

My research

1. National and international child governance pertaining to the sexual expression and gender identity of children through a critical lens.
2. The human rights of sex workers and historical and contemporary efforts to govern sex through logics of neoliberalism. I have a particular interest in critiques of the anti-trafficking regime and its connections to carceral feminisms and conservative protectionism.
3. Networks of activists that work at the intersection of sex and the state: LGBTIQ+, sex workers, children in the sex industry.

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.

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. 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, 2016: 1). The protections studied here are Safe Harbor laws, a patchwork of 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 majority of children excluded by 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, female child naively

¹ I use the expression *children involved in the sex trade* 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 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.

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 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

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.).

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.

In the context of trafficking, 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 engage 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, the International Labor Organization's Worst Forms of Child Labour Convention, and the United Nations Protocol to Prevent, Suppress and Punish Trafficking. 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 criminal 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, also 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). As first responders, police also choose how to treat a child 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 the third party (Butler, 2015: 1294; Fernandez, 2013: 885) are not protected under Safe Harbor laws in many states (Dysart, 2014: 285).

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 in the 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 in the trade are Black or Latino, youths 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 who do not have third parties also may not be considered victims (Adelson, 2008: 102–3; Dysart, 2014: 286–7).³ Statistics regarding children 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;

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

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 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 in the sex trade tend to have male clients, they also are less likely to work with third parties and thus tend to be less sympathetic to law enforcement.

These exclusions shine a revealing light on the narrative of victimhood that resonates with police officers, prosecutors, judges, and civil society. Measurements of victimhood are also shaped by the racial, gender, and class prejudices present in larger society. 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 entrenched, gendered, and racialized 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.

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 are unable 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 child 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 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 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.

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 present in Safe Harbor laws: the prosecution of older children close in age for consensual sex and the prosecution of older children who sext for creating, possessing, or distributing child pornography. The efforts to remedy these pathologies—in the form of Romeo and Juliet laws, age-gap provisions, and sexting laws— are examples of the (more) successful incorporation of children’s sexual agency within existing legal protections.

Statutory Rape

Statutory rape laws⁴ prohibit sexual relations with children under the age of consent (Flynn, 2013: 684). While these laws are designed to protect children from abuse and exploitation, a pathology of child governance occurs when those prosecuted are children of similar ages— usually between two to six years apart (James, 2009: 244; Kern, 2013: 1611-1612; Ramirez, 2020: 1). Statutory rape charges are almost always brought against an older male who engages in consensual sex with a younger girlfriend. The penalties for these crimes 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; Ramirez, 2020: 1; Smith and Kercher, 2011: 7). Via these laws, 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). Twenty-five states and the District of Columbia currently have Romeo and Juliet provisions (Ramirez, 2020: 2), and 28 states have age-gap provisions (Robinson and Williams, 2017).

⁴ These laws are also called unlawful carnal knowledge, corruption of a minor, rape in the nth degree, statutory sexual seduction, sexual abuse of a minor, etc. (Cocca, 2004; Smith and Kercher, 2011: a).

Romeo and Juliet and age-gap provisions are an effort to correct the pathology of stigmatizing and, in some cases, imprisoning individuals for statutory rape who engage in consensual sex. They do so by recognizing the sexual agency of older children to consent with a peer while continuing to protect children from relationships with older adults.

Sexting

The application of criminal penalties for consensual photographic or video sexting, or the self-production and dissemination of explicit images, varies widely across U.S. states (Albury and Crawford, 2012: 464; Doring, 2014: 8; Hasinoff, 2014: 105-6). In many states, sexting can be considered child pornography if the subject of the photograph is a child and the image is “explicit enough” (Hasinoff, 2014: 103) and can result in punishments such as jail time and mandatory registration on a state’s sex offender registry (Duncan, 2010: 649). These penalties may apply even if the child sexting is old enough to consent to sex (Duncan, 2010: 654, 656–657; Evett, 2016: 406).

Yet prosecuting children for sending consensual images runs counter to the intentions of child pornography laws (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 (McLaughlin, 2010: 150). Today, twenty-six states have laws governing sexting where the subject is a child (Cyberbullying, 2021; Hinduja and Patchin, 2018). These statutes vary, but usually provide some combination of reduced penalties, diversion programs, education, affirmative defense, age-gap provisions, and other non-punitive alternatives (Levick and Moon, 2010: 1054; Strasburger et al., 2019). While not as widespread as they might be, efforts to reduce penalties or decriminalize sexting altogether recognize the sexual agency of older children by seeking to distinguish consensual from nonconsensual sexting and align laws that address consent with sexting provisions.

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. Consent and culpability are measured by the presence of an adult, as a third party, and by the willingness of the child involved in the sex trade to assist in the prosecution of the third party if there is one. The lack of an adult, identity markers such as race, gender, and sexuality, and/or the unwillingness to assist the police is interpreted as agency and is used to assess criminality. 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 their objective of child protection.

The interpretation of the presence or absence of an adult in assessing child culpability marks a difference between these aspects of child governance. In sexting laws, the absence of an adult reduces the criminality of the incident. In Romeo and Juliet laws and age-gap provisions, the closeness in age of a couple serves as a mitigating factor, especially if neither is an adult. Conversely, in the sex trade, the lack of an adult increases the chances that the child will be 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.

A preoccupation with traffickers

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 in the sex trade 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, children of color, LGBTQ homeless 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.

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