
NOTES

LIMPING TOWARD DECRIMINALIZATION: THE CASE ACT, DE FACTO DECRIMINALIZATION OF DOMESTIC MINOR SEX TRAFFICKING VICTIMS, AND 2-WAY CCTV

ALYSSA N. DANIELS*

INTRODUCTION

When a little girl is sold by her impoverished family—girls my daughters' age—runs away from home, or is lured by the false promises of a better life, and then imprisoned in a brothel and tortured if she resists—that's slavery. It is barbaric, and it is evil, and it has no place in a civilized world.

—President Barack Obama,
Clinton Global Initiative
September 25, 2012¹

At about 8:15 a.m. on May 2, 2012, National City Police picked up a fourteen-year-old runaway for loitering and suspected prostitution.²

* J.D., Class of 2015, University of Southern California Gould School of Law; B.A. Communication Studies and Political Science 2010, University of California at Los Angeles. Many thanks to Professor Camille Rich for her invaluable feedback, to my family for their love and support, and to the members of the *Southern California Law Review* for their editorial prowess.

1. Barack Obama, Remarks by the President to the Clinton Global Initiative (Sept. 25, 2012), <https://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-clinton-global-initiative>.

2. United States' Motions in Limine at 2, United States v. Ballard, No. 3:12-cr-02259-BEN (S.D. Cal. Aug. 21, 2012) (No. 23-1).

Lauren's³ twenty-eight-year-old "boyfriend" had brought her from her hometown of El Paso, Texas, to California to pimp her out.⁴

While her "boyfriend" was exploiting her, Lauren performed hundreds of sexual acts on clients. Typically meeting with seven to ten "johns" each day, she was shuffled from one seedy southern California hotel room to the next.⁵ Her trafficker moved her from Los Angeles, down to San Diego, back up to Los Angeles, down to Orange County, and finally back to San Diego where she was arrested.⁶ During this time, her "boyfriend" had total control over Lauren—he posted online advertisements offering her sexual services on Backpage.com,⁷ arranged and paid for the hotel rooms in which she met her clients, dictated how she should dress, and took all of her earnings.⁸

After being picked up by police in National City, Lauren ran away from a victim's service center back to her "boyfriend."⁹ She was arrested again for prostitution less than a week later in Los Angeles.¹⁰ Her trafficker was arrested¹¹ as well and eventually charged by the United States Attorney's Office for the Southern District of California with Sex Trafficking of a Child in violation of 18 U.S.C. § 1591¹² and Transportation of a Minor to Engage in Prostitution in violation of 18 U.S.C. § 2423(a).¹³

Following her final arrest, Lauren was placed in a residential treatment

3. Throughout court filings, the minor trafficking victim is referred to as "L.R." See, e.g., United States' Motions in Limine, *supra* note 2, at 2 ("Initial Contact with L.R."). I have adopted the alias "Lauren" when referring to her.

4. United States' Motions in Limine, *supra* note 2, at 3. See also Lauren Steussy, *Man Sentenced in Sex Trafficking Case*, NBC 7 SAN DIEGO (Feb. 11, 2013, 3:33 PM), <http://www.nbcsandiego.com/news/local/Man-Sentenced-in-Sex-Trafficking-Case-190762561.html>.

5. United States' Motions in Limine, *supra* note 2, at 3.

6. *Id.* at 5.

7. Backpage.com is a website commonly used by traffickers to post ads to find potential "johns," or clients, for their victims. Police now commonly post false ads on the website to set up sting operations. See, e.g., *Are Prostitution Stings by the Police "Entrapment"?*, WILSON L. GRP. (Aug. 18, 2014), <https://wilsonlg.com/criminal/blog/are-prostitution-stings-police-entrapment> (describing the typical, "formulaic" police sting involving Backpage.com).

8. Memorandum of Points and Authorities in Support of United States' Motion in Limine For Testimony of Minor Victim by 2-Way, Closed Circuit Television at 2, United States v. Ballard, No. 3:12-cr-02259-BEN (S.D. Cal. Sept. 17, 2012) (No. 29-1) [hereinafter Memorandum of Points and Authorities].

9. *Id.* at 3.

10. *Id.*

11. *Id.* at 1.

12. 18 U.S.C. § 1591 (2012).

13. 18 U.S.C. § 2423(a) (2012).

center known for aiding in the recovery of child victims of sex trafficking.¹⁴ Like all such victims around her age, Lauren suffered greatly as a result of her victimization; just hearing her trafficker's name would reduce her to tears and leave her entire body shaking.¹⁵ While speaking about the impending criminal trial of her trafficker and the upcoming testimony she would have to give, Lauren became so upset that she required physical restraint for her own safety.¹⁶ This fourteen-year-old girl was in utter terror at the thought of testifying before the man who had so gravely exploited her, and she would have been further emotionally traumatized by having to do so.¹⁷

In light of these facts, the U.S. Attorney's Office filed a successful Motion in Limine for Testimony of Minor Victim by 2-Way, Closed Circuit Television ("2-Way CCTV") pursuant to 18 U.S.C. § 3509.¹⁸ Lauren would be able to testify from outside of the courtroom where counsel for both parties would be present, but notably, her trafficker would not be.¹⁹ Her testimony would be transmitted into the courtroom for the judge, jury, and her trafficker to see, while her trafficker's image would be transmitted through a monitor into the room from which Lauren was testifying.²⁰ In this way, the government would still be able to make its case against Lauren's trafficker through the use of her testimony, but she would be spared the retraumatization of testifying in his presence.

Upon learning of the successful motion allowing Lauren to testify via 2-Way CCTV at his trial, her trafficker pled guilty to the sex trafficking charges.²¹ Likely, he was waiting to see if the federal government was going to be able to "make" its case before he was willing to admit his actions. The mere *threat* of Lauren testifying about her brutal victimization was enough in this case for justice to be done. Thanks to federal legislation under the Victims of Child Abuse Act of 1990²² giving Lauren the ability to testify in this manner, her trafficker is now serving a twelve and a half

14. Memorandum of Points and Authorities, *supra* note 8, at 3.

15. *Id.* at 3-4.

16. *Id.*

17. *Id.*

18. *See id.* at 5 (citing 18 U.S.C. § 3509(b)(1)(A) (2012)).

19. *Id.* at 9; 18 U.S.C. § 3509(b)(1)(A).

20. Memorandum of Points and Authorities, *supra* note 8, at 9.

21. Plea Agreement, United States v. Ballard, No. 3:12-cr-02259-BEN (S.D. Cal. Nov. 1, 2012) (No. 43).

22. Victims of Child Abuse Act of 1990, Pub. L. No. 101-647, Title II, § 225, 104 Stat. 4798, 4798-800 (1990) (codified as amended at 18 U.S.C. § 3509 (2012)).

year prison sentence.²³

Imagine for a moment that Lauren's trafficker had not brought her from Texas to California. What if he had met her in California and moved her from San Diego, to Los Angeles, and then to San Francisco,²⁴ to perform her "dates"?²⁵ The federal government would have lacked jurisdiction over the case, and the state of California would have had to step in. Based on Lauren's emotional state, she likely would have been unable to testify against her trafficker in open court. Without her testimony, the State of California would likely have been unable to prosecute. Unfortunately, sexually trafficked minors such as Lauren are unable per statutory definition to testify using 2-Way CCTV in California courts.

Under the current California statute governing the ability of a child witness to testify outside of the courtroom via 2-Way CCTV,²⁶ Lauren would have been unable to testify using such a shielding method for two reasons: (1) minor victims of sex trafficking and commercial sexual exploitation do not fall within the statutory definition of "child victims" (although child victims of sexual abuse and violent felonies are),²⁷ and (2) at fourteen, she is statutorily too old to be considered a "child witness."²⁸ However, victims such as Lauren are just as much in need of this type of procedural safeguard that is already available to child victims of sexual abuse and violent felonies. Largely, this is due to the inherently abusive and coercive nature of the trafficker-traffickee relationship that creates unique vulnerabilities in domestic minor sex trafficking victims.

23. See Judgment in a Criminal Case at 2, *United States v. Ballard*, No. 3:12-cr-02259-BEN (S.D. Cal. Feb. 14, 2013) (No. 55) (sentencing Ballard to one hundred and fifty months in federal prison plus an additional period of supervised release).

24. These three California cities were included on a list of thirteen cities nationwide identified as High Intensity Child Prostitution Areas by the FBI's Crimes Against Children Unit ("CACU"). The full list from the CACU is: (1) Los Angeles, California; (2) Minneapolis, Minnesota; (3) Dallas, Texas; (4) Detroit, Michigan; (5) Tampa, Florida; (6) Chicago, Illinois; (7) San Francisco, California; (8) San Diego, California; (9) Miami, Florida; (10) New York City; (11) Washington, D.C.; (12) Las Vegas, Nevada; and (13) St. Louis, Missouri. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE FEDERAL BUREAU OF INVESTIGATION'S EFFORTS TO COMBAT CRIMES AGAINST CHILDREN 70 n.122 (2009), <http://www.justice.gov/oig/reports/FBI/a0908/chapter4.htm#122>.

25. Due to the interstate requirement under 18 U.S.C. § 1591 and 18 U.S.C. § 2423(a), the federal government would no longer have jurisdiction to prosecute Lauren's trafficker. California would then have to charge and prosecute him under state law. See 18 U.S.C. § 1591(a)(1) (2012) ("Whoever knowingly . . . in or affecting interstate or foreign commerce . . ."); 18 U.S.C. § 2423(a) (2012) ("A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce . . .").

26. CAL. PENAL CODE § 1347 (West 2004 & Supp. 2015).

27. *Id.* § 1347(b).

28. *Id.*

California has consistently received an “F” report regarding its ability to combat domestic minor sex trafficking.²⁹ In fact, California received the lowest overall score in the country in this area and lags far behind its sister states in enacting measures to combat domestic minor sex trafficking.³⁰ However, there is hope for the future. With the recent 81 percent approval of Proposition 35³¹ enacting the Californians Against Sexual Exploitation (“CASE”) Act, the people of California have recognized the need for a drastic shift in state sex trafficking law. The Act attempts to “strengthen California’s ability to punish human trafficking using a variety of legislative patches;”³² however, evidentiary changes under the Act could limit the state’s long-term ability to convict domestic sex traffickers of minors.³³

29. Shared Hope International, a nonprofit whose stated mission is “to eradicate sex trafficking,” conducts the “Protected Innocence Challenge” each year by releasing annual state report cards in regards to each state’s laws aimed at responding to the problem of domestic minor sex trafficking. *Protected Innocence Challenge*, SHARED HOPE INT’L, <http://sharedhope.org/what-we-do/bring-justice/reportcards/> (last visited Aug. 18, 2015); *Homepage*, SHARED HOPE INT’L, <http://sharedhope.org/> (last visited Aug. 18, 2015). From 2011 to 2014, California has consistently received a failing score. SHARED HOPE INT’L, 2014 PROTECTED INNOCENCE CHALLENGE: A LEGAL FRAMEWORK OF PROTECTION FOR THE NATION’S CHILDREN 10 (2014) [hereinafter 2014 PROTECTED INNOCENCE CHALLENGE], <http://sharedhope.org/wp-content/uploads/2014/11/2014%20Protected%20Innocence%20Challenge%20Report.pdf> (reporting annual scores of 50 percent, 50 percent, 43.5 percent, and 41 percent, respectively, from 2011–2014).

30. 2014 PROTECTED INNOCENCE CHALLENGE, *supra* note 29 at 14.

31. The 81.3 percent approval of Proposition 35 in the November 2012 election makes it the most successful California ballot initiative ever. *Prop 35*, CAS RES. & EDUC., <http://www.casre.org/prop-35/> (last visited Aug. 18, 2015).

32. Yonatan Moskowitz, Note, *Not in My Digital Backyard: Proposition 35 and California’s Sex Offender Username Registry*, 24 STAN. L. & POL’Y REV. 571, 572 (2013).

33. Prior to the barring of such evidentiary procedures under statutes like the CASE Act, prosecutors were able to use the threat of prostitution charges to bargain with minor sex trafficking victims to encourage them to testify against their traffickers in court. Additionally, if a trafficking victim gave false testimony in an effort to protect her trafficker while on the stand, prosecutors were able to introduce evidence of the victim’s past sexual history to show that she had in fact been trafficked. *See, e.g.*, Judy Hale Reed, *Human Trafficking in Pennsylvania, Part II: Legislation, and a Recent Case*, JURIS MAGAZINE (Oct. 28, 2013), <http://jurismagazine.com/human-trafficking-in-pennsylvania-part-ii-legislation-and-a-recent-case/> (“In addition, Attorneys Kim and Morgan both shared ways to corroborate victims’ stories, including use of the traffickers Facebook pages, to compensate for the risk that victims would recant testimony due to the coercion and manipulation of their trafficker “boyfriends.”). *See also* Jennifer Gentile Long & Teresa Garvey, *No Victim? Don’t Give Up*, STRATEGIES: THE PROSECUTORS’ NEWSLETTER ON VIOLENCE AGAINST WOMEN, Nov. 2012, at 1, http://www.aequitasresource.org/S_Issue_7_No_Victim-Dont_Give_Up.pdf (discussing the common reluctance of human trafficking victims, including sex trafficking victims, to testify at trial and evidentiary strategies that can be employed to combat this). Under the new evidentiary provisions enacted under Proposition 35, this is no longer possible. *See* CAL. EVID. CODE § 1161(a)–(b) (West Supp. 2015) (“(a) Evidence that a victim of human trafficking . . . has engaged in any commercial sex act as a result of being a victim of human trafficking is inadmissible to prove the victim’s criminal

While such reform in California is a step in the right direction, as it has arguably resulted in a de facto decriminalization prohibiting the prosecution of minors for prostitution,³⁴ California has failed to enact a comprehensive framework addressing this new reality. As a result of its failure to enact reforms reflecting the will of its people, inconsistencies in California's treatment of domestic minor sex trafficking victims are serving as procedural obstacles that law enforcement and prosecutors are forced to overcome in order to garner convictions. Prosecutors must be provided with tools to enable them to efficiently convict sex traffickers under this new evidentiary framework. Accordingly, the de facto decriminalization of minor victims of sex trafficking resulting from the CASE Act represents a drastic shift in policy with respect to combating sex trafficking. This shift necessitates reformed prosecutorial methods to achieve state goals until a commitment is made by the California legislature to adopt a comprehensive decriminalization framework utilizing full victim protections for domestic minor sex trafficking victims.

This Note argues for an intermediate solution until a full commitment to decriminalization is realized in California. Until such a time, California should alter the existing California Child Witness Protection statute under Penal Code § 1347 in two ways: (1) expand the use of 2-way CCTV to minor victims of sex trafficking and commercial sexual exploitation, and (2) expand the definition of "child witness" to include minors under age eighteen. Such procedural changes would provide domestic minor sex trafficking victims, a newly protected class under the CASE Act, with the

liability for the commercial sex act. (b) Evidence of sexual history or history of any commercial sex act of a victim of human trafficking . . . is inadmissible to attack the credibility or impeach the character of the victim in any civil or criminal proceeding.").

34. *But see* *In re Aarica S.*, 168 Cal. Rptr. 3d 136, 137 (Ct. App. 2014) (holding that section 1161(a) of the California Evidence Code "applies only when there is a specific causal connection between the person's status as a victim of human trafficking and the commission of the commercial sex act at issue" and that because the juvenile court had determined that the minor defendant was not a "victim of human trafficking," as she had no "pimp" at the time she solicited the undercover officer at issue, the lower court was right in denying her motion to exclude evidence under that evidentiary provision). Although there was ample evidence before the lower court to demonstrate that the minor defendant had been brutally victimized by the domestic minor sex trafficking industry, as she testified that from ages fourteen to seventeen she was the "property" of ten various pimps, the court did not find that her decision to solicit an undercover officer was "as a result of" sex trafficking, as required per section 1161(a) because at the time, she was living with her grandmother and not under the direct control of a pimp. *Id.* at 138–40. While I do not believe that such a specific showing of causation should be required in order for section 1161(a) to apply, as the defendant's continued victimization at the hands of her pimps was, in essence, a proximate cause of her continued solicitation efforts, the defendant's unique circumstance of soliciting without a pimp does not apply to the vast majority of underage girls engaged in "the life" and thus is not the focus of this Note.

ability to testify via 2-Way CCTV. While this would only provide a stopgap measure for victims and prosecutors alike, this intermediate solution would better align the statute with state interests and existing federal legislation by recognizing minors engaging in commercial sex acts as victims. In failing to allow minor sex trafficking victims to testify via 2-Way CCTV, California has caused this already vulnerable group to become even more powerless when pursuing justice against their traffickers.

This Note will first provide an overview of the national scope of the domestic minor sex trafficking problem in Part I, highlighting how this problem is particularly acute in California. Additionally, it will demonstrate the unique vulnerabilities sexually trafficked minors face that warrant California's adoption of a full decriminalization model prohibiting the prosecution of minors for prostitution. Next, Part II will discuss the federal decriminalization model for sex trafficking in relation to minor victims and the statutory models other states have adopted to combat this problem. Part III will then show how the "piecemeal" nature in which California has enacted laws to combat domestic minor sex trafficking has resulted in widespread inconsistencies of treatment regarding minor victims. Specifically, it will delve into the recent enactment of the CASE Act and the resulting *de facto* decriminalization, which rightfully prohibits the prosecution of minors for child prostitution. It discusses the necessity, as a stopgap measure, of expanding the current California shielding statute regarding the use of 2-Way CCTV for child victims to testify outside of court to include victims of domestic sex trafficking under age eighteen.

I. THE DOMESTIC MINOR SEX TRAFFICKING PROBLEM

In order to fully comprehend why it is necessary to remove criminal culpability from the victims of domestic minor sex trafficking, or even why we should view older teenagers who engage in commercial sex acts as victims, it is necessary to understand the scope of the problem. As detailed below, the domestic minor sex trafficking industry is particularly prevalent in California and is extremely lucrative for traffickers. Given the high-monetary stakes at which these "pimps" operate, they are driven to use coercive and abusive methods to gain and maintain control over all aspects of their traffickees' lives. It is this extreme degree of coercive control that results in traffickees' true victimization, making them unable to consent to the sexual acts in which they are engaging. Thus, even older teenage traffickees need to be classified as victims and afforded full protection under the law.

A. NATIONAL OVERVIEW OF DOMESTIC MINOR SEX TRAFFICKING

Human trafficking is a \$32 billion annual industry worldwide.³⁵ As the issue of domestic minor sex trafficking has largely been overlooked until recent years,³⁶ it is somewhat unsurprising, although no less upsetting, that the United States continues to be “the only modern democratic country where the majority of trafficking victims are its own citizens.”³⁷

Under the federal human trafficking statute, one “severe form of trafficking in persons” is defined as “the recruitment, harboring, transportation, provision, obtaining, patronizing or soliciting of a person for the purpose of a commercial sex act”³⁸ “in which the person induced to perform [the commercial sex act] has not attained 18 years of age.”³⁹ Due to the “commercial” aspect of this crime, in which a sexual act is being performed on the victim in exchange for “anything of value,”⁴⁰ it is considered a separate crime from other sexual crimes such as child sexual abuse, assault or rape.⁴¹ However, many argue that these minors are in reality victims of child sexual abuse as they are subjected to multiple forms of rape each and every day.⁴²

While it is notoriously difficult to accurately account for all minor victims of commercial sexual exploitation domestically,⁴³ the Federal

35. Brooke Axtell, *Selling American Girls: The Truth About Domestic Minor Sex-Trafficking*, FORBES (Dec. 3, 2012, 6:00 AM), <http://www.forbes.com/sites/shenegotiates/2012/12/03/selling-american-girls-the-truth-about-domestic-minor-sex-trafficking/>.

36. See Nicholas Kristof, Op-Ed., *What About American Girls Sold on the Streets?* N.Y. TIMES (Apr. 23, 2011), http://www.nytimes.com/2011/04/24/opinion/24kristof.html?_r=0 (“When we hear about human trafficking in India or Cambodia, our hearts melt. . . . But in the United States we see girls all the time who have been trafficked—and our hearts harden.”).

37. Tanya Mir, Note, *Trick or Treat: Why Minors Engaged in Prostitution Should Be Treated as Victims, Not Criminals*, 51 FAM. CT. REV. 163, 164 (2013).

38. 22 U.S.C. § 7102(10) (2015) (as amended by Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat. 227).

39. *Id.* § 7102(9)(A).

40. *Id.* § 7102(4).

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

42. See, e.g., Kate Brittle, Note, *Child Abuse By Another Name: Why the Child Welfare System is the Best Mechanism in Place to Address the Problem of Juvenile Prostitution*, 36 HOFSTRA L. REV. 1339, 1341 (2008) (“Domestic juveniles should be treated and viewed as victims of a horrific form of child abuse. The fact that a juvenile is prostituting is enough to establish a prima facie case of child abuse. The juvenile’s parents are guilty of failing to protect their child from harm and the pimp is liable for acts of child abuse or neglect as a person responsible for the welfare of a child.”).

43. A CALL FOR MULTI-SYSTEM COLLABORATION IN CALIFORNIA, *supra* note 41, at 17.

Bureau of Investigation (“FBI”) reports that at least one hundred thousand American children annually are victims of child prostitution, with nearly three hundred thousand children at risk of becoming victims of commercial sexual exploitation (“CSE”) each year.⁴⁴ Unlike traditional cases of child sexual abuse, CSE of minors typically starts during adolescence, with boys typically starting to be exploited at ages eleven to thirteen and girls from ages twelve to fourteen.⁴⁵ However, as 98 percent of sex trafficking victims are women and girls,⁴⁶ this Note will focus exclusively on female victims under the assumption that they will begin to be trafficked between the ages of twelve to fourteen. Recent studies support this finding.⁴⁷

B. DOMESTIC MINOR SEX TRAFFICKING IS A PARTICULARLY ACUTE PROBLEM IN CALIFORNIA

Each state should have a duty to provide its citizens with adequate protections and prosecute criminals without relying solely on the federal government.⁴⁸ In the case of domestic minor sex trafficking, state and local officials are more likely than federal officials to come into contact with minor victims and, when they do so, will be better equipped to identify them as victims due to the frequency of their interactions.⁴⁹ For example, at a hearing before the Senate Judiciary Committee on Human Rights and the Law, the State’s Attorney of Cook County, Illinois testified that “crucial leads arise on a recurring basis” due to the “daily interaction between local law enforcement and those forced to work in the sex trade.”⁵⁰ Additionally,

44. *Id.* at 9.

45. *Id.*

46. U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 45 (2012), <http://www.state.gov/documents/organization/192587.pdf>. See FAQs, SHARED HOPE INT’L, <http://sharedhope.org/learn/faqs/> (“Pre-teen or adolescent girls are more susceptible to the calculated advances, deception, and manipulation tactics used by traffickers/pimps”) (last visited Aug. 19, 2015).

47. In a study completed as part of the Demanding Justice Project’s Benchmark Assessment Report, out of 247 national cases analyzed in which a “john” attempted to solicit a commercial sexual act with a minor, 41.6 percent of the minor victims were from the ages of eleven to fourteen, and 48.7 percent involved victims from ages fifteen to seventeen. SHARED HOPE INT’L, DEMANDING JUSTICE PROJECT BENCHMARK ASSESSMENT REPORT 22 (2013) [hereinafter DEMANDING JUSTICE REPORT], <http://sharedhope.org/wp-content/uploads/2013/11/Demanding-Justice-Project-Benchmark-Assessment-Report-2013.pdf>.

48. Rebecca Carroll Sager, Note, *An Anomaly of the Law: Insufficient State Laws Fail to Protect Minor Victims of Sex Trafficking*, 38 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 359, 360 (2012).

49. *Id.* at 367 (citing U.S. DEP’T STATE, TRAFFICKING IN PERSONS REPORT 339 (2010), <http://www.state.gov/documents/organization/142979.pdf>).

50. *In Our Own Backyard: Child Prostitution and Sex Trafficking in the United States: Hearing Before the Subcomm. on Human Rights & the Law of the S. Comm. on the Judiciary*, 111th Cong. 13 (2010) (statement of Anita Alvarez, State’s Attorney for Cook County, Illinois).

state and local social service providers as well as educators are likely to come into contact with domestic minor sex trafficking victims.⁵¹ Finally, the federal government simply has neither the funds nor the personnel to effectively prosecute the majority of domestic minor sex trafficking cases that arise.⁵²

Based on a slew of state reports aimed at combating human trafficking by the State of California, the State is uniquely aware of how acute the problem of domestic minor sex trafficking is within its borders.⁵³ Based on the FBI's analysis, three of the thirteen High Intensity Child Prostitution metropolitan areas are within California: San Francisco, Los Angeles, and San Diego.⁵⁴ California has become a hub for minor domestic sex trafficking.⁵⁵ From 2010–2012 alone, California's nine task forces designated specifically to combat human trafficking have identified 1,277 sex trafficking victims; 72 percent of these victims were from America.⁵⁶ Increasingly in California, street gangs are migrating to commercial sexual exploitation as their main profit centers—sex trafficking is perceived as a low-risk, high-reward enterprise in which gang members have a lower probability of being detected by law enforcement than with arms or drug dealing.⁵⁷ This has resorted in former rival gangs coming together to join forces and engage in sex trafficking on a larger scale than ever before.⁵⁸ It has been estimated that a minor sex trafficker could earn up to \$650,000 annually by exploiting only four children.⁵⁹

Looking at the increased prevalence of minor sex trafficking in California—and the State's role as an important player in the national

51. Tessa L. Dysart, *The Protected Innocence Initiative: Building Protective State Law Regimes for America's Sex-Trafficked Children*, 44 COLUM. HUM. RTS. L. REV. 619, 631 (2013).

52. *Id.* at 630.

53. *E.g.*, A CALL FOR MULTI-SYSTEM COLLABORATION IN CALIFORNIA, *supra* note 41; KAMALA D. HARRIS, ATT'Y GEN., CAL. DEP'T OF JUSTICE, THE STATE OF HUMAN TRAFFICKING IN CALIFORNIA (2012) [hereinafter CALIFORNIA HUMAN TRAFFICKING REPORT], <https://oag.ca.gov/sites/all/files/pdfs/ht/human-trafficking-2012.pdf>.

54. *See supra* note 24.

55. A CALL FOR MULTI-SYSTEM COLLABORATION IN CALIFORNIA, *supra* note 41, at 1.

56. CALIFORNIA HUMAN TRAFFICKING REPORT, *supra* note 53, at 4.

57. *Id.* at 18–19.

58. *See, e.g., id.* at 19 (“In 2011, 38 members of the Oceanside Crips Enterprise—made up of three separate Crip gang sets—were charged with a racketeering conspiracy, including the prostitution of minors and adults. The defendants allegedly set aside traditional gang distinctions and collaborated to expand their territory against rival gangs and engage in the sex trafficking of girls and women . . .”).

59. A CALL FOR MULTI-SYSTEM COLLABORATION IN CALIFORNIA, *supra* note 41, at 11. *See also* Barbara Grady, *Youth Tracking in Oakland: Big Business Despite Government, Police Efforts (Series Part 1)*, OAKLAND LOCAL (May 5, 2010, 7:07 AM), <http://archive.oaklandlocal.com/article/youth-trafficking-part-1.html> (citing the figure as \$632,000 a year).

response to combat domestic minor sex trafficking—it is clear that California needs to take further, robust action to protect minor victims from these types of abuses. Such a need was recently recognized by the California Child Welfare Council, which conducted its own research and issued a comprehensive report entitled “Ending the Commercial Sexual Exploitation of Children: A Call for Multi-System Collaboration in California,” detailing the cycle of commercial sexual exploitation and abuse sustained by minor trafficking victims.⁶⁰

C. THE UNIQUE VULNERABILITIES OF MINORS WHO HAVE BEEN DOMESTICALLY SEX-TRAFFICKED

As is detailed below, minor sex trafficking victims are uniquely susceptible to the advances of experienced traffickers based on the victims’ often long-term history of past physical abuse, sexual abuse, and neglect resulting from their placement in the foster care system. Once they begin living “the life,” they are subject to further mental, physical, and sexual abuse at the hands of their traffickers and the thousands of johns with whom they are coerced to engage in sexual acts. Below is a detailed look at the lives of these trafficking victims, the challenges they face, and the types of long-term emotional and physical anguish they undergo at the hands of their traffickers; the combination of these factors calls for treating such children as victims in the eyes of both state and federal law.

1. Targeting of at Risk Youth

A majority of children who go on to become victims of sexual trafficking are runaways living on the streets who have fled unstable home lives.⁶¹ Many have been entangled with the foster care system, shuffled back and forth between group homes, foster homes,⁶² or child protective services. As a result, once they become exploited, their absence frequently goes unnoticed until a run-in with law enforcement occurs.⁶³ Their stories involve family histories of substance abuse and often sexual and physical abuse as well.⁶⁴ Among CSE girls, a history of child sexual abuse is the

60. A CALL FOR MULTI-SYSTEM COLLABORATION IN CALIFORNIA, *supra* note 41, at 13–20.

61. 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, 21 (2002).

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

63. A CALL FOR MULTI-SYSTEM COLLABORATION IN CALIFORNIA, *supra* note 41, at 19.

64. See *Domestic Minor Sex Trafficking: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 144 (2010) (statement of Ernie Allen,

most common shared characteristic;⁶⁵ victims of child sexual abuse are “28 times more likely to be arrested for prostitution at some point in their lives than children who were not sexually abused.”⁶⁶ These children are the most powerless and vulnerable members of society, forced to make their own way in the world. Traffickers and pimps⁶⁷ recognize the vulnerability of these children and target them relentlessly. It is estimated that one in three of these children will be “lured into prostitution within forty-eight hours of leaving home.”⁶⁸

2. Recruitment Methods

There are two methods used by traffickers to recruit their victims: the “Romeo Pimp” paradigm and the “Gorilla (or Guerilla) Pimp” paradigm.⁶⁹ Under the more common “Romeo Pimp” method, the exploiter will approach his victim initially as a lover; he will shower the victim with attention, affection, and gifts to craft a powerful relationship of dependence and attachment early on.⁷⁰ These exploiters become the “boyfriend” of their victims, and over time, the “romance” of the relationship deteriorates; at some point, the pimp will ask the child to do him a “favor” by selling sex as money gets tight.⁷¹ The victim obliges, in hopes of the romantic

President and CEO of Nat’l Ctr. for Missing & Exploited Children) http://judiciary.house.gov/_files/hearings/printers/111th/111-146_58250.PDF.

65. Francine T. Sherman & Lisa Goldblatt Grace, *The System Response to the Commercial Sexual Exploitation of Girls*, in *JUVENILE JUSTICE: ADVANCING RESEARCH, POLICY, AND PRACTICE*, 331, 336 (Francine T. Sherman & Francine H. Jacobs eds., 2011) (citing several studies to show that many commercially sexually exploited children had been previously sexually abused and that the percentages of such children who had previously been abused ranged from 68 percent to 95 percent).

66. *Id.*

67. Although pimps are a subset of traffickers, they are responsible for the trafficking of the majority of minor females. *Child Exploitation and Obscenity Section: The Prostitution of Children*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/criminal-ceos/prostitution-children> (last visited Aug. 19, 2015). This Note uses the term “pimp” and “trafficker” interchangeably.

68. *Commercially Sexually Exploited Children: National Perspective*, SEATTLE HUMAN SERVS. DEP’T, <http://www.seattle.gov/humanservices/domesticviolence/prostitutedyouth/> (last visited Aug. 19, 2015).

69. *Trafficked Teen Girls Describe Life in “the Game,”* YOUTH RADIO NPR (Dec. 6, 2010, 4:26 PM), <http://www.npr.org/2010/12/06/131757019/youth-radio-trafficked-teen-girls-describe-life-in-the-game>; *Glossary of Trafficking Terms*, SHARED HOPE INT’L, <http://sharedhope.org/learn/traffickingterms/> (last visited Aug. 19, 2015).

70. Jill Laurie Goodman, *What We Know About Human Trafficking: Research and Resources*, in *LAWYER’S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE FOR VICTIMS* 1, 9 (Jill Laurie Goodman & Dorchen A. Leidholdt eds., 2011), <https://www.nycourts.gov/ip/womeninthecourts/pdfs/LMHT.pdf>.

71. *Trafficked Teen Girls Describe Life in “the Game,”* *supra* note 69. See also LINDA A. SMITH ET AL., *THE NATIONAL REPORT ON DOMESTIC MINOR SEX TRAFFICKING: AMERICA’S PROSTITUTED CHILDREN* 31 (2009), http://sharedhope.org/wp-content/uploads/2012/09/SHI_National_Report_on_DMST_2009.pdf.

relationship returning.⁷²

Under the alternate paradigm, the “Gorilla (or Guerilla) Pimp” uses violence and fear from the very outset of the relationship—these traffickers will seek out vulnerable children in homeless shelters, schools, group homes, and shopping malls, among other places.⁷³ They will even steal children off the street.⁷⁴ Once abducted, these children face brutal violence at the hands of their exploiters, often subject to rapes by multiple men and continued beatings.⁷⁵ Victims are then forced to sell themselves to strangers and return all earnings to their pimps.⁷⁶

3. Trafficker’s Assertion and Maintenance of Control over Minor Victims

Once traffickers successfully recruit their victims, they employ methods of coercion and control to maintain their dominance, causing large-scale psychological harm to their victims.⁷⁷ “Pimps and customers use methods of coercion and control like those of other batterers: economic exploitation, social isolation, verbal abuse, threats, physical violence, sexual assault, captivity, minimization and denial of their use of physical violence and abuse.”⁷⁸ These are extremely effective tactics to use against a young child. Due to the total control the exploiter exhibits over victims, one survivor expert has equated the relationship to that of a cult;⁷⁹ the reach of the exploiter becomes so pervasive in the life of the minor that oftentimes she does not even recognize that she is being exploited or will attempt to rationalize her exploiter’s acts in a manner commonly found in intimate partner violence.⁸⁰

In addition to the mental manipulation the exploiter employs, he also uses violence to ensure his victim’s maximum profitability⁸¹—if a young

72. SMITH ET AL., *supra* note 71, at 31.

73. Goodman, *supra* note 70, at 9.

74. *Trafficked Teen Girls Describe Life in “the Game,” supra* note 69 (As one minor victim of sex trafficking described, “[A]ll I heard was, ‘Man, go get that girl!’ And one of them came out and dragged me by my hair, and he pulled me into the car. . . . [A]fter [I] was kidnapped, at least six men gang-raped [me]. [I] was then driven to Sacramento, where [my] thirty-two-year-old pimp put [me] out on the street as a prostitute.”).

75. *Id.*

76. A CALL FOR MULTI-SYSTEM COLLABORATION IN CALIFORNIA, *supra* note 41, at 14.

77. *Id.* at 14–16.

78. Melissa Farley, *Sex for Sale: Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly*, 18 YALE J.L. & FEMINISM 109, 111 (2006).

79. SMITH ET AL., *supra* note 71, at 37.

80. A CALL FOR MULTI-SYSTEM COLLABORATION IN CALIFORNIA, *supra* note 41, at 15–16.

81. *Id.* at 14–15.

girl brings back less than the expected earnings for the night, she could be “hit, kicked, punched, struck with objects, burned, cut with knives,” or even murdered.⁸² Unsurprisingly, based on these common control tactics, the life expectancy of a sexually exploited child is a mere seven years.⁸³ If the victim herself is not beaten, then threats of violence to her family and loved ones are common.⁸⁴ The victim is made to feel as though she will not be welcomed home if she tries to leave her abuser and is taught to fear law enforcement and social service providers.⁸⁵ It is recognized that an exploited child could have twenty “relapses” before she is able to fully free herself from her exploiter, if she even ever gains the strength to try.⁸⁶

4. Harms Caused by Minor Sexual Exploitation—Trauma Bonding

Due to the combination of recruitment tactics employed by traffickers, the extreme control pimps exert over their victims, repeated sexual exploitation, and the stress of the street lifestyle, minor domestic trafficking victims suffer massive long- and short-term harms.⁸⁷ Researchers have compared the experiences of trafficking victims with those of “hostages, prisoners of war, or concentration camp inmates.”⁸⁸ Studies have shown that 68 percent of commercially sexual exploited children suffer from Post-Traumatic Stress Disorder (“PTSD”) and increased rates of depression.⁸⁹ Many suffer with substance abuse and other negative long-term health consequences as a result of their trafficking-victim lifestyle.

Oftentimes, when local law enforcement makes contact with a victim of child sex trafficking, the child is reluctant to identify herself as a victim. This stems from a condition known as “trauma bonding,” in which victims form a dysfunctional attachment with their exploiters “in the presence of danger, shame, or exploitation.”⁹⁰ Such a response stems from the

82. CATHY ZIMMERMAN ET AL., THE HEALTH RISKS AND CONSEQUENCE OF TRAFFICKING IN WOMEN AND ADOLESCENTS: FINDINGS FROM A EUROPEAN STUDY 46 (2003), <http://www.lshtm.ac.uk/php/ghd/docs/traffickingfinal.pdf>.

83. A CALL FOR MULTI-SYSTEM COLLABORATION IN CALIFORNIA, *supra* note 41, at 15.

84. Goodman, *supra* note 70, at 10.

85. See DEBRA BOYER, WHO PAYS THE PRICE? ASSESSMENT OF YOUTH INVOLVEMENT OF PROSTITUTION IN SEATTLE 37 (2008), <http://www.prostitutionresearch.com/Boyer%20Who%20Pays%20the%20Price.pdf> (“Prostituted adolescents are also subject to violence, threats, and coercion of pimps. They are separated from families and support systems, moved to avoid law enforcement and often work on ‘prostitution tracks.’”).

86. A CALL FOR MULTI-SYSTEM COLLABORATION IN CALIFORNIA, *supra* note 41, at 16 (citing a Meeting with Los Angeles County Task Force on Sex Trafficking of Foster Children (Jan. 22, 2013)).

87. *Id.*

88. Goodman, *supra* note 70, at 11–12.

89. A CALL FOR MULTI-SYSTEM COLLABORATION IN CALIFORNIA, *supra* note 41, at 16.

90. SMITH ET AL., *supra* note 71, at 43 (quoting PATRICK J. CARNES, THE BETRAYAL BOND:

exploiter's use of a "powerful mix of loving care alternated with violence, threats, and dehumanizing behavior,"⁹¹ and is sometimes referred to as Stockholm Syndrome.⁹² Pimps often move their victims around "a circuit" from city to city to keep them isolated and further dependent on their exploiters.⁹³ As a result, fewer than half of sexually exploited children recognize that their pimp is "not operating in their best interest."⁹⁴

II. FEDERAL SEX TRAFFICKING LEGISLATION RECOGNIZING MINORS AS VICTIMS AND VARIOUS STATE FRAMEWORKS USED TO COMBAT DOMESTIC MINOR SEX TRAFFICKING

In order to combat the increasing prevalence of domestic minor sex trafficking, the federal government and many state governments are recognizing the need for the adoption of new legislative frameworks to combat such widespread acts of injustice. A national trend of trafficking regimes that refuse to hold domestic minor sex trafficking victims criminally culpable is emerging. Here, we will trace the federal government's adoption (and continued re-adoption) of the Trafficking Victims Protection Act and discuss recent state-level recognition that domestic minor sex trafficking victims lack criminal culpability.

A. THE FEDERAL TVPA LEGISLATIVE FRAMEWORK

The Victims of Trafficking and Violence Protection Act of 2000 (also known as the "Trafficking Victims Protection Act" or "TVPA"),⁹⁵ although originally enacted with a specific focus on stemming international human trafficking,⁹⁶ specifically criminalized the sex trafficking of minors and did not statutorily exclude domestic victims.⁹⁷ With its enactment, all

BREAKING FREE OF EXPLOITIVE RELATIONSHIPS 29 (1997)).

91. *Id.* at 44.

92. *Id.*

93. CALIFORNIA HUMAN TRAFFICKING REPORT, *supra* note 53, at 24.

94. WESTCOAST CHILDREN'S CLINIC, RESEARCH TO ACTION: SEXUALLY EXPLOITED MINORS (SEM) NEEDS AND STRENGTHS 11 (2012), http://fosteryouthalliance.org/wp-content/uploads/2012/07/WCC_SEM_Needs-and-Strengths_FINAL.pdf.

95. Victims of Trafficking and Violence Prevention Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of 8, 18, 20, 22, 27, 28, and 42 U.S.C.).

96. The TVPA was focused on targeting human trafficking in which foreign-born victims were brought into the United States to be exploited within the nation's borders. Dysart, *supra* note 51, at 622. See Kathleen A. McKee, "It's 10:00 P.M. Do You Know Where Your Children Are?," 23 REGENT U. L. REV. 313, 315 (2011) (discussing the international focus of the TVPA when originally enacted in 2000).

97. *But see* Shelby Schwartz, *Harboring Concerns: The Problematic Conceptual Reorientation of Juvenile Prostitution Adjudication in New York*, 18 COLUM. J. GENDER & L. 235, 258 (2008) ("Since most domestic juvenile prostitution prosecutions, however, take place in state courts under state law, the TVPA [and the protections it affords to minor trafficking victims] is read as largely inapplicable.").

prostituted children in the eyes of the federal government are now recognized as trafficking victims and cannot be held criminally culpable for those actions. In relevant part, section 112 of the TVPA criminalized the act of knowingly “recruit[ing], entic[ing], harbor[ing], transport[ing], provid[ing] or obtain[ing] by any means a person . . . knowing . . . that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act” or “knowingly . . . benefit[ing] financially or by receiv[ing] anything of value from participation in a venture which has engaged in an act” noted above.⁹⁸ It is important to note that as originally enacted, sex trafficking of children did not require that “force, fraud, or coercion” be used by the trafficker on the victim.⁹⁹ This is a key distinction that many states did not include in their own minor sex trafficking statutes when they were enacted.¹⁰⁰

It was not until the Trafficking Victims Protection Reauthorization Act of 2005 (“TVPRA 2005”) that Congress specifically addressed the issue of domestic minor sex trafficking;¹⁰¹ the TVPRA 2005 was intended to “begin the process of developing a comprehensive strategy to prevent the victimization of U.S. citizens and nationals through domestic trafficking.”¹⁰² It was through the TVPRA 2005 that Congress allocated \$15 million in funding to the FBI to be used for the FBI’s “Operation Innocence Lost.”¹⁰³ This initiative, which involves the collaboration of the FBI, the Department of Justice Child Exploitation and Obscenity Section, and the National Center for Missing and Exploited Children, is responsible for assembling nationwide task forces utilizing federal, state, and local law enforcement to target sexual exploiters of minors.¹⁰⁴

98. Victims of Trafficking and Violence Prevention Act of 2000, Pub. L. No. 106-386, sec. 112(a)(2), § 1591, 114 Stat. 1486–87.

99. *See id.* (“[K]nowing that force, fraud, or coercion described in subsection (c)(2) will be used to cause the person to engage in a commercial sex act, *or* that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided”) (emphasis added).

100. *See infra* Part III.A. for discussion of how California is one such state.

101. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006) (codified as amended in scattered sections of 18, 22, and 42 U.S.C.). Specifically, Title II of the Act was entitled “Combating Domestic Trafficking in Persons,” and within the recitation of Congressional findings, specific references were made to the facts that anywhere from one hundred thousand to three hundred thousand children are at risk for sexual exploitation domestically and that homeless children are particularly susceptible to trafficking. *Id.* § 2(5)–(6).

102. 151 CONG. REC. E270 (daily ed. Feb. 17, 2005) (statement of Rep. Christopher H. Smith).

103. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, § 301(7)(h), 119 Stat. 3572 (codified as amended at 22 U.S.C. § 7110); H.R. REP. NO. 109-317, at 26–27, <https://www.congress.gov/109/crpt/hrpt317/CRPT-109hrpt317-pt1.pdf>.

104. Since the creation of Operation Innocence Lost eleven years ago, task forces have rescued

With another reauthorization of the TVPA in 2008,¹⁰⁵ minor sex trafficking laws were strengthened in two large-scale ways: (1) it added, “maintains . . . a person” as a way that an exploiter can be found in violation of the sex trafficking statute, and (2) it lowered the knowledge requirement of a trafficker regarding his victim’s age from a “knowing” standard, requiring knowledge that the victim is under age eighteen, to a “knowing, or in reckless disregard” of the facts standard, requiring a lesser degree of knowledge.¹⁰⁶ This lowering of the knowledge requirement is more in keeping with holding a trafficker strictly liable for his actions and aligns with a victim-centered view of the minor trafficked child instead of viewing her as a criminally culpable individual.

Finally, with its most recent reauthorization of the TVPA in 2013, Congress now requires that the Attorney General only promulgate state model domestic minor sex trafficking statutes that “protect[] children exploited through prostitution by including safe harbor provisions.”¹⁰⁷ Specifically, such model statutes must fully adopt a decriminalization regime doing the following: (1) treating individuals under age eighteen who are arrested for “engaging in, or attempting to engage in,” a commercial sex act as “victim[s] of a severe form of trafficking in persons;” (2) prohibiting the holding of such a minor criminally liable for prostitution; (3) requiring the referral of such a minor to a program that would “provide assistance to child victims of commercial sexual exploitation; and (4) not requiring minor victims to prove that their trafficker engaged in any “fraud, force, or coercion” in order to receive such safe harbor provisions.¹⁰⁸ Additionally, the 2013 reauthorization of the TVPA amended a grant program to specifically allow the federal government “to make block grants to four entities throughout the United States for the specific purpose of combating the sex trafficking of

more than 3,400 children, resulting in convictions of nearly 1,500 “pimps, madams, and their associates.” *Violent Crimes Against Children: Innocence Lost*, FBI, http://www.fbi.gov/about-us/investigate/vc_majorthefts/cac/innocencelost (last visited Aug. 20, 2015).

105. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (codified as amended in scattered sections of 6, 8, 18, 22, 28, and 42 U.S.C.).

106. *Id.* § 222(b)(5)(A)(ii) (amending 18 U.S.C. § 1591).

107. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 1243, 127 Stat. 54, 154 (amending 22 U.S.C. § 7101). This reauthorization of the TVPA was passed as an amendment to the Violence Against Women Reauthorization Act. *Trafficking Victims Protection Reauthorization Act*, ATEST, <https://endslaveryandtrafficking.org/trafficking-victims-protection-reauthorization-act/> (last visited Aug. 27, 2015).

108. *Id.* § 1243(2)(A)–(D).

minors.”¹⁰⁹

In addition to the TVPA framework discussed above and its numerous reauthorizations, in May 2015, Congress passed the landmark Justice for Victims of Trafficking Act of 2015.¹¹⁰ The Act has been hailed as a “long-awaited bill [that] promises to revolutionize America’s response to trafficking” by “address[ing] the sophistication of the crime and set[ting] forth provisions victims need and deserve.”¹¹¹ In addition to heightening penalties for traffickers,¹¹² it reauthorizes and reformulates an expired section of the TVPA by creating a “victim-centered child human trafficking deterrence block grant program”¹¹³ to allow state and local governments to “develop and implement comprehensive victim-centered programs to train law enforcement, rescue exploited children, prosecute human traffickers, and restore the lives of victims.”¹¹⁴ Thus, the federal government is continuing its trend of shifting toward a more victim-centered paradigm in its continued battle to end domestic minor sex trafficking.

B. CONTINUED STATE TREATMENT OF MINORS AS CRIMINALLY CULPABLE FOR COMMERCIAL SEX ACTS

Currently, there are ten states that have statutorily removed the criminal culpability of a prostituted child (either entirely or partially) under prostitution law.¹¹⁵ Other than these ten states, minor sex trafficking

109. KRISTIN FINKLEA, ADRIENNE L. FERNANDES-ALCANTRA, ALISON SISKIN, CONG. RESEARCH SERV., R41878, SEX TRAFFICKING OF CHILDREN IN THE UNITED STATES: OVERVIEW AND ISSUES FOR CONGRESS 9 (2015), <https://www.fas.org/sgp/crs/misc/R41878.pdf> (citing Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 1241, 127 Stat. 54, 149–53 (amending 42 U.S.C. § 14044a)).

110. Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, 129 Stat. 227 (2015).

111. Taryn Offenbacher, *Congress Passes Landmark Bill: Justice for Victims of Trafficking Act*, SHARED HOPE INT’L (May 19, 2015), <http://sharedhope.org/2015/05/19/congress-passes-landmark-bill-justice-for-victims-of-trafficking-act/> (quoting Congresswoman Linda Smith, President and Founder of Shared Hope International).

112. Justice for Victims of Trafficking Act of 2015, sec. 101 (requiring an additional \$5,000 assessment for specific classes of crimes, including convictions for human trafficking, sexual abuse, child sexual exploitation, and interstate transportation for illegal sexual activity).

113. *Id.* sec. 103.

114. SHARED HOPE INT’L, JUSTICE FOR VICTIMS OF TRAFFICKING ACT: SECTION-BY-SECTION ANALYSIS 2 (2015), http://sharedhope.org/wp-content/uploads/2015/03/Justice-for-Victims-of-Trafficking-Act-2015_Section-by-Section_Reported-....pdf. For a full breakdown of all of the new victim-centered laws and programs adopted in the Justice for Victims of Trafficking Act of 2015, see the entirety of Shared Hope International’s aforementioned *Section-by-Section Analysis*.

115. The ten states (reflecting legislation enacted as of August 1, 2013) are: Connecticut, CONN. GEN. STAT. ANN. § 53A-82 (West 2012) (Prostitution: Class A Misdemeanor); Illinois, 720 ILL. COMP. STAT. ANN. 5/11-14(d) (West 2014) (Prostitution); Kentucky, KY. REV. STAT. ANN. § 529.120 (LexisNexis 2014) (Treatment of a minor suspected of prostitution offense); Mississippi, MISS. CODE

victims are still seen as prostitution offenders under state law and are able to be prosecuted as such. Once picked up off of the streets, these child victims are treated as either adult prostitution offenders or juvenile delinquents—both of which would result in some type of detention.¹¹⁶

Advocates for state regimes that continue to charge minors under prostitution statutes argue that the “slippery slope” of decriminalizing child prostitution will encourage and “increase the number of prostituted teens”¹¹⁷ by placing “an even bigger target on the youth population for targeting by predatory pimps and gangs.”¹¹⁸ However, it is entirely possible to counteract such an effect by shifting the blame for the prostituted child back onto her pimp through increased punishment¹¹⁹ and by increasing punishment for those paying to engage in commercial sex acts with minors through stiffer statutory penalties.¹²⁰

By and large, arguments supporting state legislative frameworks that continue to hold minors criminally liable under prostitution statutes stem from the belief that minors, especially older minors, engaging in commercial sex acts are exhibiting their own independent agency and are choosing to do so of their own accord. This view of the “delinquent” or “disobedient” child who needs to be punished and taught a lesson for his or

ANN. § 97-29-49(4) (2014) (Prostitution); Minnesota, MINN. STAT. ANN. § 609.324, subd. 2–3 (2014) (Patrons; Prostitutes; Housing Individuals engaged in prostitution; Penalties) or MINN. STAT. ANN. § 609.3243 (West 2014) (Loitering with intent to participate in prostitution); Nebraska, NEB. REV. STAT. ANN. § 28-801(5) (LexisNexis 2015) (Prostitution; penalty); New York, N.Y. FAM. CT. ACT § 311.4(3) (McKinney 2014 & 2015 Supp.) (Substitution of petition or finding); North Carolina, N.C. GEN. STAT. § 14-204(c) (2014) (Prostitution); Tennessee, TENN. CODE ANN. § 39-13-513(d) (2014); Vermont, VT. STAT. ANN. tit. 13, § 2652(c)(1)(B) (2014) (Human trafficking). SHARED HOPE INT’L, STATUTORY RESPONSES TO DOMESTIC MINOR SEX TRAFFICKING VICTIMS 3–5 (2013), <http://sharedhope.org/wp-content/uploads/2014/04/SHI-Flowcharts-Updated-4.30.14.pdf>.

116. Wendi J. Adelson, *Child Prostitute or Victim of Trafficking?*, 6 U. ST. THOMAS L.J. 96, 97 (2008); Tamar R. Birkhead, *The “Youngest Profession”: Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1059 (2011) (“[T]he laws of nearly every state subject them to arrest, detention, and prosecution regardless of age or extenuating circumstances, limited only by the vagaries of enforcement discretion rather than by the statutory language itself.”); Brittle, *supra* note 42, at 1343 (stating that trafficking victims are arrested, interrogated, prosecuted and incarcerated); Schwartz, *supra* note 97, at 236 (“The traditional adjudication of juvenile prostitutes through juvenile delinquency proceedings typifies state responses.”).

117. Birkhead, *supra* note 116, at 1086.

118. Mir, *supra* note 37, at 168 n.103 (quoting Omeara Harrington, Note, *Free Lolita! The Contradictory Legal Status of Seattle’s Prostituted Youth*, 9 SEATTLE J. FOR SOC. JUST. 401, 421 (2010)).

119. *Id.* at 168.

120. See DEMANDING JUSTICE REPORT, *supra* note 47, at 4–11 (discussing the critical role johns play in creating the demand that drives the domestic minor sex trafficking industry and accordingly the need for legislation creating greater criminal disincentives for the solicitation of minors).

her wrongdoing is inherently incorporated into state policies that allow minors to be held criminally liable for engaging in commercial sex acts when they are legally unable to consent to engage in sexual activity.

Courts across the United States are beginning to address the incongruence created by holding minors criminally liable under prostitution charges while denying minors the ability to consent to sexual encounters under statutory age of consent laws.¹²¹ Given that individual states have already recognized the need to provide specific protections to children regarding sexual crimes by creating a statutory age of consent in statutory rape cases, it is logical to extend age of consent laws to a minor's engagement in commercial sex acts.¹²²

There are two regimes that states have begun implementing to combat the inconsistency of holding domestic sex trafficking victims criminally liable under prostitution statutes that were intended to apply to individuals over age eighteen: (1) regimes decriminalizing minor sex trafficking victims and (2) regimes implementing diversion programs for these victims.¹²³ Although slow to be adopted by individual states relative to the federal government, thanks to reports such as the Protected Innocence Challenge,¹²⁴ initiated by the organization Shared Hope International, these victim-centered regimes are slowly being adopted by state legislatures. These two statutory methods, as well as regimes combining the two methods, are discussed below.

121. See, e.g., *In re B.W.*, 313 S.W.3d 818 (Tex. 2010) (holding that because a thirteen-year-old in Texas is unable to legally consent to sex based on the statutory age of consent, a thirteen-year-old cannot be prosecuted for prostitution). Additionally, the age of consent to engage in sexual activity in California is eighteen years old. CAL. PENAL CODE § 261.5(a) (West 2014). Based on the logic of the Texas Supreme Court, no minor in California would legally be able to consent to engage in commercial sex acts.

122. Sager, *supra* note 48, at 367.

123. See Darren Geist, *Finding Safe Harbor: Protection, Prosecution, and State Strategies to Address Prostituted Minors*, 4 LEGIS. & POL'Y BRIEF 67, 92–104 (2012) (discussing the decriminalization, diversion, and hybrid “Safe Harbor” paradigms).

124. The Protected Innocence Challenge is

[A] comprehensive study of existing state laws designed to inspire and equip advocates. Under the Challenge, every state receives a Report Card that grades the state on 41 key legislative components that must be addressed in a state's laws in order to effectively respond to the crime of domestic minor sex trafficking. In addition, each state receives a complete analysis of this 41-component review and practical recommendations for improvement.

Protected Innocence Challenge, SHARED HOPE INT'L, <http://sharedhope.org/what-we-do/bring-justice/reportcards/> (last visited Aug. 20, 2015).

C. CURRENT STATES REGIMES COMBATING DOMESTIC MINOR SEX
TRAFFICKING SHOW A SHIFT TOWARD A RECOGNITION OF TRAFFICKED
MINORS AS VICTIMS

Due to the fact that prostitution is a state-specific crime, there is great disparity in the ways jurisdictions determine whether a minor who has been subjected to sex trafficking will be criminalized or immunized from prosecution under state prostitution statutes.¹²⁵ Below is a discussion of the various state treatments of minor sex trafficking victims, chronicling a shift toward a victim-centered, or victimization, paradigm.

1. Decriminalization

States that have adopted a decriminalization regime completely prohibit the prosecution of minors for prostitution.¹²⁶ By adopting this statutory framework, states eliminate the inherent tension between statutory rape law and child prostitution laws through acceptance of the state's statutory age of sexual consent and applying it to commercial sex acts.¹²⁷ Tennessee and Connecticut are both examples of states that have adopted laws decriminalizing child prostitution for youth under a specific age (in alignment with existing statutory rape laws).¹²⁸ The Connecticut statute prohibits the prosecution of a minor under age sixteen for prostitution¹²⁹ and implements a rebuttable presumption that sixteen and seventeen year olds charged with prostitution were coerced by someone else to engage in the commercial sex act.¹³⁰ Tennessee's law grants immunity for all minors under age eighteen from prostitution charges in both adult and juvenile court systems.¹³¹

125. Brittle, *supra* note 42, at 1343 ("Absent a strong national trafficking policy, juvenile prostitution is generally handled as an offense of an individual state's penal code. Once discovered by law enforcement, these violations are handled by either the adult criminal justice system or the juvenile justice system.").

126. A CALL FOR MULTI-SYSTEM COLLABORATION IN CALIFORNIA, *supra* note 41, at 49.

127. Megan Anitto, *Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors*, 30 YALE L. & POL'Y REV. 1, 30-33 (2011).

128. Geist, *supra* note 123, at 93-94.

129. CONN. GEN. STAT. ANN. § 53a-82(a) (West 2012 & Supp. 2015) ("A person sixteen years of age or older 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." (emphasis added)).

130. *Id.* § 53a-82(c) ("In any prosecution of a person sixteen or seventeen years of age for an offense under this section, there shall be a presumption that the actor was a victim of conduct by another person that constitutes (1) a violation of section 53a-192a, or (2) a criminal violation of 18 USC Chapter 77, as amended from time to time." (emphasis added)).

131. TENN. CODE ANN. § 39-13-513(d) (2014) ("[I]f it is determined after a reasonable detention for investigative purposes, that a person suspected of or charged with a violation of this section is under eighteen (18) years of age, that person shall be immune from prosecution for prostitution as a juvenile

2. Diversion

In states that have adopted diversion models, they do not completely render juvenile prostitution laws unenforceable. Instead, diversion programs are utilized either pre- or post-adjudication, depending on the regime that the state has adopted; these programs are typically at the discretion of the judge or prosecutor involved with the specific case.¹³² Whether the diversion occurs before or after adjudication, it is required that the child victim undergoes specialized treatment or services to deal with the trauma inflicted upon them.¹³³

For example, New York was the first state to enact such a law, deemed a Safer Harbor law, which created the presumption that a minor arrested for prostitution is a victim of a “severe form of trafficking,” as defined under the TVPA,¹³⁴ and accordingly needs to be provided with victim protections.¹³⁵ These minors are deemed Persons in Need of Supervision (“PINS”) who cannot be detained once released and are able to access to specialized services; however, PINS status can be denied if they have already been convicted of prostitution, are unwilling to accept specialized services, do not meet the federal definition of a sex trafficking victim, or have already been certified as a PIN.¹³⁶ If any of those events occur, then the minor can be sent to delinquency proceedings.¹³⁷ A similar approach has been adopted in Washington,¹³⁸ under which minors picked up for prostitution are presumed to be sex trafficking victims under the TVPA and as such, must be diverted for their first prostitution related offense (regardless of past criminal history).¹³⁹ For subsequent arrests, it is up to the prosecutor’s discretion regarding whether to divert the minor.¹⁴⁰

or adult.”).

132. See Geist, *supra* note 123, at 96–97.

133. *Id.* at 88–89 (highlighting the Brooklyn GRASP (Girls Re-Entry Assistance Support Project) diversion program).

134. 22 U.S.C. § 7102(9)(A) (2012).

135. N.Y. FAM. CT. ACT § 311.4(1)–(3) (McKinney Supp. 2015).

136. *Id.* § 311.4(3).

137. Geist, *supra* note 123, at 96–97.

138. S.B. 6476 § 9, 61st Leg., Reg. Sess. (Wash. 2010) (enacted), <http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/Senate%20Passed%20Legislature/6476-S.PL.pdf>.

139. WASH. REV. CODE § 13.40.070(7) (2014) (“Where a case is legally sufficient to charge an alleged offender with either prostitution or prostitution loitering and the alleged offense is the offender’s first prostitution or prostitution loitering offense, the prosecutor *shall divert* the case.” (emphasis added)).

140. *Id.* § 13.40.213(2) (“A prosecutor may divert a case for prostitution or prostitution loitering into the comprehensive program described in this section, notwithstanding the filing criteria set forth in RCW 13.40.070(5).”).

Under this paradigm, the diverted minors become involved in services specifically for sexually assaulted youth (as long as funding is available).¹⁴¹

3. Combination Approach

Finally, a few states have adopted a combined approach to both decriminalize minor prostitution and provide victims with specialized services. In August of 2014, Minnesota legislation went into effect, abolishing prostitution related charges for minors facing prosecution for prostitution or loitering for the purpose of prostitution to divert to treatment programs.¹⁴² In order to oversee this transition, a Safe Harbor Committee was created to ensure that “victims of juvenile sexual exploitation are identified, receive effective victim-centered and trauma-informed services, and are housed safely.”¹⁴³ Additionally, Illinois’s Safe Harbor Law prohibits prosecuting minors for prostitution and also requires that they be placed into temporary protective custody to receive treatment.¹⁴⁴

III. CALIFORNIA’S “PIECEMEAL” APPROACH TO COMBATTING DOMESTIC MINOR SEX TRAFFICKING AND THE CASE ACT’S SHIFT TOWARD A DECRIMINLIZATION REGIME

Having examined the different frameworks that the federal government and individual states have adopted to combat the growing prevalence of minor domestic sex trafficking, we next turn to the specific laws enacted in California that apply to minor domestic sex trafficking victims. When we do so, it becomes apparent that California’s “piecemeal”

141. *Id.* § 13.32A.270 (“Within available funding, when a youth who has been diverted under RCW 13.40.070 for an alleged offense of prostitution or prostitution loitering is referred to the department, the department shall connect that child with . . . services and treatment . . .”).

142. MINN. STAT. ANN. § 260B.007 subd. 6(c) (West 2014) (resolving a prior discrepancy in Minnesota law that classified minors engaging in commercial sex acts as both “delinquents” and “sexually exploited youths” by removing them from the definition of a “delinquent child”). *See also* MINN. HUMAN TRAFFICKING TASK FORCE, HUMAN TRAFFICKING & LEGISLATION AND POLICY 2 (2014), http://mnhttf.org/site/wp-content/uploads/2014/04/Human-Trafficking-Legislation-and-Policy_-April-2014.pdf (noting that as originally enacted, Minnesota Safe Harbor Laws only applied to minors under sixteen years old but that this distinction was eliminated in 2013); *Safe Harbor Minnesota*, MINN. DEP’T OF HEALTH, <http://www.health.state.mn.us/injury/topic/safeharbor/> (last visited Aug. 20, 2015) (setting forth the “comprehensive, multidisciplinary, and multi-state agency” No Wrong Door framework for providing services to sexually exploited youths such as “regional navigators, housing and shelter, comprehensive services, and training and protocol development”).

143. A CALL FOR MULTI-SYSTEM COLLABORATION IN CALIFORNIA, *supra* note 41, at 51 (citing Telephone Interview with Beth Holger Ambrose, Homeless Youth Services Coordinator, Minnesota Department of Human Services (Oct. 9, 2012)).

144. 720 ILL. COMP. STAT. 5/11-14(d) (2014); H.B. 6462, 96th Gen. Assemb., § 15(d) (Ill. 2010) (enacted), <http://www.ilga.gov/legislation/publicacts/96/PDF/096-1464.pdf>.

approach to reform, without having a comprehensive legislative framework in place, like the federal government's TVPA model, has resulted in inconsistencies. In some areas, domestic minor sex trafficking victims are treated as true victims and afforded protections accordingly, while in other areas of the law, they are denied such victim protections. Such systemic inconsistency is making it more difficult for prosecutors to convict minor sex traffickers and needs to be addressed accordingly.

A. CALIFORNIA'S HUMAN TRAFFICKING LAWS ARE RELATIVELY NEW

Under the California Trafficking Victims Protection Act as originally enacted in 2006,¹⁴⁵ California legislators in essence placed human trafficking violations under the legal umbrella of a false imprisonment paradigm.¹⁴⁶ A person was deemed guilty of human trafficking if he “deprive[d] or violate[d] the personal liberty of another with the intent to effect or maintain a felony violation of Section 266,¹⁴⁷ 266h,¹⁴⁸ 266i,¹⁴⁹ 267,¹⁵⁰ 311.4,¹⁵¹ or 518,¹⁵² or to obtain forced labor or services.”¹⁵³

Although there was a heightened punishment for traffickers convicted of exploiting minors under the age of eighteen as compared to traffickers of adults,¹⁵⁴ as originally enacted, the California human trafficking statute provided no difference in the statutory elements that had to be proven to show that an “unlawful deprivation or violation of personal liberty” had occurred for either a minor or an adult. Regardless of whether the trafficking victim was an adult or a child, under section 236.1(d)(1), the

145. CAL. PENAL CODE § 236.1 (West 2010) (effective Jan. 1, 2006 to Sept. 8, 2010).

146. *Id.* § 236; Sager, *supra* note 48, at 371.

147. CAL. PENAL CODE § 266 (West 2010) (effective Jan. 1, 2006 to Sept. 8, 2010) (“[i]nveiglement or enticement of unmarried female under 18 for purposes of prostitution, etc.; aiding and abetting; procuring female for illicit intercourse by false pretenses”).

148. *Id.* § 266h (“pimping and pimping a minor”).

149. *Id.* § 266i (“pandering and pandering with a minor”).

150. *Id.* § 267 (abduction of a person under age eighteen for the purpose of prostitution).

151. *Id.* § 311.4 (“employment or use of minor to perform prohibited acts”).

152. *Id.* § 518 (extortion).

153. *Id.* § 236.1.

154. Under section 236.1(b) of the California Penal Code, as enacted from January 2006 to September 2010, a violation under the section resulted in imprisonment in a state prison for three, four, or five years, whereas under section 236.1(c), a violation for trafficking a minor under eighteen years old was punishable by imprisonment within a state prison for four, six, or eight years. CAL. PENAL CODE § 236.1 (West 2010) (effective Jan. 1, 2006 to Sept. 8, 2010). These were far below the mandatory imprisonment period for the federal government under TVPA at the time. *See* 18 U.S.C. § 1591(b) (2008) (requiring a fine and mandatory imprisonment for at least fifteen years if the minor trafficking victim was under fourteen years old at the time of the offense or mandatory imprisonment for at least ten years if the minor trafficking victim was between fourteen years old and not yet eighteen years old at the time of the offense).

definition of human trafficking turned on a finding that the trafficker used “fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person” to traffic the victim.¹⁵⁵ Mistakenly, the California State Legislature found this statutory definition of human trafficking to be equivalent to the federal definition of a “severe form of trafficking” under the TVPA.¹⁵⁶ However, without an exception to the required element of “fraud, deceit, coercion, violence, duress, menace or threat of unlawful injury” when the sex trafficking victim is a minor, as existed under the federal TVPA framework, the California statute was very different from the federal statute.

In 2010, the California legislature amended the state’s human trafficking statute by adding an additional provision that specifically targeted minor sex traffickers by imposing an additional fine of up to \$100,000 as well as specifying that at least 50 percent of the fines collected pursuant to section 236.1 would “be granted to community-based organizations that serve victims of human trafficking.”¹⁵⁷ Arguably, these additions showed that California was attempting to adopt a more victim-focused regime; however, the continued lack of an exception to the “force, fraud, and coercion” requirement for minor trafficking victims left this already disenfranchised group very vulnerable within the state of California.

B. CALIFORNIA’S ADOPTION OF THE CASE ACT (PROPOSITION 35)
REPRESENTS A DE FACTO SHIFT TO THE FEDERAL, VICTIM-CENTERED,
DECRIMINALIZATION REGIME

With the popular enactment of the CASE Act via the Proposition 35 ballot initiative during the November 2012 election, California drastically

155. CAL. PENAL CODE § 236.1(d)(1) (West 2010) (effective Jan. 1, 2006 to Sept. 8, 2010).

156. 22 U.S.C. § 7102(9)(A) (2012) (defining a “severe form of sex trafficking in persons” as including “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person to perform such act has not attained 18 years of age”).

157. CAL. PENAL CODE § 236.1(g)–(h) (West 2012) (effective Sept. 9, 2010 to Nov. 6, 2012). The additional provision, in relevant part, states:

(g)(1) In addition to the penalty specified in subdivision (c), any person who commits human trafficking involving a commercial sex act where the victim of the human trafficking was *under 18 years of age at the time of the commission of the offense* shall be punished by a fine of not more than *one hundred thousand dollars (\$100,000)*. (2) As used in this subdivision, “commercial sex act” means any sexual conduct on account of which anything of value is given or received by any person. (h) *Every fine imposed and collected pursuant to this section shall be deposited in the Victim-Witness Assistance Fund* to be available for appropriation to fund services for victims of human trafficking. At least 50 percent of the fines collected and deposited pursuant to this section shall be granted to community-based organizations that serve victims of human trafficking.

Id. (emphasis added).

revised its human trafficking laws.¹⁵⁸ This new trafficking regime was largely presented to voters as an implementation of more stringent punishment and higher penalties for child traffickers.¹⁵⁹ While the CASE Act does institute harsher penalties for sex traffickers (of both minors and adults),¹⁶⁰ perhaps more importantly, specific provisions regarding minor sex trafficking bring the statute closer to a strict liability standard in keeping with the federal minor sex trafficking definitions under the TVPA. This shows a marked shift to a more victim-centered paradigm of minor sex trafficking victims than California had previously adopted, which could ultimately result in a higher conviction rate of pimps of minor domestic sex trafficking victims. Such results are more likely to occur if prosecutors are afforded the ability to admit minor victim testimony in an alternate procedural manner that affords victims additional protections in order to combat the evidentiary exclusions enacted by the CASE Act.

1. Removal of the “Force, Fraud, and Coercion” Requirement for Conviction of Minor Sex Traffickers

As amended by the CASE Act, section 236.1¹⁶¹ now incorporates a provision that specifically describes the actions required for a trafficker to be convicted of minor sex trafficking; it now reads:

Any person who *causes, induces, or persuades, or attempts to cause, induce, or persuade*, a person who is a minor at the time of commission of the offense to engage in a commercial sex act, with *the intent to effect or maintain* a violation of Section 266, 266h, 266i, 266j, 267, 311.1, 311.2, 311.3, 311.4, 311.5, 311.6, or 518 is guilty of human trafficking.¹⁶²

158. Californians Against Sexual Exploitation (CASE) Act (2012) [hereinafter CASE Act], http://ag.ca.gov/cms_attachments/initiatives/pdfs/i1002_11-0059_%28human_trafficking%29.pdf. See generally Melissa Hastie & Jamie Kuryllo, *Californians Against Sexual Exploitation Act (“CASE ACT”)*, 11 CAL. INITIATIVE REV. 81 (2012), <http://www.mcgeorge.edu/Documents/Publications/californiaInitiativeReviewNov2012.pdf> (providing potential voters with an overview of the changes that would be implemented by the CASE Act, pros and cons of the Act, and background regarding its road to the 2012 ballot-box).

159. Anna Almendrala, *Prop 35 Passes: California Voters Approve Harsher Sentencing for Human Traffickers*, HUFFINGTON POST (Nov. 7, 2012, 3:16 PM), http://www.huffingtonpost.com/2012/11/07/prop-35-passes-california_n_2089305.html.

160. The CASE Act raised the punishment for a sex trafficker of an adult victim to eight, fourteen, or twenty years and the punishment of a sex trafficker of a minor to a minimum of five, eight, or twelve years, if the “force, fear, [or] coercion . . .” of the minor victim is not proven and a minimum of fifteen years (to life) for sex traffickers of minors who are found to have employed “force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury” to the minor victim. See CASE Act, *supra* note 158, § 6 (amending CAL. PENAL CODE § 236.1(b)–(c) (West 2012)).

161. CAL. PENAL CODE § 236.1(c) (West 2014).

162. *Id.* (emphasis added).

Noticeably absent is the “force, fraud, or coercion” requirement listed in prior versions of the statute for minor sex traffickers; however, this statute still requires the “intent to effect or maintain a felony violation” to a listed predicate offense. If that portion of the statute were to be removed, the new minor sex trafficking definition would be even more aligned with the federal TVPA standard.¹⁶³ To further protect victims, the CASE Act also bars traffickers from being able to claim either the defense of consent by the minor to the sexual acts¹⁶⁴ or “mistake of fact” pertaining to the age of the minor trafficking victim.¹⁶⁵ This brings the minor sexual trafficking provisions under the California statute in line with age of consent laws and strict liability standards under statutory rape law.

2. Evidentiary Changes Enacted Under the CASE Act Have Resulted in a De Facto Decriminalization of Victims of Minor Sex Trafficking Prohibiting Their Prosecution for Commercial Sex Acts

In addition to the enactments under section 236.1, the CASE Act also implemented new evidentiary regulations regarding the admissibility of certain evidence during a trial for sex trafficking. Under these new provisions, evidence of a human trafficking victim’s past commercial sex acts is inadmissible (1) to prove that the victim is criminally liable for those commercial sex acts and (2) to attack the credibility or impeach the character of the victim.¹⁶⁶ Arguably, these provisions result in a de facto decriminalization of child prostitution.¹⁶⁷

163. Sager, *supra* note 48, at 372.

164. CAL. PENAL CODE § 236.1(e).

165. *Id.* § 236.1(f).

166. CAL. EVID. CODE § 1161 (West 2014). In full, the statute states:

(a) Evidence that a victim of human trafficking, as defined in Section 236.1 of the Penal Code, has engaged in any commercial sexual act as a result of being a victim of human trafficking is inadmissible to prove the victim's criminal liability for the commercial sexual act.

(b) Evidence of sexual history or history of any commercial sexual act of a victim of human trafficking, as defined in Section 236.1 of the Penal Code, is inadmissible to attack the credibility or impeach the character of the victim in any civil or criminal proceeding.

Id. As originally enacted, the CASE Act prevented any “evidence that a victim of human trafficking . . . has engaged in any commercial sex act as a result of being a victim of human trafficking” from being admitted to prove criminal liability “for any conduct related to the activity.” CASE Act, *supra* note 158, § 4. This was much broader than the subsequently enacted statute, as it could have prevented such victims from being held criminally liable for a range of criminal activities that took place while or in light of circumstances surrounding their engagement in a commercial sex act. Accordingly, this provision was amended. A.B. 694, 2013-2014 Leg., Reg. Sess. (Cal. 2013) (effective Jan. 1, 2014).

167. *But see supra* note 34 and its discussion of *In re Aarica S.*, 168 Cal. Rptr. 3d 136 (Ct. App. 2014). Additionally, advocates at the L.A. County Sex Trafficking of Foster Youth Task Force Meeting voiced their disagreement over the implementation of the CASE Act and whether it would

While these evidentiary provisions apply to all victims of human trafficking regardless of age, due to the unique vulnerability of minor victims of sex trafficking and the high level of coercive dominance their traffickers exerted over them,¹⁶⁸ it is likely that these new evidentiary provisions will most greatly affect the prosecution of minor sex trafficking cases in which the minor victim is the key witness.

Certainly, without threat of potential prostitution charges pushing them to testify against their former traffickers, many victims would be reluctant to testify while in the same room as their former exploiters. If a victim does agree to testify, but then recants her testimony in an effort to protect her former “boyfriend,” prosecutors would be unable to bring in additional evidence of the victim’s commercial sexual acts to establish the horrendous abuses she suffered at the hands of her trafficker.¹⁶⁹ By allowing minor sex trafficking victims to testify via 2-Way CCTV, many of these potential procedural snafus could be eliminated, resulting in a higher conviction rate for minor sex traffickers under the new California human trafficking framework.

C. CONSEQUENCES OF CALIFORNIA’S FAILURE TO ADOPT A DE JURE DECRIMINALIZATION FRAMEWORK

The people of California adopted the CASE Act via a “piecemeal” proposition, but the state legislature has not yet enacted a comprehensive legislative framework to cope with the fact that Proposition 35 resulted in a de facto decriminalization framework. Due to this shift from a culpability regime to a decriminalization regime, the need is greater than ever to recognize the victimization of child victims of sex trafficking so as to provide them with the rehabilitative tools and procedural protections to hold their traffickers accountable in court for their actions. Until there is a comprehensive overhaul of state policies regarding domestic minor sex trafficking, as the State of California itself recognized is necessary in a 2013 Report,¹⁷⁰ there will continue to be procedural gaps inhibiting both prosecutors and child victims from holding sex-traffickers fully accountable for their coercion and abuse of minors.

One such inconsistency between the old paradigm of holding minor sex trafficking victims criminally culpable for their actions and the de facto

decriminalize prostitution for minors. A CALL FOR MULTI-SYSTEM COLLABORATION IN CALIFORNIA, *supra* note 41, at 53.

168. *See supra* Part I for further discussion.

169. *See supra* note 33 and accompanying text.

170. A CALL FOR MULTI-SYSTEM COLLABORATION IN CALIFORNIA, *supra* note 41.

decriminalization regime that the CASE Act enacted, is California denying domestic minor sex trafficking victims the protection of testifying against their traffickers via 2-Way CCTV. From a practical standpoint, the unique vulnerabilities of domestic minor sex trafficking victims, and the level of control their former traffickers exert over them, make such procedural safeguards necessary to allow victims to effectively testify against their traffickers. By comparing the federal government's expansive treatment of such shielding safeguards with the limitations California has put in place, it is evident that California needs to statutorily expand its definition of "child victim" to include children under age eighteen who engage in commercial sex acts to align with the new de facto decriminalization regime.

1. The Federal Government's Liberal Definition of "Child Victim" Aligns with a Victim-Centered, Decriminalization Model for Victims of Domestic Minor Sex Trafficking

a. The U.S. Supreme Court's Treatment of Closed-Circuit Testimony of Sexually Abused Children

June 1988 marked the first serious challenge to a state statute enacted to afford additional procedural protections to minors testifying about sexual offenses at trial.¹⁷¹ Pursuant to an Iowa state statute,¹⁷² two thirteen-year-old girls were allowed to testify behind a one-way screen regarding their alleged sexual assault at a campground. Delivering the opinion of the Court, Justice Antonin Scalia held this statute to be in violation of the defendant's Sixth Amendment right of confrontation, as more than a general finding of necessity was required;¹⁷³ however, in her concurring opinion Justice Sandra Day O'Connor emphasized that the Confrontation "Clause 'reflects a *preference* for face-to-face confrontation at trial' and expressly recognized that this preference may be overcome in a particular case if close examination of 'competing interests' so warrants."¹⁷⁴

171. *Coy v. Iowa*, 487 U.S. 1012 (1988).

172. IOWA CODE § 910A.14 (1987) provided in relevant part:

The court may require a party be confined [sic] to an adjacent room or behind a screen or mirror that permits the party to see and hear the child during the child's testimony, but does not allow the child to see or hear the party. However, if a party is so confined, the court shall take measures to insure that the party and counsel can confer during the testimony and shall inform the child that the party can see and hear the child during testimony.

Coy, 487 U.S. at 1014 n.1 (internal quotation marks omitted).

173. *Id.* at 1021–22. Additionally, as the victims had never been able to make a positive identification of the accused, there was arguably a greater need for the accused to have been confronted with his accusers at trial. *See id.* at 1026 n.1 (J. Blackmun, dissenting) ("Apparently the girls were unable to identify appellant as their attacker.").

174. *Id.* at 1024 (J. O'Connor, concurring) (quoting *Ohio v. Roberts*, 448 U.S. 56, 63–64 (1980) (emphasis added)).

A little over a year later, the Supreme Court upheld a Maryland statutory procedure permitting a judge to receive the testimony of a child witness who was an alleged child abuse victim via one-way CCTV.¹⁷⁵

Holding that if a state makes an

adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.¹⁷⁶

At this time, twenty-four states had statutes authorizing the use of one-way CCTV testimony in child abuse cases, and eight states, including California, authorized the use of 2-Way CCTV for children giving testimony.¹⁷⁷

b. Enactment of the Victims of Child Abuse Act of 1990

Following *Maryland v. Craig*, Congress effectively codified the Supreme Court's holding by enacting 18 U.S.C. § 3509, allowing the use of videotaped testimony and 2-Way CCTV for child witnesses in certain circumstances.¹⁷⁸ The Ninth Circuit Court of Appeals has consistently upheld the constitutionality of the statute, and the Supreme Court has consistently refused to grant certiorari to cases challenging its constitutionality.¹⁷⁹

During the process of enacting what would become the Victims of Child Abuse Act of 1990 as Title II of the Crime Control Act of 1990,¹⁸⁰ there was an explicit rejection of an earlier version of a similar bill entitled the Victims of Child Abuse Act of 1990 that statutorily limited the definition of a "child" to those under age fourteen, and thus would have prevented victims ages fourteen to seventeen from being able to testify using the provisions listed under 18 U.S.C. § 3509.¹⁸¹ After presiding over

175. *Maryland v. Craig*, 497 U.S. 836, 857–60 (1990) (upholding MD. CTS. & JUD. PROC. CODE ANN. § 9-102 (West 1989)).

176. *Id.* at 855.

177. *Id.* at 853–54 & nn.3–4.

178. Sophia Rowlands, *Cole's Law Confronts Constitutional Issues: Expanding the Availability of Closed-Circuit Child Testimony in the Face of the Confrontation Clause*, 37 MCGEORGE L. REV. 294, 295 (2006).

179. *E.g.*, *United States v. Etimani*, 328 F.3d 493, 501 (9th Cir. 2003), *cert. denied*, 540 U.S. 960 (2003); *United States v. Garcia*, 7 F.3d 885, 888 (9th Cir. 1993).

180. Victims of Child Abuse Act of 1990, Pub. L. No. 101-647, Title II, 104 Stat. 4792 (1990).

181. Victims of Child Abuse Act of 1990, 101 H.R. 4688, 101st Cong. § 602(k) (as introduced in the House, May 1, 1990), <http://thomas.loc.gov/cgi-bin/query/z?c101:H.R.4688.IH:/> (limiting the definition of a "child" entitled to use testimonial shielding methods to an "individual under the age of

a Senate Hearing on Child Abuse Victims in 1989,¹⁸² then-Senator Joe Biden introduced his own version of a Victims of Child Abuse Act in the Senate that broadly defined a “child” as “a person under age 18 who is or allegedly is a victim of, a crime of child physical abuse, sexual abuse, or exploitation.”¹⁸³ Biden also co-sponsored 101 S. 3266, which would go on to be passed as the Crime Control Act of 1990.¹⁸⁴ His influence likely played a role in the lack of an age restriction in the final version of 18 U.S.C. § 3509 that was passed as part of Title II of the Crime Control Act of 1990.¹⁸⁵

As originally enacted, a child was statutorily defined as a person under eighteen who is alleged to be “a victim of a crime of physical abuse, sexual abuse, or exploitation,” with exploitation being defined as “child pornography or child prostitution.”¹⁸⁶ Thus, the federal statute affording procedural protections to minor victims and witnesses as originally enacted was much broader and far reaching than many corresponding state statutes.¹⁸⁷

c. The Current Federal 2-Way CCTV Law’s “Substantial Likelihood” Standard Allows for Broad Judicial Discretion

Under the current version of 18 U.S.C. § 3509,¹⁸⁸ the definitions of a “child” and “exploitation” remain the same as when the statute was originally enacted. Under § 3509(b), it specifies that

[t]he court may order that the testimony of the child be taken by closed-circuit television as provided in subparagraph (A) if the court finds that the child is unable to testify in open court in the presence of the defendant, for any of the following reasons: (i) The child is unable to testify because of fear. (ii) There is a *substantial likelihood*, established

14 years and includ[ing] an individual up to age 18 who has been documented by the appropriate professionals to be of a developmental age less than 14 years”). For more information about the failed Bill, see *H.R.4688 - Victims of Child Abuse Act of 1990*, CONGRESS.GOV, <https://www.congress.gov/bill/101st-congress/house-bill/4688> (last visited Aug. 20, 2015).

182. *The Treatment of Child Abuse Allegations and Victims in Judicial and Victims Services System: Hearing Before the S. Comm. on the Judiciary*, 101st Cong. 1–2 (1989) (opening statement of Joseph R. Biden, Jr., Chairman, S. Comm. on the Judiciary).

183. Victims of Child Abuse Act of 1989, S. 1965, 101st Cong. § 505 (1989), <http://thomas.loc.gov/cgi-bin/query/z?c101:S.1965.IS/>.

184. *S.3266-Crime Control Act of 1990*, CONGRESS.GOV, <https://www.congress.gov/bill/101st-congress/senate-bill/3266> (last visited Aug. 20, 2015).

185. Victims of Child Abuse Act of 1990, Pub. L. No. 101-647, Title II, § 225, 104 Stat. 4798, 4798–800 (1990) (codified as amended at 18 U.S.C. § 3509).

186. *Id.*

187. See *infra* Section III.C.2 for a full discussion of California’s state shielding statute.

188. 18 U.S.C. § 3509 (2012).

by expert testimony, that the child would suffer emotional trauma from testifying. (iii) The child suffers a mental or other infirmity. (iv) Conduct by defendant or defense counsel causes the child to be unable to continue testifying.¹⁸⁹

This statute gives trial courts broad discretion to decide whether the child should be able to testify via 2-Way CCTV; this is indicated by the “substantial likelihood” standard as compared to more stringent evidentiary standards utilized by other corresponding state statutes.¹⁹⁰

2. Limits Placed on California’s Penal Code Section 1347 Symbolize the Systemic Tensions Between Pre-CASE Act and Post-CASE Act Regimes

As discussed above, the California evidentiary code changes enacted under the CASE Act, combined with the brutal abuse minor trafficking victims experience at the hands of their exploiters, necessitate that minor trafficking victims be given the option to testify from outside the courtroom to avoid retraumatization upon seeing their traffickers in court. This will allow state prosecutors the ability to better serve the state’s interests by convicting a greater percentage of domestic minor sex traffickers. Based on the age at which domestic minor sex trafficking victims typically begin to be exploited, these child victims would be statutorily precluded from testifying via 2-Way CCTV by the age limit under the current version of section 1347 of the California Penal Code. This is largely why the Protected Innocence Challenge’s 2014 Analysis and Recommendations for California include amending section 1347 of the California Penal Code to allow minor victims of commercial sexual exploitation of children (including minor sex trafficking victims) under the age of eighteen to testify via 2-Way CCTV.¹⁹¹

Currently, there are forty states that allow minors to testify via closed-circuit television under certain circumstances.¹⁹² These states all have varying procedural requirements (one-way verses 2-Way CCTV) and

189. *Id.* § 3509(b) (emphasis added).

190. *See, e.g.*, CAL. PEN. CODE § 1347 (West 2012) (requiring a showing of “clear and convincing” evidence).

191. SHARED HOPE INT’L, PROTECTED INNOCENCE CHALLENGE: 2014 ANALYSIS AND RECOMMENDATIONS: CALIFORNIA 48 (2014), http://sharedhope.org/PICframe4/analysis/PIC_AR_2014_CA.pdf.

192. CCTV & RECORDING TECHNOLOGY PROGRAM, ABA CTR. ON CHILDREN & THE LAW, INTEGRATING TECHNOLOGY IN CHILD ABUSE CASES: OVERVIEW FOR JUDGES 10–11 (2010), http://www.americanbar.org/content/dam/aba/migrated/child/PublicDocuments/integrating_tech_child_abuse_cases_overview_judges.authcheckdam.pdf.

various statutory age requirements in which a minor victim may no longer be able to utilize such procedures. In looking at California's statute allowing minor victims to testify outside of the courtroom when certain criterion are met, there has been a history of gradual expansion of its application to a broader class of minor victims. This shift recognizes further alignment with the federal statutory framework under 18 U.S.C. § 3509.

a. Enactment and Expansion of California Penal Code Section 1347 Allowing Testimony of a Minor Witness by 2-Way CCTV

Once the Victims of Crime Act made funding available to the states starting in 1984, there was an upswing in the enactment of provisions protecting minors.¹⁹³ This explains why so many states had already enacted statutes allowing minors to testify via closed-circuit television in child abuse cases prior to the holding in *Maryland v. Craig*. There was ample debate in 1985, when such a law was codified in California,¹⁹⁴ regarding the constitutionality of such a law given the requirement of the Confrontation Clause in the California Constitution requiring that each defendant "has the right to be personally present with counsel, and to be confronted with the witnesses against [him]."¹⁹⁵ However, section 1347 of the California Penal Code has withstood all challenges to date and has been afforded numerous expansions.¹⁹⁶

Prior to the enactment of A.B. No. 1692, amending section 1347 in 1998,¹⁹⁷ under California state law, the ability of a child witness to testify via one or 2-Way CCTV was limited to minors ten years old or younger who were victims of an alleged sexual offense.¹⁹⁸ During this time period when the California Assembly was considering amendments to section 1347, it rejected the expansion of allowing all victims of "rape, spousal rape, sexual battery, and domestic violence," regardless of age, to testify through the specific protective measures, which at the time were only

193. *OVC Fact Sheet: Victims of Crime Act Crimes Victims Fund*, OFFICE FOR VICTIMS OF CRIMES, U.S. DEP'T OF JUSTICE (July 1999), https://www.ncjrs.gov/ovc_archives/factsheets/cvfvca.htm.

194. CAL PENAL CODE § 1347 (West 1985) (enacted by Stats. 1985, c. 43, § 1).

195. Rowlands, *supra* note 178, at 296–97 (quoting CAL. CONST. art. I, § 15) (internal quotation marks omitted).

196. *Id.* at 297.

197. A.B. 1692, 1997-1998 Leg., Reg. Sess. (Cal. 1998) (enacted), http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_1651-1700/ab_1692_bill_19980921_chaptered.pdf.

198. ASSEMB. COMM. ON PUB. SAFETY, BILL ANALYSIS ON A.B. 1692 (as introduced), 1997-1998 Leg., Reg. Sess., at 1–2 (Cal. 1998), http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_1651-1700/ab_1692_cfa_19980302_124044_asm_comm.html.

allowed for children ten years old and younger.¹⁹⁹ Also, it rejected an amendment allowing victims of sexual abuse who were fifteen years old and younger from being able to testify utilizing such methods.²⁰⁰

Instead, on the basis of a suggested amendment included in a Bill Analysis for the Assembly Committee on Public Safety, the California Assembly chose to adopt a bill raising the age of minor victims able to utilize these protective measure to victims thirteen years old and younger in order to stay consistent with the fact that current law punished “more severely certain lewd acts upon a child under the age of 14.”²⁰¹ Thus, the amendment would be in line with the protections provided under current law. Additionally, with the 1998 amendment to section 1347, the California State Legislature also provided minor victims of violent felonies who were thirteen years old or younger with the ability to testify via 2-Way CCTV.²⁰² The list of violent felonies included in this category is quite expansive²⁰³

199. *Id.* at 1.

200. ASSEMB. COMM. ON PUB. SAFETY, BILL ANALYSIS ON A.B. 1692 (as amended Apr. 27, 1998), 1997-1998 Leg., Reg. Sess., at 1-2 (Cal. 1998), http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_1651-1700/ab_1651-1700_ab_1692_cfa_19980504_114934_asm_comm.html.

201. *Id.* at 4 (“Current law punishes more severely certain lewd acts upon a child under the age of 14. (Penal Code Section 288.) If the bill were amended to allow only minors under age 14 to use this closed-circuit procedure, this amendment is consistent with current law which provides greater protections to minors under age 14 and victims of certain sexual offenses. SHOULD THE AGE BE CHANGED TO 13 AND UNDER?”); CONCURRENCE IN S. AMENDMENTS, A.B. 1692, 1997-1998 Leg., Reg. Sess., at 1 (Cal. 1998), http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_1651-1700/ab_1692_cfa_19980821_204011_asm_floor.html (“chang[ing] the cutoff age from 15 years of age or younger to 13 years of age of younger”).

202. A.B. 1077 § 1, 1997-1998 Leg., Reg. Sess. (Cal. 1998) (enacted), http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_1051-1100/ab_1077_bill_19980921_chaptered.pdf (“(B) The minor is a victim of a violent felony, as defined in subdivision (c) of Section 667.5.”).

203. Pursuant to section 667.5c of the California Penal Code, a “violent felony” means any of the following:

- (1) Murder or voluntary manslaughter.
- (2) Mayhem.
- (3) Rape as defined in paragraph (2) or (6) of subdivision (a) of Section 261 or paragraph (1) or (4) of subdivision (a) of Section 262.
- (4) Sodomy as defined in subdivision (c) or (d) of Section 286.
- (5) Oral copulation as defined in subdivision (c) or (d) of Section 288a.
- (6) Lewd or lascivious act as defined in subdivision (a) or (b) of Section 288.
- (7) Any felony punishable by death or imprisonment in the state prison for life.
- (8) Any felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged . . . or any felony in which the defendant uses a firearm which use has been charged and proved as provided in subdivision (a) of Section 12022.3, or Section 12022.5 or 12022.55.
- (9) Any robbery.
- (10) Arson, in violation of subdivision (a) or (b) of Section 451.
- (11) Sexual penetration as defined in subdivision (a) or (j) of Section 289.
- (12) Attempted murder.
- (13) A violation of Section 12308, 12309, or 12310.
- (14) Kidnapping.
- (15) Assault with the intent to commit a specified felony, in violation of Section 220.
- (16) Continuous sexual abuse of a child, in violation of Section 288.5.
- (17) Carjacking, as defined in subdivision (a) of Section 215.
- (18) Rape, spousal rape, or sexual penetration, in concert, in violation of Section 264.1.
- (19) Extortion, as defined in Section 518, which would constitute a felony violation of Section 186.22 of the Penal Code.
- (20) Threats to victims or witnesses, as defined in Section 136.1, which would constitute a felony violation of Section 186.22 of the Penal Code.
- (21) Any burglary of the first degree, as defined in subdivision (a) of Section 460, wherein it is charged and proved that

and was justified in a Bill Analysis, which stated that “[s]tates have a legitimate interest in protecting the most vulnerable members of our society and can do this without infringing on the rights of a defendant.”²⁰⁴ Finally, in 2005, the statute further expanded the circumstances under which minor victims (thirteen years old and under) could testify via 2-Way CCTV for felony cases involving violations of section 273a of the California Penal Code,²⁰⁵ regarding child endangerment, and section 273d,²⁰⁶ regarding inhumane treatment of a child.²⁰⁷

Throughout the numerous California Assembly Bill Analyses on record regarding these amendments, there was no explicit mention of sexual exploitation or discussion of incorporation of minor victims of sex trafficking into the protections afforded to minor victims under section 1347 of the California Penal Code. This however, is not unexpected, as the last time the statute was substantively amended was in 2005, and the human trafficking statute, section 236.1 of the California Penal Code, was not even enacted until 2006.²⁰⁸

b. The Current California Minor-Shielding Law under Penal Code Section 1347

Under the current version of section 1347 of the California Penal Code, only minors thirteen years old or younger at the time the motion is taken are able to testify via 2-Way CCTV.²⁰⁹ In addition to falling within the categories of victimization noted in the preceding subsection, one of the following enumerated factors must be shown by the high evidentiary standard of clear and convincing evidence for the child to be able to testify via 2-Way CCTV:

- (A) Testimony by the minor in the presence of the defendant would result in the child suffering serious emotional distress so that the child would be unavailable as a witness.
- (B) The defendant used a deadly

another person, other than an accomplice, was present in the residence during the commission of the burglary. (22) Any violation of Section 12022.53. (23) A violation of subdivision (b) or (c) of Section 11418.

CAL. PENAL CODE § 667.5(c) (West 2010).

204. S. RULES COMM., S. FLOOR BILL ANALYSIS ON A.B. 1692, 1997-1998 Leg., Reg. Sess. (Cal. 1998), http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_1651-1700/ab_1692_cfa_19980818_174108_sen_floor.html (also stating that A.B. 1692 and A.B. 1077 were double joined).

205. CAL. PENAL CODE § 273a (West 2014) (“[w]illful harm or injury to child; endangering person or health; punishment”).

206. CAL. PENAL CODE § 273d (West 2014) (“[c]orporal punishment or injury of child”).

207. S.B. 138, 2005-2006 Leg., Reg. Session (Cal. 2005), http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_0101-0150/sb_138_bill_20051004_chaptered.pdf.

208. See *supra* notes 145–156 and accompanying text.

209. CAL. PENAL CODE § 1347 (b) (West 2004 & Supp. 2015).

weapon in the commission of the offense. (C) The defendant threatened serious bodily injury to the child or the child's family, threatened incarceration or deportation of the child or a member of the child's family, threatened removal of the child from the child's family, or threatened the dissolution of the child's family in order to prevent or dissuade the minor from attending or giving testimony at any trial or court proceeding, or to prevent the minor from reporting the alleged sexual offense, or from assisting in criminal prosecution. (D) The defendant inflicted great bodily injury upon the child in the commission of the offense. (E) The defendant or his or her counsel behaved during the hearing or trial in a way that caused the minor to be unable to continue his or her testimony.²¹⁰

This discrepancy in the age of a "child witness" in California, who is afforded procedural protections, and the federal government's definition of a "child," as any minor pursuant to 18 U.S.C. § 3509, is not novel; in fact, only a handful of states allow minor victims of sex trafficking to testify using closed-circuit television up until the age of eighteen.²¹¹ However, California is one of a minority of states that allows minor victims to testify via 2-Way CCTV when testifying regarding certain alleged sexual offenses, but denies victims of minor sex trafficking the same protection.²¹²

c. The California Assembly's Logic for Limiting the Age of a Minor Victim Under Section 1347 Does Not Apply to Minor Sex Trafficking Victims

As indicated by state legislative history, the California Assembly and Senate looked to the heightened punishment for those convicted under

210. *Id.* § 1347(b)(2)(A)–(E).

211. Currently, twenty-nine states allow minors to testify via closed-circuit television in sex trafficking prosecution with varying age restrictions; seven states allow minor sexual victims under age eighteen to use such procedures: Idaho, Illinois, Iowa, Minnesota, Rhode Island, Texas, and Virginia. Twenty-two other states allow minor sex trafficking victims to testify via closed-circuit television with varying age limitations: Alabama (under sixteen), Alaska (under sixteen), Arizona (under fifteen), Arkansas (under twelve), Delaware (under eleven), Florida (under sixteen), Indiana (under fourteen), Kansas (under thirteen), Kentucky (under twelve), Louisiana (under seventeen), Massachusetts (under fifteen), Mississippi (under sixteen), Montana (under sixteen), Nevada (under fourteen), New York (under fourteen), North Carolina (under sixteen), Oregon (under twelve), Pennsylvania (under sixteen), Utah (under fourteen), Washington (under ten), West Virginia (under thirteen), and Wisconsin (under sixteen). STATE COMPARISON: VICTIM-WITNESS PROTECTIONS, SHARED HOPE INT'L (2013), http://sharedhope.org/wp-content/uploads/2013/05/State_by_state_comparison_VictimWitnessProtection.pdf.

212. The states that allow for 2-Way CCTV for minor victims of certain alleged sexual offenses but not for minor victims of sex trafficking are: California, Colorado (but allows videotaped testimony for victims under age fifteen), Connecticut, Hawaii, Michigan, New Hampshire (but allows videotaped testimony for victims under age sixteen), New Jersey, Ohio (but allows videotaped testimony for victims under age thirteen), Oklahoma, South Carolina, South Dakota, and Tennessee. *Id.*

section 288 of the California Penal Code for engaging in a lewd or lascivious act involving a child under age fourteen as an indicator of the heightened protections the state afforded to minors under age fourteen.²¹³ However, under the CASE Act, there is an increased punishment for those convicted under section 236.1(c) of the California Penal Code for minor sex traffickers (victims under eighteen years old) that is more severe than the punishment prescribed for those convicted of trafficking victims age eighteen or older. Allowing minor sex trafficking victims up to seventeen years old to testify via 2-Way CCTV under section 1347 would mirror the logic applied by California state legislators, as it would be consistent with protections already provided under current law to this protected group. Additionally, the inclusion of domestic minor sex trafficking victims would fit well with the legislative intent behind previous statutory expansions—this addition would also be serving the same state interest of “protecting the most vulnerable members of our society.”²¹⁴

d. Prosecution of Domestic Minor Sex Traffickers Serves the Same Three Essential State Interests Discussed in *Maryland v. Craig*, Justifying the Use of CCTV for Minor Victim Testimony

When looking to determine whether the use of closed-circuit television warrants the denial of a defendant’s confrontation right, it is necessary to closely examine the competing interests at stake.²¹⁵ The three compelling state interests that supported the use of closed-circuit testimony in *Maryland v. Craig* similarly support the use of 2-Way CCTV for testifying minor victims in sex trafficking prosecutions. In *Maryland v. Craig*, the state had an interest in preventing the retraumatization of the child victim from being required to testify in the presence of her abuser.²¹⁶

213. Compare CAL. PENAL CODE § 288(a) (West 2014) (“any person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years” (emphasis added)), with *id.* § 288(c)(1) (“[a]ny person who commits an act described in subdivision (a) with the intent described in that subdivision, and the victim is a child of 14 or 15 years, and that person is at least 10 years older than the child, is guilty of a public offense and shall be punished by imprisonment in the state prison for one, two, or three years, or by imprisonment in a county jail for not more than one year” (emphasis added)).

214. S. RULES COMM., S. FLOOR BILL ANALYSIS ON A.B. 1692, 1997-1998 Leg., Reg. Sess. (Cal. 1998), http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_1651-1700/ab_1692_cfa_19980818_174108_sen_floor.html (also stating that A.B. 1692 and A.B. 1077 were double joined).

215. *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (quoting *Berger v. California*, 393 U.S. 314, 315 (1969)).

216. Susan H. Evans, Note, *Criminal Procedure—Closed Circuit Television in Child Sexual Abuse Cases: Keeping the Balance between Realism and Idealism—Maryland v. Craig*, 26 WAKE FOREST L. REV. 471, 493–94 (1991).

Similarly, in minor sex trafficking cases, victims testifying in the presence of their exploiters are perhaps even more likely to experience further revictimization, as they have suffered extensive physical, mental, and sexual abuse at the hands of their exploiter.²¹⁷ Due to the intensity of trauma bonding that many minor sex trafficking victims experience, it is likely that being physically in the presence of their former traffickers could undo them, effectively leaving them unable to testify.²¹⁸

Additionally in *Maryland v. Craig*, the state had an interest in bringing child abusers to justice.²¹⁹ When dealing with minor sex traffickers, these exploiters could just as easily be classified as child abusers; minor victims are often subjected to rape multiple times a day at the direction of their traffickers. The State of California, through its recent enactment of the CASE Act via popular initiative, has recognized the need for increased protection of minor victims of sex trafficking by enacting harsher punishments for minor sex traffickers as well as by removing the “force, fraud, and coercion” element that was once required to be shown to convict such traffickers. This highlights the state’s interest in protecting its most vulnerable youths.²²⁰ Additionally, much as with victims of child sexual abuse, the testimony of minor sex trafficking victims is seminal at trial as they are often the main witnesses to the crime; without their testimony against their traffickers, “the truth of the matter might never be revealed, a terrible crime might go unredressed, and a dangerous person might be turned loose to continue his or her predation.”²²¹ Thus, the state should have every motivation and interest to allow the testimony of minor sex trafficking victims to be brought forth.

Finally, the use of 2-Way CCTV to allow minor sex trafficking victims to testify at the trials of their traffickers preserves the same certain “symbolic goals” of fairness²²² as when the procedural device is used in child abuse cases. With the prevalence of minor sex trafficking on the rise

217. See *supra* Part I for an extensive discussion of the abuses victims of minor sex trafficking suffer at the hands of their traffickers.

218. See, e.g., *supra* notes 14–17 and accompanying text (discussing Lauren’s reaction to her trafficker).

219. Evans, *supra* note 216, at 493.

220. See CASE Act, *supra* note 158, § 2(3) (“Upwards of 300,000 American children are at risk of commercial sexual exploitation . . . Most are enticed into the sex trade at the age of 12 to 14 years old, but some trafficked are as young as four years old. Because minors are legally incapable of consenting to sexual activity, these minors are victims of human trafficking whether or not force is used.”).

221. *Craig v. State*, 544 A.2d 784, 800 (1988), *rev’d*, 560 A.2d 1120 (1989), *vacated*, 497 U.S. 836 (1990).

222. Evans, *supra* note 216, at 494.

within the United States, it is important to showcase “a system of criminal justice in which the perception as well as the reality of fairness prevails.”²²³ To allow minor sex traffickers to walk free because of the inability of their victims to testify in open court due to the trauma they inflicted upon vulnerable children would be the ultimate systemic injustice.²²⁴

e. Application of California’s Shielding Statute to the Post-CASE Act Regime

Based on the California legislature’s past decisions to expand the protections afforded to child witnesses under section 1347 to additional categories of child victims, specifically violent felonies and sexual offenses, the legislature would be open to expanding the statute to include additional victims, if necessary. Including trafficked children who engaged in commercial sex acts in the list of victims able to testify via 2-Way CCTV would strongly align with both the desires of the people of California—the ones responsible for insulating such minor victims from criminal prosecution for their actions in the first place via enactment of the CASE Act—and with California’s prosecutorial goals of punishing sex traffickers for their actions. By beginning to recognize the child sex-trafficking victim as a true victim under the CASE Act, it is not a far leap for the legislature to view domestic minor sex trafficking victims as literally victims of sexual abuse at the hands of both their traffickers and johns. Thus, victims of this newly protected class should be eligible for protective safeguards such as being able to provide testimony against their traffickers via 2-Way CCTV.

In order to accomplish the goal of effectively prosecuting domestic minor sex traffickers based on the average age that young boys and girls are first trafficked, it would be necessary to raise the age of a “child witness” under the California statute to align with the federal definition of a “child” under 18 U.S.C. § 3509. Without extending the age of the “child witness” in the California state statute to all minors under eighteen, adding minor trafficking victims to the list of victims eligible to use 2-Way CCTV would have little to no real effect. Thus, until California looks to fully align its legislative framework to encompass the new decriminalization paradigm when combating domestic minor sex trafficking, it is necessary for California to allow victims of domestic minor sex trafficking to testify via

223. *Lee v. Illinois*, 476 U.S. 530, 540 (1986).

224. *See Nelson v. Farrey*, 874 F.2d 1222, 1230 (7th Cir. 1989), *cert. denied*, 493 U.S. 1042 (1990) (“[H]ow ironic would it be if the child molester could use the trauma inflicted on his victim as the fulcrum for levering his way to freedom.” (Posner, J., majority opinion)).

2-Way CCTV in order to avoid retraumatization by facing their traffickers, to provide the most accurate testimony about the abuses they have endured, and to allow for increased prosecution of minor sex traffickers. Without such a safeguard in place, many victims would be unable to testify at their traffickers' trials and would have little motivation to do so.

Currently, there is an active California Assembly Bill that recognizes exactly this fact. Introduced in February 2015 and as amended in March 2015, A.B. 1276 calls to amend section 1347 of the California Penal Code in exactly the ways I have proscribed by: (1) authorizing minors under age eighteen to testify using the testimonial shielding methods proscribed by the statute and (2) expanding the offenses for which the minor could testify to include an alleged offense of human trafficking, as defined in section 236.1 of the California Penal Code.²²⁵ However, prospects for the Bill are not looking strong; as of May 5, 2015, the Assembly Committee on Public Safety cancelled a scheduled hearing on it²²⁶ and published a Bill Analysis suggesting that the Bill's author remove the provision increasing the age of victims who could testify via section 1347.²²⁷ Adding only the human trafficking offense to section 1347—without increasing the statutorily defined age for a child victim—would prove largely futile given the realities of the domestic minor sex trafficking industry to date. In light of the average age at which a minor even *begins* to be trafficked, ages twelve to fourteen for girls,²²⁸ it is unlikely that victims of domestic minor sex trafficking would be able to use the methods afforded under section 1347 at all if the victim age is not statutorily raised from thirteen. Only time will tell if both of these necessary revisions to section 1347 will be enacted.

CONCLUSION

Due to the recent enactment of the CASE Act, California's sex minor trafficking statute is limping toward gradual alignment with the federal TVPA standard by adopting a more "victim-centered" regime in which minors cannot be held criminally culpable for their actions and a more "strict liability-esque" treatment of minor sex traffickers. In shifting toward

225. A.B. 1276, 2015-2016 Leg., Reg. Sess. (Calif. 2015) (as amended Mar. 26, 2015), http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_1251-1300/ab_1276_bill_20150326_amended_asm_v98.pdf.

226. *Current Bill Status: A.B. 1276*, LEGALINFO.CA.GOV, http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_1251-1300/ab_1276_bill_20150505_status.html (last visited Aug. 20, 2015).

227. ASSEMB. COMM. ON PUB. SAFETY, BILL ANALYSIS ON A.B. 1276, 2015-2016 Leg., Reg. Sess., at 10 (Cal. 2015), http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_1251-1300/ab_1276_cfa_20150504_093223_asm_comm.html.

228. See *supra* note 45 and accompanying text.

a statutory regime that focuses more on the victimization of children who have been sexually trafficked, California will be more in keeping with sexual consent laws, state statutory rape provisions, and intrinsic ideas of the fairness of victim protections.

However, due to the “piecemeal” nature with which such changes have been adopted, there are still jarring gaps in California’s legislative framework. This has resulted in inconsistencies that have made it more difficult for state prosecutors, law enforcement officers, and child welfare workers to do their jobs in bringing traffickers to justice and allowing for the rehabilitation of domestic minor sex trafficking victims. The California procedural shielding statute inconsistency discussed above is just the tip of the iceberg. The altering of this existing procedural safeguard would be a mere stopgap measure that would aid prosecutors in convicting child sex-traffickers.

As a “magnet for the commercial sexual exploitation of children,”²²⁹ California has to do more. It is time for the legislature to adopt a more fully-fledged decriminalization paradigm, as has been done by the federal government, Connecticut, and Tennessee, which would allow for full alignment with age of consent laws, implementation of rehabilitation programs recognizing domestic minor sex trafficking victims as true victims, and adoption of harsher penalties for the “johns” so as to reduce the demand for such services. In adopting the largest state-implemented decriminalization regime in the nation, California would be able to serve as a model for the nation by showing that minor victims of domestic sex-trafficking are *victims* regardless of the court in which their trafficker is being prosecuted; as such, they should be afforded the same victim-centered protections across all legal platforms. As acknowledged in a 2010 Congressional Subcommittee Hearing on Domestic Minor Sex Trafficking, “the role of the State and local law enforcement authorities and the role of the State and local prosecutors cannot be underestimated”²³⁰ in this battle, and it is time for California to assume its rightful place as a leader of its sister states in this regard.

229. A CALL FOR MULTI-SYSTEM COLLABORATION IN CALIFORNIA, *supra* note 41, at 1.

230. *Domestic Minor Sex Trafficking: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 3 (2010) (statement of Rep. Robert C. “Bobby” Scott, Chairman, Subcomm. on Crime, Terrorism & Homeland Sec.), <http://www.gpo.gov/fdsys/pkg/CHRG-111hrg58250/html/CHRG-111hrg58250.htm>.

