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Protection of the Child Victims of Human Trafficking in the United States*

Ochrona dzieci będących ofiarami handlu ludźmi w Stanach Zjednoczonych

ABSTRACT

According to international human rights standards and European regulations, children who provide paid sexual services are considered victims of the crime of human trafficking and should receive special protection. In the United States, however, such children are also treated as perpetrators of the crime of prostitution and are often arrested. In Europe, there is a non-punishment clause, expressed in Article 8 of the European Union Directive of 2011. Since in the US such a clause does not exist, therefore some states are looking for other ways to protect child victims from arrest. One of the instruments of such protection is the institution of "safe harbor". This legal regulation allows to avoid negative criminal consequences of a violation of the law. Typical for economic and financial regulations, this institution is nowadays used by some states to protect child victims "from law enforcement". The article examines the process of creating legislation relating to children who are exploited in the sex business and who are victims of modern slavery. Analysis of such legislation in Colorado serves as a case study. Despite negative attitudes of some policymakers and part of the society, under pressure from experts and non-governmental organizations, the relevant law was pre-

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* In the first half of 2019, I was in the United States (New York, Texas, Colorado and California), where as part of a science scholarship of The Kosciuszko Foundation, I conducted a research project called "Effectiveness of the Systems to Combat Human Trafficking and Forced Labor. American-Polish Comparative Study". This is a good opportunity to thank the Foundation for its crucial support, and the following universities for their hospitality: John Jay College of Criminal Justice in NYC, Sam Houston State University, University of Northern Colorado and California State University in Los Angeles.

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Data: 06/11/2026 00:07:35

pared only in 2019. Ultimately, the legislative procedure could be finalized thanks to the agreement between the Republican and Democrat representatives, and the law came into force thanks to the firm stance of a progressive Governor of the state.

Keywords: child victims of human trafficking; special protection; paid sexual services; non-punishment clause; safe harbor; international human rights standards; legislation; the United States

INTRODUCTION

Human trafficking and forced labor are widespread phenomena that are difficult to accept, irrespective of the history of countries and societies.[1] This is mainly because they fly in the face of the idea of humanity.[2] Another reason is that they are a painful effect of existing extreme economic and social differences, and the fact that they affect everyone: women and men, young and old, weak and strong. Strong adult men from Asia, young, naive women from Eastern Europe and defenseless children from North America can all fall victim.

And this last category is what I would like to now focus on. Of course, all victims of human trafficking suffer, but child victims suffer especially, because their personal trauma is amplified through a range of social consequences. These include disturbed relationships with family, school neglect and the issue of liability for violations of the law related to the situation of a victim exploited, for example, in the sex business. In this article, I discuss a very interesting institution that can serve all victims who at some point may be involved in illegal activity, i.e. the institution of "safe harbor". However, the topic here are children, and the legislation of the state of Colorado act as an example.

SITUATION OF HUMAN TRAFFICKING VICTIMS

We will return to US law; however, now, I must discuss the main matter – the situation of human trafficking victims in general. I would also like to pay special attention to the issue of meeting the basic needs of such individuals, including the need for security.

It is obvious that in the case of modern-day slavery, the victim is our main focus. How they are treated by authorities is a test of the effectiveness of the nation and the

[1] D. Wilkins, *Understanding historical slavery, its legacies, and its lessons for combating modern-day slavery and human trafficking*, [in:] *The Palgrave International Handbook of Human Trafficking*, eds. J. Winterdyk, J. Jones, Cham 2019.

[2] T. Obokata, *Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System*, "The International and Comparative Law Quarterly" 2005, vol. 54(2).

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 06/11/2026 00:07:35

level of collective societal empathy. When the problem of human trafficking became visible,[3] pundits and NGO activists were focused on whether the support offered met the victim's basic social needs, whether it makes it easier for the victim to move past the trauma, whether it guarantees proper protection of their rights, including procedural rights, and whether it contributes to effective social reintegration. With time, the national authorities' practice of making aid or its scope dependent on whether or not the victim provided valuable information to law enforcement authorities became the subject of analyses and critique. From here, the reflection was close that the range of basic problems related to the situation of the victim must include the matter of criminal penalties for crimes committed by such a person in relation to their special status. In short: I mean the principle of not punishing victims of human trafficking (non-punishment clause or non-punishment provision), which means situations in which a victim of human trafficking commits an act that constitutes an offense or a crime, but has been forced to commit it in some form. Most often, these are actions such as: violation of border regulations by way of, for example, illegal border crossing; using a fake identity card; participating in drug distribution (for example, in a brothel); petty theft; soliciting potential clients on the street; or providing sexual services where it is punishable.[4] The principle of not punishing victims of human trafficking occupies a prominent place in the catalog of international standards for the treatment of victims of modern-day slavery, also including victims of human rights violations.

As for the non-punishment of victims of human trafficking, these standards were shaped quite recently – in 2005–2011 – and this was in EU law. At the universal level, there are no binding regulations in this area, because the most important UN document on human trafficking – the Palermo Protocol[5] of 2000 – does not directly regulate this matter. It features indirectly, because the Protocol is an international

[3] This occurred at the beginning of the 1990s, for example, in 1992 in Belgium, a book on trafficking in women appeared – C. De Stoop, *Ze zijn zo lief, meneer: Over vrouwenhandelaars, meisjesballeten en de bende van de miljardair*, Uitgeverij Kritak 1992. A reaction to this publication was the decision of the House of Representatives on appointing a Parliamentary Investigation Committee tasked with developing a policy to inhibit trafficking in women. See B. Moens, *Polityka zwalczania handlu ludźmi w Belgii – podejście kompleksowe*, [in:] *Handel Ludźmi. Zapobieganie i ściganie*, ed. Z. Lasocik, Warszawa 2006. In 1995, an international NGO was formed to deal with victims of human trafficking – La Strada International (http://lastradainternational.org/about-lsi/history [access: 7.05.2020]). See also Ł. Wieczorek, *Historia badań dotyczących problematyki handlu ludźmi w Polsce*, [in:] *Handel Ludźmi w Polsce. Kompendium wiedzy*, eds. S. Buchowska, A. Suda, E. Nowacka, Warszawa 2016, p. 15 ff.

[4] For more on this topic, see *Niekaralność ofiar handlu ludźmi – wstępna diagnoza problemu*, ed. Z. Lasocik, Warszawa 2013; *Niekaralność ofiar handlu ludźmi – nowe perspektywy*, ed. Z. Lasocik, Warszawa 2015.

[5] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime of 15 November 2000 (Polish Journal of Laws 2005, no. 18, item 160).

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 06/11/2026 00:07:35

legal act with a strong focus on the protection of the interests of victims in terms of care, assistance and prohibition of discrimination. However, in this case, it is not enough to expect specific legal solutions from the Member States. The UN returned to the issue of non-punishment almost a decade later, when the Working Group on Trafficking in Persons developed a document with a slightly mysterious title *Non-punishment and non-prosecution of victims of trafficking in persons: administrative and judicial approaches to offences committed in the process of such trafficking*.[6] This document is a combination of analysis and "soft" recommendations for the UN Member States.

Under European law, the issue in question has already appeared in two legal acts. The prohibition of punishing victims of human trafficking was clearly formulated for the first time in the Council of Europe Convention on Action against Trafficking in Human Beings of 2005.[7] At the European lawmaker's request, Article 26 of this Convention was entitled "Non-punishment provision". The said provision reads as follows: "Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so".

The second document that refers to the non-punishment of victims of human trafficking is Directive 2011/36/EU of the European Parliament and of the Council,[8] which was issued 6 years later. Unlike the 2005 Convention, Article 8 of this Directive contains a clause that is described as "Non-prosecution or non-application of penalties to the victim". This provision is entitled "Non-prosecution or non-application of penalties to the victim", and it reads as follows: "Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2 [i.e. the crime of human trafficking]".

It can therefore be seen that Article 26 of the Council of Europe Convention applies only to the non-punishment of victims, while the scope of the regulation contained in Article 8 of the EU Directive is somewhat wider and covers non-pros-

[6] Working Group on Trafficking in Persons Vienna, January 27–29, 2010, item 5 of the provisional agenda, *Non-punishment and non-prosecution of victims of trafficking in persons: administrative and judicial approaches to offences committed in the process of such trafficking*, www.unodc.org/documents/treaties/organized_crime/2010_CTOC_COP_WG4/WG4_2010_4_E.pdf [access: 16.04.2020].

[7] Council of Europe Convention on Action against Trafficking in Human Beings prepared in Warsaw on 16 May 2005 (Polish Journal of Laws 2009, no. 20, item 107).

[8] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101/1, 15.04.2011).

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 06/11/2026 00:07:35

ecution or non-application of penalties. However, this does not mean that these two documents are the only legal formulations available. The literature on the topic features others. The fairly recent monograph devoted to this problem, the British criminologist of Polish origin – J.M. Muraszkiewicz – proves that under European law, we should rather be talking about the non-liability principle.[9] I have taken note of this, and propose to postpone the debate on this subject to another occasion.

Now, given the objective and size of this article, I must satisfy myself with these general findings and two reflections that will form the context for the solutions adopted in the US. First, in order to be granted the privilege of "non-punishment", a victim of human trafficking must be in a situation where committing a crime or offense is the only option. Of course, the dynamics of the enslavement of a victim requires the assumption that the forcing of a specific behavior may vary in nature. It does not always have to be a clearly formulated instruction, or a legible "direct act" – sometimes, an order to perform a certain action may result from the victim's proper "perception" of the perpetrator's will. Second, the criminal act referred to here must be somehow related to the fact that the specific person is a victim of human trafficking.[10] It would likely be difficult to prove that an attempt to hijack a plane meets such a criterion – for lack of a less extreme example. However, stealing from brothel clients can be considered closely related to the victim's status. In the case of the Council of Europe Convention, this matter does not arise from the content of the provision; however, the European lawmaker creating the provisions 6 years later was wiser thanks to the earlier experience, and attempted to determine what crimes are involved – those that are a direct consequence of being a victim.

THE NATURE OF "SAFE HARBOR" LEGAL REGULATION

I should begin by stating that "safe harbor" is a specific type of or template for legal regulations characteristic of US legislation under which some behavior may not have negative criminal law consequences for the perpetrator, even though it is a clear violation of the law.[11] To put it differently, in practice, the so-called "safe harbor" mechanism protects people (and sometimes also companies) against liability for unforeseen or innocent mistakes. The provisions underpinning this

[9] J.M. Muraszkiewicz, *Protecting Victims of Human Trafficking from Liability: The European Approach*, Cham 2019, p. 45 ff.

[10] *Ibidem*, p. 113.

[11] P.P. Swire, *Reply: Safe Harbors and a Proposal to Improve the Community Reinvestment Act*, "Virginia Law Review" 1993, vol. 79(2), p. 350 ff.; A.S. Morrison, *Case Law, Systematic Law, and a Very Modest Suggestion*, "Statute Law Review" 2013, vol. 35(2), p. 14 ff.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 06/11/2026 00:07:35

mechanism ensure impunity to all who, acting in good faith, may have violated the law for reasons beyond their control.

Therefore, it is reasonable to ask whether the effects of such a mechanism can also extend to victims of human trafficking. The answer must be affirmative, otherwise the title of this article would be misleading. But it is not, and so I will attempt to present the genesis and elements of safe harbor regulations that function in reference to human trafficking victims in the legislation of Colorado. Why Colorado? Because that is where in 2019 I conducted research under the project "Effectiveness of the Systems to Combat Human Trafficking and Forced Labor. American-Polish Comparative Study". This was possible because I was a so-called visiting professor at the Faculty of Sociology of the University of Northern Colorado in Greeley. This allowed me to learn about state legislation, official documents and literature on the topic, as well as to conduct a series of interviews with local experts. I am sure I could provide a range of other significant reasons for choosing this specific place; however, this one seems to be sufficiently convincing. The choice of topic was determined by purely substantive reasons. From among the wide range of problems I studied, I chose this one, because the "safe harbor" mechanism in reference to victims of human trafficking is human rights problem in its purest form.

To explain the safe harbor mechanism, in the United States the following example is provided: the owner of a property has a legal obligation to specify the actual dimensions of their lands. Let us assume that an owner did what they were supposed to do, except that the details they provided turned out to be inconsistent with the facts. A violation of the law is obvious; however, the violator should not be held responsible if they acted in good faith, and the surveyors who took the measurements used faulty measuring apparatus.[12] If I remember my education correctly, in Poland, similar examples are given to law students to explain the essence of fault.

Since the key mechanism is now clear, from a chronicling obligation, let us simply note that the beginnings of legal impunity guarantees such as safe harbor reach back to the Securities and Exchange Act of 1934.[13] The idea of referring to the safe harbor mechanism appeared pursuant to Article 9 of this Act on eliminating unauthorized share price manipulation and minimizing the negative effects of complicated procedures in the case of stock trading. Application of the impunity rule comes down to determining whether the perpetrator was acting knowingly and whether they were acting in good faith. To avoid going into too much unnecessary detail, let us simply state that the so-called Rule 10B-18[14] was designed to create

[12] *Safe Harbor Law: Everything You Need to Know*, www.upcounsel.com/safe-harbor-law [access: 23.04.2020].

[13] www.govinfo.gov/content/pkg/COMPS-1885/pdf/COMPS-1885.pdf [access: 27.04.2020].

[14] The final version of this Rule was issued by the Securities and Exchange Commission in 1982. See *Petition for Rulemaking to Revise Rule 10b-18*, https://corpgov.law.harvard.edu/2019/07/18/peti-

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Data: 06/11/2026 00:07:35

guarantees for market participants in accordance with which a company that manipulates share prices can avoid liability for this if the company repurchases the shares as per the conditions set out in this Rule.[15]

With time, the safe harbor mechanism became increasingly popular, and currently, it also applies in accounting, tax situations and social benefits. In this matter, for example, Rule 401(k) is crucial – it creates a mechanism for avoidance of negative consequences by employers who are unable to meet the stringent anti-discrimination requirements when implementing employee pension plans referred to in the Small Business Job Protection Act of 1996.[16]

Safe harbor regulations can also be applied in many other legal fields outside of economic trade, including, for example, environmental protection law, copyright law and provisions on healthcare. However, in my opinion, the most important thing will be the application of this mechanism to protect victims of human trafficking, particularly those who were involved in commercial sex work (prostitution). To clarify matters, I must state that in the US, prostitution is prohibited and actually prosecuted, as evidenced by the fact that the number of arrests for this crime oscillates between 30,000–80,000 per year.[17] The increasing popularity of such an application of the safe harbor mechanism has meant that currently in the United States, this term is becoming synonymous with protection for persons providing sex services (particularly children) who may be victims of human trafficking.

PROTECTION OF CHILD VICTIMS OF HUMAN TRAFFICKING IN THE US

Let us return to the United States and attempt to determine if and to what extent US solutions refer to their European counterparts. Since the non-punishment clause does not apply there our attention should be focused on safe harbor regulation. The first state to introduce this provision in its legislation in reference to victims of human trafficking was New York. Everything began in 2003 when a 12-year-old girl named Nicolette was accused of participating in prostitution (in accordance with the law of the state of New York, offering sex services is a crime). During the court proceedings that followed, Nicolette's case reached the deliberations of the

tion-for-rulemaking-to-revise-rule-10b-18 [access: 14.04.2020]; A. Barone, *What Is Rule 10b – 18?*, www.investopedia.com/terms/r/rule10b18.asp [access: 14.04.2020].

[15] A. Barone, *op. cit*.

[16] Among others, see D. Marzullo, *What is 401k Discrimination Testing?*, 2019, www.zenefits.com/workest/401k-discrimination-testing [access: 15.04.2020]; V. Mirpuri, *Non-Discrimination Testing: 401(k) Compliance*, 2021, https://humaninterest.com/blog/non-discrimination-testing-ndt-the-basics-of-401k-compliance [access: 15.10.2021].

[17] On this topic, see *US and State Prostitution Arrests*, https://prostitution.procon.org/us-and-state-prostitution-arrests [access: 19.04.2020].

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 06/11/2026 00:07:35

First Department of New York's Appellate Division. The Legal Aid Society, which was representing the girl, adopted a very interesting line of defense, claiming that due to her age, Nicolette was legally incapable of expressing consent to take part in a sex act. And since she participated in a sex act, she was the victim of child prostitution, and not the perpetrator of this crime.[18] The Society's lawyers proved that because of this, she could not be charged with the crime of prostitution.

This logical reasoning was not supported by law. It was ironic that in accordance with Article 130.05(3) of the New York State Penal Law, a child is deemed incapable of consent to a sex act; however, pursuant to Article 230.00 of the same Penal Law, they are able to consent to sexual conduct in return for a fee and must bear the consequences for this. It is obvious that Nicolette's case was not unusual, because in the state of New York (and not only there) teenagers accused of providing sex services were arrested routinely. Discussion around this case meant that in the fall of 2004, under a coalition of NGOs acting in the interests of minors (Juvenile Justice Coalition, The Juvenile Rights Practice of The Legal Aid Society, and The Girls Educational Mentoring Services [GEMS]), a Working Group was created to eliminate this irregularity. All of these organizations undertook actions to change the law and practice so that children who were sexually exploited would be deemed as victims of a crime who should be helped instead of prosecuted.

However, the actual effects of the Working Group's efforts took several years, because new legislation on the non-punishment of children (safe harbor) was not passed until 2008, and did not enter into force until many months later – April 1, 2010.[19] The Safe Harbor for Exploited Children Act of 2008 introduced changes, i.a., to the Social Service Law and the Family Court Act. It also defined the term "sexually exploited child",[20] determining that this is anyone who is under the age of 18 who: 1) is a victim of the crime of human trafficking; 2) engages in sexual acts with another person for a fee; 3) is a victim of the crime of forced prostitution; or 4) leads a street lifestyle to practice prostitution. It can, therefore, be said that the New York lawmakers admitted that a minor engaged in paid sex is always a victim of human trafficking needing help, instead of criminal deserving punishment. However, let us highlight that unlike in Europe, the provisions of the state of New York applied only to children.

In procedural matters, the Act determined that each case of commercial sexual activity in persons under the age of 18 would no longer be sent to the criminal court, but to the family court; however, this would not happen automatically, but

[18] For more details, see K. Mullen, R. Lloyd, *The Passage of the Safe Harbor Act and the Voices of Sexually Exploited Youth*, [in:] *Lawyer's Manual on Human Trafficking: Pursuing Justice for Victims*, eds. J.L. Goodman, D.A. Leidholdt, New York 2013.

[19] K. Wigle Weiss, *A Review of the New York State Safe Harbor Law*, New York 2013, p. 2.

[20] This term was introduced as § 447-a of the N.Y. Social Services Law.

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Data: 06/11/2026 00:07:35

by way of a special petition/declaration submitted by the child in question. The essence of this special procedure was the child declaring that they are a Person in Need of Supervision (PINS). Such a petition could be submitted by a child who simultaneously met both conditions: was engaged in commercial sex and was the subject of exploitation.

This imperfect yet pioneering idea to protect children struggled to make its way into the hearts of Americans and into the minds of the authorities.[21] In 2013, approximately 20 states undertook some form of activity towards easing criminal sanctions against child victims of human trafficking offering sex services.[22] As a result of press and scientific publications, as well as due to the activities of NGOs, in 2016 – which was almost a decade after the first state safe harbor law (New York) – similar legal solutions protecting children were introduced by 28 states,[23] i.e. slightly less than half. In the same year, the National Survivor Network (NSN) conducted research on the effects of the policy of arresting and punishing victims of human trafficking engaged in the provision of sex services. The results showed that 91% of victims of human trafficking had experienced arrest, and when it came to children, this percentage was 42.[24] I will say it slightly differently: in 2016, almost one in two children exploited for prostitution in the United States was arrested for "engaging in" paid sex.

This could be one of the reasons why interest in safe harbor legislation increased, because in May 2018, the number of states that introduced it rose to 34.[25] It is difficult to deem this increase as significant, all the more so since pundits were more and more likely to mention the positive effects of the solutions adopted. They highlighted, for example, that the guarantees of legal security for children engaged in the provision of sex services resulted in NGOs being more likely to support law enforcement agencies in bringing charges against the perpetrators, mainly because, thanks to these guarantees, children are "taken" from the unfriendly hands of the

[21] There is no use even discussing similar protection being made available for adults. During my stay in the US in 2019, I often read press reports on the liquidation of brothels or criminal organizations organizing paid sex services. The result of such police actions was the publication of the names and photos of all persons detained during such interventions. One "mugshot board" features photos of traffickers, pimps, clients and persons providing sex services. Some of the latter had been forced to do this.

[22] *Safe Harbor for Youth*, www.theadvocatesforhumanrights.org/safe_harbors_initiative [access: 19.04.2020].

[23] *Safe Harbor: State Efforts to Combat Child Trafficking*, www.ncsl.org/Portals/1/Documents/cj/SafeHarbor_v06.pdf [access: 26.05.2021].

[24] *State Report Cards: Grading Criminal Record Relief Laws for Survivors of Human Trafficking*, Polaris 2019, p. 4.

[25] M. Goodland, *How Colorado climbed from an 'F' to a 'B' grade on human trafficking response*, "The Gazette", 5.05.2018, https://gazette.com/government/how-colorado-climbed-from-an-f-to-a-b-grade/article_ef983066-9293-5ce5-b6a1-e96760fbb7f2.html [access: 16.04.2020].

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 06/11/2026 00:07:35

criminal justice system and being given to the social services sector, where they can receive support from specialists, as well as care instead of punishment.[26]

However, the very enactment of the law, which contains the safe harbor formula, is insufficient to view such a regulation as satisfactory and to find that the objective is achieved. As usually occurs in such cases, of crucial importance are the details, which allow us to highlight regulations that are not simply an "attractive face" or "smoke screen", but actually eliminate the possibility of bringing children to criminal liability. In the opinion of experts, until 2019, only four states had enacted laws that actually eliminated the possibility of detaining and arresting a child and bringing them under an indictment of prostitution. In addition, these were regulations that allowed, or even forced, such a child to be covered with specialist social care. These states are Connecticut, Florida, California and Minnesota.[27]

LEGISLATION OF COLORADO – CASE STUDY AND DISCUSSION

Colorado was one of the four states that I was interested in while conducting research project "Effectiveness of the Systems to Combat Human Trafficking and Forced Labor. American-Polish Comparative Study", mentioned earlier. I chose this state for further analysis, because the history of introducing legal solutions protecting children in this state seemed the most interesting to me. On the other hand, compared to the other three, Colorado is fairly typical of a vast area of the United States.

It is located in the so-called Midwest, between Arizona, Kansas, Nebraska, New Mexico, Oklahoma, Utah, and Wyoming. The statehood of this state dates back to August 1, 1876, when Colorado joined the Union as the 38th state. The area of Colorado is almost 270,000 km^2 and is only slightly smaller than the area of Poland, while the population is in the vicinity of 5.6 million, which is seven times less than ours. The capital of the state is Denver with a population of slightly over 600,000.[28]

The main source of law in Colorado is the Constitution, and the legal system is based on common law rules. Laws are enacted by the General Assembly, which is composed of the House of Representatives (65 representatives) and the Senate (35 senators),[29] and are published in special bulletins of each session of the Assembly. Unlike in Poland, the entire law of the state of Colorado is codified in one legal

[26] *Fact Sheet: Safe Harbor Laws*, 2016, www.ncjw.org/wp-content/uploads/2017/07/Fact-Sheet_Safe-Harbor_Updated-2016.pdf [access: 26.04.2020].

[27] J. Lotus, *Minor Sex Trafficking: How Well Colorado Protects Children*, Patch, 23 January 2019, p. 3.

[28] For more information, see Colorado (CO), www.50states.com/colorado.htm [access: 23.04.2020].

[29] See Colorado General Assembly, https://leg.colorado.gov [access: 23.04.2020].

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 06/11/2026 00:07:35

collection (code), which since recently has been described as the Colorado Revised Statutes.[30] On the other hand, executive regulations issued by government agencies are published in the Colorado State Registry and codified in the Code of Colorado Regulations.[31] Local government units – counties and municipalities – can also make their own laws.

Looking at the calendar of efforts in the fight against human trafficking, I believe it can be stated that Colorado was relatively late to respond to the appearance of this phenomenon, because it did not occur until 2005/2006. Given that the first federal law on modern-day slavery was adopted by the US Congress in 2000 (Victims of Trafficking and Violence Protection Act of 2000) – the TVPA,[32] this delay is significant. Anyhow, in the same year, the General Assembly of the United Nations adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Palermo Protocol),[33] which was then and to a significant degree still a key treaty of international law on this matter. It is also worth mentioning that in Europe, the matter of combating human trafficking was already widely known in the mid-1990s, and the first provision to punish human trafficking in Poland appeared in 1997. Obviously, in the US, there were states that regulated this matter even later than Colorado, but that is a separate issue altogether.

While the regulatory history of the problem of human trafficking in Colorado began relatively late, it is extremely interesting. The first legal act that referred to this problem was the law initiated by the House of Representatives marked as HB 1143 of 2005[34] – it included provisions governing the functioning of the inter-departmental task force against human trafficking. This team was tasked with collecting data on the nature and scale of the phenomenon in Colorado, assessing prevention options, access to federal and state instruments of combating modern-day slavery, as well as checking if and to what extent existing legal regulations could be applied. It seems that this was a very rational approach by authorities – we could say it was exemplary – because the lawmaking process began with evaluating the problem and the existing legal situation.

In the next year, the state General Assembly adopted five laws that to a greater or lesser extent involved human trafficking. The first of these was SB 225 of 2006,

[30] See Colorado Revised Statutes, https://leg.colorado.gov/colorado-revised-statutes [access: 23.04.2020].

[31] See Code of Colorado Regulations: Official Publication of the State Administrative Rules, www.sos.state.co.us/CCR/Welcome.do [access: 23.04.2020].

[32] See H.R.3244 – 106th Congress (1999–2000), www.congress.gov/bill/106th-congress/house-bill/3244 [access: 21.04.2020].

[33] This was the Additional Protocol to the United Nations Convention against Transnational Organized Crime of 12 December 2000 (Polish Journal of Laws 2005, no. 18, item 160).

[34] In Colorado, laws initiated by the House of Representatives are marked with HB (House Bill), while those initiated by the Senate are marked with SB (Senate Bill).

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 06/11/2026 00:07:35

also known as 06-207 (the first number represents the year, and the second is the serial number of the document). This law related to the problem of modern-day slavery only to the extent that based on it, the head of the state patrol police was required to create a special department dealing with combating human trafficking and human smuggling on state motorways. This is another example of rational actions: after the problem is recognized, the Task Force creates an organizational unit within the police to implement clearly defined tasks.

The second law is significantly more important, and I must actually say it is the most important, because it is based on the provisions of this law that the crime of human trafficking was introduced into the law of the state of Colorado. As before, the draft law was created in the Senate, and so the law is known as SB 207 of 2006, or 06-207. The broadening of state criminal law regulations to include human trafficking occurred in a manner that is quite typical for US legislation, i.e. with a clear distinction between trafficking in adults and trafficking in children. And so, pursuant to Article 18-13-127, a person commits trafficking in adults if he or she sells, exchanges, barters, or leases an adult and receives any money or other consideration or thing of value for the adult as a result of such transaction.

A person commits the same crime if he or she receives an adult as a result of a transaction described in above, i.e. anyone who by obtaining the opportunity to exploit this person, is the final beneficiary of the commercial operation described here. What is interesting in this regulation is the fact that within the meaning of the said law, an adult is someone over 16 years of age. I must admit that this is quite an unusual solution given the many years of practice that has developed based on international law that an adult is a person who is 18 years of age or older.[35]

The Colorado state lawmaker has deemed human trafficking in adults, in principle, as a class 3 crime,[36] which is an act punishable by four to 8 years of imprisonment. However, it can be a class 2 crime if the described transaction pertains to a person whose legal status in the United States is not regulated (a migrant). In such a case, the perpetrator faces a more-severe punishment – from 8 to 12 years of imprisonment.

The definition of the crime of child trafficking, which is trafficking in persons under the age of 16 years, is identical to that of trafficking in adults (Article 18-6-402). Also identical are penalties for perpetrators, because both trafficking in adults and trafficking in children are considered a class 3 crime. Quite surprising was the solution in accordance with which the principle of more-severe sanctions for an act

[35] This is regulated by, i.a., the Convention on Rights of the Child.

[36] Pursuant to § 18-1.3-401 of the Criminal Code of Colorado, there are 5 classes of crime, which differ in the statutory threat of punishment. A class 1 crime is a sentence of life imprisonment, a class 2 crime is eight to 12 years, a class 3 crime is 4 to 8 years, a class 4 crime is 2 years to 4 years, and a class 5 crime is 1 to 2 years.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 06/11/2026 00:07:35

towards persons whose legal status is not regulated did not apply to child victims of human trafficking. By fully accepting the principle of special protection for migrants who fall into dependence, one would expect that in the case of child migrants who are victims of enslavement, the sanctions against perpetrators would be even stricter and the protection more effective. However, for now, this is not the case.

The definition of human trafficking (in adults and children) presented above and adopted in the law in question differs quite significantly from the method of defining this crime with which we have dealt and still deal with in international law. In 2000–2005, several legal definitions appeared of human trafficking, which were fairly widely accepted throughout Europe and the world. I will briefly mention them: the first was the definition formulated in the afore-mentioned Palermo Protocol of 2000,[37] and the second was the definition contained in Council Framework Decision of 19 July 2002 on combating trafficking in human beings,[38] and finally, the last definition is part of the Council of Europe Convention on Action against Trafficking in Human Beings of 2005.[39] All of these definitions were similar and contained three basic elements: methods of recruiting victims, methods of their enslavement, and the purpose for which this act was undertaken.[40] The Colorado lawmaker chose a completely different path, and was satisfied in stating that human trafficking is any transfer of a human being for money or other items of value. The purpose of the operation is irrelevant, while such purpose was a very significant element in the above-mentioned definitions. However, what raised serious reservations already then was the differentiation between trafficking in adults and trafficking in children, and most importantly, the determination that a child is a person who is under the age of 16 years (Article 16-6-402). Such a solution contradicted international law, because the Convention on Rights of the Child states that a child is a person under

[37] See footnote 6.

[38] OJ L 203/1, 1.08.2002.

[39] Polish Journal of Laws 2009, no. 20, item 107.

[40] As an example, I would like to present the first of these definitions contained in Article 3 of the Palermo Protocol: "(a) 'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs; (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used; (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth in subparagraph (a) of this article; (d) 'Child' shall mean any person under eighteen years of age".

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 06/11/2026 00:07:35

the age of 18 years (Article 1). However, we must not forget that the United States is not a party to this treaty, and so the state of Colorado was not bound by it.

The third law is of 2006 – SB 06-206 related to the introduction into state law of the crime of human smuggling, while the fourth and fifth, marked S 06S-004 and SB 06S-005 respectively, punished various forms of violence against migrants and behaviors related to forced labor involving, i.a., threat of destruction of immigration or employment documents, as well as the threat of denouncement as a means of enforcing the obedience of a forced worker.

However, let us return to human trafficking and the not-entirely successful regulations of 2006. A significant change to the solutions outlined above came in the form of the law of 2009 marked HB 1123 (09-1123). Because this time it was initiated by the House of Representatives, the acronym HB is part of the symbol. Given US standards, this is a special legal act, because it is only less than two pages long and contains four short articles. First and foremost, pursuant to this law, the age of a child victim of human trafficking was amended from 16 years to 18 years. Hence, the age of an adult victim changed, and is now 18 years and older. From the point of view of these solutions, a third change was also important – it involved deeming child trafficking as a class 2 crime (instead of class 3), which means much stricter punishment for perpetrators. However, the definition of human trafficking remained unchanged.

There was also no change in this regard in the next law regulating this problem – law SB 140 of 2010. Pursuant to Article 1 of this law, the provisions of Articles 18-3-127 and 18-6-402, which contained definitions of trafficking in adults and trafficking in children, respectively, were repealed. It was replaced by the provisions of Articles 18-3-501 and 18-3-502, which contained the same definitions as existed in the repealed provisions and that were formulated for the first time in law SB 207 of 2006. Therefore, the change was only procedural – the aim was for both crimes to be in the same editing unit of the criminal code, i.e. in the third section entitled "Crimes against persons" and in the fifth section thereof: "Human trafficking and slavery".

The practice of Colorado's judiciary quickly proved that existing laws were ineffective in combating human trafficking. It would be difficult to arrive at a different conclusion, since in 2006–2013, the state's law enforcement agencies identified approximately 450 victims of human trafficking aged between 12 years and 60 years,[41] while as a result of all procedures and investigations carried out, the allegation of human trafficking was charged 38 times,[42] but only one person was sentenced for this crime.[43]

[41] J.A. Pingleton, *Finding Safe Harbor Eliminating the Gaps in Colorado's Human Trafficking Laws*, "University of Colorado Law Review" 2016, vol. 87, p. 279.

[42] *Ibidem*, p. 281.

[43] J. Smithwick, *A Timely Ruling, Laboratory to Combat Human Trafficking*, 11 April 2014, https://perma.cc/4F6E-6D6P?type=image [access: 16.04.2020].

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 06/11/2026 00:07:35

The court case of *People of the State of Colorado v. Cardenas* was a judicial event that fundamentally changed the level of awareness of Colorado citizens about human trafficking, and reorientated the attitude of the authorities towards this crime.[44] This is partly because it was the first procedure in which the sentencing was carried out based on new legal provisions,[45] but also due to the interesting decisions of courts at two instances. In October 2010, 19-year-old Dallas Cardenas was accused of trafficking in adults, trafficking in children, pimping, forcing a minor into prostitution, and the rape of a 17-year-old girl.[46] The court sentenced D. Cardenas to 8 years imprisonment for human trafficking and other crimes.

However, as I already mentioned, this case received publicity also due to the judgment of the Court of Appeals, which quashed the judgment of the court of first instance, finding that there were no grounds for the conviction of D. Cardenas for human trafficking, but that the conviction of selling the sexual services of children was justified. The Court of Appeals agreed with the arguments of the defendant, who defended himself by stating that the children he used in prostitution provided consent. Therefore, what he did was, at worst, pimping, but not human trafficking.[47] This position taken by the court seems, at first glance, devoid of internal logic, and was, importantly, contrary to the definition of human trafficking adopted, i.a., in the Palermo Protocol, which the United States ratified on 3 November 2005.[48] I will not delve into the meanders of the twisted justification of the judgment, and will confine myself to stating that the case of *Colorado v. Cardens* by exposing the weaknesses of existing law caused much controversy and a huge social response.[49]

The result was that almost immediately negotiations began to update the act of human trafficking of 2006. An understanding between the Republicans and Democrats was reached quickly, and just two months after the judgment of the Court of Appeals, a new law appeared. This time, it was law HB 1273 of 2014, which introduced a wider range of punishability for pimps, who could no longer defend themselves by claiming that the child consented to the sale of sexual services. In addition, the law also included two new crimes. The first is human trafficking for

[44] Statewide Data Report, The Colorado Project to Comprehensively Combat Human Trafficking, Denver 2013, Laboratory to Combat Human Trafficking, p. 40.

[45] *Ibidem*, p. 227.

[46] See *Cardenas Jenkins Indictment*, www.scribd.com/doc/40088789/Cardenas-Jenkins-Indictment [access: 28.04.2020].

[47] No. 11CA1954, 338 P.3d 430; J.A. Pingleton, *op. cit.*, p. 259.

[48] See Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=_en [access: 6.05.2020].

[49] J.A. Pingleton, *op. cit.*, p. 282; J. Smithwick, *op. cit.*; J. Paul, *Colorado's new human trafficking laws aimed to boost convictions*, "The Denver Post", 2014, www.denverpost.com/2014/08/28/colorados-new-human-trafficking-laws-aimed-to-boost-convictions [access: 2.05.2020].

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 06/11/2026 00:07:35

involuntary servitude (18-3-504), a victim of which can be both an adult and a child, while the definition of the act in both cases is identical. The only difference is that the servitude of adults is a class 3 crime, while servitude of children is a class 2 crime. The second crime is human trafficking for sexual servitude, where a person commits this crime if he or she knowingly sells, recruits, harbors, transports, transfers, isolates, entices, provides, receives, or obtains by any means another person for the purpose of coercing the person to engage in commercial sexual activity. Similar to the act mentioned earlier, this act can also be carried out against an adult and against a child. If the victim is an adult, the crime is a class 3 crime, and if the victim is a child, then the crime falls within class 2.

As I mentioned above, the new regulation significantly broadened the scope of protection for persons who are forced to provide sexual services, but it also created an interesting connection between human trafficking for sexual exploitation and one of the so-called practices similar to slavery,[50] i.e. servitude. As a result of this, the legal phenomenon of sexual servitude was formed. On the other hand, the bill left a very serious gap in the law, as in penalizing new facts, it did not in any form whatsoever abolish the possibility of criminal prosecution of children who are victims of human trafficking and at the same time involved in sex work. Similarly to New York, in Colorado, a child performing paid sex who was also a victim of human trafficking was still treated, first and foremost, as a perpetrator and not as the victim of a serious crime.

This occurred because safe harbor legislation, while becoming increasingly popular in the United States (in 2014, it existed in 27 states[51]), was still considered as too "innovative", also in Colorado. However, it cannot be said that this matter was not addressed at all. On the contrary – it was, and the discussion was quite lively. We can find one of the many pieces of evidence in the report of the Colorado Human Trafficking Council of 2015.[52] This is a document in which the Council presented a comprehensive analysis of human trafficking in Colorado, and proposed actions to be undertaken in order to increase the efficiency of the nation. One of the matters discussed was the functioning of safe harbor legislation, and in particular, the experience of the states in which such legislation already existed. On this basis, the Council formulated a recommendation in accordance with which the enactment

[50] Practices similar to slavery were regulated by the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956 (Polish Journal of Laws of 1 August 1963, no. 33, item 185).

[51] See *Polaris Project*, https://polarisproject.org/wp-content/uploads/2019/09/2014-State-Ratings.pdf [access: 30.05.2020].

[52] Colorado Human Trafficking Council, *2015 Annual Report. Report to the Judiciary Committees of the House of Representatives and the Senate, pursuant to C.R.S. § 18-3-505*, Denver 2015, https://cdpsdocs.state.co.us/ovp/Human_Trafficking/report/CHTC_2015_Report.pdf [access: 29.04.2020], p. 36.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 06/11/2026 00:07:35

of provisions guaranteeing non-punishment for child victims of sexual exploitation is a necessity. In addition, the Council also prepared a series of recommendations that, if they were implemented in full, would result in a very modern instrument for combating child trafficking. Among them, the most important postulate was that children involved in prostitution should be treated as victims, and not as criminals. The Council also left no doubt as to the fact that it is the nation that should stop human trafficking by effective prosecution and prevention. However, this does not relieve civil society of its obligations, because collaboration between national and local government institutions and social organizations guarantees the creation of an optimal system of support for victims of human trafficking. And finally, as is the custom in the US, the Council expressed an expectation that sufficient funding will be provided for these activities.[53]

Unfortunately, these reasonable recommendations did not translate into good legislation, and the search for the reasons can begin at the source. The first is the significant differences in the opinions of Council members, which can be seen in the course of the vote on the report. Even though the recommended solutions were not particularly radical, and guaranteed a decent standard of eliminating human trafficking, from among the 27 persons participating in the vote, only 17 were "for", 6 were "against", and 4 abstained from voting.[54] This was poor support, and that is why the Council's recommendations remained in written form and had no impact on the law. Anticipating somewhat the development of the situation, we could say that the system needed another 3 years of reflection and pressure before it made changes.

Meanwhile, in 2014 and 2015, the US Congress passed two laws that significantly improved the legal standing of children. The first of these is the Preventing Sex Trafficking and Strengthening Families Act, P.L. 113-183,[55] which entered into force on 29 September 2014. Its goal was to create a system for protecting children who are under the care of state and local institutions from the danger of falling victim to human trafficking for sexual exploitation, and also to modify child protection systems in order to provide improved effectiveness of the activities of care institutions. The second is the Justice for Victims of Trafficking Act, 114-22, which entered into force on 29 May 2015. This legal act broadened the definition of human trafficking (including child trafficking) for sexual exploitation, strengthened the range of benefits available to victims of this crime, and imposed on states the obligation to take steps

[53] The Council was appointed by way of law HB 1273, Article 18-3-505.

[54] *Ibidem*, p. 39.

[55] P.L. 113-183 means Public Law No. 113-183. This is how draft acts are marked at federal level once they are signed by the President into law. The number is strictly a formality, and is related to the order of parliamentary sessions.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 06/11/2026 00:07:35

towards better coordination of activities that constitute the authorities' response to trafficking in children, particularly in children used in sex work.

It is difficult to say whether these regulations were an inspiration, but the following year (2016) was unique for Colorado. Firstly, because in this year, four legal acts were enacted that to a greater or lesser extent related to the problem of human trafficking. Undoubtedly, the most important of them was HB 16-1224 on the problem of child victims of human trafficking and the obligations of the state towards such individuals. First and foremost, it broadened the definition of violence against children to include cases in which a child falls victim to human trafficking, whether it be for sexual exploitation or conducting commercial sex work (child prostitution). It also imposed on social assistance departments at all levels of government and local government administration the obligation to provide protection for all children who were victims of domestic violence or any other violence, or victims of institutional neglect as a result of which these children could be victims of human trafficking (§ 19-3-308). Such a solution was a step in the right direction, because finally child victims of human trafficking became an entity entitled to social benefits from the authorities, and not just a perpetrator deserving sanctions for engaging in commercial sex. However, on the other hand, the lack of a clear decision on the non-punishment of such children (safe harbor) should be considered as conservative in every respect.

The second important event of 2016 was the publication of the next report of the Colorado Human Trafficking Council,[56] which was this authority's response to the changing situation. Some form of reaction was necessary and expected in relation to the above-mentioned changes to federal and state law,[57] but more so in the light of the increasing popularity of safe harbor legislation in the United States.

The report leads readers to the conclusion that the members of the Council reached a consensus only to the extent that it is necessary to adopt some form of solutions that would take into account the fact that some adults engaging in the provision of sexual services are also victims of human trafficking, and that children engaging in prostitution are victims of this crime, as it were, by definition. However, an agreement on the details could not be reached, if only because several fundamentally different solutions were available. The measure, or perhaps measures, that reach the furthest are those that can be described as "blanket impunity", which is

[56] See *The 2016 Colorado Human Trafficking Council Report*, https://sites.google.com/state.co.us/human-trafficking-council/the-council/annual-report/2016-report?authuser=0 [access: 3.05.2020].

[57] This does not mean, however, that state bodies are particularly concerned with federal law. On the contrary, during the interviews I carried out, I was often told that federal authorities deal with global matters and should not expect that the states will immediately react to every change in law adopted in Washington. Though Colorado residents are of the opinion that their state is one of the leaders in this matter.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 06/11/2026 00:07:35

unlimited; the second group is instruments that fall within the so-called diversion strategy[58] involving postponing prosecution or the execution of the sentence; finally, there are measures that essentially come down to the victim being entitled to use the fact of being forced into committing a crime as an affirmative defense. The diverse composition of the Council meant that all points of view were represented in the debate. People who were once victims and who indirectly or directly addressed the Council highlighted that the phenomenon of forcing victims into committing crimes is widespread, and that all measures involving temporary postponement of prosecution are ineffective, because victims have no money to hire an attorney to manage such a case. Representatives of law enforcement agencies argued that it is difficult to release victims of human trafficking from liability, because "on the other side" there are victims of the crimes that these persons committed, and the rights of these victims must also be taken into consideration. This demagogic argument is easy to dismantle, because victims of human trafficking usually commit *mala prohibita* crimes (victimless crimes),[59] for example, crimes against documents, border crimes or drug possession. The members of the Council who represented the field of justice – mainly prosecutors – leaned towards solutions that function in US law and that in practice come down to the fact that a conviction takes place, and information about the conviction, for example, for prostitution, is blocked in such a way that no one will be able to confirm that a specific person was convicted for this crime.[60]On the other hand, representatives of the social services sector pointed to the fact that all efforts to introduce changes involving increasing the effectiveness of protection by way of, for example, affirmative defense, were ineffective given the societal weakness of these individuals and their lack of money to cover legal costs.

The complicated matter meant that the members of the Council faced with a fair number of dilemmas and doubts, as well as a long list of questions. Because the voting was detailed and open, we know how specific members of the Council voted – the differences in opinion due to the differences in status had a strong influence on the way they voted. On the other hand, the lack of cohesion of opinions resulted in the fact that the votes were distributed in such a way that no single solution could be considered as preferred beyond any doubt. The length of this article does not allow me to analyze in detail the preferences of individual persons; however, there

[58] One of the strategies for preventing crime created after World War II involving removing children from the justice system.

[59] W. Dadak, *„Przestępstwa bez ofiar": zapomniana koncepcja czy aktualny problem kryminalnopolityczny?*, "Annales Universitatis Paedagogicae Cracoviensis. Studia Sociologica" 2016, vol. 8(2).

[60] The legal system of the United States has three institutions of a similar nature. To avoid going into complicated details, I will simply say that these are: sealing – sealing information on a conviction, expungement – removing information about a conviction, and vacatur – a court decision on the fact that a sentence was annulled. Therefore, arrest and convictions occur, and it is only the information that gets lost in the "abyss" of the justice system.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 06/11/2026 00:07:35

is one matter that is worthy of note: the leaders of NGOs strongly connected to the nation, who use the rhetoric of human rights on a daily basis, offered no support for the solutions that were the most beneficial to victims of human trafficking. They were also happy to abstain from voting.

This seems to be a good moment to digress again, but this time in a comparative law direction, and take a look at Europe. Here, the non-punishment of victims of human trafficking (non-punishment clause) is the standard for crime they were forced to commit. This strategy found its legal expression in Article 8 of Directive 2011/36/EU of the European Parliament and of the Council adopted by EU institutions in 2011. I would like to highlight, however, that according to the intent of the European lawmaker, a victim should not be punished for any crimes if there existed a link between their "status" of a victim and the committing of a prohibited action, for example, using someone else's passport when crossing the border. Other such situations include instances in which a victim was forced to commit a specific behavior, for example, giving intoxicants to other people (clients of a brothel). I do not know if this provision was known to the experts from Colorado, but I have not come across similar argumentation anywhere. Experts and politicians meticulously weighed the pros and cons of the non-punishment of victims, and there were more arguments against – a person providing sex services, even if forced to do so, should first be arrested. This also applied to children.

This lack of agreement between the members of the Council was so significant, and the determination of the supporters so insignificant that the report for 2017 mentions "safe harbor" only once,[61] and that only in a historical context, when the Council informed about previous initiatives for the introduction of this institution. Of course, the matter of non-punishment of victims features in the report, but only "ritually" and only as a type of *memento*. As an excuse for their own indolence, the authors of the report suggest that this is a difficult matter, and as proof they quote a statement of the then head of the US State Department's Office to Monitor and Combat Human Trafficking – Susan Coppedge – who said that effective protection of victims of human trafficking against criminal liability is a challenge for the entire country.[62]

It is difficult to resist getting the impression that this quote was cited to justify Colorado's lack of progress. It seems that this view is not shared by the famous social and political activist Kelly Dore,[63] who in 2018 wrote sneeringly that Colo-

[61] Colorado Human Trafficking Council, *2017 Annual Report*, https://sites.google.com/state.co.us/human-trafficking-council/the-council/annual-report/2017-report [access: 11.12.2021], p. 75.

[62] S. Coppedge, *Stop Criminalizing the Victims*, "CNN", 2016, https://edition.cnn.com/2016/03/17/opinions/coppedge-freedom-project-new-lives/index.html [access: 2.05.2020].

[63] Executive Director of the National Human Trafficking Survivor Coalition – involved in politics, famous and influential. As a child, she was a victim of human trafficking and spoke publicly many times about her own trauma, but also about what she experienced when she was questioned

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 06/11/2026 00:07:35

rado is one of 16 states that still does not have safe harbor legislation. The author also noted that the lack of a clear legal regulation leads to actual inequalities before the law, because in practice, the treatment of children engaging in prostitution but who are also victims of trafficking by the various offices of district prosecutors was very varied.[64]

Recognizing the complexity of the situation and increasingly frequent critical remarks, MPs and senators from both parties initiated discussion on this subject. The politicians invited the collaboration of victims of human trafficking and several people who participated in the above-mentioned controversial meeting (vote) of the Human Trafficking Council in 2016. I would like to reiterate that the majority was in favor of introducing a safe harbor law, but despite this, nothing changed, because the Council was unable to agree on clear recommendations. The actions of politicians proved to be much more effective, because in 2018, a draft act was created – SB 084 (or 18-084),[65] which provided for the introduction of safe harbor solutions. The authors of this legal act adopted the widely accepted assumption according to which any child who is involved in the provision of sex services[66] must be treated as a victim of human trafficking, and not as the perpetrator of the crime. As a result, such a child should be taken on the social assistance path of the state or county, not arrested.[67] However, how is such a mechanism meant to work in practice? And so from this point of view, this draft can hardly be considered groundbreaking – it is easier to say that it was conservative.[68] Mainly because the authors did not decide to automatically apply the principle of non-punishment of child victims (under the law), granting this right to a court acting at the request of the person concerned. In order for the mechanism to function correctly, they proposed the institution of a 14-day postponement of the arrest of a child to give the child a chance to submit the

as a teenager and when protectors of traffickers accused her that she was lying and publicly creating "perverse sexual fantasies". See M. Seaberg, *Turning the Unspeakable into a Movement to Help Others: Mirror-touch synesthete and child trafficking survivor Kelly Dore*, www.psychologytoday.com/us/blog/sensorium/201802/turning-the-unspeakable-movement-help-others [access: 26.05.2021].

[64] K. Dore, *Child victims of trafficking need a safe harbor in Colorado*, "Colorado Politics", 2018, www.coloradopolitics.com/opinion/child-victims-of-trafficking-need-a-safe-harbor-in-colorado/article_d6ed184c-cb72-5e45-af29-a8e943024243.html [access: 3.05.2020].

[65] See *Protection Minor Victims of Human Trafficking. Concerning enhancing protections for minors who are victims of human trafficking*, https://leg.colorado.gov/bills/sb18-084 [access: 3.05.2020].

[66] To highlight the specifics of the proposed solution, in bill summary the authors formulated an assumption according to which its regulations refer to "any person who is less than 18 years of age who engages in conduct that would constitute prostitution if such person were an adult". *Ipso facto*, the authors to a certain agree admitted that a child is unable to practice prostitution like an adult is, and should be treated as the victim of exploitation.

[67] See *Protection Minor Victims of Human Trafficking…*

[68] K. Dore, *op. cit*.

Pobrane z czasopisma Studia Iuridica Lublinensia **http://studiaiuridica.umcs.pl**
Data: 06/11/2026 00:07:35

correct application. One does not have to be an expert in law and court practice in the US to know that without professional help, a teenager engaged in prostitution, and so likely poor and not well educated, has little chance of benefiting from such a regulation. We were also unable to see how this would work in practice, because the draft was rejected by the Senate Judiciary Committee.[69]

The battle to pass safe harbor legislation into Colorado state law ended on 6 May 2019, when Governor Jared S. Polis signed agreement SB 19-185 of 2019 concerning protections for minor human trafficking victims.[70] It is worth noting that this was one of his first decisions, because he had become the governor in January of the same year. Looking at the resume of the new governor as a politician, there is no doubt that his sympathies lie on the side of exploited children. Mostly because in addition to political activities in the Democratic Party, he is also an active philanthropist and social activist. And probably even more so due to his social sensitivity and involvement in minority issues, including the homosexual minority, to which he belongs. He won the governorship despite openly declaring his sexual orientation – this was the first such case in the history of Colorado. Anyhow, he went down in history much earlier – in 2008 – when as the first "same-sex parent" he was chosen for the United States Congress. He is also the first Colorado governor of Jewish origin.[71] Jared S. Polis is an interesting person.

However, Governor Polis could place his signature, because there was finally a law accepted by the General Assembly. Work on the draft was initiated by and brought to a successful end by four people: two senators – Rhonda Fields and Paul Lundeen, as well as two members of the House of Representatives – Lois Landgraf and Dylan Roberts. This was a typical "inter-chamber" initiative, but it was also inter-party, because the initiators included two Democrats and two Republicans. This is also why the act was enacted unanimously. The bill in question is relatively short – five pages – and is officially called "Protections for Minor Human Trafficking Victims – concerning protections for minor human trafficking victims, and, in connection therewith, requiring a post-enactment review of the implementation of this act".[72] It is the custom of US law making that legal acts begin with a pream-

[69] See *Protection Minor Victims of Human Trafficking…*

[70] See *Concerning protections for minor human trafficking victims, and, in connection therewith, requiring a post-enactment review of the implementation of this act*, https://leg.colorado.gov/sites/default/files/2019a_185_signed.pdf [access: 3.05.2020].

[71] On this topic, i.a., see *Jared Polis to become Colorado's first openly gay governor*, "Associated Press", www.latimes.com/politics/la-na-pol-midterm-election-day-updates-2018-htmlstory.html#jared-polis-to-become-colorados-first-openly-gay-governor [access: 3.05.2020]; *Jared Polis Makes History As America's First Openly Gay Male Governor*, "Time", https://time.com/5447591/jared-polis-openly-gay-governor [access: 3.05.2020].

[72] See *Protections for Minor Human Trafficking Victims*, https://leg.colorado.gov/bills/sb19-185 [access: 11.05.2020].

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Data: 06/11/2026 00:07:35

ble, which is usually a statement or declaration. This time, the General Assembly finds that human trafficking is a serious problem that is characterized by a cycle of violence, and that children are also victims of this crime. However, above all, the lawmakers clearly state that a child who is enslaved and exploited in any form should be seen, first and foremost, as a victim, not a perpetrator. This may not seem new, but the authors of the act explain that this understanding of the problem is beneficial not only for the children in question, but also lies in the public interest. Furthermore, the General Assembly imposes on all entities (law enforcement, aid institutions, NGOs, etc.) the obligation to closely collaborate in protecting children and meeting their needs. And more concretely, it imposes on all institutions an obligation to build a system of social and rehabilitation benefits, and to create a safe harbor thanks to which children will not be afraid of perpetrators and will be able to help identify traffickers.

When it comes to legal provisions, the bill contains three important regulations. Pursuant to Article 3 of the Criminal Code (the section on prostitution), § 18-7-209 was introduced; it states that if probable cause exists to believe that a minor charged with a prostitution-related activity pursuant to state provisions (§ 18-7-201, § 18-7-202, § 18-7-204, or § 18-7-207) or a prostitution-related offense pursuant to a county or municipal ordinance was a victim of human trafficking of a minor for involuntary servitude, pursuant to § 18-3-503 (2), or human trafficking of a minor for sexual servitude, pursuant to § 18-3-504 (2), at the time of the offense being charged, the minor is immune from criminal liability or juvenile delinquency (punishable offense) proceedings for such charges. This in turn means that the lawmakers of Colorado were satisfied with not punishing child victims for being engaged in prostitution, but they omitted other crimes.

This problem appears in section 5 of the Act, which contains the second important regulation. By virtue of this provision, section 1 of the Criminal Code concerning general rules relating to crimes was enriched with § 18-1-713, which states that if a child who is a victim of human trafficking is charged with other crimes, they may use the privilege of an affirmative defense. The sense of this institution, not known to us, comes down to the fact that the defendant may in court proceedings highlight facts or events other than those referred to by the prosecutor in the indictment, which facts, if they are proven, can substantially mitigate the perpetrator's liability for illegal activities. Hence, a child accused of prostitution as well as other related crimes, for example, distribution of drugs, may defend themselves by stating that they were a victim of human trafficking and were forced into committing the said crimes. Of course, we must again ask how many children engaged in commercial sex understand the sense of such regulations or are able to receive professional legal aid. And, finally, I must highlight Article 6 of the Act, which imposed on law enforcement officials the obligation to react to cases of child trafficking (§ 18-7-201.4). An officer who identifies a victim of this crime who is under 18 years of age should immediately report

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Data: 06/11/2026 00:07:35

this to the county social services department or one of the institutions operating as part of the system to eliminate child abuse. This solution should be deemed as right and rational. If we were to compare this regulation with Polish solutions, Colorado would come out on top, because the obligation of officers is inscribed in law, while in Poland, this comes under official recommendations (procedural algorithm), which are not normative. On the other hand, however, if a law enforcement officer in Poland identifies a child victim of human trafficking, they report this to their superiors and an NGO that provides assistance to victims. Local government institutions providing social services get involved in helping the victim at a later stage and in a slightly different manner.

CONCLUSIONS

The safe harbor for child victims of human trafficking, which was built after many years of efforts in Colorado, is an asylum that protects children only from some threats. If we were to adopt the perspective that the glass is half full, we could be satisfied with the non-punishment of children who provide sexual services while being a victim of modern-day slavery. However, the version of the glass being half empty begs the question: What about children who are involved in prostitution but are not victims of human trafficking? By the very definition and nature of this crime, any child who is exploited sexually is a victim of human trafficking. In the United States, including in Colorado, where paid sex is associated with extremely strong condemnation, the climate does not accept this assumption. On the other hand, a child victim who was forced by traffickers to commit other crimes cannot enjoy blanket immunity, but receives the procedural privilege of proving that the criminal activity was not a matter of free choice. From this point of view, the rule of non-punishment of victims of human trafficking (non-punishment clause) formulated in Directive 2011/36/EU of the European Parliament and of the Council deserves more praise. But let us remain proportionate: success has many different faces, and sometimes, striving for something better is a success in and of itself.

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ABSTRAKT

Według międzynarodowych standardów praw człowieka oraz regulacji europejskich dzieci świadczące płatne usługi seksualne są uważane za ofiary przestępstwa handlu ludźmi i powinny otrzymać specjalną ochronę. Natomiast w Stanach Zjednoczonych takie dzieci są traktowane także jak sprawcy przestępstwa prostytucji i często są aresztowane. W Europie obowiązuje klauzula niekaralności, zawarta m.in. w art. 8 dyrektywy Unii Europejskiej z 2011 r. W USA taka klauzula nie istnieje, dlatego niektóre stany poszukują innych sposobów chronienia dzieci-ofiar przed aresztem. Jednym z instrumentów takiej ochrony jest instytucja „bezpiecznej przystani". Jest to regulacja prawna charakterystyczna dla ustawodawstwa Stanów Zjednoczonych, która pozwala uniknąć negatywnych konsekwencji karnych w przypadku naruszenia prawa. Znana z przepisów regulujących kwestie ekonomiczne i finansowe, instytucja ta jest współcześnie wykorzystywana przez niektóre stany do ochrony dzieci-ofiar „przed organami ścigania". W artykule przeanalizowano proces tworzenia ustawodawstwa odnoszącego się do dzieci, które są ofiarami handlu ludźmi i jednocześnie są wykorzystywane w biznesie seksualnym. Jednym ze stanów, podanym tutaj jako przykład, który stosunkowo późno podjął prace nad tego typu legislacją, jest stan Kolorado głównie ze względu na negatywny stosunek decydentów i części społeczności do komercyjnego seksu. Jednak pod naciskiem ekspertów i organizacji pozarządowych w 2019 r.u przyjęto odpowiednią ustawę. Nie obyło się przy

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Data: 06/11/2026 00:07:35

tym bez trudności, dlatego warto przedstawić, jak politycy „dorastali" do tej decyzji. Ostatecznie prace legislacyjne mogły zostać sfinalizowane dzięki porozumieniu między przedstawicielami republikanów i demokratów, a ustawa ta weszła w życie dzięki zdecydowanemu stanowisku postępowego gubernatora stanu.

Słowa kluczowe: dzieci będące ofiarami handlu ludźmi; specjalna ochrona; płatne usługi seksualne; niekaralność ofiar; bezpieczna przystań; międzynarodowe standardy praw człowieka; ustawodawstwo; Stany Zjednoczone

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