

# **VICTIMS OR CRIMINALS? THE INTRICACIES OF DEALING WITH JUVENILE VICTIMS OF SEX TRAFFICKING AND WHY THE DISTINCTION MATTERS**

Krystle M. Fernandez<sup>a1</sup>

## **ABSTRACT**

Hearing “juvenile prostitute” versus “juvenile sex trafficking victim” inherently prompts two different responses from the listener. The term “prostitute” connotes choice, compensation, and even an agreement of sorts. On the other hand, the phrase “sex trafficking victim” should make the listener uncomfortable, slightly uneasy, and hopefully even angered that a young girl could be raped and sold for profit in cities across the United States.

Federal law recognizes foreign and domestic children sold for sex in the United States as victims; however, most states’ laws do not. Except for a handful of jurisdictions, the majority of states in this country criminalize minors involved in prostitution, despite the fact that they are legally too young to “consent” to the sex they are being criminalized for. Arizona is one of these states that have failed to recognize juveniles used in prostitution as victims. When cases involving children being commercially sexually exploited fall under state law jurisdiction, the children fail to receive the protection that they would obtain under federal law. This creates disparate treatment of the same type of victims.

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a1. J.D., May 2013, Arizona State University Sandra Day O’Connor College of Law, B.S. Journalism, University of Florida, 2006. I would like to thank all of those who have supported me in my decision to attend law school in hopes of being a stronger advocate in combating sex trafficking. I have been fortunate enough to work alongside those combating trafficking in Phoenix, Arizona, and in Cambodia and the Philippines. I have worked in the juvenile court system; with sex trafficking victims both domestically and in southeast Asia; and with other legal advocates. I have assisted with the work of domestic and international safe houses for girls rescued from trafficking. I have been fortunate enough to learn from some of the leading names in prosecution, law enforcement, and aftercare providers in the anti-trafficking field. Through all of my research, work experience, and study I have seen a wide range of problems emerge from the legal, social services and rehabilitative arenas. I hope that this article prompts further discussion, awareness and ultimately continues the conversation on how we can care for our troubled youth and combat this devastating injustice.

This Article examines statutes from the states that have decriminalized the offense of juvenile prostitution. It analyzes the various methods that have been used in handling cases of domestic minor sex trafficking and explores the rehabilitative and legal complexities involved in dealing with trafficking victims. The Article suggests a statutory change for Arizona, which would decriminalize juvenile prostitution and simultaneously allow a judge discretion on a case-by-case basis when delinquent charges may be necessary. It also considers the formation of a Juvenile Trafficking Court where all advocates handling these cases are trained in the intricacies of commercial sexual exploitation and the long-lasting effects of such abuse. The Article concludes by evaluating the goals of the juvenile court system and analyzing whether the current treatment of sex trafficking victims meets these goals.

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## I. INTRODUCTION

*You don't have to be chained to a bed to think you can't leave, you don't have to be from another country to not believe that you have options and resources in this one[,] and you don't have to be undocumented to be mistrustful of law enforcement.<sup>1</sup> It's difficult to view yourself as a victim, no matter what happens to you, when your pimp, the men who buy you, and even those who are supposed to protect you see you as incapable of being victimized. Prostitution is viewed as a victimless crime, a statement that denies the humanity or victimhood of the women and girls involved. Women in the sex industry, and therefore trafficked and sexually exploited girls, are not believed to be capable of being hurt or raped. In fact, rather than being seen as victims, they're seen as willing participants in their own abuse and are often perceived as having "asked for it."<sup>2</sup>*

–Rachel Lloyd, founder of Girls Educational and Mentoring Services (GEMS)

Domestic, minor victims of sex trafficking are not “ideal victims.” Stubborn, rough, often boastful of their misdeeds, these are children of the street. Hungry for affection, they have been manipulated, abused, torn down, and built back up by lies and deceit. Offering their bodies in exchange for money, these are girls whose survival has become dependent on those who purchase their bodies and those who sell them.

A strange dichotomy exists in most states: girls too young to legally consent to sex can be criminally charged with prostitution.<sup>3</sup> Domestic minor sex trafficking (DMST) is “the commercial sexual exploitation of United States citizen or lawful permanent resident . . . children through prostitution,

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1. *In Our Own Backyard: Child Prostitution and Sex Trafficking in the United States: S. Judiciary Subcomm. on Human Rights and the Law Hearing*, 111th Cong. 14 (2010) [hereinafter *In Our Own Backyard*], (statement of Rachel Lloyd, Executive Director and Founder, Girls Educational & Mentoring Services), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg58003/pdf/CHRG-111shrg58003.pdf>.

2. RACHEL LLOYD, *GIRLS LIKE US* 126 (1st ed. 2011).

3. Tamar R. Birkhead, *The “Youngest Profession”: Consent, Autonomy, and Prostituted Children*, 88 WASH. U. L. REV. 1055, 1068–69 (2011).

pornography or sexual performance for monetary or other compensation.”<sup>4</sup> In Arizona, a person can be criminally charged for having sex with a minor.<sup>5</sup> Alternatively, a juvenile can be charged with a misdemeanor for knowingly engaging in prostitution.<sup>6</sup> This creates a situation where teens are simultaneously considered both “offenders” and DMST “victims.”<sup>7</sup> Thus, although a juvenile is legally too young to consent to sex, she can nevertheless be charged with a crime of “engaging in[,] or agreeing or offering to engage in sexual conduct” for a fee or other valuable consideration.<sup>8</sup>

Although identifying DMST juveniles as *victims* is important, it is usually superseded by criminal or delinquency charges in order for the juvenile system to obtain jurisdiction over them.<sup>9</sup> Because Arizona’s juvenile court jurisdiction is based on the existence of delinquency charges,<sup>10</sup> the criminal component becomes essential to getting these juveniles help. Therefore, delinquency charges take precedence over victim identification in order to get the juvenile specialized services and protection.<sup>11</sup> When law enforcement are concerned with the safety and cooperation of a DMST victim, they are sometimes left with no choice but to file delinquency charges, allowing the minor to be housed in a secure detention facility.<sup>12</sup> If the juvenile court could obtain jurisdiction and subsequently be able to order services and safe placement for the DMST victim without bringing charges, then delinquency charges would become unnecessary in most situations.

Criminal punishment for DMST victims can interfere with effective advocacy for them.<sup>13</sup> If a juvenile is brought into court on charges that are seemingly unrelated to prostitution, she may still disclose to her attorney

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4. LINDA A. SMITH ET AL., SHARED HOPE INT’L, DOMESTIC MINOR SEX TRAFFICKING: CHILD SEX SLAVERY IN ARIZONA 1 (2010), available at <http://sharedhope.org/wp-content/uploads/2012/09/ArizonaRA.pdf>.

5. ARIZ. REV. STAT. ANN. § 13-1405 (2013) (West) (“A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is *under eighteen* years of age.”) (emphasis added).

6. See ARIZ. REV. STAT. ANN. § 13-3214.

7. Birckhead, *supra* note 3, at 1069.

8. ARIZ. REV. STAT. ANN. § 13-3211(5).

9. See SMITH, *supra* note 4, at 36 (explaining that charges are often filed to provide the victim with detention in a safe location).

10. See ARIZ. REV. STAT. ANN. § 8-341.

11. SMITH, *supra* note 4, at 36.

12. *Id.*

13. *Supra* note a1.

her involvement in “the life.”<sup>14</sup> However, her attorney will likely advise her not to tell anyone about her involvement in prostitution and will similarly avoid bringing it to the court’s attention in order to evade potential delinquency charges and more time in detention.<sup>15</sup> Acting as a legal representative for the minor, it is understandable why her attorney would encourage her not to make the disclosure to anyone else. However, discouraging the minor from disclosing to the court may also prevent her from disclosing the crime to the proper authorities and getting the specialized help and treatment she needs. In other words, the minor’s cost of avoiding delinquency charges is foregoing the specialized treatment that could help her escape sexual exploitation. If a victim-centered statutory approach were used, a juvenile’s attorney could act under an assumed immunity to bring the juvenile’s needs to the court’s attention, and get the minor treatment specific to her exploitation, all without concern for delinquency or criminal charges.

A victim-centered statutory approach to dealing with juvenile prostitutes is a practice currently followed in ten states.<sup>16</sup> Connecticut, Illinois, Massachusetts, Michigan, Minnesota, New York, Ohio, Tennessee, Vermont, and Washington have adopted statutes that recognize juvenile prostitutes as victims, decriminalizing the offense.<sup>17</sup> These states have passed “safe harbor” laws that classify prostituted minors as victims, with protection conditioned either on age thresholds, previous offenses, or cooperation with service providers.<sup>18</sup> Georgia has also recently passed legislation that bars prosecutors from bringing sex crime charges against a victim of sex trafficking, but they have not fully decriminalized the offense.<sup>19</sup> The Georgia bill states that a person whose alleged criminal acts were “committed under coercion or deception while the accused was being trafficked for sexual servitude” cannot be guilty of a sexual crime.<sup>20</sup>

New York’s model, the Safe Harbour for Exploited Children Act (“SHA”), allows for the decriminalization of minor prostitution but also provides discretion for a judge to permit delinquency charges in specific

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14. *Supra* note a1.

15. *Supra* note a1.

16. Birckhead, *supra* note 3, at 1067.

17. Susan Crile, Comment, *A Minor Conflict: Why the Objectives of Federal Sex Trafficking Legislation Preempt the Enforcement of State Prostitution Laws Against Minors*, 61 AM. U. L. REV. 1783, 1791–92 (2012).

18. *Id.* at 1793.

19. H.B. 200, 151st Gen. Assemb., Reg. Sess. (Ga. 2011).

20. *Id.*

circumstances.<sup>21</sup> The Illinois Safe Children Act also decriminalized minor prostitution, but in addition, the Act added child prostitution to the state's definition of abused youth.<sup>22</sup> Together, these two statutes provide elements of a practical model for Arizona, allowing the judge discretion to consider each juvenile individually while simultaneously recognizing the act of DMST as a form of abuse and decriminalizing the offense of prostitution for juveniles. Additionally, the juvenile court in Houston, Texas has recently started a pilot program that creates a court solely for handling minor victims of trafficking.<sup>23</sup> A similar program would be an excellent way to help DMST victims in Arizona.

This Comment will address several difficulties in handling commercially sexually exploited juveniles, because even a victim-centered approach is not without flaws. Part II provides background on the current industry of sex trafficking as well as the conflicting federal and state laws at issue. Part II also discusses the current problems faced in Arizona concerning DMST. Part III addresses New York and Illinois' statutory decriminalization of prostitution acts by those under eighteen and explains the victim-centered approach. Part IV provides a brief picture of the three other states' laws that have similarly decriminalized juvenile prostitution. Part IV also examines Georgia's method of assisting trafficking victims and decriminalizing their behavior, and highlights the solution used in Texas: a specialty court that solely handles victims of DMST. Part V proposes that Arizona adopt a statutory solution modeled after New York's SHA and Illinois' Safe Children Act. Part V also considers the merits of adopting a Juvenile Trafficking Court like the one used in Texas. Part VI looks at the overall goal of the juvenile court system—rehabilitation—and analyzes whether the current treatment of DMST victims aligns with that objective. Part VII addresses the need for community legal education on DMST victim identification, the sensitivities involved in handling these cases, and best practices for dealing with a DMST case.

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21. Shelby Schwartz, *Harboring Concerns: The Problematic Conceptual Reorientation of Juvenile Prostitution Adjudication in New York*, 18 COLUM. J. GENDER & L. 235, 264 (2008).

22. Birckhead, *supra* note 3, at 1068.

23. Patricia Hart, *Blaming Exploited Girls Is Criminal*, HOUS. CHRON. (July 24, 2011), <http://www.chron.com/default/article/Blaming-exploited-girls-is-criminal-1571592.php>.

## II. UNDERSTANDING THE PROBLEM

A. *The Picture of Domestic Sex Trafficking*

Many Americans are familiar with international sex trafficking from extensive news coverage or social awareness campaigns about young children being sold abroad.<sup>24</sup> Thoughts may typically turn to victims in impoverished countries being kidnapped and imprisoned, kept in brothels, raped, and sold for profit.<sup>25</sup> However, when the topic of domestic sex trafficking is broached, the familiarity is not the same. The common response might be “That happens here?” or “Wait, isn’t that *just* prostitution?”<sup>26</sup> Unfortunately, domestic human trafficking is an incredibly lucrative business.<sup>27</sup> One study estimates that a pimp in the United States using four girls, seven days a week, could make approximately \$632,000 in one year.<sup>28</sup> In addition, people, unlike many other commodities, are reusable resources: a woman can be repeatedly used for commercial sexual exploitation.<sup>29</sup> Sex trafficking can also be seen as a low-risk endeavor to a pimp because prosecuting him often depends on the testimony of a victim who has been continuously mentally manipulated by the very person she is asked to testify against.<sup>30</sup>

Experts estimate that there are at least 100,000 juveniles victimized in the United States each year by commercial sexual exploitation and sex trafficking.<sup>31</sup> One study suggests that at any given time, “300,000 children in the United States are *at risk* for commercial sexual exploitation,

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24. See Birkhead, *supra* note 3, at 1064–65; Sara Dillon, *What Human Rights Law Obscures: Global Sex Trafficking and the Demand for Children*, 17 UCLA WOMEN’S L.J. 121, 130 (2008).

25. See Nicholas D. Kristof, *What About American Girls Sold on the Streets?*, N.Y. TIMES (Apr. 23, 2011), <http://www.nytimes.com/2011/04/24/opinion/24kristof.html>.

26. *Supra* note a1.

27. Dillon, *supra* note 24, at 170 n.135; Kendal Nicole Smith, Comment, *Human Trafficking and RICO: A New Prosecutorial Hammer in the War on Modern Day Slavery*, 18 GEO. MASON L. REV. 759, 766 (2011).

28. POLARIS PROJECT, DOMESTIC SEX TRAFFICKING: THE CRIMINAL OPERATIONS OF THE AMERICAN PIMP 4, <https://na4.salesforce.com/sfc/play/index.jsp?d=6FuMhnn2HQpD2dARadzU1Ow7p6I%3D&viewId=05H60000000I9jf&oid=00D300000006E4S&v=068600000008UtA> (last visited Mar. 26, 2013).

29. Smith, *supra* note 27, at 767.

30. See Kristof, *supra* note 25; Smith, *supra* note 27, at 766–67.

31. Linda Smith & Samantha Healy Vardaman, *A Legislative Framework for Combating Domestic Minor Sex Trafficking*, 23 REGENT U. L. REV. 265, 266 (2011) [hereinafter Vardaman].



including trafficking.”<sup>32</sup> This means predicting an accurate number of commercially sexually exploited minors is impossible and we are far from having even a close range. No study establishes exactly how many of those victims are from Arizona,<sup>33</sup> nor would it be easy to gather such numbers. In Arizona, reports indicate that law enforcement agencies across the state made 136 *juvenile* arrests for prostitution between 2005 and 2009.<sup>34</sup> However, an officer of the Phoenix Police Department Vice Unit estimates that “there are approximately 100–150 traffickers in the greater Phoenix area [alone], who have [each] victimized at least one *underage* girl.”<sup>35</sup> A joint-agency study has determined that the average age of a female minor entering prostitution in Phoenix is 14.83 years.<sup>36</sup>

Those most at risk for becoming a DMST victim include youth who are runaways, throwaways,<sup>37</sup> victims of physical or sexual abuse, drug users, homeless, and transgender.<sup>38</sup> In Arizona, between 2005 and 2009, more than 25,000 juveniles were arrested as runaways, with about 5,000 arrests made each year.<sup>39</sup> Experts estimate that “thirty-three percent of teen runaways and throwaways will become involved in prostitution within 48 hours of leaving home.”<sup>40</sup>

It is important to recognize the abusive and unstable dynamics involved in dealing with minor victims of trafficking.<sup>41</sup> The firmer the emotional and psychological hold that a pimp has on a girl, the more resistant she will be to treatment, which makes her more likely to run away before actually being able to receive treatment and services at a facility.<sup>42</sup> The grooming process begins with smooth talking, where the pimps begin to befriend the targeted

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32. *Exploiting Americans on American Soil: Domestic Trafficking Exposed*,: Hearing Before the Commission on Security and Cooperation in Europe, 109th Cong. 1–2 (2005) (emphasis added) (statement of Hon. Christopher H. Smith, Co-chairman, Comm’n on Sec. & Cooperation in Europe), *available at* <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1011&context=humtraffdata>.

33. SMITH, *supra* note 4, at 10.

34. *Id.* at 2.

35. *Id.* at 15 (emphasis added).

36. *Id.* at 9–10.

37. Kate Brittle, Note, *Child Abuse by Another Name: Why the Child Welfare System Is the Best Mechanism in Place to Address the Problem of Juvenile Prostitution*, 36 HOFSTRA L. REV. 1339, 1356 (2008) (defining “throwaways” as “youth asked or told to leave their home by a parent or prevented from returning home by a parent”).

38. Birkhead, *supra* note 3, at 1060.

39. SMITH, *supra* note 4, at 35.

40. *Id.*

41. See Schwartz, *supra* note 21, at 268.

42. *Id.*

youth and work to establish a romantic connection.<sup>43</sup> This con strategy develops into a combination of dependency and fear, and eventually the girls are “turned out” and sold for sex.<sup>44</sup> Much-sought attention and affection, pet names, and new clothes all work to build a rapport that the pimp can then manipulate.<sup>45</sup> A pimp may begin his process of submission by raping the youth, giving her a financial quota, and telling her she is a “whore, nothing but a whore.”<sup>46</sup> A type of psychological paralysis can ensue.<sup>47</sup> Attorney Kate Brittle writes, “[t]he youth becomes so psychologically ingrained in the street culture as a means of survival that they may be unable to leave, even if presented with the opportunity to do so.”<sup>48</sup> It is important that the law recognize juveniles used in DMST as victims, because they will not usually see themselves as such.<sup>49</sup> They will usually be resistant to treatment, may lie about their abuse and exploitation, and will very likely believe that this lifestyle is their choice.<sup>50</sup> However, if the goal of the juvenile court system is truly rehabilitation,<sup>51</sup> that goal cannot be ignored merely because the process looks too difficult or too messy.

The New York Juvenile Justice Coalition estimates that eighty to ninety percent of commercially sexually exploited children have previously been sexually abused, and two-thirds to three-quarters “experience mental health problems such as post-traumatic stress disorder.”<sup>52</sup> These needs cannot be addressed in regular juvenile facilities.<sup>53</sup> A Dallas residential treatment center for exploited youth identifies issues unique to working with DMST victims: “abuse, exploitation, anger management, parenting skills, sexually transmitted diseases[,] and life skills for independent living[.]”<sup>54</sup> Ultimately,

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43. See Norma Hotaling, Kristie Miller & Elizabeth Trudeau, *The Commercial Sexual Exploitation of Women and Girls: A Survivor Service Provider’s Perspective*, 18 YALE J.L. & FEMINISM 181, 185 (2006).

44. *Id.*

45. *See id.*

46. *Id.*

47. *See id.* at 186.

48. Brittle, *supra* note 37, at 1350.

49. *See* LLOYD, *supra* note 2, at 125–26.

50. *See* Schwartz, *supra* note 21, at 267–68.

51. *See* Roper v. Simmons, 543 U.S. 551, 570 (2005).

52. Schwartz, *supra* note 21, at 271.

53. *See id.*

54. LETOT CTR., <http://www.letotgirlscenter.org/transforming.htm> (last visited Mar. 25, 2013) (The Letot Girls’ Residential Treatment Center is a Texas facility developed specifically for girls ages 13 to 17).

through the use of intensive aftercare and continued community services, the Dallas facility tries to re-integrate girls back into the community.<sup>55</sup>

New York has recently adopted the SHA in an attempt to treat DMST victims through a method of decriminalization and diversion.<sup>56</sup> This approach developed as a result of the federal Trafficking Victims Protection Act (“TVPA”) failing to adequately protect domestic victims.<sup>57</sup> Because most domestic juvenile prostitution prosecutions take place in state courts under state law, the TVPA was often inapplicable.<sup>58</sup> Following the TVPA’s victim-centered approach, New York adopted the SHA to address a gap in statutory distinction between federal and state law.<sup>59</sup>

In a Senate Judiciary Subcommittee hearing, Rachel Lloyd, the founder of the New York Girls Educational and Mentoring Services (“GEMS”) treatment center for trafficking victims, explained the tension created by the TVPA only addressing *foreign* commercially sexually exploited juveniles as victims:

We have created a dichotomy of acceptable and unacceptable victims, wherein Katya from the Ukraine will be seen as a real victim and provided with services and support, but Keshia from the Bronx will be seen as a “willing participant,” someone who is out there because she “likes it” and who is criminalized and thrown in detention or jail.<sup>60</sup>

New York’s SHA then stood for a new legal presumption that the domestic juvenile also meets the TVPA’s requirements of a victim of a severe form of trafficking; necessary because the TVPA was not addressing the needs of domestic victims of exploitation.<sup>61</sup>

### B. The Federal TVPA

The federal TVPA was enacted by Congress in 2000 and required that those who might otherwise be in violation of U.S. law (immigration or prostitution) be treated as victims rather than criminals.<sup>62</sup> The TVPA

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55. *See id.*

56. *See* Schwartz, *supra* note 21, at 260–62.

57. *See id.* at 258.

58. *Id.*

59. *See id.* at 260.

60. *In Our Own Backyard*, *supra* note 1, at 15.

61. *See* Schwartz, *supra* note 21, at 258–60.

62. Wendi J. Adelson, *Child Prostitute or Victim of Trafficking?*, 6 U. ST. THOMAS L.J. 96, 98–99 (2008).

established “that juveniles under the age of eighteen are [per se] *incapable* of consenting to engage in prostitution.”<sup>63</sup> Further supporting this contention, the TVPA protects minor victims without a required showing of “force, fraud, or coercion against them.”<sup>64</sup> Accordingly, federal agents must place the victims in facilities like domestic violence shelters or specific housing for other victims of abuse.<sup>65</sup> The TVPA also discouraged incarcerating trafficking victims and emphasized that their victim status made punishment inconsistent.<sup>66</sup> The TVPA recognizes that prosecuting prostituted minors can be both stigmatizing and marginalizing, and can often re-traumatize the victims.<sup>67</sup> This victim-centered approach takes into account that being prosecuted as a juvenile prostitute establishes a criminal record which can potentially be used to enhance a criminal sentence for the juvenile later.<sup>68</sup> While the TVPA appears to protect domestic and international victims, it was not enacted with both groups in mind.<sup>69</sup>

Instead, the TVPA intended to protect foreign commercially sexually exploited victims trafficked in the United States, as illustrated by the assistance programs outlined in its provisions<sup>70</sup> and the creation of the T-visa, which grants temporary or potentially permanent residency for victims.<sup>71</sup> Most DMST victims’ cases are handled in state courts under state law.<sup>72</sup> Thus, unless a federal prosecutor takes the case, the TVPA becomes inapplicable.<sup>73</sup> However, when only ten states recognize commercially sexually exploited juveniles as victims, this leads to a great disparity in the other forty states as to how these foreign and domestic victims are treated.<sup>74</sup>

One is seen as a criminal who has broken the law and the other as a tortured sex slave. One is placed in safe victim housing, while the other is locked up in a detention center.

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63. Nesheba Kittling, *God Bless the Child: The United States’ Response to Domestic Juvenile Prostitution*, 6 NEV. L.J. 913, 915 (2006) (emphasis added).

64. Brittle, *supra* note 37, at 1346.

65. Schwartz, *supra* note 21, at 257.

66. Adelson, *supra* note 62, at 99.

67. Crile, *supra* note 17, at 1820.

68. *Id.*

69. Kittling, *supra* note 63.

70. *Id.*

71. Brittle, *supra* note 37, at 1347–48 (“The TVPA provides services and protection to victims of exploitation who are foreign nationals trafficked *into* the United States, but its protective reach does not extend to United States citizens subjected to the same types of exploitation.”) (emphasis added).

72. Schwartz, *supra* note 21, at 258.

73. *See id.*

74. *See* Brittle, *supra* note 37, at 1349.

One is given protection from retribution-based attacks from their exploiter, while the other is released directly into the hands of their abuser. One is recognized as immune from criminal sanctions for acts of prostitution, while the other is prosecuted.<sup>75</sup>

Under state law, most DMST victims fall under the jurisdiction of the juvenile court system.<sup>76</sup> However, since only ten states take a victim-centered approach,<sup>77</sup> the rehabilitative objective of the juvenile court system often falls short in addressing the specific needs of DMST victims, favoring instead a retributive approach.<sup>78</sup> Although the federal TVPA treats sex trafficked minors as victims, most states' laws do not align with this distinction.<sup>79</sup> It is important to recognize juveniles used in DMST as victims in order to both align with the federal law and to make sure that this population of youth receives rehabilitation.

### III. THE NEW YORK & ILLINOIS MODELS FOR DECRIMINALIZATION

#### A. *The New York Safe Harbour Act*

New York was the first state to adopt an act that decriminalized juvenile prostitution.<sup>80</sup> New York's Safe Harbour for Exploited Children Act ("SHA") went into effect April 1, 2010.<sup>81</sup> The SHA has three main provisions,<sup>82</sup> with the first defining a sexually exploited child.<sup>83</sup> The SHA language covers a broad class of juvenile victims, allowing all juveniles engaged in *any* form of prostitution to be designated as sexually exploited children under this Act.<sup>84</sup>

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75. *Id.* at 1348–49 (footnotes omitted).

76. See K. Michael Baker, Comment, *Time for Change: Handling Child Prostitution Cases in Georgia*, 4 J. MARSHALL L. REV. 177, 181 (2011) (juvenile courts have exclusive original jurisdiction over children participating in prostitution under Georgia law).

77. Birkhead, *supra* note 3, at 1067–68; Crile, *supra* note 17.

78. For further discussion on this point, see *infra* Part VI.

79. See Birkhead, *supra* note 3, at 1067–68.

80. Carrie Baker, *Jailing Girls For Men's Crimes*, MS., Summer 2010, available at <http://www.msmagazine.com/Fall2010/SexTrafficking.asp>.

81. Schwartz, *supra* note 21, at 237.

82. *Id.* at 261.

83. *Id.* It defines a "sexually exploited child" as any person *under the age of eighteen* who "engages in any kind of prostitution or commercialized vice or has suffered any kind of physical or sexual abuse . . ." *Id.* (emphasis added).

84. *Id.* at 261–62 (emphasis added).

The second component of the SHA mandates that New York localities establish “specialized social services for sexually exploited children.”<sup>85</sup> The social services discussed include short-term and long-term safe houses, preventative services, and crisis programs.<sup>86</sup> While not all of these services were in place when this legislation was passed, the SHA allowed for preexisting resources to be repurposed so long as staff was adequately trained to work with this population.<sup>87</sup> The SHA mandates that all of its services be available to exploited children regardless of whether they have specifically been arrested for prostitution.<sup>88</sup> This provision is critically important because many DMST victims will not be brought in on prostitution charges. Allowing them to receive services for their abuse regardless of their charges provides them help for the real struggle and need in their lives despite the lack of criminal or delinquent charges. We should not wait for a juvenile’s needs to be defined by legal charges; allowing a victim to receive services is critical for rehabilitation. The SHA requires that services be available to sexually exploited children whether they seek them voluntarily, as a condition in a dismissal agreement in a criminal case, through a diversion program, or through a delinquency proceeding.<sup>89</sup> Similarly, the SHA does not require that a sexually exploited child be part of a current legal proceeding in order to reside at a safe house.<sup>90</sup> This is crucial because it allows a juvenile a safe place to stay despite the lack of a legal hold over her. While it may be unlikely that a victim in this situation would not run from a facility, the option is still open for her to be there without the court ordering her to stay.

The third provision of the SHA substitutes delinquency charges with a petition alleging that the child is a “person in need of supervision” (“PINS”), upon the motion of the respondent or the court.<sup>91</sup> A PINS distinction allows New York family court judges to order social services for the child *without entering a finding of delinquency*.<sup>92</sup> This is an incredibly critical provision because it allows the court to get services for the minor without also bringing delinquent charges. This is an important part of the victim-centered approach that is lacking in most states’ laws. The TVPA recognizes that social services should be offered instead of criminal

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85. *Id.* at 262–63.

86. *Id.* at 263.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* (emphasis added).

charges, while many state laws have failed to do so. This provision makes the victim identification clear: a judge does not need to impose delinquency charges to get a minor help through the juvenile justice system. However, this provision also allows the judge a large amount of discretion. The PINS substitution for delinquency “can be reversed if the juvenile is not in substantial compliance with the court’s later orders.”<sup>93</sup> The judge can “convert the PINS petition back into a delinquency petition if he can show that the juvenile [(1)] is not a victim of severe trafficking, [(2)] is a repeat prostitution offender, [(3)] is already subject to supervision via a preexisting PINS petition, or [(4)] has expressed an unwillingness to cooperate with treatment.”<sup>94</sup>

Critics of the SHA point out two weaknesses of the New York statute. First, children arrested for prostitution in the state must petition for their removal from the criminal court,<sup>95</sup> or the court must make the choice to convert the delinquency charges to a PINS petition.<sup>96</sup> The court can deny the PINS petition if the child does not meet the definition of a victim of a severe form of trafficking under the TVPA.<sup>97</sup> The court can also consider whether the child was previously adjudicated and designated as a PINS, or whether the child has refused to participate in services for sexually exploited youth.<sup>98</sup> Pamela Bush writes, “New York conveys the message that child prostitutes are only victims and in need of services the first time around. After the first ‘pass,’ child prostitutes are again seen as criminals rather than victims.”<sup>99</sup>

It is almost an absolute that a victim of trafficking will not succeed under a PINS distinction or any other victim identification the first time around;<sup>100</sup> arguably, not the second or third time either. Keep in mind the emotional and psychological chains that bind her that cannot be loosened so easily. Some prosecutors say that they need at least the threat of criminal charges to get a victim to cooperate either with disclosing information about her pimp or participating in a trial against him.<sup>101</sup> Thus, although there is the need for some court discretion, there are many reasons to be concerned

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93. *Id.* at 264.

94. *Id.*

95. See Pamela Bush, *Legislative Update: Changing Policies Toward Child Prostitution*, CHILD. LEGAL RTS. J., Fall 2010, at 66, 66.

96. Schwartz, *supra* note 21, at 264.

97. Bush, *supra* note 95, at 67.

98. *Id.*

99. *Id.*

100. *Supra* note a1.

101. *Supra* note a1.

about a juvenile judge's undisciplined use of this kind of authority. First of all, a judge with discretion in a case like this needs to be well trained in the complexities of dealing with trafficking victims. A judge would need to expect initial resistance, stubbornness, rebellion, relapse, and potential hostility or apathy toward help or services.<sup>102</sup> Secondly, there would need to be an understanding that a "one strike" and then "no mercy" rule is unlikely to have any lasting effect on this population of juveniles. Just because the court has decided that the minor is a victim of sex trafficking does not mean that the minor sees herself as such and is now willing and eager to participate in treatment services. Each victim comes with a specific set of needs and history. Thus, no blanket rule could be adopted that could fairly apply to every victim in regards to what "cooperation" or "resistance" look like, or even in terms of "success" or "failure."

### B. *The Illinois Safe Children Act*

Illinois' Safe Children Act ("SCA") was signed into law in August 2010 decriminalizing prostitution for all minors under eighteen.<sup>103</sup> The statute "transfers jurisdiction over children arrested for prostitution from the criminal system to the child protection system."<sup>104</sup> The SCA also "added the category of prostituted minors to the [state's] definition of abused youth."<sup>105</sup> The legislation was passed in response to the estimated 16,000 girls and women involved in prostitution in the Chicago area.<sup>106</sup> The SCA recognizes that minors do not have the capacity to consent to their own sexual exploitation and thus cannot be prosecuted as prostitutes.<sup>107</sup> The SCA allows a judge to detain a juvenile suspected of prostitution "for a reasonable time for investigation."<sup>108</sup> However, if it is determined that the juvenile is indeed a minor, "the child is immune from prosecution."<sup>109</sup> The SCA does not permit jail or juvenile detention facilities to be an option for either temporary or permanent housing.<sup>110</sup> If housing is needed for those detained, options include "a hospital, other medical facility or place designated by the

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102. *Supra* note a1.

103. *See* Birkhead, *supra* note 3, at 1068.

104. Smith & Vardaman, *supra* note 31, at 293; *see also* Bush, *supra* note 95, at 66.

105. Birkhead, *supra* note 3, at 1068.

106. Bush, *supra* note 95, at 66.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*



Department of Children and Family Services.<sup>111</sup> It should be noted that the Illinois statute automatically identifies a DMST as a victim, whereas the New York law requires that the court or the respondent take action in order for this designation to take effect.<sup>112</sup> This distinction between the New York and Illinois laws may seem slight, but the implications are great. To offer a victim of trafficking outright immunity and default-victim status for any involvement in prostitution changes the entire way that she is viewed and identified by the juvenile or criminal justice system. While a victim may face charges for acts *other than* prostitution, this can communicate to the minor: “[w]e know that you did not choose to be sold for sex, we recognize that this is not your fault.” It may seem like a small step in overcoming her identity as a tough, hardened girl who loves her pimp and does not feel like a victim, but it establishes both an important precedent in knowing that she can talk to her advocates openly about her involvement in “the life,” and also de-stigmatizes the way these girls are viewed by the juvenile justice system. Some may argue that at some point a girl becomes complicit in her prostitution, or that she may have indeed chosen to sell her body in order to make money and survive. However, it is important to recognize that healthy decisions are made in healthy environments,<sup>113</sup> and a child faced with these kinds of options for money, for affection, or to survive is not able to make safe and constructive choices.

#### IV. DECRIMINALIZATION IN OTHER STATES AND MODEL PROGRAMS

##### *A. Decriminalization in Other States*

Connecticut Public Act 10-115 established that the offense of engaging in prostitution only applies to those *sixteen and over*.<sup>114</sup> Additionally, the Connecticut law created a presumption that a sixteen or seventeen year-old juvenile shall also be presumed to be a victim of trafficking, rather than an offender, and it will be presumed that the juvenile was coerced.<sup>115</sup> Connecticut law allows the sixteen or seventeen year-old juvenile to assert

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111. *Id.*

112. *Id.*; see also Schwartz, *supra* note 21, at 263.

113. LLOYD, *supra* note 2, at 80.

114. *Safe Harbor For Exploited Children: What Public Act 10-115 Does for CT*, LOVE146, [http://love146.org/sites/default/files/Upload/Blog/safeharborlaw%20for%20ct\\_0.pdf](http://love146.org/sites/default/files/Upload/Blog/safeharborlaw%20for%20ct_0.pdf) (last visited Mar. 25, 2013).

115. 2010 Conn. Acts 10-115 (Reg. Sess.); *Safe Harbor For Exploited Children: What Public Act 10-115 Does for CT*, *supra* note 114.

coercion as an affirmative defense.<sup>116</sup> Thus, in order to prove a sixteen or seventeen year-old juvenile guilty of prostitution, the prosecution must prove beyond a reasonable doubt that the juvenile was *willing* and not coerced.<sup>117</sup> This victim-status, decriminalization distinction has no bearing on the prosecution of those who commercially sexually exploit juveniles, as this remains illegal under the state's criminal code.<sup>118</sup>

A Washington statute enacted in April 2010 created a presumption that minors engaged in prostitution are victims of commercial sexual abuse.<sup>119</sup> Under the Washington law, the definition of commercially sexually exploited children was changed for the purpose of bringing such children under the state's child protective system.<sup>120</sup> The Washington statute provides a discretionary direct referral to a secure residential facility for up to fifteen days.<sup>121</sup> This option avoids the use of a criminal charge to temporarily secure the child in a detention facility.<sup>122</sup> The Washington statute also created a special funding source for specialized services for commercially sexually-exploited youth.<sup>123</sup>

The Massachusetts<sup>124</sup> and Tennessee<sup>125</sup> statutes similarly treat minors under eighteen engaging in prostitution as victims in need of protection. The Massachusetts statute, effective February 2012, creates a presumption that, rather than be subject to prosecution, a person under eighteen who engages in prostitution should be treated as a child in need of protective services.<sup>126</sup> The Tennessee statute, effective as of June 2011, mandates that those under eighteen are immune from prosecution for prostitution either as a juvenile or as an adult and shall be placed under temporary protective custody.<sup>127</sup>

Vermont's statute bars prosecution for prostitution of those under eighteen and also allows minors to assert an affirmative defense of trafficking—showing force, fraud, or coercion—for any other non-

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116. CONN. GEN. STAT. ANN. § 53a-82 (West 2011).

117. Cari Carson & Annemarie Hillman, *Connecticut's 2010 Safe Harbor Law: Protecting Child Victims of Sex Trafficking in Connecticut*, CONN. VOICES FOR CHILDREN at 2, <http://www.ctvoices.org/sites/default/files/jj11safeharbor.pdf> (last visited Mar. 25, 2013).

118. *Id.*

119. WASH. REV. CODE. ANN. § 13.32A.030 (West 2011).

120. Smith & Vardaman, *supra* note 31, at 293.

121. *Id.*

122. *Id.*

123. Birkhead, *supra* note 3, at 1068.

124. MASS. GEN. LAWS ch. 119, § 39L (2012).

125. TENN. CODE ANN. § 39-13-513(d) (West 2012).

126. MASS. GEN. LAWS ch. 119, § 39L.

127. TENN. CODE ANN. § 39-13-513(d).

prostitution charges.<sup>128</sup> The statute also defines those who are under eighteen and engage in prostitution as victims of aggravated human trafficking.<sup>129</sup>

Since 2002, the Michigan criminal code only holds those sixteen and above criminally liable for prostitution.<sup>130</sup> However, Michigan's law imposes no statutory mandates for state provision of services.<sup>131</sup> Because the law also does not provide alternatives to the filing of delinquency charges for those under sixteen, the court can charge offenses such as disorderly conduct or trespassing in order to obtain jurisdiction for these youth.<sup>132</sup>

A Minnesota statute that takes effect in August 2014 allows sixteen and seventeen year-olds to be diverted to specialized programs rather than be adjudicated as delinquents.<sup>133</sup> However, the statute only applies to first time prostitution offenses.<sup>134</sup> The statute requires that the juvenile has not previously been adjudicated for engaging in prostitution, participated in or completed a diversion program for prostitution, or been placed on probation for prostitution.<sup>135</sup> This statute, like the New York provision that requires first-time successful compliance, does not account for the likelihood of re-offense and multiple offenses that so often accompany trafficking.<sup>136</sup>

An Ohio statutory revision passed in June 2011 provides that a minor is not guilty of prostitution if the minor is a victim of trafficking.<sup>137</sup> Later revisions of the bill allow victims to have their records expunged if they can show forced exploitation.<sup>138</sup>

Georgia's House Bill 200 offered amendments to its existing human trafficking laws when it was signed into law in May 2011.<sup>139</sup> The law offered stiffer penalties for those selling sex from trafficked minors using

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128. VT. STAT. ANN. tit. 13, § 2652 (West 2012).

129. VT. STAT. ANN. tit. 13, § 2653.

130. MICH. COMP. LAWS ANN. § 750.449 (West 2012).

131. Birkhead, *supra* note 3, at 1111–12.

132. *Id.* at 1112.

133. MINN. STAT. ANN. § 609.093 (West 2011).

134. *Id.*

135. *Id.*

136. See Bush, *supra* note 95, at 67.

137. See *Ohio Governor Signs Stricter Human Trafficking Law*, NEWSNET5.COM (June 27, 2012), <http://www.newsnet5.com/dpp/news/state/ohio-governor-signs-strictor-human-trafficking-law>.

138. H.R. 262, 129th Gen. Assemb., Reg. Sess. (Ohio 2011).

139. Georgia General Assembly – HB 200 Status History, <http://www.legis.ga.gov/Legislation/en-US/display/20112012/HB/200> (last visited Mar. 25, 2013).

coercion or deception.<sup>140</sup> The law added five years to the minimum sentence for traffickers if elements of coercion or deception were present.<sup>141</sup> The state avoided declaring a per se victim status to DMST juveniles because some residents feared it might appear to legalize juvenile prostitution and ultimately increase its existence.<sup>142</sup> The Georgia bill created an affirmative defense for DMST victims who can show that their criminal prostitution charges were the result of either deception or coercion.<sup>143</sup> If a victim can show either of these elements, then the prosecution is barred from charging her with any sex crime that was a result of such deception.<sup>144</sup> The bill also created a requirement for guidelines and procedures to be incorporated in Georgia police officer training manuals regarding identifying and working with victims of trafficking, including requirements for reporting incidents of trafficking and for providing proper facilities for victims of trafficking.<sup>145</sup>

While creating a requirement for law enforcement education is an essential statutory addition, the state's requirement that a minor show either deception or coercion to avoid sex crime charges is not in line with current federal law on sex trafficking. The TVPA does not require that a showing of force, fraud, or coercion be shown for victims under eighteen.<sup>146</sup> Creating this constraint again distinguishes the way that DMST victims would be handled under federal law as opposed to Georgia's law. Thus, while it may appear that Georgia's law provides a solid affirmative defense for DMST victims, it in essence draws a line of distinction between the way foreign and domestic trafficking victims are handled in Georgia. There should not be a double standard for trafficking victims, regardless of where they came from or how they came to be in "the life." In either scenario you have a young girl being bought and sold for commercial sex. Requiring domestic victims to show force or deception when foreign victims are not required to do so is unfair and without justification.

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140. *Georgia Implements Tough Sex-Trafficking Law*, BOS. GLOBE (July 12, 2011), [http://www.boston.com/news/nation/articles/2011/07/12/georgia\\_implements\\_tough\\_sex\\_trafficking\\_law/](http://www.boston.com/news/nation/articles/2011/07/12/georgia_implements_tough_sex_trafficking_law/).

141. *See id.*

142. Jim Galloway, *Georgia's Christian Right Comes Out Against Bills Aimed at Child Prostitution*, ATLANTA J.-CONST. (Feb. 1, 2010, 2:59 PM), <http://blogs.ajc.com/political-insider-jim-galloway/2010/02/01/georgias-christian-right-comes-out-against-bills-aimed-at-child-prostitution/>.

143. *Georgia Implements Tough Sex-Trafficking Law*, *supra* note 140.

144. *Id.*

145. *Id.*

146. Brittle, *supra* note 37, at 1346.

B. A “Trafficking Victim’s Court”—Houston, Texas Pilot Program

The Harris County Juvenile Court system in Houston, Texas has recognized that juvenile victims of trafficking come with a unique set of challenges.<sup>147</sup> Harris County has worked to create a pilot program that will specifically address DMST victims’ needs in a juvenile human trafficking court.<sup>148</sup> Since many jurisdictions have specialized courts for mental health or drugs,<sup>149</sup> why not trafficking? The idea was prompted by a Texas Supreme Court opinion filed in June 2010, *In re B.W.*,<sup>150</sup> that identified children as the “victims, not the perpetrators, of child prostitution.”<sup>151</sup> The court struck down the idea that the Texas Legislature’s intent could be to criminally charge juvenile victims of prostitution who were unable to even legally consent to sex.<sup>152</sup> Judge Harriet O’Neill, writing for the court, said:

It is difficult to reconcile the Legislature’s recognition of the special vulnerability of children, and its passage of laws for their protection, with an intent to find that children under fourteen understand the nature and consequences of their conduct when they agree to commit a sex act for money, or to consider children quasi-criminal offenders guilty of an act that necessarily involves their own sexual exploitation . . . . [I]t is far more likely that the Legislature intended to punish those who sexually exploit children rather than subject child victims under the age of fourteen to prosecution.<sup>153</sup>

The court ultimately held that children under the age of fourteen could not be charged with prostitution because they cannot give consent.<sup>154</sup> As a result of this opinion and other problems that repeatedly appeared in juvenile court, Harris County officials determined that a separate court was needed.<sup>155</sup> The victim in *In re B.W.* was physically and sexually abused and had run away from a foster home.<sup>156</sup> Since she was eleven, she had been living with her thirty-two year old “boyfriend” with whom she was sexually

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147. Hart, *supra* note 23.

148. *Id.*

149. *Id.*

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

151. *Id.* at 826.

152. *Id.* at 822.

153. *Id.* at 821–22 (holding that Texas law does not allow “consent” as a defense for sex with juveniles under age 14).

154. *Id.* at 824

155. Hart, *supra* note 23.

156. *In re B.W.*, 313 S.W.3d. at 819, 826–27.

active.<sup>157</sup> A psychologist who had met with the juvenile “concluded that B.W. was ‘emotionally impoverished, discouraged and dependent.’”<sup>158</sup> Circumstances like this necessitate individualized attention. Harris County Juvenile Judge Angela Ellis recognized that, for one reason or another, girls continually failed to meet some of the qualifications that would allow them to participate in drug court, which is another intensive, individualized treatment model.<sup>159</sup> Repeatedly, Judge Ellis noticed that girls that needed more specific and individualized services were often involved in sex trafficking, and substance abuse was just one outward manifestation of their lifestyle.<sup>160</sup> Wanting to fill this gap in treatment for this population, Harris County announced the Houston Growing Independence Restoring Lives (“GIRLS”) Court in July of 2011,<sup>161</sup> and as of October 2011, fourteen girls were participating.<sup>162</sup> The program offered intense counseling and rehabilitation services.<sup>163</sup> Judge Michael Schneider, Harris County juvenile judge, said that “[i]nstead of ‘warehousing’ the girls in a detention facility . . . the goal is to send them to a safe place where they can receive therapy. Otherwise, most will return to their pimps, the only ‘family’ they’ve ever known.”<sup>164</sup> The judges involved want to provide intensive supervision and thus maintain a small caseload.<sup>165</sup> Judge Ellis, presiding GIRLS Court judge, hears cases one afternoon per week.<sup>166</sup> In any given week, a myriad of representatives from local agencies might take part in the process.<sup>167</sup> The juvenile probation department was a key component in developing this process.<sup>168</sup> Even if girls are not selected for participation in GIRLS Court, Harris County juvenile probation officers have detected trafficking victims through their screening process that they may not have recognized or

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157. *Id.* at 819.

158. *Id.*

159. Telephone Interview with J. Angela Ellis, Harris County juvenile judge (Feb. 13, 2013).

160. *Id.*

161. *Harris County Continues Reforms*, HARRIS COUNTY JUVENILE DETENTION ALTERNATIVES INITIATIVE, Vol. 3 Issue 3 (July 2011), at 1, 1, *available at* <http://www.co.harris.tx.us/hcjd/JDAINewsletter/Newsletter%20July%202011%20Final.pdf> (last visited Mar. 22, 2013).

162. Isiah Carey, *Former Prostitute Praises Girls’ Court*, FOX TELEVISION (Oct. 27, 2011), <http://www.myfoxboston.com/story/18196279/former-prostitute-praises-girls-court>.

163. *Id.*

164. Hart, *supra* note 23.

165. *Id.*

166. Telephone Interview with J. Ellis, *supra* note 159.

167. *Id.*

168. *Id.*

recommended specific resources for before this program.<sup>169</sup> Educational specialists, a parent partner (if a parent is in the juvenile's life), counselors, therapists, and Child Protective Services are also involved in the process.<sup>170</sup> If a girl successfully completes the program, her juvenile records will be sealed.<sup>171</sup> This is a major step forward for juvenile offenders entering adulthood. Successful completion will look different for each girl, but may include time served for any charges she has been adjudicated of and cooperation with her treatment providers, Child Protective Services, and juvenile probation.<sup>172</sup>

A specialized program like this would allow juvenile judges and prosecutors to more intimately know the particulars of a victim's situation. Providing judges and other juvenile advocates the opportunity to focus more individually on these cases helps to ensure that these victims are not overlooked or dismissed as rebellious, promiscuous offenders. Because DMST victims' situations and needs are unique, a GIRLS Court model allows service providers to address the victim's needs in a more specialized setting. A juvenile trafficking court would also help in overcoming the hesitancy by juvenile public defenders to bring up their client's situations in court. If a court were specifically available for DMST victims, a victim of sex trafficking would be able to share her situation openly, knowing that she would not be viewed as a "prostitute." It is unquestionable that being labeled a "prostitute" stigmatizes the juvenile both in her own mind and in the courtroom.<sup>173</sup> Thus, the creation of a juvenile trafficking court, where expectations are established that this population will be treated as victims concerning their criminal sex offenses, is important both in ordering the juveniles' social services and in recognizing their sex offenses as ongoing, untreated abuse instead of criminal acts.

#### V. CONSIDERATIONS AND COMPONENTS OF A PROPOSED ARIZONA MODEL

A study in the Coconino County (AZ) Office of the Public Defender reported that a victim of domestic minor sex trafficking would not be viewed as a delinquent and charged with prostitution but would instead be

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169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *See* Schwartz, *supra* note 21, at 269–70.

identified as a sex crime victim.<sup>174</sup> However, from a statutory perspective, this is not a distinction recognized by the Arizona Criminal Code.<sup>175</sup> Arizona law enforcement asserts that the greatest challenge in identifying DMST victims is the aversion to arresting a minor for prostitution coupled with a general lack of training and education on the crime of DMST.<sup>176</sup> The Phoenix Police Department Vice Unit similarly identifies a minor involved in prostitution as a victim and tries to avoid arresting the child on prostitution-related charges.<sup>177</sup> If cooperative,<sup>178</sup> the minor victim will likely not be arrested or charged with a crime.<sup>179</sup> The officers will also make sure that the victim has the ability to return to a safe shelter.<sup>180</sup> If the victim is unwilling to cooperate and law enforcement believes the minor is in danger, then they may arrest the juvenile and charge her with prostitution or other unrelated charges to hold her for safety.<sup>181</sup> Although this may be the internal goal of law enforcement, without a clear statutory distinction, this victim identification goes unrecognized by both the community at-large and her legal advocates and service providers. This recognition is important in developing how she is treated, the kind of services she receives, and ultimately in how she views herself.

#### A. *The Controversy About Putting DMST Juveniles in Detention*

In Arizona, without delinquency charges, a judge is unable to place a girl in a secure detention facility.<sup>182</sup> Combining time spent in detention and in residential treatment facilities is one solution to the complex problem of keeping the girls secure and still taking their victim status into account.

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174. SMITH, *supra* note 4, at 20.

175. ARIZ. REV. STAT. ANN. § 13-3214 (2013) (West).

176. SMITH, *supra* note 4, at 32.

177. *Id.*

178. Through my experience working with victims of trafficking and other anti-trafficking advocates, I have learned that the idea of a “cooperative victim” can be controversial. It is likely that most DMST victims will be uncooperative initially; they are distrustful, skeptical, and understandably unable and uneager to welcome “help” from law enforcement. They have likely been arrested before, or they have been told by their pimp or even from a legal advocate not to talk to the police. Many pimps will beat a girl for talking to the police or, at minimum, threaten a severe beating. Therefore, the whole concept of using her cooperation as a contingency in pressing charges discounts all of her history in favor of further punishing her for being “uncooperative.”

179. SMITH, *supra* note 4, at 32.

180. *Id.*

181. *Id.*

182. ARIZ. REV. STAT. ANN. § 8-341 (2013) (West).



Proponents of placing DMST victims in secure detention facilities point out the tendency of these girls to run away from their home or group home and back into the arms of a waiting pimp—from whom it is difficult to rescue them again.<sup>183</sup> These girls are often defiant and opposed to treatment,<sup>184</sup> brainwashed by their time on the streets. Because DMST victims are usually habitual runaways, a secure detention facility may be the only way to keep them from running back to their pimps, to whom they often feel desperately attached.<sup>185</sup> The mind manipulation that has taken place between a victim and her pimp is often difficult for outsiders to comprehend, and thus the girls appear not as victims but rather as complicit offenders in the sex trade.<sup>186</sup> They are hardened and wary of help. As one victim explained, “The more people you let in, the more people you let down or that let you down.”<sup>187</sup>

Those opposed to housing this population in detention facilities point out the contradiction in identifying them as victims while simultaneously locking them up.<sup>188</sup> They argue that it “detracts from their recovery and rehabilitation.”<sup>189</sup> These are children who have been physically abused and commercially sexually exploited.<sup>190</sup> These elements together mean that the juvenile likely has mental health disorders, possibly sexually transmitted diseases, and is much more likely to be dealing with complex anxiety, mood, and substance abuse disorders.<sup>191</sup> A survey of commercially sexually exploited children in New York determined that mental health counseling and medical care were two of the most frequently requested needs of this population.<sup>192</sup> Attorney Brittle writes, “Establishing a safe house where all services can be tailored to sexually exploited youth is the most efficient way to provide the breadth of services these youth require.”<sup>193</sup>

As indicated by Arizona law enforcement, sometimes criminal charges are the only way to get a girl housed in a safe place, albeit a detention facility.<sup>194</sup> However, if a victim distinction provision were enacted, like

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183. Schwartz, *supra* note 21, at 267–68.

184. *Id.* at 268.

185. *Id.*

186. *Supra* note a1.

187. *Supra* note a1 (this comment was made during a class taught by an Arizona county prosecutor when a sex trafficking victim addressed our class and shared her experiences).

188. Schwartz, *supra* note 21, at 268.

189. *Id.*

190. Brittle, *supra* note 37, at 1370–71.

191. *Id.* at 1371.

192. *Id.* at 1371–72.

193. *Id.* at 1372.

194. SMITH, *supra* note 4, at 32.

New York's SHA or Illinois' SCA, the judge or Child Protective Services would have authority to get a juvenile the care she needs without having to impose delinquency or criminal charges. Additionally, keeping DMST victims in detention initially might be necessary to get them the time they need away from their pimp to begin to loosen the chains of bondage and dependency.<sup>195</sup> Even if law enforcement view sexually exploited minors as victims, without appropriate shelters or residential facilities in which to place them, the officers are left with no choice but to file a charge that will allow them to be held in a detention facility.<sup>196</sup> Thus, judicial discretion may be necessary to order social services, residential placement, and even detention apart from delinquency charges, when appropriate.

Phoenix-area law enforcement and prosecutors engage in extensive relationship building with victims in order to earn their trust and hopefully gain information about their traffickers.<sup>197</sup> This may take months, over the course of multiple interviews.<sup>198</sup> It is essential to have a safe place for the girls to stay and one from which law enforcement and prosecutors know the girl is least likely or able to run.<sup>199</sup> With a statutory provision similar to the SHA's PINS distinction or the SCA's automatic victim designation, Arizona juvenile courts could place the juvenile somewhere safe without having to impose criminal charges.

### B. *When Criminal Charges May Be Necessary*

There are situations when it may seem necessary for criminal charges to be brought against a minor victim of sex trafficking. Some underage trafficking victims become recruiters and enforcers themselves after realizing that this will earn them some of their own money and grant them favor from their pimp.<sup>200</sup> Consider the role of "bottom girls":<sup>201</sup> the "bottom girl" is appointed by the pimp to supervise the other girls and to recruit and train new victims.<sup>202</sup> For example, in October 2009, a sixteen year-old Phoenix girl was prosecuted and convicted for running a DMST ring and

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195. See generally Shirley Jülich, *Stockholm Syndrome and Child Sexual Abuse*, 14 J. CHILD SEXUAL ABUSE 3 (2005).

196. SMITH, *supra* note 4, at 2, 32.

197. *Id.* at 20.

198. *Id.*

199. *Id.* at 39–40.

200. SMITH, *supra* note 4, at 21.

201. *Id.*

202. *Id.*

using fellow minors.<sup>203</sup> She was a commercially sexually exploited minor herself, but she recruited as many as five other girls to work with her and required them to give her the money that they made.<sup>204</sup> She was sentenced to three years in prison followed by probation.<sup>205</sup> In a situation like this, something similar to the PINS distinction provided by New York's SHA would allow criminal charges to be brought, if it was deemed necessary. It is difficult to pinpoint when such criminal charges would be "necessary" or even appropriate. These girls are unique in every way possible: temperament, history of abuse, reaction to the legal system, and having the ability to identify and recognize their part in creating other victims. Knowing this, and allowing an option for criminal charges, perhaps as a last resort, leaves some room for a prosecutor's discretion while simultaneously recognizing that a victim-turned-trafficker still began as a victim.

Certainly an argument can be made that this sixteen year-old girl from Phoenix did not set out to become a "bottom girl," but instead chose this role as her "best" alternative in a spectrum of terrible options. It is understandable how a teen being commercially sexually exploited could chose to play the role of a "bottom girl" as a means of protection. To become the recruiter rather than the girl being used is a method of self-preservation. Although other victims are coerced and abused in the process, it is hard to place blame on a juvenile who sees this as an opportunity to get herself somewhat out of harm's way.

Another area that a prosecutor may need some legal discretion to bring charges is when a juvenile may be unwilling to cooperate with treatment—the likely attitude of many victims, at least initially.<sup>206</sup> GEMS director Rachel Lloyd writes, "Victims rarely rush gratefully into your open arms; they're not immediately compliant with shelter regulations; they don't trust the people trying to help them. They're tired and traumatized and hurting and lonely and depressed and scared and to them, missing the life is as normal as breathing."<sup>207</sup> Some prosecutors claim that without the threat of a criminal conviction or imprisonment, victims of DMST will not show up to court hearings, which may result in the dismissal of charges against their pimps.<sup>208</sup> Allowing a juvenile being used in an act of DMST to initially be identified as a victim, but still allowing the court discretion to use

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203. *Id.* at 17.

204. *Id.*

205. *Id.*

206. Birckhead, *supra* note 3, at 1084.

207. LLOYD, *supra* note 2, at 182–83.

208. Birckhead, *supra* note 3, at 1083.

delinquency charges as necessary, addresses both goals. However, it is essential that judges and prosecutors who hold this discretion be well trained to understand the intricacies of dealing with sex trafficking victims. To wield such discretion means that caregivers, service providers, and decision makers must know when delinquent charges would be necessary and when resistance to treatment is just part of rehabilitation for DMST victims.

*C. A Statutory Change*

If safe harbor legislation were enacted in Arizona, it should:

1. Establish that those under eighteen charged with prostitution are victims as identified under the federal TVPA, without a required showing of force, fraud, or coercion.
2. Establish that any case involving a person under eighteen identified as a victim under the federal TVPA is automatically designated as a DMST victim in need of supervision.
3. Establish that these juveniles should receive services from licensed facilities and trained caregivers.
4. Allow the judge to consider potentially conflicting interests: safety of the juvenile, rehabilitative options; drug dependencies; law enforcement concerns about concurrently investigating the juvenile's pimp; and whether to require time in detention, time at a residential treatment center, or a combination of both.
5. Establish the juvenile court's jurisdiction over an identified sex trafficking victim and allow the provisions considered in item 4 to be ordered regardless of delinquency charges.
6. Provide the judge discretion to allow delinquency charges for a repeatedly uncooperative and resistant juvenile, or a juvenile facing criminal charges separate from her victimization. This provision should take into account the fact that a victim will likely be seemingly "uncooperative and resistant" for many initial attempts at treatment and that no two victims will react to the idea of "help" in the same way.

*D. A Juvenile Trafficking Court*

Arizona should also establish a Juvenile Trafficking Court as addressed in Part IV.<sup>209</sup> A combination of statutory changes and a Juvenile Trafficking Court would set a powerful precedent for how DMST cases are handled and how victims are viewed in Arizona.

## VI. REHABILITATION AS A “BIG PICTURE” CONSIDERATION

Another factor to consider in the classification of DMST victims is a main objective of the juvenile court system: rehabilitation.<sup>210</sup> In *Roper v. Simmons*,<sup>211</sup> the Supreme Court reaffirmed the importance of rehabilitation in juvenile proceedings.<sup>212</sup> The Court pointed to evidence of a juvenile’s character being less fixed than that of an adult, making it inappropriate to treat a juvenile as if they are beyond a change of character.<sup>213</sup> Studies conducted on female delinquents in the early twentieth century showed that courts considered sexuality and its criminal implications “as morally and philosophically distinct from most delinquent behaviors.”<sup>214</sup> This distinction continues today, as courts tend to look at sexual conduct by minors using the same standards of culpability as those used for adult conduct, despite the juvenile court’s goal to treat minors differently.<sup>215</sup>

In addition, objectives in the juvenile court system—such as public safety, accountability, victim participation, and community restoration—may compete with rehabilitation.<sup>216</sup> Also, because “accountability” includes an aspect of punishment, it can be difficult for a judge to clearly draw a line between rehabilitation and being accountable for his or her actions. When judging a juvenile’s culpability or accountability, it is important to remember that the areas of the adolescent brain that are linked to cognitive reasoning and impulse control develop last.<sup>217</sup> For a DMST victim, not only is she dealing with the restriction of a still-developing brain, but she is also

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209. See *supra* part IV, section B.

210. Kristin Henning, *What’s Wrong With Victims’ Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice*, 97 CALIF. L. REV. 1107, 1118–19 (2009).

211. *Roper v. Simmons*, 543 U.S. 551 (2005).

212. *Roper*, 543 U.S. at 570–71.

213. Henning, *supra* note 210, at 1121.

214. Schwartz, *supra* note 21, at 251.

215. *Id.*

216. Henning, *supra* note 210, at 1133.

217. *Id.* at 1136–37.

facing the psychological, emotional, and physical burdens forced on her by her involvement in trafficking.

It has been noted that juvenile offenders who demonstrate remorse often receive reduced sentences, avoid transfer to adult criminal court, receive a better plea, or even have their cases dismissed.<sup>218</sup> However, expecting a trafficking victim to show remorse is an unrealistic goal. Sociologists report that most young girls who enter into prostitution do so because they are emotionally needy; they are “searching for some form of love or protection that they cannot find at home and which they believe their pimp will give them.”<sup>219</sup> Professor Cheryl Hanna notes, “[m]ost girls are not motivated by lust or greed . . . they are lured by love.”<sup>220</sup> A DMST victim may depend on her pimp exclusively for emotional support and personal validation.<sup>221</sup> Therefore, it should not be surprising when a trafficked girl—a girl suffering from the mental and emotional bondage inherent in the girl-pimp relationship—is unable to show remorse for actions and emotions that she did not and could not identify as unhealthy. Many of the common philosophies of the juvenile court system fail to address the intricacies of dealing with DMST victims. For DMST victims, the theoretical goal of rehabilitation in the juvenile court system plays out more as a quasi-criminal model rather than a truly rehabilitative model because punishment is so much a part of how victims are treated and the ultimate adjudication of their charges.<sup>222</sup>

## VII. LEGAL COMMUNITY EDUCATION

A minor’s interaction with the Arizona juvenile court system will bring her in contact with judges, public defenders, and perhaps probation officers, guardians ad litem (“GALs”), Child Protective Services, group homes, and rehabilitative treatment centers.<sup>223</sup> When a DMST victim is seen by this wide a spectrum of people, it seems unthinkable that she would not be identified as a trafficking victim at some point along the way. However, without continuing education for those interacting with juveniles, sexual exploitation can go undetected if the minor is facing other delinquency

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218. *Id.* at 1148.

219. Schwartz, *supra* note 21, at 240.

220. Cheryl Hanna, *Somebody’s Daughter: The Domestic Trafficking of Girls for the Commercial Sex Industry and the Power of Love*, 9 WM. & MARY J. WOMEN & L. 1, 3 (2002).

221. Brittle, *supra* note 37, at 1359.

222. *Id.* at 1344.

223. *Supra* note a1.

charges.<sup>224</sup> A DMST victim might come in on charges relating to drugs, truancy, runaway status, false reporting (either lying about her name or her age), a curfew violation, or any combination of these delinquent or status offenses.<sup>225</sup> If no official with whom she interacts knows how to combine these clues to see a picture of trafficking, then she may go through the system without getting help for the abuse she is suffering, and the chances that she will reoffend or return to “the life” are even higher. Alternatively, if an official does recognize signs of trafficking but desires to avoid imposing criminal charges, the DMST victim’s needs may go unaddressed.

In addition to the safe harbor provisions outlined in section V, Arizona should adopt mandatory education on DMST for service providers and legal officials who interact with juveniles. The issue is convoluted and complex, involving both mental and physical harm to the juvenile. Because no two cases are alike, understanding the spectrum of what DMST victims may be dealing with is essential to meeting each juvenile’s needs on an individual basis. The best statutory solution is one that develops a per se victim status in regards to her sexual exploitation, while simultaneously allowing for each victim to be handled on a case-by-case basis.

Having a cohesive, multi-agency approach to dealing with DMST victims can also assist in bringing traffickers to justice. A suspected barrier to the prosecution of traffickers is that juveniles may disclose details about their victimization inside juvenile facilities, details that are not turned over to law enforcement.<sup>226</sup> When all of the involved agencies are participating and communicating in a juvenile’s case, it can allow for better information dissemination between the groups and a higher likelihood of a better outcome overall. This can also be better achieved through a Juvenile Trafficking Court, as all parties that are required to interact with the minor can be part of the process.

## VIII. CONCLUSION

Arizona should adopt legislation similar to New York’s SHA and Illinois’ SCA if it is serious about preventing DMST victimization, prosecuting the traffickers, and protecting the victims. Using a victim-centered approach will bring Arizona state law more in line with the federal TVPA. Additionally, it will help strike a more even balance concerning

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224. *Supra* note a1.

225. Status offense is designated as such because of their “status” as a minor, otherwise the act would not be criminal or delinquent.

226. SMITH, *supra* note 4, at 20.

those under eighteen who cannot legally consent to sex and yet can be criminally charged for selling it. Legislation modeled after these two states affords a juvenile court judge appropriate discretion for each individual DMST victim. However, to make sure that this discretion is handled by well-informed legal advocates, Arizona should also adopt a model like Texas' GIRLS Court. Having a legal team of judges, attorneys, and social service providers that are trained in dealing with DMST victims would help address their needs more effectively and ultimately might save taxpayers money by reducing recidivism. This statutory change would also reinforce the rehabilitative underpinnings of the juvenile court system by granting a judge jurisdiction over a DMST victim without requiring the imposition of delinquency charges, unless necessary.