

Pathologies of child governance: Safe harbor laws and children involved in the sex trade in the United States

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Abstract

The protection of children by the state has been so firmly embedded within United States law, practice, and policy that nearly every aspect of childhood is regulated by it. Collectively, these laws and practices create a shared expectation of children's experiences and development that, in their ideal form, should produce adult citizens in service of the state in terms of their health, intellect, morality, and abilities. At its crudest, certain deviations from the norms of childhood — sexual exploitation, abuse, and even some forms of juvenile sexual activity — have historically been addressed with new policy, law, education, and adjudication. Because there is a disconnect between the expectations of childhood and the actual lived experiences of diverse groups of children, these new policies, practices, and laws sometimes produce *pathologies of child governance*, defined here as unintended consequences and outcomes from laws and policies that exacerbate the abuse, delinquency, criminalization, and exploitation of children. I examine here one such pathology—the exclusion of a cohort of children, a subset of children involved in the sex trade, from treatment as victims and the subsequent protections afforded other children involved in the sex trade. I argue in this paper that through an examination of this pathology, we can better understand how a singular narrative of childhood—with its binary conceptions of agency and victimhood—produces outcomes antithetical to the intention of child protection efforts by the state.

Introduction

The protection of children under the age of 18 by the state has been so firmly embedded within United States law, practice, and policy that nearly every aspect of childhood is regulated by it. Collectively, these laws and practices create a shared expectation of children's experiences and development that, in their ideal form, should produce adult citizens in service of the state in terms of their health, intellect, morality, and abilities. At its crudest, certain deviations from the norms of childhood—sexual exploitation, abuse, and even some forms of juvenile sexual activity — have historically been addressed with new policy, law, education, and adjudication. In some cases, however, a disconnect exists between the expectations of childhood and the actual lived experiences of diverse groups of children, leading to *pathologies of child governance*, defined here as unintended consequences or outcomes from laws and policies that exacerbate the abuse, delinquency, criminalization, and exploitation of children. While this chapter examines the U.S. case, pathologies of child governance can be found throughout the international system, including within key institutions of the children's rights regime (see Pruitt and Missbach's, Martuscelli's, and Johnson's chapters in this volume).

I examine here one such pathology—the exclusion of a cohort of children, a significant percentage of children involved in the sex trade,¹ from treatment as victims under the law and the subsequent protections afforded other children involved in the sex trade in the United States. Precise numbers of children involved in the sex trade in the United States are difficult to come by, unsurprisingly, but studies have put the number between 5,000 and 21,000 (Hounmenou and O'Grady, 2019: 189; NCSL, 2017: 1). The protections studied here are Safe Harbor laws, a patchwork of U.S. laws that seek to protect some children from criminal penalties associated with involvement in the sex trade. Boys, as well as lesbian, gay, bisexual, transgender, and queer (LGBTQ) children, and those children with LGBTQ clients make up the

¹ I use the expression *children involved in the sex trade* or *sex industry* as a neutral description, regardless of whether the state considers them victims or criminals, and regardless of whether they work with a *third party* (colloquially known as a pimp) — someone other than the worker or the client — or operate alone. I employ the term *third party* because it avoids the classed and racialized stereotypes inherent in (or attached to) pimp and because it better denotes the range of roles and services provided (STELLA, 2013). I further choose the term *sex trade* as opposed to prostitution because of its greater neutrality.

majority of children excluded from Safe Harbor protections. Of these groups, Black and Latino children are overrepresented. The common connection among these excluded children is twofold: First, children in this cohort tend to deviate from the expectation of what a 'victim' should be, usually a white, cisgender female child naively derailed from her prescribed path to adulthood (Austin and Farrell, 2017; Baker, 2013). Second, they tend to operate in the sex trade without a third party (commonly known as a pimp).² I argue in this paper that through an examination of this pathology—the exclusion of children in the sex trade from Safe Harbor protections— as well as a consideration of other pathologies of child governance, we can better understand how a singular narrative of childhood with its oversimplified conceptions of gender and agency, produces outcomes antithetical to the intention of child protection efforts by the state. The outcome of this pathology is that in attempting to separate victims from perpetrators, governance related to children involved in the sex trade misidentifies child sexual agency, conflates it with consent and culpability, and further traumatizes and exploits already marginalized children.

Modern governance efforts related to child sexuality

In response to the sexual liberation movement of the 1960s and 1970s, both conservatives and radical feminists grew increasingly preoccupied by the specter of child sexuality and sexual abuse, although for completely different reasons. Feminist campaigns against familial violence, originally brought on by concerns about incest, expanded to include concerns about children's sexual abuse more broadly (Adler, 2001: 221). Religious conservatives were motivated by their perception of rampant cultural sexuality, a preoccupation that came to include child sexuality.

During the moral panics of the 1980s and 1990s, radical feminists increasingly defined women's global identity as marked by violence by men. Much of this violence was identified as the targeting of girls in the home. In response, public policy championed by these advocates in the late 20th and early 21st centuries focused on pornography, child abuse and sexual assault

² Individuals that work in the sex trade without a third party will arrange connections on their own or with the help of others in the trade, others in the informal economy, or via the internet (apps, websites, etc.).

laws, and sex trafficking. Calling these phenomena *moral panics* is not to say that there are not (and have not been) serious problems of child sexual abuse and trafficking in the United States and elsewhere. It is only to suggest that the response—the degree of public fear—was out of proportion to the actual threat (Angelides, 2004; Evans, 1994; Robinson, 2013). In their advocacy, radical feminists found common cause with Christian conservatives who opposed ‘moral crimes,’ including sex work, homosexuality, premarital or extramarital sex, and sex trafficking. This common ground on trafficking resulted in the passage of the 2000 Trafficking and Victims Protection Act (TVPA), legislation that would protect trafficking victims by granting them and their families special visas and access to social services usually reserved for citizens. The passage of TVPA was accomplished in the context of emerging international law on trafficking, via the Convention on the Rights of the Child’s Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol), which entered into force in 2002 and 2003 respectively.

In the context of these laws, the victim narrative is rigid, coarsely constructed, and oversimplified. It is preoccupied with the trafficker, also crudely constructed through racialized and gendered narratives. Given its cultural importance, however, police and state institutions are highly invested in the victim-perpetrator narrative and use it to govern policy and practice (Marcus, 2014: 225; Sano, 2016). Not surprisingly, in the United States, there is great disparity in the treatment of children involved in the sex trade. In some U.S. states, children can be arrested and prosecuted as sex workers, while in others, they are channeled into welfare services and treated as victims.

Safe Harbor Laws

U.S. Safe Harbor laws have emerged as one answer to child trafficking. In an ideal form, these laws express the idea that criminal penalties should not be extended to children (those under the age of 18) who are involved in the sex trade because they are unable to consent to commercial sex (Shared Hope, 2017). According to international law, children under the age of 18 who are involved in the sex trade should be considered victims and protected as such. The

international community's consensus on the issue is seen across a spectrum of human rights instruments, including the Convention on the Rights of the Child and its protocols, the International Labour Organization's Worst Forms of Child Labour Convention, and the Trafficking Protocol, mentioned above. National laws emerging from these instruments construct the sex trade (coerced or not) as a criminal justice issue and one that should be regulated by the police and the judicial arm of states. Globally, it is not surprising that most states focus on the arrest and prosecution of traffickers and less on the social and economic conditions of children involved in the sex trade. The United States is no exception.

There is great variety in the implementation of Safe Harbor across the U.S. states that have passed these laws. Thirty states and the District of Columbia (D.C.) have to some degree enacted protections for children under the age of 18 (Shared Hope, 2020), with 19 states requiring control by a third party to merit protections (Shared Hope, 2019a). These protections vary from diversion programs, where juveniles are diverted from punishment after they have admitted guilt or been charged with a crime, to immunity provisions that prohibit children under the age of 18 from being charged with specific crimes such as prostitution (Williams, 2017: 4-5). Twenty-one states and D.C. prohibit the criminalization of minors for prostitution, while nine states require a designation of trafficking to merit protections (Shared Hope, 2019b). Thirty-one states also distinguish between child prostitution and child sex trafficking (Shared Hope, 2019a), with most requiring a demonstration of "force, fraud or coercion" (Shared Hope, 2015), a violation of the TVPA (Section 103, 8). Nongovernmental organizations (NGOs), such as Shared Hope, Polaris, and End Child Prostitution and Trafficking (ECPAT) USA, advocate for the provision of child welfare services in addition to decriminalization (Shared Hope, 2017: 13). These NGOs want states to stop charges altogether but not arrests, because arrests bring these children under the purview of state child welfare services (Shared Hope, 2017: 15) and assist the police in prosecuting third parties.

Disparities in state practice toward children involved in the sex trade underscore the arbitrary nature of victimhood (Marcus, 2014: 225; Sano, 2016: 10). The age of eligibility for legal protection ranges from 13 to 17 (Mehlman-Orozco, 2015: 55), with eligibility for protection often contingent upon evidence of coercion. Yet children who are involved in the sex

trade, like adults, do so for many complicated reasons that do not lend themselves to simple explanations of coercion. Violence at home; discrimination against LGBTQ youth; survival sex; abuse; poverty; and street violence complicate notions of free choice (Cray et al., 2013: 11-12). Elsewhere in this volume, Dustin Johnson, in his chapter on UN Peacekeeping, observes that UN training materials challenge children's agency when their actions, such as joining an armed group, contradict norms of innocence and victimization, but accept children's agency when they choose to leave such groups (page #-3). A similar observation can be made regarding children in the sex trade: agency is denied only to those children who choose to work in the trade, not those attempting to leave it. The examples here and elsewhere in this volume indicate that narratives of children's victimization traverse borders, cultures, and issue areas.

As first responders, police also choose how to treat children involved in the sex trade, and some officers entertain misinformed or prejudiced opinions that shape how the penal system will process children (Fahy, 2015: 53; Fichtelman, 2014: 40; Mehlman-Orozco, 2015: 56). These initial judgments are complicated by assumptions about race, culture, class, and sexual and gender identity. Judges and prosecutors possess discretion as well, and rulings confirming or denying penalties are informed by these biases (Gezinski, 2021: 4; Fahy, 2015: 53). Some states that have Safe Harbor laws do not extend protections to children who are second or third 'offenders' (Hounmenou and O'Grady, 2019: 193; Polaris, 2015). Additionally, children who assist third parties or who exploit, recruit, or punish other children at the behest of a third party (Butler, 2015: 1294; Fernandez, 2013: 885) are not protected under Safe Harbor laws in many states (Dysart, 2014: 285). Patricia Martuscelli *and* Lesley Pruitt and Antje Missbach argue, in different chapters in this volume, that, denying agency is a tool both for protecting children *and* for carrying out state policies that may otherwise be seen to harm them, for example, deporting children in the name of family reunification. Martuscelli also examines the ways in which some children who migrate alone are labelled, "imposter children," by the state and, via their presumed agency, denied protections based on unreliable determinations of age. One marker of alleged 'imposters' among children in the sex trade is authority over other children, or assistance to third parties in the trade. As discussed below, the children most likely to be

considered imposters are those without a third party at all, those children who have entered the sex trade without recruitment.

Gender and racial dynamics also play a role in the application of Safe Harbor: Girls are assumed to be the dominant demographic in the sex trade, but more recent research suggests that the number of boys “may be equal to (or even exceeding) that of girls” (Hasselbarth, 2014: 414). Estimates of boys range from 45 to 60 percent of children involved in the sex trade in the United States (Conner, 2016: 57; Hounmenou and O’Grady, 2019: 191; Murphy, 2016: 5). Studies have also found that more than 80 percent of children involved in the trade are Black or Latino, children who are less likely to trust and cooperate with the police based on past interaction (Clayton et al., 2013: 206; Gezinski, 2021: 2; Murphy, 2016: 5). A smaller percentage of children (2 to 8 percent) identified as transgender or gender nonconforming in studies (Conner, 2016: 57; Hounmenou and O’Grady, 2019: 191; Murphy, 2016: 5).

In some states, protections are extended by prosecutorial discretion only to those children who help to prosecute third parties and clients (Bergman, 2012: 1367; Gezinski, 2021, 4; Fahy, 2015: 45–46; Fernandez, 2013: 863; Fichtelman, 2014: 31). Children operating without a third party also may not be considered victims, the aforementioned imposters (Adelson, 2008: 102–3; Dysart, 2014: 286–7).³ Statistics regarding children involved in the sex trade *without* third parties range from 42 to 92 percent (Conner, 2016: 57–59; Dennis, 2008: 18; Gezinski, 2021: 3; Hounmenou and O’Grady, 2019: 190; Murphy, 2016: 4; Swaner et al., 2016: 46). Of those children who do not have third parties, boys and LGBTQ children are overrepresented, making them less likely to be considered victims than cisgender girls in the sex trade (Adelson, 2008: 102–3; Conner, 2016: 57; Dennis, 2008: 18; Hounmenou and O’Grady, 2019: 189; Murphy, 2016: 4; Polaris 2016; Swaner et al., 2016: 48). Multiple studies have linked homelessness to the sex trade (Conner, 2016; Gezinski, 2021: 2; Hounmenou and O’Grady, 2019; Murphy, 2016; Swaner et al., 2016), and findings indicate that LGBTQ homeless children are three to seven times more likely to engage in survival sex than their non-LGBTQ peers (Cray

³ Five states require third-party control: Mississippi, North Dakota, Rhode Island, West Virginia, and Wyoming. Other states may be biased toward it by hinging protections on trafficking victim status: Alabama, Montana, New Hampshire, South Carolina, and Vermont (Shared Hope, 2017: 19–22).

et al., 2013: 4, 11; Hounmenou and O’Grady, 2019: 189; Martinez and Kelle, 2013: 23). Of LGBTQ homeless children, there is evidence that Black and Latino children are disproportionately represented by as much as 70 percent, with roughly 11 percent of these youths identifying as transgender (Cray et al., 2013: 6). Polaris has also found that of those detained for being involved in the sex trade, LGBTQ children are overrepresented (2016). Since boys involved the sex trade tend to have male clients, they also are less likely to work with third parties and thus tend to be viewed less sympathetically by law enforcement.

In short, the status of victim accorded to children involved in the sex trade is far from assured under the law. Rather, it hinges on conformity with gendered, racialized, and entrenched notions of victimhood and culpability, notions that find legal expression through Safe Harbor. In most states, laws regarding children involved in the sex trade do not give due consideration to the complexities of street survival. The exclusion of some children from protective policies shines a revealing light on the narrative of victimhood that resonates with police officers, prosecutors, judges, civil society, and the global children’s rights regime. Measurements of victimhood are also shaped by the racial, gender, and class prejudices present in larger society and global norms of childhood.

Discussion

Safe Harbor laws exclude children whose identity, presentation, experience, or resistance to engage with law enforcement diverges from the traditional narrative of victimhood. As a result, Safe Harbor laws produce a pathology of child governance that criminalizes the very children these laws should protect and rehabilitate. All children involved in the sex trade challenge shared social expectations and norms of childhood, but those excluded from protections such as Safe Harbor laws also challenge social expectations of child victims. The shared characteristics of those denied protections help to reveal the objectives of these laws, those who advocate for them, and the difficulty of assessing consent, culpability, and agency.

In this discussion, I will present three arguments: First, Safe Harbor laws fail to protect children who deviate from the rigid narrative of victimhood, those who are both victims and

perpetrators, and those who act without a third party. Second, Safe Harbor laws misidentify children's sexual agency and, as a result, further endanger, exploit, and abuse already vulnerable children. Safe Harbor's focus on the identification of 'good victims' results in a pathology of governance that misidentifies a high percentage of child victims, mislabels victims as perpetrators, denies them legal protection, and criminalizes them. Third, Safe Harbor laws reveal a preoccupation with traffickers at the expense of child protection. This preoccupation with traffickers can be traced to the moral panics of the 1980s and 1990s about child sexual abuse and to the growing concern in the late 20th century about trafficking and violence against women and girls. Each of these is taken in turn below.

Rigid narratives

The rigid narrative of victimhood is evident when children involved in the sex trade are denied victim status because of their independence from third parties or because they function within a stratified system of abuse. These children inhabit a liminal space in the narrative, exhibiting some markers of victim, some markers of perpetrator, and some markers of agent. The simplistic binary cannot accommodate the complexities of the sex trade and the harsh realities of street survival. Children involved in the sex trade have had widely ranging experiences, and their causal path is rarely linear.

Likewise, the child who acts alone challenges the narrative of victimhood because victims *require* a perpetrator. The child without a third party—who make up a large portion of children involved in the sex trade—is also more likely to be denied victim status, and thus, protection under law (Clayton et al., 2013: 206). The law as applied fails to acknowledge or recognize the relative independence or interdependence of these children. These imposter children, those who fall outside of the rigid narrative of victimhood, are often seen as prematurely sexualized by “choice,” since there is no third party to blame for recruitment. Drawing on the work of Nadera Shalhoub-Kevorkian, they are *unchilded*, first by a society that does not ensure their safety, nutrition, shelter, or education, and second, by state violence that arrests them for survival work in the sex trade (2019).

Comparative responses to pathologies

Pathologies of child governance are not uncommon, as many unintended consequences emerge from the interaction among macro-level policies, the diverse lived experiences of children, and changes in norms. Solutions (albeit imperfect ones) to two other types of pathologies in child governance are useful in exploring the rigid narrative that Safe Harbor laws embody: First, the prosecution of statutory rape cases—based on laws that prohibit sexual relations with children under the age of consent—are designed to protect children from abuse and exploitation, but may produce a pathology of child governance when those prosecuted are children close in age to the alleged victim (James, 2009: 244; Kern, 2013: 1611-1612). These laws are highly gendered—men are almost always the ones charged—and the penalties can be draconian, including long sentences and lifelong registration as a sex offender. Beginning in the 1970s, advocates sought to correct this pathology by advocating for age-gap provisions and Romeo and Juliet laws, which carve out exceptions to the stark penalties of statutory rape by excluding cases where the age discrepancy between the couple is within two to six years, even if one member is a legal adult (Flynn, 2013: 686, Kern, 2013: 1611-1612; Smith and Kercher, 2011: 7). Through these laws and policies, consensual sexual interaction between teenagers close in age is not a crime at all in many states, and, in others, it is reduced from a felony to a misdemeanor (Flynn, 2013: 687).

Second, sexting by teens—the self-production and dissemination of explicit images—has resulted in a pathology of child governance when criminal statutes intended to target pedophiles were used against children who photographed or videotaped themselves (Levick and Moon, 2010: 1042; McLaughlin, 2010: 157). In response to some very public prosecutions, states began to seek ways to address sexting among children beginning in 2008, primarily by amending statutes to reduce penalties and offer diversion programs and other non-punitive alternatives (Levick and Moon, 2010: 1054; Strasburger et al., 2019).

Efforts to remedy these pathologies—in the form of Romeo and Juliet laws, age-gap provisions, and sexting laws— demonstrate the sometimes successful incorporation of

children's sexual agency within existing legal protections. While law and policy governing statutory rape and sexting have been reexamined to allow for children's sexual agency and to reflect realities on the ground, few modifications have been made to Safe Harbor laws. The examples of statutory rape and sexting show that pathologies of child governance can be remedied by challenging assumptions and acknowledging lived realities, clearing the way for the alignment of child law and policy with the goal of child protection.

A preoccupation with traffickers

Unlike in sexting and statutory rape—where the lack of an adult mitigates or eliminates the criminality of the act—children involved in the sex trade who are not trafficked and do not have a third party face an increased chance of being arrested and charged with a crime. Why the disparity? One possible reason is that Safe Harbor legislation has less to do with child victims and more to do with the third party. Safe Harbor is a product of its creators, formed from their assumptions and objectives of social change. The attempt to implement law and policy to protect children involved in the sex industry through a joint social conservative and radical feminist lens resulted in Safe Harbor laws that direct some children into social services while prosecuting traffickers. The consequence of this bifurcated approach was the creation of strict, mutually exclusive categories that do not overlap: Children in the trade are understood to be exclusively either victims or perpetrators. Moreover, the binary construct of agency and victimhood that Safe Harbor laws codify is highly gendered, racialized, decidedly ideological, and rooted in a preoccupation with guilt and innocence that has little to do with children's diverse, lived experiences. Yet the consequences of these laws are all too real, resulting in the denial of protection to large numbers of the very children these laws were intended to help. The pathology of Safe Harbor is that it excludes and exacerbates the victimization of the sex trade's most marginalized and vulnerable children, mainly children of color and LGBTQ children, those who would benefit most from legal protections and social services.

Conclusion

I argue in this paper that through an examination of one particular pathology of child governance, we can better understand how a rigid narrative of childhood produces outcomes antithetical to the intention of child protection efforts by the state. In the case of Safe Harbor, the protections exclude some children, the result of a preoccupation with the trafficker and the uncritical adoption of a narrative of victimhood that disallows for diverse lived experiences and ambiguity in the designation of both victim and perpetrator. Consent and culpability are measured by the presence of an adult, as a third party, whose absence is used to assess criminality. Assessments of consent and culpability among children in the sex trade underscore a phenomenon seen in many other chapters in this volume, namely, that children who depart from narratives of childhood innocence and vulnerability are denied protections afforded others who comport with norms and expectations. Such children become sites of contestation of state authority and violence, carceral policies, and cultural preoccupations, resulting in pathologies of child governance that can further harm children.

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