

SEEKING
JUSTICE

2019
UPDATE

Legal approaches to eliminate criminal liability for child sex trafficking victims

APPROACHES TO NON-CRIMINALIZATION | 2019 UPDATE

STATE [1]	Hinges on age ^[2]		Hinges on identification as a child sex trafficking victim ^[3]		Incorporates a Service Response ^[4]			Procedure	Extension of non-criminalization				
	AGE	ID	AGE	ID	AGE	ID	AGE		ID	AGE	ID		
	Eliminates criminal liability within the prostitution law	Eliminates criminal liability through a separate non-crim provision	Identifies all commercially sexually exploited youth as victims	Requires third party control ^[5]	Provides for a specialized service response ^[6]	Provides for a general service response only	Mandates law enforcement referral to a child-serving agency	Expressly allows for temporary protective custody ^[6]	Prohibits a minor from being charged with prostitution ^[6]	Prohibits prosecution, adjudication, or conviction only	Contemplates detention and/or arrest ^[7]	Extends protection to other prostitution-related offenses ^[8]	Extends protection to non-prostitution offenses ^[9]
ALABAMA			✓		✓				✓	✓			
ARKANSAS			✓		✓				✓	✓			
CALIFORNIA	✓			✓*			✓	✓				✓	
COLORADO			✓		✓	✓	✓		✓	✓	✓		
CONNECTICUT	✓			✓*				✓					
DELAWARE	✓			✓*		✓		✓					
DC	✓			✓		✓	✓	✓		✓			
FLORIDA	✓			✓		✓	✓	✓		✓			
GEORGIA	✓			✓		✓	✓	✓		✓			
ILLINOIS	✓			✓*		✓	✓	✓		✓	✓	✓	
INDIANA	✓				✓				✓		✓		
KENTUCKY		✓		✓		✓	✓	✓		✓	✓	✓	✓
MAINE	✓								✓				
MINNESOTA		✓		✓*					✓			✓	
MISSISSIPPI	✓			✓*		✓	✓	✓		✓		✓	✓
MONTANA*		✓		✓					✓			✓	✓
NEBRASKA	✓			✓		✓	✓	✓		✓	✓		
NEVADA		✓		✓		✓	✓		✓			✓	✓
NEW HAMPSHIRE*	✓								✓			✓	✓
NEW MEXICO		✓			✓	✓	✓	✓		✓		✓	✓
NORTH CAROLINA	✓				✓	✓	✓	✓		✓		✓	
NORTH DAKOTA*	✓								✓				✓
OKLAHOMA			✓		✓	✓	✓	✓		✓		✓	✓
PENNSYLVANIA			✓	✓		✓	✓		✓		✓	✓	
RHODE ISLAND*		✓			✓				✓		✓		
SOUTH CAROLINA			✓		✓				✓				✓
TENNESSEE	✓								✓		✓		
UTAH	✓			✓		✓			✓			✓	
VERMONT			✓			✓			✓				✓
WEST VIRGINIA				✓		✓	✓		✓		✓		
WYOMING				✓		✓	✓		✓			✓	✓
30 STATES & DC prohibit the criminalization of child sex trafficking victims for prostitution.	15 STATES & DC eliminate criminal liability within the prostitution law.	6 STATES eliminate criminal liability for prostitution through a separate non-criminalization provision.	7 OF THESE STATES identify all commercially sexually exploited youth as victims.	2 OF THESE STATES require third party control.	15 STATES & DC provide for a specialized service response.	11 STATES provide for a general services response only.	17 STATES & DC mandate law enforcement referral to a child-serving agency.	10 STATES & DC expressly allow for temporary protective custody.	15 STATES prohibit a minor from being charged with prostitution.	15 STATES & DC prohibit prosecution, adjudication, or conviction only.	12 STATES contemplate detention and/or arrest.	13 STATES extend protection to other prostitution-related offenses.	11 STATES extend protection to non-prostitution offenses.
	21 STATES & DC remove criminal liability for prostitution based on age.	9 STATES hinge non-criminalization for prostitution on identification as a child sex trafficking victim.	4 STATES* non-criminalization laws provide neither a service response nor referral to a child-serving agency or protective custody.		2 of the 15 STATES that prohibit prostitution charges still contemplate arrest or detention.			In all, 18 STATES extend non-criminalization beyond just prostitution.					

NOTES

[1] Responses in the chart are solely based on statutory law as analyzed under the Protected Innocence Challenge Legislative Framework and do not reflect regulatory or practice-based responses. Except where otherwise indicated, evaluations of state laws are based on legislation enacted as of August 1, 2019. An asterisk (*) in this column indicates Uniform Act adopting states with more than one non-criminalization provision.

[2] Notably, several states have enacted two or more non-criminalization provisions, which may follow different approaches.

[3] For additional information on third party control, please visit https://sharedhope.org/wp-content/uploads/2016/02/Policy_Paper_Eliminating_Third_Party_Control_Final.pdf.

[4] An asterisk (*) indicates a definitional barrier to all commercially sexually exploited children being identified as trafficking victims. Resultantly, specialized service responses that restrict access to children identified as trafficking victims may be unavailable to all commercially sexually exploited children.

[5] A check mark (✓) refers to state laws that allow a commercially sexually exploited child to be taken into custody on protective, rather than punitive, grounds.

[6] Although the statutory construction in these states is designed to prohibit a minor from being charged with prostitution, this construction does not necessarily guarantee that a minor will not be detained and/or arrested for prostitution. In fact, some state laws contemplate this outcome. Specifically, 2 states (IN and RI) have statutes contemplating the potential detention and/or arrest of a minor for prostitution despite structuring their non-criminalization laws to prohibit a minor from being charged with the offense. Further, the statutory construction in other states may be designed to prevent a minor from being charged with prostitution, but if the state also hinges non-criminalization on a finding of

trafficking victimization, a minor could be charged before that finding of victimization is made.

[7] A check mark (✓) indicates that state law contains a specific, statutory reference to the detention and/or arrest of a minor for prostitution.

[8] "Other prostitution-related offenses" include offenses that go beyond the core prostitution law, such as loitering or promoting prostitution.

[9] "Non-prostitution offenses" include offenses related to other conduct that a child sex trafficking may be charged with, such as human trafficking or credit and substance abuse offenses.

OVERVIEW OF LEGAL APPROACHES TO NON-CRIMINALIZATION

WHILE STATES HAVE TAKEN A RANGE OF APPROACHES TO ELIMINATE A MINOR'S CRIMINAL LIABILITY for prostitution, these approaches fall into certain broad categories. Some of those categories have features that allow for more victim-centered approaches and are, therefore, more aligned with the goals of non-criminalization.¹

AGE HINGES ON AGE

Twenty-one states and the District of Columbia eliminate criminal liability for individuals under a certain age. This approach draws a bright line based on the age of the individual, akin to federal and most state trafficking laws that also draw a bright line based on age in defining the crime of child sex trafficking. Notably, however, not all non-criminalization laws that hinge on age fully or effectively prevent arrest or detention; in fact, some specifically contemplate it.

Drawing a bright line at 18² aligns with the federal definition of a child sex trafficking victim as well as the requirements of the Trafficking Victims Protection Act.³ Criminalizing minors under state prostitution laws “cannot be coherently reconciled with the federal sex trafficking law or the majority of state sex trafficking laws . . . because the conduct that makes the minor a victim of sex trafficking—engaging in commercial sex—is the same conduct that subjects that minor to prosecution under the prostitution law.”⁴ Therefore, a non-criminalization approach that protects all minors under 18 from criminalization for prostitution aligns with the federal sex trafficking definition even if the state definition does not protect all commercially sexually exploited children as victims of sex trafficking.⁵

ID HINGES ON IDENTIFICATION AS A CHILD SEX TRAFFICKING VICTIM

Contrary to federal law, several states mandate identification of a controlling third party in order for a commercially sexually exploited child to be identified as a trafficking victim.⁶ When these definitional requirements intersect, protections for child victims are narrowed:

This means if a buyer directly pays a minor or offers food or shelter in return for sex acts, then this child may not be identified as a victim. Alternatively, even when a trafficker is involved, if the minor does not identify the trafficker, the exploitation will not be identified as an instance of sex trafficking. This is problematic since victims often deny the extent of their own exploitation and often experience trauma-bonding making it difficult or impossible for children to disclose their trafficker. Instead of being identified and provided protections as a trafficking victim, the child could be prosecuted for prostitution in [those] jurisdictions.⁷

Accordingly, these definitional hurdles exclude some of the most vulnerable minors from protection under state non-criminalization laws.



INCORPORATES A SERVICE RESPONSE

Alone, removing criminal penalties for prostitution for minors is not enough. In order to avoid re-traumatization and prevent re-victimization, removing criminal penalties must be coupled with access to specialized services. Similarly, a simple mandate that law enforcement refer exploited youth to child serving agencies is not enough; the referral must be to services that are informed by and responsive to the unique trauma and harms this population faces. Otherwise, “lack of training or implementable protocols within child serving agencies or a lack of appropriately equipped service providers may still leave victims vulnerable to re-traumatization and exploitation.”⁸ Together, these express mandates help ensure that survivors are not underserved or disconnected from a specialized service response.

Further, enacting a mandated, specialized service response in conjunction with non-criminalization helps alleviate concerns that “youth may still be charged with status offenses that mask the intent to arrest victims for prostitution,” a concern “especially prevalent in areas where law enforcement feel there is a lack of safe placement alternatives or particularly high risk of re-exploitation.”⁹ Authorizing law enforcement to refer youth to specialized services and ensuring availability of appropriate services may remove the perceived need to arrest these children for their own protection and lower the risk of re-exploitation.

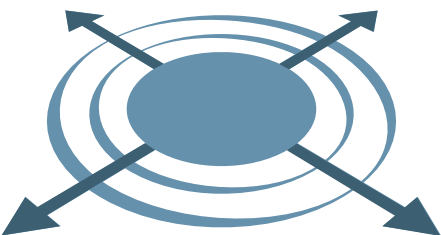
Some states’ non-criminalization laws have also gravitated towards providing law enforcement with express authority to take a child sex trafficking victim into temporary or emergency protective custody.



PROCEDURE

Eliminating criminal liability in a manner that prevents not only the prosecution and adjudication of child sex trafficking victims, but also prevents the arrest and detention of minors engaged in commercial sex, protects these children from the direct and collateral harms associated with a criminal justice response.¹⁰ “Arrest involves the trauma of physical restraint, which can be stigmatizing, especially when administered in public. Victims may also be subjected to interrogation conducted by individuals who have not been trained in the trauma dynamics associated with child sex trafficking.”¹¹ Similarly, detaining a minor, even for investigative purposes, may involve restraint and interrogation. Accordingly, detention and arrest can be as traumatizing as the adjudication process.

Further, arresting minors for prostitution negatively impacts the overall fight against child sex trafficking by reinforcing a victim’s belief that he or she is a criminal and uncared for by society, a belief instilled by traffickers as a form of control. Accordingly, a punitive criminal justice response is likely to enhance victims’ distrust of the criminal justice system.¹² Allowing for arrest, therefore, “risks undermining relationships with those who seek to help and protect survivors, such as law enforcement, prosecutors, child welfare, and even service providers,” which “may thwart the rapport necessary to support a victim’s adherence to a service plan designed to keep vulnerable minors from being re-exploited and may inhibit victims’ ready cooperation in investigations and prosecutions of perpetrators.”¹³



EXTENSION OF NON-CRIMINALIZATION TO OTHER OFFENSES

Prohibiting the criminalization of minors for prostitution offenses does not necessarily insulate a child sex trafficking victim from experiencing the direct and collateral consequences of arrest, detention, or adjudication.¹⁴ In fact, “[t]he most common crimes for which girls are arrested—including running away, substance abuse, and truancy—are also the most common symptoms of abuse.”¹⁵ Exploited youth may also be arrested for crimes that are seemingly unrelated to exploitation but that are, in fact, intimately tied to it. For example, some exploiters force victims to carry drugs or commit theft on the exploiter’s behalf. Therefore, even minors who are afforded protections from prostitution charges are oftentimes prosecuted for other crimes. For this reason, state non-criminalization laws are increasingly expanding protection beyond prostitution offenses to include other offenses that are often associated with trafficking victimization.

STATES HAVE ADOPTED VARYING STATUTORY APPROACHES TO PREVENT THE CRIMINALIZATION of commercially sexually exploited youth; resultantly, the outcomes of such legislation, oftentimes referred to as “Safe Harbor” laws, have created diverse consequences for minor survivors. While the majority of states and the District of Columbia prohibit the criminalization of minors for prostitution offenses, not all prevent child sex trafficking victims from enduring arrest, detention, interrogation, adversarial investigative practices, and, ultimately, proving their own victimization. As such, not all “Safe Harbor” laws are necessarily safe for all exploited youth.

Developing and enacting comprehensive non-criminalization laws requires a multi-year and multi-agency commitment, inclusive of input, buy-in, and contribution from a variety of stakeholders, including survivors and at-risk youth. Importantly, through expansive training and cultural changes, states should simultaneously seek policy, practice, and culture reform, ultimately shifting away from viewing and responding to commercially sexually exploited children as delinquent youth and, instead, responding to these youth as survivors of child sex trafficking.

ENDNOTES

- 1 Notably, several states have enacted two or more non-criminalization provisions, each of which may follow a different approach to non-criminalization. Resultantly, any totals discussed within this report may include a state that has been included elsewhere. For a complete breakdown of the approaches and where each state falls, *see* National State Law Survey: Approaches to Non-Criminalization located inside this report. Further, some states have eliminated criminal liability within the prostitution law while others have done so through a separate immunity provision; this report analyzes each.
- 2 For examples of state trafficking laws that set the age limit above the age of majority, see Alaska Stat. § 11.66.110 (under 20) and La. Rev. Stat. Ann. § 14:46.2 (under 21).
- 3 Trafficking Victims Protection Act (TVPA) of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1481 (stating, “[t]he following factors should be considered as indicia for serious and sustained efforts to eliminate severe forms of trafficking in persons: . . . (2) [w]hether the government of the country . . . ensures that victims are not inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts as a direct result of being trafficking”).
- 4 SHARED HOPE INT’L, NON-CRIMINALIZATION OF JUVENILE SEX TRAFFICKING VICTIMS 3 (2016) [hereinafter NON-CRIM POLICY PAPER], *available at* <http://sharedhope.org/wp-content/uploads/2014/04/JUSTRESPONSE-POLICY-PAPER-NON-CRIMINALIZATION-OF-JUVENILE-SEX-TRAFFICKING-VICTIMS.pdf> (last visited October 30, 2019).
- 5 This could have important implications for states in the implementation of the federal Preventing Sex Trafficking and Strengthening Families Act (2013) and the Justice for Victims of Trafficking Act’s (2015) amendments to the Child Abuse Prevention and Treatment Act. *See generally* SHARED HOPE INT’L, STATE IMPACT (2016), *available at* http://sharedhope.org/wp-content/uploads/2017/01/State_Impact_Memo_PIC_Fed_Legislation.pdf (last visited October 30, 2019).
- 6 *See* National State Law Survey: Approaches to Non-Criminalization located inside this report.
- 7 SHARED HOPE INT’L, ELIMINATING THE THIRD PARTY CONTROL BARRIER TO IDENTIFYING JUVENILE SEX TRAFFICKING VICTIMS 2 (2015), *available at* https://sharedhope.org/wp-content/uploads/2016/02/Policy_Paper_Eliminating_Third_Party_Control_Final.pdf (last visited October 30, 2019); *see also* Christine M. Raino, Criminalizing Buyers under Child Sex-Trafficking Laws as Critical Protection for Child Victims, 52 WAKE FOREST L. REV. 450 (2017) (discussing California cases where the court ruled that despite evidence of past control by a trafficker, the child was an “independent contractor” at the time of arrest).
- 8 SHARED HOPE INT’L, JUST RESPONSE STATE SYSTEM MAPPING REPORT: A REVIEW OF CURRENT STATUTES, SYSTEMS, AND SERVICES RESPONSES TO JUVENILE SEX TRAFFICKING 11 (2015), *available at* http://sharedhope.org/wp-content/uploads/2015/03/JuST-Response-Mapping-Report_Digital.pdf (last visited October 30, 2019).
- 9 *Id.*
- 10 NON-CRIM POLICY PAPER, *supra* note 4, at 1.
- 11 *Id.*
- 12 *Id.* at 2.
- 13 *Id.*; *see also* CSE INST., VILLANOVA UNIV. SCHOOL OF LAW, WHY “SAFE HARBOR” FULL-IMMUNITY IS THE BEST POLICY FOR DECRIMINALIZING CHILD VICTIMS OF SEX TRAFFICKING 4–5 (2015), *available at* <http://cseinstitute.org/wp-content/uploads/2015/06/Policy-Paper-Why-%E2%80%9C%9C-Safe-Harbor%E2%80%9D-Full-Immunity-is-the-Best-Policy-for-Decriminalizing-Child-Victims-of-Sex-Trafficking-.pdf> (last visited October 30, 2019) (explaining that “[v]ictims of child sex trafficking should be immune from arrest and prosecution because criminalizing them risks further traumatizing this vulnerable population. Many victims of sex trafficking have . . . reframed their situations to make them believe they are in control, leaving them feeling responsible for the crimes committed against them. Criminalizing these victims would risk re-traumatizing them because it would potentially reinforce these false beliefs and increase their mistrust of those who seek to help them.”).
- 14 *See* Vacatur of Delinquency Adjudications Arising from Trafficking Victimization and Expungement of Related Records, SHARED HOPE INT’L, <https://sharedhope.org/wp-content/uploads/2017/11/Expungement-and-Vacatur-Law-Policy-Brief.pdf> (last visited October 30, 2019).
- 15 *See generally* HUMAN RIGHTS PROJECT FOR GIRLS, GEORGETOWN LAW CTR ON POVERTY AND INEQUALITY, & MS. FOUND. FOR WOMAN, THE SEXUAL ABUSE TO PRISON PIPELINE: THE GIRLS’ STORY (2015), *available at* https://rights4girls.org/wp-content/uploads/r4g/2015/02/2015_COP_sexual-abuse_layout_web-1.pdf (last visited October 30, 2019).