



Affirmative Defenses as Harm Reduction When Safe Harbor Falls Short

ACROSS THE UNITED STATES, SAFE HARBOR LAWS WERE DESIGNED TO CORRECT A FUNDAMENTAL injustice: children who are exploited in the commercial sex trade should be recognized as victims of crime, not prosecuted as criminals. When functioning properly, Safe Harbor frameworks prevent minors from being arrested or prosecuted for conduct related to their victimization and, instead, connect them to trauma-informed services and care.

Yet even in states with Safe Harbor laws, significant implementation gaps, narrow statutory protections, and failures in victim identification mean that exploited youth are still swept into the juvenile or criminal legal systems. In these imperfect conditions, affirmative-defense provisions serve as a critical harm-reduction strategy. They allow minors who are forced to engage in unlawful conduct as a direct result of trafficking to assert their victimization and avoid unjust criminalization after the fact.

While Safe Harbor remains the gold standard, affirmative defense provisions are essential to ensuring justice for young people who inevitably fall through the cracks.

SAFE HARBOR AS THE IDEAL RESPONSE

Safe Harbor laws emerged from the recognition that child victims of sex trafficking should not be criminalized for delinquent or criminal conduct rising out of their victimization. A strong Safe Harbor system prevents the arrest, detention, charging, and prosecution of minors for prostitution and other coerced and/or survival conduct, instead, referring the minor to specialized services.

When implemented well, Safe Harbor laws do more than block prosecution — they embed an expectation that exploited youth are victims and should be treated accordingly. They promote early identification of trafficking, reduce reliance on punitive systems, and create pathways to healing through services such as safe housing, counseling, legal support, and case management. Research has shown that Safe Harbor frameworks can improve awareness among professionals, strengthen inter-agency coordination, and reduce the likelihood that a child's first contact with help comes in handcuffs.

WHERE SAFE HARBOR FALLS SHORT

Despite progress, Safe Harbor systems remain inconsistent nationwide. Some states limit protections to prostitution offenses, leaving youth vulnerable to prosecution for other crimes related to their victimization — such as drug possession, truancy, theft, or even violence in cases of survival and trauma response. Other jurisdictions restrict protections based on age, require proof of coercion or third-party control, or lack formal screening protocols to identify victims early in the process.

Even where laws are well-written, practice may falter. Police, prosecutors, and judges may not recognize trafficking, particularly when youth present with behavioral challenges or prior system involvement. Youth of color, LGBTQ+ youth, and children experiencing homelessness are especially likely to be misidentified as offenders

rather than victims.¹ Further, many locales lack sufficient service capacity, leaving court involvement—and sometimes detention—as the de facto response, even when Safe Harbor technically exists.

In short, Safe Harbor works best when professionals are trained, services exist, and screening is automatic. But until all states reach that standard—and until misidentification and service shortages are addressed—youth will continue to fall through the gaps.

AFFIRMATIVE DEFENSE: A NECESSARY BACKSTOP

Affirmative defense statutes provide a critical safeguard in these gaps. Unlike Safe Harbor laws, which aim to prevent the initial criminalization of exploited youth, affirmative defense provisions function after a charge has been brought. They allow a young person to assert that they committed an offense as a result of trafficking and, therefore, should not be held criminally liable.

When a child has been misidentified, denied protection, or charged for conduct that falls outside the narrow scope of Safe Harbor, affirmative defense can serve as a crucial corrective. It offers a mechanism to prevent conviction and the devastating collateral consequences that follow—criminal records, incarceration, school disruption, housing barriers, and ongoing vulnerability to exploitation.

Affirmative defense does not replace Safe Harbor; nor should it become the primary mechanism for protecting victims. But as long as trafficking survivors are misidentified and systems remain uneven, it is an essential harm-reduction tool. As seen in cases such as *State v. Kizer*,² broad affirmative-defense statutes can recognize the profound coercion and trauma that drive victim-survivors' actions and ensure courts confront the reality of exploitation directly.

A comprehensive legal framework must include both strong Safe Harbor protections and accessible affirmative-defense provisions. States should continue strengthening Safe Harbor laws to cover all minors involved in commercial sexual exploitation, remove unnecessary proof barriers, and connect youth to specialized services rather than punitive responses.

Simultaneously, states must enact or expand affirmative-defense statutes to ensure that all offenses directly resulting from trafficking, not only prostitution-related ones, can be excused when a minor's actions stem from victimization. Additionally, implementation matters as much as statutory language. Training for law enforcement, judges, prosecutors and defense counsel, and child-welfare professionals is essential to recognizing signs of exploitation and ensuring both Safe Harbor and affirmative-defense protections function in practice. Building service capacity, especially safe housing and specialized support, is equally critical.

CONCLUSION

Safe Harbor laws represent the legal and moral shift society must make: exploited children are victims, entitled to care and protection. Strengthening and fully implementing Safe Harbor remains the ultimate goal. However, until every jurisdiction reliably identifies trafficking victims and diverts them from punishment, affirmative defenses serve as a vital safety net.

It is a harm-reduction strategy that acknowledges the lived reality of trafficked youth. No child should carry a criminal record for acts rooted in exploitation. By embracing both proactive prevention through Safe Harbor and post-charge relief through affirmative defense, policymakers can build systems that reflect a simple truth: children coerced into sex trafficking are not criminals.