct by children using the same standards of culpability as illicit sexual conduct by adults, despite the juvenile court's overall desire to treat youth crime as distinct from adult crime in issues of individual responsibility.<sup>81</sup> This emphasis on individual responsibility for sexual conduct highlights the retributive and moralistic treatment of sex in juvenile courts. Franklin E. Zimring notes the compounding effect that prostitution and other vice crimes have on the already conflicted moralistic relationship that juvenile courts have to juvenile sexuality. He writes:

The commercial context is regarded as compounding the stigma of behavior that might ordinarily be regarded as merely immoral, and arguments are also made that prostitution is exploitation (and its practitioners victims). So suppressing prostitution is regarded as a way of improving the moral health of the wider community.

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<sup>78</sup> *Id.* at 52 (“‘We want,’ Mack explained, ‘to make a good woman of her. If she’s to grow up to that she will have to get a good many things out of her mind that she has there now, and she won’t do that as long as she has her old companions about her.’”).

<sup>79</sup> *Id.* at 51 (describing differences in early juvenile court charging and sentencing between boys and girls).

<sup>80</sup> For example, Fernald notes the significance of the “age of first sex offense” to delinquency, “whether the woman consented at that time or was raped.” FERNALD, *supra* note 6, at 380. Thus, women who engaged in sexual intercourse were held by courts to be moral “offenders,” regardless of whether their conduct was criminal or even whether they consented to it.

<sup>81</sup> See ZIMRING, TRAVESTY, *supra* note 15, at 14 (“It is now frequently assumed in legislation and litigation that adolescent and adult sexual behavior should be judged by the same standards of culpability, clinical significance, and indications of future dangerousness to the community. Much of this new trend in policymaking has proceeded with no explicit awareness that the behaviors of children and teens would be subject to the new regimes.”); see, e.g., *In re Registrant J.G.*, 777 A.2d 891, 892 (N.J. 2001) (applying Megan’s Law notification requirements until age 18 on a ten-year-old boy who undressed and rubbed against his eight-year-old female cousin and five-year-old sister); *In re J.W.*, 787 N.E. 2d 747 (Ill. 2003) (applying lifetime registration requirement to a twelve-year-old boy for convincing two seven-year-old boys to engage in oral-genital contact with him).

Also, the money and power associated with the commercialization of sex are often regarded as an opportunity for organized crime.<sup>82</sup>

These types of motives belie the court's general interventionist philosophy. Moreover, strict requirements of sex offender registries in many jurisdictions exhibit the court's divergence from diversionary and stigma-avoiding goals.<sup>83</sup> By publicizing juvenile sex offenders' identities, the Court places upon them the public stigma and long-lasting shame from which its original goals meant to protect them. These departures from the basic "child saving" mission of the juvenile courts, even one tempered by modern trends towards proportional culpability, show that juvenile sexual behaviors present special challenges to the courts and to the American public in general.

Part I has illustrated the current state of juvenile prostitution and the traditional approach to its adjudication. Since 2000, a new "victim-centered" approach to adjudicating juvenile prostitutes has emerged. Part II will describe the growth of the victim-centered approach and outline the tensions between the two methods of adjudication.

## II. THE "NEW" MODEL OF ADJUDICATION: DUELING APPROACHES CREATE DISPARITY

The second approach to juvenile prostitution adjudication is the trafficking victim-based model, first applied to foreign-born girls in the federal Trafficking Victims Protection Act ("TVPA").<sup>84</sup> This alternative has been adopted and modified by the New York state legislature in the Safe Harbour for Exploited Children Act ("SHA"), which applies it to domestic

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<sup>82</sup> ZIMRING, TRAVESTY, *supra* note 15, at 20.

<sup>83</sup> See, e.g., *Helman v. State*, 784 A.2d 1058, 1070 (2001) (finding that the Delaware General Assembly specifically intended to include juveniles in the Sex Offender Registration statute and extending notification requirements to them); *In re Welfare of J.R.Z.*, 648 N.W.2d 241, 249 (Minn. Ct. App. 2002) (finding registration and notification of juvenile sex offenders constitutional and noting that "the legislature has not acted to ameliorate the arguably harsh consequences of the registration statute as applied to juvenile sex offenders"); *In re J.G.*, 777 A.2d 891, 900 (2001) (holding that state Megan's Law registration and community notification constitutionally apply to juvenile sex offenders until they turn 18); see also ZIMRING, TRAVESTY, *supra* note 15, at 143-59 (discussing registration and community notification requirements as applied to juvenile sex offenders). Although juvenile prostitutes usually fit comfortably within the registration requirements, it is unclear if the requirements are ever applied to them.

<sup>84</sup> This Article will refer to this model as the "victim-centered approach."

juvenile prostitution. These strategies emphasize different, and potentially opposing, aspects of the amorphous problem of juvenile prostitution than the traditional approach emphasizes. The dueling approaches create tensions in the discourse about how to best rehabilitate the young women and prevent them from returning to their pimps and continued sexual exploitation.

Part II.A will explain the contours of the TVPA and its underlying philosophies and assumptions surrounding juvenile prostitution. Then, Part II.B will discuss the impetus for creation of the SHA and how it both adopts and modifies the basic approach put forth in the TVPA. Finally, Part II.C will explore the divergent philosophies creating strain and conflict between the two models, as well as the gaps in philosophical and practical considerations that both approaches ignore.

### **A. The Trafficking Victims Protection Act's Impact on Juvenile Prostitution**

The Trafficking Victims Protection Act of 2000<sup>85</sup>, along with its reauthorizations in 2003, 2005, and 2008, is a comprehensive anti-trafficking law designed to establish a national response to the issue of international trafficking in persons. It bolsters anti-trafficking law enforcement measures, raises penalties for traffickers, and authorizes a variety of services and help for all types of victims of human trafficking.

#### ***1. General Provisions of the Trafficking Victims Protection Act***

In 2000, Congress passed the Trafficking Victims Protection Act in response to the growing problem of human trafficking, both internationally and into the United States in particular.<sup>86</sup> Senator Paul Wellstone, upon the passage of the initial bill in 2000, noted its scope:

The Trafficking Victims Protection Act of 2000 is a comprehensive bill that aims to prevent trafficking in persons,

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<sup>85</sup> When the TVPA was renewed in 2003, it became the Trafficking Victims Protection Reauthorization Act ("TVPRA"). However, it is still most frequently referred to as the TVPA.

<sup>86</sup> See 146 CONG. REC. S7781 (2000) ("I rise today to address the serious and widespread problem of international trafficking in persons, particularly women and children, for the purposes of sexual exploitation and forced labor, and to seek your continued support for legislation aimed at curbing this horrific crime.") (statement of Sen. Wellstone upon passage of the TVPA).

provide protection and assistance to those who have been trafficked, and strengthen prosecution and punishment of those responsible for trafficking . . . . [It] addresses the underlying problems which fuel the trafficking industry by promoting public anti-trafficking awareness campaigns[,] . . . increases protections for trafficking victims[,] . . . seek[s] to stop the practice of immediately deporting victims back to potentially dangerous situations[,] . . . [and] toughens current federal trafficking penalties . . . .<sup>87</sup>

One scholar has called the TVPA the “strongest domestic legislative effort to combat international trafficking in the world.”<sup>88</sup> The TVPA’s four-pronged approach involves incorporating preventative border measures, instituting stricter prosecutorial options against traffickers, providing assistance and protection for trafficking victims already in the United States, and federal monitoring of contributory nations’ activities.<sup>89</sup> The prevention prong establishes an interagency task force to analyze cross-border trafficking, funds public awareness campaigns, and creates economic incentives to deter trafficking.<sup>90</sup> The prosecutorial prong increases relevant

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<sup>87</sup> *Id.*

<sup>88</sup> Rosy Kandathil, *Global Sex Trafficking and the Trafficking Victims Protection Act of 2000: Legislative Responses to the Problem of Modern Slavery*, 12 MICH. J. GENDER & L. 87, 88 (2005); see also Michael C. Payne, *The Half-Fought Battle: A Call for Comprehensive State Anti-Human Trafficking Legislation and a Discussion of How States Should Construct Such Legislation*, 16 KAN. J.L. & PUB. POL’Y 48, 51 (2006) (“The U.S. government finally recognized the severity of the problem of human trafficking and the inadequacy of existing laws to fight this problem when it enacted the [TVPA].”).

There has also been significant academic criticism of the TVPA. See, e.g., Wendy Chapkis, *Trafficking, Migration, and the Law: Protecting Innocents, Punishing Immigrants*, 17 GENDER & SOC’Y 923 (2003) (suggesting that the TVPA strategically uses anxieties over sexuality, gender, and immigration to curtail migration); Kelly E. Hyland, *Protecting Human Victims of Trafficking: An American Framework*, 16 BERKELEY WOMEN’S L.J. 29, 68-70 (2001) (discussing important provisions removed by conference committee, including private right of action for victims, mandatory sanctions for noncompliant countries, and elimination of asset forfeiture); Hussein Sadruddin et al., *Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 STAN. L. & POL’Y REV. 379, 381 (2005) (criticizing the TVPA’s complex eligibility and cooperation requirements for limiting the number of victims protected).

<sup>89</sup> See Payne, *supra* note 88, at 51 (noting and describing four prongs of the TVPA).

<sup>90</sup> See Trafficking Victims Protection Act, Pub. L. No. 106-386, §§ 105-06, 114 Stat. 1473-1481 (2000) (codified at 22 U.S.C. §§ 7103, 7104 (2008)) (establishing

federal sentences for traffickers, including a criminal sanction of a life sentence for trafficking cases involving kidnapping, sexual abuse, or homicide, and also creates new crimes and a right to mandatory restitution for the victim.<sup>91</sup> The monitoring prong requires all foreign nations receiving economic and security assistance from the United States to produce a report documenting how they meet new minimum standards for combating trafficking.<sup>92</sup>

The prong giving assistance and protection to victims of trafficking is most relevant to the discussion of juvenile prostitution. This prong grants qualified victims benefits and services under any federally funded federal or state programs. This includes programs funded by the Secretary of Health and Human Services, the Secretary of Labor, the Board of Directors of the Legal Services Corporation, and the heads of many other federal agencies.<sup>93</sup> These protections are extended only to victims of “severe trafficking,” which the act defines as those situations in which commercial sex acts are induced by “force, fraud or coercion,” or under other severe labor conditions, which are not pertinent here.<sup>94</sup> Minors involved in commercial sexual exploitation are also per se considered to be victims of “severe trafficking,” since they are legally unable to give consent to engage in sex acts.<sup>95</sup> In the most recent reauthorization of this law, assistance to trafficked minor girls is granted immediately, no longer conditioned on their providing reasonable assistance in investigating and prosecuting traffickers. This change resolves the issue of biased and insufficient grants of assistance that came from the prosecutor’s discretion and level of interest in helping the victim.<sup>96</sup> The 2008 reauthorization allows the Secretary of Health and

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interagency task force and other preventative measures); see also Payne, *supra* note 88, at 51-52 (describing steps TVPA takes in preventing human trafficking).

<sup>91</sup> See 22 U.S.C. §§ 7108-7109 (2008); see also Payne, *supra* note 88, at 52 (describing steps TVPA takes in prosecuting human trafficking).

<sup>92</sup> See 22 U.S.C. §§ 7106-7107 (2008); see also Payne, *supra* note 88, at 51 (describing steps TVPA takes in monitoring foreign nations for trafficking).

<sup>93</sup> See 22 U.S.C. §§ 7106-7107 (2008).

<sup>94</sup> *Id.*

<sup>95</sup> See Chen, *supra* note 29 (“It also criminalizes prostituting minors, regardless of whether force, fraud or coercion are used. The concept is very similar . . . which is that you don’t need to force a minor because a minor can’t consent to prostitution—they’re not of an age to give consent to sex acts.”).

<sup>96</sup> See Payne, *supra* note 88, at 53-54 (arguing against a cooperation requirement based on prosecutors’ unfettered discretion to deny assistance).

Human Services to make victims under the age of eighteen immediately eligible for interim assistance without any need to comply with prosecutors.<sup>97</sup>

## ***2. Application of the Trafficking Victims Protection Act to Cases of Juvenile Prostitution in the United States***

The TVPA, as applied to juvenile prostitution, governs the treatment of young women taken into federal custody who are “victim[s] of a severe form of trafficking in persons” based on their status as persons under age eighteen engaged in sex trafficking.<sup>98</sup> Federal agents primarily focus on undocumented immigrant women smuggled into the United States. State police also refer these kinds of cases to federal authorities.<sup>99</sup> Jessica Lustig recently noted this treatment of foreign-born juvenile prostitutes when she wrote:

If Lucilia [an adolescent girl born in the Bronx] were a 13-year-old Chinese girl smuggled to New York and made to work in a Queens brothel, she would not be seen, in the eyes of the authorities, as a prostitute at all. She would be a sex slave, a victim of human trafficking, and if she had the good fortune to be discovered by the police, she would be given federal protection and shielded by the Trafficking Victims Protection Act of 2000.<sup>100</sup>

Currently, so long as juveniles make a reasonable effort to assist in the investigation and prosecution of traffickers, they will be immune from prosecution and eligible for all the federal agency benefits.<sup>101</sup> Forms of assistance include distribution of federal funds to states, nongovernmental

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<sup>97</sup> William Wilberforce Trafficking Victims Reauthorization Act of 2008, H.R. 7311, 110th Cong. (2008). This bill was signed into law on December 23, 2008.

<sup>98</sup> 22 U.S.C. § 7105(b)(1)(C) (2008). The TVPA does not clearly define trafficking with respect to specific actions; in theory, its language is broad enough to cover all juvenile prostitutes, include domestic-born girls working for street pimps. *See infra* text accompanying notes 111-14.

<sup>99</sup> *See Chen, supra* note 29.

<sup>100</sup> Lustig, *supra* note 28. Since Lucilia is an American-born juvenile prostitute, she was adjudicated by New York state authorities under the traditional method. She was held in a juvenile detention facility and prosecuted in Family Court for prostitution. *Id.*

<sup>101</sup> 22 U.S.C. § 7105(b)(1)(E)(i)(I) (2008).

organizations, local governments, and nonprofits to strengthen services to such juvenile prostitutes.<sup>102</sup> This funding mandate emphasizes funding direct provision of services. It caps other relevant expenditures, such as research, evaluation, and statistical compilation; training and technical assistance; and management and administration.<sup>103</sup>

The TVPA creates regulations to deal with girls detained for juvenile prostitution in the context of their status as trafficking victims, and thus their immunity from prosecution for sex-related crimes. First, it forbids detention in “facilities inappropriate to their status as crime victims,” meaning that they will no longer be processed through the juvenile detention systems or held with other minor detainees.<sup>104</sup> Instead, federal agents must place them in facilities for crime victims, such as shelters for victims of domestic violence or other kinds of abuse.<sup>105</sup> The TVPA also requires that immediate medical care be provided for juvenile prostitutes.<sup>106</sup> It also authorizes an option to conceal the identities and locations of the young women from their traffickers. In certain situations, even the girls’ families may be brought into protection.<sup>107</sup>

Finally, the 2008 reauthorization of the TVPA directs the Attorney General to prepare model legislation for state use to define and prohibit all acts relating to the prostitution or trafficking of children.<sup>108</sup>

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<sup>102</sup> 22 U.S.C. § 7105(b)(2) (2008).

<sup>103</sup> See 22 USC §7105(b)(2)(B) (2008) (limiting research, evaluation, and statistical analysis to three percent of total spending, training and technical assistance to two percent, and management and administration to one percent).

<sup>104</sup> 22 U.S.C. § 7105(c) (2008).

<sup>105</sup> Note also that the federal system does not have detention facilities in which to house minor detainees in a criminal capacity or even detain them as material witnesses to the trafficking prosecution of their pimps. See Chen, *supra* note 29 (“And if you’re unwilling to cooperate and you’re threatening to flee, I can arrest you . . . Now, we’re never going to do that to young girls. And, quite frankly, we don’t have the facilities; in the federal system, there is no place to jail minors. We couldn’t do that.”).

<sup>106</sup> See 22 U.S.C. § 7015(c)(1)(B) (requiring that while juvenile prostitutes are in federal custody that they “receive necessary medical care and other assistance.”).

<sup>107</sup> 22 U.S.C. § 7105(c)(1)(C).

<sup>108</sup> See Part II.A.3 *infra* for a discussion of the interaction between the TVPA and state law.

### **3. The Trafficking Victims Protection Act's Interaction with Federal and State Laws**

The TVPA technically can apply to domestic juvenile prostitutes taken into custody by state police officers. There is nothing in the act limiting the definition of victims of "severe trafficking" to foreign-born women or those who are under eighteen and have been subjected to force or fraud.<sup>109</sup> There have been some federal investigations of sex trafficking rings that have used provisions of the TVPA<sup>110</sup> to deal with and assist "domestic" minor victims.<sup>111</sup> Since most domestic juvenile prostitution prosecutions, however, take place in state courts under state law, the TVPA is read as largely inapplicable.<sup>112</sup>

One difference in treating young girls involved in prostitution as victims of sex crimes rather than as criminals is that they will no longer be subject to registration and community notification requirements for juvenile sexual offenders.<sup>113</sup> Originally, federal sex offender laws neither required

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<sup>109</sup> See Lustig, *supra* note 28 (noting that only state enforcement, not federal law, prevents application of the TVPA to domestic juvenile prostitutes); Kittling, *supra* note 34 at 915 ("Congress formulated the TVPA to combat both international and domestic trafficking of persons by establishing measures to prevent trafficking, protect trafficking victims and prosecute perpetrators of trafficking."). Note also that discussion of the application of the TVPA nearly always characterizes victims as foreign-born and brought into America under false or forced circumstance. See, e.g., Kandathil, *supra* note 88, at 88 ("Human trafficking is becoming the fastest growing criminal activity in the world. Generally, trafficking is defined as the transportation of persons across international borders for labor purposes, by means of force, fraud or coercion."); Payne, *supra* note 88, at 49 ("Unlike the days of the middle passage, many victims are brought into the United States, not through the use or threat of physical force, but through empty promises of a more bountiful future. Additionally, many victims are children who have been kidnapped or bought from poor families.").

<sup>110</sup> See Chen, *supra* note 29 (noting potential application of the TVPA to domestic prostitutes).

<sup>111</sup> By "domestic" victims, this Article means women who are U.S. citizens or legal residents engaged in any form of prostitution inside the United States.

<sup>112</sup> See Kittling, *supra* note 34, at 925 ("Hence, despite its new rhetoric on the issue of domestic juvenile prostitution, the United States has not rescinded this reservation [from application to domestic juvenile prostitutes] and is, therefore, essentially, on the record as stating that it is acceptable to arrest and prosecute child prostitutes. The United States has no such reservation with respect to international victims of juvenile prostitution.").

<sup>113</sup> These are statutory requirements that vary widely from state to state. No state exempts minors from notification entirely, although New Mexico did until 2005. N.M. STAT. ANN. § 29-11A-3.8 (West 2008). Some allow judicial exemption of certain minors. See, e.g., ARIZ. REV. STAT. § 13-3821(D) (LexisNexis 2008); MONT. CODE ANN. 41-5-1513 (2007);

nor prohibited the states from including juvenile sex offenders in registration and notification requirements. Regardless, the majority of states did include juveniles in such statutes to varying extents.<sup>114</sup> These requirements, often known as “Megan’s laws,” challenge the traditional notion that the juvenile offender is able to reform and the belief in the court’s power of intervention because they are based on the belief that sex offender status is a permanent identity.<sup>115</sup> Timothy E. Wind noted, “[t]he juvenile sex offender poses the biggest problem for society and the law, where their acts cross the bounds of natural normative sexual behavior, and challenge traditional juvenile criminal jurisprudence—the law.”<sup>116</sup> Thus, categorically exempting juvenile prostitutes from these requirements resolves some of the tensions that existed between the philosophical vision of the juvenile courts that children are malleable and likely to mature out of delinquent behavior and the philosophical bases of registration requirements that view sexual offenders as intractable criminals with near-guaranteed recidivist behaviors.<sup>117</sup>

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MINN. STAT. § 243.166 (2007); MISS. CODE ANN. § 45-33-25 (2008) (registration not required for an offender under the age of fourteen); N.C. GEN. STAT. §§ 14-208.6C, 14-208.26 (1999). Some do not exempt minors at all. *See, e.g.*, ALA. CODE § 15-20-21 (2001); COLO. REV. STAT. § 18-3-412.5(1) (1999); MASS. ANN. LAWS ch. 6, § 178C (LexisNexis 1999); MICH. COMP. LAWS ANN. § 28.728 (West 2008); NEV. REV. STAT. § 179D.400 (2001); OR. REV. STAT. § 181.594(B) (2001); R.I. GEN. LAWS § 11-37.1-12(3)(D) (Supp. 2001); S.C. CODE ANN. § 23-3-490(D) (2007). Wisconsin exempts registration and notification requirements if the victim was within four years of the juvenile’s age at the time of the offense. WIS. STAT. § 301.45 (2007).

<sup>114</sup> *See* Elizabeth Garfinkle, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 CAL. L. REV. 163, 167-68 (2003) (noting the variance among state laws regarding application of federal registration and notification requirements); Timothy E. Wind, *The Quandary of Megan’s Law: When the Child Sex Offender is a Child*, 37 J. MARSHALL L. REV. 73, 78 (2003) (“[T]he juvenile sex offender is treated as an adult by the Megan’s Laws of most jurisdictions.”); ZIMRING, TRAVESTY, *supra* note 15, at 147-50 (discussing application of registration and notification laws to juvenile sex offenders).

<sup>115</sup> *See* Garfinkle, *supra* note 114, at 171-73 (discussing the “recidivism myth” forming the basis of the rationale for registration and community notification laws).

<sup>116</sup> Wind, *supra* note 114, at 78.

<sup>117</sup> *See* ZIMRING, TRAVESTY, *supra* note 15, at 150 (“The juvenile court regards the delinquent as neither fully mature nor set in his ways, but rather as a changeable and to some extent malleable entity. By contrast, the image of the sex offender subject to community notification laws is that of a person with a permanent identity as one who poses a sexual threat to the community, who has a set of fixed preferences in victims, and who is driven by all-but-inevitable urge to recidivate.”).

The TVPA created the victim-centered approach to adjudicating juvenile prostitutes. This approach has been adopted for use in New York State by proponents of the Safe Harbour for Exploited Children Act. This brings the federal model to application on the state level.

## **B. The Safe Harbour for Exploited Children Act**

On February 13, 2007, Assemblyman William Scarborough introduced in the New York State Assembly, A.B. 5258-C, known as the Safe Harbour for Exploited Children Act (SHA).<sup>118</sup> This Act attempts to adopt the federal TVPA model for persons under the age of eighteen who have been subject to sexual exploitation either because they were victims of sex trafficking, as defined by § 230.34 of the New York State Penal Law,<sup>119</sup> or because they had been sexually abused.<sup>120</sup>

### ***1. How the Safe Harbour for Exploited Children Act Will Change New York State Law***

The Act was passed in the Assembly and delivered to the Senate on June 19, 2008.<sup>121</sup> On June 23, 2008, the Senate passed the SHA and delivered it to Governor Patterson,<sup>122</sup> who signed it into law on September 25, 2008.<sup>123</sup> The SHA is scheduled to take effect on April 1, 2010.<sup>124</sup>

Prior to A.B. 5258-C, Assemblyman Scarborough had introduced A.B. 4352, popularly called the Safe Harbour for Exploited Youth Act.<sup>125</sup> This bill also aimed to apply the federal TVPA model to juvenile

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<sup>118</sup> A.B. 5258-C, 2007 Leg., 231st Sess. (N.Y. 2007).

<sup>119</sup> N.Y. PENAL LAW § 230.33 (McKinney 2007).

<sup>120</sup> A.B. 5258-C, 2007 Leg., 231st Sess., § 1 (N.Y. 2007).

<sup>121</sup> A.B. 5258-C, 2007 Leg., 231st Sess. (N.Y. 2007). The same bill was introduced and passed both houses in 2006, but went unsigned by Governor Spitzer. *See* Mullin, *supra* note 17 (describing creation and history of Safe Harbour Act). This bill was also passed in the Assembly in 2007 and committed to several Assembly and Senate committees. For a full version of the Act's history, see 2007 Bill Tracking N.Y. A.B. 5258-C.

<sup>122</sup> A.B. 5258-C, 2007 Leg., 231st Sess. (N.Y. 2007).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> A.B. 4352, 2007 Leg., 231st Sess. (N.Y. 2007).

prostitution arrests. Yet there are significant differences between the Exploited Youth Act and the Exploited Children Act. The Exploited Youth Act gave Family Court judges the discretion to convert delinquency petitions for juvenile prostitution into PINS petitions if the judge felt like it was appropriate based on certain criteria. The Exploited Youth Act was introduced on February 2, 2007 and referred to the Children and Families Committee, where it has since remained.<sup>126</sup>

The SHA has three main provisions. First, it defines “sexually exploited child.”<sup>127</sup> Second, it mandates the creation of specialized social services for sexually exploited children.<sup>128</sup> Third, it converts delinquency petitions charging sexually exploited children with misdemeanor prostitution offenses into PINS petitions.<sup>129</sup>

The bill defines a “sexually exploited child” as

any person under the age of eighteen who has been subject to sexual exploitation because he or she (a) is the victim of the crime of sexual trafficking as defined in Section 230.34 of the penal law; (b) is an abused child as defined in paragraph (III) of subdivision (E) of [§ 1012] of the Family Court Act; (c) engages in any act as defined in Section 230.00 or 240.37 of the penal law; (d) is a victim of the crime of compelling prostitution as defined in Section 230.33 of the penal law; (e) engages in acts or conduct described in Article [263] of the penal law.<sup>130</sup>

This effectively means that any minor who engages in any kind of prostitution or commercialized vice or has suffered any kind of physical or sexual abuse will be considered a “sexually exploited child.”<sup>131</sup> This

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<sup>126</sup> A.B. 4352, 2007 Leg., 231st Sess. (N.Y. 2007).

<sup>127</sup> A.B. 5258-C, 2007 Leg., 231st Sess., § S447-A, (N.Y. 2007).

<sup>128</sup> A.B. 5258-C, 2007 Leg., 231st Sess., § S447-B (N.Y. 2007). Although passed into law, it has not yet been codified. Additionally, it is an unfunded mandate.

<sup>129</sup> A.B. 5258-C, 2007 Leg., 231st Sess. (N.Y. 2007).

<sup>130</sup> A.B. 5258-C, 2007 Leg., 231st Sess., § S447-A (N.Y. 2007).

<sup>131</sup> Subsection (a) covers any minor who has been forced to prostitute him or herself based on having been drugged, been lied to, having his or her passport withheld as a condition of indebtedness, or having been threatened in any way. N.Y. PENAL LAW § 230.34(1)-(5) (McKinney 2007). Subsection (b) covers any minor whose parent or legal guardian has abused him or her. N.Y. FAM. CT. ACT § 1012(e) (McKinney 2005). Subsection (c) covers any minor who engages or offers to engage in prostitution or is street-walking. See N.Y. PENAL LAW § 230.00 (McKinney 2007) (“A person is guilty of prostitution when such

language recognizes the fundamental inconsistencies within state penal codes that simultaneously define a juvenile prostitute as a criminal and a victim of statutory rape.<sup>132</sup> It covers the widest possible spectrum of minor engagement in sexual commerce or sexual abuse. All juveniles engaged in any form of prostitution would be considered “sexually exploited children” under this Act.

Furthermore, not only commercially sexually exploited children arrested for prostitution are eligible for the services that the Act creates. The SHA mandates that all of its services be provided to sexually exploited children whether they seek them voluntarily, as a condition of adjournment in contemplation of dismissal of a criminal case, through a state diversion program for “at risk” youth, or through a juvenile delinquency proceeding or child protective custody order.<sup>133</sup>

The second major part of this Act mandates that localities create specialized social services for sexually exploited children.<sup>134</sup> It requires that each local social services district<sup>135</sup> develop, as part of its multi-year consolidated child welfare services,<sup>136</sup> a plan to address the needs of

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person engages or agrees or offers to engage in sexual conduct with another person in return for a fee.”); N.Y. PENAL LAW § 240.37 (McKinney 2008) (“Any person who remains or wanders about in a public place . . . for the purpose of promoting prostitution . . . is guilty of a class A misdemeanor.”). Subsection (d) covers any minor under sixteen who is compelled into prostitution by someone over twenty-one. *See* N.Y. PENAL LAW § 230.33 (McKinney 2007) (“A person is guilty of compelling prostitution when, being twenty-one years of age or older, he or she knowingly advances prostitution by compelling a person less than sixteen years old, by force or intimidation, to engage in prostitution.”). Subsection (e) covers minors involved in sexual performances for money. *See* N.Y. PENAL LAW § 263 (McKinney 2007).

<sup>132</sup> *See* Mullin, *supra* note 17 (“One, [the Safe Harbour Act], in terms of the law, helps to create a clear understanding of the inconsistency between the penal code sections by clearly showing that New York state recognizes children who have been prostituted, to be victims of sex crimes.”).

<sup>133</sup> Safe Harbour for Exploited Children Act, N.Y. SOC. SERV. LAW § 447-B(2) (McKinney 2008) (effective Apr. 1, 2010).

<sup>134</sup> *See* A.B. 5258-C, 2007 Leg., 231st Sess., § S447-B (N.Y. 2007) (describing services to be rendered to exploited children).

<sup>135</sup> N.Y. SOC. SERV. LAW § 61 (McKinney 2007) defines a “social services district:” “for the purpose of administration of public assistance and care,” the city of New York is a social services district, and every county that is not included in the city of New York is a social services district. *Id.*

<sup>136</sup> N.Y. SOC. SERV. LAW § 34-a(1)(a) (McKinney 2006) directs social services districts to prepare a “multi-year consolidated services plan encompassing adult services and family and children’s services, which shall include diversion services provided pursuant to

sexually exploited children and, to the extent funds are available, ensure preventative services for sexually exploited children.<sup>137</sup> Such services include short-term safe houses or other short-term placements such as runaway and homelessness programs, and respite and crisis programs designed to serve sexually exploited children.<sup>138</sup> These services, which currently do not exist for sexually exploited youth in New York state, are the bedrock upon which the SHA is built. The act allows pre-existing and more generalized resources to be mobilized for use in this capacity so long as staff members have been adequately trained in the provision of services to sexually exploited youth.<sup>139</sup> The Act requires that such services be available on both voluntary and court-ordered bases and that they have sufficient capacity to accommodate the estimated number of sexually exploited youth in the locality.<sup>140</sup>

Finally, the Act amends the Family Court Act by automatically substituting a petition alleging that the child is a person in need of supervision (PINS) for formal delinquency charges, upon motion of the respondent or upon the court's own motion.<sup>141</sup> A petition alleging that a person is in need of supervision is an instrument authorized by the New York Family Court Act, which allows judges to order a juvenile to obtain social services without entering a finding of delinquency.<sup>142</sup> It has traditionally been used to supervise truants, children who repeatedly

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section seven hundred thirty-five of the family court act." The N.Y. FAM. CT. ACT § 735 (McKinney 2005) mandates provision of diversion services to juveniles adjudged "persons in need of supervision" (PINS).

<sup>137</sup> A.B. 5258-C, 2007 Leg., 231st Sess., § S447-B(1) (N.Y. 2007).

<sup>138</sup> *Id.* See also Mullin, *supra* note 17 ("These services include both a short-term safe house and a long-term residential facility. These two services were determined by this study that was done by the office of CFS to be missing from available services, and of which sexually exploited youth are in dire need.").

<sup>139</sup> A.B. 5258-C, 2007 Leg., 231st Sess., § S447-B(1) (N.Y. 2007).

<sup>140</sup> *Id.* The provision of these services is administrated by the Office of Children and Family Services. *Id.*

<sup>141</sup> A.B. 5258-C, 2007 Leg., 231st Sess., § 2 (N.Y. 2007); see Mullin, *supra* note 17.

<sup>142</sup> See N.Y. FAM. CT. ACT §§ 711-717 (McKinney 1998) (defining a person in need of supervision as "a person less than eighteen years of age who does not attend school in accordance with the provisions of part one of article sixty-five of the education law or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of a parent . . .").

disobey their parents' directions, and juveniles found in possession of small amounts of marijuana.<sup>143</sup> This substitution can be reversed if the juvenile is not in substantial compliance with the court's later orders.<sup>144</sup> This substitution of a PINS petition is based on the new legal presumption that the juvenile meets the TVPA's criteria for a victim of a severe form of trafficking, which, as discussed above, all juvenile prostitutes should meet.

The SHA does allow a judge some discretion, as he may convert the PINS petition back to a delinquency petition if he can show that the juvenile is not a victim of severe trafficking, is a repeat prostitution offender, is already subject to supervision via a preexisting PINS petition, or has expressed an unwillingness to cooperate with treatment.<sup>145</sup> Note that in New York, Family Court judges already have the discretion to convert juvenile delinquency petitions to PINS petitions, even over the Presentment Agency's objections, after fact-finding occurs.<sup>146</sup> This substitution is allowed in cases where the child is being charged with violating § 230.00 of the New York Penal Law<sup>147</sup> and is not charged with a felony.<sup>148</sup>

## ***2. Philosophical Underpinnings of the Safe Harbour for Exploited Children Act***

Similar to the TVPA, the SHA attempts to develop a victim-centered philosophy, which is both compatible with the juvenile court's diversionary underpinnings and also creates a tension with its interventionist foundations. The New York State Assembly notes that prosecution is "ineffective" and hinders the "recovery" of the young women

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<sup>143</sup> *Id.* See JOSEPH CARRIERI & DAVID LANSNER, NEW YORK CIVIL PRACTICE: FAMILY COURT PROCEEDINGS § 25.01 (2d ed. 2005).

<sup>144</sup> See A.B. 5258-C, 2007 Leg., 231st Sess., § 2 (N.Y. 2007); see also Mullin, *supra* note 17 (noting that under the SHA, judges can convert PINS petitions to delinquency proceedings for substantial noncompliance with ordered services).

<sup>145</sup> Safe Harbour for Exploited Children Act, N.Y. SOC. SERV. LAW § 447-a (McKinney 2008) (effective Apr. 1, 2010).

<sup>146</sup> See Mullin, *supra* note 17.

<sup>147</sup> N.Y. PENAL LAW § 230.00 (McKinney 2007) ("A person is guilty of prostitution when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee.").

<sup>148</sup> A.B. 5258-C, 2007 Leg., 231st Sess. (N.Y. 2007).

involved in juvenile prostitution.<sup>149</sup> It finds that “[t]he overwhelming majority of these sexually exploited youth have a history of psychological, physical or sexual abuse as younger children and many have been raised amidst stark poverty and family dysfunction.”<sup>150</sup> It proceeds to outline a victim-based, sociological philosophy of child-saving that the approach attempts to address. Moreover, the placement of these girls in crisis intervention facilities, counseling, and emergency housing, rather than in a detention facility, represents the best of the juvenile court’s focus on diverting impressionable children from the climate and stigma of criminal penalties.

The SHA, however, raises a theoretical contradiction between its terms and the jurisdiction of the Family Court to deal with minors. The Act defines sexually exploited youth as girls under the age of eighteen.<sup>151</sup> Traditional Family Court jurisdiction over juvenile prostitutes is limited by the definition of juvenile delinquents as, “over seven and less than sixteen years of age.”<sup>152</sup> The Family Court was only able to adjudicate juvenile prostitution cases for girls under age sixteen. The SHA defines sexually exploited youth as girls under the age of eighteen.<sup>153</sup> It would allow the Family Court to adjudicate juvenile prostitution cases for women between sixteen and eighteen, who were previously not under the delinquency jurisdiction of the Family Court. This application conceptually broadens the cross-section of young women against whom the Family Court is authorized to bring coercive state action in order to remedy their sexual behaviors. This redefinition of prostitution as subject to Family Court, rather than Criminal Court jurisdiction, is partially justified by the Family Court’s existing jurisdiction over “person[s] less than eighteen years of age” through the PINS petition.<sup>154</sup>

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<sup>149</sup> Sponsors’ Memo Accompanying Bill A5258C, New York State Assembly (2007), available at [http://www.brooklyn.cuny.edu/pub/departments/childrenstudies/documents/childrens\\_documents/safe\\_harbor\\_act.pdf](http://www.brooklyn.cuny.edu/pub/departments/childrenstudies/documents/childrens_documents/safe_harbor_act.pdf). (“Currently, the state’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.” *Id.* at 8.).

<sup>150</sup> *Id.*

<sup>151</sup> A.B. 5258-C, 2007 Leg., 231st Sess., § S447-A (N.Y. 2007).

<sup>152</sup> N.Y. FAM. CT. ACT § 301.2(1) (McKinney 2007).

<sup>153</sup> A.B. 5258-C, 2007 Leg., 231st Sess., § S447-A (N.Y. 2007).

<sup>154</sup> N.Y. FAM. CT. ACT § 712(a) (McKinney 2007).

Overall, the SHA provides a model, based in part on the approach promulgated in the TVPA, which stands in practical and philosophical tension with the traditional model of prosecution through juvenile delinquency statutes. Part II.C will discuss the conflicting approaches and the tensions that the legislation creates in the law.

### **C. Tensions that the New Model Raises Against the Background of Traditional Approaches**

As the previous discussion suggests, the new approach under the TVPA and SHA raises significant tensions with the traditional adjudication of domestic juvenile prostitutes through delinquency proceedings. This section will highlight the conflicts that have emerged since New York State adopted the SHA. First, it will discuss a comparison of potential outcomes under the two models. Next, it will examine the debate surrounding the most contentious issue between the two models: the use of secure detention of juvenile prostitutes. Finally, it will look at the philosophical coherence of the underlying rationales for the juvenile court as a whole and consider other issues that may have disparate effects under the two models.

#### ***1. Comparison of Outcomes***

Unfortunately, very little empirical information exists as to the rate of recidivism of juvenile prostitutes.<sup>155</sup> Moreover, estimates of the probability of success for the SHA can be no more than conjecture, since the population of domestic juvenile prostitutes will likely respond very differently than the current targets of the TVPA approach due to differences in the root causes of their prostitution.<sup>156</sup> An effort to understand the comparative likelihood of outcomes is necessary to gain an understanding into the policy choices that the adoption of the SHA entails.

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<sup>155</sup> Even the Office of Juvenile Justice and Delinquency Prevention fails to keep national, let alone regional, statistics on juvenile recidivism for any criminal act. There is little detailed national information on juvenile crime as a whole, let alone juvenile prostitution in specific. Howard N. Snyder & Melissa Sickmund, *Juvenile Offenders and Victims*, NATIONAL REPORT (Off. of Juv. Just. & Delinq. Prevention, U.S. Dep't. of Just., D.C.), Mar. 2006, at 234-35 [hereinafter *Juvenile Offenders 2006*], available at <http://ojjdp.ncjrs.gov/ojstatbb/nr2006/downloads/NR2006.pdf> ("There is no national recidivism rate for juveniles. Such a rate would not have much meaning since juvenile justice systems vary so much across states.").

<sup>156</sup> See *infra* note 160 and accompanying text.

The New York State Office of Children and Family Services has reported that a model service provider estimated a fifty percent success rate in removing girls from a life of juvenile prostitution.<sup>157</sup> No statistics are available regarding the success rates of other PINS petitions, which prevents theoretical speculation about the efficacy of the SHA based on the juvenile court's success with curbing running away, truancy, and other offenses dealt with under that statute. As a proxy, however, it is possible and useful to examine the success of the federal government in working with juvenile prostitutes, both foreign and domestic, under the TVPA, since the TVPA uses the same victim-centered approach that the SHA will use. Although no empirical evidence exists, anecdotal evidence suggests that many juvenile prostitutes are unwilling to cooperate with investigators and service providers under this regime.<sup>158</sup> Without any evidence suggesting greater compliance, it would be unwise to assume that adjudication under the PINS petitions would yield a significantly better result than the assumed fifty percent success rate of the delinquency adjudications; it is possible, if not probable, that PINS adjudications would prevent even fewer young women from returning to prostitution.

## ***2. Secure Detention of Juvenile Prostitutes***

Since both traditional adjudication through juvenile delinquency proceedings and the SHA's mandates provide for services to the juvenile prostitutes, the greatest divide between the two approaches, both theoretically and practically, is on the question of whether the court has the power to remand the girl to a secure placement. Advocates for secure detention of juvenile prostitutes point out the tendency of these girls to run away, both from their homes and from non-secure placements, back to the streets and their pimps, where it becomes difficult to apprehend them again

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<sup>157</sup> GRAGG, *supra* note 25. ("These children often move back and forth from the sex industry to services. One NYC agency reported about a 50% success rate in breaking the cycle of girls returning to their pimps. The respondent stated that the intervention frequently does not work. For most girls, it takes multiple attempts to leave (often three) for the girls to acquire the necessary tools to set up a stable alternate life situation.").

<sup>158</sup> See Chen, *supra* note 29 (noting that domestic juvenile prostitutes often refuse to assist investigators and attempt to flee from courts). Chen notes that most foreign-born and internationally trafficked prostitutes provide willing assistance to investigators since they were violently forced into prostitution and actively seek to leave that life, while domestic juvenile prostitutes resist intervention and help since they feel that prostitution is their choice. *Id.*

or provide them with services.<sup>159</sup> Opponents of secure detention argue that it goes against the proper recognition that these girls are victims, and also that it detracts from their recovery and rehabilitation.<sup>160</sup>

The majority of sexually exploited and prostituted girls are defiant and oppositional to treatment; many are habitual runaways and continue to run away from service providers back to their pimps with whom they are in love.<sup>161</sup> Cheryl Hanna has noted, "Prostituted children present special challenges to the criminal justice system. Often hostile to both law enforcement and social services, prostituted children believe neither group has a genuine interest in helping them."<sup>162</sup> The complex relationship between most pimps and their juvenile prostitutes further complicates the situation, since the pimps will often arrive at court or a placement facility in order to reclaim these young women, who will leave with them if possible.<sup>163</sup> The firmer the emotional and psychological grip the pimp has on a young woman, the more resistant she will be to treatment. When a young woman is resistant to treatment, she is more likely to run away, and less likely to actually receive services and rehabilitation from an unsecured facility.<sup>164</sup> The OCFS has noted, "[s]upport [from service providers] was mixed concerning exempting youth under 16 from delinquency statutes because of concern that a secure placement option was necessary for some youth with a history of running away from foster care and non-secure voluntary agency settings, and being reexploited."<sup>165</sup>

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<sup>159</sup> See *infra* notes 164-168 and accompanying text.

<sup>160</sup> See *infra* notes 168-171 and accompanying text.

<sup>161</sup> *Id.*

<sup>162</sup> Hanna, *supra* note 15, at 26-27 (quoting Susan K. Kreston).

<sup>163</sup> See Iskowitz, *supra* note 20 ("In fact, I've seen pimps come to court for these girls, get up on the record and get sworn in as the aunt and uncle. So we need a way for these pimps, these abusers, not to get at these girls."). It is useful to note that under the TVPA, the federal government is able to conceal the girls' identities; under the traditional model when the girls are not detained and under the SHA, there is no ability to protect the girls from their pimps.

<sup>164</sup> POWERS & JAKLITSCH, *supra* note 24, at 26 ("Successful intervention becomes increasingly difficult as the adolescent progresses through these phases and becomes more involved in the lifestyle and culture."); see also STALLER, *supra* note 22, at 186-89 (describing how Covenant House, an alternative service provider managing a runaway youth shelter, was unable to prevent pimps from recruiting young girls into prostitution at its facilities and unable to keep girls from returning to streets).

<sup>165</sup> GRAGG, *supra* note 25, at iv.

There is another set of problems in placing young sexually exploited girls in secure detention facilities. Some examples are the quandaries posed by the corrupting influence of other delinquent juveniles in detention, inappropriate treatment modalities and inaccessible services, and the stigmatization of secure conditions. First, housing victims with juvenile offenders conflicts with juvenile courts' philosophical commitment to diversion. More importantly, the Family Court in New York has recognized that there are no truly appropriate secure detention facilities that have the ability to provide services to sexually exploited youth, and that many treatment providers may later refuse to accept a juvenile who has been determined to require secure detention.<sup>166</sup> Karen M. Staller notes, "[t]hese adolescents take up a lot of time and resources. They may not always appear sympathetic to the public. They can cause disruptions to the regular order of things. They are defiant, strong-willed, and independent. Ensuring that there are sufficient providers out there willing to handle them has been a recurring problem."<sup>167</sup> Finally, many girls also report highly negative experiences while in detention and the juvenile justice system at large, including sexual propositions and lewd comments from the very criminal justice personnel and service providers assigned to help them.<sup>168</sup>

With so few appropriate service providers available, depriving juvenile prostitutes of access to even a few services would severely impact

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<sup>166</sup> See STALLER, *supra* note 22, at 191-93 (recounting the judge's complaints at disposition of *In re Nicolette R.*, N.Y.S.2d 487 (App. Div. 2004)).

<sup>167</sup> STALLER, *supra* note 22, at 191; *see also* Chen, *supra* note 29 (describing initial defiant behavior of sexually exploited youth to service providers and lack of treatment facilities).

<sup>168</sup> See GRAGG, *supra* note 25, at 46 ("Male facility and court staff as well as police officers reportedly propositioned them, made lewd comments, or ignored their plight. Female staff were often perceived as being very judgmental and derogatory. Most of the female youth reported trading sex with police officers to avoid arrests. None reported instances of help or assistance from adult strangers."); Patti Binder, Deputy Dir., Girls Educ. & Mentoring Serv. (GEMS), Panel Presentation: Teen Prostitutes: Victims or Defendants?, held by the Bar Assoc. of the City of NY (Oct. 17, 2007) (audio tape on file with author) (describing sexual abuse by staff and fellow juveniles while in detention); N.Y. JUV. JUST. COAL., SUPPORT THE SAFE HARBOR ACT: STOP THE PROSECUTION OF SEXUALLY EXPLOITED YOUTH 4 (undated pamphlet) ("[In detention,] I've witnessed the constant belittling, the constant disrespecting and constant abuse that they endure from the way some of the staff mistreats them. Hitting on the girls and calling them whores doesn't help them any. In the end, the girls end up emotionally and mentally scarred.") (quoting Shaneiqua Boyd, GEMS Outreach Worker); Op-Ed, *Children in Need of Safe Harbor*, *supra* note 25 ("By threatening to lock them up, we deepen their distrust of an adult world that has brutalized and mistreated them.").

the ability of the court to deal with the problem of juvenile prostitution throughout the state, especially in New York City. Finally, detention stigmatizes these girls by allowing them to label themselves as "criminals," an identity to which they will then feel bound.<sup>169</sup>

### ***3. Philosophical Conflict and Other Considerations***

A variety of other, less pronounced considerations arise when examining the tensions between the two approaches to treating juvenile prostitutes. The first is the philosophical impact of the SHA as compared to the invalidation of the Wayward Minor Act (WMA) and adoption of juvenile delinquency proceedings. The second is whether the adoption of the SHA will spur creation of specialized resources and services for sexually exploited youth in a way that the traditional approach has been unable to do. The last is the public health implications of either approach, both for the juvenile prostitutes and for the community at large.

The WMA originally was used to incarcerate "morally depraved" young women; in general, early juvenile courts detained girls for promiscuous or otherwise "incurable" behavior.<sup>170</sup> In its application to juvenile prostitutes and regulation of female adolescent sexuality, the PINS proceedings proposed by the SHA bear a striking similarity to the WMA. This is philosophically troubling because the Family Court Act and juvenile delinquency proceedings, rather than PINS proceedings, were designed to invalidate and replace the WMA as it applied to prostitution because the WMA was overbroad and criminalized much normal adolescent sexual exploration.<sup>171</sup> The SHA, in this respect, could reverse the progress that

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<sup>169</sup> See Binder, *supra* note 168 (describing self-esteem issues among juvenile prostitutes and the adverse impact of detention); Hanna, *supra* note 15, at 27 ("The mistaken societal attitude that prostituted children are somehow responsible for their exploitation and, therefore, are unworthy of the protection the law affords to other victims of sexual abuse does nothing to alter this view.").

<sup>170</sup> See Rachel Devlin, *Female Juvenile Delinquency and the Problem of Sexual Authority in America, 1945-1965*, 9 YALE J.L. & HUMAN. 147, 164 (1997) ("The Wayward Minor Statute defined any person between the ages of sixteen and twenty-one who was addicted to drugs, associated with 'dissolute persons,' was a prostitute, or was 'willfully disobedient to the reasonable and lawful commands of parent' as legally 'wayward.'"); STALLER, *supra* note 22, at 12 ("The Wayward Minor statute was most readily applied to sexually active young women, whose behavior was deemed both a threat to themselves and a public health risk.").

<sup>171</sup> See STALLER, *supra* note 22, at 13 (describing adoption of tripartite structure of Family Court Act and deliberate division of unruly behavior and criminal acts).

early juvenile court reforms have made and move the juvenile court back to a discredited theory of adjudication. Transferring the adjudication of juvenile prostitution from delinquency to PINS proceedings moves the adjudication back toward a regime which had been found to be both unconstitutional and philosophically troubling because it is based on broad, moralistic regulation of female sexuality.

One of the largest problems with the traditional approach has been the lack of specialized treatment services for sexually exploited youth.<sup>172</sup> The adoption of the SHA, however, carries no assurances that such services will be created. The SHA does mandate the identification of emergency and long-term residential facilities for sexually exploited youth. It does not, however, mandate the creation of service providers for psychological, behavioral, or other kinds of therapies that seek to address the underlying causes of juvenile prostitution and rehabilitate the girls. The New York Juvenile Justice Coalition notes,

Juvenile facilities on both the state and local level are not equipped to meet the urgent and very specific service needs of sexually exploited young people. It is estimated that 80 to 90 percent of exploited children have previously been sexually abused. Two-thirds to three-quarters of exploited children experience mental health problems such as post-traumatic stress disorder. The Office of Children and Family Services (OCFS), which operates the placement facilities for juvenile delinquents, has no programs to address the social and emotional needs of sexually exploited children.<sup>173</sup>

Yet, moving adjudication of juvenile prostitutes from delinquency proceedings to PINS proceedings will not in itself create any new services, because PINS is an unfunded mandate.<sup>174</sup> An unfunded mandate occurs

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<sup>172</sup> See, e.g., POWERS & JAKLITSCH, *supra* note 24, at 5 (“‘Acting out’ behaviors, such as criminal activity, prostitution, and drug abuse, bring runaways to the attention of the courts, emergency rooms, and law enforcement and school systems, yet the maltreatment histories of runaways remain hidden, and appropriate services are rarely provided . . . . Although federal and state legislation has attempted to address this issue by, for example, instituting policies that separate minors from adult criminals, many young victims continue to be inappropriately served.”).

<sup>173</sup> N.Y. JUV. JUST. COAL., *supra* note 168, at 2.

<sup>174</sup> Cathleen Clements, Dir., Off. of Pub. Pol’y & Client Advoc., The Child. Aid Soc’y, Panel Presentation: Teen Prostitutes: Victims or Defendants?, held by the Bar Assoc. of the City of NY (Oct. 17, 2007) (audio tape on file with author)\_(discussing unfunded

when laws change, but no money is appropriated to pay for the services required, placing unfair and sometimes unworkable burdens on the counties responsible for implementing the changes.<sup>175</sup> The lack of funding may encourage service providers to work with the population. Conversely, it could discourage the service providers by making it appear that their services are not valued or prioritized through funding.

Finally, juvenile prostitution also raises public health concerns that the state should consider when evaluating the SHA.<sup>176</sup> Juvenile prostitutes are at risk for many health problems that implicate public health, including unwanted pregnancies, sexually transmitted infections, and substance abuse problems. Jane Levine Powers & Barbara Weiss Jaklitsch note that, "[o]n the extreme end, these young people are at risk for violence, AIDS, and drug-related deaths."<sup>177</sup> The adjudication of these girls as delinquent does nothing to specifically solve these health issues.<sup>178</sup> But in a detention facility, the girls will at least receive mandatory medical care, which may mitigate some of these problems.<sup>179</sup> Yet, compelling provision of such health care services will not create the meaningful changes in girls' behavior the way the SHA approach has the potential to do by raising their self-esteem and encouraging them to want to care for themselves.

These considerations all show the differences between the traditional approach to dealing with juvenile prostitutes and the new model. Neither delinquency adjudications nor the SHA fully and adequately addresses the problem of juvenile prostitution. The next Part attempts to

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nature of SHA and noting that counties reported themselves unable to cope financially with requirements of act).

<sup>175</sup> *Id.*

<sup>176</sup> See Anthony Iton, et al., *Applying Law Throughout the Life Stage: Preventing Sexual Exploitation of Children and Teens*, 33 J.L. MED. & ETHICS 38, 38 (2005) ("Sexual exploitation of young people is both a public health and law enforcement problem.").

<sup>177</sup> POWERS & JAKLITSCH, *supra* note 24, at 26.

<sup>178</sup> See Norma Hotaling & Leslie Levitas-Martin, *Increased Demand Resulting in the Flourishing Recruitment and Trafficking of Women and Girls: Related Child Sexual Abuse and Violence Against Women*, 13 HASTINGS WOMEN'S L.J. 117, 118 ("Criminalization of these individuals does not address the root causes, and thereby contributes to continuing sexual exploitation and violence, and enormous costs to the criminal justice, public health, and social service systems.").

<sup>179</sup> See Iskowitz, *supra* note 20 ("So these girls often for the first time in months can now get schooling, they can get medical attention, they can have their own room, and they don't have the issue of running back to the street.").

outline steps that New York and other states should take to improve their adjudicatory processes and remedy some of the problems that the SHA poses.

### III. RECOMMENDATIONS FOR A TARGETED AND EFFECTIVE RESPONSE TO JUVENILE PROSTITUTION

This Part proposes a comprehensive plan to develop a better treatment model for juvenile prostitution that is tailored to address the tensions described in Part II, especially the inability of either model to ensure philosophical consistency and better practical rehabilitation.

#### A. We Don't Know Enough: The Need for Further Studies and Pilot Programs

The most salient fact emerging from the comparison of the traditional model and the TVPA model is that the legal and sociological communities have very little understanding of what kinds of treatment will actually serve to best rehabilitate juvenile prostitutes.<sup>180</sup> Advocates disagree as to whether secure facilities stigmatize girls in a manner that reinforces their prostitution-based lifestyle, or effectively prevent them from returning to that lifestyle so that they can get the treatments they need.<sup>181</sup> Service providers are conflicted regarding what specialized services juvenile prostitutes require.<sup>182</sup> Those crafting youth policy do not have enough information to tailor the treatment they prescribe so as to maximize its effectiveness, and the SHA has not cured this problem. Thus, the legislature ought to focus on mandating and funding further studies of the effectiveness of various strategies for preventing juvenile prostitution, addressing root causes and appropriate treatment modalities. The legislature needs to commission further studies, using service providers, to track the progress of various therapies that girls adjudicated for prostitution receive and to develop a comprehensive theory on how best to treat sexually exploited youth. More importantly, the legislature should commission and fund pilot

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<sup>180</sup> See *supra* Part I.C.1, discussing the lack of data regarding ideal treatments for juvenile prostitutes.

<sup>181</sup> See Iskowitz, *supra* note 20 (debating implications of secure detention on juvenile prostitutes); Mullin, *supra* note 17.

<sup>182</sup> See GRAGG, *supra* note 25, at 67-69 (noting specialized services requested by treatment providers for sexually exploited youth, including crisis centers, residential care, mental health counseling, medical care, advocacy, case management, and education).

programs for various types of service provision and treatment philosophies. This would both immediately increase the number and range of services available to sexually exploited youth, and track and compare the successes of the various approaches.

One indication of how helpful additional information would be is the success of the one study that the New York state legislature commissioned in 2006.<sup>183</sup> The OCFS developed a study intended to “(1) [estimate] the prevalence of sexually exploited children within New York State, (2) identify the unique needs of sexually exploited children, (3) specif[y] the types of programs and services that best meet such needs, and (4) [evaluate] the capacity of the current children’s service system to meet the needs of commercially sexually exploited children.”<sup>184</sup> The study involved a survey of service providers, and it supported the conclusion that most sexually exploited youth had histories in the child welfare and juvenile justice systems, and that a chronic shortage of beds in safe residential placements with adequately trained staff and funding was the greatest impediment to treatment.<sup>185</sup>

The OCFS study did not provide sufficient background information to fully develop a comprehensive approach to juvenile prostitution. First, it relies primarily on surveys from service providers rather than cataloging differing treatment modalities and tracking their successful rehabilitations of differently profiled sexually exploited youth.<sup>186</sup> Furthermore, it fails to come to a definitive conclusion about when the use of secure detention might be appropriate or necessary despite the SHA’s bias against it.<sup>187</sup> The 2008 reauthorization of the TVPA directs the Attorney General to prepare

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<sup>183</sup> *Id.*

<sup>184</sup> GRAGG, *supra* note 25, at i.

<sup>185</sup> *Id.* at ii-iii.

<sup>186</sup> *Id.* at 9-21 (describing methodology of study). The study also relies on focus group discussions conducted among sexually exploited youth; it primarily draws on this information to identify the youths’ home lives prior to engaging in prostitution, the characteristics of their lives in prostitution, and what services they felt were necessary for their success. It contributes some information to creating a successful treatment modality but lacks critical information about success rates, as well as any sociological or psychological information. Furthermore, the youth involved in these focus groups included various kinds of commercially sexually exploited youth, including youth involved in stripping and pornography, who may require different treatment modalities than juvenile prostitutes.

<sup>187</sup> See *id.* at 91-92 (describing varied reactions by service providers as to whether commercially sexually exploited youth require secure detention).

model state legislation designed to address trafficking in juveniles for purposes of sexual exploitation in the same manner that the TVPA does for the federal government.<sup>188</sup> This model legislation, in addition to the information that could be gathered through linked state studies and pilot programs, will provide a solid informational basis for developing a permanent, comprehensive model for adjudicating juvenile prostitutes.

### **B. Addicted to Love:<sup>189</sup> Considering Substance Abuse Treatment as an Analogous Treatment Model**

Many advocates describe a juvenile prostitute's cycle of abuse and dependence upon her pimp as a form of addiction.<sup>190</sup> Though some of these advocates are speaking metaphorically, there is an important analogy to be drawn between juvenile drug and alcohol addiction and commercial sexual exploitation of juveniles. The OCFS study noted, "One young girl described the money made in the life as an addiction. The family and hierarchy created with the pimp and the other girls and women who work for him create bonds that are difficult to break."<sup>191</sup> It appears that some girls exiting prostitution and going through treatment even have withdrawal-like side effects.<sup>192</sup> Given such a similarity, courts and treatment providers ought to look to models of addiction treatment in order to best provide rehabilitative services for juvenile prostitutes.

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<sup>188</sup> William Wilberforce Trafficking Victims Reauthorization Act of 2008, H.R. 7311, 110th Cong. (2008).

<sup>189</sup> Many young women arrested for juvenile prostitution will also be addicted to illicit drugs or to the money earned from their acts. Specific treatments for these addictions, as separate from treatment of the root causes of their prostitution in general, are outside the scope of this Article.

<sup>190</sup> See Katie Backma, *Prostitution is an Addiction Not a Problem, Officials Say: Nebraska bill calls for treatment instead of jailtime for hookers*, THE BG NEWS (Bowling Green, Ohio), Feb. 6, 2006, available at <http://media.www.bgnews.com/media/storage/paper883/news/2006/02/06/Nation/Prostitution.Is.An.Addiction.Not.A.Problem.Officials.Say-1600500.shtml> ("Prostitutes can't simply stop selling their bodies for sex because it becomes an addiction," said a proponent to a legislative bill that would create a prostitution intervention, treatment and education fund."); Chen, *supra* note 29 (comparing juvenile prostitution to drug addiction). See GRAGG, *supra* note 25.

<sup>191</sup> GRAGG, *supra* note 25, at 46.

<sup>192</sup> See *id.* at 47 ("Two participants who have exited the life commented that they were unable to sleep at night and had flashbacks.").

One manner in which courts have most effectively treated addiction problems for adolescents is through the creation of juvenile and family drug courts. These courts use the coercive threat of detention, coupled with intensive monitoring and multi-systemic supports, in order to compel acceptance of treatment services.<sup>193</sup> They have seen far better outcomes than would normally be expected from traditional criminal prosecutions. The Office of Justice Programs notes that

[j]uvenile and family drug court judges are reporting, however, that their initial experience confirms remarkable sustained turnaround by juveniles and adults in the program who were otherwise at high risk for continued, escalating criminal involvement and illegal substance use . . . . They also believe that the rigorous monitoring of participants, along with the treatment and rehabilitation requirements imposed, promotes a far greater likelihood of success in reducing drug use and criminal activity than can be achieved through the traditional court process.<sup>194</sup>

Adoption of this model could be useful in assessing and crafting individualized treatment plans for juvenile prostitutes. These individualized treatment plans would likely not completely mirror the individualized treatment plans for drug addicts, given that prostitution presents a different set of complex problems than does drug addiction. Treatment providers for juvenile prostitution, however, may benefit from looking at techniques from addiction-based therapies for insight into how to craft responsive individualized treatments for youths resistant to the idea of change.<sup>195</sup>

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<sup>193</sup> See generally Peggy Fulton Hora, et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439 (1999) (describing the growth of drug courts as therapeutic jurisprudence); BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUST., JUVENILE DRUG COURTS: STRATEGIES IN PRACTICE (Mar. 2003), available at <http://www.ncjrs.org/pdffiles1/bja/197866.pdf> (providing guidance for building successful juvenile drug courts).

<sup>194</sup> OFF. OF JUST. PROGRAMS DRUG CT. CLEARINGHOUSE & TECHNICAL ASSISTANCE PROJECT, JUVENILE AND FAMILY DRUG COURTS: AN OVERVIEW 18 (1998), available at <http://www.ncjrs.gov/html/bja/jfcdcoview/dcpojuv.pdf>.

<sup>195</sup> For more information regarding the legal structure of court orders mandating such treatments, see *infra* Part III.C.

### C. Graduated Responses: Utilizing the Full Range of Options Available and Reorienting Judicial Perspectives

Until further research is completed on the root causes of juvenile prostitution and the most effective treatment modalities, a single-minded focus on using PINS petitions to the exclusion of the other options that the SHA permits would be foolish. Moreover, until the SHA goes into effect and more data are collected, an immediate solution to the dilemma is needed in order to provide the best treatment to girls currently involved in juvenile prostitution.<sup>196</sup> The problem of juvenile prostitution requires a nuanced approach incorporating the best understandings of law, sociology, developmental psychology, and other fields.<sup>197</sup> Each girl appearing before the court regarding issues of prostitution has unique needs and a particularized background. Until one approach has been proven to be most effective, juvenile court judges should have the discretion to adjudicate these cases in the manner that appears most fitting for each girl and to craft a holistic treatment plan that may incorporate services from a wide array of agencies.

Karen M. Staller has recognized the difficulties inherent in adjudicating these types of complex cases and has noted, “[i]t would seem that embracing the complications and contradictions rather than denying them might be a more honest approach to problem-solving. Presumably such a holistic and contextual approach would require more individual discretion, which carries with it the inherent danger of being less vigilant about civil rights.”<sup>198</sup> This move back towards greater judicial discretion both harkens back to the original conceptions of the juvenile court, and gives contemporary judges the best tools to provide appropriate treatments.<sup>199</sup> Until April 2010, when the SHA goes into effect, judges, prosecutors, and juvenile rights attorneys should be encouraged to use the

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<sup>196</sup> See STALLER, *supra* note 22, at 191 (“Nonetheless, somewhere along the line we may have lost sight of the fact that a full year of adult quibbling is a relatively long time in the life of a 12- or 13-year-old child like Nicolette.”).

<sup>197</sup> See SHIREMAN & REAMER, *supra* note 56, at 162-65 (discussing multiple variables influencing juvenile crime).

<sup>198</sup> STALLER, *supra* note 22, at 19.

<sup>199</sup> See Patrick R. Tamilia, *In Search of Juvenile Justice: From Star Chamber to Criminal Court*, 29 AKRON L. REV. 509, 510 (1996) (“The unbridled discretion of the juvenile court has been both the blessing and the curse of the juvenile justice system, and too frequently the achievements thereby produced are overshadowed by the more broadly advertised failures.”).

currently available provisions in the Family Court Act that allow conversion of delinquency cases to PINS proceedings when they feel that this would better serve the interests of the girls before them.<sup>200</sup> The Family Court Act currently gives judges the power to adjudicate these girls as they would under the SHA if they find that such a course is most appropriate considering the individualized circumstances of each case. After the SHA goes into effect, judges should carefully consider when the exceptions warrant reconversion into delinquency petitions, both at the initial stages in finding the girl uncooperative with potential treatment and throughout the treatment if she fails to accord with court service orders.

Moreover, the juvenile justice community should also encourage use of the preexisting mental health community, including social services counseling treatments and exercising the option of involuntary civil commitment in extreme cases.<sup>201</sup> In some cases, especially where it is likely that the juvenile will attempt to return to her life of prostitution, involuntary civil commitment may be a better secure placement than a detention center.<sup>202</sup> While it is true that “[n]o consensus has developed about

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<sup>200</sup> See N.Y. FAM. CT. ACT § 311.4 (McKinney 2008) (allowing court to substitute PINS petition for delinquency petition with permission of Presentment Agency at any time and over objection at conclusion of dispositional hearing); see also M.L. ARMSTRONG, VERA INSTIT. FOR JUST., ADOLESCENT PATHWAYS: EXPLORING THE INTERSECTIONS BETWEEN CHILD WELFARE AND JUVENILE JUSTICE, PINS AND MENTAL HEALTH 17, available at [http://www.vera.org/publication\\_pdf/pathways.pdf](http://www.vera.org/publication_pdf/pathways.pdf) (“There is another option, rarely exercised, that allows judges to convert delinquency cases to PINS. In 1993, 50 delinquency cases were converted to PINS. In recent years, there have been even fewer, usually around 20.”); Mullin, *supra* note 17 (describing preexisting legal options for judges to convert delinquency proceedings to PINS cases).

<sup>201</sup> N.Y. FAM. CT. ACT § 353.4 (McKinney 2008) allows the judge, at the conclusion of a dispositional hearing, to issue an order placing the respondent with Division For Youth for treatment of a “mental illness, mental retardation or developmental disability, as defined in section 1.03 of the mental hygiene law, which is likely to result in serious harm to himself or others.” Involuntary civil commitment may help destigmatize the treatments since they will no longer be in a “criminal” or delinquency context. There also may be more appropriate service providers in the mental health field than exist for juvenile delinquents in secure detention. See *infra* note 205 and accompanying text. Such an approach, however, means fewer individual rights and constitutional safeguards, and may raise due process concerns. For a discussion of due process issues surrounding civil commitment of minors, see generally *Parham v. J.R.*, 442 U.S. 584 (1979) (striking down Georgia’s civil commitment statute for juveniles and imposing due process standards); Elyce H. Zenoff & Alan B. Zients, *If Civil Commitment is the Answer for Children, What are the Questions?*, 51 GEO. WASH. L. REV. 171 (1983) (discussing due process ramifications of juvenile civil commitment).

<sup>202</sup> This suggestion may be regarded as extreme, especially in light of the due process concerns it raises. See *infra* notes 205-208. This Article is not suggesting that

appropriate admission criteria, treatment modalities, or duration of residential care for children thought to be mentally ill,”<sup>203</sup> the juveniles’ intense need for counseling and other mental health services coupled with the need to detain them in a secure facility so that they can no longer put themselves in situations of physical, emotional, and sexual harm seems to suggest that mental health placements are appropriate. Moreover, the “serious harm to himself” required by involuntary mental health commitment statutes seems apparent from the self-described conditions to which the juveniles frequently return. The analogy to substance abuse seems pertinent in this situation, and some courts have found that, in the wake of the *Hendricks v. Kansas*<sup>204</sup> decision, addiction can meet a statutory requirement for dangerousness to self.<sup>205</sup> In *Hendricks*, the court found that using dangerousness as a factor in involuntary commitment decisions did not violate substantive due process.<sup>206</sup> Courts in *In re Evans*<sup>207</sup> and *In re Marquardt*<sup>208</sup> have extended that logic to addiction, allowing addicts to be involuntarily committed for treatment. The family court’s application of involuntary mental health commitments to juvenile prostitutes who it finds may return to the streets is an appealing alternative to criminal detention.

In order to effectuate this greater use of judicial discretion, parties involved in the adjudication of juvenile prostitution cases need to be aware of the various options that exist within the current framework and which will remain after the SHA’s changes. Educational campaigns should be established to ensure that family court judges, prosecutors, and defense

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involuntary civil commitment is a solution to or adequate treatment for all cases of juvenile prostitution. It merely suggests that, in particular cases where a judge finds it appropriate, such an adjudication may better serve the juvenile than placement in a secure detention facility.

<sup>203</sup> Zenoff & Zients, *supra* note 201, at 173-74.

<sup>204</sup> 521 U.S. 346 (1997) (finding that involuntary civil commitment of “a limited subclass of dangerous persons” is not contrary to substantive due process).

<sup>205</sup> See Mara Lynn Krongard, *A Population at Risk: Civil Commitment of Substance Abusers After Kansas v. Hendricks*, 90 CAL. L. REV. 111, 153 (2002) (“Following *Hendricks*, it appears that substance abuse is sufficient to constitute a mental abnormality for the purposes of civil commitment. Evidence even suggests that courts are willing to find that substance abuse fulfills the statutory requirement of dangerousness to self.”).

<sup>206</sup> *Id.*

<sup>207</sup> 408 N.E.2d 33 (Ill. App. Ct. 1980).

<sup>208</sup> 427 N.E.2d 411 (Ill. App. Ct. 1981).

attorneys understand the conversion procedures between delinquency petitions and PINS proceedings, both before and after the SHA takes effect. Making judges aware of the potential for disposing of juvenile prostitution cases through involuntary mental health commitments, as well as the wide range of service provider options, will increase the practical discretion of judges to do what they think will provide the best outcome for each girl. Until further research can be done regarding juvenile prostitution, expanding judges' use of the full range of adjudicatory measures will mitigate the problems of prostitution adjudications.

### CONCLUSION

Juvenile prostitution is a prevalent problem throughout the United States, especially in major urban centers. Commercial sexual exploitation of children results in adolescents leading lives of chronic abuse and rape, since many are legally unable to give consent to sexual acts. Traditional delinquency adjudications of these girls fail to recognize their status as victims and often revictimize them, thus preventing effective rehabilitation. The TVPA model for handling juvenile prostitution presents new challenges for advocates and the legal community, as it does not provide a philosophically consistent approach and cannot ensure that the girls will be in a secure environment where they are guaranteed to receive treatment.

Despite new legislative changes, courts should continue to demand more and broader studies of effective juvenile prostitution treatments, including monitoring of pilot programs, before deciding on the proper model of treatment. Judges should remain aware of the inherent discretion in adjudication that they retain under both the traditional and SHA paradigms. Courts should look to how they handle cases of juvenile substance addictions and also provide individualized and graduated responses to each adolescent brought in for prostitution, maximizing their uses of the range of options built into the juvenile delinquency and PINS systems. Solving the problem of juvenile prostitution requires an overhaul in the way the key players approach these issues. It is dangerous to believe that the mere passage of the SHA will remedy the problem of juvenile prostitution adjudication. A pervasive lack of information, difficult philosophical tensions, an inability to place girls into appropriate treatment where they can be forced to remain, and a tendency towards one-size-fits-all solutions present lasting challenges that must not be ignored.