Even in the United States... American citizens and nationals, who are trafficked domestically, often from one State to another, are still viewed through the lens of juvenile delinquency, rather than as victims of crime, worthy of compassion and assistance. Enactment of this bill will begin to shift the paradigms so that these exploited girls and women will receive assistance that they so desperately need. It will make a difference for many American girls, mostly the runaways who are then victimized by the traffickers... Part of the problem is that current laws and enforcement strategies in the U.S. and other countries often punish the victims more severely than they punish the perpetrators.

—Representative Christopher Smith, N.J.

I. Introduction
Traditionally, in the United States ("U.S.") legal frameworks have emphasized greater protections for children than adults. The federal Trafficking Victims Protection Act and its reauthorizations ("TVPRA") establish that all minors exploited in commercial sex acts are victims of trafficking.

All states criminalize adults who victimize children by engaging in sexual acts with them when they are unable to consent due to age; however states vary in the age of consent applied. Some jurisdictions protect only minors under the age of 17 or 16. The TVPRA’s more inclusive protections for all minors under the age of 18 reflect our understanding of brain development and the vulnerability of youths. The inference drawn from enacted federal and state laws is that children are to be protected from adult sexual predators and the damaging consequences of such contact. Nevertheless, a clear distinction is evident in state statutory frameworks between children who are paid in connection with their sexual exploitation and those who are not. Consequently, a number of children in this country are still being charged and prosecuted in connection with their sexual exploitation.

A comprehensive analysis of the existing statutory framework of current legal alternatives to criminalizing children who are commercially sexually exploited in the U.S. will serve as the basis for subsequent analysis of criminal justice and child protection responses. In particular, state laws immunizing children from prostitution and prostitution-related offenses and statutes creating programs that divert commercially sexually exploited children out of the criminal justice system and into alternative programs are discussed.

II. Immunity and Diversion Laws
Only six states provide protection from prosecution for charges of prostitution or prostitution-related offenses for victims of domestic minor sex trafficking. Illinois, Tennessee, and Vermont underscore the vulnerability of minors by immunizing any action related to commercial sexual activity by a minor under the age of 18. In three states, Connecticut, Michigan, and Minnesota, a child 15 years of age or younger cannot be prosecuted for a charge of prostitution; older adolescents in these states can still be prosecuted for commercial sexual activity.
With regard to diversion programs, eight states have statutes that specifically allow commercially sexually exploited children charged with prostitution and prostitution-related offenses to be redirected in to child protection systems. Under the Illinois prostitution statute, “if it is determined, after a reasonable detention for investigative purposes, that a person suspected of or charged with a violation” of prostitution is under eighteen years of age, then “that person shall be immune from prosecution … and shall be subject to the temporary protective custody” of the Juvenile Court Act. Under New York’s Family Court Act, Juvenile Delinquency statutes, there is a presumption that a child-respondent who is arrested for an act of prostitution “meets the criteria as a victim of severe form of trafficking” as defined in the Trafficking Victims Protection Act of 2000. Furthermore, “[u] pon the motion of the respondent, without the consent of the present-ment agency, a petition alleging that the respondent is in need of supervision shall be substituted for the delinquency petition…”

Washington differs from Illinois in that it mandates diversion for a first-time prostitution or prostitution loitering offense. While commercially sexually exploited children who are subsequently arrest-ed for prostitution or prostitution loitering offenses may have their offenses diverted “if the county in which the offense is alleged to have been committed has a comprehensive program” that provides various enumerated protections and services.

Of the eight diversion programs codified in state statutes, four became effective in 2012 and another will become effective in 2014. Massachusetts’s diversion program, which came into effect February 19, 2012, creates a mandatory “presumption that a care and protec-tion petition” or “a child in need of services petition” shall be filed on behalf of a child whenever a juvenile delinquency or criminal proceeding is initiated against a sexually exploited child for violations of common night walking, common streetwalking, or Massachusetts’s prostitution law.

Effective January 17, 2012, New Jersey’s statute permits every juve-nile delinquency complaint to be reviewed for recommendations as to whether the complaint should be “dismissed, diverted, or referred for court action,” although in some cases this may only occur with the consent of the prosecutor. In making its decision to dismiss, divert, or refer a court action, the court intake services must consider among ten other factors “[a]ny information relevant to the offense in any case where the juvenile is charged with an act which if committed by an adult would constitute prostitution … or any offense which the juvenile alleges is related to the juvenile being a victim of human traffick-ing.”

On April 13, 2012, Florida’s governor approved HB 99, cited as the Florida Safe Harbor Act, requiring law enforcement officers to divert a commercially sexually exploited child from the criminal justice system into the child welfare system. The statute now reads, “[f]or such a child for whom there is also probable cause to believe he or she has been sexually exploited, the law enforcement officer shall deliver the child to the department.” Fla. Stat. § 409.1678 (Safe harbor for children who are victims of sexual exploitation), details the services which are to be provided to a commercially sexually exploited child.

The most recent state to enact a diversion program was Ohio. On June 27, 2012, Ohio’s governor signed House Bill 262, which permits a commercially sexually exploited child to be diverted from the crim-inal system into a child welfare system and be provided with appropri-ate services. The newly enacted language states that when a child has been charged with soliciting, loitering or prostitution “… the court may hold a hearing to determine whether to hold the complaint in abeyance pending the child’s successful completion of actions that constitute a method to divert the child from the juvenile court system if the child agrees to the hearing …” Finally, effective August 1, 2014, in Minnesota 16- and 17-year-olds who are charged with prostitution for the first time and meet all of the requirements set out in the law shall be referred “to a diversion program” or have a petition filed alleging the children to be “in need of protection services.”

III. Trends in the Diversion Laws

Each diversion program is structured differently. Five states treat commercially sexually exploited children arrested for prostitution as needing protection, supervision, and/or services. In New Jersey, juveniles may be diverted to a “court intake service conference” where various factors will be considered in determining whether the juvenile should be diverted. The resolution of such a conference may include, among other things, “counseling, restitution, referral to appro-priate community agencies, or any other community work programs or other conditions consistent with diversion.” The court intake service conference cannot include an order which would result in the juvenile being confined, placed on probation, or removed from his/her family.

In Washington, a commercially sexually exploited child alleged to have committed prostitution or prostitution loitering will be diverted for a first offense and may be diverted for subsequent offenses. Under Wash. Rev. Code §13.40.213, “a prosecutor may divert the offense if the county in which the offense is alleged to have been committed has a comprehensive program…” which provides safe and stable housing, onsite case management, integrated mental health and chemical dependency services, education and employment training, and specialized services.

Included in the statutory language regarding diversion, only Illinois and New York require that human trafficking investigations be initiated when a child is arrested for prostitution and prostitution-related charges.

IV. Charging Victims of Commercial Sexual Exploitation

Diversion programs, also sometimes known as “safe harbor laws,” are a step in the right direction toward recognizing commercially sex-ually exploited children as victims meriting protection and services; however, the majority of states’ laws continue to permit victims of domestic minor sex trafficking to be prosecuted in connection with their exploitation. For example, in Massachusetts, the diversion program is permissive, not mandatory, requiring the filing of a “care and protection petition,” “petition for emergency commitment,” or “child in need of services petition” on behalf of such child. Furthermore, if the court finds that the child has “failed to substantially comply” with the requirements of services, the court has the power to restore the delinquency or criminal complaint to the docket for further proceedings or place the child on probation. Similarly, in New York, despite a presumption that a child arrested for prostitu-tion “meets the criteria as a victim of a severe form of trafficking,” the court may continue with delinquency proceedings if the child is a repeat offender, if the person arrested was an adult (even if that adult had been a commercially sexually exploited child prior to turning eighteen) or if the child expresses “an unwillingness to cooperate with specialized services for sexually exploited youth ….”

New Jersey requires the prosecutor’s consent before a complaint is dismissed, diverted, or referred for court action. Factors which are considered by the court intake services in determining whether to recommend diversion include: (1) the seriousness of the offense;
(2) age of the juvenile; (3) risk the juvenile presents as a “substantial danger” to others; (4) family circumstances; (5) prior contacts with court intake services and the outcome of those contacts; (6) availability of appropriate services; (7) recommendations expressed by the complainant, arresting officer and prosecutor; (8) the “amenability” of the juvenile to participate in services; and (9) any information as to whether the juvenile is a victim of human trafficking.35

Under Ohio’s statute, the prosecuting attorney has the right to participate, object and make recommendations regarding the diversion actions.36 If the complaint is held in “abeyance,” the court may order various services, diversion actions, conditions, and education activities in the best interest of the child.37 Nevertheless, if the child does not complete the diversion program to the court’s satisfaction within 90 days, a maximum extension of 180 days may be provided.38 If the diversion program is successfully completed the court “shall dismiss the complaint and order that the records pertaining to the case be expunged immediately . . . .” However, if the child fails the program the court must proceed with the complaint.39

Of the eight states with diversion programs only Illinois and Minnesota also provide immunity from prostitution and prostitution-related charges for children.40 Unlike Illinois, the state of Minnesota limits immunity to children under the age of 16.41 In addition, the various requirements in Minnesota’s law limit the number of commercially sexually exploited children who can benefit from the protection of the statute and still permit some victims to be charged and prosecuted. Under the Minnesota law 16- and 17-year-olds are ineligible to participate in the diversion program or to be treated as “child[ren] in need of protection or services” if the child is a repeat offender, has previously participated in a diversion program (even if successfully completed), has been previously placed on probation (even if there was no adjudication or received a continuance for a prostitution charge), or has been previously found to be a “child in need of protection or services” for engaging in prostitution or “because the child is a sexually exploited youth.”42 Finally, of those 16 or 17-year-old Minnesota children who are eligible for diversion, those who do not fully comply with the diversion program or disposition can still be rerouted back into delinquency proceedings despite their status as a victim.43

Major shortcomings of some of the above-mentioned laws include offering less protection to commercially sexually exploited children who re-offend and permitting victims to be treated as criminals. Providing these minors who are arrested for subsequent prostitution or prostitution related offenses with less protection and fewer services is counterintuitive to protecting sex trafficking victims, especially given the strong evidence that youth with prostitution convictions tend to re-offend. In one study, 31 youth with prostitution convictions from 2004-2006 had an average of seven additional court referrals for prostitution-related offenses.44 Furthermore, “ unlike other diverted youth, those who have been sexually exploited come with a specific package of needs, many of which are unprecedented in the realm of diversion as it is currently understood.”45 Hence, even when commercially sexually exploited children qualify for diversion programs, many find it difficult to comply with the conditions set out in diversion agreements. Failure to complete diversion programs often results in the prosecution and re-victimization of sexually exploited children.46

The underlying flaw with the current dialogue related to protecting commercially sexually exploited children is that the statutory frameworks for diversion continue to use criminal culpability as the mechanism to require the youth to accept services and make different choices. Too many state legislatures are still grappling with whether child commercial sexual exploitation is a crime committed by minors or against them. Flawed arguments against removing criminal responsibility from children under prostitution and prostitution-related offenses include misplaced beliefs that the child had a choice and that there will be no incentive for children to disclose information about their traffickers without the fear of being criminally charged.47 However, given current efforts by states to improve their responses to human trafficking,48 states must also address inconsistencies between the human trafficking statutes and the statutory frameworks for prostitution and prostitution related offenses.49

Most importantly, states that continue to treat victims as perpetrators re-victimize children who have already suffered tremendously. “The arrest and treatment of the victim as a criminal is a secondary violence committed against her, compounding the trauma of the sexual violence she has already endured at the hands of the trafficker and the multitude of buyers who have used her.”50

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4 For a complete list of all states and U.S. territories that have enacted statutes criminalizing adult sexual contact with children, please see NDAA’s Sexual Offenses Against Children statutory compilation at http://www.ndaa.org/pdf/Sexual%20Offenses%20Against%20Children_6-2010.pdf. All states have enacted one or more statutes criminalizing adult sexual contact with a child; however, the statutory language varies from state to state. State statutes set different ages of consent and may allow close-in-age exemptions. Common statutory names include: Statutory Rape, Sexual Abuse, Child Molestation, Unlawful Sexual Conduct with a Child, Sexual Exploitation of a Minor, Lewd Conduct with a Minor, Indecent Conduct with a Minor, Sexual Assault, etc.
5 See NDAA’s Sexual Offenses Against Children statutory compilation at http://www.ndaa.org/pdf/Sexual%20Offenses%20Against%20Children_6-2010.pdf. (Currently the age of consent is 17 in 19 states).
6 See NDAA’s Sexual Offenses Against Children statutory compilation at http://www.ndaa.org/pdf/Sexual%20Offenses%20Against%20Children_6-2010.pdf. (Currently the age of consent is 16 in 30 states).

13 Wash. Rev. Code Ann. § 13.40.070(7) (2012). ("Where a case is legally sufficient to charge an alleged offender with either prostitution or prostitution loitering and the alleged offense is the offender’s first prostitution or prostitution loitering offense, the prosecutor shall divert the case.")
(a) Common night walkers, common street walkers, both male and female, persons who with offensive and disorderly acts or language accost or annoy persons of the opposite sex, lewd, wanton and lascivious persons in speech or behavior, keepers of noisy and disorderly houses, and persons guilty of indecent exposure shall be punished by imprisonment in a jail or house of correction for not more than 6 months, or by a fine of not more than $200, or by both such fine and imprisonment.
(b) Disorderly persons and disturbers of the peace, for the first offense, shall be punished by a fine of not more than $150. On a second or subsequent offense, such person shall be punished by imprisonment in a jail or house of correction for not more than 6 months, or by a fine of not more than $200, or by both such fine and imprisonment.
18 N.J. Stat. § 2A:4A-71(b) (2012). ("Every complaint shall be reviewed by court intake services for recommendation as to whether the complaint should be dismissed, diverted, or referred for court action. Where the complaint alleges a crime which, if committed by an adult, would be a crime of the first, second, third or fourth degree, or alleges a repetitive disorderly persons offense or any disorderly persons offense defined in chapter 35 or chapter 36 of Title 2C, the complaint shall be referred for court action, unless the prosecutor otherwise consents to diversion.")
38 Id.  
46 Id. at 432.
47 Id.
49 For a complete list of all states and U.S. territories that have human trafficking statutes, please visit NDAA’s pertinent online statutory compilations at http://www.ndaa.org/pdf/Human%20Trafficking%20and%20Involuntary%20Servitude.pdf; For a list of pending state human trafficking laws, please visit Shared Hope International’s Protected Innocence Initiative Legislative Report at http://www.cqstatetrack.com/texis/viewrpt?report=4f4f6c0df&sid=.
50 For a complete list of all states and U.S. territories prostitution and prostitution related offenses statutes, please visit NDAA’s pertinent online statutory compilations at http://www.ndaa.org/pdf/Statutory%20Frameworks%20Used%20to%20Charge%20Children%20for%20CSEC%20&%20Alternatives%20to%20Prosecution_3.1.12.pdf.