

**CHILD PROSTITUTES OR SEXUALLY EXPLOITED MINORS:  
THE DECIDING DEBATE IN DETERMINING HOW BEST TO  
RESPOND TO THOSE WHO COMMIT CRIMES AS A RESULT  
OF THEIR VICTIMHOOD**

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*Diversion laws are not a formidable solution for dealing with minors forced into prostitution. Diversion laws represent similar ideas that traffickers engrain in their victims—that they are criminals who are not worth saving but rather, worth punishing. It exposes them to the juvenile justice system, albeit in a more sheltered way with essentially the same effect. While some states have enacted safe-harbor laws and others are contemplating doing so, there is an underlying controversy regarding what the key components of a human trafficking safe-harbor law should be. This Note argues that diversion programs and affirmative-defense provisions are not key components. Instead, they are harmful and other methods of achieving the policy behind those provisions exist. The most helpful and essential component of state safe-harbor laws is immunity from prosecution for prostitution because it will (1) aid prosecutors in gaining evidence to bring the true criminals to justice, and (2) aid the victims in recovering from the psychological and physical trauma they were subject to by human traffickers. Conditioning treatment and rehabilitative services upon cooperation does not aid prosecutors, rather, it hinders their ability to provide a credible witness to the stand. It also harms the victims because it reinitiates the cycle of abuse by identifying them with the trafficker.*

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I. INTRODUCTION

Four adult males forced a fifteen-year-old girl to engage in prostitution in New York and Philadelphia and attempted to blackmail a man who sought her illicit services in New Jersey.<sup>1</sup> The men took her to motel

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1. U.S. Attorney’s Office of the District of New Jersey, *Four Men Charged With Conspiring To Engage In Sex Trafficking Of A Minor*, U.S. DEP’T OF JUSTICE (Aug. 28, 2013) [hereinafter *Four Men Charged*], <http://www.justice.gov/usao-nj/pr/four-men-charged-conspiring-engage-sex-trafficking->

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rooms on multiple occasions to have sex with multiple men, after which those men paid the man that initially approached the minor for the sex.<sup>2</sup> The FBI discovered that she was a minor and a runaway when they arrested her for prostitution and blackmail in New Jersey.<sup>3</sup> It was only after the FBI subjected her to interrogation and detention she revealed the true relationship between her pimp and herself, as well as what she endured while she was with him.<sup>4</sup>

What happened to this fifteen-year-old child is not uncommon.<sup>5</sup> The average age of children who are forced into the sex industry is twelve.<sup>6</sup> Hundreds of thousands of street children remain at risk of being sexually exploited by human traffickers.<sup>7</sup> Moreover, sexually exploited minors are not only forced to engage in prostitution—they also fall victim to physical abuse, fraud, and coercion.<sup>8</sup> These related mistreatments constitute the various techniques traffickers use to control their victims and, in turn, keep them enslaved.<sup>9</sup> For example, traffickers may bury victims underneath increasing or undefined debts and control their victims' money, making it impossible to pay off such a debt.<sup>10</sup> Others monitor all contact their victims have with outsiders or limit such contact, thereby effectively isolating them from the public.<sup>11</sup> Some threaten the victims or their families using violence or emotional blackmail in the form of humiliation and shame.<sup>12</sup> This Note illustrates the importance, as a matter of policy and practicality, of treating sexually trafficked minors as victims, not as criminals or prostitutes, when law enforcement applies human trafficking legislation.

To protect trafficked children who are forced, induced, or coerced into committing crimes when they are recruited to provide physical la-

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minor; *4 Philly Men Accused of Conspiring to Traffic Girl, 15, For Sex*, NBC PHILA. (Aug. 28, 2013), <http://www.nbcphiladelphia.com/news/local/4-Philly-Men-Conspired-to-Traffic-Girl-15-For-Sex-221555201.html>.

2. *United States v. Charles*, No. 13-558, 2016 U.S. Dist. LEXIS 9873, at \*5, \*7, \*9 (D.N.J. Jan. 28, 2016); *Four Men Charged*, *supra* note 1.

3. *See Charles*, 2016 U.S. Dist. LEXIS 9873, at \*1–2.

4. *See id.* at \*2–3.

5. *See* Office on Trafficking in Persons, *What Is Human Trafficking?*, U.S. DEP'T OF HEALTH & HUMAN SERVS., <https://www.acf.hhs.gov/otip/about/what-is-human-trafficking> (last visited May 29, 2017).

6. RICHARD J. ESTES & NEIL ALAN WEINER, *THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA, AND MEXICO* 92 (Univ. Pa. rev. 2002).

7. Jenifer McKim, *Despite New Anti-Trafficking Law, Effort to Shift Focus to Johns Struggles*, THEEYE (Nov. 17, 2013), <https://eye.necir.org/2013/11/17/sex-buyers-face-few-consequences-in-bay-statedespite-new-anti-trafficking-law-effort-to-shift-focus-to-johns-struggles/>.

8. U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 5; U.S. Dep't of Justice, *The Prostitution of Children*, U.S. DEP'T OF JUSTICE (June 3, 2015), <https://www.justice.gov/criminal-ceos/prostitution-children> (“[M]any child victims suffer from physical ailments, including tuberculosis, infections, drug addi[c]tion, malnutrition, and physical injuries resulting from violence inflicted upon them.”).

9. *The Prostitution of Children*, *supra* note 8.

10. *See What is Modern Slavery?*, U.S. Dep't of State, <https://www.state.gov/j/tip/what/> (last visited May 29, 2017).

11. U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT 37* (2016), <https://www.state.gov/documents/organization/258876.pdf>.

12. *Id.* at 218.

bor, services, or commercial sex,<sup>13</sup> Congress passed the Trafficking Victims Protection Act (“TVPA”) and has subsequently amended it four times to not only prosecute the traffickers, but also to protect the minors involved in such activities.<sup>14</sup> Many states have also adopted safe-harbor laws aimed at protecting sexually exploited children from the juvenile-justice system—a common consequence of their plight.<sup>15</sup> While sexually exploited children are considered *de facto* victims under the TVPA,<sup>16</sup> not all states have adopted safe-harbor laws, either in part or in full, and thus, under state laws they are not always considered victims.<sup>17</sup>

This Note will examine the split at the state level in adopting safe-harbor laws. Specifically, the split is over embracing complete decriminalization of child prostitution or implementing diversion programs to channel the victims into social services after they have been charged with prostitution. After examining this split over how to deal with minor victims of child trafficking, this Note will recommend that diversion not be an essential element in any safe-harbor law. In fact, it will further recommend that diversion programs are a harmful and a backwards working solution regarding how to deal with minors forced, coerced, or induced into prostitution. The victims should not be treated as criminals and exposed to the juvenile justice system merely to give them access to the state-sponsored, social-services diversion programs intended to help individuals dealing with similar psychological, economical, and medical issues. Forcing these diversion programs upon minors through the juvenile justice system is paternalistic and, in most instances, traumatic. Instead, all states should adopt legislation that does not provide for diversion programs but rather allows minors access to these social service programs without having to endure the stigma of being labeled a prostitute in the eyes of the law.

First, Part II explores the treatment of sexually exploited minors under both federal and state safe-harbor laws. This includes discussing how safe-harbor laws already adopted in certain states treat sexually exploited minors, as well as the components of those laws, the effectiveness of the included components, and their compatibility with deterrence and retributive theories of criminal law. It also discusses the Swedish model as a popular legislation model, pointing out that its shortcomings lie in the fact that it does not take the victims into account but only the wrongdoing of the traffickers.

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13. *Human Trafficking Issue Brief: Safe Harbor*, POLARIS PROJECT (2015), [hereinafter *Human Trafficking: Safe Harbor*] <https://polarisproject.org/sites/default/files/2015%20Safe%20Harbor%20Issue%20Brief.pdf>.

14. 22 U.S.C. §§ 7101–02 (2006); *Current Federal Laws*, POLARIS PROJECT (2017), <https://polarisproject.org/current-federal-laws>.

15. Ashley Greve, *The Controversies Behind Safe Harbor Laws*, HUM. TRAFFICKING CTR. BLOG (July 23, 2014), <http://humantraffickingcenter.org/human-trafficking/controversies-behind-safe-harbor-laws>.

16. *Id.*

17. *Id.*

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Part III explains why diversion, considered a key component in various safe-harbor laws, should not be considered instrumental. It discusses how diversion functions similarly to the criminalization of child prostitution—a phenomenon that is not driven by a child’s will but by a perpetrator’s actions—and does not offer any substantive protection. In doing so, it necessarily touches upon the need for newly crafted victim-centered laws in all states where no presumption of the minor committing the act of prostitution exists. Additionally, it explores how current victim-centered laws, which require minors to initially be charged with prostitution, hinder conviction of traffickers and the recovery of sexually exploited minors. Furthermore, it analyzes the unlikely success of pre-trial diversion programs, which, along with immunity privileges, are frequently reserved for first-time offenders. It also points out the inconsistency between the age of consent established for prostitution and the age of consent set for similar related offenses, which ultimately explains the disparate treatment of the victims in the two instances.

Finally, Part IV recommends that while all states should adopt safe-harbor laws, thereby mimicking the federal stance on child victims, pre-trial diversion programs should not be advanced because they are ineffective and traumatizing. Instead, social services should be provided through other available channels in a manner that is neither patronizing nor coercive, but rather in an environment that is conducive to them recovering.<sup>18</sup>

## II. BACKGROUND

Currently, various laws rely on a number of legal theories to implement different methods to deal with sexually exploited minors. This Part will first examine the framework of the landmark federal legislation, which makes the prostitution of minors under force, coercion, or inducement a federal crime. Then, it will look at illustrative examples of current frameworks of corresponding state laws. Next, it will explore the relevant legal theories behind the criminalization of sexually exploited children’s behavior and Sweden’s response to those theories. These legislative surveys will demonstrate that the solution to the plight of these children may neither be as simplistic as various state legislation nor as characteristically removed as federal legislation. To that end, the discussion below aims to lay out the current landscape law enforcement and sexually exploited minors must navigate in the aftermath of human trafficking.

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18. U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT 12* (June 2012), <http://www.state.gov/documents/organization/192587.pdf> (listing some of the steps to reaching a state of psychological wellbeing, which include among others: (1) “[e]stablishing a dependable safety network for victims to utilize and ensuring all their basic needs are met;” (2) “[f]ostering an empowering environment in which victims actively participate as consumers of therapeutic and other services;” and (3) “[e]nsuring privacy and confidentiality to protect victims and their families and friends . . .”).

A. *The Treatment of Sexually Exploited Minors Under Both Federal and State Safe-Harbor Laws.*

Relevant federal anti-human trafficking legislation and the corresponding state laws treat sexually exploited children in significantly different manners. Studying both federal and various state responses to human trafficking of minors informs precisely why reforms are needed at the state level and what types of policies should drive such reforms. In fact, given the various state laws governing the human trafficking of minors, which reflect their differing interpretations of the role children play in their own exploitation, “[i]t is critical that state laws are in parity with federal laws and the federal government’s view that children who are engaged in prostitution are victims of exploitation.”<sup>19</sup>

First, because the federal government lacks the resources to prosecute all domestic sex trafficking cases concerning minors, it envisioned state and federal governments working together to bring sex traffickers to justice and to rehabilitate their victims.<sup>20</sup> For instance, the federal government entrusts either the Child Exploitation and Obscenity Section of the Criminal Division of the Department of Justice or different U.S. Attorney’s Offices to handle cases regarding the trafficking of minors.<sup>21</sup> Unfortunately, the Child Exploitation and Obscenity Section of the Criminal Division of the Department of Justice staffs only twenty attorneys, along with a six-person High Technology Investigative Unit. Its caseload, however, has increased 1,100% since fiscal year 2001, and in that year its trial attorneys actively managed 352 investigations and 162 cases where charges were pressed in fiscal year 2009.<sup>22</sup> Its attorneys help train state, federal, and local prosecutors, law enforcement, and service workers dealing with sex trafficking cases involving a minor.<sup>23</sup> They also play an important role in developing a national policy and related legislation regarding sex trafficking of minors.<sup>24</sup> Moreover, the ninety-three U.S. Attorney’s Offices that prosecute federal sex trafficking cases are also responsible for prosecuting other federal crimes.<sup>25</sup> Accordingly, the federal government lacks the resources or the time to effectively prosecute the large number of sex trafficking occurrences each year.<sup>26</sup>

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19. POLARIS PROJECT, ANALYSIS OF STATE HUMAN TRAFFICKING LAWS 34 (2013), <https://polarisproject.org/sites/default/files/2013-State-Ratings-Analysis.pdf>.

20. Tessa L. Dysart, *The Protected Innocence Initiative: Building Protective State Law Regimes for America’s Sex-Trafficked Children*, 44 COLUM. HUM. RTS. L. REV. 619, 629 (2013).

21. *Id.*

22. U.S. DEP’T OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS 47–48 (2010), <https://www.justice.gov/psc/docs/natstrategyreport.pdf>.

23. *Id.* at 47–49; U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS 72–73 (2010), <https://www.justice.gov/archive/ag/annualreports/agreporthumantrafficking2010.pdf>.

24. U.S. DEP’T OF JUSTICE, *supra* note 22, 47–49.

25. *Id.* at 47; Dysart, *supra* note 20, at 630.

26. *See* Dysart, *supra* note 20, at 629.

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Second, state and local law enforcement officers are more likely to encounter sexually exploited minor victims.<sup>27</sup> For instance, at a 2010 hearing before the Senate Judiciary Committee’s Subcommittee on Human Rights and the Law, Cook County State’s Attorney Anita Alvarez said that there is “daily interaction between local law enforcement and those forced to work in the sex trade,” and that “crucial leads arise on a recurring basis within various parts of [the] office, including misdemeanor cases, domestic violence, auto theft, sex crimes, felony review, [and] cold-case murder.”<sup>28</sup> State and local law enforcement agencies are much larger in contrast to the Child Exploitation and Obscenity Section of the Criminal Division of the Department of Justice.<sup>29</sup> More specifically, local police departments staffed approximately 593,000 full time employees in 2008.<sup>30</sup> As such, convicting sex traffickers and enforcing prostitution laws have traditionally been within the police powers of states.<sup>31</sup>

Despite the fact that the federal government envisions working uniformly with state governments to handle sex trafficking cases<sup>32</sup> and that state and local governments encounter sex trafficking cases more frequently,<sup>33</sup> states fail to implement laws consistent in parity with the federal government.<sup>34</sup> Consequently, states fail to consistently tackle sex trafficking of minors in an effective manner.<sup>35</sup> To truly fight the plague of sex trafficking of minors, there needs to be legislative reform aimed at consistency and effectiveness.

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27. *Id.* at 630; Kathleen A. McKee, *It’s 10 P.M. Do You Know Where Your Children Are?*, 23 REGENT U. L. REV. 313, 315 (2011).

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

29. *Local Police*, BUREAU OF JUSTICE STATISTICS, <https://www.bjs.gov/index.cfm?ty=tp&tid=71> (last visited May 29, 2017); Dysart, *supra* note 20, at 629–30.

30. BRIAN A. REAVES, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, U.S. DEP’T OF JUSTICE 2 (2011); *see also* Dysart, *supra* note 20, at 629–30.

31. Dysart, *supra* note 20, at 630.

32. *See id.* at 631.

33. *Id.*

34. *Id.*; Linda Smith & Samantha Vardaman, *A Legislative Framework for Combating Domestic Minor Sex Trafficking*, 23 REGENT L. REV. 265, 276 (2010).

35. Dysart, *supra* note 20, at 631.

1. *The Federal Government Consistently Treats Sexually Exploited Children as Victims.*

To combat the prevalence of minors trafficked into the sex trade,<sup>36</sup> at the federal level, Congress passed the Trafficking Victims Protection Act (“TVPA”) in 2000, and later reauthorized it in 2003, 2005, 2008, and 2013.<sup>37</sup> The TVPA embodies the federal policy of prosecuting, protecting, and preventing.<sup>38</sup> It prosecutes the perpetrators of human trafficking by defining “trafficking of persons including component or related crimes of peonage [or] involuntary servitude”<sup>39</sup> as an offense which demands a penalty “sufficiently stringent to deter and adequately reflect the heinous nature of such [an offense].”<sup>40</sup> It protects the victims of human trafficking by providing certain rights and services to them such as medical care, housing, and monetary remedies.<sup>41</sup> And, it prevents human trafficking by providing for programs and funding to increase awareness and access to more information for victims.<sup>42</sup> Specifically, the TVPA authorizes the appropriation of funds to the Attorney General in the amount of \$11,000,000 for each of the fiscal years 2014 through 2017 to provide victims with benefits and assistance.<sup>43</sup> It also authorizes the appropriation of funds to the Director of the FBI for up to \$15,000,000 for the fiscal year from 2008 through 2011 for investigating severe instances of human trafficking.<sup>44</sup>

Most importantly, in addition to the protections and services provided to victims in the reauthorizations issued in 2003, 2005, 2008, and 2015, the Victims of Trafficking and Violence Protection Act of 2000 not only treats human traffickers as criminals, but expressly protects minors that have been trafficked for commercial sex. It explicitly labels those who have been subject to “severe forms of trafficking” through the use of force, fraud, or coercion at an age below eighteen as “victims” as opposed to “perpetrators,” accomplices, or co-conspirators.<sup>45</sup> Thus, federal law views any sexually exploited minor as the innocent prey of human traffickers and, consequently, offers them counseling, medical care, and

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36. *New ILO Global Estimate Of Forced Labour: 20.9 Million Victims*, INT’L LABOUR ORG. (June 1, 2012), [http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_182109/lang-en/index.htm](http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_182109/lang-en/index.htm); see also Brenda Zurita, *Human Trafficking Estimates and Statistics*, AM. THINKER (July 10, 2014), [http://www.americanthinker.com/articles/2014/07/human\\_trafficking\\_estimates\\_and\\_statistics.html](http://www.americanthinker.com/articles/2014/07/human_trafficking_estimates_and_statistics.html) (warning that statistics regarding child and adult victims of human trafficking are unreliable and scattered due to the very nature of human trafficking, a clandestine crime, where many victims choose not to come forward out of shame or humiliation).

37. *U.S. Anti-Trafficking Legislation*, PROT. PROJECT, <http://www.protectionproject.org/resources/law-library/u-s-anti-trafficking/> (last visited May 29, 2017).

38. *Id.*

39. 22 U.S.C. § 7109(b)(1) (2012).

40. *Id.* § 7109(b)(2)(A); PROT. PROJECT, *supra* note 37.

41. 22 U.S.C. § 7105 (2012); PROT. PROJECT, *supra* note 37.

42. PROT. PROJECT, *supra* note 37.

43. 22 U.S.C. § 7110(d)(1) (2012).

44. *Id.* § 7110(h).

45. *Id.* § 7102(9); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386 (H.R. 3244), 114 Stat. 1464 (2000).

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other such services.<sup>46</sup> Likewise, federal policy strives to always treat minors who are forced into prostitution as exploited children—never as willing participants or slightly responsible parties.<sup>47</sup> Accordingly, the TVPA forbids the adjudication or prosecution of sexually exploited minors as criminals or delinquents.<sup>48</sup> It encourages states to provide for criminal immunity and services or shelters to assist the minor victims in adjusting back to a stable life track and treating the subsequent trauma of their experience.<sup>49</sup>

While the Act initially garnered criticism for focusing more on punishing perpetrators and protecting foreign sex-trafficking victims than on protecting both domestic and foreign victims,<sup>50</sup> Congress later worked to create a national response to the human trafficking of minors by expanding the protections the federal government had initially granted to sexually exploited minors.<sup>51</sup> For example, Congressman David G. Reichert introduced House Committee Resolution 66,—currently sitting before the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations<sup>52</sup>—which specifies that children trafficked in the United States should no longer be treated as perpetrators of the crime but instead should be treated as victims.<sup>53</sup> The bill recognizes that sexually exploited children who have not yet reached the age of consent are typically arrested and detained on prostitution charges in connection with their exploitation by human traffickers.<sup>54</sup> Resolution 66 seeks to “[support] survivors of domestic child sex trafficking” by arranging to take care of their need for services “to heal from the complex trauma of sexual violence and exploitation.”<sup>55</sup> Notably, Congress would prefer that the juvenile justice system not be involved in providing such services or identifying victims.<sup>56</sup> Rather, it suggests that the child-welfare system would be a better

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46. POLARIS PROJECT, *supra* note 19, at 33.

47. *Id.*

48. See 22 U.S.C. § 7101(b)(19) (2012) (“Victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked . . .”).

49. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113–4, §§ 1241–43, 127 Stat. 54, 149–54 (2013).

50. See Cheryl N. Butler, *Bridge Over Troubled Water: Safe Harbor Laws for Sexually Exploited Minors*, 93 N.C. L. REV. 1281, 1303 (2015) (“[N]o universal agreement [exists] on what these youth should be labeled. Some agencies still use the term ‘prostitution,’ others ‘abuse victims,’ and others ‘sex trafficking victims.’ This causes confusion because some victims receive a duality of services and others receive no services as the agencies are not clearly communicating with each other in a language that they all understand.”).

51. *Id.* at 1304.

52. *All Bill Information (Except Text) For H.Con.Res.66 - Expressing The Sense Of The Congress That Children Trafficked In The United States Be Treated As Victims Of Crime, And Not As Perpetrators*, CONGRESS.GOV (Nov. 21, 2013), <https://www.congress.gov/bill/113th-congress/house-concurrent-resolution/66/all-info#committees>.

53. H.R. Con. Res. 66, 113th Cong. (2013).

54. *Id.*

55. *Id.*

56. Butler, *supra* note 50, at 1304.

fit for protecting and treating victims.<sup>57</sup> As discussed below, however, under various state laws, this stance is not common.

2. *State Safe-Harbor Provisions Fail to Consistently Treat Sexually Exploited Children as Victims.*

In contrast to the efforts advanced by the federal government, only a handful of states have enacted statutes that serve as a protective shield by providing a “safe harbor” to minors subject to human trafficking and commercial sexual exploitation.<sup>58</sup> In fact, most state legislation is directed at treating sexually exploited minors as criminals, not victims, thus punishing them through the juvenile justice system.<sup>59</sup> With respect to the states that have enacted safe-harbor laws in an attempt to protect and assist victims, each state’s safe-harbor law varies regarding the type of protection it offers.<sup>60</sup> Notable states include New York,<sup>61</sup> Washington,<sup>62</sup> Illinois,<sup>63</sup> Tennessee,<sup>64</sup> Vermont,<sup>65</sup> Connecticut,<sup>66</sup> Massachusetts,<sup>67</sup> and Minnesota.<sup>68</sup> Some states will render the minors immune from prosecution depending on their age.<sup>69</sup> Other states will divert them out of the juvenile justice system once they have been charged with prostitution and into social service programs related to providing them with adequate housing and education.<sup>70</sup> Alternatively, some states will act in a combination of the former two approaches, subject to certain conditions.<sup>71</sup>

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57. H.R. Con. Res. 66, 113th Cong. (2013).

58. POLARIS PROJECT, *supra* note 19, at 4, 33–36; INST. OF MED. AND NAT’L RESEARCH COUNCIL OF THE NAT’L ACAD., *CONFRONTING COMMERCIAL SEXUAL EXPLOITATION AND SEX TRAFFICKING OF MINORS IN THE UNITED STATES* 170–71 (Ellen W. Clayton et al. eds., 2014).

59. Butler, *supra* note 50, at 1307 (discussing the legal debate regarding a minor’s ability to consent to commercial sex and legal culpability, if any).

60. *Id.* at 1311–15; *Human Trafficking Enactments 2005-2011*, NAT’L CONF. ST. LEGISLATURES (Feb. 14, 2012), <http://www.ncsl.org/research/civil-and-criminal-justice/human-trafficking-laws-in-the-states-updated-nov.aspx>.

61. A.B. 5258-C, 2007 Leg., 231st Sess. (N.Y. 2007).

62. S.B. 6476, 61st Leg., Reg. Sess. (Wash. 2010).

63. H.B. 6462, 96th Gen. Assembly, Spring Sess. (IL 2010).

64. S.B. 0064, 107th Leg. Sess. 2011 (T.N. 2011).

65. S.B. 272, 2009-2010 Gen. Assembly Sess. (Vt. 2010).

66. S.B. 153, Feb. Sess. 2010 (Conn. 2010).

67. 2011 Mass. Acts Ch. 178, 187th Leg. Sess. (2011).

68. S.F. 1, 87th Leg., 1st Spec. Sess. (Minn. 2011).

69. Janet C. Sully, Note, *Precedent Or Problem?: Alameda County’s Diversion Policy For Youth Charged With Prostitution And The Case For A Policy Of Immunity*, 55 WM. & MARY L. REV. 687, 694–96 (2013).

70. *Id.* at 694–95.

71. *Id.* at 696.

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## a. Immunity from Prosecution Usually Depends Upon the Age of Consent, Which Differs By State.

As the Texas Supreme Court held in a decision overturning the lower courts' ruling that a thirteen-year-old committed a misdemeanor offense constituting prostitution, "[b]ecause a thirteen-year-old child cannot consent to sex as a matter of law . . . [the minor] cannot be prosecuted as a prostitute."<sup>72</sup> The rationale behind applying immunity provisions to sexually exploited minors is that they are forced or coerced into it (1) because of their lack of alternatives given their age, education, and/or home environment<sup>73</sup> and (2) because they are legally incapable of consenting to commercial sex.<sup>74</sup> Given that the criminal justice system operates to punish those who willingly commit an act that constitutes a crime, states may grant immunity to those who choose not to prostitute themselves, but are forced or coerced into it, especially for survival purposes.<sup>75</sup>

To explore the extent of power pimps hold over the children they exploit and through the commercial sex industry, *The New York Times* wrote to over 100 pimps and conducted interviews with over two dozen traffickers who were behind bars in New York City.<sup>76</sup> These interviews revealed that pimps targeted minors with low self-worth, prior sexual experience, and at-risk youths.<sup>77</sup> They also admitted that minors were much easier to manipulate than adults and thus the legal risk involving minors was justified.<sup>78</sup> A calculated and gradual grooming process occurs through which the trafficker keeps pushing the minor to engage in more frequent sexual experiences, masking it under a need for their own survival.<sup>79</sup> Since they are coerced into thinking they must engage in commercial sex to survive,<sup>80</sup> it is not surprising that many victims do not identify themselves as victims, but instead as criminals like the traffickers themselves.<sup>81</sup> As a result, Illinois, Minnesota, Connecticut, and many other states choose to provide prosecutorial immunity for minors found to engage in commercial sex acts.<sup>82</sup> In the fifteen states providing prosecutorial immunity as of August 2015, "sexually exploited children may not be subject to adjudication as delinquents, thus, removing any discretion that

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72. *In re B.W.*, 313 S.W.3d 818, 822 (Tex. 2010).

73. Cristina Liebolt, *Using Criminal Justice Theories to Create More Effective Policy For Commercially Sexually Exploited Children*, 20 BERKELEY J. CRIM. L. 135, 150 (2015).

74. *In re B.W.*, 313 S.W.3d at 821.

75. Liebolt, *supra* note 73, at 150-51.

76. Ian Urbina, *For Runaways, Sex Buys Survival*, N.Y. TIMES (Oct. 26, 2009) <http://www.nytimes.com/2009/10/27/us/27runaways.html>.

77. *Id.*

78. *Id.*

79. *Id.*; Liebolt, *supra* note 73, at 150-51.

80. Liebolt, *supra* note 73, at 150-51.

81. *See infra* Subsection III.B.1.

82. An Act Providing a Safe Harbor for Exploited Children, 2010 Conn. Public Act 10-115 (2010); Illinois Safe Children Act, Ill. Pub. Act 96-1464; Sexually Exploited Youth, 2011 Minn. Ch. Law 1, Art. 4-5.

often leads to discriminatory treatment” of victims.<sup>83</sup> Rather, state child-welfare agencies are entrusted with providing these minors with treatment and other services.<sup>84</sup>

Illinois and Tennessee provide the most illustrative examples of how immunization provisions keep the child’s best interests at the heart of the investigation. These states require law enforcement officers to prove the minor’s age for him/her to receive helpful resources and eligibility for recovery programs.<sup>85</sup> For example, in Tennessee, law enforcement officers may detain minors they suspect are sexually exploited for a reasonable amount of time.<sup>86</sup> As soon as they confirm the individual is in fact under the age of eighteen—and not simply posing as a minor—they are required to release the minor and provide him/her with the national human-trafficking resource center hotline phone number.<sup>87</sup>

Similarly, Illinois’ Safe Children Act provides minors under the age of seventeen with prosecutorial immunity once law enforcement officers verify a minor’s age after detaining him/her for a reasonable period of time during their investigation.<sup>88</sup> The most significant portion of this law puts consideration of the victim first, demonstrated by the fact that once law enforcement officers verify a minor’s age as under eighteen, they can no longer hold him/her in a detention facility or jail.<sup>89</sup> Instead, the minor may be put under child-welfare system’s temporary protective custody, such as medical facility stays, foster homes, or other facilities aimed at providing them with physical and psychological care, *i.e.* shelter, medical care, and therapy.<sup>90</sup>

Unfortunately, of the states that have enacted safe-harbor laws providing prosecutorial immunity, some states, such as Illinois and Tennessee,<sup>91</sup> have put an age limitation in their safe-harbor law, which, in some instances, can be more stringent than the age used to classify as a minor in other contexts.<sup>92</sup> For example, some states limit the age of immunity to sixteen while others have set it at eighteen.<sup>93</sup> Specifically, states treat age as an important factor when determining whether prostitution related activities committed by those under eighteen were the result of sexual exploitation.<sup>94</sup> In states like Texas and Michigan, law enforcement officers use age of consent, which can be set as low as fourteen or sixteen,

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83. Priscilla A. Ocen, *(E)racing Childhood: Examining the Racialized Construction of Childhood and Innocence in the Treatment of Sexually Exploited Minors*, 62 UCLA L. REV. 1586, 1622–23 (2015).

84. *Id.*

85. TENN. CODE ANN. § 39-13-513(d) (2012); 720 ILL. COMP. STAT. 5/11-14(d) (2012).

86. TENN. CODE ANN. § 39-13-513(d).

87. *Id.*

88. 720 Ill. Comp. Stat. 5/11-14(d).

89. *Id.*

90. 705 ILL. COMP. STAT. 405/2-5 to 2-7(2012).

91. TENN. CODE ANN. § 39-13-513(d); 720 ILL. COMP. STAT. 5/11-14(d).

92. Illinois Safe Children Act, Ill. Pub. Act 96–1464; Sexually Exploited Youth, 2011 Minn. Laws 15–23.

93. Illinois Safe Children Act, Ill. Pub. Act 96–1464; Sexually Exploited Youth, 2011 Minn. Ch. Law 1, Art. 4–5.

94. POLARIS PROJECT, *supra* note 19, at 34.

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to evaluate whether a minor was sexually exploited, leaving those above that age without protection and subject to the justice system.<sup>95</sup>

b. Pre-Trial Diversion Programs Are Subject to the Fulfillment of Certain Conditions by the Sexually Exploited Minor In Return for Immunity.

Instead of prosecutorial immunity, a number of states allow for both the charging of sexually exploited minors with prostitution and “discretionary diversion into the juvenile dependency system instead of adjudication in the delinquency system.”<sup>96</sup> This constitutes a popular tactic where states charge the minor with a crime, usually prostitution and/or other offenses, but then divert him/her to a separate proceeding (not a delinquency hearing).<sup>97</sup> In this separate proceeding, minors are diverted to pre-trial programs, but this depends upon the discretion of a judge or prosecutor.<sup>98</sup> These programs include access to safe housing, drug-rehabilitation services, therapy, and employment training.<sup>99</sup> In other cases, they may be directly referred to child-welfare services.<sup>100</sup> Diversion provisions allow courts to presume that the minors are in need of treatment or special services; therefore, if a minor fails, courts will reinstate the charges the minor was initially charged with when he/she was discovered.<sup>101</sup> To receive the residual benefits of diversion programs, *e.g.* immunity from prosecution charges and treatment, the sexually exploited minor must meet all the conditions the state diversion program imposes, or be subject to disqualification.<sup>102</sup> For instance, some states consider whether the present charge is a minor’s first offense when determining whether a diversion proceeding is an appropriate approach.<sup>103</sup>

The essential purpose of diversion programs constitutes protecting sexually exploited minors from the stigmatization and abuse prevalent in juvenile justice system.<sup>104</sup> It does so by allowing victims the opportunity to avoid a criminal record and potential incarceration and to participate in rehabilitative services.<sup>105</sup> In some jurisdictions, however, stigmatization and abuse still haunts sexually exploited minors once they enroll in their

95. *Id.* at 35.

96. Ocen, *supra* note 83, at 1622–23.

97. *See, e.g.*, LA. CHILD. CODE ANN. art. 839(D) (2013); MASS. GEN. LAWS ch. 119, § 39L (2012); N.Y. FAM. CT. ACT § 311.4 (McKinney 2013); OHIO REV. CODE ANN. § 2152.021(F) (West 2012); WASH. REV. CODE § 13.40.070 (2012).

98. SARAH WASCH ET AL., AN ANALYSIS OF SAFE HARBOR LAWS FOR MINOR VICTIMS OF COMMERCIAL SEXUAL EXPLOITATION: IMPLICATIONS FOR PENNSYLVANIA AND OTHER STATES 2 (2016), <http://impact.sp2.upenn.edu/fieldctr/wp-content/uploads/2013/05/SafeHarborWhitePaperFINAL.pdf>.

99. *Human Trafficking Overview*, NAT’L CONF. ST. LEGISLATURES (Dec. 5, 2016), <http://www.ncsl.org/research/civil-and-criminal-justice/human-trafficking.aspx>.

100. WASCH ET AL., *supra* note 98, at 2.

101. *See, e.g.*, MASS. ANN. LAWS ch. 119, § 39L(C); OHIO REV. CODE ANN. § 2152.021(F)(5)

102. *Id.*

103. LA. CHILD. CODE ANN. art. 839(D); N.Y. FAM. CT. ACT § 311.4(3).

104. Liebolt, *supra* note 73, at 144–45.

105. *Id.*

state's diversion programs because they are still housed in juvenile halls while under the supervision of judges and law enforcement officers.<sup>106</sup> Ultimately, they still endure the stress of the juvenile justice system as delinquents.<sup>107</sup>

In New York, law enforcement officers may deem sexually exploited minors arrested for prostitution as victims of human trafficking and, therefore, enable them to become eligible for state social services in lieu of receiving a sentence for prostitution.<sup>108</sup> Law enforcement may require that the minor meet certain requirements and successfully complete court-mandated programs.<sup>109</sup> Once they are declared victims and comply with certain conditions, the prostituted minors earn the right to an advocate and specialized social services.<sup>110</sup> Like New York, other states with similar diversion programs in place also qualify the sexually exploited minor's right to social services and treatment by requiring compliance with certain conditions.<sup>111</sup> Moreover, under New York's state statute, juvenile court judges enjoy great discretion in deciding if sexually exploited minors should be diverted out of the juvenile justice system.<sup>112</sup> In deciding whether to allow the sexually exploited minor to participate in the state's diversion programs or to punish her/him as a delinquent, judges may consider whether the minor has been previously arrested for prostitution, is willing to accept the court's ordered services, or has violated a court order.<sup>113</sup> Additionally, judges must make sure that the minor is younger than sixteen to deem him/her eligible to participate in the state diversion programs.<sup>114</sup> Unfortunately, "[this] discretion inherent in [the] system nevertheless leaves children subject to punishment within the juvenile justice system."<sup>115</sup> Thus, even though New York has made a wholehearted effort to provide social services and treatment to victims of human trafficking, it has fallen short.

### c. Funding for Social Services

As of 2013, only seven of the eighteen states that have enacted safe-harbor laws have also enacted laws that appropriate funds to establish and maintain social service programs designed to help sexually exploited minors.<sup>116</sup> In Illinois, the person purchasing commercial sex from the minor is charged \$1,000 to recover his car, \$500 of which is appropriated for the Violent Crime Victims Assistance Fund and used to provide neces-

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106. *See id.* at 145; Sully, *supra* note 69, at 695.

107. Liebolt, *supra* note 73, at 144–45.

108. N.Y. SOC. SERV. LAW §§ 447-a 447-b (McKinney 2010).

109. *Id.*

110. *Id.* § 447-b.

111. Butler, *supra* note 50, at 1287.

112. Ocen, *supra* note 83, at 1622–23.

113. N.Y. FAM. CT. ACT § 311.4 (McKinney 2010 & Supp. 2015); Ocen, *supra* note 83, at 1622–23.

114. Ocen, *supra* note 83, at 1622–23.

115. *Id.* at 1623.

116. Butler, *supra* note 50, at 1331; NAT'L CONF. ST. LEGISLATURES, *supra* note 60; POLARIS PROJECT, *supra* note 19, at 40–44.

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sary services and programs for victims.<sup>117</sup> In other states, the fine “Johns” face after their vehicles, which are presumably used in the commission of procuring sex from a minor, are recovered can be up to \$2,500, which is then used to fund a prostitution prevention and intervention account.<sup>118</sup> In addition to fines, at least twenty-five states have authorized forfeiture in human trafficking related crimes.<sup>119</sup> For instance, California enacted a law which deposits half of the funds forfeited from human trafficking related crimes into a Victim-Witness Assistance Fund, and half of those types of funds are given to the agency entrusted with administering the forfeiture.<sup>120</sup> Furthermore, the recently passed Californians Against Sexual Exploitation Act subjects traffickers to higher penalties and requires them to register on the sex offender registry.<sup>121</sup> States that do not have forfeiture provisions or do not impose fines on sex traffickers must rely on funds created by state treasuries or appropriated by state legislatures.<sup>122</sup> Possible funds created by state treasuries, however, are allotted not only to pay for services designed to aid victims, but also to fund parenting skills training, training for state personnel, and the actual prosecution of child sex traffickers.<sup>123</sup>

Yet not all states that have enacted a pre-trial diversion program mandate funding for the rehabilitative programs they provide to prostituted minors.<sup>124</sup> The New York safe-harbor provision mandates that expert nonprofit and other community agencies, along with the juvenile justice system,<sup>125</sup> provide prostituted minors with rehabilitative services.<sup>126</sup> While some nonprofit organizations created programs to deal with the unique needs of sexually exploited youth, the provision fails to specifically guarantee sufficient funding to establish these types of services.<sup>127</sup> This highlights a common problem with pre-trial diversion programs where minors have no real alternatives other than relying on services provided through the juvenile justice system.<sup>128</sup>

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117. POLARIS PROJECT, *supra* note 19, at 35.

118. *Id.*

119. *Human Trafficking State Laws: Judicial Protections*, NAT'L CONF. ST. LEGISLATURES (Dec. 5, 2016), <http://www.ncsl.org/research/civil-and-criminal-justice/human-trafficking-laws.aspx#tabs-2>.

120. NAT'L CONF. ST. LEGISLATURES, *supra* note 60.

121. CAL. PENAL CODE § 290(a) (West 2014).

122. *Human Trafficking State Laws: Funds and Services*, NAT'L CONF. ST. LEGISLATURES (Dec. 5, 2016), <http://www.ncsl.org/research/civil-and-criminal-justice/human-trafficking-laws.aspx#tabs-3>.

123. *Id.*

124. *See* Butler, *supra* note 50, at 1332–33.

125. *See supra* text accompanying notes 99–102.

126. Butler, *supra* note 50, at 1331–32.

127. *Id.* at 1332–33.

128. *Id.* at 1332.

*B. Swedish Model in Response to the Criminalization of Prostitution.*

Criminal punishment is usually reserved only for retribution, rehabilitation, deterrence, or incapacitation purposes.<sup>129</sup> When punishments are justified under a retributive theory of criminal law, they suppose that the specified crime inherently deserves punishment and that the criminal deserves condemnation.<sup>130</sup> This approach to criminal punishment disregards the achievement or lack of social benefit.<sup>131</sup> Under an incapacitation theory of criminal punishment, imprisonment operates to remove the criminal from society because of the danger he/she poses to it.<sup>132</sup> A rehabilitative approach to criminal punishment aims to reform the criminal and to reduce the probability that he will commit the crime again.<sup>133</sup> Lastly, those who push for criminal punishment on the basis of deterrence do so because they believe criminalizing and punishing that behavior will help prevent future occurrences of it, either from that criminal specifically or society at large.<sup>134</sup> When looking at the safe-harbor laws that assume the guilt of sexually exploited minors before offering them access to social services—such as diversion provisions—no theory of criminal punishment is fully realized.<sup>135</sup> Instead of punishing or reforming the perpetrator of the crime or preventing future occurrences of sexual exploitation of minors—as aimed by the deterrence, rehabilitation, and of criminal punishment—these laws may instead increase the exploitation of sexually exploited minors.<sup>136</sup>

In light of the fact that criminalizing the behavior of sexually exploited minors does not advance any of the widely cited purposes of criminalization or punishment, a few countries have criminalized the behavior of those buying sex off of trafficked minors rather than the behavior of those who were coerced, intimidated, and/or abused.<sup>137</sup> The “Swedish model” is becoming increasingly popular because it places the blame squarely upon the wrongdoers—the individuals sexually exploiting the minors—and, as a result, strives to reform their behavior.<sup>138</sup> Seemingly, it is a success in Sweden, as prostitution, while still prevalent, has not increased in reported numbers.<sup>139</sup> The numbers, however, only reflect the number of “Johns” and sex workers caught soliciting sex by law en-

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129. Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1313 (2000).

130. *Id.* at 1315–16.

131. *Id.*

132. *Id.* at 1316.

133. *Id.*

134. *Id.*

135. Lisa Ko, *Targeting Sex Buyers, Not Sex Sellers: Arresting Demand for Prostitution*, INDEPENDENT LENS (Jan. 23, 2015), <http://www.pbs.org/independentlens/blog/targeting-sex-buyers-not-sex-sellers-arresting-demand-for-prostitution/>.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

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forcement officers.<sup>140</sup> It does not reflect the sex workers and “Johns” who have turned to the Internet to keep sex trafficking activities underground and, thus, have effectively hidden from law enforcement officers.<sup>141</sup> In fact, as a result of this type of decriminalization, “[p]rostitutes have cited a ‘fear of increased violence,’ and ‘actual violence,’ and have been forced to work in more clandestine locations that may expose them to greater danger.”<sup>142</sup> Moreover, Norway has recorded an increase in prostitution after adopting this model.<sup>143</sup> Thus, neither widespread decriminalization of all prostitution nor the criminalization of the behavior of both those profiting from commercial sex and those creating the demand for it without some type of safety net for prostitutes is viewed as a favorable solution for sexually exploited children.<sup>144</sup>

## III. ANALYSIS

A. *Given the Trauma Sexually Exploited Children Endure, There Is Need for Victim-Centered Laws.*

Two goals underlie safe-harbor laws: (1) to provide legal protection to those forced, compelled, or induced to commit a crime, and (2) to provide ready access to necessary services such as psychological and medical treatment, housing, and rehabilitation services.<sup>145</sup> “[B]oth components are necessary to reduce trauma . . . .”<sup>146</sup> While some of the current safe-harbor laws discussed above do provide some or complete legal protection from prosecution,<sup>147</sup> there is a need to provide victims rehabilitative services in a meaningful way.<sup>148</sup>

Most importantly “[t]he trauma associated with trafficking and its psychological effects can be devastating and, if left unaddressed, can undermine victims’ recovery and potentially contribute to their vulnerability to re-victimization.”<sup>149</sup> For instance, many victims face child traumatic stress which is caused by exposure to sexual and physical abuse, and hinders their ability to cope with the traumatic events they have witnessed and experienced.<sup>150</sup> In addition to the need to treat the physical abuse victims endure during their captivity, victims must also face the psychological trauma their traffickers subjected them to, which is often more chal-

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140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *See id.*

145. *Human Trafficking: Safe Harbor*, *supra* note 13.

146. *Id.*

147. *See supra* Subsection II.A.2.

148. *See Ko*, *supra* note 135.

149. U.S. DEP’T OF STATE, *supra* note 18.

150. *See Julian D. Ford, et al., Trauma Among Youth in the Juvenile Justice System: Critical Issues and New Directions*, NAT’L CTR. FOR MENTAL HEALTH & JUVENILE JUSTICE (June 2007), [http://www.ncmhj.com/wp-content/uploads/2013/10/2007\\_Trauma-Among-Youth-in-the-Juvenile-Justice-System.pdf](http://www.ncmhj.com/wp-content/uploads/2013/10/2007_Trauma-Among-Youth-in-the-Juvenile-Justice-System.pdf).

lenging to treat.<sup>151</sup> It prevents them from immediately helping prosecutors hold the traffickers responsible because of the persistent nature of their symptoms.<sup>152</sup>

Furthermore, even after they have been “rescued,” they face the possibility of further abuse at the hands of law enforcement officials who either perpetuate abuse or fail to protect them from it.<sup>153</sup> According to a study conducted by the Sex Workers Project at the Urban Justice Center, 27% of sex workers surveyed experienced violent behavior from police officers.<sup>154</sup> Another study conducted in Washington, D.C. reported that 50% of sex workers who turned to law enforcement officials for assistance were ignored or experienced abuse at the hands of police officers.<sup>155</sup> The effect of this lack of protection from law enforcement officials due to stigma, violence, and other types of abuse is highlighted by a study which concluded that sex workers were exposed to a standardized mortality rate of death by homicide almost eighteen times more than the general public.<sup>156</sup> This lack of protection also leads to the probability of continuously facing arrest, incarceration, housing discrimination, and substandard healthcare, education, and subsequent job opportunities.<sup>157</sup> As such, mere criminalization reduces the safety of sex workers, creates a negative effect on communities,<sup>158</sup> and fails to provide “*meaningful* exit strategies.”<sup>159</sup> Therefore, as the executive director of the Coalition Against Trafficking in Women, Tania Bien-Aime, rightfully points out, decriminalization of prostituted youth helps, but these victims still need housing, medical care, and psychological services.<sup>160</sup>

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151. Megan Anitto, *Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors*, 30 YALE L. & POL’Y REV. 1, 10–11 (2011).

152. See Hussein Sadruddin et al., *Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 STAN. L. & POL’Y REV. 379, 404 (2005).

153. Kari Lerum et al., *Reducing Violence Against Sex Workers: What are the Policy Options?*, HUMAN RIGHTS FOR ALL (Feb. 28, 2011), <http://faculty.washington.edu/lerum/Policy%20Brief%20FINAL.pdf>.

154. *Revolving Door: An Analysis of Street-Based Prostitution in New York*, SEX WORKERS PROJECT AT THE URBAN JUSTICE CTR. (2003), <http://www.sexworkersproject.org/downloads/RevolvingDoorFS.html>. During a study conducted under the Sex Workers Project at the Urban Justice Center in New York, 30% of interviewed sex workers informed researchers that police officers had threatened them with violence and 27% of interviewed sex workers told researchers that they had actually experienced violence at the hands of the police. *Id.* This reported violence included grabbing and kicking prostitutes, along with beating and raping them. *Id.* This included fondling them and offering them cigarettes or agreeing not to arrest them in exchange for sex. *Id.*

155. Lerum et al., *supra* note 153.

156. *Id.*

157. *Id.*

158. *Id.*

159. Ko, *supra* note 135 (emphasis added); see, e.g., Shelby Schwartz, *Harboring Concerns: The Problematic Conceptual Reorientation of Juvenile Prostitution Adjudication in New York*, 18 COLUM. J. GENDER & L. 235, 271–72 (2008) (noting that while a detention facility can provide mandatory medical treatment, it cannot provide victims their self-worth and self-identity).

160. Ko, *supra* note 135.

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*B. Current Victim-Centered, Safe-Harbor Provisions Rely on a Harmful Presumption That Sexually Exploited Minors Are Prostitutes.*

The problem with victim-centered laws lies in the fact that in states that do not offer complete prosecutorial immunity but offer pre-trial diversion programs, victims have to first be charged with prostitution to gain the opportunity to assert that their actions were the result of human trafficking.<sup>161</sup> First, as discussed below, doing so hinders their own recovery.<sup>162</sup> Some officials believe that arresting minors to either divert them into child welfare programs or place them in jail for prostitution is the only way to effectively remove the minors from their pimps and the resulting lifestyle of abuse and exploitation, and allow them to successfully start afresh.<sup>163</sup> As a result, officials arrest minors for prostitution, giving them criminal records and sentences carried out in juvenile detention centers or jails with dangerous offenders.<sup>164</sup> When they are released, they gain nothing more than a criminal record and usually more trauma from the experience than what they had faced earlier.<sup>165</sup> Serving time in jail often exacerbates the trauma minors suffered when they were exploited because it “disrupt[s] a youth’s involvement in education programs or by severing positive social relationships she may have formed before detention.”<sup>166</sup> Most significantly, while diversion or prosecution physically removes sexually exploited children from the abusive environment, their abuser, the real perpetrator of human trafficking, is waiting on the other side of their mandatory jail sentence or social service program to force, coerce, or intimidate them right back into prostitution.<sup>167</sup> Second, as discussed further below, it also hinders the conviction of traffickers.<sup>168</sup>

*1. Victim-Centered Laws Requiring Minors To Initially Be Charged With Prostitution Hinders Their Own Recovery.*

Labelling sexually exploited minors as wrongdoers only further fosters how they view themselves—as perpetrators<sup>169</sup>—which lends itself to keeping the cycle of abuse initiated by traffickers ongoing.<sup>170</sup> For instance, unless victims have been kidnapped or otherwise forced to en-

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161. *Human Trafficking Crimes Against Children: States Respond*, NAT’L CONF. ST. LEGISLATURES (July 2014), [hereinafter, *Human Trafficking: States Respond*] [http://www.ncsl.org/documents/summit/summit2014/onlineresources/Human\\_trafficking\\_document\\_Summit\\_Handout.pdf](http://www.ncsl.org/documents/summit/summit2014/onlineresources/Human_trafficking_document_Summit_Handout.pdf).

162. Chelsea Parsons et al., *3 Key Challenges in Combating the Sex Trafficking of Minors in the United States*, CTR. FOR AM. PROGRESS (April 8, 2014, 9:22 AM), <https://www.americanprogress.org/issues/lgbt/report/2014/04/08/87293/3-key-challenges-in-combating-the-sex-trafficking-of-minors-in-the-united-states/>.

163. See Sully, *supra* note 69, at 694–96.

164. Parsons et al., *supra* note 162.

165. *Id.*

166. Sully, *supra* note 69, at 706.

167. Parsons et al., *supra* note 162.

168. *Id.*

169. *Id.*

170. Leslie Klaassen, *Breaking the Victimization Cycle: Domestic Minor Trafficking in Kansas*, 52 WASHBURN L.J. 581, 587–88 (2013).

gage in prostitution, when victims and traffickers initially develop their relationship, it commonly starts out intimate in nature.<sup>171</sup> Traffickers strive to develop a friendly or romantic relationship<sup>172</sup> so victims are led to believe that they are voluntarily choosing to move with their traffickers.<sup>173</sup> The fact traffickers target at-risk youths who may be runaways<sup>174</sup> suggests that victims may perceive this friendly or romantic trafficker as their protector who will provide them with the shelter and safety they are currently lacking, notwithstanding the trafficker's demand for sex.<sup>175</sup> Gradually, the minor begins to identify him/herself as a companion, or partner of the trafficker and then as a criminal by way of extension.<sup>176</sup> As a victim's spirit and self-worth are continually broken down by the trafficker's physical and psychological manipulation, which results in victims becoming completely dependent and fearful of their captor, the trafficker constantly reinforces the notion that the victim is also a criminal and wrongdoer.<sup>177</sup>

Ultimately, this type of psychological abuse by human traffickers leads victims to perceive themselves as criminals, which necessarily leads victims to distrust law enforcement officials, including prosecutors, just as much as the traffickers do.<sup>178</sup> When law enforcement officers reinforce this notion by refusing to recognize prostituted minors solely as victims, they echo the self-perception of victims, who view their plight as a continuation of the abuse they suffered for years in the child-welfare system.<sup>179</sup> It also reinforces what traffickers brainwash their victims with: that no one will believe them since they are mere prostitutes.<sup>180</sup> This continual cycle of low self-worth is common among those trafficked, as evidenced by the fact that 60% of sexually exploited minors rescued by the FBI during an operation spanning seventy-two cities had previously stayed in foster care or group homes.<sup>181</sup> Continuing this type of psychological abuse through the law will make it more likely that the victim will return to human trafficking, perpetuating the sex trade industry.<sup>182</sup> Therefore, victim-centered laws that require minors to face the possibility of prostitution charges before offering them access to social services and rehabilitative services fail to effectively help victims recover from their trauma or assist prosecutors in bringing the traffickers to justice, as that

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171. *Id.* at 587.

172. *Id.*

173. *Id.*

174. *Id.*

175. Parsons et al., *supra* note 162.

176. LINDA A. SMITH ET AL., THE NATIONAL REPORT ON DOMESTIC MINOR SEX TRAFFICKING: AMERICA'S PROSTITUTED CHILDREN 30–36 (2009), [https://sharedhope.org/wp-content/uploads/2012/09/SHI\\_National\\_Report\\_on\\_DMST\\_2009.pdf](https://sharedhope.org/wp-content/uploads/2012/09/SHI_National_Report_on_DMST_2009.pdf).

177. Klaassen, *supra* note 170, at 587–88.

178. SMITH ET AL., *supra* note 176, at 38–39.

179. Parsons et al., *supra* note 162.

180. SMITH ET AL., *supra* note 176, at 39.

181. Parsons et al., *supra* note 162.

182. Klaassen, *supra* note 170, at 601.

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type of treatment under the law reinforces the idea traffickers indoctrinate their victims with.

Lastly, since the federal model of human trafficking laws holds that eligibility for social services may not depend upon a victim's cooperation, it follows that "Congress likely would equally frown on holding the threat of criminal conviction over a prostituted minor's head to secure cooperation."<sup>183</sup> State diversion programs, however, are conditioned upon cooperation or successful completion.<sup>184</sup> Nevertheless, demanding cooperation from minors, who are needed to build cases against pimps by testifying against them in exchange for immunity, is not a simplistic task without any repercussions.<sup>185</sup> If state laws are written in a way whereby sexually exploited minors are genuinely classified as victims and are provided for social services to help them reintegrate back into society, threatening them with revocation of their immunity contravenes the underlying purpose of that state law.<sup>186</sup>

2. *Victim-Centered Laws Requiring Minors To Initially Be Charged With Prostitution Hinders the Conviction of Traffickers.*

Given that victims commonly identify themselves with their traffickers,<sup>187</sup> and thereby form a distrust of law enforcement similar to that exhibited by criminals,<sup>188</sup> laws treating sexually exploited minors as prostitutes first, and then victims by conditioning access to services upon cooperation with law enforcement, hold up the indictment and conviction of traffickers. As law enforcement continues to, in effect, assign possible culpability to sexually exploited minors by arresting them for prostitution, which, in turn, emphasizes what traffickers have taught them regarding authority figures, it would follow that they naturally protect their alleged fellow wrongdoer, *i.e.* the trafficker. As such, minors usually refuse to provide information or cooperate with law enforcement officials, leading them to accept the conviction for prostitution.<sup>189</sup> Sometimes the refusal comes from a desire to protect their pimp who has previously provided them with shelter, food, and other necessities.<sup>190</sup> To that end, victims are hesitant to aid prosecutors in putting away traffickers,<sup>191</sup> as they rarely identify themselves as the victims of sexual exploitation<sup>192</sup> and suffer from trauma bonding.<sup>193</sup> Trauma bonding, like Stockholm Syn-

183. Tessa L. Dysart, *Child, Victim, or Prostitute? Justice Through Immunity for Prostituted Children*, 21 DUKE J. GENDER L. & POL'Y 255, 279-80 (2014) [hereinafter Dysart, *Child, Victim, or Prostitute?*].

184. *Human Trafficking: Safe Harbor*, *supra* note 13.

185. Dysart, *Child, Victim, or Prostitute?*, *supra* note 183, at 280.

186. *Id.*

187. SMITH ET AL., *supra* note 176.

188. *Id.* at 42-45.

189. Sully, *supra* note 69, at 704.

190. *Id.* at 701 n.79.

191. Sadruddin et al., *supra* note 152, at 404.

192. Annitto, *supra* note 151, at 13-14.

193. SMITH ET AL., *supra* note 176, at 44.

drome, consists of a psychological response where victims become attached to their traffickers as family members and may later defend them.<sup>194</sup> They are usually described as “programmed” or “brain-washed.”<sup>195</sup>

These psychological effects are more pronounced where human traffickers target more than one victim at a time and, in effect, have a ring of sexually exploited minors.<sup>196</sup> It also makes it more difficult for those victims to come forward to assist a prosecutor or even seek treatment.<sup>197</sup> When traffickers exploit multiple victims simultaneously, the victims tend to compete with one another to avoid the trafficker’s wrath and gain his/her approval.<sup>198</sup> This competition leads to a hierarchy among victims in which each victim depends solely upon the trafficker and, thereby, cannot form any significant relationships with the other victims.<sup>199</sup> Isolation from everyone other than his/her trafficker prevents potential dissension and revolt.<sup>200</sup> So when law enforcement officials arrest sexually exploited minors trafficked in groups and attempt to garner their cooperation, they will be competing with their loyalty to the traffickers, which will no doubt be exacerbated due to the isolation and total dependence they have been subject to.

Even if victims agree to cooperate with the authorities to bring the perpetrators to justice, the persistent symptoms of such underlying psychological trauma still pose problems for a number of reasons.<sup>201</sup> First, after suffering such psychological trauma, many victims cannot narrate their experiences or identify the perpetrator to the prosecutor.<sup>202</sup> Second, victims may experience a psychological break which hinders their ability to willingly assist the prosecutor.<sup>203</sup> According to some experts, this resistance could be characterized as a dissociative disorder, which acts as a defense mechanism where a victim puts up a barrier in his/her memory “in order to cope with the sexually-invasive acts performed on her multiple times each day for weeks, months, or even years.”<sup>204</sup> This is especially problematic because a credible witness “needs to be able to think, remember and give details.”<sup>205</sup> But a recently rescued minor victim of human trafficking will hardly be able to do any of those things.<sup>206</sup> Third, as discussed above, victims frequently develop traumatic bonds with the

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194. *Id.*

195. *Id.*

196. Klaassen, *supra* note 170, at 588.

197. SMITH ET AL., *supra* note 176, at 39–40.

198. Sarah Primrose, Note, *Killing the Messenger: The Intersection Between Sex Trafficking, Planned Parenthood & the Marginalization of Youth Victims*, 22 U. FLA. J.L. & PUB. POL’Y 299, 315 (2011).

199. Klaassen, *supra* note 170, at 588.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*; see also SMITH ET AL., *supra* note 176, at 42–44.

205. Sadruddin et al., *supra* note 152, at 396.

206. Klaassen, *supra* note 170, at 601.

traffickers and, as a result, may feel as though they are betraying the trafficker when they provide evidence to help prosecutors bring the traffickers to justice.<sup>207</sup> Essentially, because of resulting psychological trauma, self-blame, and a lack of self-identity, victims remain “uncooperative,” which influences the lack of penalties for traffickers.<sup>208</sup> For instance, in Colorado, the 2014 Colorado Legislative Report on Human Trafficking found that 55% of the convictions carried little to no jail time.<sup>209</sup>

Prosecuting minors, or even charging them with prostitution, shifts the blame squarely on their shoulders or holds them equally blameworthy as their abuser.<sup>210</sup> For instance, Withelma Ortiz Walker Pettigrew, a sexually exploited minor from the age of ten who was repeatedly arrested and charged with solicitation and prostitution, experienced further trauma and humiliation by the juvenile justice system.<sup>211</sup> She felt like the very agencies put in place to assist her treated her like a criminal rather than a victim of sexual exploitation.<sup>212</sup> Identifying sexually exploited minors as potential criminals as opposed to simply victims until cooperation is provided interferes with law enforcement’s ability to capture the trafficker and provide proper recovery services to the minor.<sup>213</sup>

### 3. *The Exploitation and Abuse of Minors Arises as an Affirmative Defense in Child Prostitution Cases.*

The privilege to assert that their actions were due to their exploitation and, therefore, that they should be considered blameless, only comes up as an affirmative defense.<sup>214</sup> Moreover, these options are only available in some states.<sup>215</sup> In other states, victims are left defenseless and without any diversion options.<sup>216</sup> Of the states that do offer victims an opportunity to present an affirmative defense of sexual exploitation in response to prostitution charges, some require that the victim prove there was force or coercion before allowing them to plead the defense.<sup>217</sup> For example, Alabama, New Hampshire, and South Dakota offer victims affirmative defenses connected to their respective state trafficking statutes, which require that the victim, minor, or otherwise prove force or coercion used for human trafficking purposes.<sup>218</sup> On the other hand,

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207. *Id.* at 588; *see also* SMITH ET AL., *supra* note 176, at 42–44.

208. COLORADO STATEWIDE YOUTH DEVELOPMENT PLAN: SUPPLEMENTAL MATERIAL 2 (2014), <http://www2.cde.state.co.us/artemis/humonos/hu12yo82014internet/hu12yo8201408internet.pdf>.

209. *Id.*

210. Parsons et al., *supra* note 162.

211. *Id.*

212. *Id.*

213. *See* SMITH ET AL., *supra* note 176, at 42–44.

214. *Human Trafficking: States Respond*, *supra* note 161.

215. *State Survey Law: Immunity from Prostitution Charges for Domestic Minor Sex Trafficking Victims*, SHARED HOPE INT’L (2014), <http://sharedhope.org/wp-content/uploads/2014/06/Shared-Hope-State-law-survey-immunity-for-minors-through-8.1.pdf> (including Arkansas, Georgia, Alabama, and Massachusetts).

216. *Human Trafficking: States Respond*, *supra* note 161.

217. Dysart, *Child, Victim, or Prostitute?*, *supra* note 183, at 276–77.

218. *Id.* at 276.

Georgia, Iowa, Massachusetts, Missouri, Oregon, South Carolina, and Rhode Island do not require minors to prove force or coercion in cases regarding human trafficking of minors, but do require proof of force or coercion to use their affirmative defenses.<sup>219</sup> Not only must victims wait to justify their actions when charged with prostitution, but even after they get the opportunity to present an affirmative defense in response to a prostitution charge, the difficulty of proving force or coercion may render the privilege of the affirmative defense useless, given the lasting psychological trauma sexually exploited minors endure.<sup>220</sup>

*C. Diversion or Immunity Privileges Are Frequently Reserved Only for a First-Time Offender.*

In some jurisdictions, victims who have been arrested multiple times throughout their prolonged time as a sexually exploited child may be ineligible to receive the privilege of having their proceeding diverted to a child-welfare program designed to help them.<sup>221</sup> This situation also exists for those who are less willing to cooperate.<sup>222</sup> Given the fact they may face stigma and further abuse from law enforcement officials,<sup>223</sup> their uncooperative nature should not be surprising. In these instances, the victims are commonly charged with a misdemeanor that involves a light sentence, *i.e.* less time between a “safe” place and the environment perpetuating exploitation.<sup>224</sup>

Usually, when victims are finally identified it is not the first time they have been charged with prostitution.<sup>225</sup> For example, in Colorado, the 2014 Colorado Legislative Report on Human Trafficking found that 20% of trafficked victims represented repeat victims and 40% of juveniles were rescued again as adults.<sup>226</sup> Furthermore, other related criminal activity and prostitution frequently follow one another, so the victim may have been charged with truancy or curfew violations in the past.<sup>227</sup> Notably, a study titled “The Sexual Abuse to Prison Pipeline: The Girls’ Story,” conducted by the Human Rights Project for Girls at the Georgetown Law Center on Poverty and Inequality and the Ms. Foundation for Women, revealed that arresting and convicting young minors for prostitution, truancy, or running away often leads to a pattern of more arrests

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219. *Id.*

220. *See supra* Section III.B.

221. Sully, *supra* note 69, at 694–96.

222. *Id.*

223. Lerum et al., *supra* note 153.

224. Sully, *supra* note 69, at 694–96.

225. Lisa Holl Chang, Comment, *Reaching Safe Harbor: A Path for Sex-Trafficking Victims in Wisconsin*, 2013 WIS. L. REV. 1489, 1511 (2013).

226. COLORADO STATEWIDE YOUTH DEVELOPMENT PLAN, *supra* note 208.

227. Chang, *supra* note 225, at 1511.

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down the line, along with a profound mistrust of law enforcement and the legal system.<sup>228</sup>

Because of the relationship dynamic of control and the reciprocal attachment shared between a pimp and a prostituted minor, many minors accept a conviction the first time they are arrested for prostitution instead of opting to participate in a state's diversion program.<sup>229</sup> Given that a large portion of minors are youths coming from plights such as homelessness, unstable homes, and hostile relationships, protecting the pimps who provide them with vital survival tools becomes a necessity.<sup>230</sup> Others refuse because they simply distrust authority figures such as judicial officials and law enforcement officers.<sup>231</sup> Additionally, the minors who fall victim to human trafficking make up an overwhelmingly large part of vulnerable communities.<sup>232</sup> They are typically children, women, and minorities.<sup>233</sup> They tend to frequently interact with various social service agencies, all of which are inadequate to aid these communities.<sup>234</sup> Moreover, reports have revealed that homeless children are at a particularly high risk of being trafficked, making it unlikely they will have a stable place to return to after they complete a diversion program.<sup>235</sup> Now, this conviction, which may give a minor access to a juvenile facility or social-service program, usually becomes a cyclical saga because these children will run right back to the people who exploited them as a result of "the unique trauma bonding that occurs between victims and their traffickers."<sup>236</sup> Thus, minors who are arrested for prostitution usually are not first-time offenders, and even when they are, they are likely to resist leaving their pimp or resist trusting authority figures.

Moreover, children are more open to building a relationship, and thereby cooperating with law enforcement officers, when they do not feel threatened from prosecution as punishment for not cooperating.<sup>237</sup> They are already exposed to that tactic by traffickers who instill fear into minors by suggesting law enforcement officers punish victims if they ask for help.<sup>238</sup> When law enforcement officers condition assistance with the threat of punishment, they simply enforce the fear traffickers have previ-

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228. Timothy Williams, *History of Abuse Seen in Many Girls in Juvenile System*, N.Y. TIMES (July 9, 2015), [http://www.nytimes.com/2015/07/09/us/girls-in-juvenile-facilities-often-abused-report-says.html?\\_r=0](http://www.nytimes.com/2015/07/09/us/girls-in-juvenile-facilities-often-abused-report-says.html?_r=0).

229. Sully, *supra* note 69, at 703–04.

230. *Id.* at 701–03.

231. *Id.* at 704.

232. Parsons et al., *supra* note 162.

233. *Id.*

234. *Id.*

235. *Id.*

236. SHARED HOPE INT'L, PROTECTED INNOCENCE LEGISLATIVE FRAMEWORK: METHODOLOGY 3 (2011), [https://sharedhope.org/wp-content/uploads/2012/09/SHI\\_ProtectedInnocence\\_Methodology\\_FINAL.pdf](https://sharedhope.org/wp-content/uploads/2012/09/SHI_ProtectedInnocence_Methodology_FINAL.pdf); Wendi J. Adelson, *Child Prostitute or Victim of Trafficking?*, 6 U. ST. THOMAS L.J. 96, 125–26 (2008).

237. Dysart, *Child, Victim, or Prostitute?*, *supra* note 183, at 280.

238. *Id.*

ously instilled into young sexually exploited girls.<sup>239</sup> Victims are also susceptible to Stockholm Syndrome, which causes them to view their pimp as a father figure or boyfriend, making it less likely they will hand over their exploiter to the authorities.<sup>240</sup> If they are less likely to cooperate with the law enforcement, it only makes it easier for their exploiters to convince them to rejoin their human trafficking activities, even after receiving assistance. In turn, they are likely to be arrested again for prostitution and thus denied the opportunity to participate in diversion programs.

For instance, when sexually exploited minors are rescued from their traffickers, law enforcement officers normally conduct a raid where they enter forcefully and take both the victims and traffickers into custody at the same time.<sup>241</sup> At that time, if law enforcement officers fail to provide immediate treatment or relief to the victim, but condition the availability of such services upon the fulfillment of certain requirements, such as testifying against her trafficker, they simply reaffirm to the victim, through the forceful nature of the raid, that victims are just as culpable as traffickers.<sup>242</sup> This type of reinforcement, as a result of the postponement of social services on the part of law enforcement and lack of self-identifying as a victim on the part of minors, will only encourage runaway victims to return to their traffickers with whom they feel less ostracized.<sup>243</sup> Indeed, “[t]hough the frequency of recidivism may seem peculiar to those who recognize these victims as victims of a crime, most of them have been thoroughly pressured into a system that becomes familiar to them by the time they are rescued.”<sup>244</sup> Therefore, many minors are not first-time offenders,<sup>245</sup> often making them ineligible for diversion or immunity privileges which are frequently reserved only for a first-time offender.<sup>246</sup> Instead, if law enforcement immediately provides the victim with rehabilitative services, the victim will be able to identify herself as a victim much faster, and, in turn, will be more likely to testify against the trafficker.<sup>247</sup>

*D. Age of Consent Inconsistency Between Prostitution and Other Similar Related Offenses*

States proclaim that their response to human trafficking of minors is focused on punishing the wrongdoers.<sup>248</sup> Arguably, it may be more important to treat victims of sex trafficking with appropriate and compas-

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239. *Id.*

240. *Id.* at 280–81.

241. Klaassen, *supra* note 170, at 602.

242. *Id.*

243. *Id.*

244. *Id.*

245. SMITH ET AL., *supra* note 176, at 55.

246. *See id.* at vi.

247. Klaassen, *supra* note 170, at 602.

248. Butler, *supra* note 50, at 1307.

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sionate care than to stop traffickers.<sup>249</sup> On the other hand, when various states call for minors to be charged with prostitution before becoming eligible to participate in diversion programs or to allow them to use their victimhood as an affirmative defense,<sup>250</sup> thereby, subjecting minors to a *de facto* penalty, states routinely consider sexually exploited minors as wrongdoers.<sup>251</sup> To do so, they must necessarily find that minors were able to and did in fact consent to commercial sex and, thus, can be legally charged with prostitution.<sup>252</sup> Yet, “[w]e would never assign blame or culpability to a child-abuse or rape victim in another context, so why do we continue to do so in the context of commercial sexual exploitation?”<sup>253</sup>

While states have not uniformly adopted one law determining whether a minor can consent to sex, they have adopted different laws, namely statutory rape laws,<sup>254</sup> through which states have definitively established circumstances where minors are unable to consent to sex.<sup>255</sup> Statutory rape laws establish that until a person reaches a designated age, usually between the ages of fourteen to eighteen, depending on which state law one looks to, they cannot legally consent to sexual intercourse.<sup>256</sup> It is a strict liability offense for the person who was able to legally consent, the offender.<sup>257</sup> In other words, if a legal adult has sex with a minor below the set age of consent, it constitutes statutory rape, and the adult receives criminal penalties while the minor is treated as a victim.<sup>258</sup> It logically follows that this standard should be upheld notwithstanding where the minor is coerced or forced into engaging in commercial sex. If the legal adult pays for sex with the minor, however, some states still insist that the minor is treated as a prostitute and, in turn, an offender who may also be subject to criminal penalties.<sup>259</sup> State prostitution laws, however, tend to completely ignore the age-of-consent policy underlying statutory rape laws.<sup>260</sup> Instead, state laws have almost always considered minors who partake in commercial sex as criminals, not victims.<sup>261</sup>

To combat the discrepancy of the treatment of sexually exploited minors and the traffickers, many states have implemented specific laws to

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249. Parsons et al., *supra* note 162.

250. *See supra* Section III.B.

251. *See* Butler, *supra* note 50, at 1307.

252. *See id.*

253. Parsons et al., *supra* note 162.

254. SANDRA NORMAN-EADY, CHRISTOPHER REINHART & PETER MARTINO, OFFICE OF LEGIS. RES., STATUTORY RAPE LAWS BY STATE, 2003-R-0376 (Conn. 2003), <https://www.cga.ct.gov/2003/olrdata/jud/rpt/2003-r-0376.htm>; Butler, *supra* note 50, at 1307.

255. NORMAN-EADY, REINHART & MARTINO, *supra* note 254.

256. *Id.*

257. *See id.*

258. Ocen, *supra* note 83, at 1620–21.

259. Butler, *supra* note 50, at 1307; Ione Curva, *Thinking Globally, Acting Locally: How New Jersey Prostitution Law Reform Can Reduce Sex Trafficking*, 64 RUTGERS L. REV. 557, 566 (2012) (describing how prostitutes are quite often punished as severely as human traffickers and sometimes as severe as pimps in state criminal justice systems).

260. Butler, *supra* note 50, at 1307.

261. *Id.*; Curva, *supra* note 259, at 560.

hold those who buy sex from minors responsible and to impose a higher penalty than what would be imposed in a situation where the prostitute was not a minor, which would generally constitute a low level misdemeanor offense.<sup>262</sup> Even in these states, victims of child sexual abuse and victims of sexual exploitation are treated differently with regard to who is responsible and what penalties that person will face.<sup>263</sup> For example, in Missouri, anyone who solicits a prostitute between the ages of fourteen and eighteen faces a Class A Misdemeanor charge with a maximum penalty of one year in prison.<sup>264</sup> If a person older than twenty-one engages in sexual intercourse with someone under the age of seventeen, the person older than twenty-one faces a Class C Felony with a maximum penalty of seven years in prison.<sup>265</sup> Clearly, the same conduct occurs, but if it occurs within the context of commercial sex or sexual exploitation of a minor, the person contributing to the exploitation of the minor faces more stringent treatment under the law.<sup>266</sup> This suggests that the minors are not victims of sexual abuse but are mere prostitutes,<sup>267</sup> when, in fact, they do face abuse and trauma in the context of commercial sexual activity.<sup>268</sup>

*E. Pre-Trial Diversion Programs are Still In Effect and Used by States*

Despite the evidence noted above that treating victims as criminals first and then offering them the option to receive services and help conditioned upon their ability to meet certain requirements, states still implement prediversion programs and their related restrictions in cases where sexually exploited minors are rescued.<sup>269</sup> Studies have found that pre-trial diversion programs lead to positive outcomes as opposed to the traditional criminal justice system.<sup>270</sup> In one study, those who participated in pre-trial diversion programs were more likely to integrate back in the community rather than return to jail or treatment facilities twelve months after their initial offense.<sup>271</sup> Those researchers also found that offenders who chose to participate in pre-trial diversion programs spent less time behind bars than those who were eligible but chose not to participate.<sup>272</sup> Notwithstanding, these positive benefits depend on whether the individual is placed with a well-matched mental health professional who can adequately address that individual's needs.<sup>273</sup> Pre-trial diversion

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262. Parsons et al., *supra* note 162.

263. *Id.*

264. *Id.*

265. *Id.*

266. *See id.*

267. *Id.*

268. *See supra* text accompanying notes 8–12; *supra* Sections III.A–B.

269. *Human Trafficking: States Respond*, *supra* note 161, at 2.

270. CATHERINE CAMILLETI, BUREAU OF JUSTICE ASSISTANCE, PRETRIAL DIVERSION PROGRAMS: RESEARCH SUMMARY 3 (Oct. 25, 2010), <https://www.bja.gov/Publications/PretrialDiversionResearchSummary.pdf>.

271. *Id.*

272. *Id.*

273. *Id.*

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programs are also preferred because of the benefits they provide for the criminal justice system as a whole and the jurisdictions which use them.<sup>274</sup> They tend to be cost effective and to save courts time by keeping court dockets moving, and they prevent prisons from becoming overcrowded.<sup>275</sup>

Regardless of these benefits, few programs keep track of offenders' rate of relapse into the criminal justice system.<sup>276</sup> Importantly, evidence exists that "an offender's openness to treatment can affect his or her experience in pre-trial diversion program as well as success after the program ends."<sup>277</sup> Sexually exploited minors arrested for prostitution, in particular, tend to be uncooperative and are more likely to return to their abuser if they are not offered immediate treatment.<sup>278</sup> In the states that do allow pre-diversion proceedings, however, victims only gain access to pretrial programs at the discretion of justice officials once they are charged with prostitution-related crimes.<sup>279</sup> Even after the victims gain access to these services and assistance programs, they do not gain immunity from prosecution until they successfully complete the program.<sup>280</sup> Many sexually exploited children are, however, subject to child traumatic stress, preventing them from coping with their experience in a healthy, productive manner.<sup>281</sup> Moreover, many victims show signs of aggression, disordered conduct, or other delinquent behavior because of the trauma.<sup>282</sup> Thus, their chances of completing such a program are greatly reduced by the very nature of their "crime." So, while there are many benefits to the pretrial diversion programs, these benefits may not necessarily carry over for prostituted minors who have been abused, "brainwashed," and suffer from trauma.<sup>283</sup>

#### IV. RECOMMENDATION

This Note recommends that states seek to eliminate diversion as a viable and encouraged approach for dealing with minors who are caught engaging in commercial sexual activity. Rather, it suggests that states adopt prosecutorial immunity provisions and increase fines for "Johns" to dry out the supply for sexually exploited minors. While some states have done so already, it is necessary for all states to do so because human trafficking activities are frequently conducted across borders.<sup>284</sup>

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274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *See supra* text accompanying notes 242–43.

279. *Human Trafficking: States Respond*, *supra* note 161, at 2.

280. *See Human Trafficking: Safe Harbor*, *supra* note 13.

281. Ford et al., *supra* note 150.

282. SMITH ET AL., *supra* text accompanying notes note 176, at 43–44.

283. *See supra* notes 193–95.

284. 22 U.S.C. § 7101(b)(12) (2012) ("Trafficking in persons substantially affects interstate and foreign commerce. Trafficking for such purposes as involuntary servitude, peonage, and other forms of forced labor has an impact on the nationwide employment network and labor market.").

First, diversion and affirmative defense options are ineffective and traumatizing for this particular population.<sup>285</sup> They need “meaningful exit strategies.”<sup>286</sup> Second, the state can act in other stages in the battle against human trafficking of minors to encourage them, as opposed to coerce them, into using specialized social services. It would be more meaningful and productive for them to receive care and treatment in a safe space<sup>287</sup> rather than for them to be subject to the juvenile justice system for acts they were not able to make an informed decision about.

*A. Diversion and Affirmative Defenses are Ineffective and Traumatizing*

While there is evidence of positive outcomes for offenders who suffer from substance abuse, mental-health conditions, or co-occurring disorders after they have participated in pre-trial diversion programs,<sup>288</sup> they fail to address the specific concerns of sexually exploited youth and can do more harm than good. For instance, in Massachusetts, should the minor fail to comply with the state-sanctioned diversion programs, the charges against him/her can be reinstated.<sup>289</sup> As noted earlier, sexually exploited minors tend to be less cooperative and responsive to treatment because of the trauma of their experience.<sup>290</sup> Conditioning treatment and services upon requirements only exacerbate victims’ trauma and tendency to be uncooperative.<sup>291</sup> Thus, the victims’ behavior, not the perpetrators’, dictates whether the victims receive immunity for actions they were coerced into committing.<sup>292</sup> Therefore, “[e]ffective Safe Harbor statutes must address not only the issue of whether to charge a youth (decriminalization), but also how to obtain appropriate referrals to service providers regardless of legal outcomes.”<sup>293</sup> Unfortunately, state safe-harbor statutes do offer referrals to service providers or actual rehabilitative services but condition it upon cooperation with law enforcement officers who they have been taught to fear or other such requirements.<sup>294</sup> Even though pre-trial diversion programs claim to treat the underlying factors of a crime, *i.e.* prevent the abuse minors suffer from the traffickers,<sup>295</sup> traffickers and “Johns” are not the ones predominantly penalized.<sup>296</sup> While law enforcement officials and prosecutors justify keeping sexually exploited minors in the juvenile justice system to protect them and provide them with ac-

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285. SMITH ET AL., *supra* note 176, at 9 (pointing out that because sexually exploited minors do not act like “traditional sex abuse victims” but require specialized treatment and care).

286. Ko, *supra* note 135.

287. See POLARIS PROJECT, *supra* note 19, at 33.

288. CAMILLETTI, *supra* note 270.

289. Greve, *supra* note 15.

290. See *supra* Sections III.A–B.

291. See *supra* Section III.B.

292. Greve, *supra* note 15.

293. *Id.*

294. See *supra* Subsection II.B.2.; Dysart, *Child, Victim, or Prostitute?*, *supra* note 183, at 145; POLARIS PROJECT, *supra* note 19, at 33–34.

295. CAMILLETTI, *supra* note 270, at 1.

296. SMITH ET AL., *supra* note 176, at 54, 61.

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cess to services, these purposes are left completely unfulfilled when the victims lose access to funds created for crime victims and certain social services because of the prostitution charges against them.<sup>297</sup> As stated previously, it is more important to treat victims of sex trafficking with appropriate and compassionate care than to stop traffickers.<sup>298</sup> Moreover, according to anecdotal evidence regarding arrests of victims versus arrests of buyers of commercial sex, most buyers are not even charged with engaging in or soliciting commercial sex from a minor.<sup>299</sup> Critics of the approach to hamper down on those who buy sex, the “Johns,” and effectively cut down on the supply, point out that the justice system does not have enough funds, manpower, or support from the courts or agencies in following through with the arrests.<sup>300</sup> They could possibly find the funds and manpower to do so by redirecting law enforcement officers to identify sexually exploited minors as victims and apprehend traffickers and “Johns.”

Additionally, with respect to the decision to charge minors with “masking charges”<sup>301</sup> or prostitution, in Massachusetts and Vermont, both judges and prosecutors have the ability to exercise this discretion, while only the judge in New York and the prosecutor in Washington can exercise this discretion.<sup>302</sup> This type of discretion amounts to a type of an abuse where some prostituted youth are valued as victims and others are treated like offenders. As a result, pretrial diversion programs where sexually exploited minors are threatened with prosecution if they fail to comply with certain conditions must uniformly be eliminated, as they fail to protect victims or apprehend the real abusers of sex trafficking.

#### *B. Victims May Access These Services Through Other Channels*

Law enforcement officers should channel victims to food pantries, shelters, community clinics, and legal aid clinics from the time they determine the person is a minor engaging in commercial sex, usually after detaining them for a reasonable amount of time.<sup>303</sup> There are a variety of federally funded programs, along with state funded programs that do not require judicial authorization.<sup>304</sup> For example, a becoming trend is for former human-trafficking victims to create nonprofit rehabilitative agencies, such as the Veronica’s Voice in Kansas City, Missouri, which offer

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297. *Id.* at 61.

298. Parsons et al., *supra* note 162.

299. *Id.*

300. McKim, *supra* note 7.

301. SMITH ET AL., *supra* note 176, at 50–51.

302. Greve, *supra* note 15.

303. See *supra* text accompanying notes 78–80.

304. *Services Available to Victims of Human Trafficking: A Resource Guide for Social Service Providers*, U.S. DEPT OF HEALTH & HUMAN SERVS. (May 2012), [https://www.acf.hhs.gov/sites/default/files/ort/traffickingservices\\_0.pdf](https://www.acf.hhs.gov/sites/default/files/ort/traffickingservices_0.pdf) (describing the creative ways in which service organizations provide victims with assistance, such as asking a local attorney to provide pro bono legal service or soliciting donations from a local church).

counseling and peer or survivor support groups.<sup>305</sup> In 2011, Veronica's Voice worked with 188 new clients including sixteen minors.<sup>306</sup> For the clients who were still subject to sexual exploitation, this specific organization worked to create a meaningful exit plan for each individual.<sup>307</sup> Organizations like Veronica's Voice employ a grassroots approach through which they strive to provide rescued victims with economic opportunities on a long-term scale and to provide at-risk youths, currently sexually exploited minors, and newly rescued minors with rehabilitative services.<sup>308</sup> In states that do not have funds set up for human-trafficking victims, they should take note from other states that do by fining the pimps they arrest and convict to help provide the necessary funds.<sup>309</sup>

In addition to programs sponsored through nonprofit organizations and the federal government, law enforcement officers can also play a greater role in providing access to treatment to victims,<sup>310</sup> and, in effect, eliminating the need for diversion programs. For example, in Texas, a law enforcement officer is allowed to "take possession of a child without a court order if a person of ordinary prudence and caution would believe there is an immediate danger to the physical health or safety of the child, or that the child has been the victim of sexual abuse."<sup>311</sup> The officer can take possession of the child with a court order "to protect the child's health and safety."<sup>312</sup> The minor then "has access to a full range of counseling and treatment options, including 24-hour supervision and one-on-one monitoring,"<sup>313</sup> where the services offered are administered with the purpose of solely rehabilitating the minors without subjecting them to the permanent stigma of prostitution.<sup>314</sup> Texas, however, is not the only state which provides alternative channels for children to seek treatment and necessary services.<sup>315</sup> According to Professor Annitto, the Director at the Center for Law and Public Service at West Virginia University College of Law, there are laws on the books that allow child protective services agencies to provide medical and psychological services to survivors of sex trafficking or, alternatively, the existing laws can be amended so that agencies can provide those services in the most effective manner.<sup>316</sup>

With respect to federally funded programs, foreign victims of human trafficking receive federal assistance and funds to receive services, such as housing, financial assistance, clothing, and food, through the De-

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305. Klaassen, *supra* note 170, at 597–98 (2013).

306. *Id.*

307. *See generally id.*

308. *Id.* at 587.

309. POLARIS PROJECT, *supra* note 19, at 35–36.

310. *In re B.W.*, 313 S.W.3d at 825.

311. TEX. FAM. CODE §§ 262.104(a)(1) & (3); *In re B.W.*, 313 S.W.3d at 825.

312. TEX. FAM. CODE § 262.001; *In re B.W.*, 313 S.W.3d at 825.

313. *In re B.W.*, 313 S.W.3d at 825.

314. *Id.*

315. Dysart, *Child, Victim, or Prostitute?*, *supra* note 183, at 282.

316. Annitto, *supra* note 151, at 41–53.

partment of Health and Human Services.<sup>317</sup> The Department strives to ensure that victims are rehabilitated as quickly and effortlessly as possible with the help of case managers.<sup>318</sup> This same service should be provided for domestic victims of the same type of crime. Relying on state protections and benefits is difficult, especially for those unfamiliar with the system and programs.<sup>319</sup> As such, federal funding should be expanded to help both domestic and foreign sex trafficking victims instead of letting domestic sex trafficked minors become victims of both their trafficker and the juvenile justice system.

## V. CONCLUSION

This Note recommends that diversion is not a key element in safe-harbor laws across states. In fact, it is no solution at all regarding how to deal with minors forced into prostitution. It reinforces the same idea that traffickers engrain in their victims—that they are criminals and worth punishing rather than saving. It exposes them to the juvenile justice system, albeit in a more sheltered way with essentially the same effect.<sup>320</sup>

While some states have enacted safe-harbor laws and others are contemplating doing so, there is an underlying controversy regarding what the key components of a human trafficking safe-harbor law are. This Note argues that diversion programs and affirmative-defense provisions are not key components. Instead, they are harmful and other methods of achieving the policy behind those provisions exists. The most helpful and essential component of state safe-harbor laws is immunity from prosecution for prostitution because it will (1) aid prosecutors in gaining evidence to bring the true criminals to justice, and it will (2) aid the victims in recovering from the psychological and physical trauma they were subject to by human traffickers. Conditioning treatment and rehabilitative services upon cooperation does not aid prosecutors but hinders their ability to provide a credible witness to the stand. It also harms the victims because it reinitiates the cycle of abuse by identifying them with the trafficker.

Eliminating the diversion claim from existing state safe-harbor laws and preventing the diversion approach from becoming adopted in other states would prevent sexually exploited minors from enduring revictimization through the state. Victims of sexual exploitation should not have to go through the juvenile justice system or court proceedings to get access to specialized social services, but should be encouraged to use specialized social services voluntarily. Ultimately, victims should be treated as victims, not coconspirators or willing participants, because they are the product of physical and psychological abuse, not the product of free will.

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317. Amanda Peters, *Disparate Protections For American Human Trafficking Victims*, 61 CLEV. ST. L. REV. 1, 37–38 (2013).

318. *Id.*

319. *Id.*

320. Greve, *supra* note 15.

